PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS
DECEMBER 1, 2016 to DECEMBER 31, 2016

I. APPEALS

A. ***Fink v. Fink***

2016-CA-000797 12/22/2016 2016 WL 7405769

Opinion and order by Judge VanMeter; Judge Combs concurred; Judge Thompson dissented and filed a separate opinion.

Appellant brought a civil action against appellee, and the circuit court entered an order directing appellant to pay appellee's attorney's fees. Appellant challenged the award on appeal, but the Court of Appeals dismissed due to his failure to name appellee's attorney as a party to the appeal. Citing to *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001), the Court noted that if fees are ordered to be paid directly to the attorney - as was the case here - the attorney may enforce the order in his own name and, thus, is the real party in interest and a necessary and indispensable party to any appeal from that order. Therefore, the appeal was subject to dismissal because appellee's counsel was a real party in interest and an indispensable party. The Court further held that appellant's belated attempt to cure the deficiency in the notice of appeal by amending it to add appellee's attorney was ineffective and improper. Any attempt to amend the notice of appeal to add indispensable parties must be accomplished within the normal time requirements for filing the notice of appeal.

II. ATTORNEY AND CLIENT

A. ***Applegate v. Dickman Law Offices, P.S.C.***

2014-CA-002031 12/22/2016 2016 WL 7405776

Opinion by Judge VanMeter; Judges Maze and Taylor concurred.

On review from the dismissal of a legal malpractice action, the Court of Appeals affirmed, holding that the malpractice cause of action against appellees was barred by operation of the statute of limitations pursuant to KRS 413.245. Appellant plead guilty to two counts of possession of matter portraying a sexual performance by a minor; the remainder of the charges against him were dismissed, and he was sentenced to serve two consecutive four-year terms of imprisonment on May 27, 2011. On March 5, 2013, appellant filed a petition for a writ of habeas corpus, alleging that his plea and sentence were based upon an unconstitutional ex post facto application of the law. The circuit court issued the writ and appellant was released on April 18, 2013. Appellant then filed a legal malpractice action against appellees on June 2, 2014. However, the action was dismissed on the grounds that a collateral attack on a criminal conviction does not toll the statute of limitations on a claim of malpractice against a criminal defense attorney, and that the statute had expired on the malpractice claim on March 5, 2014 - one year after appellant filed the petition for the writ. The Court of Appeals reaffirmed, citing *Bryant v. Howell*, 170 S.W.3d 421 (Ky. App. 2005) and *Faris v. Stone*, 103 S.W.3d 1 (Ky. 2003), that the filing of a petition for a writ of habeas corpus does not toll the statute of limitations in a malpractice action. Since a petition for a writ of habeas corpus is a collateral attack on the judgment, the one-year period of limitation began to run when appellant's conviction was final or, at the very latest, when appellant discovered that he was being unlawfully detained as a result of his attorney's alleged malpractice and filed his petition for a writ. Therefore, the action was not timely filed and dismissal was merited.

III. CORRECTIONS

A. ***Peterson v. Dunbar***

2015-CA-000513 12/16/2016 2016 WL 7321433

Opinion by Judge Acree; Judge D. Lambert concurred; Judge VanMeter dissented and filed a separate opinion.

The Court of Appeals affirmed the circuit court's summary judgment finding that the jailer of Russell County and his deputies were entitled to qualified official immunity from suit by the estate of a prisoner who died, while in the jailer's custody, from an overdose due to drugs she had ingested prior to her reporting to the detention center. The Court concluded that there were no genuine issues of material fact bearing on the issue of the performance of the jailers' duties. After examining multiple duties related to the intake and monitoring of prisoners in jails, the Court concluded that no ministerial duty was negligently performed and no discretionary duty was performed in bad faith or outside the scope of the jailer's duties or those of his deputies. Judge VanMeter dissented on the grounds that federal and state summary judgment standards are not the same and that while the prisoner's own conduct contributed to her death, comparative fault instructions are designed to apportion fault between the parties.

IV. CRIMINAL LAW

A. ***Fischer v. Commonwealth***

2014-CA-002094 12/16/2016 2016 WL 7321434

Opinion by Judge VanMeter; Judges Maze and Taylor concurred.

