PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS
JANUARY 1, 2014 to JANUARY 31, 2014

I. APPEALS

A. ***Erwin v. Cruz***

2013-CA-001027 01/31/2014 2014 WL 346076

Opinion and Order by Judge VanMeter; Judges Combs and Dixon concurred. The Court of Appeals held that it lacked jurisdiction to consider a former paramour's appeal of a domestic violence order (DVO) and dismissed the appeal. The original DVO was entered on October 4, 2011, and the amended DVO was entered on November 1, 2011. Because every argument or factual assertion made by appellant related to the parties' actions or the state of their relationship on or prior to November 1, 2011, the appeal should have been brought within 30 days of entry of the amended DVO. CR 73.02; *Stinson v. Stinson*, 381 S.W.3d 333, 336 (Ky. App. 2012). As it was not, dismissal was required.

II. CIVIL PROCEDURE

A. ***Edwards v. Headcount Management***

2012-CA-000535 01/31/2014 2014 WL 346070

Opinion by Chief Judge Acree; Judges Dixon and Lambert concurred. The Court of Appeals affirmed an order denying appellant's motion to set aside summary judgment pursuant to CR 60.02. Appellant alleged that CR 60.02 relief was warranted because appellee allegedly committed fraud upon the court when it filed suit under its d/b/a or trade name. The Court first determined that the essence of appellant's defense was one of capacity. The Court then held that appellant waived the defense of capacity when she failed to assert it in a timely manner by motion or responsive pleading. The Court also held that appellant did not properly invoke CR 60.02 because appellant's capacity defense could and should have been raised in a direct appeal. Finally, the Court concluded that the alleged deceit identified by appellant did not rise to the level of extrinsic fraud contemplated by CR 60.02.

III. CIVIL RIGHTS

A. ***Charalambakis v. Asbury College***

2012-CA-000242 01/31/2014 2014 WL 346068

Opinion by Judge Thompson; Judges Clayton and Maze concurred. The circuit court entered summary judgment for appellees on a professor's discrimination and retaliation claims, dismissed his defamation claim, and entered judgment on a jury verdict for appellees on his breach of contract claim. The Court of Appeals affirmed. The Court held that a provost's comments, in which he said that the professor, who was of Greek national origin, had a "funny" accent, did not constitute direct evidence of discrimination. The Court also concluded that adverse actions resulting from the professor's being placed on probation, rather than from filing and amending his discrimination complaint, could not be considered retaliatory. The Court further held that the professor's defamation claims were not slanderous per se and instead were slanderous per quod. Consequently, they required affirmative proof of special damages, and no causal connection was shown between any statements at issue and the professor's termination.

IV. CONTRACTS

A. ***Ohio Casualty Ins. Co. v. City of Providence***

2012-CA-002204 01/10/2014 2014 WL 92268 Rehearing Pending

Opinion by Judge Nickell; Judges Clayton and Maze concurred. A former city clerk alleged various tort claims against the City of Providence following allegations that the clerk embezzled city funds. Appellant, who had written, as surety, an "aggregate and non-cumulative" performance bond in the penal sum of $300,000 on the clerk for an "indefinite" period of time when she was appointed, moved to intervene and sought a declaratory judgment regarding its rights and obligations under the bond. The city had filed a claim with the surety arguing that it had purchased $300,000 in coverage for each year the clerk was in office. The city based its claim not on a reading of the bond, but on "renewal notices" it had received from its insurance agent alerting the city it was time to pay its annual premium of about $1,000. After the clerk's claims were dismissed, the circuit court entered judgment on a jury verdict in favor of the city finding that the bond created $300,000 in liability for each of the seven years the bond was in force. The circuit court specifically found that the words "aggregate" and "non-cumulative" were ambiguous and open to multiple interpretations. Due to the perceived ambiguity, the circuit court relied on extrinsic evidence to determine the intentions of the parties when the bond was originally executed in 1997. On appeal, the Court of Appeals reversed and remanded, holding that based on the unambiguous terms of the bond, the surety was only liable for $300,000 for the life of the bond. The Court relied on the fact that the clerk was appointed rather than elected and that her bond was written for an "indefinite" open-ended period rather than for a specific term. The Court further held that the fact that the city had been paying a yearly "premium" did not merit a different result. There was no need in this case to resort to extrinsic evidence because of the intention of the parties as stated in the bond, the subject matter of the bond, the situation of the parties and the conditions under which the bond was written. Moreover, because the bond was for an indefinite term, the fact that the premiums were paid annually did not create a series of separate yearly contracts.

