PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

JUNE 1, 2016 to JUNE 30, 2016

I. APPEALS

A. ***Gambrel v. Gambrel***

2016-CA-000028 06/10/2016 2016 WL 3213216 Rehearing Pending

Opinion by Judge Nickell; Judge Dixon concurred; Judge J. Lambert concurred and filed a separate opinion.

Appellant challenged the entry of a domestic violence order (DVO) against him at the request of his former wife. The Court of Appeals affirmed, noting that because a complete record was not provided - specifically the hearing culminating in entry of the DVO - it could not review the factual findings the trial court made on the record but did not incorporate into the written order. It also could not determine whether there was sufficient evidence to justify entry of a DVO. Thus, the Court had to assume that the content of the hearing supported the trial court's entry of the DVO. The Court reiterated that appellants bear responsibility for ensuring the appellate court receives a complete record - including video records covered by CR 98. However, the Court also acknowledged the grey area presented by CR 98 concerning hearings in family court practice that result in a final determination (DVO; dependency, neglect and abuse; DNA; termination of parental rights; etc.) - *i.e.*, whether they must be designated by the appellant to be included in the record on appeal or if circuit court clerks must certify such hearings as part of the record automatically. The Court also "strongly encourage[d]" the Supreme Court of Kentucky to clarify the matter.

II. CONVERSION

A. ***Jasper v. Blair***

2014-CA-000204 06/17/2016 2016 WL 3382140

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

Appellee sued appellant, a jewelry store, for conversion of a diamond ring stolen from her home by another party. Following a jury trial, the circuit court concluded "as a matter of law" that appellant was liable for converting the diamond ring and directed a verdict for liability only. The circuit court then submitted the issue of damages to the jury, which awarded appellee $15,000 in compensatory damages but no punitive damages. By a 2-1 vote, the Court of Appeals affirmed, holding that appellee met all seven elements of the tort of conversion set forth in *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d 849 (Ky. App. 2014) so as to merit a directed verdict, and that the jury's damages award was supported by the evidence.

III. CORRECTIONS

A. ***McCallister v. Riley***

2014-CA-001286 06/03/2016 2016 WL 3136278 DR Pending

Opinion by Judge J. Lambert; Chief Judge Acree and Judge Maze concurred.

The circuit court dismissed a former inmate's claim seeking damages from three jail officials arising from an altercation with another inmate. The Court of Appeals affirmed the lower court's dismissal order, holding that the inmate failed to establish his three claims. On his failure to train claim, the Court held that the other inmate's attack on a deputy jailer months prior to this assault was irrelevant to the circuit court's consideration and that the jailer did not breach his duty to exercise reasonable and ordinary care to prevent an unlawful injury to an inmate in his custody. The Court also rejected the inmate's claim that the jailer failed in his duty to protect the inmate from being assaulted because he did not breach his duty of reasonable care, as well as the inmate's failure to provide medical care claim, as the evidence established that the prison officials responded appropriately.

IV. CRIMINAL LAW

A. ***Buckler v. Commonwealth***

2015-CA-000511 06/17/2016 2016 WL 3382037

Opinion by Judge VanMeter; Judges Dixon and Nickell concurred.

Upon review of the circuit court's denial of a county sheriff's motion to dismiss his indictment under KRS 510.090(1)(e) for sodomy in the third degree, the Court of Appeals affirmed. The Court held that dismissal of a criminal indictment in the pre-trial stage is only permissible in five scenarios: 1) when the criminal statute is unconstitutional; 2) when prosecutorial misconduct prejudices the defendant; 3) when a defect in the grand jury proceeding occurs; 4) when an insufficiency on the face of the indictment occurs; or 5) when the court itself lacks jurisdiction per RCr 8.18. *Commonwealth v. Bishop*, 245 S.W.3d 733 (Ky. 2008). Here, the sheriff claimed that he was not an employee or contractor with the Department of Corrections or a detention facility as required by KRS 510.090(1)(e). The Court ruled that such an argument constitutes a challenge to the sufficiency of the evidence, not an insufficiency on the face of the indictment, and thus the circuit court's denial of the motion to dismiss the indictment was proper. *See Commonwealth v. Isham*, 98 S.W.3d 59 (Ky. 2003) (holding that the proper time for an evaluation of the sufficiency of the evidence is following the conclusion of the Commonwealth's proof by means of a motion for a directed verdict).

