PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

APRIL 1, 2020 to APRIL 30, 2020

I. CRIMINAL LAW

A. ***Constant v. Commonwealth***

2018-CA-001457 04/24/2020 2020 WL 1966537

Opinion by Judge Jones; Judges Goodwine and Kramer concurred.

Two Lexington police officers were dispatched to an apartment to execute a pickup order for a minor. The minor was locked in her bedroom. When the minor emerged from her bedroom, the officers discovered appellant - a 30-year-old man - also locked in the bedroom with her. Appellant provided the officers with false identifying information. While the officers were preparing for the minor's arrest, appellant was detained inside the apartment. During this time, he paced and shouted inside the apartment before suddenly bolting from the apartment. A pursuit ensued, which resulted in an indictment for two counts of assault in the third degree, fleeing or evading in the first degree, possession of a controlled substance in the first degree, resisting arrest, giving an officer a false name, and being a persistent felony offender. Appellant filed a motion to suppress for unlawful detention and seizure. The circuit court denied the motion to suppress, and appellant entered a conditional guilty plea. On appeal, appellant argued that his initial detention was unlawful and so any evidence supporting the charges related to his initial detention, before any subsequent independent crimes, should be suppressed. The circuit court did not determine whether the initial detention was lawful. The Court of Appeals adopted the Sixth Circuit's interpretation of the Fourth Amendment, which provides law enforcement the limited authority to briefly detain all individuals at the scene of an arrest, even innocent bystanders. Thus, the officers were justified in briefly detaining appellant to gather more information. Law enforcement officers are allowed to detain individuals at the scene of an arrest for bystander and officer safety. The Court of Appeals extended this logic to arrest warrants as police are entitled to ensure their own safety, as well as the safety of the individuals they are placing under arrest.

B. ***Olmeda v. Commonwealth***

2019-CA-000497 04/03/2020 2020 WL 1646822

Opinion by Judge Lambert; Special Judge Buckingham and Judge Combs concurred.

In a direct appeal from the circuit court's decision to deny appellant's suppression motion and to sentence him to a two-year term of imprisonment after his jury trial, the Court of Appeals affirmed. Appellant argued that the circuit court improperly denied his suppression motion, contending the police unlawfully extended the traffic stop until a K-9 unit could arrive and conduct a sniff search in violation of *Rodriguez v. United States*, 575 U.S. 348, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015); *accord Davis v. Commonwealth*, 484 S.W.3d 288 (Ky. 2016). The Court of Appeals disagreed, holding the length of the stop was not extended by police but by the fact of appellant's suspended license. In so doing, the Court cited in support *United States v. Vargas*, 848 F.3d 971 (11th Cir. 2017) and *United States v. Gurule*, 935 F.3d 878 (10th Cir. 2019), which held police do not violate *Rodriguez* by preventing unlicensed individuals from driving a vehicle.

II. EMPLOYMENT

A. ***Hunziker v. AAPPTec, LLC***

2019-CA-000412 04/24/2020 2020 WL 1966533

Opinion by Judge L. Thompson; Chief Judge Clayton and Judge K. Thompson concurred.

The Court of Appeals reversed the trial court's directed verdict in favor of Hossain Saneii, Ph.D. In this Kentucky Wages and Hour Act lawsuit brought by appellant, the circuit court found that Saneii was not an employer as defined in KRS 337.010(1)(d) and could not be held liable. KRS 337.010(1)(d) defines employer as "any person, either individual, corporation, partnership, agency, or firm who employs an employee and includes any person, either individual, corporation, partnership, agency, or firm acting directly or indirectly in the interest of an employer in relation to an employee[.]" The Court of Appeals held that Saneii could be considered an employer pursuant to the definition because he was a person acting in the interest of an employer - in this case, appellee AAPPTec, LLC. Saneii was the president of AAPPTec, LLC and was the person who hired appellant. The Court held that the circuit court did not consider this aspect of the employer statute and reversed and remanded for it to do so.

