PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JULY 1, 2020 to JULY 31, 2020

I. BUSINESS ORGANIZATIONS

A. ***Unbridled Holdings, LLC v. Carter***

2018-CA-001071 07/31/2020 2020 WL 4498852

Opinion by Judge Jones; Chief Judge Clayton and Judge Lambert concurred.

The two sole members of three Kentucky limited liability companies experienced a complete breakdown of their business relationship, leading one of the members to file a complaint wherein he asked the circuit court to judicially dissolve all three companies pursuant to KRS 275.290(1). The circuit court dismissed two of the companies based on the conclusion that there was no "deadlock" between the two members. The Court of Appeals vacated and remanded. The Court noted that the General Assembly has not defined the "not reasonably practicable" standard set forth in the statute; however, it is clear that it does not mean "impossible." "Not reasonably practicable" requires the circuit court to conduct a multifaceted analysis which takes into account a number of different factors. The Court looked at the Colorado approach and held that it reflected the proper standard. The relevant factors include: (1) whether the management of the entity is unable or unwilling reasonably to permit or promote the purposes for which the company was formed; (2) whether a member or manager has engaged in misconduct; (3) whether the members have clearly reached an inability to work with one another to pursue the company's goals; (4) whether there is deadlock between the members; (5) whether the operating agreement provides a means of navigating around any such deadlock; (6) whether, due to the company's financial position, there is still a business to operate; and (7) whether continuing the company is financially feasible. Dissolution does not require total impossibility or complete frustration. On the facts of this case, the Court held that the circuit court did not evaluate the companies using the proper factors. Therefore, remand for further consideration was merited.

II. CHILD SUPPORT

A. ***Ridgeway v. Warren***

2019-CA-001207 07/02/2020 2020 WL 4498795

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

Appellant challenged the family court's order requiring him to pay private school tuition as improperly deviating from the child support guidelines absent his agreement to do so, and absent a showing that public schools would be inadequate to meet the child's educational needs in violation of Kentucky law. In a 2-1 decision, the Court of Appeals vacated and remanded for further proceedings. The family court made a finding that the private school would best serve the child's educational needs. However, there was no proof, and the family court failed to make the requisite finding, that public schools would be inadequate to meet the child's educational needs. Therefore, in ordering appellant to pay for private school tuition over his express objection and without any clear finding that he had agreed to pay such tuition, the family court erred. In dissent, Judge Jones opined that because some evidence was presented to the family court that public schools would not be able to meet the child's immediate and extraordinary educational needs - and appellant did not meet his burden of rebutting this evidence - the family court's decision should be affirmed.

III. CONTRACTS

A. ***Arete Ventures, Inc. v. University of Kentucky***

2016-CA-001586 07/24/2020 2020 WL 4499072

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

A commercial builder and two sureties appealed a judgment entered after a bench trial holding them liable for breach of a construction contract and two bonds because the structure of an equine quarantine facility built for the University of Kentucky failed. The University of Kentucky cross-appealed and challenged the circuit court's failure to award pre-judgment interest and its suspension of post-judgment interest for approximately ten months following the judgment. After holding that substantial evidence supported the factual finding that the builder's breach of duty caused the damages suffered by the university, the Court of Appeals rejected the surety's argument that the university's right to enforce the bond was lost when it did not inspect the builder's work for defects; the Court held that mere inaction, indulgence, or forbearance, nor even the university's failure to notify the surety of a possible or even probable default by the builder, was enough to release the surety. Quoting *Henderson v. Phoenix Ins. Co.*, the Court held, "It is the surety's business to see that the principal performs the duty which he has guaranteed." 233 Ky. 217, 25 S.W.2d 359, 362 (1930). The Court also rejected the sureties' argument that the Kentucky Model Procurement Code, KRS 45A.190, capped costs such as attorney's fees on performance bonds at 100% of the contract price. The Court noted that this statute includes no language so limiting recovery from the surety of a performance bond, contrasting it with another statute that does limit recovery on fiduciary bonds - KRS 62.070. The Court also noted that the language of the bond itself allowed recovery of "all costs and damages . . . including attorneys' and consultants' fees[.]" On the university's cross-appeal, the Court reversed the circuit court's disallowance of pre-judgment interest and several months of post-judgment interest. Noting the circuit court had concluded the claim was liquidated, the Court held pre-judgment interest is awarded as a matter of right on a liquidated demand. Furthermore, the Court held there were no factors making it inequitable to require the payment of interest, and post-judgment interest must be awarded at the rate set out in the statute.

