

Kentucky Court Of Appeals

Cases of Note

[May-June, 2018](#)

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1. Hold down the control (“Ctrl”) key and click on the link.
2. Right-click on the link and select “Open Hyperlink”.

INSURANCE

Ritchie v. Turner

[2016-CA-000686](#) 03/23/2018 2018 WL 1444246 DR Pending

Opinion by Judge Nickell; Judges J. Lambert and Taylor concurred. The Court of Appeals affirmed a judgment finding no insurance coverage for a middle school teacher who sexually abused a minor student. The school had purchased a special endorsement covering acts of sexual abuse or misconduct. Two exclusions in the insurance policy, one excluding coverage for criminal acts and the other excluding coverage for willful violations of penal statutes, were cited by the circuit court in declaring coverage unavailable. Appellants argued that these exclusions were void because they made coverage for sexual abuse or misconduct illusory by excluding damages related to criminal acts - such as sexual abuse in this case. The Court of Appeals held that the exclusions applied and that coverage was not illusory because only the perpetrator of sexual abuse or misconduct was excluded from coverage. Employees who supervised, hired, trained, or investigated a perpetrator were covered by the sexual abuse endorsement.

TORTS

DeMoisey v. Ostermiller

[2017-CA-000730](#) 06/01/2018 2018 WL 2449117

Opinion by Judge Dixon; Judges J. Lambert and Maze concurred. The Court of Appeals affirmed an order dismissing appellants’ claims for wrongful use of civil proceedings/malicious prosecution and abuse of process against appellee. Appellants argued that the circuit court erred in dismissing their claim for wrongful use of civil proceedings as being time-barred under KRS 413.140(1)(c) because the statute of limitations could not have begun to run until the Court of Appeals decided appellee’s cross-appeal, which concerned whether the claim for wrongful use of civil proceedings should have been dismissed with prejudice. However, the Court held that that it did not need to reach the statute of limitations issue because appellants did not prevail on the merits in an underlying legal malpractice action between the parties; therefore, they could not maintain a claim for wrongful use of civil proceedings regardless of when it was filed. Dismissal of a suit for technical or procedural reasons that do not reflect on the merits of the case is not a favorable termination of the action for purposes of the tort. Here, because the underlying legal malpractice action against appellants was dismissed as being time-barred, there was no determination of its merits. The Court further rejected appellants’ argument that the circuit court erred in finding that *res judicata* barred their abuse of process claim. The circuit court ruled that appellants’ claim was substantively identical to the one litigated in a related case in a different division, and thus the Court’s opinion in that matter, which remanded the case for entry of an order dismissing the abuse of process claim with prejudice, was binding on the instant case. Appellant argued that the Court’s opinion changed then-existing law with respect to the manner in which the statute of limitations is calculated on abuse of process claims. The Supreme Court of Kentucky denied discretionary review in that matter but ordered the opinion to not be

published. It was appellants' position that to apply the unpublished opinion to their abuse of process claim, when it could not be used as precedent to change the calculation of the statute of limitations of any other litigant's abuse of process claim, was unconstitutional. The Court observed that although this argument was novel and thought provoking, it would be better addressed by the Supreme Court.

ARBITRATION

New Meadowview Health and Rehabilitation Center, LLC v. Booker **[2017-CA-000073](#) 05/04/2018 2018 WL 2070840**

Opinion by Judge Maze; Chief Judge Kramer and Judge Johnson concurred. In 2007, Mona Hardin executed a durable power-of-attorney (POA) that designated her husband William as her attorney-in-fact. In 2012, William executed documents to admit Mona as a resident to Meadowview's facility in Louisville. After Mona died in 2016, her estate brought an action against Meadowview for negligence, wrongful death, and violation of the Long-term Resident's Rights Act. Meadowview moved to compel arbitration under an agreement that William purportedly executed at the time of her admission. However, Meadowview only presented the signature page of the agreement and attempted to establish the rest of the agreement through the testimony of its corporate counsel. The circuit court denied the motion to compel arbitration. The Court of Appeals affirmed. The Court first noted that Meadowview had the initial burden of establishing the existence of an enforceable agreement. The Court held that the signature page of the arbitration agreement was insufficient to establish a complete agreement, and that the testimony of corporate counsel about Meadowview's customary admission practices could not establish that entire contract was presented to William at the time of its execution. Second, the Court held that the POA unambiguously stated that it became effective upon Mona's disability or incapacity. KRS 386.093(5) sets out the evidence required to establish such disability or incapacity. The Court concluded that Meadowview failed to present sufficient evidence to meet the statutory standard to invoke the POA. Lastly, the Court held that Meadowview failed to establish that it reasonably relied upon William's apparent authority to execute the arbitration agreement.

Ambac Assurance Corporation v. Knox Hills LLC **[2017-CA-000149](#) 06/15/2018 2018 WL 2990839**

Opinion by Judge Kramer; Judge J. Lambert concurred; Judge Taylor concurred and wrote a separate opinion. In a breach of contract action, Knox Hills LLC sought an order staying the proceedings and compelling Ambac Assurance Corporation, pursuant to the terms of their contract, to arbitrate. Over Ambac's objection, the circuit court granted Knox Hills' motion and required the parties to submit their dispute to the arbitrator for two purposes: (1) to determine whether the arbitration agreement was enforceable; and, if so, (2) to resolve the parties' contract dispute. The arbitrator determined that the parties' arbitration agreement was enforceable, and the contract dispute was resolved in favor of Knox Hills. On appeal, Ambac argued that the circuit court should not have permitted the arbitrator to determine whether the parties were properly subject to binding arbitration. Ambac alternatively argued that the circuit court should not have affirmed the arbitrator's award because, contrary to the arbitrator's holding, arbitration was never required. The Court of Appeals agreed with Ambac as to both arguments and reversed. With respect to the first of Ambac's arguments, the Court agreed because Ambac's refusal to arbitrate was based upon a matter of substantive arbitrability (an issue typically decided in the first instance by the courts), as opposed to procedural arbitrability (an issue typically decided in the first instance by an arbitrator). Namely, Ambac's argument concerned whether a contract to arbitrate had ever been formed between Ambac and Knox Hills. With

respect to Ambac's second argument, the Court also determined that no such contract had been formed and, accordingly, that the lower court had erred by affirming the arbitrator's award.

LIBEL AND SLANDER

Palmer v. Alvarado

[2017-CA-000302](#) 06/29/2018 2018 WL 3193078

Opinion by Judge Maze; Judges Jones and Kramer concurred. This appeal arose from a unanimous jury verdict awarding appellee \$125,000 in compensatory damages and \$75,000 in punitive damages for defamation and false light. Appellant, an incumbent, was running for re-election against appellee, a local doctor. Appellant ran a thirty-second advertisement criticizing appellee's opposition to Kentucky legislation intended to regulate the prescribing of controlled substances. The ad included spliced video footage of a recorded courtroom proceeding in Montgomery County. In that proceeding, the trial judge expressed concern over appellee's prescribing of pain medicine to a defendant. The commercial highlighted this concern but did so by rearranging the trial judge's statements. Appellee sued appellant for defamation and publicity placing a person in a false light. After the unanimous jury verdict in favor of appellee, appellant appealed. The Court of Appeals reversed, holding that the statements were either true or political opinion and that appellee could not meet the burden of falsity and actual malice. Additionally, the Court noted that the "gist" of the trial hearing was accurately depicted in the commercial.