PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JANUARY 2009

I. ARBITRATION

A. Jackson v. Mackin

2008-CA-000344 01/16/2009 2009 WL 103230

Opinion by Judge Taylor; Judges Moore and VanMeter concurred. The Court reversed and remanded an order of the circuit court dismissing appellant's complaint alleging that appellee made false or reckless material misrepresentations in the sale of a home. The Court first held that appellant could bring the action under the contract after the deed had been properly delivered and, because the complaint primarily sounded in fraud, appellant sufficiently asserted claims that survived the merger doctrine. The Court then held that the contract terms permitting "binding arbitration" between the parties were not required to be asserted as an affirmative defense under the "arbitration and award" provision of CR 8.03 in a response to a complaint filed as a result of a dispute arising from the contract. CR 8.03 contemplates that "arbitration and award" is an affirmative defense only in those instances where a dispute has previously been submitted to arbitration and a final award has been made. Even so, the Court held that because appellee failed to comply with the provision in the contract providing that notice of demand for arbitration must be made in writing not more than one year after the dispute arose and further failed to comply with KRS 417.060(1) and (3) by not requesting the court to refer the matter to arbitration in a timely fashion, his action constituted a waiver of any arbitration rights under the contract. The Court finally held that the trial court did not lose subject matter jurisdiction as a result of the arbitration clause and its conclusion to dismiss the action due to appellant's failure to seek enforcement of the arbitration provision more than a year after the dispute between the parties had arisen was clearly erroneous and dismissal of the case was an abuse of discretion. The Court also held that appellee's failure to file a protective cross-appeal to properly preserve the issue of whether the trial court could have granted summary judgment on the merits precluded review of that issue.

B. Olshan Foundation Repair and Waterproofing v. Otto

2007-CA-002008 01/16/2009 2009 WL 102963

Opinion by Judge Stumbo; Senior Judge Guidugli concurred; Judge Thompson concurred in result only. The Court reversed an order of the circuit court denying appellant's motion to compel arbitration and stay an action brought by appellees. Appellees brought the action for breach of contract, breach of implied and express warranties, and negligence, related to fully-transferable lifetime warranties for repairs made to the foundation of a house they purchased. The Court preliminarily held that the appeal was not interlocutory, in that a party prosecuting an interlocutory appeal from an order denying a motion to compel arbitration under the

Kentucky Uniform Arbitration Act, could proceed either under CR 65.07 or the general appellate procedure set out in CR 73. Because the motion to compel arbitration was expressly brought pursuant to the KUAA and the Federal Arbitration Act, the interlocutory appeal was properly brought via CR 73. The Court then held that the trial court erred in denying the motion to compel arbitration. While appellees were not bound to the agreements under contract law principles, because they decided to seek warranty repairs as third-party direct beneficiaries, they were estopped from disavowing the arbitration language in the warranties.

II. CIVIL PROCEDURE

A. Clemmer v. Rowan Water, Inc.

2007-CA-000355 01/23/2009 2009 WL 152867

Opinion by Senior Judge Guidugli; Chief Judge Combs and Judge Stumbo concurred. The Court reversed and remanded a partial summary judgment in favor of appellee concluding that appellants' claims for trespass, nuisance, and fraud were barred by the doctrine of res judicata. The Court held that a federal court order dismissing the claims for lack of subject matter jurisdiction did not preclude relitigation of the same claims in state court because there was no adjudication in federal court on the merits of the claims.

B. Harrod v. Irvine

2007-CA-002178 01/16/2009 2009 WL 103130

Opinion by Judge Stumbo; Judge Thompson concurred; Senior Judge Guidugli dissented by separate opinion. The Court reversed a summary judgment wherein the circuit court determined that the issues raised in appellant's intervening complaint were previously resolved in a separate circuit court action. The Court held that the trial court erroneously concluded that the doctrine of *res judicata* was applicable. Because the tract of property at issue in the instant action had not yet been carved out of the tract at issue in the previous proceedings and because the property boundary at issue in the instant action was not at issue in the previous proceedings, the doctrine of *res judicata* did not bar the claim.

