PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

DECEMBER 1, 2017 to DECEMBER 31, 2017

I. ATTORNEY AND CLIENT

A. ***Kendall v. Godbey***

2016-CA-001266 12/15/2017 2017 WL 6390496

Opinion by Judge Clayton; Chief Judge Kramer and Judge Taylor concurred.

In a legal malpractice action, appellant challenged the circuit court's grant of summary judgment in favor of appellees. Appellant maintained that appellees committed legal malpractice by missing the statute of limitations while representing her in a negligence action. The facts of the underlying case centered on the rape of appellant by a taxi cab driver. The circuit court granted summary judgment in favor of appellees on the grounds that appellant would not have been successful in her negligent hiring and retention action because the taxi driver's sexual assault was not foreseeable by the cab company and, therefore, it would not have been liable for the driver's actions. As a result, appellant would be unable to succeed in the legal malpractice action. The Court disagreed with both the circuit court and appellees that the cab company owed no duty to appellant. Notwithstanding the requirements for the establishment of duty in negligent hiring and retention cases, in this case the universal duty of care overrode any foreseeability analysis, and the cab company had a duty to its passengers. Since the Court held that the cab company had a duty to its passengers, whether the cab company breached that duty was a question of fact for the jury. The Court further recognized that the common carrier standard of care is still operative law in Kentucky. The common carrier standard of care mandates that a common carrier owes the highest degree of care in transporting passengers. Since a material issue of fact existed as to whether the cab company was liable, the Court reversed and remanded for further proceedings. If the cab company was negligent, appellees may be liable for legal malpractice since the underlying action was not filed before the applicable statute of limitations ran out.

B. ***Large v. Oberson***

2015-CA-001285 12/15/2017 2017 WL 6390663

Opinion by Judge Nickell; Judges Combs and Dixon concurred.

Appellants were sanctioned pursuant to CR 11 after they filed a suit alleging paternity fraud regarding a child who reached her majority twenty years earlier. The Court of Appeals affirmed. Appellants argued that their civil complaint was not inherently meritless, despite being barred on its face by the applicable statutes of limitations, because: (1) the statute of limitations is an affirmative defense, with the possibility of the defendant's waiver of the defense; and (2) paternity fraud as a cause of action did not exist until *Denzik v. Denzik*, 197 S.W.3d 108 (Ky. 2006), and, thus, the statute of limitations should relate from that date. Appellants additionally argued that the circuit court abused its discretion in awarding sanctions in the form of attorneys' fees because appellee could have limited her damages by moving for summary judgment earlier in the proceedings. In affirming, the Court first noted that the complaint went far beyond being merely untimely and that appellee Large made no attempt to dispute paternity in the parties' underlying divorce action. Moreover, appellants not only maintained the subject action after the assertion of the statute of limitations defense, but they then attempted to amend the complaint to include the child as a party. Based on these facts, the circuit court found the case to have been filed and maintained for harassment purposes, justifying a finding of sanctions, and the Court of Appeals agreed. The Court further noted that *Denzik* explicitly states that paternity fraud was not a new cause of action, being "nothing more than ordinary fraud." *Denzik*, 197 S.W.3d at 112. Therefore, the circuit court was correct in finding that appellants' position did not represent a plausible view of the law. Finally, the Court concluded that the circuit court did not abuse its discretion in awarding appellee attorneys' fees because appellee rationally proceeded to document her case as though it were going to trial and there was no evidence suggesting unreasonable delay.

II. CIVIL RIGHTS

A. ***Taylor v. Middletown Fire Protection District***

2016-CA-001042 12/01/2017 2017 WL 5908163 DR Pending

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

In an appeal from the dismissal of an action seeking damages for discrimination pursuant to CR 12.02, the Court of Appeals reversed and remanded. To establish a claim for gender discrimination, appellant had to establish that: (1) she was a member of a protected group; (2) she was subjected to an adverse employment action; (3) she was qualified for the position; and (4) similarly situated, non-protected employees were treated more favorably. There was no argument that appellant successfully established the first and third elements. The Court reversed the circuit court's order on the other two elements, holding that appellant established that a male employee was treated more favorably in a similar situation and was only asked to take a single-rank demotion while she was asked to take a two-rank demotion. The Court further held that due to a lack of discovery, questions remained as to whether appellant was subjected to an adverse employment action. Therefore, discovery was merited on that issue. The Court also denied the passed motion of Kentucky Professional Firefighters (KPFF) for leave to file an *amicus curiae* brief in support of appellant's position. The brief duplicated arguments raised by appellant in her brief and was otherwise not helpful because it addressed a claim for retaliation that appellant did not plead.

