

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
DECEMBER 1, 2014 to DECEMBER 31, 2014

I. CRIMINAL LAW

A. *Bessinger v. Commonwealth*

[2013-CA-002111](#) 12/19/2014 451 S.W.3d 244

Opinion by Judge Caperton; Judge Stumbo concurred; Judge Kramer concurred in result only. Appellants sought discretionary review of the Warren Circuit Court’s reversal of the Warren District Court. The district court granted appellants’ motion to suppress any and all evidence and statements from the arresting officer, based on the Commonwealth’s loss of police car video recordings of their respective traffic stops resulting in their arrests. The Commonwealth did not dispute that such video once existed and did not dispute its inability to produce the video during discovery, explaining that a permanent server failure had occurred at the Bowling Green Police Department. The district court found that RCr 7.26 required the Commonwealth to produce the video. Additionally, the district court determined that the video recordings were the “best evidence” of the officer’s statements. The district court also relied upon *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), in concluding that the destruction of the video rendered the other evidence properly suppressed. The circuit court disagreed with the district court and reversed the grant of the motion to suppress the evidence. In affirming the circuit court, the Court of Appeals distinguished *Sanborn*, as the *Sanborn* prosecutor intentionally destroyed the taped statements, unlike the seemingly unintentional technical failure in this case. Additionally, in *Sanborn*, these were statements of witness and, as such, observations or fact statements that were not observed by the defendant. In contrast, the appellants in this case were present during any statements made to them, and necessarily by them, and free to make and recall any observations of the situation. Thus, the Court agreed with the circuit court that neither *Sanborn* nor RCr 7.26 mandated suppression. The Court further held that a “missing evidence” instruction was not warranted.

B. Commonwealth v. Angus

[2012-CA-001836](#) 12/12/2014 450 S.W.3d 719

Opinion by Judge J. Lambert; Judge Stumbo concurred; Judge Jones concurred in result only. On discretionary review, the Court of Appeals affirmed the decision of the Jefferson Circuit Court. The circuit court upheld the suppression of the Commonwealth's evidence by the Jefferson District Court due to a violation of the defendant's *Miranda* rights when she was stopped and later arrested for DUI and other offenses. Defense counsel moved to suppress the evidence at trial when the officer testified that the defendant had not been apprised of her *Miranda* rights when an officer told her she was going to jail and she did not believe she was free to leave. The district court suppressed the evidence and dismissed the charges against the defendant. On appeal, the circuit court held that the district court properly suppressed the evidence and that double jeopardy barred the Commonwealth's appeal. This Court agreed, holding that the dismissal of the charges following the grant of the defendant's mid-trial motion to suppress was the functional equivalent of a directed verdict of acquittal from which the Commonwealth had no right to appeal. Jeopardy attached once the district court began hearing evidence.

C. Jackson v. Commonwealth

[2013-CA-000582](#) 12/05/2014 2014 WL 6844545 DR Pending

Opinion by Judge Thompson; Judges Combs and Stumbo concurred. Appellant was found guilty but mentally ill of assault in the third degree. He argued that his statement to a psychiatric access nurse invoked his right to remain silent under *Miranda* and, therefore, the statement could not be used by the Commonwealth to rebut his insanity defense. The Court of Appeals affirmed, holding that the psychiatric access nurse was not a state actor when treating appellant and, therefore, *Miranda* did not apply. The Court also held that appellant's claim that KRS 202A.041(1) required the Commonwealth to involuntarily hospitalize him instead of taking him to jail and filing criminal charges was not reviewable under RCr 10.26.

D. *Ramsey v. Commonwealth*

[2014-CA-000242](#) 12/24/2014 453 S.W.3d 738

Opinion by Judge Clayton; Judges Caperton and Jones concurred. Appellant brought an appeal from an order denying his motion for relief pursuant to CR 60.02. Appellant argued that his motion should be granted due to his need to seek necessary medical attention that was unavailable to him while incarcerated. The circuit court denied his motion, noting that although there were a number of compelling arguments to be made on behalf of appellant's early release, he was not entitled to relief pursuant to CR 60.02. The Court of Appeals agreed, holding that CR 60.02 functions as a means by which a party may seek relief from a final judgment, based upon any "reason of an extraordinary nature justifying relief." Physical ailments of a defendant are not tantamount to trial defects and, therefore, do not amount to claims of extraordinary relief for purposes of CR 60.02.

