PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS
AUGUST 1, 2014 to AUGUST 31, 2014

I. ADMINISTRATIVE LAW

A. *Com., Cabinet for Health and Family Services v. RiverValley Behavioral Health*

2013-CA-001226 08/29/2014 2014 WL 4258277 DR Pending

Opinion by Judge Maze; Chief Judge Acree and Judge Thompson concurred. RiverValley is a mental health provider offering inpatient services for juveniles in Daviess County. In 2001, the Cabinet's Department for Medicaid Services (DMS) modified its regulations to calculate the Medicaid reimbursement rate for the 2000 rate year. Due to changes in RiverValley's operations, the reimbursement rate was set at a substantially lower amount than it had previously received. Other regulatory changes locked in the lower reimbursement rate at the 2000 level until 2007. In 2004, RiverValley filed an administrative challenge to the rate; however, despite some informal discussions, the Cabinet failed to make a determination on RiverValley's challenge. In 2009, RiverValley filed an appeal in the Franklin Circuit Court. The circuit court found that exhaustion of administrative remedies would have been futile because the Cabinet refused to process RiverValley's administrative appeal. Therefore, the court remanded the matter for mediation and a hearing before an appointed hearing officer. The hearing officer issued a recommended order concluding that DMS's rate methodology was in violation of KRS 205.560, which requires that Medicaid reimbursement rates "shall be on bases which relate the amount of the payment to the cost of providing the services or supplies." Based upon this conclusion and other findings, the hearing officer determined that RiverValley was entitled to an additional $9,636,000 in Medicaid reimbursements. However, the Cabinet Secretary rejected the recommended order, concluding that DMS properly set that reimbursement rate for RiverValley, and that the amount was "not inadequate." The Secretary found that RiverValley was only entitled to an additional $3,966,165, based upon a showing of changed circumstances. The circuit court reversed the Secretary's final order and reinstated the recommended order. The Court of Appeals affirmed this decision. The Court agreed that the Secretary has broad discretion to accept, reject, or modify a hearing officer's recommended order. However, where the Secretary chooses to reject or modify the hearing officer's

conclusions, KRS 13B.120(3) requires that the final order "shall include separate statements of findings of fact and conclusions of law." Although the Secretary is not required to refute every finding of fact and conclusion of law made in the recommended order, the final order must articulate a rationale for departing from the recommendation that is sufficient to explain the reasons for the deviation and to allow meaningful appellate review. The final order in this case failed to set forth any reasons for deviating from the recommended order; therefore, in the absence of such the circuit court properly adopted the hearing officer's recommended order. The Court further noted that KRS 205.560 and other applicable federal statutes and regulations require DMS to set reimbursement rates that relate to the provider's actual costs. The regulations adopted by DMS arbitrarily froze RiverValley's rates at the 2000 level without regard to its actual costs. Consequently, DMS exceeded its statutory authority by promulgating the regulations, and the Secretary's finding to the contrary was clearly erroneous. Finally, the Court held that the Secretary arbitrarily calculated the additional amount to which RiverValley was entitled.

II. ARBITRATION

A. ***Stephen D. Prater Builder, Inc. v. Larmar Lodging Corp.***

2013-CA-001242 08/22/2014 441 S.W.3d 133

Opinion and order dismissing by Judge Combs; Judges Stumbo and Thompson concurred. After the parties engaged in arbitration, the circuit court vacated the arbitration award and remanded for a new hearing. An appeal was filed, as well as a motion to dismiss the appeal. The Court of Appeals held that dismissal of the appeal was warranted. While KRS 417.220(1), which sets forth the circumstances under which an arbitration award can be appealed, allows for an appeal of an order vacating an arbitration award without directing a rehearing, the statute implies that an order vacating an award and directing rehearing is non-final and non-appealable. Therefore, dismissal was required.

III. CHILD SUPPORT

A. ***Smith v. Lurding***

2014-CA-000055 08/08/2014 2014 WL 3882964 DR Pending

Opinion by Chief Judge Acree; Judges Lambert and VanMeter concurred. Appellant sought reversal of the family court's order modifying a provision of the parties' settlement agreement, incorporated in the divorce decree, awarding tax exemption for the parties' child. The Court of Appeals affirmed the order, citing KRS 403.180(6), holding that "if a tax-exemption provision is part and parcel of the agreement's provision relating to child support, the exemption, like child support, is modifiable[,]" unless the " 'exemption and the concomitant tax savings would be lost' by allocating it in toto to a parent 'in a low tax bracket, not working, or for any reason was not required to file an income tax return[.]' " Quoting Marksberry v. Riley, 889 S.W.2d 47, 48 (Ky. App. 1994) (quoting Hart v. Hart, 774 S.W.2d 455, 457, n. 3 (Ky. App. 1989)).

