

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
APRIL 1, 2017 to APRIL 30, 2017

I. AGENCY

A. *Dixon v. Lake Cumberland Regional Hospital, LLC*

[2014-CA-000917](#) 04/28/2017 2017 WL 1533812

Opinion by Judge Jones; Chief Judge Kramer and Judge Maze concurred.

The Estate of Pamela Dixon brought suit against Lake Cumberland Regional Hospital and multiple doctors following Pamela's death one week after undergoing gastric bypass surgery. Prior to trial, the trial court granted summary judgment to the Hospital on the Estate's vicarious liability claims after concluding that it would be impossible for the Estate to demonstrate that Dr. John Husted, the surgeon who operated on Pamela, acted as either an actual or ostensible agent of the Hospital. The trial court also granted judgment in favor of the Hospital on the Estate's theory that the Hospital was jointly liable with Dr. Husted under the theory of "joint enterprise." Additionally, the trial court dismissed the Estate's negligent credentialing claim against the Hospital on the basis that Kentucky does not recognize that cause of action. On appeal, the Estate argued that it had presented sufficient facts to create jury issues regarding the issue of an actual or ostensible agency relationship and of joint enterprise between Dr. Husted and the Hospital. Looking at the question of actual agency, along with the record, in light of the factors set out in *Kentucky Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Kentucky, Inc.*, 91 S.W.3d 575 (Ky. 2002), the Court of Appeals concluded that disputed issues of material fact existed with respect to the relationship between Dr. Husted and the Hospital. In so determining, the Court examined the Hospital's interjection into Dr. Husted's practice, documents provided to Pamela prior to surgery, and emails sent between Hospital employees and Dr. Husted's staff, among other factors. On the question of ostensible agency, the Court held that the trial court erred in failing to recognize that the Estate had alleged and introduced sufficient proof to create an issue as to whether the Hospital made representations and took actions sufficient to lead Pamela to believe that Dr. Husted was an employee of the Hospital. However, the Court affirmed the trial court on the issue of joint enterprise. On this point, the Court concluded that

while Dr. Husted and the Hospital did share common goals and may have agreed on certain matters to bring those goals to fruition, the record did not support that they had “a community of pecuniary interest,” an element required to establish liability based on the existence of joint enterprise. As to the negligent credentialing issue, the Court declined to address the substantive merits because it found that the Estate had waived the claim by accepting the benefits of the judgment assessed against the Hospital on the theory of negligence.

II. ATTORNEY AND CLIENT

A. *Saalwaechter v. Carroll*

[2015-CA-001799](#) 04/07/2017 2017 WL 1290620

Opinion by Judge Dixon; Judges Combs and Nickell concurred.

The Court of Appeals affirmed the trial court's summary judgment in favor of appellees, which dismissed appellant's complaint alleging breach of contract, breach of fiduciary duties, and professional negligence arising out the parties' attorney-client relationship. The lawsuit arose from appellees' representation of appellant in a transaction involving a pawn shop business and surrounding real estate in Evansville, Indiana. In affirming, the Court first rejected appellant's claim that although he suffered losses in 2007 and 2008 as a result of appellees' negligence, his damages did not become fixed and non-speculative until his appeal was denied in a collateral federal lawsuit in which appellees were not parties and were in no manner affected by its outcome. The Court noted that KRS 413.245 encompasses two separate statutes of limitation: the occurrence limitation period and the discovery limitation period. Concluding that this was an "occurrence" case, the Court determined that by the very language of appellant's first complaint in 2010 (that was subsequently dismissed for lack of prosecution), he was aware that he had been injured by appellees' alleged negligent conduct. At that point, even if he may not have known the full extent of his damages in terms of the precise dollar amount, the fact of his injury was certainly "irrevocable" and "non-speculative." The Court then agreed with the trial court that appellant's second complaint filed in 2015 was outside the one-year statute of limitations set forth in KRS 413.245. The Court further rejected appellant's argument that breach of contract claims against attorneys, especially those that arise from contracts other than the engagement contract itself and that provide non-professional services, fall within a 15-year statute of limitations rather than the one year set forth in KRS 413.245. The Court reaffirmed that it is the existence of a professional performing a task and not the nature of the task itself that brings a claim within KRS 413.245. While the contract between appellant and appellees was not an engagement letter, it nevertheless set forth professional services, albeit some non-legal, to be performed by appellees. Accordingly, appellant's claims arose from appellees' professional services for purposes of KRS 413.245.

