PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS
JANUARY 1, 2015 to JANUARY 31, 2015

I. ADMINISTRATIVE LAW

A. ***Kentucky Retirement Systems v. Carson***

2013-CA-000309 01/23/2015 2015 WL 293387 DR Pending

Opinion by Judge VanMeter; Judges Kramer and Taylor concurred. On review of a circuit court's order remanding a Kentucky Employees Retirement Systems (KERS) member's claim for disability retirement benefits to the administrative agency for additional findings, the Court of Appeals affirmed. The Court held that under KRS 61.600, a KERS member may file a second application for benefits, following an initial denial, if accompanied by new medical evidence. Upon reapplication, the administrative agency must reconsider all the medical evidence, including that presented with the first application. In this case, administrative *res judicata* did not bar the reconsideration of findings made upon the first application in light of the infirmities claimed in the successive application. The infirmities should have been viewed pursuant to a holistic, comprehensive approach as opposed to treating each infirmity as a separate and discrete illness.

II. ARBITRATION

A. ***Stanton Health Facilities, LP v. Fletcher***

2014-CA-001015 01/09/2015 454 S.W.3d 312

Opinion and order granting petition for a writ of mandamus by Judge Kramer; Judges Lambert and Taylor concurred. A patient's daughter brought a medical negligence action against a healthcare provider arising out of treatment provided to the patient. When the provider moved to compel arbitration, the circuit court deferred ruling on the motion and ordered the parties to proceed with pretrial discovery on the merits of the claim. The provider then petitioned the Court of Appeals for a writ of mandamus to require the circuit court to rule on the motion to compel arbitration. In granting the petition, the Court noted that the plain language of KRS 417.060 directs that a trial court "shall proceed summarily" to the determination of a motion to compel arbitration. KRS 417.060(4) further requires a trial court to stay "[a]ny action or proceeding" pending the determination of a motion to compel arbitration. Therefore, the circuit court acted erroneously and threatened irreparable injury in requiring the parties to proceed with pretrial discovery as to the merits while a motion to compel arbitration was pending.

III. CRIMINAL LAW

A. ***Griffith v. Commonwealth***

2013-CA-001437 01/30/2015 454 S.W.3d 315

Opinion by Judge Combs; Judges Nickell and Taylor concurred. Appellant filed an RCR 11.42 motion to correct her sentence for first-degree robbery and for specific performance of her plea agreement. The circuit court denied the motion, and appellant appealed. The Court of Appeals vacated the circuit court's decision and remanded the case, holding that the circuit court erred in refusing to apply the bargained-for terms of the plea agreement. The Court specifically held that the circuit court was required to give appellant notice of its intent, at sentencing, to reject the negotiated plea agreement and to give appellant an opportunity to withdraw the plea. Here, the record was devoid of any indication that the circuit court notified appellant that she could withdraw her guilty plea upon the court's rejection. The Court also held that the circuit court inappropriately deferred to the wishes of the victim of the crime rather than adhering to the terms of the plea bargain as negotiated by the Commonwealth and appellant. Citing to *Elmore v. Commonwealth*, 236 S.W.3d 623 (Ky. App. 2007), the Court reiterated that when a trial court, *sua sponte*, revises the terms of a negotiated sentence after accepting a guilty plea, the defendant is entitled either to withdraw his plea or to enforce specific performance of the sentence for which he had bargained.

IV. CUSTODY

A. ***Hoskins v. Hoskins***

2013-CA-001748 01/16/2015 2015 WL 222177 DR Pending

Opinion by Judge Thompson; Judges Combs and Stumbo concurred. Appellant appealed from an order modifying timesharing with his son. He contended that the trial court erred when it considered the report of the son's guardian *ad litem* (GAL) when modifying timesharing. Relying upon *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014), the Court of Appeals agreed, holding that the trial court could not appoint a GAL to both represent the child and to conduct an investigation and file a report. The Court specifically noted that GALs are appointed to represent the child's best interest and the role of a GAL is to act as an attorney for the child. Thus, as an attorney in the litigation, the GAL may not file a report with the court, testify, or be cross-examined. Consequently, the trial court's consideration of the GAL's report in this case constituted reversible error.