IV. CORRECTIONS

A. ***Gray v. Department of Corrections***

2019-CA-001242 07/10/2020 2020 WL 4498803

Opinion by Judge K. Thompson; Judges Combs and Dixon concurred.

Gray appealed from a judgment of the Franklin Circuit Court dismissing his petition for declaration of rights, in which he claimed that he was improperly denied work-time credit. Although he timely deposited his notice of appeal from this decision in the prison mail system, it was not filed in the circuit court until after expiration of the time to appeal. The Court of Appeals held that the notice of appeal was nonetheless timely under the equitable tolling doctrine. While RCr 12.04(5) ("the prison mailbox rule") applies only to criminal appeals, the rule did not eradicate the need for equitable tolling in civil appeals filed by *pro se* inmates. However, the Court ultimately affirmed, holding that although Gray's 2001 conviction for first-degree robbery was not classified as a violent offense at that time, he was not entitled to work-time credit. The Court noted that KRS 197.047(6)(b) refers to the nature of the offense and not whether the inmate was actually classified for parole purposes as a violent offender. The Court also held that there was no *ex post facto* violation by the revocation of Gray's work-time credit and he had been compensated for his work.

V. CRIMINAL LAW

A. ***Goff v. Commonwealth***

2019-CA-000460 07/17/2020 2020 WL 4499774 Rehearing Pending

Opinion by Judge Maze; Judges Acree and Combs concurred.

The Court of Appeals affirmed appellant's conviction for one count of complicity to first-degree robbery against allegations that the circuit court erred in failing to suppress his statement to police; that he was entitled to an instruction on the lesser-included offense of facilitation to robbery; and that he was denied a fair trial when a juror twice fell asleep during the proceedings. In rejecting the contention that appellant's statement should have been suppressed, the Court cited a recording of the interrogation and the testimony of an interrogating detective as establishing that appellant was repeatedly and clearly advised that he could end the interrogation at any time; that the police did not re-approach or initiate questioning; that it was appellant who spoke to the detectives; and that there was nothing which could be construed as intimidating or coercive in the detectives' questioning, tone of voice, or demeanor. The Court also determined that because appellant was not only present at the robbery but actively participated in the crime, the evidence would not support an instruction on the lesser-included offense of facilitation. Finally, regarding the inattentive or sleeping juror, the Court held that it is possible to distinguish between "nodding off," meaning the juror's head is falling forward because he is about to fall asleep, and actually sleeping. Regardless, because the alleged inattentiveness occurred during presentation of the Commonwealth's case, the Court concluded that the Commonwealth was the party suffering the prejudice and, in any event, the evidence regarding the extent of the juror's inattentiveness and any resulting prejudice was clearly insufficient to disturb the decision of the circuit court regarding appellant's motion for a mistrial.

B. ***K.H. v. Commonwealth***

2017-CA-001989 07/24/2020 2020 WL 4499067

Opinion by Judge Acree; Judges Goodwine and Kramer concurred.

The Court of Appeals granted discretionary review after the Fayette Circuit Court affirmed the Fayette District Court's order denying appellant's motion to suppress evidence. In a case of first impression, the Court of Appeals rejected the argument that investigative stops of individuals suspected of committing completed misdemeanors were *per se* unconstitutional. The Court further held that whether criminal conduct was ongoing or "completed," and whether the conduct investigated suggested the commission of a misdemeanor or a felony, are merely factors among the totality of circumstances a court must consider when determining the constitutionality of an investigatory stop. The lower courts had weighed both as factors in balancing the nature and quality of the intrusion on appellant's personal security against the importance of the governmental interests alleged to justify the intrusion.

C. ***Lee v. Commonwealth***

2020-CA-000019 07/31/2020 2020 WL 4497152

Opinion by Judge Goodwine; Judges Combs and Lambert concurred.

Appellant challenged an order denying his motion to return money seized during a search of his business. The Court of Appeals reversed and remanded. Police searched appellant's residence and business and seized items, including cash and pills, from both locations. Appellant was charged with crimes stemming from the search of his residence only. He pled guilty to tampering with physical evidence, second-degree trafficking in a controlled substance, and possession of marijuana. As a condition of his plea, appellant agreed to forfeit all items seized in the action. Although the plea agreement specifically mentioned the search of appellant's residence, it was silent regarding the search of his business. The circuit court entered a forfeiture order in the amount of $3,500 for the money seized from appellant's residence. Approximately five years later, appellant moved for return of $2,210 seized from his business. The Commonwealth had no knowledge of this seizure, and appellant presented no proof of it. The circuit court denied his motion without a hearing. Then, the Commonwealth provided supplemental discovery proving police had seized $2,210 from appellant's business. Appellant renewed his motion, and the circuit court denied it without a hearing. The Court of Appeals determined that because appellant did not agree to forfeit the money seized from his business, he was entitled to a forfeiture hearing.

