PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

NOVEMBER 1, 2019 to NOVEMBER 30, 2019

I. APPEALS

A. ***M.M. v. Allen County Attorney's Office***

2019-CA-000401 11/22/2019 2019 WL 6222910

Opinion and order dismissing by Judge Jones; Judges Combs and L. Thompson concurred.

The subject appeals involved four children ordered to be temporarily removed from the home by the family court. The Cabinet for Health and Family Services became involved after receiving reports of domestic violence and suspected drug use by the adults in the household. The family court found that there was sufficient and credible evidence of domestic violence and environmental neglect. The Court of Appeals declined to reach the merits because appellant named only the county attorney - and not the Cabinet - in the notices of appeal. The Court noted that the Cabinet is the "plaintiff" when it files a dependency action, and that the Court has previously dismissed dependency, neglect, and abuse appeals in which the Cabinet was erroneously omitted as a party. The Court entered an order requiring appellant to show cause why the appeals should not be dismissed for failure to name an indispensable party, and the deadline passed with no response from appellant. Therefore, the Court ordered that the appeals be dismissed for failure to name an indispensable party.

II. CHILD CUSTODY AND RESIDENCY

A. ***Hoskins v. Elliott***

2018-CA-000428 11/15/2019 2019 WL 6041390

Opinion by Judge Acree; Judges Combs and Maze concurred.

After the circuit court awarded appellee/non-parent custodial rights to appellant's/Father's child, Father appealed. Father argued the circuit court erroneously: (1) used KRS 403.270's timeframe requirements in determining the *de facto* custodian status of appellee; and (2) ordered him supervised visitation without a finding consistent with KRS 403.320(3). The Court of Appeals found all of Father's arguments persuasive. The Court interpreted KRS 403.270(1)(a) as meaning that a parent cannot circumvent another parent's rights by "placing" a child in the care of someone else. The Court rejected appellee's definition of "placement" as a biological parent leaving the child in the care of another individual. Instead, the Court held that only the Cabinet can "place" a child when there is an active dependency, neglect, or abuse action. Given this holding, the Court determined that the appropriate timeframe for determining *de facto* custodian status in this case was one year. Also, the Court held that the circuit court's findings of fact and conclusions of law lacked an appropriate finding under KRS 403.320(3) to warrant limiting Father to supervised visitation. Thus, the Court reversed and remanded the circuit court's decision.

B. ***Lage v. Esterle***

2018-CA-000465 11/08/2019 2019 WL 5850497

Opinion by Judge Taylor; Judges Lambert and Maze concurred.

Appellants challenged orders denying their motions to be declared *de facto* custodians of two minor children. The Court of Appeals vacated and remanded. The children were placed in the care of appellant Amy Lage, a maternity home program volunteer, while their mother delivered and recovered from childbirth. By agreement of the parties, the children began living with Amy and her husband; this arrangement continued beyond the time originally agreed to. Nearly two years later, appellants filed petitions to adopt the children and motions for emergency custody; the ultimate result of these proceedings was that the children were returned to their mother after spending almost two years with appellants. Appellants subsequently filed the subject actions in which they sought to be declared *de facto* custodians. At the custody hearing, the mother did not testify (and her counsel did not appear); instead the circuit court utilized and took judicial notice of her testimony from the temporary removal hearing conducted in the adoption and emergency custody actions. The court then based its findings of fact upon said testimony. In vacating, the Court of Appeals held that it was inappropriate to use the mother's testimony in this manner, noting that "the evidence introduced in one court or proceeding cannot be used in another proceeding by judicial notice to prove a similar proposition in that case." The Court held that the testimony from the earlier hearing did not pass the indisputability test of KRE 201 and that, by the circuit court taking notice of the testimony, appellants were unable to cross-examine the mother regarding the *de facto* custodian issue. The Court further held that the circuit court erred by precluding appellants from being considered as the primary financial providers for the children solely because the children received health insurance as a public benefit.

C. ***Turner v. Hodge***

2019-CA-000229 11/08/2019 2019 WL 5850921

Opinion by Judge Lambert; Judges Goodwine and K. Thompson concurred.

