PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
FEBRUARY 1, 2023 to FEBRUARY 28, 2023

Note to practitioners: These are the Opinions designated for publication by the Kentucky Court of Appeals for the specified time period. Practitioners should Shephardize all case law for subsequent history prior to citing it.

I. ARBITRATION LAW

A. ***MASONIC HOMES OF KENTUCKY, INC. D/B/A MASONIC HOME OF LOUISVILLE v. ANNETTE WILEY, INDIVIDUALLY AND AS ADMINISTRATRIX AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLOTTE BLAIR, ET AL.***

2021-CA-0544-MR 02/24/2023 2023 WL 2193398
Opinion by McNEILL, J. CHRISTOPHER; CALDWELL, J. (CONCURS) AND TAYLOR, J. (DISSENTS AND FILES SEPARATE OPINION)
DISCRETIONARY REVIEW GRANTED 10/18/2023

Appellant Masonic Homes of Kentucky, Inc. d/b/a Masonic Homes of Louisville appealed from the Jefferson Circuit Court's order denying its motion to compel arbitration. Appellee Annette Wiley was the daughter of and power of attorney ("POA") for Charlotte Blair as well as the administratrix of her estate. Wiley filed suit against Masonic Homes alleging various tort, contract, and statutory claims in connection with Blair's long-term care at an elder care facility owned by Masonic Homes. Masonic Homes moved to stay the civil proceedings and compel arbitration pursuant to the alternative dispute resolution ("ADR") agreement signed by Wiley as Blair's POA. The circuit court denied the motion finding that the POA was invalid due to it missing two witness signatures as required by KRS 457.050.

The Court of Appeals reversed on the reasoning that KRS 457.050 was amended in 2020 to dispense with the two-witness signature requirement, and the amendment applied retroactively to the period when Blair and Wiley's POA was created. The Court was unpersuaded by Wiley's argument that the POA terminated upon Blair's death before the statute's amendment, and thus, made the POA no longer governed by the statute. The Court stated the law "concerns an agent's authority to act pursuant to a POA as clearly indicated by the context of KRS 457.100. The relevant issue in this case is whether the POA was valid at the time Wiley signed the ADR agreement. According to KRS 457.060(1), it was." The Court further rejected an argument on appeal that the POA did not grant authority to bind Blair to an arbitration agreement. Citing *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015), the Court held the POA's "broad, universal delegation of authority" allowed for entry into ADR agreements. Additionally, Wiley argued the POA was unconscionable due to a provision in the elder care home's admission agreement absolving liability for mere negligence. The Court disagreed stating that the terms of the admission agreement were separate and independent from the POA and thus had no bearing. Wiley also argued that the ADR agreement lacked sufficient consideration, but the Court held that the ADR agreement required both parties to submit equally to arbitration thus satisfying the consideration requirement. Lastly, for purposes of whether a wrongful death claim should be stayed, the Court remanded with instructions to the circuit court to consider

whether the claim's outcome would be dependent upon the arbitrator's decision. Judge Taylor authored a dissent on the basis KRS 457.060(1) did not cure the two-witness signature requirement during the period the POA was executed.

II. CIVIL PROCEDURE

A. ***CUMBERLAND SECURITY BANK, INC. v. FIRST SOUTHERN NATIONAL BANK, ET AL.***

2021-CA-1515-MR 02/10/2023 2023 WL 1871478
Opinion by CALDWELL, JACQUELINE M.; DIXON, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Appellant Cumberland Security Bank, Inc. appealed the Pulaski Circuit Court's denial of payment from a supersedeas bond posted by Appellee First Southern National Bank in relation to its previous appeal challenging the priority of Cumberland's mortgage on real property upon which both parties had liens. First Southern filed the bond to delay sale of the property during the first appeal, but it was uncontested First Southern was not liable for the monetary amount of the original judgment. After the first appeal was resolved in Cumberland's favor, Cumberland sought to satisfy the remaining balance of the monetary judgment from the bond with interest. The bond was executed on a standard form issued by the Administrative Office of the Courts which stated that First Southern would "satisfy the judgment together with interest, costs and damages for delay if for any reason the appeal is dismissed or the judgment is affirmed . . . ." First Southern argued the bond was only intended to satisfy the non-monetary portions of the judgment.

The Court of Appeals reversed on the basis that the principles of contract law governed, and the express language of the bond would be strictly enforced. The Court reasoned that First Southern's argument would "render illusory the straightforward language of the bond," and effectually, First Southern "would have not really have promised to do anything." However, the Court held that Cumberland was not entitled to attorney fees as such are not generally recoverable from supersedeas bonds, and nothing in the terms of the bond executed by the parties "contravened that general rule." Additionally, the Court stated First Southern was not bound by language in the promissory note stipulating the mortgagor would pay Cumberland's attorney fees in the event of default because Southern was not a party to that agreement.