On review from the denial of a motion to suppress, the Court of Appeals affirmed, finding that both the procedure and voluntariness of a "knock and talk" in which detectives went to appellant's house outside their jurisdiction was supported by substantial evidence. Appellant entered a conditional guilty plea, reserving the right to appeal the denial of suppression of his first confession made during the knock and talk, as well as a subsequent confession at the Lexington Division of Police. Under *Quintana v. Commonwealth*, 276 S.W.3d 753 (Ky. 2008), a knock and talk is procedurally proper to investigate a resident of a property so long as the officer goes only where he has a legal right to be, just as any member of the public, and the entire encounter is consensual. The Court held that although the detectives were outside their jurisdiction, since they merely stood on the front steps of appellant's home and asked if appellant would speak with them, even offering him the opportunity to choose the location of the conversation, the detectives did not exceed the rights of the public, nor did they take any type of police action that would require jurisdiction. Second, although the application of the knock and talk in *Quintana* focuses on search and seizure under the Fourth Amendment, the validity of a knock and talk reasonably applies also to the constitutional rights afforded by the Fifth Amendment, implicating the voluntariness prong of *Quintana*. The Court held that the detectives did not engage in any forceful or coercive behavior; in fact, at all times, appellant was told he was free to leave, and not currently under arrest. Last, since the Court affirmed that the knock and talk was proper and consensual, no reason existed to support that the second confession, which was also voluntary and Mirandized, should be suppressed.

B. ***Montgomery v. Commonwealth***

2015-CA-001844 12/02/2016 2016 WL 7029201

Opinion by Judge J. Lambert; Judge Acree concurred; Judge Thompson concurred in result only.

Appellant was found guilty of third-degree assault, second-degree wanton endangerment, and resisting arrest. The jury fixed his punishment at five years' imprisonment for the assault conviction, twelve months for wanton endangerment, and thirty days for resisting arrest. On appeal, appellant argued that he was entitled to a directed verdict on all charges, that his convictions for third-degree assault and wanton endangerment constituted a violation of constitutional double jeopardy protections, and that a prosecution witness improperly testified about appellant's prior bad acts. The Court of Appeals affirmed in part, reversed in part, and remanded, holding: (1) it was not clearly unreasonable for the jury to find guilt, thus the trial court did not err in allowing the jury to deliberate on the charges of third-degree assault and resisting arrest; (2) the convictions for third-degree assault and wanton endangerment violated double jeopardy protections; thus, the conviction for wanton endangerment - the lesser of the two offenses - was reversed; and (3) the admission of testimony about prior bad acts (an unpreserved issue) was not palpable error. The matter was remanded to the trial court for entry of a new judgment of conviction on the two remaining counts.

C. *Mullakandov v. Commonwealth*

2015-CA-001587 12/09/2016 2016 WL 7176902 DR Pending

Opinion by Judge Nickell; Judges Combs and Dixon concurred.

Appellant, an Arizona resident, was arrested on a Saturday afternoon for DUI, first offense. About sixteen hours later, a pretrial officer interviewed her in the Logan County Detention Center, telling her she did not qualify for appointed counsel because the value of her home was too great and she earned too much money. She appeared at arraignment on Monday morning without counsel. The district court opened the session by reading a statement of rights to the defendants en masse. During the subsequent colloquy, appellant told the judge she understood her rights and wanted to plead guilty. The court accepted her guilty plea and imposed sentence commensurate with the Commonwealth's offer. After returning to Arizona, appellant hired a lawyer who moved the district court to allow withdrawal of the plea, claiming it had been unknowingly and involuntarily entered because: (1) a deputy jailer had told her she could not leave Kentucky without posting a large cash bond or pleading guilty; (2) she never affirmatively waived her right to a jury trial, to counsel, or to confront her accuser; and (3) she was never told the consequences of pleading guilty without counsel. After a brief hearing, at which appellant testified, the motion to withdraw her plea was denied. The circuit court affirmed the district court on appeal. The Court of Appeals granted discretionary review to determine whether a *Faretta* hearing is required before a defendant is permitted to plead guilty without counsel. The Court held that it was not and applied *Iowa v. Tovar*, 541 U.S. 77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) instead. That case applies specifically to the warning a trial court must convey to an accused before accepting a *pro se* guilty plea. The Court concluded that the district court sufficiently canvassed appellant's constitutional rights with her before accepting her guilty plea. During the plea colloquy she was told she had a right to an attorney and was twice told that pleading guilty would waive that right and all other constitutional rights. Appellant was also told that she was charged with DUI, first offense, and was told the Commonwealth's offer. Appellant never asked for time to hire a lawyer or time to weigh her options, saying instead that she wanted to "resolve" the charge and often talking over the judge rather than listening to the judge. Therefore, the Court of Appeals affirmed.