III. FAMILY LAW

A. ***Ehret v. Ehret***

2018-CA-001576 04/17/2020 2020 WL 1898438

Opinion by Judge Lambert; Judges Maze and K. Thompson concurred.

Wife appealed from an order in a dissolution action ruling that a qualified domestic relations order (QDRO) did not allow for Wife's equalization payment to be subject to gains or losses. The Court of Appeals affirmed, holding that the parties agreed to not only the valuation of the asset and the date of its valuation, but most importantly a sum certain on Wife's specific share in that asset. There was no evidence to the contrary. The fact that the parties' documents were silent regarding gains and losses of the asset supported, rather than contradicted, the circuit court's finding that the parties intended for the asset to be divided in 2012 and at the specific sum contained in those documents. The circuit court did not abuse its discretion.

B. ***Hartlage v. Hartlage***

2019-CA-001003 04/17/2020 2020 WL 1897403

Opinion by Judge Taylor; Judges Goodwine and K. Thompson concurred.

The Court of Appeals reversed and remanded an order granting expanded grandparent visitation to appellees, Daniel Wade Hartlage, Sr. and Tina Lynn Hartlage. Appellant's husband, the father of the child in question, passed away from cancer in 2016 before the subject proceedings. The parties entered into an agreed order in 2018 granting Tina and Daniel limited, supervised visitation with the child. This visitation was agreed to by appellant. Tina and Daniel then sought to expand visitation, over the objection of appellant. The circuit court granted the request and expanded the grandparents' supervised visitation notwithstanding the court's findings that they did not establish what type of relationship they had with the child before their son passed away and that during most of 2017, they had little or no contact with the child. Effectively, the only relationship they had with the child was the limited, supervised visitation agreed to by appellant as set out in the agreed order. The Court of Appeals held that Tina and Daniel had failed to establish a preexisting and viable relationship with the child sufficient to trigger the presumption under KRS 405.021(1)(b), *i.e.*, "[i]f the parent of the child who is the son or daughter of the grandparent is deceased, there shall be a rebuttable presumption that visitation with the grandparent is in the best interest of the child if the grandparent can prove a pre-existing significant and viable relationship with the child." The Court further noted that the circuit court failed to consider any of the factors set forth in *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012) and *Morton v. Tipton*, 569 S.W.3d 388 (Ky. 2019) and did not determine whether there was clear and convincing proof to establish that it was in the child's best interests to expand visitation despite appellant's opposition.

IV. INSURANCE

A. ***McAlpin v. American General Life Insurance Company***

2019-CA-000053 04/03/2020 2020 WL 1646824

Opinion by Judge Kramer; Judges Combs and K. Thompson concurred.

Appellant challenged the summary dismissal of various tort claims he had asserted, all of which were rooted in his view that one of the appellees in this matter, his insurance agent, had breached a professional obligation owed to him when, on February 14, 2008, the agent offered to sell him the life insurance he requested but did not offer to sell him accidental death insurance. Upon review, the Court of Appeals explained that under given circumstances, an insurance agent may expressly or implicitly assume a "duty to advise" an individual regarding insurance matters, but that the scope of such an assumed duty is an essential consideration for purposes of tort liability. Affirming the circuit court's summary dismissal, the Court explained that if the insurance agent owed appellant any duty to advise regarding insurance matters, nothing of record supported that such a duty was ever breached. For example, appellant faulted the appellees for failing to offer him a $1 million accidental death policy but, at all relevant times, the appellees undisputedly did not sell $1 million accidental death policies to anyone, nor had appellant requested accidental death insurance. Appellant also faulted the insurance agent for not mentioning "the possibility of accidental death coverage." However, the accidental death coverage the agent could have offered would not have presented a solution to the needs or problems appellant had brought forward. Undisputedly, the accidental death insurance the agent could have offered at the time would have assumed fewer risks and provided at most only half the coverage amount of the life insurance appellant sought.

