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

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I. FAMILY LAW

A. J.P.T. v. Cabinet for Health and Family Services, 2023-CA-0218-ME (Ky. App. 2024)

2023-CA-0218-ME 5/03/2024 2024 WL 1946175
Opinion by ACREE, JUDGE; CALDWELL, J. (CONCURS) AND LAMBERT, J. (CONCURS)

This opinion addresses both procedural and substantive issues in an appeal of a Dependency, Neglect, or Abuse (DNA) adjudication and disposition. Procedurally, the Court indicated that Appellant's substantial non-compliance with the Rules of Appellate Procedure (RAP) governing brief-writing justified striking the brief and dismissing the appeal. However, after reviewing Appellant's counsel's history of repetitively violating the same rules in five appeals in the past five years, and documenting that history in the opinion, the Court determined the proper remedy was to fine counsel. Counsel was fined $1,000 by separate Order. Substantively, the Court addressed Appellant's arguments: (1) that the family court's orders were not supported by substantial evidence; and (2) that there was no proof Appellant intended to injure Child. The Court found there was substantial evidence that Child was injured at the hands of Appellant who acknowledged playing with Child by picking him up by the upper arms and tossing him on a bed. Appellant's second argument was not persuasive because the infliction of physical injury under KRS 600.020(1)(a)(1)–(2) does not require intent to injure, only that the injury occurred "by other than accidental means." Elaborating upon the holding in *Cabinet for Health & Fam. Servs. v. P.W.* that "a parent need not intend to abuse or neglect a child in order for that child to be adjudged an abused or neglected child[,]" 582 S.W.3d 887, 895 (Ky. 2019), the Court of Appeals distinguished between intentional acts and purposeful acts, as follows:

"For the purposes of this statute, we do not define the adjective 'accidental' by the absence of *intent*; we define it by the absence of human agency—*i.e.*, a person's engaging in a *purposeful* act even if the outcome was unintended. [ACCIDENTAL, Black's Law Dictionary 18 (11th ed. 2019) (hereinafter "Black's") (emphasis added)]. Black's defines 'purposeful' as something '[d]one with a specific aim in mind; deliberate.' PURPOSEFUL, Black's 1483. Deliberate action is still purposeful, even if the intended

outcome does not come to fruition and, instead, some other consequence results from that deliberate action."

The Court of Appeals affirmed the family court's adjudication and disposition orders in this DNA case.

B. G.M.A. v. COMMONWEALTH OF KENTUCKY 2023-CA-0941-ME (Ky. App. 2024)

2023-CA-0941-ME 5/03/2024 2024 WL 1945596
Opinion by ECKERLE, JUDGE; KAREM, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Judge Eckerle, Presiding. Judges Karem & Lambert, Associates. In July 2021, G.M.A. (an attorney) filed a dependency/neglect/abuse (DNA) petition on behalf of his newly-born granddaughter. The petition alleged that granddaughter had been living with him and his wife, M.A., since shortly after her birth, and that her parents were unable to care for granddaughter due their mental-health and substance-abuse issues. The family court granted temporary custody to grandparents.

Subsequently, grandparents filed a motion for child support and to propound interrogatories to parents. The family court denied the motion, holding that grandparents were not parties to the action. Rather, only the Commonwealth, through the county attorney's office or the Cabinet for Health and Family Services, was a party with standing to file such motions. Shortly after this ruling, grandparents entered into an informal adjustment of the DNA petition with parents.

Thereafter, grandparents filed motions for permanent custody and for a finding that they were *de facto* custodians. The family court denied the motions, concluding that the matters were not ripe in light of the informal adjustment. Later, grandparents filed motions alleging that the parents violated the terms of the informal adjustment and asserting rights to intervene as *de facto* custodians. The family court denied the motions, again concluding that grandparents were not parties to the case and lacked standing to intervene.

While the matter was pending, G.M.A. was elected as county attorney. The family court entered a *sua sponte* order disqualifying his office and directing the appointment of an outside county attorney. The family court also entered orders sealing the record and the proceedings from any participation by non-parties, including G.M.A. and M.A. Eventually, the family court dismissed the DNA petition, concluding that parents complied with its terms.

