PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JULY 1, 2024 to JULY 31, 2024

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I. FAMILY LAW

A. LINK v. LINK (Ky. App. 2024).

2023-CA-1073-MR 7/12/2024 2024 WL 3380798
Opinion Vacating and Remanding by KAREM, JUDGE; CETRULO, J. (CONCURS) AND GOODWINE, J. (CONCURS)

This appeal was brought from an order denying the appellant's petition for custody of his ex-wife's biological son and from a restraining order. When the appellant married the appellee, her son was approximately eighteen months of age, and his biological paternity was unknown. The appellant and appellee were married for over nine years and had a daughter together. The appellant acted as a father to both children, providing financial support and caretaking. The son was not informed that the appellant was not his biological father. After appellant and appellee divorced, appellant served as the caretaker of both children on an alternating weekly basis. After over three years of this arrangement, appellee ended son's contact with the appellant. He petitioned for joint custody. The circuit court dismissed his petition, on the grounds that he did not have standing and that appellee mother had not waived her superior parental rights. The circuit court also entered a restraining order banning appellant from any communication or contact with appellee or son and from posting on social media about appellee, son or the proceedings.

The Court vacated the order, holding that appellant had standing under KRS 403.800(13) because he had equal time sharing of the son for more than six months preceding the commencement of the custody action. The Court further held that the circuit court's findings regarding waiver were inadequate as a matter of law for failing to recognize the doctrine of partial waiver as set forth in *J.S.B. v. S.R.V.*, 630 S.W.3d 693 (Ky. 2021) and *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), *as modified on denial of reh'g* (Aug. 26, 2010) (adopting the factors listed in *Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347 (2008)). The case was remanded for the circuit court to make findings under the *Heatzig* factors.

The Court vacated the restraining order for failure to comply with CR 65 because its intent was unclear and it had no termination date and because it contained very broad

restrictions on appellant's actions, including future restraints on expression, which implicated appellant's free speech rights.

B. ADAIR v. EMBERTON, ET AL. (Ky. App. 2024).

2023-CA-1100-MR 7/12/2024 2024 WL 3381156
Opinion Reversing and Remanding by CETRULO, JUDGE; GOODWINE, J. (CONCURS) AND KAREM, J. (CONCURS)

This is an appeal from an order granting expanded parenting time to a biological mother in a custody action. The paternal grandmother has had custody of the child since birth and appealed from the order increasing mom's parenting time after a hearing that did not fully comply with the statutes or prior court rulings. In this action in Jefferson County, the family court had previously appointed a Friend of the Court ("FOC") to assist with this case. The court conducted a hearing in June 2023 during which the grandmother custodian was not initially admitted into the proceedings through the zoom link, although present. The court had informal discussions with the FOC, mom, and her attorney for nearly eight minutes before the grandmother was admitted. The court appeared to be preparing its order increasing mom's parenting time prior to the grandmother's presence. Once she was admitted into the proceedings, the court restricted grandmother from cross examining witnesses, including the FOC. The family court further relied upon the unsworn recommendations of the FOC to increase parenting time, even though there was no written report, no apparent interview of mental health counselors involved with the child, and the FOC had never interviewed the child, in violation of KRS 403.300. Previous orders of the court had indicated that motions to modify would not be heard until the FOC met with the child and provided a written report, and that had not yet occurred. There was also no indication in the order or on the record that the family court considered the best interests of the child as required before a modification of parenting time pursuant to KRS 403.320. The ruling of the Jefferson Family Court was reversed.

C. A.S. v. M.R. ET AL. (Ky. App. 2024).

2024-CA-0245-ME 7/19/2024 2024 WL 3463387
Opinion Reversing and Remanding by EASTON, JUDGE; CALDWELL, J. (CONCURS) AND COMBS, J. (CONCURS)

In an appeal from the family court's findings that A.S. was neglectful, A.S. argued: (1) that the court abused its discretion because its findings were clearly erroneous, and (2) that the court violated the separation of powers doctrine when it did not allow the Assistant County Attorney to drop the prosecution against A.S. This appeal originated as a DNA petition involving four children (Children) and four adults (Mother, A.S., Father, and Uncle), who all lived in the same residence. The initial DNA petition alleged that Mother was arrested for assaulting one of the Children, but the petition named all four adults as parties responsible for the abuse and neglect of the Children.

The case was scheduled for adjudication in February 2023, where Mother appeared with counsel and agreed to stipulate to neglect. In the criminal action, Mother had entered a guilty plea to Assault 4th. The Commonwealth requested the court dismiss the petition against Father, Uncle, and A.S. The Commonwealth stated it was not pursuing charges against Uncle and A.S. due to the lack of forensic evidence and requested the petition against them to be dismissed. The court denied the request due to the allegations made in the amended petition.

