PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

AUGUST 1, 2018 to AUGUST 31, 2018

I. APPEALS

A. ***Hernandez v. Commonwealth***

2016-CA-000314 08/10/2018 2018 WL 3798757

Opinion and Order dismissing by Judge Nickell; Judges Dixon and Kramer concurred.

Appellant, a Spanish-speaking indigent indicted for a number of offenses, required interpreting services that were provided pursuant to an order authorizing defense counsel to utilize any services believed "to be reasonably necessary to ensure effective representation." Freelance certified court interpreter Ilse Apestequi provided services on three separate occasions. Her first bill - for $777.00 - was approved, as was her third bill - for $339.43. However, her second invoice - seeking $2,520.00 - was deemed unreasonable and unnecessary by the circuit court and reduced by more than one-half to $1,200.00. The second invoice was for written translation and transcription of a 69-minute police interview with appellant. Alleging an abuse of discretion, the Louisville Metro Public Defender (LMPD) appealed the order approving the reduced fee. Notably, the appeal was filed in the concluded criminal action in appellant's name against the Commonwealth. The Commonwealth moved to dismiss the appeal for failure to name an indispensable party - either LMPD (which had contracted for the services), Apestequi (who had rendered the services), or both. The Commonwealth argued that appellant had no personal stake in an appeal that sought only full payment for the interpreter, particularly where appellant had pled guilty and was serving a ten-year sentence. The Court of Appeals dismissed the appeal for failure to name Apestequi as an indispensable party. The circuit court's order directed the Finance and Administration Cabinet to pay Apestequi directly, making her an indispensable party who could seek enforcement of the order in her own name under *Fink v. Fink*, 519 S.W.3d 384 (Ky. App. 2016). The Court also determined that the appeal was untimely and that the circuit court had lost jurisdiction.

II. CHILD CUSTODY AND RESIDENCY

A. ***Robinson v. Robinson***

2017-CA-000271 08/03/2018 2018 WL 3673188

Opinion by Judge Thompson; Judges Combs and Kramer concurred.

Father appealed from an order in a child custody matter determining that Kentucky was an inconvenient forum and relinquishing jurisdiction to North Carolina under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The Court of Appeals held that the circuit court did not abuse its discretion and affirmed. The Court noted that the lower court properly considered the factors set forth in KRS 403.834(2) in reaching its decision. The child and Mother resided in North Carolina since 2010 and Father retained counsel in that state. In 2012, Father participated in a telephonic conference with the North Carolina court and agreed to terminate his weekend visitation. Moreover, the child had moved from Kentucky and had not regularly visited Kentucky, and all school records, medical records, and therapy and counseling records were in North Carolina. The record also indicated that Father had the financial resources to travel to North Carolina, where he initially agreed to exchange the child for visitation. In light of these facts, the circuit court's decision was proper.

III. CITIES

A. ***Krietemeyer v. City of Madisonville***

2017-CA-001250 08/24/2018 2018 WL 4037645

Opinion by Judge Maze; Judges D. Lambert and Nickell concurred.

Krietemeyer was injured after falling on concrete steps leading from the front door of the Madisonville Police Department. Thereafter, she filed a negligence action against the City of Madisonville, which owned the building. In response, the City argued that the action was barred because Krietemeyer failed to give proper notice of her injury prior to bringing the action, as required by KRS 411.110. The circuit court agreed and granted the City's motion for summary judgment. On appeal, the issue turned on whether the steps were an "other public thoroughfare" within the meaning of the notice statute. The Court of Appeals considered the interpretation of the term in Kentucky cases construing KRS 411.110 and in Missouri cases construing a similar statute. The Court concluded that the term "thoroughfare" refers to publicly maintained exterior improvements designed to facilitate travel. In contrast to the other named terms in the statute, the stairs leading to the Madisonville Police Department were physically part of the structure. Consequently, the Court held that Kreitemeyer's claim was not subject to the notice requirements of KRS 411.110, and it reversed the circuit court's grant of summary judgment.