III. CRIMINAL LAW

A. ***Mitchell v. Commonwealth***

2016-CA-001319 12/22/2017 2017 WL 6542837

Opinion by Judge Thompson; Judges Clayton and J. Lambert concurred.

Shannquan Mitchell and April Shunnarah appealed from separate judgments incorporating orders of restitution after they pled guilty to facilitation of burglary, second degree, and facilitation of receiving stolen property over $500. Appellants alleged that: (1) there was not substantial evidence of the value of the items stolen; (2) their due process rights were violated because the items claimed to be stolen were not identified prior to the restitution hearing; (3) the circuit court erroneously added sales tax to the amount owed; (4) the circuit court erroneously ordered the payment of post-judgment interest; and (5) the circuit court erred when it imposed $500 fines against them. The Court of Appeals affirmed in part, vacated in part, and remanded. The Court first held that the testimony of the victim regarding the value of the stolen items based on her internet search was sufficient evidence. The Court further held that there was no due process violation by the addition of items at the hearing to those previously disclosed because the circuit court offered additional time for the defense to prepare, which was not accepted. The Court next held that the circuit court erred when it added sales tax to the amount of restitution owed, as sales tax was not a component of the value of the item. Although restitution may be based on replacement value, there was no evidence that the victim paid or would pay sales tax on the items, if replaced. Finally, the Court held that an award of post-judgment interest was improper under RCr 11.06(1) and that the circuit court erred when it imposed fines because appellants were indigent.

B. ***Stephenson v. Commonwealth***

2016-CA-000013 12/01/2017 2017 WL 5907976 DR Pending

Opinion by Judge Maze; Judges Dixon and Johnson concurred.

Appellant was convicted of theft of identity after he provided his brother's identifying information to police as his own following a traffic stop. On appeal, the Court of Appeals vacated and remanded, holding that giving a false name to a police officer is a lesser-included offense to theft of identity; therefore, given the evidence, the circuit court erred in failing to give an instruction on that offense. Under KRS 523.110(1), a person is guilty of giving a false name to a police officer when he gives a false name or a false address to an officer. In contrast, KRS 514.160 provides that a person is guilty of theft of identity when he knowingly uses more than one item of identifying information belonging to another person. While appellant provided his brother's name to police, he was unable to accurately remember his brother's birth date or social security number. Accordingly, a jury could reasonably conclude that appellant was not guilty of the greater offense, but was guilty of the lesser offense of giving a false name. The Court also concluded that the warning required by KRS 523.110(1) is not a separate element of the offense of giving a false name, but is merely a prerequisite to bringing the charge. Finally, the Court held that a retrial was necessary in any event because the circuit court improperly allowed the Commonwealth Attorney to testify regarding the scope of the identity-theft and false-name statutes.

C. ***Terry v. Commonwealth***

2016-CA-001406 12/08/2017 2017 WL 6061823 Released for Publication

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

Following a jury trial, appellant was convicted of complicity to first-degree assault, complicity to first-degree burglary, and intimidating a participant in the legal process. The Court of Appeals affirmed, holding that the circuit court did not commit any error or abuse its discretion in denying appellant's motion to suppress statements that he made during the execution of a search warrant. The Court reasoned that the exchange between appellant and a police officer, during which the officer answered questions appellant asked, did not constitute an interrogation. The Court also concluded that no discovery violation had occurred in providing appellant with the oral statement information three years later because the trial was held months later. The circuit court also did not err in denying appellant's request to cross-examine a forensic biologist on her testimony in a 1993 trial about her visual examination of hair, finding that testimony to be far removed from her blood analysis. The Court further upheld the circuit court's permitting the Commonwealth to ask the investigating officer to offer his opinion on the ability of shooting victims to accurately identify their assailants and its naming a juror as an alternate and dismissing her at the conclusion of the trial due to her work schedule. Finally, the Court found no abuse of discretion in permitting the introduction of the victim's credit card statement pursuant to KRE 803(6) after it had been authenticated by an investigator for the bank, although the investigator's affidavit was not introduced into the record. The circuit court properly found that the credit card statement was reliable based upon the parties' discussion as to its authenticity as well as the victim's identification of the statement as the one he received in the mail.