III. FAMILY LAW

A. ***COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES, ET AL. v. R.C., A CHILD, ET AL.***

2022-CA-0921-ME 02/17/2023 2023 WL 2052270
Opinion by ECKERLE, AUDRA JEAN; ACREE, J. (CONCURS) AND COMBS, J. (CONCURS)

In February 2021, the Cabinet for Health and Family Services ("CHFS") filed a Dependency, Neglect, and Abuse ("DNA") petition on behalf of a 12-year-old Child who was found in Kentucky in the company of two unrelated adults. CHFS suspected the adults of trafficking Child. Child's Mother was

in North Dakota and had another child removed due to her drug use and suspected trafficking of Child. CHFS placed Child in foster care and coordinated Mother's case plan with the North Dakota child-welfare agency. By the end of 2021, Mother was fully compliant with her case plan. The local CHFS workers and CHFS counsel recommended that Child be transferred back to North Dakota under the Interstate Compact on Placement of Children ("ICPC"). In January 2022, the Barren Family Court entered an order directing that CHFS "immediately" return Child to North Dakota for a trial home visit with Mother. In the alternative, the order directed CHFS to identify any barriers under the ICPC to return of Child within ten (10) days. Child was not immediately returned to North Dakota, and CHFS did not file any pleadings with the family court. Several weeks later, Mother's counsel filed a motion to hold CHFS in contempt for failure to comply with the January order. During the hearings on the motion, the local workers testified that state-level CHFS officials privately expressed objections to returning the Child and refused to assist the local officials in returning Child. The state-level officials admitted to expressing concerns about the January order but denied directing the local workers not to comply. They also suggested that the blame lay with the local workers. However, emails from those officials advised the local workers that the January order was improper under the ICPC and CHFS had no intention of complying with it. The family court directed CHFS to return Child to North Dakota within ten (10) days. CHFS complied with this later order. Thereafter, the family court found CHFS in civil contempt for willful violation of the January order. The family court assessed CHFS with attorney fees incurred by Mother's counsel and Child's GAL in bringing the show cause motion. The family court also stated that two state-level officials were "subject to contempt" for their violations of the January order and for giving false testimony at the hearings, but ultimately, did not find them in contempt or impose any penalties. Instead, the family court suggested that the Commonwealth Attorney pursue perjury charges. Finally, the family court suggested that CHFS counsel had knowingly introduced false testimony. The Court did not find counsel in contempt but referred counsel to the Kentucky Bar Association ("KBA") for disciplinary action.

The Court of Appeals affirmed the family court's finding of contempt against CHFS. The Court first concluded that CHFS was subject to a finding of civil contempt even though it returned the Child to North Dakota before the contempt finding was entered. The Court further concluded that CHFS failed to show good cause for its failures to comply with the January order, and that there was evidence to show its failures were willful. However, the Court also opined that the state-level officials and CHFS counsel were not subject to civil contempt for their actions. While the actions of the state-level officials were attributable to CHFS, they were not personally liable for contempt for violation of the order. Similarly, civil contempt will not lie against the state-level officials for alleged perjury. However, since no contempt finding was made, the family's courts discussions on this point were moot and not subject to review. Similarly, the Court noted that the family court had the right to report counsel's suspected misconduct to the KBA, but those findings were not binding in any disciplinary action. Consequently, the Court concluded that counsel was not aggrieved by the family court's order.

B. ***JAMES ERIC BANKSTON v. JENNIFER S. MATTINGLY***

2021-CA-1490-MR 2/17/2023 2023 WL 2052413

Opinion by JONES, ALLISON; KAREM, J. (CONCURS) AND THOMPSON, C.J. (CONCURS)

The Marion Circuit Court entered an order that James Bankston and Jennifer Mattingly each claim their child, for which they shared joint legal custody and equal timesharing, as a dependent on their respective federal income tax returns every other year on a rotating basis, reasoning that *Adams-Smyrichinsky v. Smyrichinsky*, 467 S.W.3d 767, 781 (Ky. 2015), directs trial courts to allocate the tax credit in a manner maximizing the greatest financial benefit to the children. Bankston appealed asserting the decision to be erroneous as a matter of law.

The Court of Appeals reversed and remanded on the basis that the exemption is primarily a matter of federal law, but the family court could order the parties to execute a waiver in certain situations. The Court reasoned that IRS rules state that a taxpayer may claim the dependency exemption if they are the qualifying child, and thus, live in the same abode as the taxpayer for more than one-half of the taxable year. In this case, it was noted that the parties have equal timesharing, and the child did not reside with one parent more than the other. In such cases, the parent with the highest adjusted gross income is treated as the qualifying parent. Therefore, the Court held Bankston would be entitled to the deduction.

