PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
NOVEMBER 1, 2023 to NOVEMBER 30, 2023

Note to practitioners: These are the Opinions designated for publication by the Kentucky Court of Appeals for the specified time period. Practitioners should Shephardize all case law for subsequent history prior to citing it.

I. CRIMINAL LAW

A. ***MESSIAH BURTON v. COMMONWEALTH OF KENTUCKY***

2022-CA-0436-MR 11/03/2023 2023 WL 7248128
Opinion by JONES, ALLISON; COMBS, J. (CONCURS) AND THOMPSON, C.J. (CONCURS)

In a direct appeal from the trial court's second judgment and sentence, the Court of Appeals vacated and remanded with instructions to the trial court. The trial court issued its second judgment and a series of *nunc pro tunc* orders after the Appellant, a youthful offender, was granted parole while at the Department of Juvenile Justice following the trial court's first judgment. The trial court justified its ruling by stating that it had not yet issued a final sentence in the age-eighteen hearing for a youthful offender and, therefore, the Appellant had been granted an "illegal parole."

The Court of Appeals vacated the second judgment, holding that the initial judgment and sentence of the then-seventeen-year-old Appellant operated as the final judgment and sentence, citing *Commonwealth v. Carneal*, 274 S.W.3d 420 (Ky. 2008). Next, the Court held that the trial court erred when it stated that a youthful offender could not be granted parole prior to the age-eighteen hearing. "[Kentucky Revised Statute] 640.030(2) indicates that youthful offenders may be paroled prior to their eighteen-year-old hearing." *Edwards v. Harrod*, 391 S.W.3d 755, 762 (Ky. 2013). Finally, the Court of Appeals held that the trial court's *nunc pro tunc* orders were improper. Such orders "may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken." *Webster County Bd. of Educ. v. Franklin*, 392 S.W.3d 431, 437 (Ky. App. 2013). The Court of Appeals then vacated the second judgment and sentence and remanded to the trial court with instructions allowing the Appellant to serve his parole.

II. EMPLOYMENT LAW

A. ***DELANNA MILLER, INDIVIDUALLY; AND AS ADMINISTRATOR OF THE ESTATE OF JUSTIN MILLER; AS LEGAL GUARDIAN OF KYNDALL ELAINE MILLER, A MINOR; AND AS LEGAL GUARDIAN OF JUSTIN WAYNE MILLER, A MINOR v. KENTUCKY POWER COMPANY D/B/A KENTUCKY POWER, ET AL.***

2022-CA-1200-MR 11/03/2023 2023 WL 7254916
Opinion by CALDWELL, JACQUELINE M.; COMBS, J. (CONCURS) AND KAREM, J. (CONCURS)

Appellant Delanna Miller appealed from the Breathitt Circuit Court's grant of summary judgment in favor of Kentucky Power Company (Kentucky Power). Appellant is the widow and administrator of the estate of Justin Miller who worked for Asplundh Tree Expert Company (Asplundh) which performed tree trimming right of way maintenance work pursuant to a contract with Kentucky Power. While performing a job, Justin Miller was electrocuted and killed while trimming a tree away from an electric utility's right of way, and Appellant filed suit asserting claims of wrongful death and loss of consortium. Kentucky Power argued it was entitled to up-the-ladder immunity citing undisputed evidence of its own and Asplundh's workers' compensation coverage and of its contract with Asplundh to perform tree trimming right of way maintenance work. Kentucky Power further argued that the tree trimming right of way maintenance work performed by Asplundh was a regular or recurrent part of its business. Appellant counterargued that tree trimming was not regular or recurrent work for Kentucky Power as defined by *General Electrical Company v. Cain*, 236 S.W.3d 579 (Ky. 2007), because its employees never performed the work, and there was an industry-wide practice for electric utilities to subcontract out such tree trimming work. Appellant contended that *Cain* modified a prior precedent in *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459, 462 (Ky. 1986).

