PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

NOVEMBER 1, 2018 to NOVEMBER 30, 2018

I. CONTRACTS

A. ***Hellier Manor Apartments, Ltd. v. City of Pikeville***

2017-CA-000842 11/30/2018 2018 WL 6252581

Opinion by Judge Johnson; Judges D. Lambert and J. Lambert concurred.

On September 10, 1985, the City of Pikeville and the U.S. Department of Housing and Urban Development (HUD) entered into a Housing Development Grant Agreement, a specialized type of grant designed to encourage the construction of low-income housing. HUD granted Pikeville approximately $1.4 million to disburse with the stipulation that the project be comprised of at least 20% low-income residents. The Grant Agreement specified that Hellier would receive the grant funds provided to Pikeville for construction of the project. The term of the loan was twenty years, with HUD having the power to grant extensions beyond that period. As part of their agreement, Pikeville and Hellier executed a real estate note stating, in relevant part, that it would be repaid by Hellier, to the extent possible, in annual installments not to exceed $105,100.00. The note further provided that any unmet portion of these annual installments would accrue and ultimately be repaid. However, there was never any repayment under these terms as the income generated by the housing did not exceed setoffs designated by the Grant Agreement. The note further provided, though, that "[i]n any event, the total repayment of this Note shall be $2,102,000.00." After the term of the contract expired, Pikeville sought and received a judgment and order of sale against Hellier for $2,102,000.00, with 8% interest dating back to February 17, 2008, and post-judgment interest at a rate of 12%. On appeal, Hellier first argued that the agreements between the parties, when read in concert with controlling federal law, prohibited repayment of the Housing Development Grant when no substantive violation had occurred. The Court of Appeals disagreed and affirmed as to this issue, noting that the Grant Agreement provided that there could be repayment provisions even without a substantive violation or debt forgiveness provision. Therefore, since the parties agreed upon a repayment amount of $2,102,000.00, Pikeville was entitled to recover that sum. Hellier also argued that the circuit court erred in

imposing interest on the judgment. On this point, the Court of Appeals reversed, holding that under the plain language of KRS 360.040(3) and KRS 360.010(3), as well as the express terms of the agreements between the parties, interest on the loan must be calculated at a rate of 7% for both pre-judgment and post-judgment interest.

B. ***Wagner v. Wagner***

2015-CA-001024 11/02/2018 2018 WL 5726517

Opinion by Judge Thompson; Judges Acree and D. Lambert concurred.

Appellant Valerie Wagner challenged an order denying her motion to hold appellee Kevin Wagner in contempt for violation of a provision in the parties' property settlement agreement requiring Kevin to make the monthly mortgage payments on the marital residence and for his failure to make property distribution equalization payments as required by the agreement. Under the terms of the settlement agreement, Valerie was given exclusive use and control of the marital residence and Kevin was required to make the mortgage payments "until such time as Valerie decides to sell the property." Twenty-five months after Valerie listed the residence for sale - but before it was sold - Kevin ceased making the mortgage payments, which resulted in foreclosure. The family court found that under the agreement, Kevin's obligation to pay the mortgage ended when Valerie listed the property for sale. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court concluded that the agreement unambiguously provided that Kevin's obligation to pay the mortgage did not end until Valerie *accepted* an offer to purchase. When Valerie listed the residence for sale, she made only the decision to solicit offers, not to sell the property. Thus, the family court's order was reversed in part and remanded for that court to hold Kevin in contempt for his failure to make the mortgage payments. As to Valerie's argument that Kevin should also have been held in contempt for his failure to make equalization payments in accordance with the settlement agreement, the Court of Appeals affirmed. Valerie argued that an acknowledgement she signed giving Kevin credit for the balance owed on his equalization payment in exchange for a quitclaim deed for his interest in the marital home was signed under duress and unenforceable. The family court found that the acknowledgment was not entered into under duress, and the Court of Appeals concluded that this finding was not an abuse of discretion. Although domestic violence may be a factor in determining whether an agreement was entered into under duress, there was no evidence that Valerie signed the acknowledgment because of violence or a threat of violence.

II. CRIMINAL LAW

A. ***Adams v. Commonwealth***

2016-CA-001088 11/30/2018 2018 WL 6253060

Opinion by Judge Jones; Judges Johnson and Kramer concurred.

Appellant was convicted of first-degree fleeing or evading police, operating a motor vehicle while under the influence of alcohol or other substance that impairs driving ability, and first-degree wanton endangerment. At issue on appeal was: (1) whether the circuit court erred in allowing the testimony of a police officer concerning the mechanics of the vehicle that appellant was driving at the time of the subject incident, and (2) whether the prohibition against double jeopardy was violated. The Court of Appeals answered "yes" to both questions and vacated and remanded for further proceedings. The Court first noted that the officer's testimony was not offered as an expert opinion but, rather, was offered as a lay opinion under KRE 701. The testimony far exceeded the common knowledge of ordinary people and lacked a basis for the officer's personal knowledge of the specific vehicle in question. Since the testimony of the officer was not based on his personal perceptions of the vehicle and was technical in nature, it well exceeded the permissible scope of lay-witness testimony. The Court also held that the admission of the testimony was more than mere harmless error. The officer testified while in full police uniform, was the only witness called by the Commonwealth, and his testimony was highly technical in nature. As to the double jeopardy violation, the Court noted that the jury instructions given at trial stated that to find appellant guilty of DUI, the jury must find that he was operating a motor vehicle and that he was under the influence of alcohol or a substance that may impair one's driving ability. However, the jury instruction for fleeing or evading police also included the determination that appellant was operating a motor vehicle under the influence of alcohol or a substance that may impair one's driving ability. Once the Commonwealth proved the specific conduct required to convict appellant of first-degree fleeing or evading police, it necessarily proved the general conduct necessary to convict him of DUI. Therefore, double jeopardy was violated.

