KENTUCKY COURT OF APPEALS

PUBLISHED OPINIONS

DECEMBER 2012

I. APPEALS

OAKLEY v. OAKLEY

2011-CA-001410 12/21/12

Opinion by Judge Nickell; Judges Dixon concurred; Judge Maze concurred in result only by separate opinion.

Appeal dismissed on basis that notice of appeal was improperly filed from verbal order made during an evidentiary hearing. Court of Appeals held that appellant should have appealed from written order entered approximately one week after the hearing or amended his original notice of appeal to include the written order. In addition, Court of Appeals struck the appellant's brief for failure to substantially comply with CR 76.12 with respect to pinpoint citations to either the written or video record and a statement as to how the alleged errors were preserved for review.

II. COUNTY GOVERNMENT

A. BULLITT COUNTY BOARD OF HEALTH v. BULLITT COUNTY FISCAL COURT

2011-CA-001798 12/07/12

Opinion by Judge VanMeter; Judge Keller concurred; Judge Taylor dissented.

Court of Appeals reversed judgment of the circuit court which invalidated a board of health regulation which generally prohibited smoking in public places, places of employment, private clubs, and at some outdoor events in Bullitt County. Majority concluded that 1) legislature has clearly granted county boards of health authority to promulgate regulations or ordinances involving public health. Majority

also held that Supreme Court of Kentucky had previously resolved in board's favor issues of whether exposure to second-hand smoke is a health issue and whether adopted ordinances were reasonable.

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III. CRIMINAL LAW

A. McELROY v. COMMONWEALTH

2011-CA-000235 12/21/12

Opinion by Judge Lambert; Judges Caperton and VanMeter concurred.

Appellant failed to demonstrate manifest injustice sufficient to overturn his conviction for robbery where his claims of evidentiary errors were unpreserved. Court of Appeals found no palpable error in Commonwealth's introduction of evidence concerning victim's drug use in order to bootstrap its theory that appellant's motive for commission of the robbery was to obtain drugs. Neither did unpreserved error concerning appellant's references to his prior DUI offenses and a conviction for possession of Percocet in videotaped

statement to police detective rise to the level of palpable error. Court of Appeals vacated order imposing court costs and remanded for appropriate findings required by KRS 23A.205(2).

B. JONES v. COMMONWEALTH

2011-CA-001298 12/21/12

Opinion by Judge Stumbo; Chief Judge Acree concurred; Judge Nickell concurred by separate opinion.

Court of Appeals affirmed the conclusion of the trial court that under KR 218A.14151(1)(a) the decision whether to allow a defendant into a deferred prosecution program is a matter within the sole discretion of the prosecution because the prosecutor must agree to allow the defendant into the program. If the Commonwealth denies a defendant entry into the program, it must then take a position of presumptive probation stating on the record substantial and compelling reasons why the defendant cannot be safely supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety. The "substantial and compelling" reasons required by the presumptive probation statute are not the reasons for denying deferred prosecutions.

C. WILSON v. COMMONWEALTH

2011-CA-002157 12/07/12

Opinion by Lambert; Judges Combs and Nickell concurred.

Court of Appeals vacated conviction and remanded case for a new trial where trial court erred in refusing to grant a continuance based upon the Commonwealth's failure to produce a requested discovery document previously ordered to be produced. Denial of continuance constituted abused of discretion after Commonwealth delayed production of police "pool" car log until moments before trial began, preventing development of defense that prior occupants of "pool" car had left drugs inside.

D. COMMONWEALTH v. BROOKS

2011-CA-002075 12/07/12

Opinion by Judge Clayton; Judges Combs and Thompson concurred.
Trial court did not err in suppressing evidence found in purse where no evidence supported Commonwealth's contention that warrantless search was the product of concern for officer safety. Neither did third-party's consent to search entire house extend to purse where no reason was offered for not asking consent of owner of pursue nor did Commonwealth show it would have been unable to secure a warrant to search the purse.

