KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
AUGUST 2010

I. ADMINISTRATIVE LAW

A. Iles v. Commonwealth, Energy and Environment Cabinet

2009-CA-000240 5/14/2010 2010 WL 1925232 Ord. Pub. 8/13/2010

Opinion by Senior Judge White; Judges Lambert and Stumbo concurred. The Court affirmed an order of the circuit court affirming the final order of the Energy and Environment Cabinet finding that appellant violated KRS 224.40-100 and KRS 224.40-305, prohibiting the disposal of waste at any site without a permit. The Court first held that that an earlier complaint filed the Kentucky Department of Transportation (DOT) did not preclude the Cabinet from filing its complaint. Claim preclusion did not apply as there was no identity of parties or causes of action, because the DOT action involved a different state agency seeking enforcement of different statutes. Issue preclusion did not bar litigation because the DOT action alleged violations of completely different statutes than those invoked by the Cabinet. The Court next held that there was no evidence to support a finding of the elements of equitable estoppel. The Court next held that the allegation that appellant was disposing of waste or maintaining an open dump on the property but had no permit to do so was well within the scope of statutes granting jurisdiction to the Energy and Environment Cabinet. The Court next held that the hearing officer did not err in denying appellant's motion for summary judgment and ruling that KRS 224.40-100 and KRS 224-40-305 applied to appellant's property. The Court also held that the Cabinet did not have to prove that appellant was commercially involved in waste disposal in order to pursue the action. The Court next held that the inspector's testimony and the photographs of the property were substantial evidence supporting the finding that the items on the property were waste and had been disposed. The Court also held that the Cabinet's determination that the items were discarded was rationally related to the legitimate state objective of environmental protection and was not an arbitrary exercise of state power. The Court next held that there was no requirement that a property owner must also violate the lead acid battery and waste tire laws, if those items were present on the property, in order to be cited for maintaining an open dump.

II. ATTORNEY AND CLIENT

A. Norsworthy v. Castlen

2010-CA-001117 8/12/2010 2010 WL 3270160

Opinion and order by Judge Keller; Chief Judge Taylor and Judge Acree concurred. The Court granted a petition for a writ of prohibition prohibiting the circuit court from enforcing an order requiring an attorney to produce communications between the attorney and his client to determine whether evidence in a criminal proceeding was protected by the attorney-client privilege or subject to the crime/fraud exception

in KRE 503(d)(1). The Court held that without an initial determination by the trial court that the Commonwealth had proven by a preponderance of the evidence that an exception to KRE 503 applied, an in camera review was premature. The Court directed the circuit court to conduct an evidentiary hearing to determine whether the exception applied.

III. CIVIL PROCEDURE

A. Wade v. Poma Glass & Specialty Windows, Inc.

2009-CA-000204 8/06/2010 2010 WL 3292910

Opinion by Judge Acree; Judges Keller and Lambert concurred. The Court affirmed an opinion and order of the circuit court allowing appellee to pursue collection of a 1991 judgment against appellant. The Court held that the trial court properly concluded that the limitations period applicable to judgments, KRS 413.090(1), had not expired. When the judgment creditor complied with KRS 426.381, the successor statute to section 439 of the prior Civil Code, and pursued garnishment proceedings pursuant to KRS 425.501, *et seq*., the most recent date on which such garnishment proceeding was initiated was "the date of last execution" on a judgment, as that term is used in KRS 413.090(1).

IV. CRIMINAL LAW

A. Gourley v. Commonwealth

2009-CA-001098 8/06/2010 2010 WL 3292935

Opinion by Judge Combs; Chief Judge Taylor and Judge Nickell concurred. The Court affirmed appellant's convictions for various drug charges. The Court held that the trial court did not err in denying a motion to suppress evidence obtained pursuant to a search warrant. The Court held that the warrant was valid even though the trial commissioner who signed the warrant had not been re-appointed and did not take the oath of office as required by KRS 62.010. Because of the trial commissioner's de facto authority as described in *Holland v. Stubblefield*, 206 S.W. 459 (Ky. 1918) and *Feck v. Commonwealth*, 95 S.W.2d 25 (Ky. 1936), the warrant was valid.

B. McNew v. Commonwealth

2009-CA-001325 8/20/2010 2010 WL 3270112

Opinion by Senior Judge Lambert; Judges Dixon and Keller concurred. The Court affirmed an order of the circuit court denying appellant's motion for post-conviction relief filed pursuant to CR 60.02, wherein he argued that the sentencing judge lacked authority to enter a judgment and sentence. The Court held that the trial court did not err in denying the motion for CR 60.02 relief. Canon 3F of the Code of Judicial Conduct expressly gave the parties the authority to waive the trial judge's prior disqualification. Consequently, when the judge's disqualification was remitted, he regained authority to impose a judgment and sentence in the case. The Court rejected appellant's argument that the "Remittal of Disqualification" was void

because it was entered more than 10 days after the "Memorandum and Order of Disqualification."

