PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

FEBRUARY 1, 2018 to FEBRUARY 28, 2018

I. ADMINISTRATIVE LAW

A. ***Wasson v. Kentucky State Police***

2015-CA-000815 02/09/2018 2018 WL 792200

Opinion by Judge Nickell; Judges Combs and Dixon concurred.

Appellant, an injured Kentucky State Trooper, was removed from injured status and returned to limited duty by the Kentucky State Police Commissioner pursuant to KRS 16.165 even though his medical condition had not changed from prior years. As authorized by KRS 16.165, appellant appealed the Commissioner's decision. The circuit court upheld the decision after determining that it was neither arbitrary nor capricious. The Court of Appeals affirmed. The Court noted that the case presented a matter of first impression and cited to *City of Homestead v. De Witt*, 126 So.2d 582 (Fla. Dist. Ct. App. 1961), for the principle that decisions to remove an officer from payroll must be reviewed by examining the governing charter - or, in this case, statute. Here, the Commissioner's generosity in choosing not to remove appellant from injured status sooner was a benevolent gratuity, not a right. Under KRS 16.165, the Commissioner is expressly authorized to assign an injured officer to limited duty based on "medical reports." From the record, this is what happened here. Therefore, KSP did not exceed its granted powers. The Court further concluded that appellant was not entitled to prior notice of the Commissioner's decision or a hearing under KRS 16.165. Thus, his procedural due process rights were not violated.

II. ARBITRATION

A. ***Hardy v. Beach***

2015-CA-000691 02/16/2018 2018 WL 911851

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

Appellant challenged the dismissal of his breach of contract claim. At issue was whether an arbitration clause deprived the circuit court of subject-matter jurisdiction beyond a ruling as to the binding nature of the arbitration clause itself. The Court of Appeals held that it did not and that the circuit court had jurisdiction to issue injunctive relief to maintain the status quo if a party was so entitled. However, the Court concluded that in this case appellant had not shown entitlement to injunctive relief; therefore, it affirmed.

III. CHILD CUSTODY AND RESIDENCY

A. ***Garvin v. Krieger***

2015-CA-001819 02/23/2018 2018 WL 1021426

Opinion by Judge Taylor; Judge Jones concurred; Judge D. Lambert dissented and filed a separate opinion.

Appellants challenged an order declaring two appellees *de facto* custodians and awarding them sole permanent custody of a minor child. In a 2-1 vote, the Court of Appeals reversed and remanded. Appellants specifically argued that only one individual or a married couple may be considered a *de facto* custodian under KRS 403.270. In this case, the appellees awarded custody were an unmarried couple. Consequently, appellants asserted that it was reversible error to designate them *de facto* custodians of the child. The Court agreed, noting that case law clearly provided that only one individual may qualify as a *de facto* custodian under the statute; a married couple may also qualify, having been deemed a "single unit" under KRS 403.270(1). However, there is no authority recognizing an unmarried couple as a single unit for purposes of *de facto* custodian status. Therefore, reversal was merited. In dissent, Judge Lambert argued that the family court's decision should stand because Kentucky now recognizes the concept of fictive kin.

IV. CHILD SUPPORT

A. ***Jarboe v. Reynolds***

2016-CA-001900 02/16/2018 2018 WL 910816

Opinion by Judge Combs; Judges Jones and Nickell concurred.

At issue in this appeal was the circuit court's determination of a child support obligation. The Court of Appeals vacated and remanded the circuit court's order, which had imputed income to Father solely based on Mother's annual income at the time. The Court held that imputation of income to a disabled parent based on potential income is not warranted under KRS 403.212(2)(d), the statute addressing voluntary unemployment or underemployment. Instead, it must be calculated based upon a consideration of his "recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community."

V. CIVIL RIGHTS

A. ***Lindsey v. Board of Trustees of University of Kentucky***

2016-CA-000521 02/02/2018 2018 WL 663090 Rehearing Pending

Opinion by Judge Jones; Judge Stumbo concurred; Judge J. Lambert concurred in part, dissented in part, and filed a separate opinion.