III. CRIMINAL LAW

A. Dever v. Commonwealth

2007-CA-000932 01/09/2009 2009 WL 50164

Opinion by Judge Clayton; Judge Moore concurred by separate opinion; Judge Taylor concurred in result only. The Court reversed and remanded with direction a judgment of the circuit court requiring appellant to register for lifetime as a sexual offender. The Court first held that the issue was preserved by appellant when he raised the application of the statutory exception in KRS 17.500(2)(b) in his motion to amend the judgment. The Court then held the circuit court erred in imposing a lifetime registration requirement as the exception in KRS 17.500(3)(b), which exempted from lifetime registration conduct by a person under the age of eighteen that is criminal only because of the age of the victim, was applicable. Although the

information appeared to have been premised on forcible compulsion, the plea offer and plea hearing did not mention forcible compulsion as the basis for the charges. This removed appellant from the application of KRS 17.520(2)(a)(4), requiring lifetime registration. The Court remanded with direction for the circuit court to require appellant to register as a sex offender in accordance with the version of KRS 17.520 in effect at the time he committed the offenses.

B. Stump v. Commonwealth

2007-CA-001762 01/16/2009 2009 WL 102954

Opinion by Judge Moore; Judge Caperton and Senior Judge Guidugli concurred. On discretionary review, the Court vacated and remanded an opinion of the circuit court affirming a district court denial of appellant's motion to present the result of a preliminary breath test as exculpatory evidence. The Court held that both the district and circuit court erred in concluding that KRS 189A.104(2) specifically prohibited the introduction of such evidence at trial and that the statute was unconstitutional. KRS 189A.104 was inapplicable because appellant did not refuse to submit to the appropriate breath test nor was he subject to any enhancement of penalties. The Court noted that on remand the district court must determine whether the result of the test was relevant and whether the result was sufficiently reliable pursuant to *Daubert*.

IV. FAMILY LAW

A. Bell v. Cartwright

2008-CA-001137 01/16/2009 2009 WL 103230

Opinion by Judge Lambert; Judge Taylor and Senior Judge Graves concurred. The Court vacated and remanded an order of the family court increasing appellant's monthly child support obligation. The Court held that the family court abused its discretion in increasing the child support solely based on appellant's increased income without supportive evidence of an increase in the child's reasonable needs. The Court remanded with direction for the family court to address the modification under the proper standards set forth in *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001).

B. Ruby v. Ruby

2008-CA-000122 01/23/2009 2009 WL 153185

Opinion by Thompson; Judge Moore concurred; Senior Judge Henry dissented by separate opinion. The Court vacated and remanded an order of the family court denying the parties' motion to vacate a domestic violence order. The Court held that, while KRS 403.750 allowed for the parties to seek the amendment of a DVO, consistent with public policy, an agreed order vacating a DVO could not be approved unless a hearing was conducted to determine whether the victim made the request free from intimidation and coercion by the abuser. The Court also held that 1) absent a showing of bias or prejudice, the family court judge was not required to recuse merely because appellant was a practicing attorney in the court; 2) the family court did not abuse its discretion in denying a motion to continue the hearing on the

DVO in light of the time prescription in KRS 403.740 and the fact that a previous continuance had been granted; 3) the family court did err in limiting an additional hearing only to appellant's testimony; 4) appellant was not denied assistance of counsel and the right to confront appellee, as substitute counsel cross-examined appellee on appellant's behalf; and 5) appellant was not denied the right to compel witnesses when the family court refused to hold witnesses in contempt for failure to appear and denied a motion to obtain appellee's mental health and prescription drug records, as the relevance of the testimony was questionable and to do so would have resulted in further delay.