V. JUVENILES

A. ***C.C. v. Mehling***

2019-CA-000312 04/24/2020 2020 WL 1966535

Opinion and order denying by Judge Kramer; Judges Acree and Lambert concurred.

C.C., by counsel, petitioned the Court of Appeals for a writ of mandamus to order the respondent judge to dismiss the status offense charge of habitual runaway due to a lack of jurisdiction. The Commonwealth filed a response to the petition for writ of mandamus and stated that the charge was dismissed on March 6, 2019, and that the case was moot. Although moot, the Court deemed it appropriate to address the complained-of error because C.C. was a minor, and it was possible for the same issue to arise again. Therefore, the Court held that the capable-of-repetition-yet-evading-review exception applied. *Commonwealth, Dep't of Corrections v. Engle*, 302 S.W.3d 60 (Ky. 2010); *C.S. v. Commonwealth*, 559 S.W.3d 857 (Ky. App. 2018). The Court nonetheless denied the writ. C.C. argued that he was entitled to mandatory diversion, which would have diverted his case from the family court. He argued that KRS 610.030 and KRS 630.050, as well as the Juvenile Court Rules of Procedure and Practice (JCRPP), mandated diversion or referral to the family accountability, intervention, and response team (FAIR team) prior to filing a status offense petition. The Court disagreed, holding that this argument failed because it ignored provisions of the Unified Juvenile Code and the JCRPP which pertain specifically to habitual runaway status offenses. KRS 610.012, pertaining specifically to suspected habitual runaways, is more specific and, therefore, controlled. Under KRS 610.012(6) the offer of diversion or referral to the FAIR team was not required prior to instituting a status offense case in the family court. At the detention hearing held on January 23, 2019, the court ordered that C.C. be released to his father. At that point, a status offense was required to be initiated pursuant to KRS 610.012(6).

B. ***Doe v. Ramey***

2018-CA-001154 04/17/2020 2020 WL 1898418

Opinion by Judge K. Thompson; Chief Judge Clayton and Judge Maze concurred.

Appellant, a minor, appealed from the Jefferson Circuit Court's opinion and order affirming the Jefferson District Court's grant of an interpersonal protective order (IPO) against him in favor of T.L.C.'s mother and protecting T.L.C., another minor. The Court of Appeals accepted discretionary review and reversed the circuit court's opinion and order, holding that the district court lacked subject matter jurisdiction to issue an IPO where a juvenile was the respondent. The Court noted that pursuant to KRS 456.030(6)(a), "[j]urisdiction over petitions filed under this chapter [IPOs] shall be concurrent between the District Court and Circuit Court." Accordingly, because jurisdiction over IPO cases is not vested exclusively in the circuit court, where the respondent is a minor, an IPO hearing must take place before the juvenile session of the district court as it has exclusive jurisdiction "in all cases relating to minors in which jurisdiction is not vested by law in some other court[,]" KRS 24A.130, and "in proceedings concerning any child living or found within the county[,]" KRS 610.010(1). Based on this language, appellant was entitled to have this matter heard by the juvenile court with the concurrent confidentiality of such court, with law enforcement and school personnel still receiving appropriate information. Thus, the circuit court erred by failing to reverse the district court's decision for lack of subject matter jurisdiction.

VI. LANDLORD/TENANT

A. ***Cinque v. Lexington Village, LLC***

2018-CA-001707 04/03/2020 2020 WL 1646829

Opinion by Special Judge Buckingham; Judges Combs and Lambert concurred.