B. ***Akande v. Commonwealth***

2017-CA-000827 11/30/2018 2018 WL 6252823

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

Appellant, a physician, was convicted of fraud and unlawful taking related to his billing practices for patients who were part of the Medicaid and Managed Care Organizations System. As part of his services, appellant provided patients with smoking cessation counseling. He was permitted to bill the Commonwealth for this service, with the amount of the billing depending on the time he spent counseling the patient. Once appellant noted the time spent counseling in the patient's file, his office sent the information to his billing company who then billed Medicaid. From 2012 to 2016, appellant was paid $10,228.84 for the smoking cessation counseling. However, when an audit was performed by Medicaid, it was determined that appellant was being paid a higher rate for longer sessions than his patient notes indicated. The discrepancy was referred to the Commonwealth Attorney, who charged appellant on two counts of theft by unlawful taking of property valued at $10,000 or more and two counts of Kentucky Medical Assistance Program fraud. He was convicted of one count of each offense and appealed. On appeal, appellant argued that given the evidence, no reasonable jury could convict him of Medicaid fraud. He specifically contended that under KRS 514.030(1) and KRS 205.8463, intent was a required element for conviction. He pointed out that there was no evidence that he ever submitted a bill to Medicaid with the intent to collect for services not rendered or that he knowingly required his billing service to submit incorrect bills or even knew of the mistake made by his billing service. The Court of Appeals reversed, agreeing with appellant that a showing of intent was required for conviction and that, while his bills may have been incorrect, there was no proof in the record that he intended to bill Medicaid for services he had not provided. The Court noted that the Commonwealth bears the burden of proving intent to defraud and that it must be proven beyond a reasonable doubt. In reviewing the record, there was no evidence demonstrating that appellant intentionally instructed his billing service to submit incorrect bills or knew that such was occurring. Thus, reversal was required.

C. ***Chatman v. Commonwealth***

2018-CA-000347 11/30/2018 2018 WL 6252578

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

The Court of Appeals affirmed the denial of appellant's CR 60.02 motion to vacate sentence. Appellant pled guilty to a number of offenses, including two Class B felony kidnapping charges. He was sentenced to two 20-year terms for the kidnapping charges, to run concurrently with each other and with his other sentences. These sentences were then enhanced by his pleading guilty to being a persistent felony offender in the second degree, which increased his time to 40 years' imprisonment. On appeal, appellant argued that the sentence was unlawful. The Court of Appeals disagreed, holding that the 40-year sentence was well within the sentencing range of KRS 532.060(2)(a) and lower than the maximum consecutive sentence pursuant to KRS 532.110(1).

D. ***Commonwealth v. Adams***

2017-CA-001016 11/30/2018 2018 WL 6252928

Opinion by Judge Thompson; Chief Judge Clayton concurred; Judge Maze dissented and filed a separate opinion.

In a 2-1 vote, the Court of Appeals affirmed an order remanding the Commonwealth's motion to revoke appellee's probation for failing to pay restitution because appellee's term of probation had already been satisfied. Although appellee's plea agreement required restitution, this condition was not incorporated into the judgment or ordered separately. Additionally, this condition was never properly imposed on appellee during his term of probation, and there was never a finding that his term of probation needed to be extended to provide him additional time to pay restitution. Thus, when appellee's five-year term of probation expired before restitution was satisfied without his agreeing to an extension of his term of probation, there was no existing order of probation to revoke for his failure to complete paying restitution. In dissent, Judge Maze contended that appellee had waived any objection to the lack of a signed and statutorily-compliant restitution order.

E. ***Commonwealth v. Holt***

2017-CA-001126 11/30/2018 2018 WL 6252812

Opinion by Judge J. Lambert; Judge D. Lambert concurred; Judge Johnson dissented and did not file a separate opinion.

The Commonwealth appealed from an order suppressing evidence found in appellee's car after a second search was conducted by the police (The first search - of appellee's person - uncovered nothing). The Commonwealth argued that the officer had a reasonable suspicion that drug trafficking was taking place, that the circuit court ignored the totality of the circumstances, and that the circuit court erroneously applied a higher standard for reasonable suspicion. The Court of Appeals affirmed, holding that there was no clear error in the circuit court's assessment that the police officer lacked reasonable suspicion for the search. By the officer's own testimony, there had been no complaints about the particular public parking lot in which appellee was found, and no tips had been received concerning either appellee or the other person allegedly involved in the drug transaction. Moreover, the search of appellee's person, as well as his car, revealed no weapons, drugs, or contraband. The only evidence tying appellee to illegal activity was $120.00 found in his vehicle's console after an improper detention. Thus, the circuit court properly suppressed the evidence based on the officer's lack of reasonable suspicion. The Court further held that the totality of the circumstances did not justify the second search of appellee's vehicle.