Appellant challenged orders granting summary judgment and dismissing her claims for violations under the Kentucky Civil Rights Act, including both race and gender discrimination under KRS 344.040 and retaliation under KRS 344.280. Appellant, an African-American woman, worked at the University of Kentucky from 1990 until 2006. During that time, she believed that on three separate occasions she was passed over for promotion. Appellant alleged that the decisions not to promote her were impermissibly driven by the race and gender biases of her supervisors in violation of the Act. She further alleged that she was retaliated against because of her complaints; therefore, she filed a lawsuit seeking damages. The Court of Appeals affirmed the dismissal of appellant's discrimination claims; however, it reversed the dismissal of her retaliation claim and remanded for further proceedings. Applying the modified *McDonnell-Douglas* framework to appellant's retaliation claim, the Court held that the evidence in the record, while not conclusive, was sufficient - for purposes of summary judgment - to raise an inference of discriminatory intent on the University's behalf; specifically, appellant raised the inference that her supervisors closely scrutinized her work in retaliation for her grievance and her lawsuit. The Court reached this conclusion in accordance with the "cat's paw" theory of liability, whereby a plaintiff can hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision. In a separate opinion, Judge Lambert dissented as to the reversal of the dismissal of appellant's retaliation claim.

VI. CONTRACTS

A. ***Bailey v. Kentucky Lottery Corporation***

2016-CA-001740 02/16/2018 2018 WL 910824

Opinion by Judge Combs; Judges Jones and Nickell concurred.

Appellant sued the Kentucky Lottery Corporation for breach of contract, fraud, and misrepresentation after his winning entry in a second-chance promotion for non-winning "Scratch-Off" tickets was disqualified due to the Lottery's inability to timely reach him. The Lottery contended that appellant failed to claim his prize in timely fashion and that he failed to maintain a current phone number with the Lottery for notification purposes - both of which were required by the terms of the ticket. The circuit court entered summary judgment in favor of the Lottery, and the Court of Appeals affirmed. The Court held that appellant failed to adhere to the contest rules and regulations - *i.e.*, the rules of the contract - that were in effect when he entered his non-winning tickets into the online drawing. Since appellant failed to comply with the requirements of the Lottery's promotion, the Lottery had a contractual right to disqualify his entry from the drawing.

VII. CRIMINAL LAW

A. ***Cherry v. Commonwealth***

2017-CA-000444 02/16/2018 2018 WL 910814 Rehearing Pending

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

Appellant was convicted of a number of offenses, including murder, and sentenced to life imprisonment. His conviction was upheld on direct appeal in *Cherry v. Com.*, 458 S.W.3d 787 (Ky. 2015). Appellant then sought RCr 11.42 relief, arguing that his trial and appellate counsel were ineffective. The circuit court denied the motion without holding an evidentiary hearing. On appeal, appellant argued that trial counsel failed to hire a second investigator as well as expert witnesses in the fields of ballistics and toxicology, and that counsel was ineffective for failing to advise him regarding a guilty plea. Appellant also insisted that the circuit court erred in failing to hold an evidentiary hearing on his motion. The Court of Appeals affirmed, holding that each of appellant's claims was refuted by the record; that, even were the allegations true, appellant had failed to demonstrate that the outcome of his trial would have been different; and that the circuit court was not required to hold an evidentiary hearing when the allegations were refuted on the face of the record.

B. ***Commonwealth v. Cambron***

2016-CA-001178 02/02/2018 2018 WL 664815 Rehearing Pending

Opinion by Judge Nickell; Judges Acree and Dixon concurred.

Appellee was charged with murder and tampering with physical evidence. He confessed to both crimes, was declared indigent, and is represented by the Office of the Louisville Metro Public Defender (OLMPD). Without the Commonwealth's knowledge, the Jefferson Circuit Court entered more than thirty *ex parte* orders, all of which were sealed and none of which was listed on the record index. As reflected in the orders, all but one resulted from an oral motion. There is no record of the precise requests, stated justification, or analysis the circuit court may have conducted before signing and entering the orders. One of the orders directed the Louisville Metro Police Department Crimes Against Children Unit (CACU) to produce appellee's complete record and to deliver it to the defense team within ten days. Rather than complying with the order, CACU alerted the prosecution to its receipt. Upon learning of the order for production, the Commonwealth moved to quash it and sought disclosure of the "nature" of more than thirty other sealed *ex parte* documents discovered in a CourtNet search. Had CACU not revealed the order - a custom OLMPD characterized as "common practice in Jefferson County and throughout the state" - secretly using the trial court to procure records without notice to the Commonwealth or an opportunity to be heard would continue. The circuit court denied the Commonwealth's motions *in toto*, finding appellee's rights - to remain silent, not reveal his defense, and receive due process - trumped any argument the Commonwealth could muster. The circuit court described its role as "simply expediting the receipt of records to which [appellee], in good faith, believes he is legally entitled but that are being denied to him due to circumstances outside of his control." The record demonstrated no actual denial of records by any source and no showing of entitlement to desired records. The Court of Appeals unanimously rejected the circuit court's analysis, giving it no deference, deeming it an abuse of discretion, and concluding that the sparse record could not support it. The Court set forth multiple avenues of acquiring records - none of which was attempted by the defense - holding that when a party seeks the trial court's help, opposing counsel must be made aware of the request and given the opportunity to participate and respond. The Court concluded that the subject practice constituted a violation of SCR 4.300, Canon 3(B)(7), which authorizes *ex parte* communication between a judge and party in only limited circumstances, that it was not expressly authorized by law, and that it did not fit within approved scenarios. The Court further noted that the better practice would have been for defense counsel to move for an order - giving notice to the Commonwealth -