The Court of Appeals reversed, noting that KRS 620.100(5) allows custodians the rights to notice of, and a right to be heard in, any proceeding held with respect to the child, even when they are not expressly made parties. Furthermore, the Court emphasized that 620.070(1) allows "any interested person" to file a DNA petition. In addition, the Court pointed out that an informal adjustment is necessarily "an agreement reached

among the parties," KRS 600.020(36), which is inconsistent with the Commonwealth's current position that custodial grandparents may never be parties to a DNA petition. The Court concluded that, when filed by an "interested person" with proper standing, the petitioner in a DNA action is accorded the status of party plaintiff.

Thus, the family court erred by holding that grandparents were not parties to the action, sealing the record and closing the proceedings, and refusing to hear their motions regarding parents' noncompliance with the informal adjustment. But since grandparents agreed to the informal adjustment, they were estopped from bringing substantive motions concerning custody and child support while the informal adjustment was in effect. Finally, the Court held that the family court properly disqualified G.M.A. after he was elected county attorney.

II. IMMUNITY

A. J.A., PARENT, AND ON BEHALF OF MINOR, JOHN DOE v. MCCRACKEN COUNTY SCHOOL DISTRICT AND BOARD OF EDUCATION, ET AL., 2022-CA-1270-MR (Ky. App. 2024).

2022-CA-1270-MR 5/17/2024 2024 WL 2225400
Opinion by TAYLOR, JUDGE; THOMPSON, C.J. (CONCURS) AND ECKERLE, J. (CONCURS)

J.A. appealed the order of the McCracken Circuit Court granting summary judgment motions submitted by Ceglinski, principal of McCracken County High School, and Harper, superintendent (Appellees), based on qualified official immunity. John Doe was a student at McCracken County High School and was the victim of sexual assault from his fishing coach, John Parks. Parks was subsequently shot by sheriffs during an attempt to serve a bench warrant.

This Court affirmed the order granting summary judgment in favor of Appellees based on immunity. A public official is granted qualified official immunity when he engages in a discretionary act, which involves exercising discretion and judgment, or personal deliberation, decision, and judgment. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). Review of the record revealed that Ceglinski did not act in bad faith while conducting his investigation into Doe's allegations against Parks. Harper, as superintendent, had discretionary supervisory authority over the school district and the management of school affairs. There was no bad faith in the actions Harper took while investigating Doe's allegations. Accordingly, both Ceglinski and Harper were correctly afforded qualified official immunity.

B. ***IVES v. HMB PROFESSIONAL ENGINEERS, INC., 2021-CA-1187 (Ky. App. 2024)***

2021-CA-1187-MR 5/24/2024 2024 WL 2487850
Opinion by JONES, JUDGE; ACREE, J. (CONCURS) AND LAMBERT, J. (CONCURS)

DISCRETIONARY REVIEW GRANTED 12/12/2024

In four direct appeals from the trial court's grant of summary judgment to the engineers and engineering firms involved in the case, the Court of Appeals reversed and remanded for further proceedings. The four appeals stem from a catastrophic automobile accident which killed Hiram Ives and seriously injured his business partner, Jennings Copley. The family and estate of Ives filed suit against Copley and the various engineers and engineering firms which oversaw the widening of the portion of Interstate 65 where the accident occurred. Following discovery, the trial court granted summary judgment to the engineer parties on the basis of immunity and that the claims were preempted by federal law.

The Court of Appeals reversed. First, it disagreed with the trial court's finding of immunity, holding a private, engineering consultant was not immunized from liability simply because its roadway design plan was approved by a sovereign entity. Here, the mere fact that the engineer parties contracted with the Kentucky Transportation Cabinet did not transform them into state actors or quasi-state actors for purposes of immunity.

Second, the Court of Appeals held that neither the federal statutes nor the federal regulations pertinent to the National Highway System contain express statements of preemption. Further, Kentucky's common law negligence and wrongful death causes of action appear to be in harmony with federal law, and therefore, the trial court incorrectly concluded that federal preemption barred the state law claims.

C. ***FINDLEY v. WESTERN KENTUCKY UNIVERSITY, 2023-CA-0521-MR (Ky. App. 2024).***

2023-CA-0521-MR 5/03/2024 2024 WL 1945590
Opinion by MCNEILL, JUDGE; THOMPSON, C.J. (CONCURS) AND EASTON, J. (CONCURS)

This is an appeal from the Warren Circuit Court's Order affirming the findings of the Board of Claims that Findley suffered a permanent injury resulting in a loss of earning capacity. Findley, a Western Kentucky University student, suffered an injury to his wrist in the course of his internship at a greenhouse. The Board had awarded Findley $250,000 in damages for loss of earning capacity, but the circuit court reversed the damage award by the amount of payments Findley had the right to receive. Kentucky Revised Statute (KRS) 49.130(2).