B. ***Romero-Perez v. Commonwealth***

2014-CA-002006 06/24/2016 2016 WL 3462241

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

Appellant was sentenced to ten years' imprisonment after a jury found him guilty of first-degree burglary, fourth-degree assault (domestic violence), and fourth-degree assault (minor injury). On appeal, appellant asserted that he was denied his constitutional rights to cross-examination and to present a defense during his trial because the trial court refused to allow him to question one of the alleged victims about her pending application for a U-Visa, a type of visa available to victims of certain crimes, including domestic violence, allowing the holder to reside lawfully in the United States. *See* 8 U.S.C. §§1101(a)(15)(U)(iii), 1184(p)(6). Upon review, the Court of Appeals held that that the trial court erred in disallowing questioning concerning the victim's U-Visa application. The success of the victim's application depended on a certification that she provided "helpful" assistance to the prosecution. The fact that the victim's U-Visa application was pending before the trial court was sufficient to support an inference that she might believe that it was in her best interest to testify in the Commonwealth's favor. However, the Court further determined that any error in disallowing the questioning was harmless because other witnesses testified to substantially the same facts as the victim. Therefore, appellant's conviction was affirmed.

C. ***Stanfill v. Commonwealth***

2015-CA-001323 06/24/2016 2016 WL 3462239

Opinion by Judge Combs; Judges Clayton and Stumbo concurred.

Appellant challenged an order denying his RCr 11.42 motion to vacate his conviction. Notably, appellant alleged that he received ineffective assistance of counsel when his trial counsel failed to ensure that the requirements of *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), were met regarding his motion for hybrid representation at trial and at the *Faretta* hearing conducted on the motion. The motion for hybrid representation was presented solely for the purpose of allowing appellant to present an opening argument. The Court of Appeals affirmed, holding that although the hearing conducted in the case was less than ideal, it was nonetheless adequate to satisfy *Faretta*. Moreover, any alleged imperfections in complying with *Faretta* were ultimately attributable to the trial court rather than to defense counsel, obviating the applicability of RCr 11.42.

V. DAMAGES

A. ***Gaither v. Commonwealth, Justice and Public Safety Cabinet***

2015-CA-000603 06/03/2016 2016 WL 3136179 DR Pending

Opinion by Judge Clayton; Judges Maze and Stumbo concurred.

The administratrix and personal representative of the estate of an undercover informant murdered as a result of police negligence sought to recover post-judgment interest under KRS 360.040. The Board of Claims entered an award in the amount of $168,729.90 in favor of the estate after concluding that the informant's death was caused by the negligent performance of ministerial acts by the police officers acting within the scope of their employment. However, this award was subsequently reversed by the circuit court on the grounds of immunity. The Court of Appeals affirmed the circuit court's judgment but was subsequently reversed by the Supreme Court, which directed the Board of Claims to re-enter the award to the estate. The estate then sought post-judgment interest from the date the circuit court entered its initial judgment erroneously reversing the Board of Claims. The circuit court denied the motion on the grounds that the interest should accrue from the date of the judgment entered on remand from the Supreme Court. However, the Court of Appeals reversed on the grounds that the estate was entitled to interest from the date judgment in its favor should have been entered by the circuit court because the original, erroneous judgment met the definition of a judgment under CR 54.01.

