PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

SEPTEMBER 01, 2021 to SEPTEMBER 30, 2021

I. PUBLIC SERVICE COMMISSION

A. ***COREY M. BIDDLE, ET AL. V. PUBLIC SERVICE COMMISSION OF KENTUCKY, ET AL.***

2018-CA-1686 09/24/2021 2021 WL 4343656

Opinion by THOMPSON, KELLY; DIXON, J. (CONCURS) AND KRAMER, J. (DISSENTS AND FILES SEPARATE OPINION)

Kentucky RSA #3 Cellular General Partnership (RSA #3) sought a certificate of public convenience and necessity to build and operate a permanent cell tower in Breckinridge County, Kentucky under KRS 278.650. The proposed site adjoined property owned by Appellants Corey M. Biddle and John K. Potts. Appellants received notice of RSA #3's application and filed a motion with the Public Service Commission of Kentucky (PSC) to intervene. PSC denied Appellant's motion to intervene and their subsequent motion for rehearing. Appellants then filed a complaint in the Franklin Circuit Court, which denied that the PSC committed any error. This appeal followed. The Court of Appeals reversed the Franklin Circuit Court and remanded with instructions to vacate the PSC's order and to require the PSC to consider whether Appellants should be allowed to intervene because they have demonstrated a special interest in the proceedings. The Court concluded that although Appellants did not have an absolute right under KRS 278.665(2) to intervene, they must be provided an appropriate full hearing at which they may present evidence as to why intervention should be granted under either prong of 807 KAR 5:001 Section 4(11)(b), and the PSC must make appropraite factual findings supported by the evidence.

II. KENTUCKY CIVIL RIGHTS ACT

A. ***NORTON HEALTHCARE, INC. V. JOYCE TURNER and JOYCE TURNER V. NORTON HEALTHCARE, INC.***

2019-CA-0328 09/17/2021 2021 WL 4228329

2019-CA-0569

Opinion by McNEILL, J. CHRISTOPHER; LAMBERT, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Appellee Joyce Turner was a registered nurse for Appellant Norton Healthcare, Inc. She was diagnosed and treated for breast cancer. After returning to work, she was placed on administrative leave for her failure to follow certain protocols regarding medication charting and dispensing. Norton eventually terminated her employment. Turner filed a lawsuit claiming, among other things, discrimination on the basis of a disability or perceived disability in violation of the Kentucky Civil Rights Act (KRCA). The jury awarded Appellant $91,139.59 in back pay

and $1,000,000 for embarassment, humiliation, and emotional distress. Norton appealed, and Turner cross-appealed. The primary issue on appeal was whether Turner's cancer constitutted a qualifing disability under the KRCA because it limited her normal cell growth. The Court of Appeals concluded it did not, noting that while the Americans with Disabilities Act Amendments Act (ADAAA) includes "normal cell growth" in its definition of what constitutes a qualifying disability, the KRCA does not. The Court confirmed that until such time as the Kentucky Supreme Court or General Assembly speaks on the issue, the Court will take the pre-ADAAA approach. The Court clarified it was not stating that cancer could not be a qualifying disability based on the specific evidence offered in certain cases; however, in this case, no such evidence was presented.

B. ***CYNTHIA WILLIAMS V. BROWN-FORMAN CORPORATION***

2020-CA-0470 09/03/2021 2021 WL 3954028

Opinion by ACREE, GLENN E.; CALDWELL, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Appellant appealed the trial court's order dismissing her age-discrimination and retaliation claims against Brown-Forman Corporation (Brown-Forman). Appellant was put under a performance improvement plan by her supervisor but claims her supervisor constantly "moved the goal post," undermining her ability to succeed. Appellant believes she, and other older co-workers, were subjected to disparate treatment from her supervisor due to their age. Ultimately, Appellant was terminated and filed an action claiming age discrimination and retaliation. At the time of termination, Appellant was 50 years old. Her eventual replacement was 45 years old. The trial court granted summary judgment to Brown-Forman, and the Court of Appeals affirmed. Regarding Appellant's retaliation claim, Brown-Forman had presented the trial court with affidavits stating it did not know Appellant had exercised, or was exercising, a civil right when it terminated her employment. The Court affirmed the trial court because Appellant failed to controvert the affidavit or otherwise create a genuine issue of material fact. Regarding Appellant's claim for age discrimination, the Court followed the *McDonnell Douglas* framework in its decision. Because Appellant could not establish that the difference in her age and her replacement's age was substantial, the Court agreed the facts did not have a legitimate tendency to lead the mind to the conclusion that age was a motivating factor in her termination, and it affirmed the trial court's order dismissing the claims.

III. INSURANCE

A. ***KRISTINA D. BRATCHER V. STATE FARM FIRE AND CASUALTY COMPANY, ET AL.***

2020-CA-0680 09/03/2021 2021 WL 3953467

Opinion by McNEILL, J. CHRISTOPHER; KRAMER, J. (CONCURS) AND DIXON, J. (CONCURS AND FILES SEPARATE OPINION)

