PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS
SEPTEMBER 1, 2014 to SEPTEMBER 30, 2014

I. CIVIL PROCEDURE

A. *Cox v. Owen*

2013-CA-000024 09/19/2014 452 S.W.3d 137

Opinion by Judge Clayton; Judges Combs and Nickell concurred. Vendor/lessor, a limited liability company (LLC), and its owner brought an action against a lessee for failure to make payments on promissory notes. They also added a purchaser and its owner as defendants. Following the entry of summary judgment in favor of the defendants on issues of breach of contract and unjust enrichment, a jury trial was set to be held on the issue of fraud. However, the trial court entered a directed verdict on the fraud claim before vendor/lessor and its owner were allowed to present evidence on the issue. On appeal, appellees argued that the directed verdict was a continuation of their motion for summary judgment, which the trial court had earlier granted except for the issue of fraud. The Court of Appeals noted, however, that CR 50.01 provides that a motion for a directed verdict must be made at the close of evidence offered by the opponent. Therefore, the trial court erred in directing a verdict on the fraud claim prior to the start of trial since no evidence had been heard.

II. CRIMINAL LAW

A. ***Hack v. Commonwealth***

2013-CA-001991 09/12/2014 2014 WL 4494231 DR Pending

Opinion by Judge Clayton; Judges Combs and Stumbo concurred. The Court of Appeals reversed an order denying a motion to suppress evidence seized after a warrantless entry into appellant's garage. The Commonwealth argued that officers had probable cause to enter the garage for the following three reasons: an uncorroborated anonymous tip that methamphetamine was being manufactured at the residence; upon the officers' arrival, they saw a fire being burned in the yard between the house and the garage in violation of a county burn ban; and the observation of a man who, when he saw the officers pull into the driveway, ran into the garage. However, when the officers arrived, they did not smell any noxious odor related to a methamphetamine lab. Therefore, the Court held that the anonymous tip was not corroborated and a "knock and talk" for that reason alone would be unwarranted. The Court then determined, though, that the fire burning in appellant's yard gave the officers a valid reason to enter the protected curtilage of the home to speak with appellant about the fire. The Court also reasoned that entry into the garage was lawful if, based on the totality of the circumstances; probable cause existed for the officers to believe that evidence was in imminent danger of being destroyed. However, in this case, neither the anonymous tip nor the fire being burned in violation of a county burn ban gave rise to a reasonable belief that contraband was in imminent danger of being destroyed - notwithstanding the Commonwealth's argument that the man running into the garage did so in order to destroy evidence of manufacturing methamphetamine. In reaching this conclusion, the Court cited a federal case articulating that "flight, in and of itself, is not sufficient to constitute probable cause for otherwise anyone[ ] who does not desire to talk to the police and who either walks or runs away from them would always be subject to a legal arrest." *U.S. v Margeson*, 259 F. Supp. 256, 265 (E.D. Pa. 1966). The Commonwealth also argued that the police had a right to enter the garage in order to effectuate a *Terry* stop, but the Court held that an exigent circumstance of imminent escape did not arise in this situation as there was no possibility of the person getting away. Further, the Court held that the police may not lawfully enter a private residence without a warrant or consent in order to initiate a *Terry* stop.

B. ***Spann v. Commonwealth***

2012-CA-001499 09/05/2014 2014 WL 4375987 DR Pending

Opinion by Judge Caperton; Judge Combs concurred; Judge Thompson concurred in result only. The Court of Appeals affirmed the trial court's denial of appellant's motion to suppress (and his subsequent conditional guilty plea to possession of a controlled substance in the first degree, promoting contraband in the first degree, and possession of drug paraphernalia). The Court upheld the trial court's determination that police officers were properly invited into a residence where contraband was found based on consent given by an individual who had apparent authority over the premises. Additionally, the Court did not believe that appellant was entitled to reversal on his argument that he was unlawfully detained when an officer requested his identification, ran this information through a state database, and learned that appellant had a prior charge for burglary involving a weapon. The Court reasoned that the arrest did not stem from the officer's request for identification. The Court also determined that the *Terry* frisk of appellant was proper given the officer's knowledge and observations. Last, the Court addressed the search of the couch where appellant had been sitting and the contraband found therein. In light of the facts presented, appellant appeared to be nothing more than a person with permission to be on the premises. The Court concluded that appellant was not the type of guest envisioned in *Minnesota v. Carter*, 525 U.S. 83, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998) and, therefore, was not one who was entitled to claim the protection of the Fourth Amendment in the home of another. Thus, the Court was compelled to disagree with appellant that the court below erred in denying his motion to suppress the evidence concealed in the couch.