IV. EMPLOYMENT LAW

A. COOKE v. CSX TRANSPORTATION, INC.

2012-CA-000735 12/07/12

Opinion by Lambert; Judges Caperton and Moore concurred.
Court of Appeals affirmed dismissal of claim against railroad for failing to provide a reasonably safe place to work under the Federal Employers' Liability Act. Jury instruction on causation which included "in whole or part" language, without additional modifying language "no matter how slight," was consistent with federal statute and established caselaw, as well as Kentucky preference for bare bones instructions. Evidence of post-accident remedial measures was properly excluded under KRE 407. No error in excluding evidence that railroad changed composition of its paint where there was no medical evidence to support theory that oil-based paint had caused his dizziness and evidence was irrelevant where issue claimant was trying to rebut had not been raised.

B. ROGERS v. PENNYRILE ALLIED COMMUNITY SERVICES, INC.

2012-CA-000204 12/14/12

Opinion by Judge Nickell; Judge Dixon concurred; Judge Maze dissented.
Summary judgment held improvidently granted on employee's claim for violation of KRS 61.101, et seq., the Kentucky Whistleblower Act, that she was terminated after confronting her supervisor about his trespass on her private property. Majority of Court of Appeals held that trial court

incorrectly based its decision on conclusion that protections of the act are triggered only with regard to information which "touches on a matter of public concern." Because statute terms are clear and unambiguous, it was error to read act in manner that would directly conflict with statute's use of word "any" or supply words the General Assembly did not include.

V. ENVIRONMENTAL LAW

A. RAY v. ASHLAND OIL

2008-CA-000840 12/21/12

Opinion by Lambert; Judges Combs and Keller concurred.

Court of Appeals affirmed the dismissal of several toxic tort claims filed as a result of Ashland Oil's drilling operations in the Martha Oil Field. Because of deficiencies in appellants' brief in terms of content and format, particularly with respect to preservation and citation to the record, several issues were reviewed solely for manifest error and none was found. Regarding dismissal of the trespass claims, Court of Appeals cited the parties' agreement that the five-year statute of limitations set out in KRS 413.120(4) applied and this Court's previous ruling that the contamination does not constitute a continuing trespass. The claims related to nuisance, negligence, ultra hazardous activities and failure to warn should have been raised in the prior appeals and are now law of the case. The dismissal of the appellants' water claims was affirmed on the basis that the issue was conclusively decided in this Court's previous opinion.

B. MULLINS v. ASHLAND OIL

2008-CA-000860 12/21/12

Opinion by Judge Lambert; Judges Combs and Keller concur.

Because of failure to substantially comply with the requirements of CR 76.12 concerning preservation of error and failure to properly list issues argued in brief in prehearing statement, Court of Appeals considered only argument that trial court erred in dismissing toxic tort

claim for failure to file suit within the five-year statute of limitations set out in KRS 413.120(4) and found no error.

VI. FAMILY LAW

FORTWENGLER v. FORTWENGLER
2011-CA-001833 12/21/12
Opinion by Judge Lambert; Judges Combs and Nickell concurred.
Court of Appeals affirmed the conclusion of the trial court that the proper action to collect a debt against one of the parties to a dissolution proceeding would be for the creditor (in this case either the husband or his father, whomever has the right to the debt) to obtain a common law judgment or attempt to collect the debt through a separate lawsuit. Furthermore, based upon this holding, the trial court did not err in denying husband's parents' motion to intervene in dissolution action.

A. CJM v. CABINET FOR HEALTH AND FAMILY SERVICES

2012-CA-000590 12/21/12
Opinion by Judge Clayton; Judges Combs and Nickell concurred.
Termination of parental rights was affirmed against parents' claims that they were given an insufficient amount of time to demonstrate their ability to parent the child since she was removed from their home shortly after her birth; that the cabinet failed to prove by clear and convincing evidence that the child was neglected or abused; that the cabinet failed to make reasonable efforts toward reunification; and that parents were without effective assistance of counsel during critical portion of the dependency action. Evidence that child was born with marijuana in her system; that she was found sleeping on a couch which is dangerous for an infant; that father was hostile and menacing to cabinet workers; that parents fired their appointed counsel during the dependency hearing, but reappointed for the termination action; that father informed cabinet workers that neither he nor mother were going to work the case plan until his federal civil rights litigation against the cabinet workers was completed; that father was subsequently arrested for terroristic threatening against a cabinet worker and her supervisor; and that a no-contact order had been issued and were still in place at time of

