

Kentucky Court Of Appeals
Cases of Note
July-August, 2020

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1. Hold down the control (“Ctrl”) key and click on the link.
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NEGLIGENCE

Frankfort Plant Board Municipal Projects Corporation v. BellSouth Telecommunications, LLC

2019-CA-000193 07/02/2020 2020 WL 4497177 DR Pending

Opinion by Judge Lambert; Judges Combs and Goodwine concurred. The Frankfort Plant Board Municipal Projects Corporation challenged an order granting summary judgment in favor of BellSouth Telecommunications. Pursuant to an easement created in 1936, BellSouth had telecommunications facilities on property owned by the Plant Board. During an excavation by the Plant Board to expand its substation, facilities belonging to BellSouth were damaged and had to be temporized, repaired, and relocated. BellSouth sued for damages, and the circuit court granted summary judgment in its favor. The Court of Appeals affirmed, holding that the easement remained valid and that the Plant Board’s failure to comply with KRS 367.4911 (the “Call Before You Dig” law), which led to the damage to the facilities, constituted negligence per se. On cross-appeal, the Court found no abuse of discretion in the circuit court’s denial of pre-judgment interest to BellSouth.

Poore v. 21st Century Parks, Inc.

2019-CA-000855 07/31/2020 2020 WL 4498825

Opinion by Judge Jones; Judges Goodwine and Kramer concurred. Kelli Poore and her husband Tony were kayaking at a park operated by 21st Century Parks, which had several access points to access a state-controlled waterway. On the day of the accident, they were kayaking on a stretch of state-controlled waterway that extended outside the park, when Tony collapsed. Emergency personnel knew generally where the Poores were located, but there was limited accessibility. Tony ultimately suffered a heart attack and was pronounced dead upon arrival after finally being found and transported to a hospital. After the Estate initiated suit, 21st Century moved for summary judgment, invoking KRS 411.190, Kentucky’s Recreational Use Statute, and common law negligence principles. The circuit court granted summary judgment. The Court of Appeals affirmed, determining that the Recreational Use Statute does not violate the jural rights doctrine. The Court first noted that it was duty-bound to follow *Sublett v. United States*, 688 S.W.2d 328 (Ky. 1985), which certified that the Recreational Use Statute was constitutional pursuant to Sections 14 and 54 of the Kentucky Constitution, two of the three sections comprising the jural rights doctrine. The Court then held that the Recreational Use Statute barred the Estate’s claims against 21st Century Parks. Both parties agreed that 21st Century Parks was a qualifying land owner under the statute and that it could not be held liable for acts of ordinary negligence on its property. However, the Estate claimed that 21st Century Parks could not rely on the Recreational Use Statute because Tony was injured on a state-controlled navigable waterway that 21st Century Parks does not own. The Court rejected this argument, citing *Collins v. Rocky Knob Associates, Inc.*, 911 S.W.2d 608 (Ky. App. 1995), and *Charpentier v. Von Geldern*, 191 Cal. App. 3d 101, 105, 236 Cal. Rptr. 233, 235 (Cal. Ct. App. 1987). The Court also held that the Estate could not prove that 21st Century Parks’ conduct fell within 411.190(6), providing

liability for a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

TORTS

Willow Grande, LLC v. Cherokee Triangle Association, Inc.

[2019-CA-000208](#) 08/21/2020 2020 WL 4910127

Opinion by Judge Maze; Chief Judge Clayton and Judge Dixon concurred. Willow Grande sought to build a condominium tower in the Cherokee Triangle area of Louisville. The adjoining property owners objected to the project based on the tower's size. The Neighborhood Association and the adjoining property owners pursued appeals from the approvals of each significant step of the project: the granting of demolition and construction permits; Louisville Metro's ordinance granting the re-zoning; and the Planning Commission's granting of waivers and variances for the project. The circuit court affirmed each of these actions and the Court of Appeals upheld those rulings. Following these appeals, Willow Grande filed an action against the Association, its members, and counsel, asserting claims for abuse of process, wrongful use of civil proceedings, and interference with a prospective economic advantage. The defendants filed a motion to dismiss, arguing that they had statutory and constitutional rights to appeal the adverse zoning decisions. The circuit court agreed and granted the motion to dismiss. The appeal focused on the application of the Noerr-Pennington doctrine, which bars federal or state causes of actions arising from the exercise of citizens' rights to association and to petition for redress of grievances. Willow Grande argued that the Noerr-Pennington doctrine did not apply here because it does not provide absolute immunity where the challenged action is a mere sham to cover an attempt to interfere with business relationships of a competitor. However, the Court concluded that although the Association's underlying litigation was ultimately unsuccessful, Willow Grande failed to identify any ground on which it was so objectively baseless that no reasonable litigant could have realistically expected to secure favorable relief. The Court went on to note that Willow Grande failed to plead sufficient facts to establish the subjective element of the test. There was no allegation that the Association brought the appeals with an anti-competitive purpose or to secure a collateral advantage in the negotiations with Willow Grande. The Association's efforts to delay the project to influence governmental approval of the size and scope of the development were not objectively baseless as a matter of law. Therefore, the Court affirmed the circuit court's dismissal of Willow Grande's complaint.

CONTRACTS

Arete Ventures, Inc. v. University of Kentucky

[2016-CA-001586](#) 07/24/2020 2020 WL 4499072

Opinion by Judge Acree; Chief Judge Clayton and Judge Taylor concurred. A commercial builder and two sureties appealed a judgment entered after a bench trial holding them liable for breach of a construction contract and two bonds because the structure of an equine quarantine facility built for the University of Kentucky failed. The University of Kentucky cross-appealed and challenged the circuit court's failure to award pre-judgment interest and its suspension of post-judgment interest for approximately ten months following the judgment. After holding that substantial evidence supported the factual finding that the builder's breach of duty caused the damages suffered by the university, the Court of Appeals rejected the surety's argument that the university's right to enforce the bond was lost when it did not inspect the builder's work for defects; the Court held that mere inaction, indulgence, or forbearance, nor even the university's failure to notify the surety of a possible or even probable default by the builder, was enough to

release the surety. Quoting *Henderson v. Phoenix Ins. Co.*, the Court held, “It is the surety’s business to see that the principal performs the duty which he has guaranteed.” 233 Ky. 217, 25 S.W.2d 359, 362 (1930). The Court also rejected the sureties’ argument that the Kentucky Model Procurement Code, KRS 45A.190, capped costs such as attorney’s fees on performance bonds at 100% of the contract price. The Court noted that this statute includes no language so limiting recovery from the surety of a performance bond, contrasting it with another statute that does limit recovery on fiduciary bonds - KRS 62.070. The Court also noted that the language of the bond itself allowed recovery of “all costs and damages . . . including attorneys’ and consultants’ fees[.]” On the university’s cross-appeal, the Court reversed the circuit court’s disallowance of pre-judgment interest and several months of post-judgment interest. Noting the circuit court had concluded the claim was liquidated, the Court held pre-judgment interest is awarded as a matter of right on a liquidated demand. Furthermore, the Court held there were no factors making it inequitable to require the payment of interest, and post-judgment interest must be awarded at the rate set out in the statute.