requiring the production of records with delivery to the circuit court. Following *in camera* inspection by the circuit court, the records would have been made available - in whole or in part - to both parties or, if appropriate, to the defense alone.

C. ***Commonwealth v. Ford***

2016-CA-001774 02/09/2018 2018 WL 792066

Opinion by Judge Clayton; Judges Dixon and Maze concurred.

The Commonwealth appealed from an order granting appellee's motion to expunge his felony conviction on four counts of uttering a forged check. The Commonwealth argued that the expungement was erroneously granted because the convictions arose from multiple incidents, whereas the expungement statute, KRS 431.073, only permits expungement of convictions "arising from a single incident." The Court of Appeals agreed and reversed. Appellee passed the forged checks, which were all drawn on the same account, on four different days at three different institutions over a ten-day period. The Court held that even though the four counts were contained in one indictment, under the plain language of the statute the conviction simply did not arise from a "single incident."

D. ***Commonwealth v. Martin***

2016-CA-001017 02/23/2018 2018 WL 1021423

Opinion by Judge Johnson; Judge D. Lambert concurred; Judge Combs dissented and filed a separate opinion.

Appellee pled guilty to two counts of distributing matter portraying a sexual performance by a minor and twenty counts of possessing matter portraying a sexual performance by a minor, for which he received a sentence of six years' imprisonment. Upon his sentencing, appellee was immediately taken into custody. After serving 204 days of his sentence, appellee sought shock probation. After a hearing, the circuit court granted his motion. The Commonwealth filed this appeal questioning whether the circuit court acted outside its jurisdiction since KRS 439.265 requires that a motion for shock probation be filed not earlier than 30 days nor later than 180 days after a defendant has been incarcerated following conviction and sentencing. In a 2-1 vote, the Court of Appeals held that the time for filing a motion for shock probation begins to run when the inmate is delivered "to the keeper" of the correctional institution, *i.e.*, when the inmate is placed in the custody of the Department of Corrections, regardless of where he may be housed. Because appellee did not file his motion for shock probation within 180 days of being taken into custody, the majority held that the circuit court misread KRS 439.265 and acted without jurisdiction, and it reversed the grant of shock probation.

E. ***Commonwealth v. Wheeler***

2017-CA-000573 02/23/2018 2018 WL 1021247

Opinion by Judge Jones; Judges Combs and Nickell concurred.

Following his arrest for DUI at a traffic-safety checkpoint operated by the Kentucky State Police, Paul Brady moved the district court to suppress all evidence obtained as a result of the checkpoint. Citing to the factors set forth in *Commonwealth v. Buchanon*, 122 S.W.3d 565 (Ky. 2003), Oldham District Court Judge Wheeler granted the motion after determining that the traffic checkpoint was unreasonable and violated Brady's civil liberties. Judge Wheeler specifically emphasized that no media notice had been issued to advise the public of the checkpoint and that there were no warnings, signs, or cones set out on the road to notify the public. Accordingly, she found that KSP had failed to comply with the third *Buchanon* factor, which requires the checkpoint to be readily apparent to approaching motorists. The Commonwealth petitioned the Oldham Circuit Court for a writ directing Judge Wheeler to reverse her order; this petition was denied. On appeal, the Court of Appeals agreed with the Commonwealth that seeking a writ was the proper avenue for relief from the suppression order and that if Judge Wheeler's ruling was erroneous, the Commonwealth would suffer irreparable injury without the grant of a writ. The Court ultimately concluded, however, that Judge Wheeler's ruling was not erroneous. The Court noted that the facts of the case were substantially similar to those in *Commonwealth v. Cox*, 491 S.W.3d 167 (Ky. 2015). In both *Cox* and the present case, the troopers working the traffic checkpoints had been in uniform and had activated the emergency lights on their vehicles; however, there were no warning signs, no cones set up, and no media notice provided to notify the public of the checkpoint. In *Cox*, this was held to be inadequate notice, and the Court reached the same conclusion here. The Court further noted that perfect compliance with *Buchanon* is not required, but it determined that Judge Wheeler had considered the totality of the circumstances surrounding the checkpoint in determining that the checkpoint did not satisfy constitutional requirements. Accordingly, the Court affirmed the denial of the Commonwealth's petition for a writ.