IV. CIVIL RIGHTS

A. ***Williams v. City of Glasgow***

2017-CA-001246 08/10/2018 2018 WL 3794739 DR Pending

Opinion by Judge Nickell; Judges D. Lambert and Maze concurred.

Appellant challenged orders dismissing her Kentucky Civil Rights Act (KCRA) and wrongful discharge claims and upholding the constitutionality of Kentucky's Claims Against Local Governments Act (CALGA). The Court of Appeals affirmed. Appellant claimed that she was fired for her participation in an internal "investigation" into the impropriety of police officers' conduct. The Court held that the Kentucky Commission on Human Rights (KCHR) must be involved - even if only through an inquiry about filing a charge - to invoke statutory protection under the participation clause of KRS 344.280(1). This failure to involve KCHR was fatal to appellant's claims. Appellant, an at-will employee, also claimed that she was wrongfully discharged in violation of public policy. However, her failure to plead sufficient cause demonstrating a charge or investigation of sexual harassment was fatal to her claim. Appellant further argued that CALGA is unconstitutional because it precludes punitive damages from being assessed against local municipalities. The Court held that CALGA does not violate the jural rights provisions of the Kentucky Constitution because the General Assembly merely codified the law regarding municipal immunity by enacting CALGA. The Court further held that CALGA does not violate the doctrine of separation of powers.

V. CORRECTIONS

A. ***Campbell v. Ballard***

2018-CA-000098 08/17/2018 2018 WL 3945294

Opinion by Judge Jones; Chief Judge Clayton and Judge Combs concurred.

Appellant, an inmate, sought a determination that the Kentucky Department of Corrections (DOC) could not legally classify him as a violent offender because his judgment did not include any recitation that the victim suffered death or serious physical injury. The circuit court determined that appellant could not prevail as a matter of law because KRS 439.3401(1) explicitly provides that a violent offender includes "any person who has been convicted of or plead guilty to the commission of … (m) robbery in the first degree." Therefore, the circuit court dismissed appellant's declaratory judgment action against the DOC and its Commissioner, Rodney Ballard, for failure to state a claim. On appeal, appellant argued that Class B felonies are only classified as violent offenses when a court's judgment designates that a victim has suffered death or serious physical injury. The Court of Appeals, however, held that the violent offender statute is clear: any person who has been convicted of or pled guilty to the commission of robbery in the first degree qualifies as a violent offender. No designation by the circuit court is required. Accordingly, the circuit court properly dismissed appellant's action for failure to state a claim.

VI. CRIMINAL LAW

A. ***Caldwell v. Commonwealth***

2016-CA-001851 08/03/2018 2018 WL 3675578

Opinion by Judge Johnson; Judges Dixon and Taylor concurred.

Appellant was convicted of first-degree sexual abuse after touching a 14-year-old victim in an inappropriate manner. Appellant - a long-time friend of the victim's family - spent the day with the victim and her siblings and invited them to stay overnight, which their parents agreed to. The subject incident occurred during this stay. Appellant was subsequently convicted of sexual abuse pursuant to KRS 510.110(1)(d) after being found to be a "person in a position of authority or position of special trust, as defined in KRS 532.045[.]" On appeal, appellant argued that there was no evidence in the record to support the finding that he was in a position of "special trust" with the victim. The Court of Appeals affirmed. The Court noted that in this instance, the victim testified on the stand that appellant was her "papa," he was like a family member, they often did things with him as a family, she trusted him, and she felt comfortable confiding in him. Given this evidence, the jury could reasonably conclude that appellant's relationship with the victim amounted to a position of special authority or trust.

B. ***Flege v. Commonwealth***

2017-CA-001009 08/03/2018 2018 WL 3672354

Opinion by Judge Kramer; Judges J. Lambert and Taylor concurred.