Appellant challenged an order denying her motion to be designated as a *de facto* custodian of a child she had believed to be her biological grandchild. The Court of Appeals affirmed, holding that the status of a *de facto* custodianship must be addressed anew whenever the status is asserted and that an interruption can destroy the status. Here, the mother reestablished care between 2008 and 2015 after appellant had arguably been the child's *de facto* custodian from her birth in 2006 through 2008. The biological father began paying child support since at least late 2015, when his paternity was established, and a joint, split custody order between the mother and the father was entered in September 2017. The evidence also established that the child spent time at residences other than appellant's and that multiple individuals provided for the child's financial support.

III. CHILD SUPPORT

A. ***Brannock v. Brannock***

2018-CA-001202 11/08/2019 2019 WL 5850420

Opinion by Judge L. Thompson; Chief Judge Clayton and Judge Nickell concurred.

The Court of Appeals affirmed a judgment finding that William Brannock did not owe child support arrears to Amity Brannock. When the parties divorced, they entered into a separation agreement which provided that William would pay Amity $1,000 per month in child support. Shortly after entering into the agreement, the parties reconciled and began living together. William did not pay Amity child support during this time. He alleged that he and Amity orally agreed that in lieu of child support, he would pay the mortgage on the family home and she would cover household and child-related expenses. When the parties separated six years later, Amity sought six years' worth of past child support. The circuit court found - and the Court of Appeals agreed - that the parties had orally agreed to modify the child support agreement and that William did not owe a child support arrearage. In so concluding, the Court rejected Amity's argument that the circuit court erred when it failed to enforce the terms of the parties' separation agreement, which required all modifications to be in writing and signed by the parties. The Court held that it could not fully review the issue because the circuit court did not specifically rule as to what effect the modification clause had on the child support arrearage matter. The Court also noted that although Amity filed a CR 52.02 motion seeking additional findings of fact, she did not request additional findings as to this issue. Without such a request, the Court could not reverse. The Court further noted that even assuming the circuit court ruled there was an oral modification later committed to writing (via text messages and email), the Court could not fully review the issue because the text messages and email were not included in the record on appeal. The Court also agreed with the circuit court that Amity was equitably estopped from seeking child support arrearages because she allowed William to believe that he was satisfying his child support obligation by paying the mortgage for six years instead of giving money directly to her.

IV. CLASS ACTIONS

A. ***Summit Medical Group, Inc. v. Coleman***

2018-CA-001238 11/01/2019 2019 WL 5655909 Rehearing Pending

Opinion by Judge Lambert; Judges Goodwine and Maze concurred.

Appellant challenged an order certifying appellee's medical billing claim as a class action and appointing counsel under CR 23. The Court of Appeals vacated and remanded, holding that although appellee met her burden under CR 23.01's commonality and typicality requirements (numerosity was not challenged), she failed to meet the adequacy burden regarding appointment of counsel. The Court noted that appellant had not been afforded the opportunity to challenge counsel's credentials; moreover, appointed counsel had withdrawn and a challenge to the proposed substitute counsel was never afforded. Accordingly, the certification order was vacated with instructions to revisit the requirements of CR 23.01 before applying analysis under CR 23.02.