V. CRIMINAL LAW

A. ***Childress v. Commonwealth***

2012-CA-001675 01/24/2014 2014 WL 265504

Opinion by Judge Dixon; Judges Moore and Thompson concurred. In an appeal from an order denying appellant's motion to void her drug-possession conviction pursuant to KRS 218A.275(8), the Court of Appeals vacated and remanded for further proceedings. The Court held that the circuit court had the authority to consider the merits of the motion under the current version of the statute, which was in effect at the time the motion was filed and which allows felony convictions to be voided.

B. ***Hall v. Commonwealth***

2012-CA-001030 01/10/2014 2014 WL 92262 DR Pending

Opinion by Judge Combs; Judges Lambert and Thompson concurred. In an appeal from an order denying appellant's motion to suppress evidence, the Court of Appeals affirmed in part, reversed in part, and remanded. The Court first held that the trial court did not err in failing to suppress the contents of a package opened by postal employees in a warrantless search. The package was suspicious because both the sender and the intended recipient had the same name. A USPS inspector contacted the store from which the package was sent in order to verify that it was a legitimate business and that it regularly ships its goods through the USPS. The person contacted at the store was unable to verify whether the package was or was not from the store; however, he gave the inspector permission to open the package. Under the circumstances, it was proper for the postal employees to rely upon this consent. The Court then held, though, that evidence obtained from a subsequent search of the residence addressed on the package should have been suppressed. When officers went to the residence to conduct a "knock and talk" investigation, their knocks went unanswered. However, the landlord of the premises then unlocked the door to the residence and yelled for the tenant. The tenant came to the door, the officers told her that they smelled marijuana, and they entered the residence. The Court concluded that this entry was impermissible because the police had exceeded the scope of a "knock and talk" investigation when they allowed the landlord to unlock the door without any legal justification. The Court also rejected the argument that the officers' entry was lawful because the smell of marijuana constituted an exigent circumstance justifying a warrantless search. The Court held that the police had created the exigent circumstance of "plain smell," in violation of the Fourth Amendment, when they improperly permitted the landlord to unlock the door.

C. ***Knuckles v. Commonwealth***

2011-CA-002321 01/31/2014 2014 WL 346060

Opinion by Chief Judge Acree; Judges Taylor and VanMeter concurred. The Court of Appeals reversed and remanded an order denying appellant's motion to vacate his criminal conviction pursuant to RCr 11.42 because the trial court improperly denied appellant's request for an evidentiary hearing. The trial court denied the hearing relying on supplemental affidavits submitted by the Commonwealth in opposition to appellant's motion. However, by submitting additional affidavits, the Commonwealth essentially admitted that the record was insufficient to resolve the motion without an evidentiary hearing. Therefore, the trial court should have held an evidentiary hearing pursuant to RCr 11.42(5).

D. ***Teague v. Commonwealth***

2012-CA-001012 01/10/2014 2014 WL 92258 Rehearing Pending

Opinion by Judge Clayton; Chief Judge Acree and Judge Moore concurred. In an RCr 11.42 appeal from a denial of appellant's motion to vacate a sentence imposed due to a violation of the terms of his pretrial diversion, the Court of Appeals affirmed. The Court held that appellant's argument - that the amended version of KRS 434.650 should have applied to his sentencing - could have been raised on direct appeal.

E. ***Willoughby v. Commonwealth***

2012-CA-000776 01/10/2014 2014 WL 92253 Rehearing Pending

Opinion by Judge Maze; Judges Clayton and Dixon concurred. In a matter of apparent first impression, the Court of Appeals held that the evidentiary record was insufficient for the Court to determine whether Kentucky's "automated vehicle information system" (AVIS), which signaled a police officer to verify proof of insurance for appellant's vehicle, was sufficiently reliable to support reasonable suspicion for a traffic stop. The Court noted that the trial court heard little or no evidence regarding AVIS's reliability in indicating criminal activity and that the trial court quoted the officer as having attributed a 95% accuracy rate to AVIS when no such testimony had been given. Because of this, the Court concluded that further fact-finding was needed regarding the reliability of AVIS and remanded for additional proof on this issue. The Court further held, however, that as a member of a law enforcement agency, the officer was permitted under KRS 186A.040 and federal law to access the information contained in AVIS. The Court also held that - validity of the initial traffic stop aside - the duration of the stop was not unreasonable under the circumstances and the search of appellant's vehicle, though warrantless, was reasonable pursuant to at least one exception to the Fourth Amendment's warrant requirement.

