PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
MARCH 1, 2023 to MARCH 31, 2023

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I. CRIMINAL LAW

A. ***DONNA WARFIELD v. COMMONWEALTH OF KENTUCKY***

2021-CA-1404-MR 03/31/2023 2023 WL 2718970
Opinion by ACREE, GLENN E.; CETRULO, J. (CONCURS) AND GOODWINE, J. (CONCURS)
DISCRETIONARY REVIEW GRANTED 06/07/2023

Following a traffic stop, Appellant was arrested and indicted on various counts of drug trafficking and possession after a search of her vehicle revealed drugs, paraphernalia, and cash. Appellant filed a motion to suppress, arguing the police illegally extended the traffic stop beyond its initial purpose—failure to wear seat belt violations—so that the police could summon a drug-sniffing dog to check the vehicle for drugs. The Boone Circuit Court denied the motion. Appellant entered a conditional guilty plea and appealed but absconded from her probation while her appeal was pending. The Court of Appeals affirmed but declined to dismiss the appeal on the basis that Appellant had absconded. The opinion concluded that Section 115 of the Kentucky Constitution guarantees an appeal from a criminal conviction, even in the event of an appellant absconding from justice. The Court declined to apply case law in which a criminal appeal was dismissed after an appellant had escaped from confinement because such case law predated Kentucky's present constitution. The Court also declined to extend the application of the federal courts' "fugitive disentitlement doctrine" to Kentucky criminal appeals because the federal doctrine says nothing about the Kentucky Constitution's guaranteed right of appeal from a criminal conviction. Although the fugitive disentitlement doctrine had been applied in *Commonwealth v. Hess*, 628 S.W.3d 56 (Ky. 2021), such application was limited to an appeal from an order revoking probation and, thus, the constitutional right to appeal from a criminal conviction was not implicated. Finally, though the Court determined that Appellant did not waive her appeal, it ultimately affirmed because the police did not unlawfully extend the traffic stop in violation of Appellant's rights under the Fourth Amendment.

II. GAMING LAW

A. ***CHARLIE KIRBY, ET AL. v. KEENELAND ASSOCIATION, INC., ET AL.***

2022-CA-0603-MR 3/31/2023 2023 WL 2718316
Opinion by COMBS, SARA WALTER; JONES, J. (CONCURS) AND THOMPSON, C.J. (CONCURS)

For more than a decade of contradictory opinions emanating from numerous Kentucky courts, the issue of the legality of historic horse racing as a form of pari-mutuel wagering has been vigorously

litigated. On September 24, 2020, the Kentucky Supreme Court issued an opinion holding that historic horse racing was not a form of pari-mutuel wagering. In reaction, the General Assembly passed legislation effective February 22, 2021, announcing its clear legislative intent that historic horse racing was indeed pari-mutuel wagering subject to the promulgation of appropriate regulations by the Kentucky Racing Commission. In this underlying case initiated in Franklin Circuit Court, Appellants sought to recover as damages the amount of their wagers and the wagers of numerous others who placed bets on the historic racing machines in the period before legislative enactment. They argued that such wagering was illegal in this critical interim and relied on the provisions of KRS Chapter 372, the Kentucky Safe Harbor Act, which allows an action by a first or third party to recoup sums lost to illegal gambling. The circuit court dismissed Appellants' complaints for failure to state a claim upon which relief can be granted. The Court of Appeals affirmed the dismissals and reasoned, by its clear terms, the Safe Harbor Act did not apply nor provide recourse if the alleged gambling was authorized, permitted, or legalized. The Court noted that, throughout twelve years of litigation, no court had ever declared the disputed regulations to be void *ab initio*, but rather, it was their interpretation that had been the subject matter of the years of litigation.

III. QUALIFIED IMMUNITY

A. ***JOHN SHOLAR, ET AL. v. KAYLA TURNER***

2021-CA-1374-MR 3/17/2023 2023 WL 2542136
Opinion by EASTON, KELLY MARK; JONES, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Two Louisville Metro Police officers appealed the denial of their motion for summary judgment asserting qualified immunity from a personal injury suit. The suit was filed against the officers in their individual and official capacities, as well as against the Louisville Metro Government (Metro), alleging the officers negligently parked their police cruisers in a hazardous manner which resulted in the collision of Appellant's vehicle with one of their vehicles. The police cruisers were parked near the middle of a concrete barrier separating the eastbound and westbound lanes of Interstate 64 while the officers attended to another motor vehicle accident. The Jefferson Circuit Court granted dismissal on immunity grounds for Metro and both officers in their official capacities but denied summary judgment in favor of the officers in their individual capacities on the reasoning that the way they parked their vehicles was a breach of ministerial duty.