D. ***Pomeroy v. Commonwealth***

2015-CA-001487 12/22/2016 2016 WL 7405772

Opinion by Judge Thompson; Chief Judge Kramer and Judge Nickell concurred.

Appellant was charged with first-degree possession of a controlled substance and possession of drug paraphernalia. He filed a motion to dismiss the indictment pursuant to KRS 218A.133(2),which provides that a person shall not be charged with or prosecuted for possession of a controlled substance or possession of drug paraphernalia when medical attention is required to assist with a drug overdose. The trial court denied the motion because the statute was enacted after appellant's crimes were committed and could not be applied retroactively. The Court of Appeals reversed and remanded, holding that the statute can be applied retroactively because it creates an immunity from prosecution and not simply a defense. It is a new procedural statute that creates an exception to the general rule that a trial court may not dismiss an indictment prior to trial. Therefore, it may be applied retroactively.

V. CUSTODY

A. *Cherry v. Carroll*

2016-CA-000291 12/22/2016 2016 WL 7405771

Opinion by Judge Nickell; Judges Dixon and VanMeter concurred.

Cherry, the father of three minor boys, was incarcerated. In his absence, the boys' mother, having her own legal issues, left the boys in the care of their great aunt, with whom the Cabinet placed them and to whom Indiana courts ultimately awarded custody. When the great aunt's husband developed significant health issues nearly five years later, she sought another placement for the boys, who were now all over the age of three, and the Cabinet placed them with their maternal grandfather, Carroll. Less than seven months later, the boys were returned to Cherry, prompting Carroll to petition for de facto custodian status and custody. After a hearing, the trial court found Carroll qualified as de facto custodian and awarded him status as such. Nearly three years later, a custody trial was finally held, after which the trial court ordered Cherry and Carroll to share joint custody, with Carroll serving as primary residential custodian. Cherry appealed, claiming that the children had not resided with Carroll one year or more as required by KRS 403.270(1)(a). Carroll moved to dismiss the appeal as untimely, claiming de facto custodian status should have been challenged within thirty days, not three years later. The Court of Appeals held that the designation of status is interlocutory and that the proper time to challenge it is after a custody decision is made. Therefore, the appeal was timely filed. The Court then held that the placement of the children by the Cabinet alone was insufficient to qualify Carroll for consideration as de facto custodian. Instead, any child placed by the Cabinet must reside with the prospective de facto custodian for at least one year while the prospective custodian is the child's primary caregiver and financial supporter. The Court rejected Carroll's argument that the nearly seven months that the children resided with him could be "tacked on" to the nearly five years they had resided with Miller to achieve the mandatory period of one year or more. The Court noted that KRS 403.270(1)(a) defines a de facto custodian as "a person"; thus, it envisions the residency requirement being satisfied in the home of one individual for a continuous year - not in multiple homes with different people. Additionally, during the residency period, the prospective de facto custodian must be a child's primary caregiver and financial provider. Carroll satisfied none of these criteria since it was undisputed that the children resided with him less than seven months. Therefore, because Carroll did not qualify as a de facto custodian, he lacked standing to seek custody. The circuit court's decision was reversed and remanded for an appropriate order returning the children to Cherry's sole custody.

VI. DAMAGES

A. ***PBI Bank, Inc. v. Signature Point Condominiums LLC***

2013-CA-001874 12/02/2016 2016 WL 7030423 DR Pending

Opinion by Judge Jones; Judge Stumbo concurred; Judge Maze concurred in part, dissented in part, and wrote a separate opinion.