F. ***Evans v. Commonwealth***

2016-CA-001327 02/23/2018 2018 WL 1021422

Opinion by Judge Maze; Judges Clayton and Dixon concurred.

Appellant was an inmate at the Kentucky State Penitentiary in Eddyville, Kentucky. When three officers tried to move him to a different cell, he took the clothing smock he was wearing, soaked it in the toilet in his cell, and flushed the toilet several times. He then threw the smock towards the officers and liquid from the smock hit the officers. All three officers testified that the liquid smelled strongly of urine, though no one saw appellant urinate in the toilet. After a trial, a jury found him guilty of three counts of third-degree assault. During the sentencing phase, an employee of the Department of Probation and Parole testified that if the jury returned a maximum verdict of five years on each count, running consecutively, appellant would be eligible for parole in three years. During the Commonwealth's closing at sentencing, the Commonwealth told the jury that if they gave appellant the maximum fifteen years, "he's only looking at three years to serve," referencing the testimony of the Probation and Parole employee. Appellant was subsequently sentenced to four years' imprisonment on each count, to run consecutively. On appeal, appellant challenged the Commonwealth's statement at closing. Applying *Ruppee v. Commonwealth*, 754 S.W.2d 852 (Ky. 1988), the Court of Appeals held that the Commonwealth's statement was a misstatement of law. Moreover, the jury was clearly affected by the statement because they asked how much time appellant would actually serve if they gave him four years on each count, a question the trial court was unable to answer. The Court determined that a substantial possibility existed, therefore, that the result would have been different had the Commonwealth not misstated the law. Therefore, the misstatement caused a manifest injustice and was palpable error necessitating reversal for a new sentencing hearing.

G. ***Phillips v. Delahanty***

2016-CA-001956 02/23/2018 2018 WL 1021253

Opinion by Judge Jones; Judges Combs and Nickell concurred.

In October 2010, appellant was arrested and charged with DUI, first offense. She subsequently entered a guilty plea on that charge and was informed that her guilty plea would make her susceptible to KRS 189A.010(5), which enhances penalties for subsequent DUI offenses committed within a specified "look-back" period. At the time appellant pleaded guilty, the look-back period was five years. In April 2016, SB 56 was signed into law. SB 56 amended the look-back period in KRS 189A.010(5) from five years to ten years. Six days after the amendment, appellant was again charged with DUI, first offense. In light of the amendment to the look-back period, the Commonwealth moved the district court to amend the charge against appellant to DUI, second offense. Over appellant's objections, Jefferson District Court Judge Anne Delahanty granted the Commonwealth's motion to amend the charge. The Commonwealth then moved for pretrial suspension of appellant's driver's license. Appellant requested a continuance and filed a petition for a writ of mandamus with the Jefferson Circuit Court. In her petition, appellant contended that Judge Delahanty had erroneously interpreted and applied SB 56 as retroactive and that she would suffer an irreparable injury, with no adequate remedy by way of appeal, if her driver's license was suspended for the pretrial period. The circuit court found that pre-trial suspension of appellant's driver's license did not rise to the level of injury required for issuance of a writ of mandamus and that, if and when appellant was convicted on the DUI charge, she had an adequate remedy by way of appeal. Therefore, the circuit court denied appellant's petition. The Court of Appeals agreed with the circuit court that appellant had failed to demonstrate that she lacked an adequate remedy by way of appeal or that she would suffer an irreparable injury if her petition for a writ was not granted. Further, the Court determined that appellant could not show that Judge Delahanty had acted erroneously in granting the Commonwealth's motion to amend the charge against her. The Court noted that *Commonwealth v. Jackson*, 529 S.W.3d 739 (Ky. 2017), had confirmed that Judge Delahanty was acting appropriately in applying the ten-year look-back period to appellant's DUI charge. Accordingly, the Court affirmed the circuit court's denial of Blaire's petition for a writ of mandamus.