III. CONTRACTS

A. Pope v. Thompson

[2015-CA-000031](#) 04/28/2017 2017 WL 1533811

Opinion by Judge J. Lambert; Judges Taylor and Thompson concurred.

Appellant Pope purchased a pedigreed German Shepherd male dog from appellees. The sales contract contained the following terms (among others): The dog would be treated as a family pet, not as a breeding dog; the dog would receive proper veterinary care; Pope would maintain contact with appellees; Pope would exercise the dog regularly; and Pope would give appellees the right of first refusal should the dog be offered for sale. Appellees later learned that Pope had breached each of these terms and had transferred the dog's ownership to appellant Bailey. Appellees subsequently filed a breach of contract claim and a petition for a writ of possession. The writ of possession was granted following an *ex parte* hearing. The circuit court entered an opinion and order denying appellants' motion to quash the writ of possession and finding that Pope had breached the contract of sale. On appeal, appellants argued that the circuit court lacked jurisdiction to enter its ruling and that the contract provisions were unconscionable; thus, the circuit court abused its discretion in finding in appellees' favor on the breach of contract claim. The Court of Appeals affirmed, holding: (1) that the jurisdictional requirements for a writ of possession under KRS 425.051 were met and that the issue had not properly been preserved for review; and (2) that there was no abuse of discretion in the circuit court's determinations that appellant Pope was in breach of the contract's terms and that appellees were entitled to the return of the dog.

IV. CRIMINAL LAW

A. *Thomas v. Commonwealth*

[2015-CA-000654](#) 04/21/2017 2017 WL 1439685

Opinion by Judge Thompson; Judge J. Lambert concurred; Judge Taylor concurred in result only.

Appellant challenged a denial of his CR 60.02 motion to vacate his convictions for murder, assault, robbery, and wanton endangerment, alleging that his sentence was illegally imposed pursuant to a hammer clause and was, therefore, unauthorized under Kentucky law. The Court of Appeals reversed and remanded, holding that relief was available under CR 60.02(f) because of the extraordinary circumstances presented. The Court concluded that the trial court abused its discretion in enforcing the hammer clause agreed to in appellant's plea agreements. Although the trial court considered the circumstances of appellant's violations of the conditions of his release, it did not consider whether the sentences imposed for the underlying crimes were appropriate considering the relevant factors, including the presentencing report. The only factor considered during sentencing was the violation of the plea agreement and the agreed upon punishment for that violation. Consequently, the trial court effectively - and erroneously - sentenced appellant as punishment for his failure to appear, rather than his underlying crimes. The Court then concluded that extraordinary circumstances existed under CR 60(f) because appellant was repeatedly denied counsel in pursuing his post-conviction motions, which raised issues that could not be refuted on the record. The Court further held that appellant's CR 60.02 motion would not be denied as successive where he was denied counsel. Finally, the Court held that the motion was brought within a reasonable time.

V. DAMAGES

A. *Muncie v. Weiseman*

[2015-CA-001788](#) 04/21/2017 2017 WL 1449216

Opinion by Judge J. Lambert; Judge Acree concurred; Judge Thompson dissented and filed a separate opinion.

Appellants challenged an order granting summary judgment to appellee on their claim for stigma damages arising from an oil leak on appellee's property that caused damage to appellants' property. By a 2-1 vote, the Court of Appeals affirmed, holding that when there is actual damage to real property, stigma/reputation damage may be included as a measure of damages, but there is not an independent right of recovery for these damages. The Court also held that a claimant is not entitled to damages for both the costs of remediation and diminution in value. Because appellants received a remediation settlement in a related federal action, they were precluded from recovering for diminution in value in the state action.