PBI Bank, Inc. appealed from a judgment entered following a jury trial in a real estate developer - lender dispute. On appeal, PBI alleged numerous assignments of error: (1) the trial court erred when it failed to grant a directed verdict/JNOV as related to claims of fraud, tortious interference with prospective business advantage, breach of contract, breach of good faith and fair dealing, and promissory estoppel; (2) the jury instructions for fraud, negligence, and tortious interference did not accurately state Kentucky law; (3) the jury rendered an inconsistent verdict; (4) the verdict was impermissibly vague and ambiguous as to damages; (5) allowing "out-of-pocket" damages was clear error; (6) the jury's award amounted to a "double recovery"; (7) there was no evidence of causation or foreseeability to support the jury's damages award; (8) allowing punitive damages was clear error as the damages were based on improper purposes/claims and there was no evidence presented of an "intent to injure"; (9) the jury's award of punitive damages was excessive; and (10) the trial court abused its discretion by refusing to lower post-judgment interest. The Court of Appeals affirmed the judgment on all counts. As to PBI's claim that the circuit court erred in failing to grant a directed verdict/JNOV in its favor, the Court noted that it could not disturb the trial court's decision on appeal absent clear error. Addressing each of the claims in turn, the Court found that Signature Point had presented substantial evidence on each claim, which, when viewed in Signature Point's favor, was sufficient to support the jury's findings. The Court then turned to the jury instructions and found that the instructions, while certainly not perfect, did not materially misstate the law or omit essential elements of the law and, as such, satisfied the "bare bones" approach to jury instructions under Kentucky law. In addressing the damages issues, the Court first noted that PBI had not properly preserved its alleged error that the compensatory damages were speculative and uncertain. Nonetheless, the Court found that even if the claim had been properly preserved, there was no error in the instructions or the verdict regarding compensatory damages and that Signature Point had submitted sufficient evidence to support the amounts awarded. Looking next to the punitive damages award, the Court agreed with the trial court that there was ample evidence in the record showing that PBI had intentionally committed fraud and interfered with Signature Point's business, thus entitling Signature Point to a punitive damages instruction. Addressing PBI's claim that the punitive damages were excessive, the Court analyzed PBI's conduct under the

guideposts set out by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and held that the punitive damages award did not violate either Kentucky law or the United States Constitution. Finally, the Court addressed PBI's assertion that the trial court had abused its discretion by refusing to lower the 12% post-judgment interest rate. The Court examined KRS 360.040, which covers post-judgment interest, and the Kentucky Supreme Court's holding in *Morgan v. Scott*, 291 S.W.3d 622 (Ky. 2009), and held that the trial court had not abused its discretion in refusing to lower the interest rate. In his partial dissent, Judge Maze argued that the amount of punitive damages awarded was excessive in light of the specific circumstances of the case.

VII. FAMILY LAW

A. ***Trimble v. Trimble***

2015-CA-001021 12/02/2016 2016 WL 7030413 Rehearing Pending

Opinion by Judge Clayton; Judges Stumbo and VanMeter concurred.

The parties were married in 2006 and divorced in 2009. At some point during the marriage, Wife paid Husband's accumulated credit card debt. The circuit court entered an order dissolving the marriage on February 25, 2009, but reserved all issues arising out of the dissolution proceedings. Husband subsequently filed Chapter 7 bankruptcy and his debts were discharged in 2011. Wife was given notice of the bankruptcy petition but did not participate in the action. In 2013, the circuit court determined that it did not have authority to impose marital debt upon Husband. Specifically, the court found that Husband could not be ordered to reimburse Wife for her payment of his credit card debt. Wife filed a motion to alter, amend, or vacate, arguing that the credit card debt she had assumed was not dischargeable in bankruptcy under 11 U.S.C.A § 523(a)(5) or (15). The circuit court granted Wife's motion, and this appeal followed. The question before the Court of Appeals was whether the debt Husband accrued during the marriage constituted a post-petition debt not subject to discharge. In affirming the circuit court, the Court first adopted the "fair contemplation" test, which provides that when parties could have fairly contemplated a claim prior to bankruptcy, the claim will be held to have arisen pre-petition, even when the actual right to payment matures post-petition. The Court then noted that the credit card debt in the present case was entirely collateral to child or spousal support, and was, therefore, not dischargeable under 11 U.S.C.A. § 523(a)(5). The Court also held that because Wife assumed Husband's credit card debt during the marriage, under 11 U.S.C.A. § 523(a)(15) that debt would still constitute a debt to a former spouse incurred in connection with a divorce decree and was, therefore, not subject to discharge.

VIII. INSURANCE

A. ***LaCrosse v. Owners Insurance Company***

2015-CA-000418 12/22/2016 2016 WL 7405775 Rehearing Pending

Opinion by Judge VanMeter; Judge Maze concurred; Judge D. Lambert concurred in part, dissented in part, and filed a separate opinion.