VIII. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. ***Benson v. Lively***

2016-CA-001344 02/02/2018 2018 WL 663003

Opinion by Judge Jones; Judges Stumbo and Taylor concurred.

Appellant challenged an amended domestic violence order entered against him in June 2016. Specifically, appellant challenged the circuit court's addition of language prohibiting him from possessing any firearms during the pendency of the amended DVO. The Court of Appeals affirmed, holding that the circuit court retained jurisdiction under CR 60.01 to correct its own clerical mistake and to clarify its original order even though more than ten days had passed between entry of that order and entry of the amended order. The time restrictions of Rule 59.05 did not apply. Next, the Court held that the circuit court properly found that the parties had "lived together" and properly entered a DVO ordering appellant to surrender his firearms. KRS 403.750 provides that "[a]ny family member or any member of an unmarried couple" may file a petition for a protective order under the domestic violence statutes. Here, the evidence showed that the parties were in an intimate relationship over the course of six years and that they lived together for a period of at least seven weeks. This was sufficient to establish that the parties were "an unmarried couple" for purposes of entering a DVO.

IX. ESTATES

A. ***Sluss v. Estate of Sluss***

2016-CA-001826 02/16/2018 2018 WL 910819

Opinion by Judge Combs; Judges Jones and Nickell concurred.

This appeal was brought in a probate case in which the issue was a challenge to the testamentary capacity of the testatrix. Appellant - her daughter - challenged the entry of summary judgment in favor of her aunt, the sister of the testatrix, and the executrix of the estate. The Court of Appeals affirmed, holding that appellant presented insufficient affirmative evidence as to the alleged lack of testamentary capacity. Bare allegations and speculation fail to constitute affirmative evidence of incapacity or of undue influence.

X. FAMILY LAW

A. ***Goodlett v. Brittain***

2016-CA-000632 02/23/2018 2018 WL 1022546

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

Michael Goodlett appealed from an order granting grandparent visitation to Bill and Marsha Brittain (the Brittains). The Brittains also appealed from that order, alleging that the visitation awarded was inadequate. The Court of Appeals first concluded that the circuit court had subject matter jurisdiction over the matter even though the Brittains withdrew their petition for visitation prior to its service on Goodlett and subsequently re-opened it. The Court noted that the circuit court clearly had subject-matter jurisdiction over the petition for grandparent visitation; however, it lost particular-case jurisdiction when it dismissed the petition at the Brittains' request. The Court held, though, that because Goodlett did not object to the motion to re-open the case or request specific findings under CR 60.02, he effectively consented to the circuit court's exercise of jurisdiction over the case and waived any right to raise the issue on appeal. The Court next agreed with Goodlett that the circuit court's factual findings were insufficient to justify an award of grandparent visitation. Therefore, the Court reversed and remanded for entry of additional findings.

B. ***Lewis v. Estate of Lewis***

2015-CA-001369 02/09/2018 2018 WL 793119

Opinion by Judge Nickell; Judges Dixon and Jones concurred.

Richard and Linda Kay Lewis entered into a marital settlement agreement (MSA) dividing their assets. Linda agreed to convey the marital residence to Richard who, in return, was to execute a will bequeathing the residence and its contents to Linda at his death, providing that he still owned the property. Linda was to execute a will leaving all of her property to the parties' two sons. The day after a decree was entered incorporating the terms of the MSA, the parties met with shared counsel to execute the deed and wills. Pursuant to an alleged oral agreement, Richard's will was modified to mirror Linda's, *i.e.*, leaving all of his property to the parties' sons. Following Richard's death, Linda filed a claim against his estate seeking possession of the marital home and its contents. The claim was rejected, and Linda subsequently filed suit seeking specific performance of the MSA and conveyance of the marital home and contents to her. Throughout the proceedings, Linda denied agreeing to the modification of Richard's will and classified any statements to the contrary as lies, including those from her sons and counsel who had represented the couple through their divorce. The circuit court found the existence of an oral modification to the MSA, rejected Linda's claim against the estate, and ordered probate to proceed. Seeking reversal, Linda appealed and argued that the MSA specifically precluded modification. Relying on *Brown v. Brown*, 796 S.W.2d 5 (Ky. 1990), she contended that the parties settled their affairs "with a finality beyond the reach of the Court's continuing equitable jurisdiction." The Court of Appeals affirmed after concluding that the MSA provision prohibiting modification applied only to judicial actions; it did not preclude amendments or alterations by the parties without court intervention. The circuit court was not asked to modify the terms of the MSA but instead was tasked with enforcing its terms, including any modifications made by the parties.