F. ***Jensen v. Commonwealth***

2017-CA-000914 11/30/2018 2018 WL 6252821

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

The Court of Appeals vacated an order revoking appellant's probation and sentencing him to ten years' imprisonment. The Court held that the circuit court did not have jurisdiction to revoke appellant's probation because his probation period ended before a revocation hearing could take place. An arrest warrant was issued for appellant on August 5, 2015, prior to the end of appellant's probation on December 1, 2015. Pursuant to KRS 533.020(4), this pending warrant tolled the probation period. Appellant was arrested on October 19, 2016, and appeared before the circuit court on November 3, 2016. A probation revocation hearing occurred on March 2, 2017. The Court, citing *Commonwealth v. Tapp*, 497 S.W.3d 239 (Ky. 2016), held that the active arrest warrant extended appellant's probationary period, but upon his being brought before the circuit court on November 3, 2016, the probation period could only thereafter be extended by an order of the court. Since the circuit court did not order his probation period extended at that time, his probation officially ended on November 3, 2016, and the court was without jurisdiction to revoke his probation on March 2, 2017.

G. ***Karsner v. Commonwealth***

2017-CA-000927 11/30/2018 2018 WL 6252819

Opinion by Judge Thompson; Judges Dixon and Nickell concurred.

Appellant was convicted of custodial interference following a jury trial and sentenced to one year's imprisonment. She appealed, alleging that she was entitled to a directed verdict of acquittal because there was insufficient evidence that she took, enticed, or kept the children from their father's lawful custody as required by KRS 509.070. The Court of Appeals agreed and reversed. When the children's father appeared at appellant's residence with an emergency custody order and officers to take the children, appellant objected to their presence but did not engage in any overt conduct that prevented the children's removal from the home. Without any contact with appellant or communication with her, the children, ages 14 and 16, ran away from home upon hearing that they would have to go with their father. The Court held that a verbal expression of discontent with the appearance of the children's father and police officers was not sufficient to convict appellant of a Class D felony under KRS 509.070.

H. ***Miller v. Commonwealth***

2017-CA-001352 11/30/2018 2018 WL 6252803

Opinion by Judge Kramer; Chief Judge Clayton and Judge Johnson concurred.

Appellant was convicted of reckless homicide and was sentenced to five years' imprisonment. On appeal, he argued that the circuit court erred in excluding evidence that he believed called into question the credibility of two of the Commonwealth's witnesses, Shana Cummings (the victim's live-in girlfriend and sole testifying witness to the incident) and Detective Billy Correll (the lead investigator who ultimately arrested appellant). With respect to Cummings, appellant asserted that he should have been permitted to impeach her by demonstrating that, during the time of his trial, she was on pretrial diversion for a felony conviction and that two bench warrants were pending against her. The Court of Appeals disagreed. Under KRE 609(a), evidence of a witness's felony conviction is an accepted form of impeachment, even if a witness is participating in pretrial diversion that could ultimately negate the felony conviction. Here, however, the evidence merely demonstrated that Cummings had been charged with a felony and did not indicate how her charge had been resolved, if at all, which was insufficient for purposes of the evidentiary rule. With respect to the two bench warrants, which appellant claimed evinced Cummings' incentive to lie to curry favor with the prosecution, the Court explained that evidence of potential bias is properly excludable where, as here, there was a lack of credible evidence supporting the inference. Specifically, Cummings' warrants had originated in a different county; the Commonwealth's Attorney prosecuting this matter had no jurisdiction to grant her any leniency in relation to those warrants or the proceeding they related to; and it was uncontroverted that Cummings was offered nothing from the Commonwealth's Attorney in exchange for her testimony. With respect to Correll, appellant asserted that the circuit court had wrongfully prevented him from asking whether the detective had, prior to arresting him, received or reviewed the victim's criminal or psychological records. The Court of Appeals disagreed, and for three separate reasons. First, appellant cited no authority indicating that Correll had any duty to review the victim's criminal or psychological records prior to making an arrest. Second, appellant had asked Correll that question at trial, and Correll had, in fact, answered it in the negative. Third, it appeared that appellant had also sought to question Correll about those records in greater depth to ultimately elicit Correll's opinion of whether the victim may have been the first aggressor, which would have been impermissible; as a lay witness, Correll was unqualified to provide any opinion of the victim's probable mental state based upon the hearsay evidence of those records. Any opinion Correll could have given regarding the victim's mental state could only have been

based upon his own factual observations or perceptions of the victim, of which Correll had none.

I. ***Power v. Commonwealth***

2017-CA-001177 11/02/2018 2018 WL 5725983

Opinion by Judge J. Lambert; Judge Jones concurred; Judge Thompson dissented.