V. FAMILY LAW

A. Anderson v. Johnson

2009-CA-001261 8/27/2010 2010 WL 3360965

Opinion by Judge Acree; Senior Judge Buckingham concurred by separate opinion; Chief Judge Taylor dissented by separate opinion. The Court affirmed an order of the family court denying a motion to modify timesharing. The court held that the family court did not err in denying the motion without making specific findings. The family court was not required to enter any findings of fact or conclusions of law because, under CR 52.01, findings are unnecessary when a post-decree motion for modification is denied.

B. Jones v. Hammond

2009-CA-000546 8/20/2010 2010 WL 3270095

Opinion by Judge Clayton; Chief Judge Taylor and Judge Thompson concurred. The Court affirmed in part, reversed in part, and remanded an order of the family court terminating appellee's child support obligation. The Court held that the family court did not abuse its discretion in imputing income to appellant or in finding that the children's independent financial resources permitted deviation from the child support guidelines. However, the family court erred in completely eliminating appellee's child support obligation. The Court remanded for the family court to calculate child support according to the child support guidelines with the imputation of income to appellant and to then use the children's income to deviate from the guidelines per each parent's proportionate child support responsibility.

C. Miller v. Harris

2009-CA-002330 8/27/2010 2010 WL 3361690

Opinion by Judge Nickell; Judge Acree and Senior Judge Harris concurred. The Court affirmed an order of the circuit court awarding custody of two children to their great uncle and aunt and denying the maternal grandmother's intervening petition seeking custody of the children. The Court ultimately held that the trial court did not err in awarding custody to the uncle and aunt. In reaching that holding, the Court first held that the circuit court did not misapply KRS 403.270 in awarding custody when it considered the statutory factors and its findings were supported by the record. The Court next held that the circuit court did not abuse its discretion in failing to interview the children. The grandmother only made one of the children available for the hearing, she only asked the court to interview that child, and the children were only six and eight years old at the time of the hearing. The Court next held that the circuit court did not give insufficient weight to the grandmother's testimony. While there was some evidence to support the testimony, there was credible evidence to support the award of custody to the aunt and uncle. The Court finally held that the trial court did not err in considering the grandmother's criminal record in awarding custody to the aunt an uncle. KRS 403.270 directs the trial court

to consider all relevant factors and does not restrict the court's consideration to events occurring within the children's lives or within a particular span of time.

VI. GOVERNMENT

A. Blankenship v. Lexington-Fayette Urban County Gov't

2008-CA-002044 8/20/2010 2010 WL 3270045

Opinion by Judge Clayton; Chief Judge Taylor concurred in result only; Judge Wine dissented by separate opinion. The Court affirmed an order of the circuit court dismissing appellant's claim for damages against the appellee county government on sovereign immunity grounds. The appellant firefighters alleged that the county government violated KRS 337.285 as well as breached an implied contract found in county ordinances and policies requiring they be paid overtime when they worked in excess of 40 hours per week. The Court held that KRS 337.285 did not indicate a desire by the General Assembly to waive sovereign immunity. The Court also held that the application of the Kentucky Wage and Hour Law to County Employees was not indicative of a waiver of sovereign immunity. The Court finally held that the ordinance and policies regarding overtime pay did not constitute a written contract between the parties and even if they did, the action would have had to have been brought in Franklin Circuit Court within one year as set forth in KRS 45A.245 and 45A.260.

VII. INSURANCE

A. Holzknecht v. Kentucky Farm Bureau Mutual Insurance Co.

2009-CA-001022 8/13/2010 2010 WL 3187645

Opinion by Judge Combs; Chief Judge Taylor and Judge Nickell concurred. The Court affirmed a summary judgment in favor of the appellee insurance company on its petition for declaration of rights pursuant to KRS 418.040, alleging that it was under no obligation to defend or to indemnify homeowners on appellant's claims for injuries sustained by her daughter at a home-based child care business. The Court held that the trial court properly concluded that the homeowner's policy specifically and unambiguously excluded coverage for personal liability arising from the business. The Court rejected appellant's argument that the business pursuits exclusion should only apply if the dog was involved in the business and kept on the premises for the purpose of earning a profit for the business. The Court also held that the business pursuits exclusion was not subject to the policy's severability provision so as to preserve coverage for the spouse of the person running the day care. The spouse plainly fell within the scope of the policy's business-pursuits exclusion because he was involved in the enterprise. The policy exclusion was unambiguous and broad enough to encompass him. The severability clause did not render the exclusion ambiguous. Therefore, the availability of a business-risk endorsement was the only clear and unambiguous protection to the homeowners.