Western Kentucky University argued that there was no substantial evidence that Findley had suffered a permanent injury. However, findings made by the Board of Claims are conclusive if supported by substantial evidence, even if a reviewing court may reach a different conclusion. Here, there was substantial evidence that Findley suffered a permanent injury, thus, there was no error.

Findley argued that, while the Board did err in failing to reduce his damage award, the circuit court reduced his award in excess. This Court determined that the legislature intended medical expenses written off by a provider under an agreement with Medicare to be "payments received or the right to receive payment" under KRS 49.130(2). Therefore, the circuit court did not err in reducing Findley's award by $191,486.65.

III.JURY INSTRUCTIONS

A. ***KENTUCKY STATE POLICE/COMMONWEALTH OF KENTUCKY v. SGT. KEVIN BURTON; LT. FRANK CHAD TAYLOR; AND SGT. MIKE GARYANTES, 2022-CA-1028-MR (Ky. App. 2024).***

2022-CA-1028-MR 5/10/2024 2024 WL 2096885
Opinion by CALDWELL, JUDGE; CETRULO, J. (CONCURS) AND A. JONES, J. (CONCURS)
DISCRETIONARY REVIEW GRANTED 02/13/2025

This is an appeal by Kentucky State Police ("KSP") from a jury verdict in favor of the Appellees, who had brought Whistleblower Act claims against KSP. Appellant, KSP, filed a motion for directed verdict/JNOV, which was denied by the trial court. Appellees Burton, Taylor, and Garyante were employees of KSP. Appellees alleged they were subjected to retaliation and reprisal for reporting their concerns about "irregularities and thefts of evidence from" their post in Elizabethtown, Kentucky. Specifically, the Appellees allege they were threatened to be quiet or they would be transferred outside of their post, and that they were retaliated against for reporting the matter to the Commonwealth's Attorney and KSP officials.

KSP argued that the trial court erred in admitted certain evidence; that the evidence was insufficient to support the jury's verdict; and that the trial court gave erroneous jury instructions. This Court determined that the evidence submitted to the jury was sufficient to establish a *prima facie* Whistleblower Act claim; the reviewing Court must defer to the fact-finder's determinations about the weight and credibility of evidence and must view the evidence in a light most favorable to the Appellees. Therefore, the trial court did not err in denying KSP's motion for directed verdict, and KSP's argument of insufficient evidence failed.

However, the Court determined that one of the jury instructions was erroneous. KSP had tendered to the trial court jury instructions requiring the jury to make a finding that KSP took action against each of the Appellees as part of determining whether a *prima*

facie case was made. That instruction was not included in the instructions the trial court gave the jury, and thus, the trial court's instructions were materially different from KSP's. Although the specific "material, adverse" language KSP's proposed instruction was not required to be in the final instructions, the final instructions were required to include a finding of action against each of the Appellees. Because the trial court's final jury instructions did not require the jury to make a finding of action against each of the Appellees individually, the Court reversed and remanded.

V. LEGAL MALPRACTICE

A. ***MILLERS LANE CENTER, LLC (KY), AND MILLER LANE CENTER, LLC (FL) v. MORGAN & POTTINGER, P.S.C.; JAMES P. MCCROCKLIN; AND MOSLEY & TOWNES, PLLC, 2022-CA-1341-MR (Ky. App. 2024)***

2022-CA-1431-MR 5/10/2024 2024 WL 2096721
Opinion by EASTON, JUDGE; KAREM, J. (CONCURS) AND TAYLOR, J. (CONCURS)
DISCRETIONARY REVIEW GRANTED 10/16/2024