II. FAMILY LAW

A. *Farrar v. Farrar*

[2013-CA-000180](#) 12/12/2014 2014 WL 7012609 DR Pending

Opinion by Judge Jones; Judges Lambert and Stumbo concurred. The Court of Appeals reversed the trial court's order requiring Husband to pay Wife one-half interest in the marital residence minus closing costs when Husband was to retain, rather than sell, the residence. The Court also affirmed the trial court's exercise of subject matter jurisdiction when it allowed Husband to retain the marital residence post-decree without making any findings pursuant to CR 60.02. The Court also held that the doctrine of estoppel by deed did not preclude Wife from appealing the trial court's order after delivering the deed and accepting the equity payment pursuant to the order. The Court also remanded an award of attorney's fees for consideration of the financial circumstances of the parties and upheld the trial court's refusal to award sanctions to Husband.

B. *S.L.C.E. v. Cabinet for Health and Family Services*

[2014-CA-000639](#) 12/24/2014 454 S.W.3d 305

Opinion by Judge J. Lambert; Judges Clayton and Thompson concurred. The Court of Appeals affirmed the termination of the mother's parental rights to her child. The mother argued that she was not notified of the trial court's intent to use the "beyond a reasonable doubt" standard found in the Indian Child Welfare Act, 25 U.S.C. § 1912, and that termination was improper. The Court held that the Existing Indian Family Doctrine applied, thus rendering the application of the "beyond a reasonable doubt" standard improper. However, because the Commonwealth utilized a higher standard of proof, rather than a lesser standard, the mother was not prejudiced, and termination was proper.

III. INDEMNITY

A. *Butt v. Independence Club Venture, Ltd.*

[2013-CA-001400](#) 12/19/2014 453 S.W.3d 189

Opinion by Judge Dixon; Judge Clayton concurred; Judge Jones concurred in result only. After entering into settlement agreements with an intoxicated driver and the driver's insurer, an injured passenger and the co-administrators of the estates of two other passengers filed suit against the nightclub that sold alcohol to the driver on the night of the accident under the Dram Shop Act. The Court of Appeals affirmed an order granting summary judgment in favor of the nightclub and dismissing appellants' cause of action for violation of the Act. The Court held that a "hold harmless" provision in appellants' release of claims against the intoxicated driver and the driver's insurer precluded recovery against the nightclub under the Act. In *Destock #14 v. Logsdon*, 993 S.W.2d 952 (Ky. 1999), the Supreme Court of Kentucky held that pursuant to KRS 413.241(3), a tortfeasor remains primarily liable for injuries while the dram shop is secondarily liable with a right of indemnity against the tortfeasor. Thus, the "hold harmless" provision releasing the tortfeasor, his family, and insurance company effectively nullified all dram shop liability. Although appellants intended to preserve their right to pursue a claim against appellee, they agreed to hold harmless and indemnify the released parties from "any and all claims, liens, causes of action, demands or suits of any kind which may have been brought because of the accident referred to herein" Appellants were then precluded from any recovery against appellee because it, in turn, would be entitled to indemnity against the tortfeasor for the amount of any recovery, and appellants would be required to hold the tortfeasor harmless to the extent of the indemnification. The Court noted that this is the "circuitry of litigation" that courts must avoid.

IV. TORTS

A. *Halle v. Banner Industries of N.E., Inc.*

[2012-CA-001997](#) 12/19/2014 453 S.W.3d 179

Opinion by Judge Thompson; Judge Stumbo concurred; Judge Taylor concurred in result only. A coal mining company's financiers brought suit against prior investor entities for fraud in the inducement, breach of contract, tortious interference with business relations, civil conspiracy, and abuse of process. The circuit court denied the investor entities' motion to dismiss based on the judicial statements privilege, and the investor entities appealed. The Court of Appeals affirmed, holding that the judicial statements privilege does not apply to conduct and has no application to abuse of process claims. The Court further held that the privilege does apply to interference with business relations and fraud in the inducement claims to the extent the claims rely on communications made preliminary to, in the institution of, or during the course of a judicial proceeding. Additionally, it applies only if those communications were material, pertinent, and relevant to the judicial proceeding.

V. WORKERS' COMPENSATION

A. *Stevenson v. Mohon*

[2013-CA-001539](#) 12/05/2014 2014 WL 6872169 Rehearing Denied

Opinion by Judge J. Lambert; Chief Judge Acree and Judge Jones concurred. In an appeal from a summary judgment entered in favor of the defendants in a wrongful death action, the Court of Appeals affirmed. The decedent passed away when he fell off of a tractor while he was working for his employer. The Court held that the exclusive remedy defense in KRS 342.690 applied to bar his estate's civil claim against his employer and manager because the decedent was acting in the course and scope of his employment when the fatal accident occurred. The Court also held that the estate failed to state a cause of action for negligence against the remaining defendants because none of them owed a duty to the decedent, nor was the accident foreseeable. Finally, the Court rejected the estate's argument that it had insufficient time to develop proof.