Lexington Village, LLC, filed a civil action against seven college students seeking a judgment for breach of a residential lease agreement. Lexington Village obtained a default judgment against one of the students, Shea Cinque, but the other six students prevailed on their summary judgment motion against Lexington Village, resulting in dismissal of the claims against them. The Court of Appeals reversed the order denying Cinque's motion to set aside the default judgment and affirmed the summary judgment entered in favor of the other students. The Court first held that the circuit court abused its discretion in refusing to set aside the default judgment because Cinque never received actual notice of the legal action against her and, when she did learn of the default judgment, she promptly moved the court to set it aside so that the case could be decided on its merits. Further, there was no indication that Cinque had any culpability in the lack of service on her. The Court also noted that Cinque had a meritorious defense or defenses as shown by the circuit court's entry of summary judgment in favor of the other students. Finally, Lexington Village would suffer no prejudice in the setting aside of the default judgment against Cinque, as the same facts continued to be subject to litigation along with Cinque's co-defendants. As to the entry of summary judgment in favor of the students, the Court held that October 2016 emails from Lexington Village to the students provided clear written notice that the lease would not be renewed unless they signed a new lease. While the lease itself stated that it would be automatically renewed unless written notice of the intention to terminate was given at least 120 days before the expiration of the term, the email communications clearly stated, in writing, that "The deadline for renewal is 10/24/2016." When the students did not sign the new lease by that date, it was clear Lexington Village was no longer giving them the opportunity to renew. Therefore, as Lexington Village had stated its intention not to renew, the students were not in violation of the lease.

VII. NEGLIGENCE

A. ***Holder v. Paragon Homes, Inc.***

2019-CA-000908 04/03/2020 2020 WL 1646818

Opinion by Judge Lambert; Special Judge Buckingham and Judge Combs concurred.

On direct appeal, the Court of Appeals affirmed the circuit court's decision to grant summary judgment in favor of appellee, a general contractor. Appellant, an independent contractor, argued two theories of negligence, negligence *per se* for violation of KRS 338.031(1) and premises liability, after falling at a job site and injuring his arm. Ultimately, the circuit court determined appellee did not owe a duty to appellant under either theory. The Court of Appeals agreed, holding that because appellant was an independent contractor whose services were not retained by appellee, he lacked the relationship necessary under KRS 338.031(1) to impose a duty of care under a negligence *per se* theory. Further, appellant's status as an independent contractor again prevented recovery under a premises liability theory because the defect which caused his injury was apparent, and he should have recognized the danger or risk of harm.

VIII. OPEN RECORDS

A. ***Department of Kentucky State Police v. Courier Journal***

2019-CA-000493 04/17/2020 2020 WL 1897406

Opinion by Chief Judge Clayton; Judges Caldwell and Combs concurred.

The Courier Journal appealed the denial of its request for the entire Uniform Citation File database (KyOPS) of the Kentucky State Police (KSP). KSP argued that producing KyOPS, which contains over eight million entries with approximately 1,800 new entries added daily, constituted an unreasonable burden under KRS 61.872(6) of the Open Records Act because private materials which are statutorily exempt from disclosure, such as Social Security numbers, driver's license numbers, and information relating to juveniles, would have to be individually and manually redacted from the records, a massive task. Alternatively, the exempt materials could be categorically redacted by electronic means at a cost of $15,000. The Court of Appeals agreed with the Attorney General and the Franklin Circuit Court that KSP had a statutory duty to keep exempted and non-exempted materials subject to disclosure separate under KRS 61.878(4) and that the creation of an electronically-redacted record did not constitute a "new record." As to the apprehension expressed by the KSP and *amicus curiae* the Energy and Environment Cabinet regarding the expense to public agencies of designing or upgrading databases to separate exempt and non-exempt materials, the Court held that these valid concerns are more appropriately directed to the General Assembly.

IX. PEREMPTORY CHALLENGES

A. ***Louisville Metro Government v. Ward***

2018-CA-001276 04/10/2020 2020 WL 1814599

Opinion by Judge Jones; Judges Lambert and L. Thompson concurred.