Appellant was convicted of operating a motor vehicle under the influence, fourth or subsequent offense within a five-year period, and sentenced to three years of imprisonment, sixty months of license revocation, and thirty months of using an ignition interlock license/device. Appellant moved for an order to allow her to apply for an ignition interlock device during her license revocation period. The circuit court denied her motion. Upon review, the Court of Appeals vacated the circuit court's order because the district court had exclusive jurisdiction over appellant's motion pursuant to KRS 189A.400(1).

C. ***Fultz v. Commonwealth***

2015-CA-001791 08/03/2018 2018 WL 3675609

Opinion by Judge Maze; Judges Combs and J. Lambert concurred.

Appellant was convicted of trafficking in a controlled substance, possession of drug paraphernalia, and excessive/improper window tinting. Based upon the jury's verdict, the circuit court imposed $500 and $100 fines for the drug paraphernalia and window-tint charges, respectively. The circuit court denied appellant's motion to set aside the fines and court costs based upon his status as an indigent, but directed that he could pay the fines following his release from prison. The Supreme Court of Kentucky granted discretionary review on the question of the validity of the fines and remanded the case to the Court of Appeals for further consideration in light of *Commonwealth v. Moore*, 545 S.W.3d 848 (Ky. 2018). In *Moore*, the Supreme Court addressed the scope and application of KRS 534.040(4), which directs that fines shall not be imposed upon any person determined to be indigent pursuant to KRS Chapter 31. The Supreme Court held that the statute, by its plain language, does not apply to fines that are defined and sentenced outside the penal code. Following this reasoning, the Court of Appeals noted that the offense of excessive window tinting is defined by KRS 189.110, and the fine is set out in KRS 189.990(1) - both outside the penal code. Therefore, the indigency provision of KRS 534.040(4) did not apply to the window-tint fine. The Court then noted that while the offense of possession of drug paraphernalia is defined outside the penal code by KRS 218A.500(2), the fine is imposed under the general misdemeanor sentencing statute, KRS 534.040(2). Thus, KRS 534.040(4) prohibited the circuit court from imposing the $500 fine for the drug paraphernalia conviction. The Court recognized that this created an anomalous result and suggested that the matter could use further clarification from either the Supreme Court or the General Assembly.

VII. EDUCATION

A. ***Geron v. Jefferson County Board of Education***

2017-CA-000540 08/31/2018 2018 WL 4167274

Opinion by Judge Nickell; Judges Dixon and Thompson concurred.

A non-tenured teacher appealed the dismissal of her action seeking judicial review of the nonrenewal of her limited teaching contract by the Jefferson County Public Schools (JCPS), a decision upheld by the Local Evaluation Appeals Panel (LEAP) and State Evaluation Appeals Panel (SEAP). The nonrenewal was based on the teacher's unacceptable performance of essential job functions and her failure to improve over the course of the school year. On appeal, the teacher argued that attachments to appellee's motion to dismiss were improper and that the circuit court's consideration of them constituted reversible error; that the SEAP decision was subject to judicial review; that dismissal of her breach of contract claim was erroneous; and that she presented *prima facie* evidence of religious discrimination sufficient to withstand a motion to dismiss. The Court of Appeals affirmed, first holding that documents attached to the motion to dismiss were not "matters outside the pleadings" as they were cited and relied on by the teacher in her complaint and were central to her claims. Therefore, they were properly before the circuit court. The Court next held that SEAP did not conduct "administrative hearings" as required to invoke the provisions of KRS Chapter 13B and, therefore, judicial review is not available as a matter of right from adverse SEAP decisions. SEAP is a review panel with statutorily defined functions limited to procedural matters already addressed by LEAP; it cannot review "professional judgment conclusions of an evaluation" and is authorized only to set aside a defective evaluation - it can provide no other remedy. The Court also concluded that no arbitrary action occurred at the administrative level sufficient to require assumption of jurisdiction in the absence of statutory authorization under *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964). Finally, the Court held that the teacher did not allege a viable breach of contract or religious discrimination claim.

