

Kentucky Court Of Appeals

Cases of Note

[September-October, 2013](#)

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

Keaton v. G.C. Williams Funeral Home, Inc.

[2012-CA-000297](#) 10/25/2013 2013 WL 5763238

Opinion by Judge Nickell; Judges Combs and Lambert concurred. In an action where a family sued the operators of a funeral home and cemetery in connection with the burial of their mother in the wrong plot, the circuit court granted summary judgment against the family as to their claims of negligence, intentional infliction of emotional distress (IIED), fraud, negligent misrepresentation, and Kentucky Consumer Protection Act (KCPA) violations. On appeal, the Court of Appeals discussed the applicability of the recent holding in *Osborne v. Keeney*, 399 S.W. 1 (Ky. 2012), which abandoned the “impact rule” in relation to claims for mental anguish resulting from negligence, thereby requiring cases such as the one *sub judice* to be decided under general negligence principles. In light of *Osborne*, the Court concluded that to the extent the entry of summary judgment as to the family’s negligence claim relied on the absence of an impact, it was infirm. However, because the family had failed to present adequate proof to sustain their negligence claim, *i.e.*, a showing of “severe emotional distress,” any such error was deemed harmless. The Court further held that the family had failed to make a *prima facie* showing of outrageous conduct sufficient to support their IIED claim. Similarly, the Court determined that insufficient evidence had been provided to sustain a claim for a violation of the KCPA against the funeral home, and a lack of standing prohibited bringing a similar claim against the cemetery. On cross-appeal, the Court concluded that the circuit court correctly denied summary judgment as to the family’s breach of contract claim against the funeral home as genuine issues of material fact existed.

ARBITRATION

Ison v. Robinson

[2010-CA-000898](#) 09/20/2013 2013 WL 5297153

Opinion by Judge Taylor; Judges Combs and Nickell concurred. Homeowners, who owned property located on a mine bench, brought an action against a developer alleging that excavation on the developer’s property located below the bench undermined the slope of the mountainside, resulting in landslide damage to homeowners’ property and access road. Following arbitration, the circuit court affirmed the arbitration award and entered judgment in favor of homeowners in the amount of \$732,500. On appeal, the Court of Appeals affirmed this decision. The Court held that a homeowner’s submission of a memorandum to the arbitrator that included damage claims against the developer for loss of credit rating and evidence regarding those claims, without service on opposing counsel, did not rise to the level of undue means or fraud necessary to vacate the arbitration award. The developer agreed to the procedures and terms for the arbitration, including the submission of concurrent memoranda to the arbitrator, and was aware of the fact that the homeowner was seeking lost profits and other business-related damages. The Court also held that the circuit court did not err in its award of pre- and post-judgment interest.

Kindred Healthcare, Inc. v. Cherolis

[2012-CA-002074](#) 10/11/2013 2013 WL 5583587

Opinion by Judge Maze; Judges Clayton and Nickell concurred. The executrix of the estate of a nursing home facility resident instituted an action against the nursing home facility asserting claims for negligence, medical negligence, personal injury, wrongful death, and a violation of the long-term care resident's rights statute. Relying upon *Ping v. Beverly Enterprises*, 376 S.W.3d 581 (Ky. 2012), the circuit court denied the facility's motion to compel arbitration, finding that a power of attorney executed by the resident prior to her death did not vest executrix, her daughter, with the authority to execute an arbitration agreement on her behalf. The Court of Appeals reversed on appeal, holding that the subject power of attorney conveyed more authority to executrix than the one at issue in *Ping* and permitted executrix to execute an arbitration agreement with the facility on behalf of her mother. Therefore, the facility was entitled to compel arbitration as to the estate's negligence and personal injury claims. The arbitration agreement did not apply, however, with respect to the estate's wrongful death claim.