In July 2016, appellant entered a conditional plea to a fourth offense of driving under the influence of alcohol or drugs (DUI) within a ten-year period. He reserved for appeal the issue of whether the circuit court erred in using the then-recently enlarged "look back" period of ten years (rather than five years, which was the "look back" period at the time of his older offenses) to enhance his charge as a fourth, rather than third, offense DUI. Appellant argued that the use of his 2007 conviction was violative of contractual promises made in the 2007 plea agreement; that it was violative of the protections ensured by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and Kentucky Rules of Criminal Procedure (RCr) 8.08 that a guilty plea be made "voluntarily with understanding of the nature of the charge"; and that the ten-year, rather than five-year, "look back" period was violative of the constitutional protections (both federal and state) against *ex post facto* laws. The Court of Appeals affirmed, holding that each of appellant's claims was refuted by the Supreme Court of Kentucky in *Commonwealth v. Jackson*, 529 S.W.3d 739 (2017), and that it was bound by that decision pursuant to SCR 1.030(8)(a).

J. ***Southerland v. Commonwealth***

2017-CA-001259 11/30/2018 2018 WL 6252810

Opinion by Judge J. Lambert; Judges Maze and Smallwood concurred.

Appellant challenged an order denying his motion to expunge his 1994 felony conviction. The Court of Appeals affirmed, holding that appellant was not entitled to seek expungement. The Court noted that the conviction at issue was for a felony not on the list of those eligible for expungement under KRS 431.073(1). Appellant also had not complied with the statutory requirement that he first seek an "Expungement Eligibility Certification Notice" from the Kentucky State Police, as required by KRS 431.079(1). Finally, the Court noted that appellant had previously received expungement for a 2012 conviction, making him ineligible for a second expungement pursuant to KRS 431.073(4)(a).

K. ***Walker v. Commonwealth***

2017-CA-001686 09/07/2018 2018 WL 4264872

Opinion by Judge Nickell; Judges Acree and Smallwood concurred.

Appellant challenged an amended judgment and sentence that purported to correct a sentencing error from the original judgment and sentence entered seven years earlier. The amended judgment increased the period of appellant's post-incarceration supervision from three years to five years to comport with statutory requirements. Appellant argued that the circuit court had no jurisdiction to correct a judicial error following the lapse of such a significant amount of time. The Court of Appeals affirmed. Relying upon *Phon v. Commonwealth*, 545 S.W.3d 284 (Ky. 2018), the Court noted that appellant's initial sentence of post-incarceration supervision was contrary to the applicable requirements set forth in KRS 532.043. As such, that portion of his sentence was void as a matter of law. Consequently, the circuit court acted within its jurisdiction - irrespective of any time limits imposed by rule - when it entered the amended judgment because appellant's sentence was illegal and had been illegal from imposition. Correction of an illegal sentence is an inherent and necessary power of a trial court.

III. EMPLOYMENT

A. ***Alford v. Kentucky Unemployment Insurance Commission***

2017-CA-000888 10/19/2018 2018 WL 5099636

Opinion by Judge Maze; Judges Acree and Combs concurred.

Appellant challenged an order affirming a decision by the Kentucky Unemployment Insurance Commission finding that he was disqualified from receiving benefits because he was discharged for misconduct or dishonesty related to his employment. Appellant argued that the Commission improperly substituted its own judgment for the reasons given by his employer for the termination. The Court of Appeals affirmed, holding that it is the nature of the alleged conduct, not the label that the employer chooses to attach to it, that determines whether an employee's actions amount to misconduct. Thus, the Commission was authorized to consider the conduct on which the employer based the termination, rather than merely the identified rules which the employer claimed that appellant had violated. Since the finding of dishonesty was supported by substantial evidence, there was no basis to disturb the Commission's conclusion that appellant was discharged for misconduct. As a result, the Commission properly concluded that he was disqualified from receiving unemployment insurance benefits.

IV. ESTOPPEL

A. ***Williams v. Hawkins***

2017-CA-001977 11/30/2018 2018 WL 6252800

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

Tracie Williams and Charlotte Hawkins were in an automobile collision. Williams subsequently hired counsel, who wrote to Charlotte and requested that she forward the letter to her insurance carrier. Kentucky Farm Bureau (KFB) responded and periodically exchanged pre-suit correspondence with Williams' counsel. Prior to expiration of the statute of limitations imposed by the Motor Vehicle Reparations Act, Williams filed suit against Charlotte, who - unbeknownst to Williams or KFB - had passed away, with administration of her estate being dispensed with by court order. KFB hired defense counsel who, through a CourtNet search, discovered Charlotte's estate. Immediately after discovering his client's death, Charlotte's counsel contacted Williams' counsel to relay the information. Charlotte's counsel moved to dismiss the action as a legal nullity, which was granted. Williams' counsel later - after expiration of the statute of limitations - moved to re-open Charlotte's estate, after which this action was filed. The estate moved to dismiss the action as being filed beyond the statute of limitations and the motion was granted. On appeal, Williams argued that the estate should be estopped from asserting a statute-of-limitations defense because of its failure to disclose Charlotte's death and because no legal entity was available for suit before the statute of limitations expired. The Court of Appeals affirmed. First, the Court held that KFB had no duty to discover or disclose Charlotte's death. With no evidence that KFB even knew of Charlotte's death, Williams was unable to prove fraudulent concealment; thus, estoppel was unavailable. Second, Williams failed to adequately explain or support her argument that due to circumstances beyond her control, there was no way for her to file suit against a proper defendant prior to expiration of the statute of limitations. The Court declined to extend *Nanny v. Smith*, 260 S.W.3d 815 (Ky. 2008), and apply estoppel where Williams had failed to avail herself of information readily available to her in public records.

