PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
NOVEMBER 1, 2022 to NOVEMBER 30, 2022

I. CIVIL PROCEDURE – SUBSTITUTION OF PARTIES

A. ***BARBARA ANN DITTO, ET AL. v. JERRY T. MUCKER***

2021-CA-1488-MR 11/18/2022 2022 WL 17072191
Opinion by CETRULO; SUSANNE M., ACREE, J. (CONCURS) AND GOODWINE, J. (CONCURS)

The Court of Appeals reviewed a Breckinridge Circuit Court Order dismissing Appellants' lawsuit for failure to revive their personal injury action within one year of the death of the Appellee.

Appellants Robert E. Murray, Jr. and Barbara Ann Ditto were involved in a two-vehicle accident with Appellee Jerry Mucker. The Appellants filed a complaint in circuit court claiming Mucker acted negligently while driving his vehicle. First Chicago Insurance Company, Mucker's vehicle insurer, represented him in the action. After an unsuccessful mediation, Appellants' counsel informed First Chicago that Mucker had recently died of COVID-19. First Chicago filed a Notice of Death of Defendant with service to the Appellants. No personal representative was appointed for the deceased Mucker, and no estate was opened for Mucker.

More than one year after Mucker's death, First Chicago filed a motion for summary judgment, which the Breckinridge Circuit Court granted. The trial court found that, despite having received proper notice of Mucker's death, the Appellants failed to revive their action — by substituting a personal representative for Mucker — within the one-year statute of limitations. Additionally, the trial court determined that any agency relationship that may have existed between First Chicago and Mucker terminated upon Mucker's death. Finally, the trial court found no conflict of interest or ethical violations "for a plaintiff to take action to revive claims against a deceased defendant."

The Court affirmed, and in its opinion, noted that under *Harris v. Jackson*, 192 S.W.3d 297, 307 (Ky. 2006), the attorney for the deceased has a duty to disclose his or her client's death to the opposing party if a defendant dies between the filing of a complaint and legal resolution. However, the Court stated that the deceased's attorney is not *required* to file the motion for substitution. CR 25.01(1). The Court further stated that if the representative or other party decides to revive the action, they must file a motion for substitution within one year after the defendant's death. KRS 395.278. In this matter, the Court held that the duty to disclose Mucker's death was not at issue, and all parties were aware of his death approximately one week after it occurred. Instead, the Court determined that the Appellants attempted to expand the duty beyond disclosure as required under *Harris*.

The Court was unpersuaded by the Appellants' position that First Chicago had a duty to file the revivor because of the ongoing agency relationship between Mucker and his insurer. It was reasoned there was no need to discuss *if* an agency relationship existed because even if an agency relationship existed, the agency ended at Mucker's death. *Ping v. Beverly Enterprises, Inc*., 376 S.W.3d 581, 591 (Ky. 2012) (citing *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 50 (Ky. 2003)). *See also Restatement 2d of Agency*, § 120.

Lastly, the Appellants argued that if they had filed a petition on Mucker's behalf, that would be — in a limited capacity — the same as representing both sides of the litigation, thereby violating SCR 3.130 (1.7). However, the Court disagreed and concluded that *not* petitioning for the appointment is contrary to the Appellants' *own interest* because without the appointment, the litigation could be properly dismissed under CR 25.01 and KRS 395.278. Additionally, the Court indicated that the appointment, under these circumstances, is more akin to *joining* an essential party than it is *representing* an opposing party. Moreover, it was noted that the Kentucky Supreme Court addressed the issue of revivor without imposing a duty to file the petition for substitution on a *particular* party. *See Harris*, 192 S.W.3d at 307; *see also Jackson v. Est. of Day*, 595 S.W.3d 117, 123 (Ky. 2020).

II. CONTRACTS

A. ***KENNETH MCPEEK RACING STABLE, INC. v. NORMANDY FARM, LLC***

2022-CA-0195-MR 11/18/2022 2022 WL 17072302
Opinion by THOMPSON, LARRY E.; ACREE, J. (CONCURS) AND McNEILL, J. (CONCURS)
DISCRETIONARY REVIEW GRANTED 04/19/2023

Pursuant to an oral agreement, Kenneth McPeek Racing Stable, Inc. trained racehorses for Normandy Farm, LLC. Part of the agreement stated that McPeek racing would receive a 5% commission if any of the horses it trained were sold. Normandy Farm eventually sold a horse McPeek Racing trained but refused to pay the 5% commission. A lawsuit was filed, and the circuit court held that KRS 230.357(11), which requires all contracts for the sale of racehorses be in writing, prohibited McPeek Racing from collecting the 5% commission. The Court of Appeals reversed and held that KRS 230.357(11) did not apply to the contract at hand because the contract was for training services, not the sale of a racehorse. Even though the 5% commission came about from the selling of a horse, it was still a fee for training services and not for the sale of a horse.