IV. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. ***Allen v. Gueltzow***

2017-CA-000605 12/08/2017 2017 WL 6062231 Released for Publication

Opinion by Judge Johnson; Chief Judge Kramer and Judge Jones concurred.

On January 13, 2017, a hearing was conducted on the father's petition for a DVO, filed on behalf of his two minor children, against the children's stepfather. At the hearing, the family court relied only upon the testimony of the father. While the stepfather was present, he invoked his Fifth Amendment right not to testify since he was facing criminal charges as a result of the altercation giving rise to the request for the DVO. While the mother was present at the DVO hearing, she did not testify. The family court judge decided not to have either of the children called to testify, based upon the judge's decision that such an event would be too traumatic for a six-year-old child. However, the father was not present when the events in question occurred and could only testify as to what his children had told him had happened. The family court attempted to supplement the father's testimony by admitting into evidence the police report concerning the incident. The Court of Appeals vacated and remanded, holding that the testimony of the father constituted hearsay and, thus, was not admissible. The Court further held that a police report is not exempt from hearsay unless it is offered for an admissible purpose. In this case, the family court sought to rely upon the police report for the truth of the events that occurred. Having struck the father's testimony and the police report, the Court vacated and remanded the case to the family court for further proceedings.

V. ESTOPPEL

A. ***Bickett v. Cecil***

2014-CA-001985 12/08/2017 2017 WL 6062120 DR Pending

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

Appellant Joe Keith Bickett was part of the "Cornbread Mafia" responsible for distributing large quantities of marijuana along the Eastern Seaboard in the 1980s. When arrest, indictment, and conviction for various drug activities were imminent, he transferred - for consideration - two tracts of land to his sister and her husband, Daniel and Mary Kathleen Cecil. After a jury trial, Bickett served a twenty-year term in federal prison, followed by eight years of supervised probation. Upon his release from prison, he sought return of the land - specifically the 196-acre "Thompson farm" - claiming that it was transferred to the Cecils pursuant to a confidential oral trust and was to be returned to him upon request. Bickett claimed that his oral trust was only with Daniel Cecil, but he admitted that he had no written proof of such an agreement. The Cecils argued that they paid Bickett for the land and held nothing for him in trust. The Cecils would ultimately argue defenses of the merger doctrine, issue preclusion, unclean hands, accord and satisfaction, judicial estoppel, and statutes of both limitations and frauds. The Court of Appeals unanimously affirmed the circuit court's award of summary judgment to the Cecils on grounds of judicial estoppel, issue preclusion, and the merger doctrine. The crux of the appeal concerned the federal presentence investigation report (PSI) filed in the federal criminal case and used by the federal court to determine Bickett's "ability to pay" fines. Bickett faced a maximum aggregate fine of $6,500,000. The PSI showed that Bickett claimed virtually no assets and a fine of just $17,500 was imposed. Importantly, Bickett claimed no interest in the "Thompson farm" on the PSI, a position diametrically opposed to the one he took in this litigation. Also at odds with Bickett's state court claim was the financial affidavit he signed under oath in 1990 in federal court, again listing only miniscule assets - some of which had been seized by the federal government. Again, the financial affidavit failed to mention the "Thompson farm."

VI. IMMUNITY

A. ***County Employees Retirement System v. Frontier Housing, Inc.***

2014-CA-001623 12/22/2017 2017 WL 6542741

Opinion by Judge Nickell; Judges Acree and Jones concurred.