Furthermore, the Court held that *Adams-Smyrichinsky* allows for the circuit court to execute a release in favor of the other party, but only if the circuit court first determines there are extraordinary reasons that compel disregarding the IRS rules for a stated sound reason reliably related to the support of the child. The circuit court should presume the IRS rules apply and not displace the rules in favor of achieving mathematical equity or fairness. Here, the Court reasoned, Bankston qualified for the deduction, not Mattingly, and the circuit court did not state a reasonable nexus to support assigning the exemption.

IV. INSURANCE LAW

A. ***PROGRESSIVE DIRECT INSURANCE COMPANY v. COURTNEY HARTSON***

2021-CA-0197-MR 2/10/2023 2023 WL 1871477
2021-CA-0256-MR

Opinion by EASTON, KELLY MARK; DIXON, J. (CONCURS) AND JONES, J. (CONCURS)

Progressive Direct Insurance Company (“PDIC”) appealed the Jefferson Circuit Court’s summary judgment ordering it to pay basic reparation benefits (“BRB”) denied to Courtney Hartson. Hartson cross-appealed seeking to overturn the circuit court’s denial of attorney fees and judgment fixing the award of interest at twelve percent (12%) instead of eighteen percent (18%). Hartson was involved in a motor vehicle accident while driving her visiting out-of-state grandparent’s vehicle and was denied BRB from Southern-Owners Insurance Company, a subsidiary of Auto-Owners Insurance Company, on account of her not being named on her grandparent’s insurance policy. Hartson initially sued to collect BRB from Auto-Owners as obligor. Hartson also filed a claim under the Kentucky Assigned Claims Plan (“KACP”), and her claim was assigned to Progressive Adjusting Company, Inc. (“PAC”). The circuit court absolved Auto-Owners of liability for BRB. Hartson subsequently filed an amended complaint naming PDIC as defendant, and summary judgment was granted ordering payment of twelve percent (12%) interest from the date it was first notified of her claim. On appeal, PDIC argued

that PAC was the proper party against which to file suit, and Hartson was not entitled to BRB due to, *inter alia*, her having settled a bodily injury claim with the at-fault driver's insurance, State Farm.

The Court of Appeals affirmed the award of BRB payment from PDIC. The Court held that PDIC failed to sufficiently preserve its argument it was the improper party before the circuit court. Citing *Smith v. Commonwealth*, 410 S.W.3d 160, 167 (Ky. 2013), the Court concluded that PDIC's only mention of this defense was in a brief footnote in its response to Hartson's motion for summary judgment. Therefore, the Court deemed this was inadequate to raise the significance of this issue to the circuit court's attention. Even if the issue was preserved, the Court stated PDIC would be estopped from asserting it due to "its actions in this case." The Court reasoned, "[a] litigant should not be able to just mention an issue, take no affirmative action to correct it, litigate the issues in the case for years, and then insist on starting over with a newly named entity." It was also held Southern-Owners was not liable for BRB because Hartson's grandparent's policy did not "contractually add BRB for Harston" and Southern-Owners was not licensed in Kentucky.

The Court was unpersuaded by PDIC's argument's that unpaid medical bills were the result of Hartson's failure to pay them. The Court stated the record contained Hartson's application for no-fault benefits and noted she was not provided an "opportunity to designate whether she wanted the medical providers to be paid directly." Additionally, Hartson provided medical bills which were presumed to be a reasonable cost under KRS 304.39-020(5)(a), and the fact Hartson had not paid those bills out of pocket could not be argued to relieve PDIC of BRB payments directly to the medical providers. The Court proclaimed, "the purpose of BRB is to get bills paid without arguments over fault, and this purpose is further served by making sure medical providers are paid for their services, whether directly or by the injury victim." The Court rejected arguments that Hartson would be receiving "double compensation" for her medical bills due to her settlement with State Farm. Quoting *Holzhauser v. West American Ins. Co.*, 772 S.W.2d 650 (Ky. App. 1989), the Court proclaimed that tort recovery and contractual BRB are "distinct methods of recovery" which "do no overlap" or "provide duplicate benefits for the same elements of loss." It was noted, Hartson's general release with State Farm did not contain anything releasing the BRB carrier or indemnifying BRB benefits.

The Court affirmed the award of interest at the twelve percent (12%) rate on the premise there was "reasonable foundation" for delay in payments under KRS 304.39-210(2). There was an initial mutual belief that Auto-Owners was responsible for BRB payments, and it was reasonable for PDIC to investigate Medicaid benefits paid toward Hartson's medical bills. The Court reversed with respect to the date from which the interest would begin on the grounds that interest should accrue from the date PDIC received the medical bills rather than the date the claim was first assigned during ongoing litigation between Hartson and Auto-Owners. In conclusion, the circuit court's denial of attorney fees was held to be a reasonable use of discretion citing the delay in providing medical bills to PDIC.