termination proceeding all supported trial court's determination that termination was in child's best interest. Despite being unrepresented during part of dependency proceedings, which was a matter of their own choosing since they fired counsel,, parents were afforded assistance during all of termination proceeding. No manifest injustice occurred in the case.

B. SHAFIZADEH v. SHARIZADEH
2010-CA-000758 12/14/12
Opinion by Chief Judge Acree; Judges Clayton and Keller concurred.
Family court order entered while a disqualification petition filed pursuant to KRS 26A.020 before the Chief Justice was not void for lack of jurisdiction but merely voidable and enforcement of such order is suspended until the Chief Justice decides the disqualification issue. While Court of Appeals upheld award of maintenance to allow wife time to obtain gainful employment, it reversed open-ended award and remanded for the family court to specific a fixed duration of the maintenance award.

VII. INSURANCE

A. MARTINDATE V. FIRST NATIONAL INS. CO. OF AMERICA
2011-CA-001747 12/21/12
Opinion by Judge Nickell; Judge VanMeter concurred; Judge Taylor concurred in result only.
Court of Appeals affirmed dismissal of appellants from bad faith claim they filed after a jury verdict in an automobile accident case. Citing the doctrine of judicial estoppel, the trial court based their dismissal from the bad faith claim upon their concealment in a subsequent bankruptcy proceeding of the personal injury lawsuit and resulting jury award. Furthermore, even if the bad faith claim had been allowed to proceed, the Court of Appeals concluded that the appellants could not have prevailed at trial where, at most, appellants demonstrated only a disparity between the jury's award and the insurance company's offers. That factor alone is insufficient to establish a bad faith claim.

C. EDWARDS v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

2012-CA-000033 12/21/12

Opinion by Judge Lambert; Judges Combs and Nickell concurred.

Trial court did not err in refusing to admit release into evidence where appellant failed to plead release as an affirmative defense; failed to comply with mandatory disclosure order; and offered no explanation whatsoever why she did not come forth with release prior to the day of trial. Court of Appeals also upheld award of damages against contention that it was not based upon fair market value of vehicle. Appellant offered no evidence at trial of her opinion as to fair market value through the testimony of an expert or documentary evidence and did not object to the testimony presented by the insurer. Because NADA information was not available due to newness of the car, insurer's testimony as to how the valued the car and the amount of damages it paid its insured was adequate to determine fair market value.

D. SPARKS v. TRUSTGUARD INSURANCE COMPANY

2011-CA-001119 12/14/12

Opinion by Judge Moore; Chief Judge Acree and Judge Thompson concurred.

Long-time companion of named insured who did not meet the definition of "family member" under automobile insurance policy sought UIM benefits under policy on basis that she, not named insured, had always been owner of the car insured. Court of Appeals held that trial court did not err in declining to impute her into coverage under the policy on basis of her claim of that she was a "*de facto* insured." Neither did her arguments of estoppel, reasonable expectations, illusory coverage, and public policy provide a basis for reserving entry of summary judgment for insurance company.

VIII. IMMUNITY

A. WALES v. PULLEN

2011-CA-002109 12/21/12

Opinion by Judge Lambert; Judges Combs and Nickell concurred.

Court of Appeals held that the fact that the Jefferson County Engineer was not aware of his statutory duties concerning removal of trees did not constitute an adequate defense for a public official or employee seeking the protection of sovereign immunity. Public works director was entitled to qualified official immunity because his duties were ministerial in nature and appellant failed to prove that director's actions with respect to removal of trees after massive windstorm were objectively unreasonable.