V. CONTRACTS

A. ***Aries Entertainment, LLC v. Puerto Rican Association for Hispanic Affairs, Inc.***

2018-CA-001104 11/15/2019 2019 WL 6041388

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

Aries, a talent agent based in Harlan, Kentucky, represented four celebrities hired to appear at a weekend scholarship fundraiser in Florida. Aries drafted four personal appearance contracts and emailed them to the Association, a Florida 501(c)(3) non-profit corporation sponsoring the event. Each contract contained a choice of forum clause specifying that Harlan Circuit Court would resolve all disputes using Kentucky law. Knowing each contract contained a choice of forum clause, Association signed all contracts without hesitation. When a dispute arose, Aries filed suit in Kentucky for breach of contract and tortious interference with contract. Association moved to dismiss due to a lack of jurisdiction, arguing that it would be a "terrible hardship" to require it to defend suit in Kentucky, a fact it must have known prior to signing the contracts. The circuit court declined to enforce the choice of forum clause, finding that it would be "unreasonable" to do so because the fundraiser was a "single transaction" not rising "to the level of 'transacting business in this Commonwealth'" and "Kentucky has only a minimal interest in this action." In dismissing the action without prejudice, the circuit court said enforcing the clause would be "unreasonable," but did not explain why. The Court of Appeals reversed and remanded for an evidentiary hearing and findings. The Court determined that the circuit court erroneously applied portions of Kentucky's long-arm statute when the parties had freely consented to the choice of forum clause. The Opinion notes that Kentucky has a strong public interest in ensuring parties abide by bargains and that the circuit court's role is not to save a party from what it perceives to be a bad bargain. It also clarifies that the test for determining whether to enforce a choice of forum clause is whether doing so is "unfair or unreasonable" - not merely inconvenient - and reiterates that inconvenience is a factor to consider, but it must be so serious as to deprive the complainant of his opportunity for a day in court.

B. ***EQT Production Company v. Big Sandy Company, L.P.***

2017-CA-001178 11/08/2019 2019 WL 5850586

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

These appeals and cross-appeals arose from several rulings related to contract rights set forth in two deeds executed nearly a century ago addressing coal, oil, and gas interests on property located in Pike County, Kentucky. Both parties sought declaratory relief related to the terms of the deeds, including which party would have to pay to relocate pipelines and the meaning of the phrase, "coal workings, extended or projected." EQT added a claim for unjust enrichment for royalty payments mistakenly paid to Big Sandy for several years; the issue on review there was the date the statute of limitations began to run on that claim. The Court of Appeals affirmed the circuit court's rulings enforcing the terms of the deeds. The Court rejected EQT's argument that it could not have reasonably discovered its mistaken royalty payments and held that the circuit court properly ruled that the statute of limitations cut off any claims that arose prior to five years from the date EQT filed its amended counterclaim. The Court also found no merit in Big Sandy's argument that the deeds should have been reformed to change the payment terms that it now claimed were unconscionable in order to reflect modern prices and volume. These terms were set forth in the deeds, and the Court found no abuse of discretion in the circuit court's decision to keep the original terms of the deeds intact.

VI. CRIMINAL LAW

A. ***Bolin v. Commonwealth***

2018-CA-000477 11/08/2019 2019 WL 5850483

Opinion by Judge Jones; Judges Combs and L. Thompson concurred.

Following entry of a conditional guilty plea, appellant argued that the circuit court improperly denied his motion to suppress evidence seized from the vehicle he was driving at the time he was stopped by law enforcement. The Court of Appeals affirmed. Appellant was driving a vehicle owned by the passenger, who remained present during the entire encounter with the state trooper. The Commonwealth argued that, as a non-owner, appellant had no reasonable expectation of privacy in the vehicle. After a discussion of the guiding case law, the Court held that whether the non-owner driver of a vehicle has a reasonable expectation of privacy with respect to the vehicle's compartments and interior hinges on whether the owner has relinquished both possession of and control over the vehicle to the non-owner such that the non-owner driver has formed a subjective expectation of privacy that society is prepared to accept as reasonable. The Court noted that this is a fact-intensive inquiry, and the defendant bears the burden of proof as exemplified by *United States v. Lochan*, 674 F.2d 960 (1st Cir. 1982). Here, appellant did not possess the required privacy interest in the vehicle's interior to contest the search; therefore, the Court affirmed denial of his motion to suppress.

B. ***Commonwealth v. Harbin***

2019-CA-000305 11/01/2019 2019 WL 5655903 Rehearing Pending

Opinion by Judge L. Thompson; Judge Combs concurred; Judge Jones concurred and filed a separate opinion.