IV. CIVIL RIGHTS

A. ***Sangster v. Kentucky Bd. of Medical Licensure***

2012-CA-001831 06/20/2014 454 S.W.3d 854

Opinion by Judge Moore; Chief Judge Acree and Judge Jones concurred. Following disciplinary proceedings, the Kentucky Board of Medical Licensure (KBML) indefinitely restricted appellant's license to practice medicine and assessed him with costs. In addition to appealing this administrative decision, appellant filed a separate 42 U.S.C. § 1983 action for monetary damages against the KBML and its members in their individual capacities. As the basis for his § 1983 action, appellant asserted that the KBML's order was: 1) the product of the KBML's fraud and misconduct involving its administration of its authorizing legislation and the provisions of KRS 13B.005 *et seq.*; 2) in violation of constitutional and/or statutory provisions; 3) in excess of the statutory authority of the KMBL; 4) without support of substantial evidence on the whole record; 5) arbitrary, capricious, or characterized by abuse of discretion; 6) based on ex parte communications that substantially prejudiced appellant's rights and likely affected the outcome of his disciplinary proceedings; and 7) affected by a failure of the hearing officer conducting the proceeding to be disqualified due to bias. Rather than answering appellant's complaint, the KBML and its members moved to dismiss on grounds of immunity. Specifically, the KBML asserted immunity from suit based upon the Eleventh Amendment of the United States Constitution, and the members of the KBML, who had been sued in their individual capacities, asserted absolute quasi-judicial immunity. The circuit court granted appellees' motion to dismiss on both grounds. In affirming, the Court of Appeals held that it was unnecessary for the circuit court to have relied upon the Eleventh Amendment as a basis for dismissing appellant's damages suit against the KBML because the KBML is a state agency, and states, state agencies, and state officials sued in their official capacities for money damages are not "persons" subject to suit under § 1983. The Court further noted that while KRS 311.603 provides that the KBML and its members may be subject to liability where "actual malice is shown or willful misconduct is involved," it supplies no basis for a § 1983 suit against the KBML or its members. A state may not, by statute or common law, create a cause of action under § 1983 against an entity whom Congress has not subjected to liability, or define the defenses to a federal cause of action. Lastly, the Court held that under federal law, the individual members of the KBML were entitled to absolute quasi-judicial immunity from appellant's § 1983 action.

V. CRIMINAL LAW

A. ***Cox v. Commonwealth***

2013-CA-001124 08/15/2014 2014 WL 3973121 DR Pending

Opinion by Judge Jones; Judges Clayton and Dixon concurred. This appeal originated in the Jefferson District Court. The district court dismissed without prejudice the underlying criminal charges against appellant after finding him incompetent to stand trial. The Commonwealth appealed to the Jefferson Circuit Court, asserting that the district court abused its discretion when it refused to order a competency evaluation pursuant to KRS 504.100 prior to dismissing the charges against appellant. The circuit court reversed and remanded to the district court with instructions to conduct any further competency proceedings pursuant to the requirements of KRS 504.100. The Court of Appeals granted appellant's request for discretionary review to determine whether the district court erred when it refused to order an evaluation under KRS 504.100 and instead relied upon an evaluation performed approximately ten months earlier as part of a separate criminal action against appellant. In examining the statutory language of KRS 504.100, the Court found it to be unambiguous regarding whether the trial court can forego a competency evaluation in the immediate proceeding before it and rely instead on an evaluation performed in a prior proceeding. Nonetheless, the Court noted that because the requirement for the evaluation is statutory and subject to waiver, with the trial court's consent, both parties could waive a new evaluation. Here, however, the Commonwealth objected. In the face of that objection, the trial court abused its discretion by refusing to comply with its statutory obligation to appoint a mental health expert to evaluate appellant's competency under KRS 504.100(1). As such, the Court concluded that the district court lacked the discretion to forego the evaluation process over the Commonwealth's objection and affirmed the circuit court.

B. ***McIntosh v. Commonwealth***

2012-CA-000527 08/01/2014 2014 WL 3765496 DR Pending

Opinion by Judge Nickell; Judges Moore and Taylor concurred. The Court of Appeals affirmed an order denying appellant's motion for RCr 11.42 post-conviction relief. In addition to claiming ineffective assistance of counsel, appellant argued that a trial court must conduct an inquiry pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) before denying a movant's request to serve as co-counsel during an RCr 11.42 hearing. The Court disagreed, noting that under *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), there is no constitutional right to a post-conviction collateral attack on a criminal conviction or to be represented by counsel at such a proceeding where it exists. The Court reasoned that since there is no constitutional right to a post-conviction collateral attack, nor to representation as part of such an attack, it follows that a criminal defendant has no constitutional right to serve as post-conviction co-counsel. While RCr 11.42 allows counsel to be appointed when an evidentiary hearing is required, it does not allow the movant to serve as co-counsel.