V. FAMILY LAW

A. ***Baas v. Baas***

2016-CA-000725 11/30/2018 2018 WL 6252919

Opinion by Judge Nickell; Judge Combs concurred; Judge D. Lambert dissented and did not file a separate opinion.

Appellant challenged orders enforcing and incorporating a mediated agreement into the decree dissolving her marriage to appellee. At issue was whether a "bullet-point" mediated agreement could be incorporated directly into the decree as a separation agreement under KRS 403.180; whether mediator or attorney misconduct rendered the mediated agreement unconscionable; and whether the mediated agreement was unconscionable. In a 2-1 vote, the Court of Appeals affirmed. During mediation, appellant's attorney left the session to run personal errands. After the attorney's return, appellant prepared to leave, but the mediator then relayed an offer from appellee that would allow appellant to claim the parties' three-year-old daughter on her future tax returns until the child reached the age of majority. Appellant claimed that the mediator stated that the value of the exemption was $3,000-$5,000 annually. Based on that valuation, appellant accepted the offer, and the parties, counsel, and mediator signed a "bullet-point" mediated agreement reflecting the agreed-on terms. However, after mediation, appellant consulted an accountant, discovered that the exemption was worth less than she thought at mediation, and refused to sign the formal agreement. Appellee sought to enforce the agreement and to incorporate it into the parties' decree of dissolution, and the circuit court ruled in his favor. In affirming, the Court of Appeals held that KRS 403.180 merely requires the agreement to be in writing; therefore, the circuit court did not err by incorporating the "bullet-point" mediated agreement into the decree. The Court further held that the temporary absence of appellant's attorney was not sufficient conduct to render the mediation proceedings unconscionable, particularly when the agreement was entered into after appellant's attorney returned and participated in negotiations. The Court also upheld the circuit court's finding that the mediator's statement regarding the valuation of the tax exemption was not a misrepresentation but was instead a misunderstanding on appellant's part that could have been further investigated prior to entering into the agreement. Thus, the Court concluded that the mediated agreement was neither substantively nor procedurally unconscionable.

B. ***Lockhart v. Lockhart***

2017-CA-000071 11/30/2018 2018 WL 6252830

Opinion by Judge Maze; Judges D. Lambert and Nickell concurred.

As part of their divorce, Phillip and Mary Lockhart entered into a marital settlement agreement which provided, among other things, that Phillip would pay Mary maintenance for eleven years. The agreement further provided that it was not subject to modification except by written consent of the parties. Shortly after the divorce, Phillip underwent a bankruptcy that drastically reduced his income. The family court denied his motion to modify maintenance based on the non-modifiability clause, and - in a prior appeal - the Court of Appeals affirmed. Thereafter, Mary moved to hold Phillip in contempt for his failure to pay maintenance as directed. The family court found Phillip in contempt, finding that he was deliberately remaining underemployed to avoid his maintenance obligation. Phillip then filed a second motion to modify maintenance based upon his changed circumstances and the fact that Mary was cohabiting. The family court denied the motion, concluding that the first ground was *res judicata* and that the second ground was foreclosed because the agreement did not specifically provide for termination of maintenance for cohabitation. On appeal, the Court of Appeals affirmed on the first ground, concluding that the non-modifiability of the agreement was *res judicata* from the earlier appeal, and that Phillip had failed to raise any new grounds for modification of maintenance arising since that time. The Court also noted that the family court's findings in the contempt order would preclude a finding of unconscionability. However, the Court then held that the family court erred in failing to consider termination of maintenance based on Mary's cohabitation. The agreement provided for termination of maintenance upon the death of either party or Mary's remarriage. Despite the absence of an express provision terminating maintenance for cohabitation, the Court determined that cohabitation may be sufficient to invoke the termination provision of the agreement. Thus, the Court affirmed in part, reversed in part, and remanded the matter for additional findings pursuant to *Combs v. Combs*, 787 S.W.2d 260 (Ky. 1990).

C. ***N.B.D. v. Cabinet for Health and Family Services***

2018-CA-000494 11/02/2018 2018 WL 5725968 DR Pending

Opinion by Chief Judge Clayton; Judge Kramer concurred; Judge Johnson dissented and filed a separate opinion.

Under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J), an undocumented juvenile immigrant may apply for permanent residency by obtaining special immigrant (SIJ) status. As a predicate to acquiring this status, the immigrant must present findings from a state juvenile court that the immigrant is dependent on the juvenile court; reunification with one or both parents is not viable due to abuse, neglect, or abandonment; and it is not in the immigrant's best interest to return to the country of origin. Here, the family court declined on jurisdictional grounds to make such findings regarding N.M.D.J., a minor born in Guatemala who entered the United States without her parents. She resides in Kentucky and was placed in the custody of her boyfriend's mother after being adjudged dependent. In a 2-1 vote, the Court of Appeals reversed and remanded, holding that the family court's jurisdiction under KRS 23A.100(2) and KRS 23A.110(4) is broad enough to make the predicate SIJ findings in order to assure "an adequate remedy for children adjudged to be dependent, abused, or neglected[.]" The Court emphasized that such findings of fact are within the unique competence of the family court but in no way constitute a federal immigration determination. The Court also held that making the requisite findings did not violate the anti-commandeering doctrine of the Tenth Amendment of the United States Constitution because the SIJ statute does not impose a regulatory scheme or duty on state courts.