B. ***Hardin v. Jefferson County Board of Education***

2016-CA-001331 08/10/2018 2018 WL 3798765

Opinion by Judge Acree; Judges Dixon and Jones concurred.

The Court of Appeals reversed an order dismissing appellant's claims that appellees: (1) violated KRS 161.765 by demoting him from his position as an administrator without a hearing; (2) violated statutory and regulatory requirements governing his evaluation; and (3) discriminated against him based on his age. The Court held that the circuit court misinterpreted KRS 161.765 by improperly adding a requirement that an administrator's minimum of three years' experience as an administrator must be acquired in the same school district. The Court also held that failure to exhaust administrative remedies was not a proper ground for dismissing with prejudice a claim of statutory and regulatory noncompliance. Appellant's claim was percolating through the administrative process, which was under appellees' control. The Court noted that failure to exhaust administrative remedies delays, but does not preclude, judicial review, citing *Popplewell's Alligator Dock No. 1, Inc. v. Rev. Cabinet*, 133 S.W.3d 456 (Ky. 2004). Thus, the circuit court should have held the case in abeyance until the administrative process completed rather than dismiss the case with prejudice. Finally, the Court held that appellant's complaint presented a *prima facie* case of age discrimination that adequately stated a cause of action sufficient to defeat a CR 12.02(f) motion.

VIII. EMPLOYMENT

A. ***Summers v. Beech Bend Park, Inc.***

2016-CA-001600 08/24/2018 2018 WL 4037817

Opinion by Judge Nickell; Judges Acree and Dixon concurred.

Appellant challenged four orders entered in a lawsuit alleging that Beech Bend Park, Inc. (BBP) was a hostile work environment and violated the Kentucky Civil Rights Act (KCRA). Named as defendants were BBP, Beech Bend Raceway Park, Inc. (Raceway), and Dallas Jones, the owner and president of both entities. Appellant claimed that Jones sexually harassed, abused, and molested her weekly beginning in 2001, creating conditions so intolerable that she was compelled to resign in 2009. After a four-day trial, the jury found in favor of BBP, the only defendant not dismissed before deliberations began. The Court of Appeals affirmed. Appellant sought to use unproven claims from former park employees to argue that she suffered similar harassment. The circuit court excluded the testimony as violative of KRE 401, 403, and 404(b). The Court agreed, holding that appellant had to prove her own experience and response, not that of others. None of appellant's proposed witnesses knew her, worked with her, or even worked during the same timeframe as appellant, making it impossible for them to establish her case. Furthermore, the experiences and responses of other women were not similar enough to appellant's claims to be admissible. Additionally, appellant sought to impeach the park owner and his daughter/park general manager with multiple unrelated incidents after daughter stated that the park "[n]ever had a claim or an allegation" of sexual harassment against a park employee or official. Appellant argued that this was a "lie" because two other women had previously filed suit. The circuit court denied the request, finding that appellant had invited the answer, and reiterated that only appellant's case was being tried. Citing *Commonwealth v. Prater*, 324 S.W.3d 393 (Ky. 2010), the Court held that a party cannot introduce proof of a collateral matter as a vehicle for introducing proof that the circuit court had previously determined was inadmissible.

IX. ESTATES

A. ***Martin v. Bell, Orr, Ayers and Moore, PSC***

2016-CA-001217 08/24/2018 2018 WL 4037818

Opinion by Judge Nickell; Judges Acree and Maze concurred.