In September 2023, the parties moved to enter stipulations. Mother would stipulate to risk of neglect, while A.S. and Uncle agreed to stipulate that the court could have made a finding for risk of emotional abuse, and they would be informally adjudged. They also agreed to not be caretakers of the Children for a one-year period. A week later, the court rejected the stipulations of the parties. Mother had to stipulate to abuse due to her guilty plea to Assault 4th. The court determined that due to the living situation, all parties had to stipulate to abuse or the case would be set for a hearing. The parties requested a hearing.

Two weeks later, the adjudication hearing was held. The Commonwealth did not call any witnesses. Mother testified that she threw a medicine bottle at a pet animal, accidentally striking one of the Children, which caused a red mark and small bruise. A.S. was present at the time of the incident. There was no mention of Father and Uncle. In its standardized adjudication order and attendant written findings, the court found that the Child was hit under A.S.'s direct supervision and that the Commonwealth met its burden of proof for a finding of neglect against A.S. A disposition hearing was held in January 2024, where A.S. was ordered to have no contact with the Children.

This Court noted the filing of an action in court connects the executive and judicial branches, and a family court is not required to acquiesce in the county attorney's recommendations without question. However, the prosecutor is the most knowledgeable as to whether a pending prosecution should be terminated, and "[t]he exercise of discretion with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to manifest public interest." *See generally Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004). In this case, the Bullitt County Attorney's Office joined A.S. in both the argument that the family court erred in ignoring its prosecutorial discretion in presenting cases and in A.S.'s contention that there was no evidence to support a finding of neglect against her. The family court failed to have a hearing on the Commonwealth's motion to dismiss as contemplated under *Hoskins*. Furthermore, there was little testimony during the adjudication hearing. With that little testimony, the court made a finding that A.S. had neglected the Children based on her being in a supervisory role, failing to protect the Children, and not reporting the incident. The court's findings in this regard were clearly erroneous. The Bullitt Family Court's orders were reversed and remanded with direction to dismiss the petitions against A.S.

II. IMMUNITY

A. ***MICHAEL WILSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS FIREFIGHTER v. WESLEY ENGLAND AND KENTUCKY ASSOCIATION OF COUNTIES, WORKERS' COMPENSATION FUND (Ky. App. 2024).***

2023-CA-0223-MR 7/12/2024 2024 WL 3380981
Opinion Reversing and Remanding by CALDWELL, JUDGE; ACREE, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Wilson, a firefighter, was driving an ambulance when he ran a stop sign, causing injuries to the passengers who were EMTs and a baby they were trying to save. England, one of the injured EMTs, brought suit against Wilson. The trial court determined that a firefighter's duty to drive an ambulance was a ministerial duty; therefore, Wilson could not enjoy qualified official immunity. However, there is no precedent of a firefighter having a specific duty to drive an ambulance a certain way, as they are not trained to specifically drive ambulances. Therefore, Wilson's actions were discretionary, and he was entitled to qualified official immunity.

III. INSURANCE

A. ***ERIE INSURANCE EXCHANGE v. SHRI BRAMANI, LLC; ERIC MOBERLY; KAP LEASING, INC.; KEVIN MOBERLY; MOBERLY BROTHERS PROPERTIES, LLC; AND PRADIPKUMAR PATEL (Ky. App. 2024).***

2023-CA-0169-MR 7/19/2024 2024 WL 3463666
Opinion Reversing and Remanding by JONES, JUDGE; CALDWELL, J. (CONCURS) AND CETRULO, J. (CONCURS)

DISCRETIONARY REVIEW GRANTED 02/13/2025

In a direct appeal from the trial court's summary judgment against it in a declaratory judgment action, Erie Insurance Exchange ("Erie") contends the trial court erroneously interpreted an exclusionary clause in its insurance coverage with a gas station for injuries or damages caused by "pollution." The trial court ruled that an incident involving a leak from an underground petroleum tank, causing alleged environmental damage to a neighboring property, was not excluded based on the policy. The Court of Appeals disagreed and reversed the trial court.

The Court held that gasoline is clearly a pollutant when it leaks from an underground storage tank and enters a neighbor's land and contaminates the water and soil thereon. In so doing, the Court disagreed with the Appellees' argument that the exclusion was ambiguous because the policy's definition of "pollutant" did not specifically name "gasoline" or "petroleum." Applying reasoning from its earlier precedents, the Court held that the list of potential pollutants is virtually boundless. It would be both impractical and

inefficient for the insurer to attempt to include a laundry list of every potential pollutant in its policies.