V. EMPLOYMENT

A. ***Collins v. KCEOC Community Action Partnership, Inc.***

2014-CA-000285 01/30/2015 455 S.W.3d 421

Opinion by Judge Combs; Judges Nickell and Taylor concurred. A former substitute teacher brought an action against her employer, a child development center, for wrongful discharge, negligence and vicarious liability, and defamation. The circuit court granted the employer's motion to dismiss, and the Court of Appeals affirmed. The center terminated appellant's employment and reported appellant's suspected neglect of a four-year-old student to the Cabinet of Health and Family Services' Department of Community Based Services. Even though appellant was later exonerated in a hearing, the Court held that she had no cause of action against her employer because of the sweeping, mandatory nature of KRS 620.030(6) regarding the reporting of suspected child abuse or neglect. Failure to report is a crime under that statute, and any entity making such a report in good faith enjoys immunity from a lawsuit pursuant to the statute. Since appellant produced no evidence of bad faith, the Court affirmed the dismissal of appellant's complaint.

VI. FAMILY LAW

A. ***Brown v. Brown***

2013-CA-001515 01/16/2015 2015 WL 222178

Opinion by Judge Jones; Judges Clayton and Dixon concurred. The Court of Appeals affirmed the circuit court's award to Wife, which included cost-of-living adjustments ("COLAs") that Husband's civil retirement account received after the parties divorced. Specifically, the Court held that where the original dissolution decree used the deferred distribution method and made no mention of the exclusion of any future COLAs, the former spouse was entitled to inclusion of the COLA on her marital percentage of the retirement payout upon distribution. This approach allowed the former non-employee spouse to fully realize the present-day value of the marital portion of the pension. To hold otherwise would result in a reallocation of the percentage values, *i.e.* the non-employee spouse would receive less than the 50% value of the marital portion and the employee spouse would receive more. Therefore, Wife was entitled to share equally in the COLA as it applied to the marital portion of Husband's retirement.

VII. IMMUNITY

A. ***Beward v. Whitaker***

2013-CA-000773 01/23/2015 2015 WL 293461 DR Pending

Opinion by Judge J. Lambert; Judges Jones and Stumbo concurred. The Court of Appeals affirmed the circuit court's interlocutory decision ruling that two high school principals were not entitled to qualified official immunity for injuries a student sustained in a hallway that was unsupervised because the teacher assigned to supervise that station pursuant to the supervision schedule was absent that day. The supervision schedule was adopted in order to implement the Code of Student Behavior and Discipline, which was formulated pursuant to KRS 158.148(4). The principals argued that because the supervision schedule did not include any direction or rule to address when a teacher or administrator assigned to a station was absent, it was left to their discretion as to how to proceed, which entitled them to immunity. This Court disagreed, holding that the principals were engaged in ministerial actions in enforcing the Code via the supervision schedule, as they were not required to use discretion but were instead tasked with enforcing the supervision schedule.

VIII. INSURANCE

A. ***Indiana Insurance Company v. Demetre***

2013-CA-000338 01/30/2015 2015 WL 393041 DR Pending

Opinion by Judge Thompson; Judges Combs and Stumbo concurred. The Court of Appeals affirmed a jury verdict and judgment awarding appellee $925,000 for emotional pain and suffering and $ 2.5 million in punitive damages in this first-party insurance bad faith claim. The Court first held that appellee made a claim for benefits under his homeowners insurance policy when he notified Indiana Insurance of a personal injury claim against him (the claim alleged injuries from gasoline vapors emanating from appellee's vacant land), since "claim" included a demand for benefits under the policy. Thus, this claim for benefits triggered Indiana Insurance's duties under the Unfair Claims Settlement Practices Act, Consumer Protection Act, and common law. Although Indiana Insurance ultimately provided a defense and indemnification as to the personal injury claim filed against appellee, it was not absolved from liability where there was evidence it acted in bad faith. Specifically, there was evidence showing that Indiana Insurance immediately set in motion a defense of no coverage and did nothing to protect appellee's security through prompt investigation of the merits of the personal injury claim; Indiana Insurance did not retain an expert or investigate the claim even after being informed it had no merit; Indiana Insurance investigated and quickly resolved the claim only after appellee hired his own attorney in the personal injury action and the insurer's declaratory judgment action; and the evidence supported a conclusion that the attorney provided by Indiana Insurance was not functioning as independent legal counsel, but was at all times controlled by adjusters who had the intent of denying coverage. The Court then concluded that because appellee testified that he incurred legal fees to defend against Indiana Insurance's litigation of the coverage issue, there was sufficient evidence of an ascertainable loss to submit the case to the jury under the Consumer Protection Act. The Court also held that appellee was not required to produce expert testimony that his emotional distress was severe. A heightened standard of proof is not required when damages are sought in a statutory action in which compensatory damages for mental anguish and anxiety have been traditionally permitted. The Court also found no error in the jury instructions where the breach of contract and tort elements were intertwined but the jury was instructed to only award punitive damages on the statutory claims. Further, the instructions were not required to include any reference to the severity of appellee's emotional distress. Finally, the Court held that the punitive damage award was not excessive and that the issue of attorneys' fees was moot.