The Court of Appeals affirmed the summary judgment on the rationale that Kentucky Power enjoyed "exclusive remedy" immunity wherein employers subject to workers' compensation liability who secure payment for workers' compensation are immune from other, non-workers' compensation claims for work injuries. The Court stated that immunity extended up-the-ladder from subcontractors directly employing workers to qualifying contractors. It was reasoned that the decision in *Cain* did nothing to alter *Fireman's Fund* because *Cain* quoted from *Fireman's Fund* and "did not expressly state . . . that it was disturbing any holding [therein]." The Court noted that a decision rendered after *Cain* in *Doctors' Associates, Inc. v. Uninsured Employers' Fund*, 364 S.W.3d 88, 92 (Ky. 2011), stated, "'A contractor that never performs a particular job with its own employees can still come within [immunity].'" Additionally, the Court held that "the evidence undisputedly showed the work at issue was repeated frequently and required by law."

III. PLANNING AND ZONING

A. ***WILLIAM RICHARDSON, ET AL. v. GEORGETOWN-SCOTT COUNTY PLANNING COMMISSION, ET AL.***

2021-CA-1163-MR 11/17/2023 2023 WL 7931126
Opinion by LAMBERT, JAMES H.; EASTON, J. (CONCURS) AND McNEILL, J. (CONCURS)

This matter involved an appeal from the Scott Circuit Court's opinion affirming a planning commission's approval of Verizon Wireless' application for the construction of a new cellular antenna tower. The Court of Appeals affirmed, holding that the circuit court properly limited the record in the Kentucky Revised Statute (KRS) 100.347 statutory appeal to the administrative record, that the appropriate standard of review was whether the decision was arbitrary, and that Appellant William Richardson's procedural due process rights were not violated. It was held that there was no issue with the naming of the proposed site; KRS 100.987(4)(a) provides for a review of a uniform application, not a trial-type hearing as Richardson argued; and KRS 100.987 only requires findings of fact when an application is denied, not granted. Finally, Richardson was determined to have failed to establish that the approval was arbitrary, as the record reflected that the planning commission did not

act in excess of its granted powers, Richardson was afforded due process, and substantial evidence supported the approval.

IV. PROFESSIONAL LICENSURE

A. ***MONNICA T. WILLIAMS, PHD v. COMMONWEALTH OF KENTUCKY, PUBLIC PROTECTION CABINET, DEPARTMENT OF PROFESSIONAL LICENSING, BOARD OF EXAMINERS OF PSYCHOLOGY, ET AL.***

2022-CA-1298-MR 11/17/2023 2023 WL 7930459
Opinion by ACREE, GLEEN E.; DIXON, J. (CONCURS) AND McNEILL, J. (CONCURS)

The Board of Examiners of Psychology (the Board) initiated a disciplinary action against Dr. Monnica T. Williams for alleged misconduct that occurred during her supervision of a doctoral candidate's limited practice of psychology. Those proceedings against Dr. Williams began in October 2019 despite her choosing not to renew her license in June 2018. In sum, the Board sought to impose discipline on a person who no longer held a license to practice psychology. To prevent this, Dr. Williams filed for a writ of prohibition against the Board in the Franklin Circuit Court, but the circuit court denied her this writ. Dr. Williams appealed, and the Court of Appeals considered whether the Board had jurisdiction to impose discipline upon an individual who no longer held credentials to practice psychology. The Board argued Kentucky Revised Statute (KRS) 319.118(3) gives it authority to pursue disciplinary action against someone who chooses not to renew their license. Dr. Williams argued, on the other hand, that KRS 319.118(3) only gives the Board the power to pursue disciplinary action against someone who surrenders his/her license for the purpose of avoiding discipline after initiation of disciplinary proceedings.