The Court of Appeals reversed and remanded an order which found that Leslye Harbin received ineffective assistance of counsel during his criminal trial for murder. The circuit court found that trial counsel should not have allowed his client to speak with the police shortly after the murder, erroneously stated that Harbin would testify during his opening argument, and should not have advised Harbin to take a plea deal. The court went on to say that while each of these issues, individually, did not amount to ineffective assistance of counsel, they cumulatively rose to that level. The Court of Appeals held that there was no ineffective assistance of counsel. The Court determined that when trial counsel allowed Harbin to talk to the police, no adversarial proceedings had begun against Harbin; therefore, the Sixth Amendment right to counsel had not attached and this action could not be used as a claim for ineffective assistance of counsel. The Court also held that even if the Sixth Amendment did apply to pre-arrest or pre-indictment actions, in this case counsel allowing his client to speak to the police was reasonable trial strategy. The Court also concluded that counsel's mentioning that Harbin would testify during trial did not amount to deficient performance. When counsel made the statement, he believed Harbin would testify. It was not until the trial was underway that Harbin decided not to testify. The Court also held that counsel's advice to accept the plea agreement was not in error because Harbin had been found guilty of murder by a jury and the plea agreement gave him the minimum sentence. Finally, the Court held that the cumulative error doctrine did not apply because trial counsel committed no actionable errors. Judge Jones's concurring opinion expanded upon the analysis of the opening statement issue.

C. ***Doebler v. Commonwealth***

2019-CA-000130 11/01/2019 2019 WL 5655283 Rehearing Pending

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

Appellant pled guilty to possession of drug paraphernalia. Following a forfeiture hearing, the circuit court directed appellant to forfeit cash found in her purse when she was arrested. The Court of Appeals reversed. During the forfeiture hearing, at which appellant was directed (erroneously) to proceed first, appellant asserted (and the circuit court ultimately found) that she had obtained the money at issue from her late father's estate the afternoon before its seizure by police. Appellant admitted to possessing a syringe but denied other drug activity. In lieu of putting on evidence, the Commonwealth instead relied on the presumption of close proximity and argued that appellant failed to rebut the presumption by clear and convincing evidence. Despite the lack of evidence, the circuit court concluded that the nature of appellant's conviction and the money's proximity to illegal drugs justified its forfeiture. In reversing, the Court of Appeals noted that proper procedure requires the Commonwealth bear the initial burden of presenting first at a forfeiture hearing. This burden is a slight one, but it rests with the Commonwealth - not the defendant - and requires following the procedure laid out in *Osborne v. Commonwealth*, 839 S.W.2d 281 (Ky. 1992). As part of this burden, the Commonwealth must put on at least some competent evidence justifying forfeiture. Here, the Commonwealth did not present any evidence but instead relied on proximity alone. This was insufficient. Because of the lack of evidence, reversal was merited.

D. ***Mayfield v. Commonwealth***

2018-CA-001722 11/15/2019 2019 WL 6041104

Opinion by Judge Goodwine; Judges Spalding and L. Thompson concurred.

Appellant challenged an order denying his motion to suppress evidence found during a search of his car and person. He moved the Court of Appeals to convene *en banc* to overturn *Dunn v. Commonwealth*, 199 S.W.3d 775 (Ky. App. 2006), which extended the "plain smell" doctrine to searches of a car's occupants, rather than only the car itself. The Court affirmed the circuit court's decision and denied appellant's request to convene *en banc*, holding: (1) *Dunn* correctly extended the "plain smell" doctrine to searches of a person subject to a traffic stop, rather than solely the search of the car; and (2) the automobile exception to the warrant requirement extends to the operator of the vehicle when the "plain smell" of marijuana results in the existence of probable cause, which justifies a search independently of an arrest.

VII. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. ***Petrie v. Brackett***

2019-CA-000467 11/22/2019 2019 WL 6222905

Opinion by Judge Goodwine; Judges Lambert and K. Thompson concurred.

Appellant challenged a domestic violence order (DVO) entered against him by the family court in favor of his 16-year-old son. The Court of Appeals reversed and remanded. The DVO stemmed from an altercation between the two about which the son testified that he pushed appellant three times before striking him in the chest. Appellant then physically restrained him to wait for law enforcement to arrive. The family court made no statutory findings. Rather, it detailed the family's long history in family court, including the mother's allegations of abuse against her own mother, but nothing regarding appellant or the son. The Court of Appeals determined that the family court palpably erred by issuing the DVO. KRS 403.740(1) required the family court to make a finding of physical injury, past or present physical threats of abuse, or fear of imminent harm, which it failed to do here. The family court's summation of the family history, which did not include appellant or the son, was insufficient under the law to issue a DVO.