Ward, an African-American female, worked for Louisville Metro as an administrative assistant, and eventually as an administrative specialist. She filed suit against Louisville Metro after she was separated from her employment following a contentious counseling meeting with her supervisor. Ward sought damages for a violation of her due process rights, pay-related racial discrimination, and retaliation. During trial, Ward challenged two of Louisville Metro's peremptory jury strikes as being racially motivated in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Both jurors were African-American and were two of only three African-American jurors remaining after preliminary strikes. The circuit court sustained one of the two *Batson* challenges and placed that juror back on the panel. A fifteen-member panel, which included the subject juror, heard the case. Prior to selecting the final twelve deliberating jurors, a discussion arose regarding what to do about the *Batson* juror. Ultimately, the circuit court told the parties that the subject juror would automatically be part of the deliberating jury and directed the deputy clerk to remove that juror's name from the drawdown pool. The Court of Appeals affirmed the circuit court's decision to sustain the *Batson* challenge insomuch as there was some evidence that the proffered reasons for the strike were pretextual and that the strike was racially motivated. However, it further held that the court committed reversible error when it insulated the subject juror from the drawdown process. While *Batson* is designed to ensure that jurors are not unfairly discriminated against, in this case, the circuit court's remedy went too far; instead of allowing the subject juror to be treated equally in terms of ability to serve, the remedy removed the element of fairness that a random draw affords. Because of this error, a new trial was required.

X. PUBLIC OFFICIALS

A. ***Louisville/Jefferson County Metro Government v. Ackerson***

2018-CA-001067 04/24/2020 2020 WL 1966538

Opinion by Judge Maze; Judges Caldwell and Dixon concurred.

Appellees Brent Ackerson and David Yates are sitting Metro Council members who also engage in the private practice of law. Two Metro employees retained Ackerson and Yates to represent them in their civil claims against third-party defendants following a work-related automobile accident. Metro had previously paid workers' compensation benefits to the employees. While the third-party defendants were insolvent, the defendant's insurer offered to pay the proceeds of a $1,000,000 liability policy into court in exchange for a release of their clients. On behalf of their clients, Ackerson and Yates agreed and the money was paid into court. Metro intervened in the action, asserting that it was entitled to subrogation of its workers' compensation interests. Metro also argued that Ackerson and Yates should be disqualified due to their conflicts of interest as Council members. However, Metro continued to negotiate with Ackerson and Yates, obtaining a full settlement of several unrelated claims. Furthermore, Metro stipulated that its subrogation claim and any conflicts of interest were contingent upon the value of the employees' pain and suffering claims. That matter was submitted to an arbitrator, who found that the employees' pain and suffering claims exceeded the amount of the settlement. Upon return to circuit court, Metro again moved to disqualify Ackerson and Yates, arguing that they were disqualified under KRS 61.220 and for their conflicts of interest under the Rules of Professional Conduct. As a result, Metro argued that Ackerson and Yates must forfeit any attorney fees or liens in the settlement proceeds. The circuit court disagreed, finding that KRS 61.220 did not apply and that Metro had waived any conflicts of interest. On appeal, the Court of Appeals first held that an attorney's representation of a client is not an "interest[] in a claim against a county" within the meaning of KRS 61.220(1). Consequently, the contracts of representation were not void under the statute. Rather, the Court held that any conflict of interest must be evaluated under the standards for disqualification set forth in SCR 3.130 (Rule 1.7(a)). While the Court agreed that Metro had a potential subrogation interest, disqualification requires proof of an actual conflict, not merely a potential one. In the current case, the Court expressed doubt whether Metro would have been able to assert a subrogation claim against the settlement proceeds. The Court further noted that Metro might have been able to obtain an independent apportionment of damages, thus triggering an active conflict of interest. However, the Court agreed with the circuit court that Metro waived this right by negotiating with Ackerson and Yates and by agreeing to submit the matter to arbitration without its participation. The Court concluded that Ackerson and

Yates were entitled to rely on Metro's oral and written representations, which effectively waived its subrogation rights and, by extension, any conflict of interest. Consequently, the Court held that the circuit court properly denied Metro's motion to disqualify Ackerson and Yates as counsel, and they remain entitled to assert their liens against the proceeds.