C. ***Mays v. Mays***

2016-CA-001409 02/23/2018 2018 WL 1021420

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

A separation agreement between an ex-husband and ex-wife included a maintenance provision that prohibited modifying the obligation to pay maintenance but was silent regarding modification of the maintenance amount. The Court of Appeals affirmed the family court's order denying the ex-husband's motion to find the entire agreement unconscionable. However, the Court reversed the family court's denial of the ex-husband's motion to modify maintenance and remanded to determine whether the ex-wife was cohabitating and, if so, whether that constituted changed circumstances sufficient to justify modification of the maintenance amount based on KRS 403.250.

XI. FEES AND COSTS

A. ***Energy and Environment Cabinet v. Bowling***

2016-CA-001181 02/02/2018 2018 WL 663004

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

The Court of Appeals reversed an order directing the Energy and Environment Cabinet to pay the costs of a receiver. The Court held that taxpayers are not responsible for a receiver's shortfalls and that the circuit court failed to consider CR 54.04, which provides that when the Commonwealth or one of its agencies is involved in a civil action, fees shall only be imposed to the extent that the law permits. The Court further held that: (1) although a receiver's expenses are typically paid from revenue generated by the receivership, when there is a shortfall the expenses can be shifted as costs to the parties; and (2) the circuit court cannot shift the costs to the successful plaintiff on the basis of nothing more than that he instituted an action that required appointment of a receiver and in which he was the prevailing party.

XII. IMMUNITY

A. ***Harrod v. Caney***

2016-CA-000744 02/23/2018 2018 WL 1021339

Opinion by Judge Thompson; Judges Johnson and Jones concurred.

The Court of Appeals affirmed an opinion and order denying the Franklin County Coroner's motion for summary judgment based on absolute immunity and qualified immunity. The coroner and his deputy seized the body of a man who died from natural causes based on a dispute about the disposition of his body. Prior to his death, his wife completed a pre-need cremation authorization for her husband as his power of attorney. However, his daughter sought to enforce the decedent's wish, as expressed in a non-binding note, for burial above his first wife with the arrangements to be handled by the funeral home owned by the coroner. The coroner refused to release the body until they reached an agreement, with the daughter's wishes ultimately prevailing. The wife subsequently filed a complaint against the coroner alleging unlawful invasion of the right of sepulture, mishandling and mutilation of a corpse, tortious interference with contract, and intentional infliction of emotional distress. The Court of Appeals concluded that while the claim by the wife against the coroner in his official capacity was barred by absolute immunity, his office was still liable for the deputy coroner's actions under KRS 72.045. The Court further held that it could not be found as a matter of law that the coroner acted in good faith in seizing the body. The law is clear that a surviving spouse has precedence in determining the disposition of a body over adult children. Moreover, the coroner's authority to issue or not issue a permit for transportation for cremation under KRS 213.081 did not authorize him to seize the body or embalm it while waiting for the family to reach an agreement. Ultimately, the coroner was not entitled to summary judgment on grounds of qualified immunity because questions of fact remained as to whether he acted within the scope of his perceived duty by attempting to enforce the decedent's wishes and believing that he had legal authority to do so, or whether he knew he was acting beyond the scope of his office but used its authority to further his own pecuniary interests.

B. ***Kinney v. Maggard***

2014-CA-001127 02/23/2018 2018 WL 1022549

Opinion by Judge Nickell; Judge Clayton concurred; Judge Thompson dissented and filed a separate opinion.