VI. GOVERNMENT

A. ***Landrum v. Lassiter***

2017-CA-001310 11/16/2018 2018 WL 6132283

Opinion by Judge Thompson; Judges Acree and Jones concurred.

William M. Landrum, Secretary of the Kentucky Finance and Administration Cabinet, appealed from an order ruling that the Secretary did not have the power to issue an administrative subpoena *duces tecum* to Frank Lassiter, a former member of Governor Steve Beshear's administration, as part of an investigation into the award of no-bid contracts to SAS Institute, Inc. during Beshear's time as governor. The Court of Appeals reversed and remanded. The Court held that the Secretary has the power to issue a subpoena under KRS 45.142 even if KRS Chapter 45A, the Model Procurement Code, is not listed in that statute. The Court concluded that because the Secretary has a broad duty under KRS 45.131 to investigate mismanagement of public funds within the executive branch, there was no need for the legislature to use words including KRS Chapter 45A within the subpoena power granted in KRS 45.142. The Court also held that the Secretary's subpoena power was not limited to current state employees and that a subpoena *duces tecum* may be properly issued to persons and entities outside of state government. However, the Secretary has no independent power to enforce those subpoenas. The Court remanded the case to the circuit court to determine if Lassiter could be compelled to comply with the subpoena. The subpoena was enforceable only if it was within the statutory authority of the agency, the information sought was reasonably relevant to the investigation, and it was not too indefinite.

VII. HEALTH

A. ***Cabinet for Health and Family Services v. Pediatric Specialist, PLLC***

2017-CA-001093 11/30/2018 2018 WL 6252817

Opinion by Judge Smallwood; Judges Johnson and Thompson concurred.

The Court of Appeals affirmed a decision of the Franklin Circuit Court concerning the overpayment of Medicaid benefits. The Court held that, pursuant to KRS 13B.090(7), the Cabinet for Health and Family Services has the burden of proof to show that amounts overpaid to a Medicaid provider were recoverable by the Cabinet. The Court also held that extrapolation methods provided for in 907 KAR 1:671 § 3(7), which deals with unacceptable practices and referrals for fraud inquiries, only apply to that section and not to 907 KAR 1:671 § 2, which concerns the recovery of benefits paid through a Medicaid audit. Finally, the Court held that SCR 3.130(3.4) prohibited employees of a third-party company that identifies overpayments to Medicaid providers from testifying as expert witnesses because they were paid on a contingency fee basis. SCR 3.130(3.4) prohibits expert witnesses from being paid in this manner.

B. ***Wayne County Hospital, Inc. v. WellCare Health Insurance Company of Kentucky, Inc.***

2017-CA-001273 11/16/2018 2018 WL 6004929

Opinion by Chief Judge Clayton; Judges Dixon and Jones concurred.

The circuit court dismissed Wayne County Hospital's complaint for breach of contract, which claimed that WellCare had not properly reimbursed the Hospital for emergency medical services provided to patients who were receiving Medicaid benefits. The dispute arose when the Kentucky Medicaid program transitioned from a traditional "fee-for-service" model to a managed care model. To receive Medicaid funding, participating states must comply with federal statutory and regulatory requirements. The change in the funding model resulted in the Hospital receiving a lower reimbursement for services. WellCare filed a motion to dismiss on the grounds that the Hospital failed to exhaust WellCare's internal grievance process prior to filing its lawsuit. The circuit court granted the dismissal and the Court of Appeals affirmed. The Court reasoned that although Kentucky courts had not addressed the exhaustion of these specific administrative remedies, federal courts have held that prior to the filing of a private cause of action, a provider must comply with the statutorily-imposed grievance process. Here, the contract between the parties required an internal grievance and appeal process. The Hospital's argument that the process was voluntary was unavailing, particularly because the Commonwealth required the grievance process to be in the contract. Therefore, the process was mandatory. To hold otherwise would render the statutory and contractual language superfluous.

VIII. IMMUNITY

A. ***Mason v. Barnett***

2016-CA-000778 11/02/2018 2018 WL 5726387

Opinion by Judge Acree; Judges Dixon and Jones concurred.

After appellee John Barnett was injured in an automobile accident, he filed suit against McCracken County Road Supervisor Perry Mason. He claimed that Mason's failures to replace a missing stop sign and to clear overgrown foliage at the intersection where the accident occurred were substantial factors in causing the accident. The circuit court denied Mason's claim to qualified official immunity. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court held that Mason's duty to replace a stop sign was ministerial and, as to that duty, Mason was not entitled to immunity. However, the Court further held that a road supervisor's duty to clear foliage involves discretion and, therefore, the circuit court erred when it found this duty to be ministerial. The Court noted that the General Assembly had provided a window of time of more than seven weeks within which to perform the duty of clearing road obstructions. Set forth in KRS 179.230(1), the duty is clarified as follows: "The brush, bushes, weeds, overhanging limbs of trees and all other obstructions along the roads shall be removed between July 1 and August 20 of each year . . . ." Thus, if there was any duty at all by the road department to clear foliage between August 21 of the year preceding the accident and the date of the accident, June 25, that duty was discretionary. Consequently, in the absence of bad faith, Mason was entitled to qualified official immunity against claims that he had breached his duty to clear foliage.