B. Little v. Kentucky Farm Bureau Mutual Insurance Co.

2009-CA-001030 8/20/2010 2010 WL 3270110

Opinion by Judge Nickell; Judge Stumbo and Senior Judge White concurred. The court affirmed summary judgments entered in favor of the appellee insurance company, agent and agency on appellant's claims for negligence and vicarious liability for failing to provide him with the underinsured coverage he requested. The Court held that KRS 304.39-320(2) did not impose a duty upon the insurer to provide a specific amount of requested underinsured coverage. Further, nothing in caselaw interpreted the statute to contain a common law duty to provide the specific amount of insurance requested by an insured.

VIII. TORTS

A. Bennett v. Malcomb

2009-CA-000871 8/20/2010 2010 WL 3270103

Opinion by Judge Acree; Chief Judge Taylor and Senior Judge Buckingham concurred. The Court affirmed an order granting summary judgment to appellee on appellant's complaint for the tort of outrage related to his allegation that appellee harmed him by pinning him against a post with a tractor. The Court held that the trial court properly concluded that the claim was barred by the one-year statute of limitation in KRS 413.140. Because recovery could appropriately be sought under the traditional common law torts and the evidence showed that the actions were not intended to only cause emotional distress, the cause of action for outrage was not appropriate. The tort of outrage was not intended to provide a cause of action for plaintiffs who simply failed to bring a traditional tort claim within the statute of limitations.

B. Cornett v. Bright

2009-CA-001186 8/27/2010 2010 WL 3360875

Opinion by Judge Nickell; Judge Stumbo and Senior Judge White concurred. The Court affirmed a jury verdict entered in an automobile negligence case and an order denying a motion for a new trial. The Court held that the trial court did not err in denying appellant's motion for a new trial. The fact that the jury awarded damages for medical expenses and lost wages was legally insufficient to require an award of damages for pain and suffering. The Court then held that the trial court did not err in offsetting the jury's award for medical expenses and lost wages by the basic reparation benefits payable by statute. The actual payment of the expenses by the basic reparation benefits carrier was not required for the offset provisions of the Motor Vehicle Reparations Act (MVRA) to apply. The Court then held that the trial court correctly considered a motion for costs filed within a reasonable time following the judgment. CR 54.04, which controls bills of costs, contains no limitation on when such motions must be filed and a plain reading of the rule indicates that the supplemental judgment has nothing to do with the lost jurisdiction to alter, amend or vacate the final judgment. The Court finally held that the trial court did not err in denying appellant's motion for costs. The trial court dismissed appellant's complaint with prejudice on the ground that the amount of the jury's verdict was less than the MVRA tort liability threshold. Thus, appellant could not be

the prevailing party for any purpose, especially for the purpose of the application of CR 54.04.

C. May v. Holzknecht

2009-CA-001905 8/13/2010 2010 WL 3191766

Opinion by Judge Combs; Chief Judge Taylor and Judge Nickell concurred. The Court affirmed a partial summary judgment and subsequent trial order and judgment of the circuit court in favor of the mother and next friend of a minor child injured when a dog mauled her in a home-based childcare center. The Court first held that the trial court did not err by concluding that the provisions of KRS 258.235(4), the dog-bite statute, created strict liability for appellants under the circumstances when neither the child victim, nor any intervening third party, was at fault to exculpate appellants. Appellants harbored the dog, they knew or reasonably expected that the dog would have direct access to the children in their home, and they told the child's mother that the dog would be kept outside, contrary to actual practice. Evidence of the dog's temperament was irrelevant. The child was legally incapable of negligence and no third party or fortuitous circumstance existed to implicate any aspect of comparative negligence. The Court next held that the trial court did not err in denying a motion for directed verdict to the spouse of the person caring for the children. He was liable by virtue of his status as a keeper of the dog who violated his statutory duty to prevent the child from being mauled by the dog. The Court finally held that the trial court did not err by permitting the jury to make an award for the child's future pain and suffering even when no future medical expenses were indicated. Under the circumstances, pain and suffering were likely to continue to occur.

D. Thornton v. Carmeuse Lime Sales Corp.

2009-CA-000090 8/20/2010 2010 WL 3270055

Opinion by Judge Acree; Chief Judge Taylor and Senior Judge Buckingham concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of appellee on appellant's negligence claim. The Court held that the circuit court properly granted summary judgment. Because appellee fell within the statutory definition of a contractor under KRS 342.610(2), it was entitled to "exclusive remedy" immunity under KRS 342.690. The delivery of lime to appellee's customers was a regular and recurrent part of its business to mine and deliver lime to its customers. The relationship between appellee and the employer transit company amounted to a contractor-subcontractor relationship as defined by KRS 342.610(2). Because appellee was a contractor under the statute, the Court declined to engage in an examination of the motor-carrier agreement.