PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

FEBRUARY 01, 2022 to FEBRUARY 28, 2022

I. CLASS ACTIONS

A. ***TOM SWEARINGEN INDIVIDUALLY AND ON BEHALF OF ALL SIMILARLY SITUATED V. HAGYARD DAVIDSON MCGEE ASSOCIATES, PLLC, ET AL.***

2020-CA-0456 02/11/2022 2022 WL 413981

Opinion by THOMPSON, KELLY; GOODWINE, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

Appellant Tom Swearingen, individually and on behalf of all similarly situated, filed a class action complaint alleging that the appellees had for years altered the dates of procedure shown on x-rays taken of horses in order to make it appear that the x-rays had been performed within the three weeks prior to the horse's eventual sale at Keeneland. Appellant alleged that the misdated x-rays caused some buyers to purchase horses they would not have otherwise purchased. Appellant's deposition was taken, and his testimony was inconsistent with the allegations in the complaint and revealed that he had no justiciable claim. The appellees moved for summary judgment. In response, Appellant's counsel offered an affidavit from him attempting to explain and change his testimony. Appellant's counsel also moved to file a first amended complaint that in effect abandoned his initial claims and attempted to assert a new claim of liability. The trial court denied Appellant's motion to file an amended complaint and granted the appellees' motion for summary judgment dismissing Appellant's individual and class action claims. On appeal, Appellant argued that the circuit court erred in denying his motion to file an amended complaint and in dismissing the class action on the basis that Appellant was not an appropriate class representative. The Court of Appeals affirmed, concluding that the trial court did not abuse its discretion in denying Appellant's motion to amend because Appellant in effect abandoned his initial claims and had only attempted to change his previously false allegations after his deposition revealed that his original claims were meritless. The Court stated that Appellant's sworn admissions, once made within the litigation, were not susceptible to a "do over" in the form of a post-deposition affidavit that directly contradicted his deposition testimony. The Court further concluded that the circuit court did not err in dismissing the class action because the existence of a justiciable cause of action and an identified class representative are elemental to the very existence of a class action. The trial court also did not err in precluding an alleged class with no representative and no justiciable claim to take discovery in the hope that it may one day discover a representative with standing for a class of persons who may have a cause of action.

II. CRIMINAL LAW

A. ***CLAYTON PARKER V. COMMONWEALTH OF KENTUCKY***

2020-CA-0611 02/11/2022 2022 WL 414108

Opinion by LAMBERT, JAMES H.; JONES, J. (CONCURS) AND K. THOMPSON, J. (DISSENTS AND FILES SEPARATE OPINION)

Appellant Clayton Parker appealed *pro se* from the Henderson Circuit Court's denial of his CR 60.03 motion. The sole basis for relief raised by Parker in his CR 60.03 motion was that his counsel in 2013 had been ineffective; however, Parker's brief on appeal contained only his factually incorrect assertion that his five-year shock probation had expired prior to it being revoked and that his subsequent persistent felony offender conviction was, therefore, improper. The Court of Appeals affirmed the circuit court's denial of Parker's CR 60.03 motion because, among other things, Parker abandoned the allegations that formed the basis of his CR 60.03 motion and substituted new arguments in his brief on appeal. A party cannot raise new issues on appeal. The Court also stated that Parker's five-year shock probation had not expired because his five-year probationary period stopped running when the warrant for his probation violation was issued and because the circuit court's order revoking his probation was entered prior to expiration of his probation period. Judge K. Thompson dissented from the Court's decision to address Parker's argument that his period of shock probation had expired prior to it being revoked.

B. ***DENNIS JACKSON V. COMMONWEALTH OF KENTUCKY***

2020-CA-1301 02/04/2022 2022 WL 332725

Opinion by CETRULO, SUSANNE M.; CALDWELL, J. (CONCURS) AND MAZE, J. (CONCURS)

Appellant Dennis Jackson appeals from the Breathitt Circuit Court's order denying his motion for relief under CR 60.02, CR 60.03, and the Eighth Amendment of the U.S. Constitution. Jackson argued that he was entitled to relief from the remainder of his sentence due to his risk of contracting COVID-19 and because his various health ailments put him in a high-risk category for complications from the virus. The Court of Appeals affirmed. The Court concluded that Jackson was not entitled to relief under CR 60.02(f) because he did not allege any errors stemming from his prosecution, guilty plea, or sentence. Also, Jackson was not entitled to relief under CR 60.03 because he did not file an independent action, because his CR 60.03 argument is based upon the same grounds that failed to satisfy CR 60.02(f), because he failed to show that he had no other remedy available, and because he did not establish grounds for equitable relief. Finally, the Court concluded that Jackson was not entitled to relief under the Eighth Amendment because the institution's measures to protect inmates from COVID-19 were reasonable.

III. FAMILY LAW

A. ***F. E. V. E. B., ET AL.***

2021-CA-0286 02/18/2022 2022 WL 495617

Opinion by JONES, ALLISON E.; CLAYTON, C.J. (CONCURS) AND DIXON, J. (CONCURS)

Appellant F.E. (the "Aunt") appealed from the Butler Circuit Court's order terminating her visitation with T.S. (the "Child"). This case arose out of a DNA action in which E.B. (the "Mother") placed her Child with Aunt while she was facing drug-related criminal charges. Aunt received custody.