IX. INTEREST

A. ***Edgemont Manor Nursing Home, Inc. v. Cabinet for Health and Family Services***

2017-CA-000030 11/30/2018 2018 WL 6252585

Opinion by Judge Jones; Judges Johnson and Kramer concurred.

Appellants challenged an order denying their motion to direct appellees, the Cabinet for Health and Family Services and the Department for Medicaid Services, to pay pre- and post-judgment interest on wrongfully-withheld Medicaid reimbursements. The Court of Appeals affirmed. Appellants argued that under KRS 45A.245, interest payments on money owed by agencies of the Commonwealth of Kentucky are subject to the accruement of pre-and post-judgment interest, so long as the action arose out of a contract. This is opposed to the interpretation that KRS 45A.245 is strictly limited to those interest payments arising out of breach-of-contract actions. However, the Court noted that in the proceedings leading up to the appeal, appellants' arguments were solely based on statutory and regulatory authority; they even went so far as to say that the Provider Agreement between the parties was irrelevant. Additionally, the circuit court never looked to the Provider Agreement as part of its adjudication. While the circuit court implicitly found that appellees had breached the Provider Agreement, there was nothing in its order suggesting that a breach of contract had occurred. As a result, the Court of Appeals held that KRS 45A.245 could not be applied since there were no claims being brought out of the Provider Agreement and, thus, no suit was being brought under the contract. Since KRS 45A.245 could not apply, appellants were barred from collecting interest because the Commonwealth enjoyed sovereign immunity.

X. JUVENILES

A. ***E.C., a Child Under Eighteen v. Commonwealth***

2017-CA-000325 11/30/2018 2018 WL 6252828

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

During the proceedings below, the district court determined that appellant was a juvenile sexual offender and the circuit court affirmed. The Court of Appeals granted discretionary review. Appellant argued that the district court's adjudication was based on a statement that he made to law enforcement without having received any *Miranda* warnings and, therefore, that should have been suppressed as violative of the Fifth Amendment of the United States Constitution. The Court of Appeals reversed and remanded for further proceedings. The district court determined that appellant did not require a *Miranda* warning during his interview with law enforcement because he was not in custody. Appellant was asked by a social worker to meet in her office for what he believed to be an interview regarding who would have physical custody of him. It wasn't until he arrived with his mother that he learned he would have to talk with a Kentucky State Police detective concerning the allegations against him. The interview took place in the conference room at the office of the Cabinet for Health and Family Services, the door was closed, and the interview lasted close to 45 minutes. Appellant was never given any *Miranda* warnings and was never informed that he was free to leave at any time or that he could request an attorney. The Court of Appeals held that under the circumstances, appellant was in custody when he was questioned and, therefore, the district and circuit courts erred in finding that there was no requirement for him to receive *Miranda* warnings. Notably, the Court commented that in the absence of such warnings, it was "unfathomable" that a young child sitting in a closed door conference room with two authority figures, one of whom was a state police detective, would believe he had the right to refuse to answer questions, ask for a lawyer, or terminate the interrogation at will.

B. ***R.T. v. Commonwealth***

2017-CA-000907 11/02/2018 2018 WL 5726383

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

At issue in this appeal was the proper interpretation of KRS 635.060(4)(a)2 of the Juvenile Code, which allows the juvenile court the option of committing a child "adjudicated for an offense involving a deadly weapon" to the custody of the Department of Juvenile Justice. Appellant contended that the trial court erred in construing the language, "involving a deadly weapon," to include possession of a handgun by a minor. The Court of Appeals found no error and affirmed. The Court held that the plain meaning of the phrase "involving a deadly weapon" is that a deadly weapon was present during, or somehow included in, the commission of an act. It does not require actual *use* of that weapon or something beyond simple possession.

XI. PREEMPTION

A. ***Russell v. Johnson & Johnson, Inc.***

2017-CA-000866 11/09/2018 2018 WL 5851101 Rehearing Pending

Opinion by Judge Nickell; Judges Johnson and Maze concurred.

These appeals involved a product liability case resulting from the use of an experimental heart catheter in a 2015 clinical test evaluating the safety of the device in treating paroxysmal atrial fibrillation. At the time of the procedure, the catheter had received FDA approval under an Investigational Device Exemption (IDE) for use in human study. Just over a year after appellant Clifford Russell's procedure, the FDA granted the catheter pre-market approval (PMA). Alleging a wide variety of state tort claims, appellants filed suit against the manufacturer of the catheter, Biosense Webster, Inc., and the hospital where the study occurred. The circuit court dismissed the complaint against Biosense (and all companies under the Johnson & Johnson brand) after finding that the state tort claims against them were preempted by federal law. The Court of Appeals affirmed. The Court applied the preemption test announced in *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008) (which asks: Are there federal requirements for the device; if so, do the state common law claims attempt to impose requirements "different from, or in addition to" federal ones relating to safety and effectiveness?). The Court held that appellants' state law claims were preempted because the IDE and PMA processes impose device-specific requirements pertaining to safety and effectiveness, and the complaint attempted to impose different or additional state law requirements contrary to 21 U.S.C.A. § 360k(a). The Court endorsed the circuit court's denial of appellants' request to amend the complaint and to pursue discovery because they did not - and could not - identify any violation of federal law with a corresponding parallel state law claim. Proving the state claims would require proof that the FDA should have imposed more stringent requirements - a claim specifically foreclosed by 21 U.S.C.A. § 360k. Appellants' second appeal challenged the denial of their CR 60.02 motion to set aside the prior dismissal due to newly discovered evidence. Long after the subject procedure, Biosense announced a voluntary recall of various catheters, including the same model used in this case (but a different lot number). The Court agreed with the circuit court that the recall was neither new nor material evidence. The recall (and any other adverse event) was promptly posted to the FDA's public website, making the information available to appellants. The Court further noted that with full knowledge of the recall the FDA still granted PMA. The Court finally noted that there was still no parallel state claim for appellants to assert and that setting aside the prior dismissal due to an event occurring after entry of the prior dismissal would destroy finality of decisions, in contravention of court rules.