C. ***Stilgenbauer v. Commonwealth***

2012-CA-000903 09/26/2014 2014 WL 4782938 DR Pending

Opinion by Judge VanMeter; Chief Judge Acree and Judge Taylor concurred. The Commonwealth filed a motion to set aside appellant's diversion agreement. The circuit court subsequently revoked appellant's diversion, adjudicated her guilty of first-degree possession of a controlled substance, and imposed a five-year sentence of imprisonment. The Court of Appeals affirmed, holding that the circuit court did not exceed its authority when it modified appellant's diversion agreement to include completion of drug court as a condition even though the modification of the agreement was not signed by the parties. The diversion agreement clearly authorized the circuit court to revoke or modify any condition set forth in the agreement during the diversion period. The Court further held that the circuit court's revocation of appellant's diversion agreement based on her failure to complete drug court was not an abuse of discretion. Appellant was expelled from the drug court program after her urine screens tested positive for alcohol, and thus the revocation was not arbitrary or unreasonable.

III. INSURANCE

A. ***Grange Property and Cas. Co. v. Tennessee Farmers Mut. Ins. Co.***

2013-CA-000228 09/12/2014 445 S.W.3d 51

Opinion by Judge Clayton; Judges Combs and Stumbo concurred. An employee brought a personal injury action arising from an automobile accident that occurred with an uninsured motorist (UM) while the employee was driving a vehicle owned by his employer. The employer's UM insurer cross-claimed against the employee's personal UM insurer, a Tennessee insurer, regarding the priority of UM coverage and seeking judgment based on Kentucky's pro rata law. The circuit court entered judgment in favor of the employee's insurer, and the Court of Appeals affirmed. Applying the modern choice-of-law test set forth in Restatement (Second) of Conflicts of Law § 188, which determines the choice of law based on which state has the most significant relationship with the transaction and the parties, the Court determined that Tennessee law was applicable regarding the priority of UM coverage. The Court then held that the employer's UM coverage provided primary coverage to the injured party and the employee's UM coverage provided secondary coverage. However, the employee's UM coverage was extinguished because under Tennessee law he had collected over $100,000.00 in workers compensation benefits, which negated the payment of secondary insurance.

IV. NEGLIGENCE

A. ***Klinglesmith v. Estate of Pottinger***

2013-CA-001737 09/12/2014 445 S.W.3d 565

Opinion by Judge Stumbo; Judges Clayton and Combs concurred. The Court of Appeals affirmed an order granting summary judgment in favor of the Estate of Reba Pottinger. Appellant was on Ms. Pottinger's front porch when she fell over and injured herself. Ms. Pottinger died sometime thereafter and appellant brought a negligence action against the estate claiming that the poor condition of the porch caused her to fall. The trial court granted summary judgment because appellant did not present evidence that the condition of the porch was the reason she fell. On appeal, appellant argued that the trial court erred in finding that the open and obvious doctrine precluded recovery. She claimed the case of *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901 (Ky. 2013), did not eliminate a landowner's general duty to maintain premises in reasonably safe condition or the duty to warn of or eliminate unreasonably dangerous conditions. The Court discussed the *Shelton* case, but ultimately affirmed because the trial court granted summary judgment due to appellant's lack of evidence regarding the cause of her fall. During her deposition, appellant testified that she did not observe any defects in the porch and that she did not know why she fell other than to note that she felt an urge or compunction to fall after bending over.

V. TORTS

A. ***Readnour v. Gibson***

2014-CA-000023 09/19/2014 452 S.W.3d 617

Opinion by Judge Combs; Judge VanMeter concurred; Judge Caperton concurred by separate opinion. A driver brought suit against a second driver and the second driver's passengers following a road rage incident. The suit asserted claims for violations of various criminal statutes, loss of personal liberty, and loss of consortium. The circuit court granted summary judgment in favor of defendants, and the Court of Appeals affirmed. The Court first held that the remedy afforded by KRS 446.070, which provides that a person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, even if a penalty or forfeiture is imposed for the violation, was not available with respect to appellant's negligence per se claim that the second driver and his passengers violated provisions of the Commonwealth's insurance code. The Court then held that appellant failed to allege that he suffered any physical injury as a result of the actions of the second driver and his passengers during the incident, as required to state a negligence per se claim based on their alleged violations of various criminal statutes. Next, the Court held that the actions of the second driver and his passengers during the incident were not the legal cause of whatever loss of personal liberty appellant may have sustained as a result of the criminal charges lodged against him or his alleged loss of consortium. Finally, the Court held that there was no evidence that the second driver or his passengers initiated any physical contact with appellant, as required to support a claim for negligent infliction of emotional distress.

B. ***Smith v. Grubb***

2011-CA-000223 09/26/2014 2014 WL 4782937 DR Pending

Opinion by Judge Thompson; Judges J. Lambert and VanMeter concurred. The Court of Appeals reversed and remanded a judgment of the circuit court awarding appellants damages for past medical expenses, pain and suffering, and loss of consortium for injuries the appellant wife received when she fell in the appellee store's parking lot. The Court first held that the circuit court erred as a matter of law in finding that the store manager was individually liable for the injuries. Liability against the manager was precluded because she did not have sufficient control or supervision of the premises. The Court next held that the circuit court erred in denying the store's motion for a directed verdict based on the "open and obvious" doctrine. The condition of the eroded area in the parking lot was open and obvious, and the Court concluded that such a condition is common in a parking lot, did not create an unreasonable risk of injury, and was not a condition the owner could anticipate would not be observed by an invitee because of a foreseeable distraction.