Widow, both in her individual capacity and as co-executrix of the estate of her late husband, challenged an award of summary judgment to the law firm that had represented the estate and to another co-executor (Mauldin) who was an attorney practicing in said firm. She alleged legal malpractice, excessive billing procedures, and breach of fiduciary duty. Widow had signed a letter of engagement agreeing to Mauldin's proposal (based on KRS 395.150) in which he would take a co-executor's fee of three percent of the value of the estate, from which he would directly pay the law firm for its legal work as attorneys for the estate. Ultimately, a total of $1.4 million was paid to Mauldin (and the law firm) for handling the matter. This commission was charged against only $46 million even though the personal estate was valued at $63 million; nothing was charged against income Mauldin collected for the estate as co-executor. Widow reviewed monthly checks issued by the estate but never questioned the amounts or sought an accounting of the work being performed by the law firm or Mauldin. In 2013, Widow asked both Mauldin and the law firm to cease acting on behalf of the estate and hired new counsel. In 2014, while a motion to approve a periodic settlement, Mauldin's commission, and the law firm's fee was pending in district court, Widow filed the subject action. In granting summary judgment to appellees, the circuit court distilled the case to a fee dispute in which Widow could not prevail under any circumstances because she offered no proof of error, failure to act, or damages. Notably, in her deposition, Widow testified that everything she had asked be done was done; she simply believed that the estate had paid too much for seven years of work and sought a full refund plus interest, punitive damages, and attorneys' fees. The Court of Appeals affirmed, holding that: (1) Widow was not entitled to a jury trial even though she had requested punitive damages; (2) the claimed violations of the Kentucky Rules of Professional Conduct did not give rise to a civil cause of action; (3) an attorney has no duty to advise a client of the full spectrum of fee options; (4) Kentucky does not recognize a claim of legal malpractice or breach of fiduciary duty based solely on a fee dispute between the executor or attorney for an estate and the client in a probate case; and (5) a failure to file periodic settlements, when extensions granted by the district court deferred reporting, was not error - especially where Widow's own expert testified that the estate suffered no damage.

X. FAMILY LAW

A. ***Jaburg v. Jaburg***

2015-CA-001768 08/24/2018 2018 WL 4037819

Opinion by Judge Maze; Judges Acree and Combs concurred.

The parties divorced and executed a property settlement agreement that required appellee to pay appellant permanent maintenance. The settlement agreement stated that "[n]o modification or waiver of any of the terms of this Agreement shall be valid unless in writing and executed by the Parties hereto." Appellee subsequently lost his job and asked the family court to terminate his maintenance obligation. He argued that he could no longer afford the payments and that his unemployment constituted a changed circumstance so substantial and continuing that it rendered continued enforcement of the Settlement Agreement unconscionable and modifiable under KRS 403.250(1). The family court granted the motion, finding that KRS 403.250(1) permitted a court to modify a maintenance obligation despite the presence of a non-modification clause in a marital settlement agreement. The Court of Appeals reversed. The Court held that a trial court's authority to modify a maintenance obligation under KRS 403.250(1) is limited by KRS 403.180(6), which permits the parties to a marital dissolution to expressly preclude modification of the terms of their marital settlement agreement.

XI. IMMUNITY

A. ***Howard v. Big Sandy Area Development District, Inc.***

2017-CA-000747 08/03/2018 2018 WL 3672708 Rehearing Pending

Opinion by Judge Kramer; Judges Combs and Jones concurred.

Big Sandy Area Development District, Inc. operates a regional homecare program for eligible individuals in conformity with 910 KAR 1:180. The program's primary function is to prevent unnecessary institutionalization of functionally impaired persons over the age of 60 who lack adequate support, and to allow those individuals to live safer and more comfortable lives at home, by providing them supplementary in-home assistance with housekeeping, personal care, and a variety of other as-needed services. Emma Jean Hall qualified for and was provided these homecare services. Under the terms of her individualized homecare plan, an aide employed by Big Sandy would visit Hall twice per week for periods of two hours. Upon one such visit, the Big Sandy aide discovered that Hall appeared ill. Hall was taken to the hospital where it was determined that a severe bedsore had formed in the region of her coccyx. Due to complications from the bedsore, Hall ultimately passed away. Subsequently, Hall's estate filed suit against Big Sandy based upon Big Sandy's provision of homecare services to Hall. The estate's arguments focused upon the fact that when Big Sandy's aides visited twice per week, one of the tasks Hall typically asked them to perform for her was assisting her with bathing. The estate asserted that if the visiting aides had bathed Hall in a non-negligent fashion, Hall's bedsore would not have formed or would have been detected earlier with fewer ill consequences. The circuit court summarily dismissed the estate's action. The estate appealed. The Court of Appeals affirmed. Specifically, the Court determined that Big Sandy was entitled to governmental immunity from suit under the circumstances because it qualified as a political subdivision and provision of the homecare services at issue qualified as a governmental function.