XII. PROPERTY

A. ***Colyer v. Coyote Ridge Farm, LLC***

2016-CA-001726 11/30/2018 2018 WL 6252836

Opinion by Judge Taylor; Judges Johnson and Thompson concurred.

Appellant challenged an order finding that Coyote Ridge Farm, LLC had an easement appurtenant permitting the use of a roadway across appellant's eighteen-acre tract of land to access Coyote's farmland. The Court of Appeals affirmed. The Court first noted that a 1996 final order addressing litigation between appellant and the prior owners of Coyote's property adjudicated the existence of an easement appurtenant, by prescription, across appellant's property. Because easement appurtenants pass with the land to which they attach, or are appurtenant to, without the necessity of being mentioned in a deed, the easement here was not extinguished as a matter of law upon the transfer of the property to Coyote. The Court also rejected appellant's argument that the easement was intentionally terminated or extinguished upon the transfer of the property to Coyote based upon the terms of the deed. The Court reviewed the deed and found no expressly-stated intent by the parties to specifically terminate the easement allowing Coyote's right of access across appellant's property. At best, an ambiguity in the deed existed, and in such a circumstance the law of Kentucky favored the passing of a complete title to Coyote, the grantee, including the easement. Thus, the parties did not intentionally terminate the easement upon the transfer of the property to Coyote. Finally, the Court rejected appellant's claims that the easement had been abandoned by Coyote.

XIII. TERMINATION OF PARENTAL RIGHTS

A. ***K.M.E. v. Cabinet for Health and Family Services***

2018-CA-000034 11/09/2018 2018 WL 5851071

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

Two children were removed from Father's home after he whipped Daughter with paint sticks wrapped in duct tape, causing significant bruising. The Cabinet petitioned for involuntary termination of Father's parental rights to Son and Daughter on three grounds: abandonment, failure/inability to provide children essential care and protection for not less than six months, and failure/inability to provide "essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being" without reasonable expectation of improvement. KRS 625.090(2)(a), (e), & (g). The family court found clear and convincing proof of all three grounds and granted termination. The Court of Appeals affirmed. Father admitted noncompliance with court orders, one of which was completion of an abusive parenting class requiring completion of a statement of accountability. Father attended two sessions, refused to sign an accountability statement, was discharged from the class, and relocated to Michigan before returning to challenge termination of his parental rights. While in Michigan, he completed a nurturing parenting class, which the Court noted was far different from an abusive parenting class involving group therapy and one-on-one counseling. Father was told that the nurturing parenting class was not a substitute for an abusive parenting class. At trial, Father expected the Cabinet to offer an alternative for him to satisfy the family court's order; however, the family court stated from the bench that Father's refusal to admit abuse did not trigger an obligation by the Cabinet to find an alternative program that he could complete without admitting abuse. The Court held that requiring the Cabinet to seek and offer an alternative "would exceed the bounds of 'reasonable efforts' and 'services available to the community,' " which is all that is required by KRS 620.020(11).

XIV. TRUSTS

A. ***Davis v. Davis***

2017-CA-000312 11/02/2018 2018 WL 5726700

Opinion by Judge Thompson; Judges Combs and Kramer concurred.

Mike L. Davis, as Trustee of the Davis Family Wealth Trust UAD 02/22/10 and as Executor of the Estate of Robert L. Davis, appealed from an order of the Jefferson Circuit Court ruling that the Jefferson District Court possessed exclusive jurisdiction in a trust dispute. The Court of Appeals reversed and remanded, holding that the circuit court had jurisdiction over matters within the concurrent jurisdiction of the circuit court and district court under the Uniform Trust Code, KRS Chapter 386B. KRS 386B.2-030 permits a party to file an action in circuit court and to divest the district court of matters within the concurrent jurisdiction of both courts if the action is filed within twenty days of receiving notice of the district court proceeding involving the same trust matter. The Court held that the time in which to file the circuit court action commences whenever a new matter relating to the trust is filed. In this case, the original action in district court was for an accounting and was concluded when that relief was given. Upon the filing of a new action in district court raising matters unrelated to the request for an accounting, the time in which to file a circuit court action began anew. However, the Court emphasized that the circuit court had jurisdiction only over those matters raised by the parties that did not fall within the exclusive jurisdiction of the district court.