III. CRIMINAL LAW

A. ***KACY LEE SIGRIST v. COMMONWEALTH OF KENTUCKY***

2021-CA-1038-MR 11/10/2022 2022 WL 16842005
Opinion by CLAYTON, DENISE G.; ACREE, J. (CONCURS) AND TAYLOR, J. (CONCURS)

While appellant was incarcerated at a county jail, he and his fellow cellmates were subjected to an impromptu search for contraband. Appellant dropped a small package of methamphetamine on the floor as he was being ushered through a doorway by the deputy jailer. The key pieces of evidence at trial were the testimony of that deputy and the video surveillance recordings of the area. Appellant's primary defense was that another inmate, who immediately preceded him through the doorway, dropped the contraband, and he presented expert testimony analyzing the surveillance recordings to show that a small dark spot appeared on the floor immediately after that other inmate passed through the doorway. The appellant was convicted by a jury of one count of first-degree possession of a controlled substance, one count of first-degree promoting contraband, and one count of being a first-degree persistent felony offender (PFO I). He received a sentence of five years for the promoting charge enhanced to ten years by the PFO I and three years for the possession charge. The Court

reversed the conviction for possession of first-degree contraband and vacated the three-year sentence. In all other respects, the judgment and sentence were affirmed in full.

The Court held, in reliance on *Collins v. Commonwealth*, 640 S.W.3d 55 (Ky. App. 2021), that the convictions for first-degree possession and first-degree promoting contraband violated the prohibition against double jeopardy because they were both predicated on the same quantity of methamphetamine recovered from the jail floor. It reversed the conviction for first-degree possession of contraband and vacated the corresponding sentence.

Appellant further argued that the trial court improperly assumed the role of the prosecutor in questioning two witnesses. These arguments were reviewed under the palpable error standard. The trial court questioned the deputy jailer about the placement of the dark object on the jail floor depicted in defense photographs taken from the video surveillance. The Court held that the trial court's questions regarding the placement of the object were appropriate because they sought to clear up any confusion that may have been caused by viewing the scene from the different angles recorded by the surveillance cameras. On the other hand, the trial court's reference to "whatever it was" to refer to the object the defense claimed was the contraband was deemed problematic as it implied the trial court was not acting as an impartial arbiter but had decided the object was not the contraband. The Court held that the statement, although improper, did not rise to the level of palpable error considering the evidence in the record. The trial court also questioned a probation and parole officer during the penalty phase and elicited inaccurate testimony about the length of time appellant would serve for the conviction of promoting contraband. The Court held the questioning did not result in manifest injustice because the appellant would have to serve a minimum sentence of ten years under the operation of the PFO statute and the jury imposed that minimum sentence.

The Court held that the trial court did not abuse its discretion in allowing the deputy who escorted appellant through the doorway to testify, based on his experience of multiple other inmates, that the appellant throwing up his hands while passing through the doorway was an attempt to distract him from seeing him throw away the contraband. The Court stated that the testimony was admissible as an experience-based interpretation of facts the deputy had personally observed and was not based on scientific or specialized knowledge. The Court held that the testimony of another deputy, that a piece of paper wrapped around the methamphetamine was a commissary shopping list in what appeared to be the appellant's handwriting, was also admissible because it was based on his personal familiarity with multiple examples of the appellant's handwriting.

The Court further held that the fact the prosecutor had represented the appellant in a prior case which was used to support the PFO I charge, and the jury would have seen his name on the final judgment entered into evidence during the penalty phase, did not rise to the level of palpable error because it did not have an effect on his sentence. Although the jury recommended his sentences to run consecutively, the conviction for possession was reversed and consequently any prejudice was erased. Furthermore, the PFO enhancement of the promotion sentence was the lowest possible sentence he could have received on that charge.

Finally, the Court held that appellant appearing at the penalty phase in an orange jail jumpsuit with shackles on his feet did not rise to the level of palpable error because the guilt portion of the trial had

already concluded, and the jury was aware that appellant had been incarcerated on previous occasions and had seen him in prison garb on the video surveillance recordings.

