The KBC Report

A Quarterly Judicial Review

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Introduction

When I was a kid, my dad told me that "DOS" stood for "Dave's Operating System." He may even have been serious: this was before anonymous people on the internet put the Right Answer to Everything at your fingertips. In the spirit of Dave—not to mention the legal profession's tradition of unimaginative titles—welcome to the inaugural edition of the "Krog Business Cases Report."

The goal of this circular is simple: each quarter, we intend to bring together notes on appellate decisions that might be of interest to businesses operating in Tennessee, their owners, and their general counsel. We look at every civil case that comes out of Tennessee's appellate courts, and select federal cases from around the country, and summarize those that create precedents relevant to the business community. Some of the cases matter because of the substantive rule of law applied; some matter because they highlight or decide important procedural points that might arise in a commercial dispute.

We have omitted decisions marked as non-citable and most personal-injury and healthcare-liability cases. At the same time, we have included those kinds of tort cases when they feature some aspect of independent interest. *Ellington v. Cajun Operating Co.* (page 11) is a good example: the vicarious-liability issue there is important for businesses. And we even mention a juvenile case this quarter because of an important evidentiary point.

Highlights from this quarter include an extensive discussion of the Tennessee Revised Limited Liability Company Act (*King v. Chase*, page 4), limits on banks' abilities to impose arbitration agreements (*Sevier County Schools Federal Credit Union v. BB&T*, page 4), misrepresentation and constructive eviction in a commercial lease (*Pryority Partnership v. AMT Properties LLC*, page 7), ERISA misrepresentation claims (*Nolan v. Detroit Edison Co.*, page 6), air-ambulance pricing (*Phi Air Medical LLC v. Corizon Inc.*, page 7), and the missing-witness rule (*In re Mattie L.*, page 8).

There are also cautionary tales. *Conboy v. U.S. Small Business Administration* (page 3) and *Davis v. Sovereign Investments LLC* (page 9) provide tips on avoiding appellate sanctions.

I hope the KBC Report proves useful. If you would like to receive future issues via RSS, follow the link on the last page.

Paul Krog
April 2021

Topical Index

Advertising

Rupp v. The Courier Journal Inc., 839 F. App'x 1003 (6th Cir. 2021) - newspaper did not infringe "Derby Pie" trademark by publishing articles about pies and macaroons described as "derby pie" or derby-pie-flavored. Because the newspaper was not purporting to describe the origin or ownership of the specific pie associated with the trademark, it made a "non-trademark use" of the term, which was not prohibited.

Appeals

Conboy v. U.S. Small Business Admin., 992 F.3d 153 (3d Cir. 2021) - hire an appellate lawyer! Why? Because if your lawyer cuts and pastes his argument on appeal from trial-court papers, the Court of Appeals will notice, you will lose, and the lawyer will get sanctioned. The Court of Appeals may even attach a redline of your deficient brief to its opinion, which is very embarrassing.

Breland v. United States (In re Breland), 989 F.3d 919 (11th Cir. 2021) - The debtor filed a claim in his bankruptcy that the Court of Appeals suspects is bogus. But it can't throw the claim out on the merits because the ruling below was based on standing alone (and the Court of Appeals concludes there is standing), and the defendants did not file a notice of cross-appeal

asking to have the standing judgment converted to a *merits* judgment.

Arbitration

Sevier Cty. Schools Fed. Credit Union v. Branch Banking & Trust Co., 990 F.3d 470 (6th Cir. 2021) - successor bank could not unilaterally amend account agreement between plaintiffs and predecessor bank to add arbitration clause when no limitation on right to sue was contained in original agreement and plaintiffs did nothing to assent to amendment's terms; amendment failed for want of mutuality and breach of good faith and fair dealing under Tennessee law.

Attorney's Fees

At-Last Inc. v. Buckley, No. W2020-0249 (Tenn. Ct. App. March 22, 2021) (procedure) - Plaintiff sued Defendant to enforce a non-compete agreement, and obtained a preliminary injunction. Plaintiff then let the case lie dormant until the non-compete expired, at which time the case was nonsuited without prejudice, reserving Plaintiff's claim for attorney's fees. But the Plaintiff isn't entitled to any attorney's fees, because the fee-shifting clause in the non-compete agreement says Defendant only has to pay if he breaches, and without a final judgment determining that he breached, he wasn't liable. The result may

have been different if the fee-shifting clause had just said the prevailing party is entitled to fees.