VI. CUSTODY

A. ***D.L.B. v. Cabinet for Health and Family Services***

2012-CA-001797 01/03/2014 2014 WL 26990 Released for Publication

Opinion by Judge VanMeter; Judges Lambert and Taylor concurred. On review from a circuit court judgment voluntarily terminating father's parental rights and involuntarily terminating mother's parental rights, the Court of Appeals affirmed in part, reversed in part, and remanded in part. The Court first held that substantial evidence supported the involuntary termination of mother's parental rights. However, the Court then concluded that the circuit court improperly terminated father's parental rights since father had failed to comply with the statutory procedures governing voluntary termination outlined in KRS 625.040-.041. The Court further held that the circuit court abused its discretion as to two evidentiary rulings that could arise again on remand. First, the circuit court abused its discretion by excluding the children's therapist's testimony regarding their out-of-court disclosures of parental abuse and neglect. Such testimony was admissible under KRE 803(3), the "state of mind" exception to the hearsay rule. Second, the circuit court abused its discretion by not allowing the Cabinet to refresh a witness's recollection on re-direct examination with a Cabinet record that had been available to mother throughout the course of the proceedings. Mother opened the door to the inquiry at issue on cross-examination, and the Cabinet was permitted to refresh its witness's recollection pursuant to KRE 612, despite the fact that the document used to refresh had not been disclosed pre-trial.

B. ***Ellis v. Ellis***

2013-CA-000815 01/24/2014 2014 WL 265512

Opinion by Judge Maze; Judges Clayton and Nickell concurred. The Court of Appeals held that the trial court abused its discretion when it found that Arizona would be the more appropriate forum for addressing child custody issues in a post-divorce child custody modification proceeding involving the parties' son where husband and son resided in Kentucky and mother and daughter resided in Arizona. The Court concluded that husband would be placed at a significant disadvantage if he was required to litigate the custody and visitation issues relating to son in Arizona. Moreover, all relevant evidence as to son was located in Kentucky.

C. ***P.W. v. Cabinet for Health and Family Services***

2013-CA-000496 11/08/2013 2013 WL 5969875 Released for Publication

Opinion by Judge Dixon; Judges Clayton and Maze concurred. The Court of Appeals held that the family court did not err in denying mother's motion for placement of her children with relatives after the children had been adjudicated as neglected and placed in a foster home. The Court held that while relative placement is certainly preferred, there is no statutory mandate that the Cabinet for Health and Family Services choose relative placement over other options. Throughout the proceedings, the Cabinet had repeatedly asked mother about the existence of any relatives, but she had failed to disclose them. It was only upon learning that the Cabinet had changed its goal from reunification to termination and adoption that mother provided information about her relatives. The Court noted that while mother had a low IQ, she was able to participate in the court proceedings and conference with counsel; therefore, her claim that she did not understand the Cabinet's request was not a reasonable one. The Court ultimately concluded that the children were bonded with their foster family such that it was in their best interests to remain with the foster family.

VII. FAMILY LAW

A. ***Doane v. Gordon***

2013-CA-000659 01/31/2014 2014 WL 346075

Opinion by Judge Combs; Judges Dixon and VanMeter concurred. In a grandparent visitation action, the Court of Appeals held that the wishes of a mother who had lost physical and legal custody of her child due to abuse and neglect were not entitled to any weight on a maternal grandmother's petition for visitation. Instead, the grandmother's rights under Kentucky's grandparent visitation statute, KRS 405.021(1), were governed solely by the "best interest" standard articulated in the provision, and her rights were legally separate and apart from any fundamental liberty interest of the mother, an interest that the mother had lost standing to assert.

B. ***Maclean v. Middleton***

2011-CA-000267 01/03/2014 2014 WL 47068 Released for Publication

Opinion by Judge Maze; Judge Stumbo concurred; Judge Taylor concurred in part and dissented in part via separate opinion. The Court of Appeals affirmed in an appeal and cross-appeal concerning the tracing and characterization of non-marital interests, the division of marital interests and debt, an award of maintenance, the calculation of wife's earning capacity for purposes of setting child support, and an award of attorney's fees and costs to wife. On direct appeal, wife argued that the proceeds from husband's settlement of a litigation involving a non-marital family trust were marital because they were recovered through litigation during the marriage with marital funds. A majority of the panel disagreed. While the Court suggested that wife might be entitled to equitable recovery of any marital funds spent on the litigation, the Court emphasized that the source of the funds arose from husband's status as a remainder beneficiary under a non-marital trust. Therefore, the proceeds must also be considered as husband's non-marital property. On cross-appeal, husband argued that the family court imposed an excessively high standard for tracing of his non-marital interests in various residences during the marriage. A majority of the panel disagreed, holding that the family court reasonably required husband to present documentation tracing his claimed non-marital interests. The Court further held that most of husband's non-marital contributions to the purchase and improvement of the various residences were substantially intermingled with marital contributions. Consequently, the Court affirmed the family court's finding that husband had failed to trace most of his claimed contributions. In dissent, Judge Taylor did not object to the majority's conclusions on any of these issues; however, he opined that family courts have no authority to appoint a master commissioner as was done in this case. The dissent also commented that the fee paid to the master commissioner exceeded the maximum allowable under CR 53.07, and it criticized the family court's order granting the parties' motion to seal the record in this case.