VI. DETAINERS

A. ***Meinshausen v. Friendship House of Louisville, Inc.***

2019-CA-000953 07/17/2020 2020 WL 4499061

Opinion by Judge Maze; Chief Judge Clayton and Judge Dixon concurred.

Meinshausen was a tenant at Friendship House, a non-profit, HUD-subsidized senior living facility. In October 2018, a forcible detainer complaint was filed by Friendship House's housing manager seeking to evict Meinshausen. Meinshausen's counsel objected to the filing because the housing manager was not an attorney and had no ownership interest in the property. The district court denied the motion to dismiss and granted the writ of possession for Friendship House. On appeal, the circuit court affirmed, concluding that the petition was not improper because Friendship House was represented by licensed counsel during the proceeding. On discretionary review, the Court of Appeals first found that the matter was not moot even though Meinshausen was no longer in possession of the property. The Court then reversed based on the recent holding in *Hornsby v. Housing Authority of Dry Ridge*, 566 S.W.3d 587 (Ky. App. 2018). In *Hornsby*, the Court held that a non-attorney officer is not authorized to sign a forcible detainer petition on behalf of the corporation. Likewise, the Court here found that a forcible detainer complaint is a pleading that must be filed and practiced by an attorney. Consequently, the subsequent participation of licensed counsel did not correct the deficiency. Since the housing manager had no immediate right of possession in her own capacity and did not have the right to assert that right on behalf of Friendship House, her filing of the petition was insufficient to invoke the subject-matter jurisdiction of the district court. Because the district court never acquired subject-matter jurisdiction, the Court held that the complaint should have been dismissed.

VII. EMINENT DOMAIN

A. ***Borders Self-Storage & Rentals, LLC v. Kentucky Transportation Cabinet, Department of Highways***

2019-CA-000217 07/02/2020 2020 WL 4498810 DR Pending

Opinion by Judge Taylor; Judges Caldwell and Jones concurred.

Borders Self-Storage & Rentals, LLC challenged an order awarding Borders $140,000 as compensation for the taking of its real property by eminent domain. The Court of Appeals affirmed. The sole issue on appeal was whether the circuit court properly excluded evidence of the property valuation administrator's assessed tax value of the condemned real property that Borders sought to introduce. The Court noted that in a highway condemnation proceeding, the assessed tax value of the condemned real property is admissible if such assessed value was fixed by the landowner and offered into evidence by the Commonwealth. In such circumstance, the assessed tax value is considered an admission against the interest of the landowner and may be so utilized by the Commonwealth. However, the Court further noted that the Supreme Court of Kentucky has clearly held that evidence of assessed tax value of real property may not be introduced into evidence by the landowner. *Culver v. Commonwealth, Department of Highways*, 459 S.W.2d 595, 597-98 (Ky. 1970); *Commonwealth, Department of Highways v. Brooks*, 436 S.W.2d 499, 500-01 (Ky. 1969). Accordingly, the Court was compelled to conclude that the circuit court properly excluded the evidence of assessed tax value sought to be introduced by Borders; however, the Court expressed a belief that such exclusion was "fundamentally unfair and legally unsound" and urged the Supreme Court to revisit the issue.

VIII. FAMILY LAW

A. ***Andrews v. Andrews***

2018-CA-001876 07/10/2020 2020 WL 4498835 Rehearing Pending

Opinion by Judge Lambert; Judges Maze and L. Thompson concurred.

Husband challenged an order in a marital dissolution action denying his motion to reduce his monthly maintenance payments and awarding attorney's fees to Wife. The Court of Appeals affirmed, holding that the parties agreed to not only the monthly maintenance amount, but also waiver of their rights to each other's retirement accounts. The original separation agreement was drafted by Husband's attorney, and Wife was not represented. Although Husband's reduction in salary was not voluntary, his accumulation of debt was. The circuit court's decision was supported by sufficient evidence and was not an abuse of discretion. *Mays v. Mays*, 541 S.W.3d 516 (Ky. App. 2018). There was likewise no abuse of discretion in the award of attorney's fees to Wife. *Herbener v. Herbener*, 587 S.W.3d 343 (Ky. App. 2019).

B. ***Cabinet for Health and Family Services v. Marshall***

2019-CA-001569 07/02/2020 2020 WL 4498929

Opinion by Judge Caldwell; Judges Acree and Lambert concurred.