VIII. FAMILY LAW

A. ***Roper v. Roper***

2018-CA-000979 11/08/2019 2019 WL 5850427

Opinion by Judge Jones; Chief Judge Clayton and Judge L. Thompson concurred.

Appellant Craig Roper challenged the circuit court's findings of fact, conclusions of law, and decree dissolving his marriage with appellee Erin Roper. He also challenged a supplemental decree that decided issues of child support, spousal maintenance, and marital property. In particular, Craig argued that the circuit court lacked subject matter jurisdiction over child support and timesharing since the parties and their children were all residing in Texas at the time the supplemental decree was entered. With respect to jurisdiction, the Court of Appeals held that the circuit court's supplemental decree addressing child support, entered following a previous temporary support order, was considered a modification order under the Uniform Interstate Family Support Act (UIFSA). Therefore, the circuit court had continuing exclusive jurisdiction to modify the temporary support order under KRS 407.5205(1)(b). However, as to custody/timesharing, the Court reversed the circuit court's *sua sponte* order modifying such where, at the time of modification, the parties did not live in Kentucky and had lived in Texas for over a year. The Court held that the circuit court lacked jurisdiction to modify custody or parenting time pursuant to KRS 403.824(1). The Court affirmed as to the circuit court's division of marital property, but vacated its spousal maintenance award and remanded for consideration of Craig's ability to pay the ordered maintenance while meeting his own reasonable and necessary expenses. The Court noted that the circuit court did not consider additional income from Erin's IRA in its analysis, and that because it failed to consider all of Erin's financial resources and erroneously concluded, based on its own findings, that Craig had the ability to support himself, further consideration was merited.

IX. HEALTH

A. ***Cabinet for Health and Family Services v. Loving Care, Inc.***

2018-CA-000199 11/15/2019 2019 WL 6041392

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

This case arose after the Cabinet for Health and Family Services sought to be reimbursed Medicaid payments paid to Loving Care, Inc. The question presented was whether Loving Care properly preserved its arguments concerning whether there was an "overpayment" (as defined in the applicable federal regulation) to entitle the Cabinet to seek reimbursement and whether it preserved the argument that it had substantially complied with the applicable regulation so that reimbursement was improper. The hearing officer found that the issues were not properly preserved at the Dispute Resolution Meeting (DRM) as required by 907 KAR 1:671 Section 9(13) and the Cabinet affirmed the recoupment decision. The Franklin Circuit Court reversed and remanded for a hearing. It also ruled that the Cabinet had the burden of proof. The Court of Appeals affirmed. It held that "directly" as used in 907 KAR 1:671 Section 9(13) did not mean "exactly" and that Loving Care had sufficiently raised both issues in its request for a DRM and at the DRM. The Court also held that the Cabinet had the burden to show that it was entitled to recoupment.

X. IMMUNITY

A. ***Damron v. Garrett***

2018-CA-000825 09/20/2019 2019 WL 4565239

Opinion by Judge Nickell; Judges Kramer and L. Thompson concurred.

Appellant claimed she was seriously injured when the vehicle she was driving left Ligon Camp Road in Floyd County and landed upside down in a creek. Alleging negligent road upkeep and violation of Kentucky's Open Records Act, she sued Floyd County, its County Judge Executive Ben Hale, and county road foreman Gary Garrett. All defendants jointly moved for dismissal on grounds of sovereign immunity, official immunity, and qualified official immunity. This request was ultimately granted and appellant appealed, challenging the grant of qualified official immunity to Garrett and the award of summary judgment to all appellees, and alleging that road maintenance is a ministerial act; Floyd County has no road maintenance plan; and a jury must decide whether the open records request was received. The Court of Appeals affirmed. The Court held that appellant presented no evidence of any negligence or wrongdoing by the county or anyone affiliated with the county. As to appellant's argument that immunity was wrongly applied to Garrett because road maintenance, under KRS 179.070, is a ministerial function, not a discretionary one, the Court first noted that Garrett did not qualify as a county road engineer or supervisor under KRS Chapter 179. Consequently, Garrett - as county road foreman - was not statutorily responsible for maintaining all Floyd County roads and bridges under KRS 179.070. Because he responded to complaints at the direction of County Judge Executive Hale, his work was wholly ministerial and his actions were not covered by immunity. The Court further held, however, that while appellant's claims should not have been dismissed against Garrett on grounds of immunity, the error was harmless as appellant could not prevail. She offered no proof of a defective roadway, a negligent act, or receipt of a complaint being ignored, and no proof Garrett was a county road engineer or supervisor subject to KRS 179.070. The Court also rejected appellant's open records claim, holding that she had failed to establish that Floyd County and Hale received her requests and willfully withheld the desired information.