Business Entities

King v. Chase, No. M2019-1084 (Tenn. Ct. App. March 17, 2021) - a partnership owned an LLC, and the LLC owned a piece of land. But the LLC didn't have the money to pay its mortgage on the land, so the partnership's manager (principal of one of the partners) lends it the money to do so. Then the LLC sells the land, pays off the emergency loan, and everyone makes a 30% profit. But two affiliated partners aren't happy, and when they sue it takes five years and a fifty-five-page Court of Appeals

opinion to conclude that they lose. They lose their own claims against the manager because they didn't prove that the emergency loan harmed the enterprise or its partners (the evidence was they would have had to pay more to get an alternative loan elsewhere) or that the partners were unfairly coerced into selling the land for less than it was worth. They lose the manager's counterclaims against them because they intentionally concealed their plans to sue him until the LLC had distributed almost all its money, money the manager would have been entitled to use to defend himself. Jury instructions, judicial interjections during opening statements, the tort of another rule, exclusion of undisclosed witnesses, and the indemnification provisions of the Revised Uniform Partnership Act all make appearances as well.

(See "Vicarious Liability," page 11, for a discussion of an entity's liability for its agent's conduct, and "Shareholders" for corporate-versus-individual claims and assets.)

Construction

Hall v. Tabb, W2020-0740 (Tenn. Ct. App. March 25, 2021) (TCPA) - because defendants were engaged in the business of constructing and selling houses, the TCPA applied to their sale to the plaintiffs of a house they built, even though they had made personal use of it during the construction process. The defendants were also liable for intentional misrepresentation because they failed to disclose and misstated water damage and past repairs to the property.

Contracts

Franklin Real Estate Group Inc. v. Spero Dei Church, No. M2019-1691 (Tenn. Ct. App. Jan. 27, 2021) - real estate broker used his selling-agent agreement with client to prepare a buying-agent agreement, but failed to switch over all the terms in the commission paragraph. No worries! Because parol evidence and context showed the parties intended client to pay broker a commission if he introduced client to a property it purchased, the broker was entitled to reformation. Broker was also entitled to his commission, because term "introduced" in agreement covered properties shown by Broker, even if client already knew, in general, that they existed.

Contracts, continued

Bennett v. Chattanooga Properties LLC, No. E2019-1790 (Tenn. Ct. App. Feb. 23, 2021) - plaintiffs contracted with defendants to build a custom home but refused to close because of unfinished punch-list items; the court affirmed a finding that the value of the outstanding punch-list items was within the "completion" limit allowed by the contract (meaning the plaintiff breached by failing to close), but held defendant had converted plaintiff's fixtures when it relisted the home.

Employees & Employment Claims

Upchurch v. Sullivan Cty. Dep't of Educ., No. E2019-1071 (Tenn. Ct. App. March 24, 2021) - the plaintiff alleged that mold in his workplace made him ill, but the Court of Appeals confirmed that the Workers' Compensation law provides the exclusive remedy for this kind of workplace injury, regardless of whether the claim is framed as one of negligence or intentional infliction of emotional distress. Allegations that the defendant knew of the mold problem and required plaintiff to continue working around it were insufficient to qualify for the Workers' Compensation Law's "actual intent to injury" exception.

Phelps v. Tennessee, No. M2020-0570 (Tenn. Ct. App. March 10, 2021) - in a Tennessee Human Rights Act claim based on sexual harassment by a supervisor, the court held that harassment at an after-work employee party and intimidating behavior by the perpetrator created a sufficient nexus to the workplace to support the claim, so it reversed summary judgment on the claim. It also reversed summary judgment on a relation claim based on evidence that the plaintiff's supervisors had moved her to less-lucrative shifts in her waitressing job.

ERISA

Nolan v. Detroit Edison Co., 991 F.3d 697 (6th Cir. 2021) - The Defendant changed the way its pension plan worked, and gave its existing employees the choice to switch to the new plan or stay in the old plan. The Plaintiff switched. Almost sixteen years later, she learned that the value of her pension had not increased at all since the switch, despite language in the Defendant's literature making it sound like employees who switched would get the current value of their old plan plus extra value from the new plan, even though, given the way the plan actually worked, this was only theoretically possible. Thus, the Plaintiff stated a timely claim for violation of ERISA's substantive disclosure requirements (though a procedural-disclosure claim was time-barred).