Eventually, custody was returned to Mother, and Aunt received visitation. Mother later filed to terminate Aunt's visitation on the basis that it was no longer beneficial to the child. Mother did not offer any specific reason for seeking to end Child's visitation with Aunt. Following the hearing, the circuit court terminated Aunt's visitation on the basis that Aunt had no standing to seek visitation. Aunt argued that she had properly been granted visitation pursuant to KRS 403.320. The circuit court found that she had not properly invoked the statute because she had neither intervened in the DNA action, nor commenced an original action seeking visitation. The Court of Appeals reversed the circuit court and remanded for further proceedings. In doing so, the Court concluded that Aunt was not required to formally intervene in the DNA action when she was awarded visitation because she had filed the DNA petition, had notice of the DNA proceedings, and had custody of Child. The Court also concluded that Mother waived her right to contest Aunt's statutory standing to seek visitation when she failed to appeal the order that returned custody of Child to Mother and granted Aunt visitation. The only issue Mother could raise relating to standing was whether Aunt had constitutional standing. Aunt had such standing because she had been awarded visitation and, therefore, had a substantial interest in the subject matter of the litigation. Last, because the trial court did not make specific findings with respect to the best interest factors, on remand, the trial court should determine whether Mother met her burden of proving that terminating visitation is in Child's best interests. This is not an initial determination, so the trial court is not required to presume that Mother is acting in Child's best interest under *Troxel v. Granville*, 530 U.S. 57 (2000).

IV. WORKERS' COMPENSATION

A. ***PERRY COUNTY BOARD OF EDUCATION V. MARK CAMPBELL, ET AL.***

2021-CA-0605 02/25/2022 2022 WL 569216

Opinion by CALDWELL, JACQUELINE M.; CETRULO, J. (CONCURS) AND JONES, J. (CONCURS)

Appellant Perry County Board of Education ("Perry") appealed from a Workers' Compensation Board ("Board") opinion, which affirmed the Administrative Law Judge's order resolving a medical fee dispute in favor of Appellee Mark Campbell. In April 2018, Campbell fell at work, causing knee and other injuries. He had arthroscopic meniscal repair surgery on his right knee in November 2018, but he continued to complain of pain and stiffness in the knee and underwent total knee replacement surgery in December 2019. Campbell filed a workers' compensation claim. He offered medical opinions that did not specifically address issues involved in his claim. They did not, for example, explicitly find a causal relation between the April 2018 work incident and the total knee replacement surgery. Perry, on the other hand, provided evidence from three orthopaedic surgeons who explicitly opined that there was no causal relation between the April 2018 work incident and the total knee replacement surgery and that the knee replacement surgery was not reasonable or necessary. The ALJ entered an order resolving the medical fee dispute in favor of Campbell. The Workers' Compensation Board affirmed. In its petition for review to the Court of Appeals, Perry argued that the Board improperly shifted the burden of proof to it instead of Campbell; that the ALJ could not reasonably conclude that Campbell's need for a total knee replacement was caused by the April 2018 work incident; and that the knee replacement surgery was not reasonable or necessary. The Court of Appeals affirmed. Although the Court agreed with Perry that the Board misapplied *C & T of Hazard v.*

Stollings, No. 2012-SC-0834-WC, 2013 WL 5777066 (Ky. Oct. 24, 2013), and that the burden of proof on a pre-award medical fee dispute was on the claimant under KRS 342.735(3), the error was harmless because there was substantial evidence of record to support a finding in Campbell's favor. The Court further concluded that the ALJ was permitted to make inferences from the more general opinion statements by Campbell's witnesses and that work-related arousal of a pre-existing and previously dormant, asymptomatic condition into a disabling, symptomatic reality is compensable.

V. OPEN RECORDS

A. ***JAY HARTZ, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE LEGISLATIVE RESEARCH COMMISSION V. MCCLATCHY COMPANY, LLC***

2021-CA-0634 02/04/2022 2022 WL 332866

Opinion by THOMPSON, LARRY E.; MAZE, J. (CONCURS) AND LAMBERT, J. (CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION)

Appellant appealed from the Franklin Circuit Court's opinion and order granting summary judgment in favor of Appellee and from an order granting Appellee's attorney's fees. In March 2018, Appellant sought records of a complaint made by an LRC staffer against Rep. Jim Stewart III on February 6, 2015, records of any meetings held with Stewart on February 9, 2015, and any agreement stating that Stewart was to have no contact with the staffer. The LRC denied the request, and Appellant sought review of the denial from the Franklin Circuit Court. After the LRC's attempt to dismiss the claim on the ground of legislative immunity was unsuccessful in the circuit court and on appeal, both parties filed motions for summary judgment. The circuit court granted Appellee's motion for summary judgment and denied Appellant's motion. The circuit court also granted Appellee's subsequent motion for its attorney's fees and costs. The Court of Appeals affirmed, concluding that the General Assembly's records policy does not prevent a nonjusticiable political question; Appellee's request to have the judiciary compel disclosure of legislative records is not barred by the Separation of Powers doctrine; neither Section 39 nor Section 43 of the Kentucky Constitution shield disclosure of the documents; the amended version of KRS 7.119 does not have retroactive application; the General Assembly's policy of nondisclosure does not supplant its enactment of KRS 7.119; the facts do not implicate the attorney-client privilege nor the attorney work-product doctrine; and the award of attorney's fees and costs pursuant to KRS 61.882(5) was not clearly erroneous. Judge Lambert concurred with the Opinion with the exception of awarding attorney's fees to Appellee.