VI. ESTATES

A. ***Haste v. Vanguard Group , Inc***

2014-CA-001992 06/17/2016 2016 WL 3382038

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

Appellant, the executor of the estate of David Peck, appealed from a summary judgment concluding that Herbert Moore III and Patricia Moore were the beneficiaries of Peck's IRA. The executor argued that there was a material issue of fact regarding whether Peck did everything necessary to effect a beneficiary change and, therefore, substantially complied with the terms of the IRA agreement. The Court of Appeals affirmed, holding that there was no material issue of fact and that summary judgment was proper. The Court noted that Peck did not take any affirmative steps to direct appellee Vanguard to change the Moores' status as beneficiaries, and that Peck was repeatedly informed by Vanguard of the process to effectuate a change. Pursuant to KRS 391.360, an IRA is a non-testamentary asset that cannot be distributed through probate in accordance with a will. Thus, Peck's IRA designation superseded his will, and the fact that the will made a different disposition of his probate estate did not preempt his IRA designation.

VII. IMMUNITY

A. ***Feinberg v. Keeton***

2014-CA-001656 06/17/2016 2016 WL 3382063

Opinion by Judge D. Lambert; Judges Combs and VanMeter concurred.

Appellant, a psychologist to whom the circuit court referred a divorced couple for a child custody evaluation, appealed the denial of his motion to dismiss a malpractice suit brought against him by appellee, the spouse who eventually lost custody of her two minor children. The Court of Appeals reversed the circuit court's determination that appellant did not enjoy quasi-judicial immunity and directed the circuit court to dismiss the action. The Court noted that Kentucky law clearly provides that court-appointed psychologists and custody evaluators are entitled to quasi-judicial immunity as a means to protect the integrity of the judicial process. *J.S. v. Berla*, 456 S.W.3d 19 (Ky. App. 2015); *Stone v. Glass*, 35 S.W.3d 827 (Ky. App. 2000).

VIII. LIENS

A. ***New Tech Mining, Inc. v. THC Kentucky Coal Venture I, LLC***

2014-CA-000144 06/03/2016 2016 WL 3136607

Opinion by Judge Nickell; Judges Combs and Taylor concurred.

New Tech Mining, Inc. ("New Tech"), Rama Development Co., Inc. ("Rama"), Pikeville Energy Group, LLC ("PEG"), and Bank of Mingo challenged the circuit court's grant of a warehouseman's lien pursuant to KRS 1 355.7-209 in favor of THC Kentucky Coal Venture I, LLC ("THC") against certain underground mining equipment, and finding the four entities were jointly and severally liable to pay the lien amount of $48,000.00. The Court of Appeals vacated and remanded, holding that the lien granted was statutorily defective. The Court noted that "warehouse" is defined in KRS 355.7-102(1)(m) as "a person engaged in the business of storing goods for hire." A review of the record revealed that THC failed to meet the statutory definition of being a warehouse in relation to the mining site. No argument was advanced nor was evidence presented to show THC was either engaged in the warehouse business or was qualified as a warehouseman sufficient to advance its claim for a warehouseman's lien. Moreover, the record was devoid of any warehouse receipt or storage agreement pertaining to the subject equipment. Thus, KRS 355.7-209 was wholly inapplicable to the facts at bar and the trial court's grant of a lien pursuant to that statute was plain error. The Court further held that the evidence failed to provide grounds for an equitable lien.

IX. PROPERTY

A. ***Gilland v. Dougherty***

2015-CA-000286 06/17/2016 2016 WL 3382157 Rehearing Pending

Opinion by Judge Thompson; Judges Kramer and Taylor concurred.

The Court of Appeals reversed a judgment quieting title in property claimed through adverse possession due to a failure to join indispensable parties. The disputed property was a wooded area whose legal description was not contained in any of the neighboring properties' deeds. Expert witness testimony at trial established that the record title owners of the subject parcel could be identified because the original tract of land they owned included the disputed parcel of land. Moreover, after they sold other portions of the property more than one hundred years ago, the remaining parcel closely matched the acreage of the disputed parcel. The Court noted that pursuant to *Baker v. Weinberg*, 266 S.W.3d 827 (Ky. App. 2008), CR 19.01, CR 19.02, and the Declaratory Judgment Act, record owners are indispensable parties to a quiet title action. Therefore, the heirs of the record title holders must either be joined as indispensable parties or the quiet title action must be dismissed because the controversy could not be resolved between the existing parties without prejudicing the heirs' rights. Consequently, the Court reversed and remanded for dismissal without prejudice or for the matter to be held in abeyance while the heirs of the record title owners were located and joined as parties.