Federal Preemption

Phi Air Med. LLC v. Corizon Inc., No. M2020-0800 (Tenn. Ct. App. March 5, 2021) (contracts) - Plaintiff sued to collect unpaid air-ambulance fees via unjust enrichment; the court of appeals affirmed a dismissal based on the preemptive effect of the Airline Deregulation Act, 49 U.S.C. § 41713.

Misrepresentation

Pryority Partnership v. AMT Properties LLC, No. E2020-0511 (Tenn. Ct. App. March 10, 2021) (leases) - plaintiff landlord leased to defendant tenant a warehouse for use as a machine shop; landlord represented that it could easily fix the leaky roof, but it should have known it really couldn't, because it was continuing to use methods that had failed to stop the leak before. The court affirmed a judgment in favor of defendant on a counterclaim for negligent misrepresentation. It also affirmed damages on the counterclaim for breach of lease that gave back to tenant all of its rent payments plus relocation and renovation expenses, based on a finding that the warehouse was never tenantable.

Municipal Ordinances

Metro. Gov't v. Dreher, No. M2020-0635 (Tenn. Ct. App. March 12, 2021) - the double-jeopardy clause of the state constitution prohibits de novo trial of a suit brought to enforce a municipal ordinance where a general sessions court entered judgment on the merits in favor of the defendant.

Premises Liability

Vaughn v. DMC-Memphis LLC, No. W2019-0886 (Tenn. Ct. App. Jan. 27, 2021) - fact that flooded condition in bathroom was visible to customer before she fell did not alleviate property owner's duty of care, because it was reasonably foreseeable that the bathroom was dangerous and there is no open-and-obvious bar in Tennessee any longer; reasonable minds could differ on the question of comparative fault, given plaintiff's testimony about the urgency of her need to use the bathroom.

Procedure

Justice v. Craftique Construction Inc., No. E2019-0884 (Tenn. Ct. App. Jan. 15, 2021) - plaintiff who had obtained judgment for liability but not damages could not nonsuit just the damages element of his claim; his invocation of right to voluntarily dismiss his claim against one defendant resulted in dismissal of whole claim, liability and damages.

Bidwell ex rel. Bidwell v. Strait, 618 S.W.3d 309 (Tenn. 2021) - when doctors filed answers identifying their proper employer, which plaintiff had not sued, in a manner that implicated comparative fault, plaintiff had absolute right to amend complaint to name the employer without leave of court: his failure to do so within 90 days extinguished his claim against employer and, under circumstances of this case, against doctors as well.

In re Mattie L., 618 S.W.3d 335 (Tenn. 2021) - Supreme Court clarifies the missing-witness rule (it applies in bench trials, but only permits a common-sense inference; it does not substitute for substantive evidence like a presumption) and unclean hands (it doesn't bar a defense and can't be invoked based on acts collateral to the issue at hand).

Elvis Presley Enterprises Inc. v. City of Memphis, --- S.W.3d --- (Tenn. 2021) - A dismissal for failure to exhaust administrative remedies does not bar a subsequent suit under different circumstances via claim preclusion, as the dismissal is not "on the merits."

Payne v. Bradley, No. M2019-1453 (Tenn. Ct. App. Feb. 26, 2021) - appellant wasn't entitled to a new trial on grounds that trial court denied a continuance: she had proceeded pro se for much of the case and asked for a trial setting, so there was no abuse in not delaying when she changed her mind at the last minute. And although she hired an attorney on appeal, that

Procedure, continued

attorney waived her merits issue---about whether a contract was sufficiently definite to enforce---by not putting forth more than a skeletal argument on it.

Larry E. Parrish P.C. v. Bennett, 989 F.3d 452 (6th Cir. 2021) - It is not easy to file a federal case barred by the *Rooker-Feldman* doctrine. But claiming that you were injured by state appellate judges who made intentionally false statements in their judgment against you will do the trick. Come for frivolous-lawsuit recidivism, stay for the lesson in federal frivolous-appeal sanctions.

Mott v. Luethke, No. E2020-0317 (Tenn. Ct. App. March 16, 2021) - Plaintiff sues alleged tortfeasor. Oops: tortfeasor is already deceased. Plaintiff does not have an administrator ad litem appointed until ten months after tortfeasor's death, and administrator is not served as a defendant until thirteen months (twenty-two months after accident). Plaintiff's suit was properly dismissed because he failed to comply with the deadlines in the statute governing revival of actions against decedents and the limitations period expired as a result.