Kinney and Maggard are OB/GYNs. Kinney testified as an expert witness on behalf of Maggard's former patient in a federal medical malpractice lawsuit. After a finding that Kinney lacked objectivity and credibility, the federal case was dismissed with prejudice. Before the case was dismissed, Kinney filed a grievance against Maggard with the Kentucky Board of Medical Licensure (KBML). As a result of these events, Maggard filed a complaint in state circuit court alleging that Kinney's testimony - both in deposition and at trial - constituted libel and slander. Maggard subsequently amended her complaint to allege defamation based on comments Kinney had made to the KBML. Relying in part on the judicial statements privilege, Kinney sought dismissal of the complaint because his challenged statements occurred during judicial proceedings, which are afforded absolute immunity from suit. The circuit court denied the motion to dismiss without explanation. In a 2-1 vote, the Court of Appeals reversed in part and remanded. In particular, the Court held that, consistent with *Morgan & Pottinger, Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599 (Ky. 2011), a physician who files a grievance with the KBML against a doctor may successfully assert the same absolute immunity afforded an individual filing a KBA complaint against an attorney.

XIII. INSURANCE

A. ***Isaacs v. Sentinel Insurance Company, Limited***

2017-CA-000204 02/02/2018 2018 WL 663001 DR Pending

Opinion by Judge Taylor; Judges Jones and D. Lambert concurred.

Appellant Darryl Isaacs was injured when he was struck by a motor vehicle while riding his bicycle. Isaacs and his wife subsequently filed suit against the driver, and they also claimed entitlement to underinsured motorist (UIM) coverage under a motor vehicle policy of insurance issued by Sentinel Insurance Company to Isaacs & Isaacs, P.S.C. In making this argument, appellants acknowledged that the named insured on the motor vehicle insurance policy was Isaacs & Isaacs, P.S.C. and not Darryl individually. However, they maintained that because Darryl was the "sole owner" of the P.S.C., the two were synonymous and, therefore, he was entitled to UIM coverage as a named insured. The circuit court rejected this argument, and the Court of Appeals affirmed. The Court noted that under the unambiguous terms of the policy, an individual was entitled to UIM coverage only if they were occupying a covered motor vehicle at the time of the accident - which Darryl was not. The Court did not agree that Isaacs & Isaacs, P.S.C. and Darryl were "synonymous" under the insurance policy because the policy clearly did not equate the two being one and the same. The Court noted that appellants essentially argued that the P.S.C. was nothing more than a "legal fiction" for tax purposes only, yet they cited no Kentucky legal precedent to support this argument. It further noted that a professional service corporation is a distinct legal entity under Kentucky law and that the record reflected that Darryl was a shareholder of the corporation. The Court also rejected appellants' contention that the doctrines of illusory coverage and reasonable expectations compelled UIM coverage in this case.

B. ***Metzger v. Auto-Owners Insurance Company and Owners Insurance Company***

2016-CA-001625 01/19/2018 2018 WL 794740 DR Pending

Opinion by Judge Stumbo; Judges Clayton and Thompson concurred.

Appellants argued that Diana Metzger was entitled to underinsured motorist (UIM) coverage under a commercial automobile insurance policy issued to Metzger's Country Store, LLC (Metzger's), after she was struck by a vehicle while out walking. Appellants were part-owners and members of the LLC. The appellee insurance companies argued that Diana was not covered under the terms of their UIM coverage. The Court of Appeals agreed with the insurers and affirmed. In particular, the Court rejected appellants' argument that Diana should be considered a first-class insured, as a member of the LLC, for purposes of UIM coverage. Distinguishing the facts of this case from those of several others, the Court noted that Metzger's itself was not given first-class UIM coverage under the policy. Instead, the policy specifically required that the named insured be an individual before first-class coverage applied - which was not the case here. Appellants cited to no case or statutory law that requires all UIM policies to provide first-class coverage under any and all circumstances. Consequently, because Metzger's was not given first-class coverage, nor did the UIM coverage mention the members of the LLC, Diana was not entitled to UIM benefits. The Court also rejected appellants' argument that the policy at issue was ambiguous.

XIV. LIENS

A. ***Newman v. Estate of Hobbic***

2016-CA-000340 02/02/2018 2018 WL 663094

Opinion by Judge Taylor; Judges Jones and D. Lambert concurred.

Appellant challenged orders adjudicating the validity of a judgment lien filed by appellees (the Estate). Appellant argued that the judgment lien notice was defective as it failed to strictly adhere to the requirements of KRS 426.720. He particularly contended that the judgment lien notice failed to properly state the interest rate on the judgment, failed to state that court costs were awarded, failed to include the complete text of KRS 427.060, failed to include the "header" of KRS 427.060, and erroneously included an additional sentence not contained in KRS 427.060. The Court of Appeals affirmed, agreeing with the circuit court that the alleged deficiencies in the judgment lien notice were merely "a matter of form, not content" and that the Estate strictly complied with KRS 426.720.