Furthermore, in considering the ordinary meaning of the term, the Court cited the United States Supreme Court for the principle that even a valuable and useful product such as gasoline can become a pollutant when it contaminates a natural resource. *United States v. Standard Oil Co.*, 384 U.S. 224, 226 (1966).

Finally, the Court ruled this type of exclusion is enforceable when the nature of the damage is one in which the purported pollution is alleged to cause contamination, negative health, or environmental effects, as was the case here. The Court of Appeals concluded by reversing the trial court's summary judgment order and remanding with instructions to enter a judgment in favor of Erie.

IV. MALPRACTICE

A. CARPENTER v. SAUNDERS (Ky. App. 2024).

2023-CA-0923-MR 7/12/2024 2024 WL 3381400
Opinion Affirming by KAREM, JUDGE; ACREE, J. (CONCURS) AND ECKERLE, J. (CONCURS)

Patient filed a complaint against her treating surgeon alleging malpractice for failing to obtain informed consent. The trial court granted summary judgment finding there was no proof that the patient's alleged lack of informed consent caused her injuries.

The patient, although acknowledging she was fully aware of the risks and hazards of surgery, alleged the doctor violated the standard of care for obtaining informed consent by not fully answering her question regarding his experience. In addition, she alleges the doctor misled her as to the number of prosthetics that would be available for implantation during surgery. She ultimately claims, had she been provided the complete and correct answers to her questions, she would not have consented to this particular doctor performing the surgery.

The Court affirmed the trial court finding the patient failed to provide proof that the alleged negligence was the cause of her injuries. The Court went on to explain any claim she may have, falls more appropriately in the realm of battery.

V. PROPERTY LAW

A. WOOD v. CLEWELL (Ky. App. 2024).

2023-CA-1019-MR 7/12/2024 2024 WL 3381394
Opinion Affirming by CETRULO, JUDGE; GOODWINE J. (CONCURS) AND KAREM, J. (CONCURS)

In this appeal, we revisit the holding of the Court in *Johnson v. Akers Dev., LLC*., 672 S.W.3d 205 (Ky. App. 2023) regarding right of redemption cases. Perry failed to pay property tax liens; Clewell paid the liens and then purchased the property after filing for foreclosure. Perry then assigned his right of redemption pursuant to KRS 426.530 to Wood. Wood attempted to exercise the right of redemption within six months as required by statute by paying the purchase price plus 10% interest and reasonable costs allowed by the provisions of KRS 426.530. However, Wood did not pay or prove efforts to discover those reasonable costs incurred by the purchaser before expiration of the six month window. A redeemer must make good faith efforts to ascertain and pay all costs within the statutory window in order to establish substantial compliance. The circuit court found that Wood failed to do so, and the Logan Circuit Court was affirmed.

VI. TORTS

A. THE ESTATE OF JOSHUA ADAM FUSON, ET AL. v. MERCY REGIONAL EMERGENCY MEDICAL SYSTEM LLC, ET AL. (Ky. App. 2024).

2023-CA-1242-MR 7/12/2024 2024 WL 3381440
Opinion Affirming in Part, Reversing in Part, and Remanding by THOMPSON, CHIEF JUDGE; COMBS, J. (CONCURS) AND LAMBERT, J. (CONCURS)
DISCRETIONARY REVIEW GRANTED 03/12/2025

The Court of Appeals held that KRS 413.170(1) tolls the usual statute of limitations for claims and allows a minor to bring a claim against a defendant at any time while he or she is a minor via a next of friend or guardian. A next of friend raising a claim for a minor does not start the running of the statute of limitations for all claims and does not preclude other claims from being raised later.

VII. WORKERS COMPENSATION

A. GENERAL MOTORS, LLC v. SMITH (Ky. App. 2024).

2024-CA-0367-WC 7/12/2024 2024 WL 3381198
Opinion Affirming by KAREM, JUDGE; CETRULO J. (CONCURS) AND GOODWINE, J. (CONCURS)

The employer petitioned for review of the Workers' Compensation Board's (Board) opinion affirming the Administrative Law Judge (ALJ) wherein he awarded temporary total disability benefits (TTD), permanent partial disability benefits (PPD) enhanced by the three-multiplier, and medical expenses.

The Court affirmed the Board opining that an award of TTD must meet both the statutory definition of TTD under KRS 342.0011(11)(a) and comport with the language of KRS340.040(1) regarding how long an employee must be disabled to qualify or disqualify for payments. Additionally, when determining if an employer is owed credit towards TTD payments made, the Court held that the employer must provide evidence to establish the employee's gross wages minus applicable taxes.

Lastly, the Court agreed with the Board that the ALJ's interpretation of the facts was supported by substantial evidence and therefore it's application of the three-multiplier would not be disturbed.