IX. NEGLIGENCE

A. RIES v. OLIPHANT

2011-CA-000100 12/21/12

Opinion by Judge Taylor; Judge Stumbo concurred; Judge Clayton concurred in result only.

In medical malpractice action, Court of Appeals held that trial court erred in permitting expert testimony in form of mathematical formula that essentially timed fetal blood loss. Expert admitted to having done no independent research in the area or having knowledge of any scientific study or other objective source directly setting forth his "mathematical model and equilibration theory" concerning a fetus *in utero*. Without an underlying objective basis of record to support expert's assumption that the equilibration rate of a human fetus *in utero* is identical to that of a human adult or child, it is virtually impossible to assess the reliability of that assumption or the reliability of his mathematical formula. Because the timing of fetus's blood loss was a critical factual issue for the jury to resolve, the persuasive effect of the expert's testimony in stating that he could accurately time the blood loss within a fifteen minute window required reversal for new trial.

B. JACKSON v. GHAYOUMI

2011-CA-002017 12/14/12

Opinion by Judge Lambert; Chief Judge Acree and Judge Thompson concurred.

Trial court did not err in excluding expert testimony to support claim in malpractice action that chiropractor's us of an electrical stimulation treatment modality caused plaintiff to spontaneously miscarry her pregnancy. Excluded expert testified in his deposition that he had no knowledge whatsoever regarding the delivery of electrical stimulation to the human body and disclaimed any knowledge of how electrical stimulation delivered to plaintiff's neck caused her alleged injurires. Court of Appeals found no error in trial court's conclusion, after conducting a *Daubert* hearing, that expert's testimony was speculative and unreliable.

C. RICE v. VANDERESPT

2011-CA-002152 12/21/12

Opinion by Judge Combs; Judges Lambert and Nickell concurred. Patrol office shot while responding to a dispatcher's call concerning a report of domestic violence sued landlords of her assailant based upon their decision to rent their property to "violent and/or disruptive tenants." Court of Appeals affirmed summary judgment for landowners on basis that that they were protected from liability by the public policy considerations of the Firefighter's Rule. Court of Appeals rejected officer's argument that landowners' failure to evict menacing tenant created an undue risk of injury beyond what is inevitably involved in response to a call for help in a domestic violence situation.

D. MILLER v. FRASER

2011-CA-000884 12/07/12

Opinion by Judge Caperton; Judges Lambert and Nickell concurred. Court of Appeals reversed jury verdict for physician in medical malpractice action on the basis that trial court erred in ruling plaintiff could not present his claim for failure to obtain informed consent prior to administration of therapeutic medication. Court of Appeals concluded that informed consent statute is not limited to surgical procedures and thus plaintiff should have been permitted to present his claim of negligence for lack of informed consent.

E. POTTER v. BOLAND

2011-CA-001336 12/07/12

Opinion by Judge Thompson; Judge Clayton concurred; Judge Combs dissented.

Majority of Court of Appeals affirmed dismissal of loss of consortium claims as having been filed outside applicable statute of limitations. Because it is an independent action and not specifically a part of a wrongful death claim, a parent's claim for loss of consortium under KRS 411.135 remains regardless of whether the child's personal representative asserts a wrongful death claim or whether a personal representative is appointed.

Thus, as previously settled by the Supreme Court, KRS 411.140 is the only limitation period set forth by the General Assembly for loss of consortium and trial court properly applied it in this case. Because it was painfully obvious that parents knew they had been harmed when child died, they had a duty to exercise reasonable diligence to discover whether they had been injured by physician's malpractice. In order to defeat application of one-year statute of limitations, parents were thus required to submit affirmative evidence that they could not discover with reasonable diligence that they had been injured by the physician.

F. COLLINS v. APPALACHIAN RESEARCH AND DEFENSE FUND OF KENTUCKY, INC.

2011-CA-001680 12/07/12

Opinion by Judge Dixon; Judges Maze and Nickell concurred.