XV. NEGLIGENCE

A. ***Fraley v. Zambos***

2016-CA-001446 02/16/2018 2018 WL 910834 Rehearing Pending

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

This appeal was brought in a medical negligence case in which appellant contended that her radiologist breached the appropriate standard of care in reading her mammograms and thus failed to detect breast cancer over a period of approximately nine years. Appellant contended that the circuit court erred in preventing the jury from hearing her full line of questioning as to two of her witnesses and in allowing the physician-appellee to testify at trial. She further contended that he exceeded the permissible scope of personal testimony and improperly proferred expert opinion testimony. The Court of Appeals found no error and affirmed.

XVI. PROPERTY

A. ***Scanlon v. Scanlon***

2016-CA-000982 02/02/2018 2018 WL 663087

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

Husband appealed from an order finding that a free-standing canopy bar located in a garage assigned to Wife in the couples' property settlement agreement was a fixture of the garage and, therefore, belonged to Wife. The Court of Appeals reversed and remanded. The Court conducted a three-part test under *Doll v. Guthrie*, 24 S.W.2d 947 (Ky. 1929) to determine whether the circuit court had erred in finding that the bar was a fixture. This required consideration of: (1) the bar's actual or constructive annexation to the real property; (2) the adaptation or application of the bar to the use or purpose of the real property; and (3) the intention of the parties to make the bar a permanent accession to the real property. The Court first agreed with the circuit court's finding that the primary purpose of the Garage had been to house and repair Husband's antique car collection; thus, the bar could not be considered a trade fixture. The Court then noted that Husband and Wife had agreed that the bar was free-standing and was never physically attached to the Garage. Further, removal of the bar had not damaged the Garage and had not left the Garage incomplete. Therefore, the Court determined that the bar had never been annexed to the Garage. Looking at the second test, adaptation, the Court again noted that the Garage's primary use had been to house and repair vehicles. Consequently, the Court concluded that the bar's presence in the Garage did not enhance its purpose, and that the bar's removal did not diminish its purpose. The Court also noted that there was no evidence that the bar had been adapted to go into the Garage or that the Garage had been adapted to house the bar. Accordingly, the Court found that the second test was not met. Finally, the Court determined that there was no evidence that Husband or Wife intended for the bar to be a permanent accession to the Garage. While the parties did purchase the bar to go into the Garage, this fact alone was insufficient to establish an intent to make the bar a permanent fixture of the Garage.

XVII. WORKERS' COMPENSATION

A. ***Fields v. Benningfield***

2015-CA-001975 02/16/2018 2018 WL 911483

Opinion by Judge Taylor; Judge Nickell concurred; Judge J. Lambert dissented.

Appellant, a former employee of a county jail, brought suit against county entities and officials alleging wrongful termination for his pursuing a workers' compensation claim. The circuit court granted summary judgment in favor of defendants/appellees. In a 2-1 vote, the Court of Appeals reversed and remanded, holding that KRS 342.197, which prohibits an employer from engaging in workers' compensation retaliation, constitutes a waiver of governmental immunity for claims against any governmental entity or government employer who violates the statute. The Court further held that genuine issues of material fact existed as to whether appellant's termination was motivated by his filing of a workers' compensation claim. Therefore, reversal was required.

B. ***Gregory v. A & G Tree Service***

2015-CA-000721 02/16/2018 2018 WL 911855

Opinion by Judge Nickell; Judges Dixon and Taylor concurred.

The Court of Appeals affirmed a decision of the Workers' Compensation Board vacating an award of permanent partial disability benefits because the Administrative Law Judge set forth insufficient findings of fact. In addition, the Court affirmed the Board's decision vacating two impairment ratings because one injury was not at maximum medical improvement and the other was not based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Finally, the Court affirmed the Board's holding that appellant was not entitled to the safety violation enhancement set forth in KRS 342.165(1). Appellant argued that the employer violated KRS 338.031, commonly known as the "general duty" clause, by allowing appellant to transport crew in a company vehicle while impaired, thereby entitling him to a safety violation enhancement. The Court, relying on the four factors set forth in *Lexington-Fayette Urban Cty. Gov't v. Offutt*, 11 S.W.3d 598 (Ky. App. 2000), held that one of the factors, whether there was a feasible means to eliminate or reduce the hazard, had not been established.