B. ***Wells v. C.W. Hoskins Heirs***

2014-CA-001220 06/24/2016 2016 WL 3463007 Rehearing Pending

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

Ruth Farmer Wells, Albert Wells, and Terry Farmer (collectively "the Wellses") and ICG Hazard, LLC ("ICG") appealed from a judgment entered following a bench trial. The case began as an action to recover coal royalties from ICG for mined coal and evolved into disputed boundary litigation between the Wellses and Phillip Lewis, Robin Lewis, and a general partnership known as the C.W. Hoskins Heirs (collectively "Lewis-Hoskins"). The circuit court ruled in favor of Lewis-Hoskins, but the Court of Appeals reversed and remanded. At issue was the circuit court's reliance on, and adoption of, one particular survey in establishing the boundary for the disputed area in favor of Lewis-Hoskins. Citing to *Webb v. Compton*, 98 S.W.3d 513 (Ky. App. 2002), the Court of Appeals noted that a circuit court, as fact-finder, may choose between conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions or does not ignore established factors. The Court concluded that the survey at issue failed to meet the criteria set forth in *Webb v. Compton* for several reasons. For example, the survey on its face did not comport with the legal descriptions set out in each of the three deeds at issue. Moreover, the survey ignored the legal descriptions of the boundary between the properties set forth in the deed, and its conclusions were based on numerous erroneous assumptions. The Court ultimately concluded that another survey resolved the issues and directed the circuit court to enter judgment for the Wellses and ICG.

X. SCHOOLS

A. ***Beechwood Board of Education v. Wintersheimer***

2015-CA-000582 06/17/2016 2016 WL 3382025

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

Beechwood sought tuition from the Wintersheimers, claiming that they did not reside inside the Beechwood school district while their children attended Beechwood Independent Schools. The Wintersheimers were constructing a residence in the Beechwood district when they first enrolled their children at the schools. Pursuant to school policy, they paid non-resident tuition for the first semester while the house was being built. Due to construction delays, the house was not completed by the end of the semester, so the Wintersheimers rented an apartment inside the Beechwood school district while they continued to have their house constructed. They also maintained their previous residence and spent some nights, and all of their time in the summers, at their previous residence, which is outside of the Beechwood school district. The Court of Appeals held that the Wintersheimers were bona fide residents of Beechwood. They were making substantial steps toward building a home in the district, and they were renting an apartment in the district. They were also spending some days and nights during the school year at their apartment, and they intended on residing within the district. Accordingly, the circuit court's order finding that the Wintersheimers were bona fide residents within the school district was affirmed.

XI. TAXATION

A. ***Petition Committee by and Through Belhasen v. Board of Education of Johnson County, Kentucky***

2015-CA-000449 06/24/2016 2016 WL 3465511 Rehearing Pending

Opinion and order reversing, remanding, and denying motion to dismiss appeal by J. Thompson; Chief Judge Acree and Judge J. Lambert concurred.

Five Johnson County voters living in the county school district filed a petition challenging the district's tax levy pursuant to KRS 132.017 and KRS 160.597. The county clerk certified the petition after finding that 1,347 of the signatures were valid and that only 771 were required. However, the circuit court ruled that certain pages of the petition did not meet the strict requirements of the statutes in that they did not identify the signatories' precinct, identified the precinct by number only, or contained a signature from voters residing in two or more precincts. It also ruled that the tax recall petition committee members failed to expressly list an address for future service. Finally, it ruled that the petition was erroneously certified because the clerk did not publish the affidavit in a newspaper of general circulation in Johnson County. The Court of Appeals reversed. First, it denied the school board's motion to dismiss the appeal on lack of standing because it was not filed by all five members of the petition committee. The Court held that the individual members of the committee were parties below and, as voters, they had standing to appeal. It then held that the affidavit and petition substantially complied with the statutory requirements for a tax recall vote. The signatures stricken by the circuit court were verified by the county clerk by the voter's name, address, birth date, and Social Security number and, therefore, the legislative intent was fulfilled. The Court also held that publication of the affidavit was optional with the petition committee and not a mandatory directive to the clerk. Likewise, the statutes' requirement that a single committee member be designated for service was directory.