In negligence action stemming from automobile accident, Court of Appeals affirmed trial court's determination that Appalred was entitled to summary judgment on plaintiffs' claim that it was vicariously liable for their injuries under doctrine of respondeat superior. Where plaintiff offered no proof other than their own beliefs as to whether defendant driver was acting within scope of her employment at time of accident, no genuine issue of material fact is created to rebut defendant's proof to the contrary. Further, a defendant's general schedule is not determinative of what she was doing on the morning of the accident so as to bring her activities within the scope of her employment.

X. PROPERTY

A. WOODLAWN SPRINGS HOMEOWNERS ASSOCIATION, INC. v. YOUR COMMUNITY BANK

2012-CA-000439 12/21/12

Opinion by Judge Combs; Judges Lambert and Nickell concurred. Bank was not entitled to exemption from homeowners association fees with respect to lots conveyed to it by estate of developer in lieu of foreclosure. Bank maintained that when developer's lots were transferred to it, it was entitled to the developer's exemption from homeowners fees set out in the development's declaration of covenants. Court of Appeals vacated summary judgment in favor of the bank on the basis that the declaration of covenants concerning the development made clear that it was the homeowners association which functionally stood in the shoes of the developer with respect to carrying out the duties enumerated in the declaration and that the association was therefore entitled to collect fees from all property owners including the bank.

B. BROCK v. LOUISVILLE METRO HOUSING AUTHORITY

2011-CA-002244 12/14/12

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

Pedestrian walking a dog was injured when the dog pulled her onto the grass adjacent to sidewalk and she stepped in a hole hidden by grass and leaves. Trial court granted summary judgment to Housing Authority on basis that the pedestrian was a trespasser to whom the Housing Authority owed no duty of care. Habitual trespassers are afforded the status of gratuitous licensees if the landowner could have known about the habitual use in the exercise of ordinary care and failed to object. Court of Appeals vacated summary judgment as premature where issues of fact existed including whether Housing Authority should have been on notice about habitual use of property

by the public and whether it acted negligently in not covering a deep, leaf-obstructed hold close to a public street.

C. THE VILLAS AT WOODSON BEND CONDOMINUIN ASSN. v. SOUTH FORK DEVELOPMENT, INC.
2010-CA-000578 12/07/12
Opinion by Judge Nickell; Judges Lambert and VanMeter concurred. Court of Appeals affirmed determination of the trial court that developer retained the right to pursue future development activities beyond the four-year marketing interval where the language of the Master Deed did support time restriction on additional development urged by condominium association. Court of Appeals found no indication that in drafting the Master Deed the developer intended to, or inferred it would, complete all construction activities within a four-year time period.

XI. WORKERS' COMPENSATION

A. MEUTH CONCRETE v. KINDLE
2012-CA-001059 12/21/12
Opinion by Judge Combs; Judges Keller and Lambert concurred. Court of Appeals affirmed an opinion of the Board which vacated and remanded the decision of the ALJ on the basis that the ALJ filed to make sufficient findings of fact and failed to properly account for rejecting the opinion of a university evaluator with respect to causation. The Court of Appeals agreed with the Board's conclusion that the ALJ's summary of the evidence was partially inaccurate and that the ALJ's finding as to causation did not provide an evidentiary basis sufficient to enable a reviewing body to determine whether the finding was supported by substantial evidence and whether it was reasonable.

B. JONES v. DOUGHERTY
2010-CA-001985 12/14/12
Opinion by Judge Keller; Judges Clayton and Maze concurred.

Absent evidence of aggression or hostility in assistant principal's act of taking a snake to a teacher's office to show it to her, assistant principal's actions act occurred within the scope of employment where there was no evidence she knew that teacher had a fear of snakes or that she pushed or thrust the snake toward the teacher. Thus, Court of Appeals affirmed entry of summary judgment on teacher's claim that assistant principal's "willful and unprovoked aggression" overcame the exclusive remedy provisions of the Workers' Compensation Act. Trial court correctly determined that appellants failed to provide evidence that the assistant principal's action in showing snake to teacher constituted will and unprovoked aggression.