C. ***Napier v. Commonwealth***

2012-CA-001672 08/15/2014 2014 WL 3973113 DR Pending

Opinion by Judge Thompson; Judges Jones and Stumbo concurred. In reversing appellant's conviction of first-degree assault, the Court of Appeals held that the trial court committed error when it permitted the jury to replay a CD of a police interview of a witness in the privacy of the jury room without the presence of appellant or his counsel and on an unclean laptop provided by the Commonwealth. The Court further held that the error was palpable because the witness's statement directly contradicted appellant's version of events and because the jury had access to information from internet sources and to information regarding appellant's case. The Court further held that on remand, and if a new trial is held, the trial court could properly take judicial notice that expert testimony from a forensic scientist regarding a ballistics analysis is scientifically reliable.

D. ***Stage v. Commonwealth***

2013-CA-001697 08/01/2014 2014 WL 3765449 DR Pending

Opinion by Judge Maze; Judges Moore and VanMeter concurred. The Court of Appeals held that certain amended provisions of the Sex Offender Registration Act (SORA) did not violate the prohibition against ex post facto laws. The amendments at issue included a modification of KRS 17.510 and 17.520 to include a sex offender's "postincarceration supervision" among the existing list of privileges a court may revoke for noncompliance with registration requirements. The Court held that the amendments were not punitive simply because the General Assembly included "criminal justice system" in the title of the amending act, and thus, their retroactive application did not violate the prohibition against ex post facto laws. The Court further noted that the amendments revealed no evidence of the General Assembly's wish to transform SORA into a law that punished, as opposed to merely monitored, sex offenders.

VI. INSURANCE

A. ***Hensley v. State Farm Mut. Auto. Ins. Co.***

2013-CA-000006 08/15/2014 2014 WL 3973115 DR Pending

Opinion by Judge Jones; Chief Judge Acree concurred; Judge Moore dissented by separate opinion. This appeal required the Court of Appeals to consider when the statute of limitations begins to accrue on an underinsured motorist (UIM) claim. As a matter of first impression, the Court held that the statute of limitations on a UIM claim begins to run when the insurer denies a claim for UIM coverage and communicates that denial to the insured. The Court also held that while an insurer can shorten the limitations period by contract, KRS 304.14-370 operates to prevent a foreign insurer from relying on policy provisions that bar claims filed less than a year from the accrual of the cause of action. As such, under both the policy terms at issue and the common law of Kentucky, appellant's UIM claim did not accrue until November 4, 2011 - when appellee denied her claim and less than a year before the subject action was filed.

VII. JUVENILES

A. ***J.M. v. Commonwealth***

2012-CA-001826 08/22/2014 2011 WL 12460227 DR Pending

Opinion by Judge VanMeter; Judges Combs and Dixon concurred. On discretionary review of a circuit court order affirming the district court's denial of appellant's motion for a new trial, the Court of Appeals affirmed, upholding appellant's conviction of terroristic threatening in the third degree and criminal mischief in the third degree. The Court held that during a juvenile bench trial, the district court is permitted to use the charging petition in determining whether a juvenile is guilty of the crimes alleged in the petition. The Court further held that RCr 9.56, which prohibits a jury's use of the indictment or charging document in making a determination of guilt, does not apply to judges in juvenile bench trials. Because KRS 610.080(1) requires the judge in a juvenile adjudication to determine whether the allegations contained in the petition are true or false, the Court found it practically impossible for a judge in a juvenile adjudication to make such a determination without considering the contents of the petition. The Court further held that the petition is not relied upon as evidence. Instead, evidence from the adjudication is merely compared to the allegations set forth in the petition in order to determine the truthfulness of the allegations. Therefore, the petition itself does not need to be admitted as evidence in order for the judge to consider it.

VIII. MINES AND MINERALS

A. ***Hall v. Rowe***

2011-CA-001946 08/08/2014 439 S.W.3d 183

Opinion by Judge VanMeter; Judges Caperton and Dixon concurred. On review from a circuit court's denial of motions to alter, amend, or vacate a jury verdict and judgment, the Court of Appeals reversed and remanded the case, finding that the trial court erred when it refused to instruct the jury to determine which party to a coal mining lease was first to breach the contract. The Court held that even in cases in which the plaintiff seeks monetary damages, rather than an equitable remedy, one party's initial breach extinguishes the other party's obligation to perform. Thus, the question of who was first to breach the contract was a question of fact that should have been decided by the jury, and the jury should have been instructed that once a party breaches a contract by failing to perform as promised, he may no longer enjoy the benefit of the other party's obligation to perform. The Court also addressed additional issues which might arise on retrial. The Court rejected the argument that one party should not owe damages because he was acting as an agent of a principal, because sufficient evidence existed for a jury to find that he was acting on his own accord. Additionally, when a named party did not participate in the trial, but no jury instruction excluding that party was proposed, a judgment against both named parties was appropriate. On cross-appeal, the Court determined that sufficient evidence supported the award for the plaintiff, and that pre-judgment interest is a matter of right in a claim for liquidated damages, regardless of whether a demand for pre-judgment interest was made in the complaint.