XII. TERMINATION OF PARENTAL RIGHTS

A. ***M.L.W. v. Heart to Home Adoption Agency***

2015-CA-001110 06/10/2016 2016 WL 3213493 Rehearing Pending

Opinion by Judge Jones; Chief Judge Acree concurred; Judge Combs concurred and filed a separate opinion.

These consolidated appeals arose out of three orders terminating the rights of parents to three minor children. Only Father appealed. Prior to the termination action being filed, Mother contacted an out-of-state adoption agency she located on the internet to inquire about surrendering the children for adoption. The out-of-state agency reached out to Heart to Home Adoption Agency, LLC, a child placement agency licensed by the Commonwealth of Kentucky. Mother, who had physical custody of the children, eventually permitted Heart to Home to remove the children and place them in foster care. Thereafter, Heart to Home filed petitions for involuntary termination, which the family court granted. The Court of Appeals vacated the trial court's termination orders because they were not accompanied by written findings of fact demonstrating that termination was in the children's best interests, and it remanded the matter for additional findings of fact. The Court also instructed that on remand the family court must: (1) direct that the Cabinet for Health and Family Services be added as a party as required by KRS 625.060(1)(b); (2) strike the investigatory reports filed by the GAL and limit the GAL's role to that of an attorney; and (3) consider whether the placement agency complied with all applicable administrative regulations, including those requiring it to make "a reasonable effort . . . to return the child to the family of origin." 922 KAR 1:310.

XIII. TRIALS

A. ***Insight Kentucky Partners II, L.P. v. Preferred Automotive Services, Inc.***

2014-CA-001189 06/10/2016 2016 WL 3213586 DR Pending

Opinion by Judge Dixon; Judges Nickell and Taylor concurred.

Following a jury trial, the Court of Appeals reversed a judgment finding appellant liable to appellee for aiding and abetting a breach of fiduciary duty by appellant's former general manager. The Court concluded that a jury instruction misstated the law regarding breach of a fiduciary duty by including the vague term "fiducial information" rather than "fiducial confidences," and by erroneously expanding the scope of fiduciary duties. The Court also determined that the jury instruction on aiding and abetting a breach of fiduciary duty failed to comport with the language of Restatement (Second) of Torts § 876(b), which requires both: (1) knowledge of the breach of fiduciary duty, and (2) substantial assistance or encouragement to the fiduciary to breach such duty. The Court further determined that improper expert testimony from appellant's damages expert, as well as other evidentiary errors, also warranted a new trial. Addressing appellee's cross-appeal, the Court concluded that appellee failed to prove that its customer records were trade secrets.

XIV. WORKERS' COMPENSATION

A. ***Belcher v. Manpower of Indiana***

2015-CA-001781 06/03/2016 2016 WL 3136903 Released for Publication

Opinion by Judge Combs; Judges Dixon and Stumbo concurred.

Appellant sought review of a decision of the Workers' Compensation Board, which instructed the Administrative Law Judge to recalculate appellant's average weekly wage ("AWW") in accordance with KRS 342.140(1)(d). Appellant was held to be an employee of Manpower, a job placement agency, for purposes of calculation of his AWW as distinguished from his being an employee of the various entities to which he was temporarily assigned and placed. Appellant's injuries occurred while he was working on one of these assignments and, citing to *Nesco v. Haddix*, 339 S.W.3d 465 (Ky. 2011), he contended that KRS 342.140(1)(e) should be used to calculate his AWW. The Court of Appeals disagreed and concluded that appellant's status as an employee of the agency was evidenced by his inability to pick and choose his assignments, as well as by his retention by Manpower after his injury. This continuity of employment was the essential factor in the calculation of his AWW.