This is an appeal from two consolidated cases in which the trial court dismissed Millers Kentucky, LLC's 2021 claim for lack of standing; dismissed Millers Florida's claims because it had attempted to assign any proceeds from its malpractice claim, depriving it of standing; and dismissed Mark Brewer's claims of lost value in his membership interest in Millers Florida and emotional distress due to lack of standing. Millers Florida, LLC (which included members Brewer and Harold) operated and leased-out a warehouse in Louisville, Kentucky to a recycling company, Blue Skies. Eventually, Blue Skies filed suit against Millers Florida. After the parties failed to settle, a jury awarded Blue Skies upwards of $1.5 million. During that action, Brewer created Millers Kentucky, LLC, which is a totally separate entity to Millers Florida, LLC. Millers Kentucky subsequently filed for bankruptcy even though it does not own the property at issue and was not a party to the action. The bankruptcy court entered an order which directed Millers Kentucky and Millers Florida to consolidate their assets for the purposes of the bankruptcy and to file the correct documents with the Secretary of State to completely merge the two LLCs. Millers Kentucky and Millers Florida failed to submit any merger forms to the Secretary of State. The bankruptcy court also conducted a mediation on December 18, 2020, in which Millers Kentucky reached a global settlement ("Settlement Agreement") with its creditors, including Blue Skies.

On December 20, 2021, Millers Kentucky filed suit against Morgan & Pottinger, James McCrocklin, and Mosely & Townes ("Attorneys") for malpractice, as they were the attorneys who represented Millers Florida during various stages of the Blue Skies action. On March 16, 2022, Millers Florida and Brewer filed separate complaints against the Attorneys; Millers Florida alleged the same claims Millers Kentucky did in 2021, and Brewer alleged emotional distress, depreciation of his membership in Millers

Florida, and expenses incurred in collateral litigation. The trial court consolidated the 2021 and 2022 actions and entered its Opinion and Order on October 14, 2022.

The four issues on appeal were: (1) whether Millers Kentucky had standing, (2) whether the bankruptcy court's order merged Millers Kentucky and Millers Florida, (3) whether the trial court erred in holding that Millers Florida had no standing to bring its 2022 action due to its attempt to assign its malpractice claim, (4) whether the trial court erred in determining Brewer had no standing to recover damages for his membership value loss, and (5) whether the trial court erred in not dismissing the actions filed in 2022 by Millers Florida and Brewer because the actions were time-barred.

This Court first determined that Millers Kentucky was not a real party in interest pursuant to Kentucky Rule of Civil Procedure ("CR") 17.01, because Millers Florida was the true client to the Attorneys in the Blue Skies lawsuit. The Blue Skies lawsuit began in 2015, a year before Millers Kentucky was created, and it was never joined in the lawsuit after creation. Second, the bankruptcy court's decision to consolidate the assets of Millers Kentucky and Millers Florida did not effectively merge the two entities. The consolidation was just for the bankruptcy, and, further, substantive consolidation in bankruptcy is an equitable measure, is punitive in nature, and cannot be used offensively. Lastly, the claims brought by Millers Florida and Brewer were barred by a one-year statute of limitation. While the trial court did err in determining that Millers Florida lacked standing because it attempted to assign its legal malpractice claim, because assignment is prohibited, Millers Florida's claims were nevertheless time-barred, as well as Brewer's claims. The statute of limitations in a legal malpractice action start running when damages become "fixed and speculative," which occurred here when the Settlement Agreement with Blue Skies was reached in December 18, 2020, resolving the Blue Skies lawsuit.

VI. TORTS

A. LP LOUISVILLE HERR LANE, LLC D/B/A SIGNATURE HEALTHCARE AT JEFFERSON PLACE REHAB & WELLNESS CENTER ET AL. v. WILLIAM A. BUCKAWAY, EXECUTOR OF THE ESTATE OF SHIRLEY WILSON ET AL. (Ky. App. 2024).

2022-CA-0582-MR 5/24/2024 2024 WL 241056
Opinion by COMBS, JUDGE; EASTON, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Appeal from denial of a motion for summary judgment. Nursing home seeks to avoid liability for allegedly negligent care of patient due to blanket blame based on Covid restrictions. There exist numerous material facts to be fleshed out precluding entry of summary judgement. Therefore, we upheld its denial by the trial court.

*B. **BROWN v. FUNK, 2023-CA-0576-MR (Ky. App. 2024).***

2023-CA-0576-MR 5/10/2024 2024 WL 2096892
Opinion by LAMBERT, JUDGE; COMBS, J. (CONCURS) AND GOODWINE, J. (CONCURS)

The Court held that the plaintiff's voluntary decision to file an amended complaint which did not incorporate the original complaint effectively started the case anew, so the trial court did not err by setting aside a default judgment based on the superseded initial complaint. The Court also held that the trial court properly granted summary judgment because the plaintiff had not shown the defendant had a duty to repair or maintain the sidewalk upon which the plaintiff had tripped and fallen.