C. ***Murry v. Murry***

2013-CA-000337 01/03/2014 2014 WL 26991 Released for Publication

Opinion by Judge Combs; Judges Nickell and Stumbo concurred. In an appeal from a family court order in a grandparent visitation action, the Court of Appeals affirmed in part and remanded in part. The Court first held that the family court had the authority to modify grandparents' visitation and to schedule the visitation concurrently with father's parenting time. Parents' right to the care and custody of their children was superior to grandparents' interest in visitation, and the original visitation order did not entitle grandparents to visitation with the children in the same manner or upon the same schedule forever without any possibility of modification. However, the family court's finding that the grandparent visitation provision of the original visitation order had not been working and that it "presents more problems than it resolves" was inadequate to allow for effective appellate review; therefore, remand for entry of additional findings was warranted pursuant to CR 52.01. The Court finally held that the family court had not erred by refusing to cite mother for contempt and by refusing to award grandparents attorney's fees.

VIII. IMMUNITY

A. ***Leamon v. Phillips***

2012-CA-001955 01/10/2014 2014 WL 92266

Opinion by Judge Stumbo; Judges Moore and Nickell concurred. The Court of Appeals affirmed a judgment finding that Child Protective Services, its workers, and a third party who made an anonymous report were all entitled to either qualified official immunity or statutory immunity under KRS 620.050(1) for their roles in reporting suspected child abuse and neglect and in removing appellant's children from her custody. Appellant was unable to prove any action was taken in bad faith, and the actions of the CPS workers were discretionary, not ministerial, in nature. The third party also had reasonable cause to make an allegation of child endangerment.

IX. INSURANCE

A. ***Countryway Ins. Co. v. United Financial Casualty Co.***

2012-CA-002051 01/24/2014 2014 WL 265508 Rehearing Pending

Opinion by Judge Jones; Chief Judge Acree and Judge VanMeter concurred. In an appeal concerning the priority of coverage between two uninsured motorist (UM) policies, the Court of Appeals reversed and remanded. The trial court had determined that the policies contained mutually repugnant excess coverage provisions and ordered damages to be pro-rated between the two policies. In reversing, the Court held that under *Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803 (Ky. 2010), where two excess/other insurance UM provisions clashed, the repugnancy rule and apportionment were no longer applicable. Instead, pursuant to *Shelter*, the UM policy covering the injured person will be deemed primary to the policy covering the vehicle, as a matter of public policy and judicial economy.

B. ***Deans & Homer, Inc. v. Com., Public Protection Cabinet, Kentucky Dept. of Ins.***

2012-CA-000012 01/31/2014 2014 WL 341887

Opinion by Chief Judge Acree; Judges Lambert and Maze concurred. The Court of Appeals reversed the opinion and order of the Franklin Circuit Court adopting the Kentucky Department of Insurance's order determining that appellant was promoting an unauthorized insurance policy. The Court held that appellant's practice of amending individual storage unit rental contracts to include the partial waiver of an exculpatory clause in the event of property damage in exchange for an additional monthly rental payment did not constitute the formation of an insurance contract, but instead was merely an adoption of a different risk of loss provision between the parties. The court remanded the case to the Franklin Circuit Court with instructions to vacate the previous order of the Kentucky Department of Insurance.

X. PROPERTY

A. ***Branham v. Estate of Elkins***

2012-CA-001789 01/31/2014 2014 WL 346072

Opinion by Judge Moore; Judges Nickell and Stumbo concurred. An unincorporated association was listed as the grantee in a deed regarding a parcel of land in Pike County, Kentucky. A group of signatories to the certificate of consideration attached to the deed (who signed on behalf of the unincorporated association) filed a KRS 389A.030 action in Pike Circuit Court for an order to sell the tract of land described in the deed. They argued that Kentucky law does not permit an unincorporated association to be a grantee in a deed, and that by virtue of signing the certificate of consideration attached to the deed, they had become tenants in common. Their action was dismissed on the ground of standing, and the Court of Appeals affirmed. The Court held that written evidence of title to the land at issue is a prerequisite to filing an action pursuant to KRS 389A.030, and that the deed listing the unincorporated association as grantee did not qualify as the requisite evidence because it did not legally operate to vest any form of title regarding the tract at issue with the certificate of consideration signatories. Specifically, the Court noted that KRS 382.135 - which requires a certificate of consideration on a deed - does not contravene Kentucky common law regarding deeds. The common law in Kentucky regarding deeds provides that it is fundamentally necessary that a conveyance identify the grantee in the body or caption of the instrument, and it further provides that merely signing and acknowledging a deed in which one is not named as a party, as in the case at bar, means nothing.