XI. NEGLIGENCE

A. ***Critser v. Critser***

2018-CA-001668 11/15/2019 2019 WL 6041107

Opinion by Judge Jones; Judges Combs and L. Thompson concurred.

Appellant Michael Critser was injured when a vehicle driven by his wife Judy hit a patch of ice, skidded, and stopped suddenly, causing a collision with another vehicle. Michael filed a negligence action against Judy in circuit court. The circuit court granted summary judgment in favor of Judy, finding it undisputed that she was obeying all traffic laws at the time of the accident and that the icy patch was a sudden emergency that she could not have avoided. In affirming, the Court of Appeals discussed the history of the sudden emergency doctrine in Kentucky, and its viability notwithstanding Kentucky's adoption of comparative negligence. The sudden emergency doctrine absolves one acting in the face of an emergency from liability, even where the actions may have been unwise. The doctrine does not apply in situations where the driver operates a vehicle in a negligent manner making it more likely that the car would slip. In this case, both parties testified that Judy was driving slowly, cautiously, and attentively. Since Michael failed to offer any evidence that Judy was driving negligently when she hit the patch of ice and spun out of control, summary judgment in her favor was appropriate.

XII. OPEN RECORDS

A. ***Harilson v. Lexington H-L Services, Inc.***

2018-CA-001857 11/22/2019 2019 WL 6222913

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

The Court of Appeals affirmed the circuit court's ruling that legislative immunity does not protect against open records requests made to the Legislative Research Commission (LRC). The Court held that the General Assembly waived any legislative immunity as it pertains to open records requests made to the LRC by enacting KRS 7.119(3), which allows for judicial review of adverse decisions made by the LRC regarding open records requests.

XIII. PROPERTY

A. ***U.S. Bank National Association as Trustee v. Courtyards University of Kentucky, LLC***

2018-CA-001019 11/15/2019 2019 WL 6041389

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

Appellant Bank initiated foreclosure proceedings on property but did not receive notice of the Master Commissioner's sale due to a clerical error at its law firm. The Bank sought to vacate the sale, arguing that it was unfairly surprised and that the sales price was grossly inadequate. The circuit court refused to vacate the sale and the Court of Appeals affirmed, agreeing with the circuit court's finding that the sales price, which met the two-thirds threshold under KRS 426.530(1), was not grossly inadequate nor did the facts of the case suggest fraud or unfairness in the proceedings. Any confusion about the date of sale, which was properly advertised and conducted by the Master Commissioner, was attributable solely to the Bank and its attorneys.

XIV. WORKERS' COMPENSATION

A. ***Crittenden County Fiscal Court v. Hodge***

2018-CA-000815 11/22/2019 2019 WL 6222915

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

The Court of Appeals reversed and remanded an award of permanent disability benefits for an unlimited duration pursuant to *Holcim v. Swinford*, 581 S.W.3d 37 (Ky. 2019). That decision holds that the time limits set out in the 2018 amendments to KRS 342.730(4), which limit the duration of benefits to workers who were injured after they reached the age of seventy years or older to four years, are to be applied retroactively. Thus, the new version of KRS 342.730(4) limited appellee's benefits after he was injured to four years of duration because he was over seventy years of age at the time of the disabling accident. Consequently, it was error for his award of benefits to be of unlimited duration.