IX. STATUTE/RULE INTERPRETATION

A. ***McAbee v. Chapman***

2013-CA-001677 08/22/2014 2014 WL 4115907 DR Pending

Opinion by Judge Combs; Judges Caperton and VanMeter concurred. In a medical negligence action, the Court of Appeals held that the trial court's decision to allow experts to remain in the courtroom during trial was not an abuse of its discretion under KRE 615(3) where the experts would be offering differing opinions on the same set of facts, each party would need to address the opinions of the opposing party on cross-examination, and due to the technical nature of the evidence, trial strategy would require the input of the experts.

X. STATUTES

A. ***United Ins. Co. of America v. Com., Dept. of Ins.***

2013-CA-000612 08/15/2014 2014 WL 3973160 DR Pending

Opinion by Judge Maze; Chief Judge Acree and Judge Thompson concurred. Insurance companies brought an action for declaratory relief against the Department of Insurance. The suit challenged the Department's retroactive application of the Unclaimed Life Insurance Benefits Act to policies that were issued prior to the Act's effective date. In response, the Department sought declaratory relief holding that retroactive application of the Act was constitutional. On cross-motions for summary judgment, the circuit court entered judgment in favor of the Department. The Court of Appeals reversed, holding that the Act's requirements may only be applied to policies executed after the Act's effective date. The Court noted that the Act clearly imposes new and substantive requirements that affect the contractual relationship between insurer and insureds. Most notably, the Act shifts the burden of obtaining evidence of death and locating beneficiaries from the insured's beneficiaries and estate to the insurer. Although this may be a valid exercise of the state's regulatory authority, it is a substantive and not a remedial alteration of the contractual relationship between insurers and insureds. Consequently, the Act falls within the rule prohibiting retroactive application to contracts in effect prior to its effective date.

XI. TORTS

A. ***Pearce v. Whitenack***

2013-CA-000669 08/08/2014 440 S.W.3d 392

Opinion by Judge VanMeter; Chief Judge Acree concurred; Judge Taylor dissented by separate opinion. A former city police officer, who had resigned his employment as a police officer after being suspended with pay, brought an action against the police chief and other public officials, alleging violation of his statutory due process rights and various tort claims. The circuit court dismissed the complaint, and the Court of Appeals affirmed. The Court held that all of the officer's claims, except his claim for invasion of privacy, were precluded by his failure to exhaust his administrative remedies under KRS 15.520. The Court further held that the officer had lost his expectation of privacy regarding information he transmitted from his home computer to his social networking website; therefore, the police chief did not violate the officer's right to privacy when he issued a notice of verbal counseling based on information the officer had posted on the website. As with all internet communications, the officer ran the risk that even a posting or communication he intended to remain private would be further disseminated by an authorized recipient. In dissent, Judge Taylor argued that the Court's conclusion that the officer had failed to exhaust his administrative remedies was contradicted by the record in this case, which reflected that the city terminated the administrative process and left the officer no other option but to file suit. Judge Taylor further contended that the majority impermissibly acted as a fact-finder regarding appellant's constructive discharge claim.

XII. WORKERS' COMPENSATION

A. ***Basin Energy Co. v. Howard***

2013-CA-001725 08/08/2014 447 S.W.3d 179

Opinion by Judge Jones; Judges Maze and Moore concurred. This appeal required the Court of Appeals to consider whether the Workers' Compensation Board erred when it *sua sponte* dismissed the subject action on the ground that both the Board and the Administrative Law Judge lacked subject-matter jurisdiction over a medical dispute where a prior dismissal order stated that the underlying claim was dismissed as settled "with prejudice." The Court held that the Board erred by raising the jurisdictional issue because the jurisdictional question in this instance involved particular-case jurisdiction, which is waived if not asserted at the trial level, as opposed to general subject-matter jurisdiction, which can never be waived. Because the Workers' Compensation Act gives an ALJ the authority to rule on motions to reopen filed pursuant to KRS 342.125, the ALJ had general subject-matter jurisdiction over the medical dispute and reopening. The Court also held that the "with prejudice" language in the prior ALJ's order did not deprive the parties of their statutory right to reopen because the Form 110 was clear and unambiguous with respect to the fact that medicals were left open for a portion of the claimant's injuries and because the dismissal order referred to the Form 110. Thus, the "with prejudice" language could not bar a reopening otherwise proper under KRS 342.125.