Property

Kellerman v. Gabriel, No. M2019-1893 (Tenn. Ct. App. Jan. 6, 2021) - property owners, whose deeds defined boundary between their lots by unclear references to landmarks, could and did enter enforceable oral agreement setting new boundary.

Tiger Lily LLC v. U.S. Dep't of Housing & Urban Dev., 992 F.3d 518, No. 21-5256 (6th Cir. 2021) - The plaintiffs sued the federal government, claiming the CDC's eviction-moratorium order exceeded the powers conferred on it by Congress. The District Court agreed, and entered judgment for the plaintiffs. The government asked the Sixth Circuit to stay that order---to keep the moratorium in place---while it appealed. The Sixth Circuit refused, concluding that the plaintiffs are likely right that the CDC's moratorium order is not authorized by an applicable statute.

Davis v. Sovereign Investments LLC, No. M2019-1949 (Tenn. Ct. App. March 30, 2021) (procedure) - Davis lost a property to foreclosure in 2012, and then lost a detainer action brought by the foreclosure purchaser. Undeterred, Davis filed (and lost) two quiet-title actions against the purchaser before entering into a settlement agreement with the purchaser and the defendant (to whom the purchaser intended to sell the property). Despite the agreement, Davis sued again. The Court of Appeals affirmed dismissal of the case based on res judicata (from the prior actions) and express waiver (from the settlement agreement). The court imposed frivolous-appeal sanctions on Davis.

Shareholders

Gibbons v. Bennett, No. E2019-2188 (Tenn. Ct. App. Feb. 8, 2021) - Court concluded that certain vehicles purchased by close corporation's former shareholders were not corporate assets or otherwise included in stock purchase agreement, and that purchasers could not, without making out a piercing claim, cause corporation to sue former owners for pre-sale expenditures made for personal purposes (a ruling that is almost certainly inapt, as it ignores the direct claim a corporation has against its officers for breach of fiduciary duty).

Taxation

Colonial Pipeline Co. v. State Board of Equalization, No. M2020-0247 (Tenn. Ct. App. Jan. 25, 2021) - transmission pipelines for oil or natural gas, run over easements, are properly assessed as real property for state tax purposes, while pipes used in fixtures are properly assessed as personal property.

Vicarious Liability

Ellington v. Cajun Operating Co., No. W2020-0087 (Tenn. Ct. App. Feb. 10, 2021) - when a disagreement over bad drive-through food grew heated, one of defendant's employees increased the temperature further by throwing hot grease at plaintiff customer after she had left the defendant's restaurant; the court agreed this was unforeseeable and outside the scope of the employee's employment, in part because employee's duties did not encompass security or corralling unruly customers.

Zoning

Jefferson County v. Wilmoth Family Properties LLC, No. E2019-2283 (Tenn. Ct. App. Feb. 1, 2021) - active farm was immune from county zoning regulations that would otherwise prohibit it from hosting large wedding receptions pursuant to right-to-farm statute that includes entertainment activities "in conjunction with but secondary to" farming. Result was not changed by disparity in income from wedding and farming activities.

The Northshore Corridor Assoc. v. Knox County, No. E2020-0573 (Tenn. Ct. App. March 30, 2021) (justiciability) - Knox County's planning commission approved a development plan, and the Board of Zoning Appeals affirmed. But the trial court reversed on certiorari, on the basis that the applicable ordinance's plain text did not allow a wastewater-treatment facility in the zoning district the development plan proposed to build it. The Court of Appeals affirmed. In the course of doing so, it discussed how to apply canons of statutory construction and rejected the claim that affidavits about potential changes to the development plan, which were not in the administrative record, rendered the case non-justiciable.

Litigation is ever more complex. Thirty years ago, many attorneys were still general practitioners. Today, even trial attorneys frequently focus on one type of dispute.

Appeals are no different: as some of the cases in this issue demonstrate, appellate disasters and even sanctions are not reserved for pro se litigants. And the opinions themselves don't always reveal the extent to which their results were shaped by how the parties framed their arguments, preserved issues, or dealt with other technical details. Those things make a difference.

Forward-thinking litigants and trial counsel should consider hiring appellate counsel to focus on those very issues. Appellate counsel not only bring specialization and expertise to work *during* an appeal, they can help lay the groundwork for success *prior* to it by doing technical work and focusing on preservation. That frees trial counsel to focus on their specialties, such as persuading the trier of fact and organizing the case.

If you are considering hiring appellate counsel, please feel free to call Bulso PLC.

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