IX. NEGLIGENCE

A. ***Ward v. JKP Investments, LLC***

2013-CA-001706 01/23/2015 2015 WL 293332 DR Pending

Opinion by Judge VanMeter; Judge Kramer concurred; Judge Maze dissented via separate opinion. In this premises liability case, the Court of Appeals affirmed the circuit court's grant of summary judgment in favor of the landlord/property owner on appellant's personal injury claim. The Court held that under the redefined approach to the "open and obvious" defense as outlined in *Shelton v. Ky. Easter Seals Soc'y, Inc.*, 413 S.W.3d 901 (Ky. 2013), the visitor to the property at issue (who tripped on an outdoor step which was obviously in deteriorating condition, fell, and injured herself) failed to present affirmative evidence, viewed in a light favorable to her, showing that the property owner should have reasonably foreseen that visitors would be distracted, would be engaging in some activity while traveling on the deteriorating step, or would otherwise not proceed with caution given the surrounding area. Appellant's deposition testimony revealed that she attended the tenant's party at the location in question for approximately six hours; she had traversed the staircase in question three times that day without difficulty before falling; it was daylight when she fell; she was not looking or paying attention to where she was stepping; she placed her foot in the far corner of the step where cement was crumbling rather than walking up the middle of the relatively wide step; and she was not sharing the step with anyone. Nothing in the record indicated that under the circumstances, the property owner had reason to expect that visitors' attention might be distracted or that visitors would proceed to encounter an obvious danger. The property owner's duty of care is limited to foreseeable harm. The Court concluded that this case presented the scenario contemplated in *Shelton* in which summary judgment is viable and appropriate. In dissent, Judge Maze argued that the issues presented should have been put before a jury.

X. PROPERTY

A. ***Bickel v. Haley***

2013-CA-001137 01/23/2015 2015 WL 293462 DR Pending

Opinion by Judge VanMeter; Judges Kramer and Maze concurred. The administrator of Husband's estate filed a complaint against Wife and Wife's children, asserting a claim that an antenuptial agreement, pursuant to which Husband and Wife agreed that Husband would move into Wife's residence, that Husband would build a garage on the residence, and that the garage was Husband's property, created an equitable lien interest in the garage in favor of Husband's estate. The circuit court declined to enforce the agreement, and the administrator appealed. The Court of Appeals affirmed, holding that Husband waived his right to enforce whatever interest he may have had in the garage. The Court determined that Husband took no action to perfect his interest during the course of the marriage. Further, that interest, such as it was, ceased to exist upon Husband's execution of a general warranty deed conveying any and all interest he may have had in Wife's property to her children. Accordingly, Husband did not have an equitable interest in the property, and his heir was not entitled to an equitable lien for the value of the garage.

XI. STATUTES

A. ***Whitlock v. Rowland***

2013-CA-000681 01/09/2015 453 S.W.3d 740

Opinion by Judge Nickell; Judges Clayton and Combs concurred. Appellant, a former constable for Jefferson County, appealed from the Jefferson Circuit Court's rejection of his challenges to Louisville Metro Code of Ordinances (LMCO) §39.060, which purported to limit the rate of pay for constables to $100.00 per month rather than the statutory salary of $9,600.00 delineated in KRS 64.200. The circuit court found that LMCO §39.060 was valid and was not in conflict with, nor preempted by, any applicable statutes on the subject. On appeal, the Court of Appeals discussed KRS 67C.121, which expressly transfers the powers and duties of county constitutional officers to a consolidated local government such as the Louisville/Jefferson County Metro Government. However, the Court held that KRS Chapter 67C did not grant consolidated governments the authority to set constable salaries at an amount different than that set forth in KRS 64.200. Thus, because LMCO §39.060 conflicted with the statutory salary provisions stated in KRS 64.200, it was deemed to be preempted by KRS 64.200 and the circuit court's decision to the contrary was reversed.