XII. INSURANCE

A. ***Auto Club Property-Casualty Insurance Co. v. Foreman***

2016-CA-001949 08/10/2018 2018 WL 3798395 Rehearing Pending

Opinion by Judge Kramer; Judge Jones concurred; Judge Combs dissented and filed a separate opinion.

Appellees' home was determined to be have been intentionally damaged by fire after their teenage son set fire to the basement. They submitted a claim for the damages to their homeowner's insurance provider, which denied their claim, citing an "intentional acts" exclusion within their policy. Appellees filed an action for a declaration of rights under the terms of their policy. Ultimately, they moved for summary judgment, which the circuit court granted. By a 2-1 vote, the Court of Appeals reversed and remanded, holding that under the pertinent language of the "intentional acts" exclusion, it was undisputed that the objective component of that provision had been satisfied. Appellees' son was considered an "insured person" under the policy, lighting a fire was considered an "action," and it was reasonably foreseeable that a fire lit in a basement could spread to the other parts of the home and cause a "loss." Accordingly, summary judgment was improper.

XIII. LANDLORD/TENANT

A. ***Smithfield Farms, LLC v. Riverside Developers, LLC***

2016-CA-001520 08/17/2018 2018 WL 3945627

Opinion by Judge Acree; Judges Dixon and Nickell concurred.

The parties disputed the terms of a contract to lease land for growing soybeans. The initial term was for one year, beginning January 20, 2011. Pursuant to the holdover statute, KRS 383.160, the contract was renewed annually through January 2015. Shortly thereafter, the parties met to renegotiate but those efforts were unsuccessful. On March 26, 2015, the landlord notified the tenant that the lease was terminated. The tenant argued that the contract was ambiguous and inconsistent with industry standards for the soybean growing season, which ends on November 1st, and claimed that this date was the contract termination date, not January 20th. The circuit court found no ambiguity in the contract, determined the termination date to be January 20, 2015, and determined that the landlord timely notified the tenant of the termination of the lease within 90 days of the end of the lease term, in accordance with KRS 383.160(1). The Court of Appeals affirmed the circuit court's summary judgment in favor of the landlord.

XIV. NEGLIGENCE

A. ***Catholic Health Initiatives, Inc. v. Wells***

2016-CA-001919 08/10/2018 2018 WL 3798562

Opinion by Judge Kramer; Judges Acree and Taylor concurred.