IV. OPEN RECORDS LAW

A. ***COURIER-JOURNAL, INC. v. SHIVELY POLICE DEPARTMENT***

2021-CA-1120-MR 11/10/2022 2022 WL 16842295

Opinion by CLAYTON, DENISE G.; CALDWELL, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

DISCRETIONARY REVIEW GRANTED 08/16/2023

Appellant Courier-Journal, Inc. appealed the Jefferson Circuit Court's order denying its request for an injunction seeking the disclosure of Appellee Shively Police's records documenting a police pursuit of a domestic violence suspect involved in a fatal auto collision along with an award of attorney fees and statutory penalties. Initially on the date of the open records request, Shively Police asserted the law enforcement agency records exemption under KRS 61.878(1)(h). After the initiation of a civil suit seeking to compel release, Shively Police filed an answer reasserting the law enforcement exemption in more detail by indicating that disclosure of the requested records, which contained body camera footage and 911 audio, would adversely affect an ongoing investigation by compromising witness integrity and potentially tainting a jury pool. It further asserted that release of body cam footage depicting deceased individuals would implicate personal privacy concerns under KRS 61.878(1)(a), and KRS 61.878(1)(l) applied exempting disclosure via another statutory basis under KRS 17.150(2) due to no prosecution having been completed. The circuit court ultimately ruled that the requested records fell within the KRS 61.878(1)(h) law enforcement exemption and declined to address the remaining arguments as needless after having found that one exemption applied.

On appeal, the Court reversed and remanded holding that the rationale offered by Shively Police to assert the KRS 61.878(1)(h) law enforcement agency records exemption was too generalized and did not offer specifics on how its investigation would be harmed by disclosure. The Court determined that Shively Police could have taken remedial measures including redactions to safeguard its investigation along with witness and jury pool integrity. The Court further determined it had a continuing duty of disclosure during pending open records litigation "once conditions change negating the reasons for a prior denial" such as when aspects of its investigation have concluded.

Despite the circuit court declining to address the two other arguments for exemption, the Court did and firstly held that, in asserting the KRS 61.878(1)(a) privacy interest exemption, Shively Police failed to conduct a comparative weighing of the privacy interests with the public interests in disclosure. Any disclosure potentially implicating privacy exemptions relating to video footage of the deceased, the Court reasoned, could have also been addressed through redactions. It was also reasoned that Shively Police could not assert the privacy exemption without first seeking input from the decedents' relatives as to whether they objected to any release.

Secondly, the Court's opinion proclaimed that the exemption argued for under KRS 61.878(1)(l) was inapplicable to the underlying facts because KRS 17.150(2)'s triggering prefatory language requiring

the completion of a pending criminal prosecution was not met. Also, "the prospective investigation" discussed in KRS 17.150(2)(d) was interpreted to refer to separate investigations otherwise unrelated to a completed prosecution referenced in the statute's prefatory language. "Intelligence and investigative reports" cited for potential exemption under the statute, the Court also stated, would not necessarily encompass the requested video footage and audio communications.

In conclusion, the Court disagreed with the Shively Police arguments that an improper withholding of the records could not be deemed wilful and subject to payment of attorney fees and penalties because it properly relied upon Attorney General opinions. The Court explained that the Shively Police initially issued improper blanket denials that could not be retroactively cured by the later rationale offered after the initiation of litigation, and the circuit court would need to determine the question of wilfulness after weighing the provided explanations with the propriety of the initial withholding of the records as well as the continued withholding as conditions changed. The Court remanded with instructions to the circuit court to conduct an *in-camera* review of the records to determine if any were exempted under statutory privilege and for a determination on the necessity for fees and penalties.

V. WORKERS' COMPENSATION LAW

A. ***DREISBACH WHOLESALE FLORISTS, INC. v. DONALD LEITNER, ET AL.***

2021-CA-1495-WC 11/10/2022 2022 WL 16842447
Opinion by ACREE, GLENN E.; CLAYTON, C.J. (CONCURS) AND TAYLOR, J. (CONCURS)

After an automobile collision at work, Appellee Donald Leitner obtained compensation for injuries to his left knee and right shoulder, but not for his claimed injuries to his neck. After the award, Leitner underwent neck decompression surgery which relieved pain, and a subsequent expert opinion stated that previous expert opinions, relied upon by the ALJ in making the award, were incorrect in concluding Leitner had no impairment in his neck. Leitner moved to reopen his award, alleging mistake, and an ALJ denied the motion. The Worker's Compensation Board reversed the denial. The Court of Appeals again reversed, holding the subsequent expert opinion did not demonstrate a mistake and therefore did not exempt Leitner's award from *res judicata*. The ALJ weighed evidence regarding Leitner's asserted neck impairment when making the award, and thus the subsequent medical opinion was not sufficient to establish a mistake sufficient to reopen the award. Because an ALJ is the finder of fact in workers' compensation actions, the Board, by reversing the denial of Leitner's motion to reopen, improperly substituted its own judgment as to the weight of evidence for the judgment of the ALJ.