On review from an order granting summary judgment in favor of Owners Insurance Co. and Progressive Northern Insurance Co. in an insurance case, the Court of Appeals affirmed in part, holding that the trial court correctly applied Illinois law and correctly offset the underinsured motorist ("UIM") coverage at issue with collateral sources, but reversed in part and remanded, holding that the trial court erred in finding that sufficient evidence had been presented to show a written request or rejection of the higher UIM coverage limit. Following a motor vehicle accident involving an underinsured motorist and appellant, who was driving a commercial vehicle owned by his employer, Tuttle Trucking, appellant sought UIM benefits against both Owners, the insurer for Tuttle Trucking, and Progressive, his personal automobile insurance provider, to cover the expense of his damages. The Court of Appeals first held that the trial court was correct in applying Illinois law since Illinois had the most significant relationship to the formation and performance of both the Owners and Progressive insurance policies/contracts, the test for which is set forth in *Lewis v. Am. Family Ins. Grp.*, 555 S.W.2d 579 (Ky. 1977). The Court also noted that Kentucky has no clear public policy on UIM coverage that would be given preference, citing to *State Farm Mut. Auto Ins. Co. v. Hodgkiss-Warrick*, 413 S.W. 3d 875 (Ky. 2013). Second, the Court held that the trial court erred in relying only on the affidavit of Sandy Tuttle, of Tuttle Trucking, to find that the UIM coverage selected was $100,000, not the $1,000,000 allowed by the insured's liability limits. Under Illinois law, UIM coverage is equal to the amount of liability coverage unless the insurance company obtains a written rejection/request from the insured or applicant. Although evidence other than the original policy can be sufficient, the Court held that this affidavit alone was not sufficient to satisfy the requirement for a written request or rejection to subvert the automatically equivalent UIM coverage provided in the Illinois statute. Absent evidence of such a written request/rejection, the Court vacated the trial court's reliance on this affidavit and remanded for a determination as to whether Tuttle Trucking provided a written request or rejection of the higher UIM limits. Third, the Court held that the trial court correctly used offsets from collateral sources, including liability coverage from the tortfeasor, workers' compensation benefits, and no-fault benefits received by appellant, to reduce each insurer's UIM coverage, since such an offset of UIM benefits was permissible under Illinois law, contractually agreed upon by the parties, and not contrary to Kentucky public policy. Last, since the Court reversed the trial

court's determination of the Owners policy's UIM limits, the Court addressed Owners' cross-appeal regarding the "other insurance" excess clauses contained in both the Owners and Progressive policies, which would make any insurance benefits provided secondary, or excess, to any other applicable UIM coverage. The Court held that because appellant was driving a vehicle covered by Owners and the accident did not involve a "covered auto" under Progressive, neither policy's clause was applicable at the same time as the other, thereby implicating only Progressive's excess clause: the Owners' UIM coverage was primary, and Progressive's UIM coverage was to be applied as excess.

IX. MUNICIPAL CORPORATIONS

A. ***Dearborn v. City of Frankfort***

2014-CA-001801 12/09/2016 2016 WL 7175265 DR Pending

Opinion by Judge Thompson; Judge J. Lambert concurred; Judge Combs concurred in result only.

Appellants were retired police officers formerly employed by the City of Frankfort. They challenged an opinion and order granting the City summary judgment on the officers' breach of contract, negligent misrepresentation, and violation of wage and hour claims on the basis that they had no entitlement to education incentive back pay. The officers argued that they were entitled to education incentive pay because they were told they would receive it while they were being recruited as new hires. The Court of Appeals affirmed the circuit court, holding that the officers were only entitled to be paid in accordance with the Frankfort Code of Ordinances in effect because the City had the authority to change their salaries through ordinance. The Court also held that the officers could not establish equitable estoppel because any reliance on their part was unreasonable given a contrary ordinance and the City's ongoing ability to alter their salaries.

X. TORTS

A. *D.W. Wilburn, Inc. v. K. Norman Berry Associates, Architects, PLLC*

2015-CA-001254 12/22/2016 2016 WL 7405774

Opinion by Judge Thompson; Judges Clayton and Stumbo concurred.

Appellant challenged a summary judgment entered in favor of K. Norman Berry Associates (KNBA). The issues presented were: (1) whether appellant could maintain a negligent misrepresentation claim against KNBA for alleged negligence in preparing plans and specifications for the construction of a school project; (2) whether appellant's claim was precluded by the economic loss rule; and (3) whether change orders and final application for payment waived or released appellant's claim for delay damages. In reversing and remanding, the Court of Appeals held that under the Restatement (Second) of Torts § 552, KNBA owed a duty to appellant independent of its contractual duties to the school board. It further held that the economic loss rule did not apply to a claim for negligent misrepresentation under Section 552 where there was no privity of contract. Finally, the Court held that change orders signed by appellant and the school board did not waive or release appellant's negligent misrepresentation claim because they did not constitute a contract between appellant and KNBA.