Dr. Anis Chalhoub implanted a pacemaker in Kevin Wells at Saint Joseph Hospital in London, Kentucky. Thereafter, Wells filed suit against Dr. Chalhoub, arguing that the pacemaker implantation had been medically unnecessary; that it had become a detriment to his health; and that Dr. Chalhoub, prior to implanting the pacemaker, had failed to secure his informed consent to do so. Wells also filed suit against the Hospital, arguing that Dr. Chalhoub never would have had the opportunity to implant the pacemaker absent the Hospital's failure to properly supervise physicians at its facility. Wells ultimately settled with Dr. Chalhoub. At trial, six claims were submitted for the jury's consideration: (1) negligence (relating to whether Dr. Chalhoub violated medical standards of care by implanting Wells' pacemaker); (2) lack of informed consent (also relating to Dr. Chalhoub); (3) negligent supervision (relating to the Hospital); (4) "conspiracy"; (5) "joint venture"; and (6) an alleged violation, on the part of the Hospital, of the Kentucky Consumer Protection Act (KCPA), codified in KRS 367.110 *et seq*. The jury found in Wells' favor with respect to all six of the claims. On appeal, the Court of Appeals held as follows. First, Wells' claim of "conspiracy" should have been dismissed at the directed verdict phase. Conspiracies require specific intent (*i.e.*, an agreement) and are not formed through negligence or recklessness. Second, Wells' claim of "joint venture" should have been dismissed at the directed verdict phase. Where a plaintiff settles with or covenants not to sue the primarily liable party (in this case Dr. Chalhoub), the secondarily liable party is likewise released from any claim that depends upon vicarious liability. Third, the remainder of Wells' claims against the Hospital required a new trial due to evidentiary error. Specifically, before the jury had made any determination that Dr. Chalhoub had acted negligently toward Wells, the circuit court allowed Wells to introduce evidence of Dr. Chalhoub's alleged negligence with respect to other patients. This "prior bad acts" evidence may have been relevant to Wells' claim against the Hospital for negligent supervision, but it was irrelevant and unduly prejudicial with respect to Wells' claim that Dr. Chalhoub had acted negligently toward him - a claim Wells was required to prove before the Hospital could be assessed with derivative liability for negligent supervision. The circuit court also erred by admitting into evidence a report detailing the Hospital's failure to comply with various federal certification requirements and reimbursement guidelines relating to participation in Medicaid and Medicare. These regulations and guidelines are not relevant to common law negligence and malpractice actions, and claims of negligence in Kentucky cannot be based

upon violations of federal statutory or regulatory law. On cross-appeal, Wells asserted that the circuit court erred by reducing his award of punitive damages to conform with a pre-trial itemization of damages he filed in this matter pursuant to CR 8.01(2) because, in his view, punitive damages were not considered "unliquidated damages" within the meaning of the rule. The Court of Appeals disagreed and affirmed as to this issue.

XV. STATUTE/RULE INTERPRETATION

A. ***Grossl v. Scott County Fiscal Court***

2016-CA-001762 08/17/2018 2018 WL 3945624

Opinion by Judge Acree; Judges Dixon and Nickell concurred.

Deputy jailers filed a wage and hour claim against the Scott County Fiscal Court pursuant to KRS 337.385 for failing to pay them in accordance with promotions and pay increases purportedly awarded by the Scott County Jailer. They claimed that the jailor was authorized by KRS 441.225 to grant pay increases so long as the amounts remained within the budget line item previously approved by the fiscal court. The circuit court dismissed the action for failure to state a claim. The Court of Appeals affirmed. Interpreting the statute for the first time, the Court held that a jailer's authority over expenditures referenced in KRS 441.225 has nothing to do with the determination of compensation or the discretion to adjust the compensation of deputy jailers. That authority is granted to the fiscal court pursuant to KRS 64.530(1) and (2), which provide that "deputies . . . of county officers shall be deemed to be county employees" and that "the fiscal court of each county shall fix the reasonable compensation of every county officer and employee[.]" The Wage and Hour Act imposes liability only when an employer "pays any employee less than wages and overtime compensation to which such employee is entitled," KRS 337.385(1), and makes it unlawful for the employer to withhold "any part of the wage agreed upon." KRS 337.060(1). Because the fiscal court never agreed to the claimed wages and appellants were not entitled to such, their claims were properly dismissed.

XVI. TERMINATION OF PARENTAL RIGHTS

A. ***K.S. v. Cabinet for Health and Family Services***

2018-CA-000088 08/17/2018 2018 WL 3945299

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

Mother challenged the involuntary termination of her parental rights, arguing that the Cabinet failed to provide clear and convincing evidence that the child was neglected. The Court of Appeals agreed, vacated the order of termination, and remanded the matter. The Court held that for a parent to neglect or abuse a child, the Cabinet must show that the parent *intended* to neglect or abuse the child. When a child is dependent, as was the case here, the parent's actions are unintentional or result from causes unrelated to a parent's culpability. Mother had cognitive and developmental challenges but met all of the requirements proffered by the Cabinet to allow the child's return to her custody. In fact, Mother never had custody of the child since he was removed shortly after his birth. Thus, while the child was dependent, neglect was not established since Mother's actions were in conformity with the Cabinet's case plan. The Court noted that under our jurisprudence, parental relationships deserve the highest protection; therefore, it is incumbent upon the Cabinet to meet all three prongs under KRS 625.090 before parental rights can be terminated.