VI. EVIDENCE

A. *Commonwealth v. Hinton*

[2016-CA-000637](#) 04/28/2017 2017 WL 1531646

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

The Commonwealth filed an interlocutory appeal from an order granting appellee's KRE 504 motion to assert the spousal privilege in his prosecution for torture of a cat or dog pursuant to KRS 525.135. The Court of Appeals vacated and remanded, holding that the trial court erred as a matter of law in holding that the spousal testimonial privilege was absolute. The exceptions set forth in KRE 504(c) apply to both the testimonial privilege set forth in (a) and the marital communications privilege set forth in (b). The matter was vacated to permit the trial court to determine whether the exception set forth in KRE 504(c)(2)(A) applied. This subsection states that there is no privilege when a spouse is charged with wrongful conduct against the person or property of the other spouse.

VII. FAMILY LAW

A. *K.C.O. v. Cabinet for Health and Family Services*

[2016-CA-000465](#) 04/07/2017 2017 WL 1290583

Opinion by Judge Nickell; Judge Combs concurred; Judge Dixon concurred in result only.

The biological parents of a three-year-old child challenged an award of grandparent visitation to the child's paternal grandparents in an informal adjustment order entered in a juvenile dependency, neglect, and abuse (DNA) proceeding. The trial court, *sua sponte*, granted visitation even though the paternal grandparents had not filed a petition seeking visitation, were not parties to the DNA case, and had not moved to intervene in the DNA case. Moreover, no proof had been heard to establish the child's best interest, and there was no consideration of the factors set forth in *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. 2004). The Court of Appeals affirmed in part, vacated in part, and remanded, holding that a trial court may not *sua sponte* award grandparent visitation in a juvenile DNA proceeding. Vacating that portion of the order granting visitation, the Court held that KRS 405.021 controls and requires a grandparent to petition a circuit court for visitation and then to clearly and convincingly establish that visitation with the grandparent is in the child's best interest. The Court further noted that this was not a custody proceeding and that no one had demonstrated that a juvenile DNA proceeding is a " 'jurisdictionally sound' custody proceeding." Additionally, the paternal grandparents never characterized themselves as *de facto* custodians in an attempt to invoke jurisdiction under KRS 403.270. Thus, the Court questioned the trial court's jurisdiction over them and its authority to grant visitation. The Court also rejected the theory that KRS 610.160 permits a trial court to require a grandparent to participate in visitation as a form of "treatment" or "social service program" so as to justify awarding visitation in a DNA proceeding.

VIII. JUVENILES

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

[2016-CA-000116](#) 04/28/2017 2017 WL 1533786

Opinion by Judge D. Lambert; Judges Clayton and Dixon concurred.

Appellant sought review of the circuit court's affirmation of the district court's adjudication of his guilt of the offense of sodomy in the first degree where the victim was under the age of twelve years. Appellant argued that the trial court: (1) improperly found the eight-year-old victim competent to testify; (2) violated the Confrontation Clause contained in the Sixth Amendment of the U.S. Constitution by placing screens between himself and the victim during her testimony; (3) erred in allowing the victim's grandmother to sit near her and hold her hand during testimony; (4) was presented with insufficient evidence to support a finding of guilt. The Court of Appeals affirmed all rulings relating to the child victim's competency and the grandmother's alleged interference in the victim's testimony. However, the Court concluded that the screening procedures implemented by the trial court violated the Confrontation Clause and that, in light of this, the trial court's ruling regarding the sufficiency of the evidence could not stand. Specifically, the Court noted that the trial court did not make a specific determination that either child witness could or would not testify as to the offense, or that their testimony would be inhibited if given in front of the accused. The compelling need language of KRS 421.350 requires a determination that the child witness would be unable to testify in open court. In the absence of this showing, the trial court abused its discretion and violated appellant's right to confrontation in erecting the screens to obstruct the victim's view of the witness during her testimony. The Court further concluded that a reasonable possibility existed that the victim's testimony, taken in a situation which violated appellant's constitutional right to confront the witnesses against him, contributed to his conviction. It was not, therefore, harmless beyond a reasonable doubt. Consequently, the Court reversed the conviction and remanded for a new adjudication hearing.

IX. REAL ESTATE

A. *Gadd v. Hensley*

[2015-CA-001948](#) 03/24/2017 2017 WL 1102982 DR Pending

Opinion by Judge Clayton; Judges Maze and Stumbo concurred.