The Court of Appeals reversed and remanded with instructions to dismiss the underlying suit. The Court acknowledged that prior case law established that general operation of a police cruiser is a ministerial act. However, the Court reasoned that *Meinhart v. Louisville Metro Government*, 627 S.W.3d 824 (Ky. 2021), makes clear that decisions in emergencies cross the line into discretion. The Court further reasoned that this case presented an issue of where the line was drawn between a ministerial and discretionary act when it involved the "placement of a vehicle with respect to investigating an accident scene[.]" Ultimately, the Court determined the parking of the officers' vehicles under these circumstances was discretionary. The officers were presented with a decision regarding the quickest route to respond to a potential emergency. The accident occurred on Interstate 64's eastbound lanes, and the officers determined the quickest route was to approach it from the westbound lanes on Interstate 64. Due to substantially similar facts, the Court cited to the

unpublished decision rendered in *Estate of Brown ex rel. Brown v. Preston*, No. 2009-CA-002362-MR, 2010 WL 5018558 (Ky. App. Dec. 10, 2010), and concluded the parking of the police cruisers at their location were discretionary actions taken to secure an accident scene.

IV. TORTS

A. ***KENT E. CULP v. SI SELECT BASKETBALL, ET AL.***

2021-CA-1439-MR 3/17/2023 2023 WL 2542625
Opinion by CETRULO, SUSANNE M.; CALDWELL, J. (CONCURS) AND COMBS, J. (CONCURS)

This is an appeal from the McCracken Circuit Court's summary judgment in favor of a sports plex and its promoter who were sued after a third-party coach's criminal act resulted in injuries to a referee at a basketball tournament. The referee alleged that the promoter and the facility were negligent for not conducting background checks on all participants or providing security guards; and further, that the attack was reasonably foreseeable, or at least that foreseeability was a jury question. This Court heard arguments, considered the briefs, and held the matter in abeyance for consideration of the Kentucky Supreme Court's opinion in *Walmart, Inc. v. Reeves*, ___ S.W.3d ___, 2023 WL 2033691 (Ky. Feb. 16, 2023) (not yet final). At issue was whether *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901 (Ky. 2013) was limited to open-and-obvious cases or also applied to cases involving third-party criminal actions like that before the Court.

After the Kentucky Supreme Court's ruling in *Reeves* that *Shelton*'s cabining of foreseeability to a breach analysis is limited to only open-and-obvious cases, this Court looked to the evidence to determine whether the attack was reasonably foreseeable. The evidence was that in 10 years of coaching and promoting tournaments at the sports plex, this promoter had never experienced a fight among participants. The referee produced "run reports" from local law enforcement; however, those reports included only one account of an assault by one participant upon another player in January 2017 at an event that wasn't from the promoter. The referee testified that he had never been concerned about violence there previously; nor had he seen any assaults on other participants or other referees; and, that this assault was completely unprovoked and unexpected. Consistent with *Reeves*, the Court concluded the evidence presented did not establish a pattern that could have led the promoter to anticipate the assault. The Court further concluded that the criminal acts were not reasonably foreseeable, and the summary judgment was affirmed.

B. ***SHERI FLOYD v. THE PARKVIEW COUNCIL OF CO-OWNERS, INC., ET AL***

2022-CA-0765-MR 3/31/2023 2023 WL 2718973
Opinion by THOMPSON, LARRY E.; COMBS, J. (CONCURS) AND JONES, J. (CONCURS)

Appellant Sheri Floyd slipped and fell on snow and ice in the parking lot of Parkview Condominiums. She was on the premises to visit an owner of one of the condominiums. Ms. Floyd sued Parkview, as it was the owner of the common areas, and the landscapers, who were supposed to remove the snow and ice from the parking lot. The rules and regulations of Parkview stated that it was not liable for the injuries of owners caused by inclement weather and sustained in the common areas. The rules gave a broad definition of an "owner" that included guests and visitors of an owner. Parkview moved for

summary judgment claiming that since Ms. Floyd was a visitor, she was an “owner” and could not hold it liable for her injuries. The Jefferson Circuit Court agreed and granted summary judgment. The Court of Appeals reversed and remanded. The Court held that there was no evidence that Ms. Floyd agreed, either directly or indirectly, to be bound to Parkview’s rules and regulations or was even made aware of the rules. Thus, Parkview could not unilaterally waive its duty of care.