XVII. TRIALS

A. ***United Parcel Service, Inc. v. Barber***

2016-CA-001161 08/10/2018 2018 WL 3795519

Opinion by Judge Nickell; Judges Dixon and Kramer concurred.

Following a jury trial, eight African-American drivers employed by United Parcel Service, Inc. were awarded over $5.3 million in damages and nearly $500,000 in costs and attorneys' fees on their claims of racial discrimination, racially hostile work environment, and retaliation. On appeal, UPS alleged that the judgment was in error due to a failure of proof on essential elements of each claim, that the jury's awards were excessive, and that the circuit court committed evidentiary and instructional errors. The Court of Appeals affirmed. The Court determined that the circuit court appropriately undertook its gatekeeping role in reviewing the evidence to determine whether claims could go to the jury, noting that the circuit court did not submit multiple claims to the jury upon determining that insufficient proof had been presented. The remaining claims were sufficiently supported to submit to the jury. Further, based on voluminous testimony, the Court determined that the jury's awards did not result from passion or prejudice. Next, the Court concluded that the jury's awards bore a relationship to the evidence presented, were not so disproportionate as to warrant setting aside, and would not be disturbed. Finally, the Court rejected UPS's assertion that the jury instructions omitted essential elements of proof or law required to support the verdict, and that the error was compounded by the circuit court's admittance of evidence related to incidents occurring outside the limitations period. The instructions fairly and adequately stated the applicable law and required proper findings of fact necessary for a verdict. The mere fact that the circuit court refused proffered instructions from UPS that would have required additional legal and factual findings was not sufficient to impute error. The Court discerned no abuse of discretion in the circuit court's evidentiary rulings and no showing was made of undue prejudice or jury confusion due to the admission of challenged evidence.

XVIII. WORKERS' COMPENSATION

A. ***Mullins v. Rural Metro Corp.***

2016-CA-001152 08/10/2018 2018 WL 3797571

Opinion by Judge Nickell; Chief Judge Clayton and Judge Dixon concurred.

Mullins petitioned and Rural Metro Corp. cross-petitioned for review of a Workers' Compensation Board opinion vacating in part and remanding an Opinion, Award, and Order and an order denying reconsideration entered by the Administrative Law Judge. The ALJ found that Mullins was entitled to permanent total disability (PTD) income benefits and medical benefits. The Court of Appeals reversed and remanded. Mullins was injured while working for Rural Metro, experiencing pain and symptoms in his shoulder and neck. In its order denying the petition for reconsideration, the ALJ found that Mullins had experienced a cervical and shoulder injury; however, because the underlying opinion stated that the ALJ did not find a separate and distinct shoulder injury, the Board reversed and remanded, finding that it was improper for the ALJ to rely on work restrictions based on Mullins' shoulder symptoms. The Court of Appeals held that the Board erred by disregarding or misapprehending the ALJ's well-founded factual finding of a disabling medical condition involving disc protrusion and degenerative processes in the cervical spine, with radiculopathy impacting the left shoulder and left upper extremity, all caused or aroused into disabling symptomology by a stipulated injurious traumatic "injury." The Court held that it was imperative to apply a correct understanding of the medical term, "radiculopathy." The ALJ found that Mullins' cervical condition was sufficient, by itself, to cause the left shoulder and left upper extremity symptoms, absent any separate or distinct underlying left shoulder injury. The Court further held that the ALJ was justified in weighing all permanent work restrictions in awarding PTD income benefits.