In 2002 and 2003, two Kentucky non-profit corporations providing low-and moderate-income housing in Eastern Kentucky applied for and were granted membership in the County Employees Retirement System (CERS), a public retirement system administered by the Kentucky Retirement Systems (KyRS) for county and school board employees under KRS 78.510 *et seq*. In 2013, the two non-profits jointly petitioned the Franklin Circuit Court for a declaratory judgment deeming them ineligible to participate in CERS and allowing them to withdraw therefrom because neither is a county or a school board. KyRS argued that allowing the non-profits to cease participating in CERS would shift their portion of the unfunded liability of CERS to other participants and potentially to the state. KyRS also suggested that other entities would seek to abandon CERS if this litigation succeeded. KyRS asserted multiple defenses, most notably sovereign immunity. On the strength of *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833 (Ky. 2013), the Franklin Circuit Court found that sovereign immunity does not apply to a petition for declaratory judgment because all that is being decided is the rights of the party - it does not reach into the state's coffers. The Court of Appeals granted immediate *de novo* review of what would otherwise be an interlocutory appeal in light of the assertion of sovereign immunity. Limiting its review to that claim, the Court unanimously affirmed the denial of the motion to dismiss.

VII. JUDGMENT

A. ***HP Hotel Management, Inc. v. Layne***

2016-CA-001542 12/08/2017 2017 WL 6061821 Released for Publication

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

This appeal concerned the denial of motions to set aside a default judgment against appellants in a personal injury action pursuant to CR 55.02 and CR 60.02. The Court of Appeals reversed and remanded, holding that the circuit court abused its discretion in denying the motions. Appellee served appellants, who were foreign companies doing business in Kentucky, pursuant to KRS 454.210. However, both claimed that they did not have actual notice of the lawsuit as they never received service. The Court considered appellants' arguments that they did not have a fair opportunity to present their defenses to appellee's lawsuit due to a lack of action notice and that appellee served them through the Office of the Secretary of State rather than through their registered agents. The Court applied the three-factor analysis set forth in *First Horizon Home Loan Corp. v. Barbanel*, 290 S.W.3d 686 (Ky. App. 2009), which requires consideration of whether the defaulting party: (1) provided the trial court with a valid excuse for defaulting; (2) demonstrated a meritorious defense; and (3) established the absence of prejudice to the non-defaulting party. Here, only the first element was at issue. Appellants argued that because they did not have actual knowledge of the lawsuit, their conduct was not culpable, and that even if it were, the other two factors entitled them to relief. The Court held that based upon the circumstances of this case, the default judgment should have been set aside due to the lack of culpable conduct on the part of appellants and problems evident with service.

VIII. LIBEL AND SLANDER

A. ***National College of Kentucky, Inc. v. WAVE Holdings, LLC***

2016-CA-000091 12/15/2017 2017 WL 6390828

Opinion by Judge Stumbo; Judges Clayton and Thompson concurred.

The Court of Appeals affirmed a grant of summary judgment which found that appellees did not defame National College of Kentucky, Inc. National College is a for-profit college which sued a Louisville news station, a news reporter, and a former student for defamation based on statements made in two news reports. The Court held that the statements were either true or protected opinion; therefore, they were not actionable as defamation.

IX. WORKERS' COMPENSATION

A. ***Overstreet v. American Printing House for the Blind***

2017-CA-000448 12/08/2017 2017 WL 6061796 Released for Publication

Opinion by Judge J. Lambert; Judges Clayton and Thompson concurred.

Appellant was injured twice in 2014 and received permanent partial disability benefits as a result. The Administrative Law Judge (ALJ) determined that those benefits terminated when appellant reached the normal "old-age" Social Security retirement age pursuant to KRS 342.730(4). The Workers' Compensation Board affirmed, relying primarily on *McDowell v. Jackson Energy RECC*, 84 S.W.3d 71 (Ky. 2002). The Court of Appeals reversed and remanded, noting that the Supreme Court of Kentucky reversed its holding in *McDowell*, *supra*, in its decision of *Parker v. Webster Cty. Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017). That case holds that KRS 342.730(4) violates the right to equal protection and is constitutionally infirm. Accordingly, the Court reversed the Board's decision and remanded to the ALJ for entry of an opinion and award consistent with the opinion.