C. W.A. v. Cabinet for Health and Family Services

2008-CA-000241 10/31/2008 2008 WL 5473623 DR filed

Opinion by Judge Moore; Judge Caperton and Senior Judge Guidugli concurred. The Court affirmed an order and judgment of the circuit court terminating appellants' parental rights. The Court held that there was substantial evidence to support the family court's determination that the child qualified as neglected under KRS 600.020(1) based on testimony that 1) either or both parents were substantially incapable of providing essential care; 2) the mother was not able to financially support the child for that period of time; 3) there was a period of 90 days when the parents had no contact with the child; 4) the child tested positive for cocaine at birth and was immediately placed in the Cabinet's care; 5) the Cabinet retained custody for 15 months before filing the petition; 6) although both parents obtained treatment for substance abuse problems, they were unable to remain drug free during the entire 15 months; 7) the mother gave birth to another child who tested positive for cocaine one year after the birth of this child; and 8) there were multiple domestic violence incidents between the parents up to one month before the hearing in family court. Also, based on this testimony, the Court then held that the trial court did not err in finding the existence of one or more grounds for terminating parental rights as required by KRS 625.090(2). The Court finally held that the trial court did not err in finding that termination was in the best interest of the child, as required by KRS 625.090, based on the following facts: 1) Reasonable reunification efforts had been made. 2) The mother had only been working at her new job for less than a month at the time of hearing. 3) While the mother had obtained housing at the time of the hearing, the parents had not been able to keep housing for more than three months due to drug problems. 4) The parents were involved in domestic violence up to one month before the hearing and the father was in jail awaiting adjudication for criminal charges arising from the incident.

V. INSURANCE

A. Auto-Owners Insurance Company v. Veterans of Foreign Wars Post 5906

2008-CA-000141 01/16/2009 2009 WL 103197

Opinion by Judge Lambert; Judges Clayton and Wine concurred. The Court affirmed a summary declaratory judgment in favor of a VFW post finding that it was entitled to liability coverage and indemnity under a liability policy entered into with the appellant insurer. The Court held the commercial general liability insurance

policy provided coverage for a wrongful death claim arising from an automobile accident involving a driver who had visited the VFW prior to the accident. The exclusion contained in the policy pertaining to incidents involving bodily injury or property damage in causing or contributing to the intoxication of a person was not applicable because the VFW was not in the business of manufacturing, distributing, selling, serving, or furnishing alcoholic beverages but rather, was primarily concerned with the operation of its bingo hall and various charitable activities and simply a storage facility for its members' alcohol.

VI. TORTS

A. Combs v. Stortz

2007-CA-001232 01/09/2009 2009 WL 50174

Opinion by Judge Caperton; Judge Keller and Wine concurred. The Court reversed and remanded a judgment of the circuit court entered pursuant to a jury verdict finding liability but awarding no damages on appellant's claims for negligence arising from an automobile accident. The Court held that 1) the damage instructions impermissibly linked the two threshold questions of monetary damages for reasonably necessary medical expenses exceeding $1,000 and the specifically enumerated physical or permanent injuries, loss, or death, as allowed by KRS 304.39-060(2)(b); 2) appellant was not entitled to a directed verdict on the liability of a settling party; 3) the apportionment instruction as to the liability of the settling party was not improper and even so, any error was harmless; 4) the trial court did not commit reversible error by excluding reference to the insurer as the provider of UIM coverage; 4) the trial court did not err in admitting expert opinion testimony that took into account the mechanism of injury, appellant's medical history and available medical records, in addition to the information derived from a physical examination; 5) the trial court did not err by allowing testimony regarding prior workers' compensation claims and insurance payments for impeachment purposes; 6) the trial court did not err in excluding expert medical testimony regarding appellant's condition that was couched in terms of possibility, rather than probability or certainty, and that was not timely produced; 7) appellant placed her medical condition at issue and therefore, defense counsel did not improperly cross-examine her regarding past workers' compensation claims, past treatment and injury claims with past employers; 8) while cross-examination about appellant's nephew's employment by appellant's counsel was admitted in error, the error was harmless; and 9) expert testimony by an auto mechanic regarding alleged brake failure was properly admitted.

VII. WORKERS' COMPENSATION

A. Ridener v. South KY Rural Electric Cooperative, Corp.

2008-CA-001520 01/23/2009 2009 WL 172897

Opinion by Judge Keller; Chief Judge Combs and Senior Judge Henry concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming an opinion of the ALJ finding appellant only partially disabled. The Court held that the

employer's proof of appellant's entitlement to long-term disability benefits had little or no bearing on his entitlement to permanent total disability benefits, as the definition of disability under the long-term disability policy was significantly different from and far less restrictive than the definition of permanent total disability under KRS 342.0011. The Court also held that the evidence did not compel a finding that appellant was totally disabled.