The Cabinet for Health and Family Services challenged an order granting the request of the county attorney to informally adjust a dependency, neglect, and abuse (DNA) petition, claiming it did not agree. The Court of Appeals affirmed. The Court noted that the Cabinet voiced its opposition for the first time eight days after the case was informally adjusted, even though it knew of the informal adjustment hearing beforehand and had a representative present at that proceeding, who chose to remain silent when the county attorney brought the motion for informal adjustment before the family court. Under those facts, the Cabinet was estopped from belatedly voicing its objection. The Court noted that the prejudice here to Mother and Child if this case was reopened is plain. Moreover, the Cabinet had an opportunity to timely raise any objections it had to an informal adjustment, but it failed to do so. In reliance upon the Cabinet's silence, both the family court and the parties agreed to resolve the DNA petition amicably. Thus, reversal was not merited.

IX. NEGLIGENCE

A. ***Frankfort Plant Board Municipal Projects Corporation v. BellSouth Telecommunications, LLC***

2019-CA-000193 07/02/2020 2020 WL 4497177 DR Pending

Opinion by Judge Lambert; Judges Combs and Goodwine concurred.

The Frankfort Plant Board Municipal Projects Corporation challenged an order granting summary judgment in favor of BellSouth Telecommunications. Pursuant to an easement created in 1936, BellSouth had telecommunications facilities on property owned by the Plant Board. During an excavation by the Plant Board to expand its substation, facilities belonging to BellSouth were damaged and had to be temporized, repaired, and relocated. BellSouth sued for damages, and the circuit court granted summary judgment in its favor. The Court of Appeals affirmed, holding that the easement remained valid and that the Plant Board's failure to comply with KRS 367.4911 (the "Call Before You Dig" law), which led to the damage to the facilities, constituted negligence *per se*. On cross-appeal, the Court found no abuse of discretion in the circuit court's denial of pre-judgment interest to BellSouth.

B. ***Poore v. 21st Century Parks, Inc.***

2019-CA-000855 07/31/2020 2020 WL 4498825

Opinion by Judge Jones; Judges Goodwine and Kramer concurred.

Kelli Poore and her husband Tony were kayaking at a park operated by 21st Century Parks, which had several access points to access a state-controlled waterway. On the day of the accident, they were kayaking on a stretch of state-controlled waterway that extended outside the park, when Tony collapsed. Emergency personnel knew generally where the Poores were located, but there was limited accessibility. Tony ultimately suffered a heart attack and was pronounced dead upon arrival after finally being found and transported to a hospital. After the Estate initiated suit, 21st Century moved for summary judgment, invoking KRS 411.190, Kentucky's Recreational Use Statute, and common law negligence principles. The circuit court granted summary judgment. The Court of Appeals affirmed, determining that the Recreational Use Statute does not violate the jural rights doctrine. The Court first noted that it was duty-bound to follow *Sublett v. United States*, 688 S.W.2d 328 (Ky. 1985), which certified that the Recreational Use Statute was constitutional pursuant to Sections 14 and 54 of the Kentucky Constitution, two of the three sections comprising the jural rights doctrine. The Court then held that the Recreational Use Statute barred the Estate's claims against 21st Century Parks. Both parties agreed that 21st Century Parks was a qualifying land owner under the statute and that it could not be held liable for acts of ordinary negligence on its property. However, the Estate claimed that 21st Century Parks could not rely on the Recreational Use Statute because Tony was injured on a state-controlled navigable waterway that 21st Century Parks does not own. The Court rejected this argument, citing *Collins v. Rocky Knob Associates, Inc.*, 911 S.W.2d 608 (Ky. App. 1995), and *Charpentier v. Von Geldern*, 191 Cal. App. 3d 101, 105, 236 Cal. Rptr. 233, 235 (Cal. Ct. App. 1987). The Court also held that the Estate could not prove that 21st Century Parks' conduct fell within 411.190(6), providing liability for a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

X. TRUSTS

A. ***Garland v. Miller***

2018-CA-001384 07/31/2020 2020 WL 4499057

Opinion by Judge Taylor; Judges Dixon and Kramer concurred.

Appellant challenged a district court order that terminated an irrevocable trust established by appellee, appellant's sister, pursuant to KRS 386B.4-110(1) and (2), part of Kentucky's Uniform Trust Code. Appellant was trustee of the trust and opposed termination. The Court of Appeals affirmed, holding that while the trust was not subject to a "section one" termination under KRS 386B.4-110(1), continuing the trust was unnecessary to advance any material purpose of the trust; therefore, termination was proper pursuant to KRS 386B.4-110(2).