V. PROPERTY LAW

A. ***CHRIS JOHNSON v. AKERS DEVELOPMENT, LLC, ET AL.***

2022-CA-0318-MR 2/24/2023 2023 WL 2193235

Opinion by CETRULO, SUSANNE M.; DIXON, J. (CONCURS) AND EASTON, J. (CONCURS)

This is an appeal of a judgment of the Pike Circuit Court that confirmed a deed transfer to Appellee Akers Development, LLC. The circuit court determined that Akers Development sufficiently utilized its right of redemption — after a previous foreclosure action — despite not paying the statutorily required "reasonable costs incurred by the purchaser" within a six-month period. The property in question had been purchased at a public action by Appellant Chris Johnson for less than two-thirds of the property's appraised value. On appeal, Johnson argued that Akers Development did not sufficiently satisfy its right of redemption because KRS 426.530 demanded strict compliance.

The Court affirmed the judgment of the circuit court because 1) Johnson's own actions waived strict compliance with the statutory requirements of the reasonable costs payment deadline; and 2) *substantial compliance* with the reasonable fee deadline was sufficient because *that element* of KRS 426.530 was directory (not mandatory).

The Court of Appeals determined that — under these circumstances — strict compliance of the reasonable cost payment (within the six-month statutory payment) was not required. Akers Development paid the purchase price of the property plus ten percent interest within the statutory deadline. Akers Development attempted to discover the reasonable fees and costs incurred by Johnson, but Johnson did not relay that information to Akers Development; and, mere days before the right of redemption window closed, Johnson incurred additional expenses for the property but did not inform Akers Development of those purchases either. After the court ordered Johnson to turn over receipts for his reasonable costs incurred, Akers Development paid them in full within ten (10) days.

VI. SOVEREIGN IMMUNITY

A. ***BOARD OF EDUCATION OF PARIS, KENTUCKY v. JASON EARLYWINE***

2021-CA-0788-MR 2/24/2023 2023 WL 2192965

Opinion by EASTON, KELLY MARK; COMBS, J. (CONCURS) AND McNEILL, J. (CONCURS)

DISCRETIONARY REVIEW GRANTED 08/16/2023

The Board of Education of Paris, Kentucky appealed the Franklin Circuit Court's ruling that KRS 45A.245 waived the Board's governmental immunity in a breach of employment contract action. The Board also challenged the transfer of venue from Bourbon Circuit Court to Franklin Circuit Court. The underlying action involves a suit filed by Appellee seeking back wages accrued during unpaid suspension time. The Court of Appeals affirmed the Franklin Circuit Court's ruling that KRS 45A.245 waived immunity on the basis the Board was an agency of state government, and the statute's language was "an unqualified waiver of immunity on all contracts with the Commonwealth and its agencies, including employment contracts." However, the Court further held the contract was governed under KRS Chapter 161 and reversed on the grounds that Appellee failed to exhaust administrative remedies required under KRS 161.790. In conclusion, the Court deemed proper venue was in Bourbon Circuit Court on the reasoning that teacher contracts did not fall within any of the provisions in KRS 45A.245 mandating transfer to Franklin Circuit Court. The matter was remanded with instructions to the Franklin Circuit Court to transfer the case to Bourbon Circuit Court who was instructed to dismiss for lack of subject matter jurisdiction.

VII. TORTS

A. ***JAMES MICHAEL EVERETT v. GREGORY PAUL EDELEN, ET AL.***

2022-CA-0109-MR 2/17/2023 2023 WL 2052293
Opinion by EASTON, KELLY MARK; COMBS, J. (CONCURS) AND McNEILL, J. (CONCURS)

Appellant challenged the Marion Circuit Court's summary judgment finding he enjoyed independent contractor status while building a barn on Appellees' cattle farm. Appellant was injured after falling twelve (12) feet off the top of the barn's structure while performing construction. After weighing all of the Restatement (Second) of Agency § 220(2)'s listed factors with the facts in the record, the Court of Appeals affirmed the summary judgment. While observing that Appellees supplied most of the tools and materials and both parties agreed on an hourly basis payment arrangement, the Court held the circumstances supported the finding Appellant was an independent contractor. Citing *Auslander Properties, LLC v. Nalley*, 558 S.W.3d 457 (Ky. 2018), and *Dexter v. Hanks*, 577 S.W.3d 789 (Ky. App. 2019), the Court determined Appellees "left the details of the job of building the barn" to Appellant.