The Court of Appeals determined that Dr. Williams did not belong to any category of individuals that KRS Chapter 319 gives the Board power over as she was no longer a license holder as defined by statute. *See* KRS 319.082. The Court did not fully subscribe to Dr. Williams' interpretation as it would yield to circumstances in which license holders could commit misconduct and voluntarily surrender their license before the Board's awareness thereby escaping punishment. Instead, by KRS 319.118(3)'s plain meaning, the Court determined Dr. Williams never surrendered her license at all, and by operation of KRS 319.071, the Board canceled her license when it was not renewed. *See* KRS 319.071. Being a creature of statutes, the Court proclaimed that the Board is strictly confined to those statutes which created it and must derive all authority to act from those originating statutes. The Board could not provide a statute that gives it authority to impose sanctions against Dr. Williams, and for these reasons, the Court reversed the circuit court's denial of Dr. Williams writ of prohibition

V. PROPERTY LAW

A. ***OLIVIA BOGGS MOLINAR, ET AL. v. TERRY A. GIESE***

2022-CA-1349-MR 11/03/2023 2023 WL 7248028
Opinion by THOMPSON, LARRY; CETRULO, J. (CONCURS) AND COMBS, J. (CONCURS)

The Court of Appeals reversed and remanded an order of the circuit court which confirmed a Master Commissioner's sale of property. The property for sale was listed as "surface property" only, meaning the oil and mineral rights had been reserved and excluded from the sale. After the Appellants purchased the property, it was discovered that the timber rights had also been previously excluded from the property and were not included in the sale. The lack of timber rights was not disclosed to the court prior to the commissioner's sale and was not disclosed by the commissioner to the potential buyers. The trial court ruled that the commissioner sold the surface property as required, and the sale was not flawed. The Court of Appeals held that the lack of notice to the potential buyers that the timber rights were not included in the sale caused the commissioner's sale to be fatally flawed and necessitated the sale be vacated. The Court held that timber rights are part of the surface property unless specifically excluded. While the timber rights had been excluded in this case, there was no notice of this fact.

VI. TORTS

A. ***MELINDA CANTRELL v. KELLY CONLEY***

2023-CA-0044-MR 11/03/2023 2023 WL 7247894
Opinion by JONES, ALLISON; COMBS, J. (CONCURS) AND McNEILL, J. (CONCURS)

Melinda Cantrell appealed the Johnson Circuit Court's (1) order of summary judgment dismissing a premises liability negligence claim she asserted against her former landlord, Kelly Conley; and (2) order denying her subsequent Kentucky Rule of Civil Procedure (CR) 60.02 motion to alter, amend, or vacate. Cantrell sued Conley for compensation related to injuries sustained from a fall caused by the collapse of concrete steps providing entry into her rented dwelling in Oil Springs, Kentucky. Cantrell ultimately abandoned any common law premises liability claim and instead claimed Conley's failure to maintain the stairs violated the Kentucky Uniform Residential Landlord Tenant Act (URLTA), and thus established negligence *per se*. The circuit court summarily dismissed Cantrell's action on the basis that Conley violated no common law duty owed to Cantrell under the evidence presented, and that the URLTA – even if it applied – did not authorize damages for personal injuries. Cantrell filed a CR 60.02 motion to vacate the dismissal on the basis it was premature due to a pending motion to compel discovery which had not yet been ruled on.

The Court of Appeals affirmed. The Court stated that landlords do not owe tenants the requisite duty that premise owners owe invitees. While "*a possessor of property* owes a duty to an invitee to discover unreasonably dangerous conditions on the land and either eliminate or warn of them. . . . [an] occupying tenant is expected to be aware of property defects" aside from "latent or unknown defects" because "the landlord has surrendered exclusive possession and control of the leased premises to the tenant." The Court further indicated that under common law, the remedy was limited to cost of repair for any breach of a landlord's covenant to make repairs. Additionally, it was reasoned that the URLTA is applicable only to the cities, counties, and urban-county governments which elect to enact it, and Cantrell did not identify any ordinance by which Johnson County or the City of Oil Springs have adopted the URLTA. Furthermore, when enacting the URLTA, there was no "clear intention on the part of the legislature to depart from the common-law standard for landlord liability." *Miller v. Cundiff*, 245 S.W.3d 786, 789 (Ky. App. 2007). Lastly, the Court held dismissal of

the CR 60.02 motion was proper because the actual discovery materials requested in the motion to compel was not relevant to the claims at issue.