The developer of a subdivision filed an action against a subdivision property owner, asserting that the property owner violated deed restrictions by using properties as short-term rentals, and sought a permanent injunction. The property owner filed a counterclaim for harassment. The circuit court entered judgment in favor of the developer, permanently enjoined the property owner from any further violations of deed restrictions, awarded the developer costs, denied the developer's request for punitive damages, and denied the property's owner's counterclaim. The Court of Appeals affirmed the denial of the counterclaim for harassment but reversed the circuit court's decision prohibiting the property owner from short-term rentals of his property. The Court reasoned that Kentucky has abandoned the rule of strict construction of restrictive covenants and, further, that Kentucky courts must construe restrictive covenants according to their plain language. Here, the deed restrictions clearly indicated that rental of property was permitted and specified no time limit for such. If appellee wanted to limit rental of the property to a certain time period, he could have included such language in the deed restrictions. As he did not, the deed restrictions did not prevent the property owner from renting the property for a short or limited time period.

X. TORTS

A. *Seeger Enterprises, Inc. v. Town & Country Bank and Trust Co.*

[2015-CA-001111](#) 04/07/2017 2017 WL 1290631

Opinion by Judge Maze; Judge Dixon and Chief Judge Kramer concurred.

After appellee initiated foreclosure proceedings against property owned by appellant, appellant filed counterclaims alleging that appellee, through its representatives, had intentionally interfered with the sale of the property to another individual. In addition to tortious interference with contractual relations, appellant alleged that appellee's conduct constituted breach of the implied covenant of good faith and fair dealing and of appellee's fiduciary duty to its "borrowers" because it prevented repayment of appellant's debts. At the close of proof at trial, appellant submitted proposed jury instructions, which included an instruction on the claim of tortious interference with a prospective business advantage. However, the trial court refused to tender the instruction, pointing out that the claim was not included in appellant's counterclaims or subsequent pleadings. The trial court also denied appellant's request for leave to amend his pleadings to conform to the evidence. Appellee moved for a directed verdict on all of appellant's counterclaims, and the motion was granted. The Court of Appeals affirmed, holding: (1) that the tortious interference with contractual relations claims failed because appellant failed to present proof of a written contract with a prospective buyer; (2) that the breach of fiduciary duty claim failed because appellant presented no evidence that appellee actually interfered with the sale of his property or profited at his expense or the expense of other borrowers by doing so; and (3) that the trial court did not abuse its discretion in refusing to permit appellant to amend his complaint "at the eleventh hour."

XI. WORKERS' COMPENSATION

A. *Roach v. Owensboro Health Regional Hospital*

[2015-CA-001696](#) 04/07/2017 2017 WL 1290626

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

The Court of Appeals affirmed an order of the Workers' Compensation Board vacating an Administrative Law Judge's (ALJ) determination that certain unpaid medical expenses and out-of-pocket medical expenses paid by appellant were compensable. The Board concluded that appellant's failure to comply with regulations governing procedure before the ALJ - in particular 803 KAR 25:010 § 13 - prohibited the admission of proof of these expenses at the time such proof was offered. The Court found no error in the Board's interpretation of the subject regulations.

B. Teno v. Ford Motor Co.

[2015-CA-001903](#) 04/28/2017 2017 WL 1533793

Opinion by Judge J. Lambert; Judge Thompson concurred; Judge Acree dissented and filed a separate opinion.

Appellant filed a petition for review of a decision of the Workers' Compensation Board affirming the Administrative Law Judge's dismissal of her workers' compensation claim. The ALJ found that appellant had failed to prove a work-related injury. On appeal, appellant claimed that the ALJ and the Board had overlooked the opinions of numerous medical professionals who diagnosed her with work-related thoracic outlet syndrome and, instead, erroneously relied solely on the opinion of one defense independent medical exam doctor. By a 2-1 vote, the Court held that the ALJ had misconstrued the evidence of one of the physicians and reversed. Specifically, the Court concluded that the ALJ had "flagrantly erred in her discounted assessment" of one doctor's opinion that appellant had not been experiencing any active impairment at the time of her work injury and that her work activities caused her to experience pain. Because the ALJ is the fact finder, the matter was remanded to the ALJ for re-examination of this doctor's report along with the rest of the medical proof. However, the Court further noted that it did not find any merit in appellant's argument that thoracic outlet syndrome is "universally recognized" to be caused by repetitive work; there must be proof in the record that causally connects the diagnosis to the work injury before it can be found to be work-related.