Appellant Kristina Bratcher was injured in a motorcycle accident while riding on a motorcycle operated by Raymond Negron. Appellant filed a claim for UIM benefits under three policies issued by State Farm to her parents, Don and Tina Bratcher. The policy Declarations Page

listed the named insured as “Bratcher, Don & Tina L., 439 Hillcrest Ave., Louisville, KY 40206-1508.” At the time of the accident, Appellant was 34 years old and lived at a rental property owned by her parents. Her mother was living with her. Appellant had not lived with both of her parents at the 439 Hillcrest address since she was 17 years old. Appellant was entitled to coverage only if she qualified as a “resident relative” under the policy’s terms. Appellant filed suit in Jefferson Circuit Court against State Farm seeking UIM benefits. State Farm moved for summary judgment, arguing Appellant did not qualify as a resident relative under the policy. The Jefferson Circuit Court granted State Farm’s motion because she did not reside primarily with the first person shown as a named insured on the declarations page, which the court found to be Don Bratcher because his name appeared first. Appellant argued the policy was ambiguous because the “named insured” on the Declarations Page is singular, and her parents are listed as a single insured. The Court of Appeals reversed the Jefferson Circuit Court and remanded for further proceedings, holding that both of her parents are first-named insureds under the policy, and there was an issue of fact as to whether Appellant resided primarily with her mother at the time of the accident.

IV. TRUSTS AND ESTATES

A. ***JOHN R. TODD, IV V. HILLIARD LYONS TRUST COMPANY, LLC***

2020-CA-0895 09/10/2021 2021 WL 4125828

Opinion by CALDWELL, JACQUELINE M.; ACREE, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

A trust created by Rucker Todd (Rucker) included language stating that “under no circumstances shall any power of appointment . . . be exercisable for the benefit of any person adopted by another person, the issue of any person so adopted by another person, or the ancestors of any person so adopted by another person.” A beneficiary of the trust adopted two children and wished to use his power of appointment under the trust to benefit them. The trustee filed a declaratory judgment action in Jefferson Circuit Court, arguing the trust prevented the beneficiary from doing so. The Jefferson Circuit Court agreed, ruling that the trust was not ambiguous, and it prevented the distribution of its assets to the beneficiary’s adopted children. On appeal, the beneficiary challenged the Jefferson Circuit Court’s interpretation of the trust and argued that the trust provision at issue was unlawful. The Court of Appeals concluded that the trust’s language was ambiguous but reversed the Jefferson Circuit Court because the trust’s exclusion of persons who were adopted is unenforceable and illegal for public policy reasons and because it violated KRS 199.520(2) and KRS 386B.1-030(2)(c). The trust language at issue essentially rejected an entire class of people – anyone who is adopted, a descendent of an adopted person, and an ancestor of an adopted person. The Court further stated that if Rucker wished to disinherit anyone he wanted, including the

two children adopted by the beneficiary, he could have done so in numerous other ways without discriminating against an entire class of people.

B. *BREYANNA MURPHY V. KALEB SHEHAN and ZACHARY SHEHAN V. P.N.C. BANK, N.A., TRUSTEE, ET AL.*

2020-CA-0934 09/17/2021 2021 WL 4228661

2020-CA-0943

Opinion by THOMPSON, LARRY E.; CALDWELL, J. (CONCURS) AND DIXON, J. (CONCURS)

In 1974, Fred M. McClellan executed a Last Will and Testament with Testamentary Trust. The trust included language directing the trustee to distribute its remaining assets to the "descendants" of Mr. McClellan's daughter, Norma. Patrick was Norma's biological son. He had three children, Zachary, Breyanna, and Kaleb. Patrick's parental rights to his children were terminated. One of his children, Kaleb, was adopted by Norma's step-son. Zachary and Breanna argued that because of Kaleb's adoption, he was no longer a descendant under the trust. The Court of Appeals determined that Mr. McClellan intended to employ the term descendants in its plain and ordinary sense to include the biological issue of himself, of his daughter Norma, and of her son Patrick, so Kaleb was a "descendant" of Norma. The Court next considered whether Kaleb's adoption terminated his status as Norma's descendant for purposes of trust distribution. The Court concluded that KRS 199.520(2), which provides that an adopted child becomes the natural child of the adopting parents, did not prevent Kaleb from being deemed a beneficiary in this case. A distinction must be made between legal lineage, which may be severed, and biological lineage, which may not. The Court held that because the term "descendant" is grounded in human biology, and biological ties survive the legal process of adoption, Kaleb remained a descendant of Norma for purposes of trust distribution.

V. WORKERS' COMPENSATION

A. *MARIA JIMENEZ V. LAKSHMI NARAYAN HOSPITALITY GROUP LOUISVILLE*

2021-CA-0515 09/10/2021 2021 WL 4126874

Opinion by COMBS, SARA W.; ACREE, J. (CONCURS) AND MAZE, J. (CONCURS)

Appellant Maria Jimenez slipped and fell while working as a housekeeper for Holiday Inn. She filed a Workers' Compensation claim for injuries to her head, neck, left shoulder, and back. The administrative law judge (ALJ) awarded her temporary total disability benefits, found she did not have a permanent injury, and dismissed her claims for future medical and income benefits. Neither party appealed. Two years later, she filed a motion to reopen, claiming a change in disability as shown by objective medical evidence. The ALJ granted the motion and awarded her permanent partial disability benefits. Holiday Inn moved for reconsideration. In an amended opinion, the ALJ concluded that KRS 342.125 renders the doctrine of *res judicata* inapplicable. Holiday Inn appealed to the Workers Compensation Board (the Board), and the

Board reversed and remanded the claim to the ALJ with direction to dismiss the reopening as barred by *res judicata*. The Court of Appeals held the Board erred in determining that KRS 342.125 precludes re-opening a claim where temporary total disability was awarded. The Board misapplied the doctrine of *res judicata* in administration proceedings, confusing it with its application in judicial proceedings. The Court of Appeals reversed the opinion of the Board and directed it to reinstate the ALJ's award.