

KENTUCKY COURT OF APPEALS

PUBLISHED OPINIONS

FEBRUARY 2013

I. CIVIL PROCEDURE

A. NORTHERN TOOL AND EQUIPMENT, INC. v. DURBIN

[2011-CA-000503](#) 02/01/12

Opinion by Judge Thompson; Judges Combs and Maze concurred. On discretionary review from a circuit court judgment affirming the decision of the district court in a small claims action, the Court of Appeals held that the strict evidentiary standards contained in the Kentucky Products Liability Act are not applicable in a small claims action. If the defendant desired to have this claim litigated in a forum where civil procedural rules are applicable, it could have sought removal to district court under KRS 24A.310.

B. McPHERSON v. FELKER

[2009-CA-000901](#) 02/15/13

Opinion by Judge Stumbo; Chief Judge Acree and Judge Nickell concurred.

Court of Appeals held that a faxed order which is signed by the judge must be considered a “signed” order under CR 58(1). Entry of a faxed order, which is regular on its face and which has not been challenged as not intended to be entered or not the signature of the judge, is a final judgment for purposes of calculating the timeliness of a subsequent motion to alter, amend, or vacate.

C. STANLEY, D/B/A APC, LLC v. C&R ASPHALT, LLC

[2012-CA-001025](#) 02/08/13

Opinion by Chief Judge Acree; Judge Caperton concurred; Judge Thompson dissented.

Appeal dismissed on basis that bare CR 59.05 motion, without stating with particularity the grounds therefore, is insufficient to toll the thirty-day period for filing notice of appeal. CR 59.05 motion which fails to state with particularity the grounds therefore is incomplete and therefore invalid.

D.

II. COUNTIES

A. KNOTT COUNTY FISCAL COURT v. AMBURGY

[2011-CA-000782](#) 02/01/12

Opinion by Judge Caperton; Judges Combs and Nickell concurred. Fiscal court did not waive sovereign immunity under KRS 67.180 where the plaintiff's injuries did not arise from the actual use of a county vehicle, but resulted from a vehicular accident not involving a county-owned vehicle due to alleged negligence for failure to remove mud and debris from the roadway and the failure to warn of the hazardous condition.

III. CRIMINAL LAW

A. MADDIX v. COMMONWEALTH

[2011-CA-001765](#) 02/01/13

Opinion by Judge VanMeter; Judge Nickell concurred; Judge Taylor concurred in part and dissented in part.

Where Commonwealth filed motion to extend pre-trial diversion during the three-year diversion period, circuit court retained jurisdiction to rule on the motion even after the expiration of the diversion period. Majority also held that although original pre-trial diversion order failed to set an amount of restitution, that order was interlocutory and was extended by appellant's agreement. Because appellant participated in civil proceeding which set restitution and had every opportunity to contest the amount owed, majority concluded that he suffered no prejudice when circuit court set the amount of restitution per the civil judgment.

B. BOUNDS v. COMMONWEALTH

[2011-CA-000671](#) 02/08/13

Opinion by Chief Judge Acree; Judges Nickell and Stumbo concurred. Court of Appeals held that officer's affidavit established probably cause to issue search warrant for appellant's residence, person, and vehicle where: 1) affidavit stated that officer was a seven-year veteran of the police force; 2) it is common knowledge among law enforcement and the courts that pseudoephedrine is a key ingredient in the manufacture of methamphetamine; issued court could reasonably assume that person manufacturing drugs is doing so at his residence; and under totality of the circumstances, district court had a substantial basis for concluding that the factual recitations in the officer's affidavit established probably cause to issue search warrant.

C. COMMONWEALTH v. ARMSTRONG

[2011-CA-000931](#) 02/22/13

Opinion by Chief Judge Acree; Judges Clayton and Keller concurred. In an appeal from the denial of the Commonwealth's petition for a writ of prohibition, the Court of Appeals upheld the conclusion of the circuit court that the district court properly suppressed evidence acquired following appellant's arrest for DUI on the basis that, under the totality of the circumstances, there was no probable cause to infer that he was operating or in physical control of his vehicle at the time of arrest. Officer testified that when he approached appellant's legally parked vehicle, he found appellant unresponsive and had to break the back window of the car to rouse him. Although the motor of the car was running, there was no evidence that appellant had moved or otherwise operated the vehicle while intoxicated.

D. MEYER v. COMMONWEALTH

[2011-CA-001622](#) 02/22/13

Opinion by Judge Moore; Chief Judge Acree concurred; Judge Keller concurred in result only.

Trial court abused its discretion in declaring mistrial as to all five counts of an indictment where jury had informed court it was hung as to only two of the five counts. Introduction of evidence as to the counts upon which a guilty verdict had been reached in the first trial held improperly admitted in second trial under KRE 404(b) as prior bad acts, as well as being inadmissible under KRE 401 and KRE 402 as irrelevant to counts properly tried. It was also error to permit the Commonwealth to introduce evidence concerning a count upon which a verdict of not guilty had been reached.

E. CARTER v. COMMONWEALTH

[2012-CA-000064](#) 02/22/13

Opinion by Judge Combs; Judge Caperton concurred; Judge Dixon dissented.

Court of Appeals vacated and remanded an order revoking probation on the basis that the trial court erred in failing evaluate all criteria set forth in KRS 439.3106 and in relying solely on element of failure to report. General Assembly did not prioritize the element of reporting in criteria to be considered; rather it emphasized the necessity of analyzing the severity and risks of a person's crime before committing him to jail without probation.

F. DEHART v. COMMONWEALTH

[2011-CA-001592](#) 02/22/13

Opinion by Judge Caperton; Judges Dixon and Taylor concurred.

Upon review of colloquy, Court of Appeals reversed order denying appellant's motion to withdraw guilty plea. At time appellant entered the plea, he asked specific questions concerning the applicable parole eligibility and requested that the court clarify the issue and received erroneous and confusing information. Because information appellant received during colloquy was ambiguous, if not misleading, Court of held that record established that appellant should have been permitted to withdraw guilty plea on the basis that it was not knowingly, intelligently, or voluntarily entered in that record is clear that he relied

upon the misrepresentations of the court and the Commonwealth as to parole eligibility.

IV. EDUCATION

A. WEBSTER COUNTY BOARD OF EDUCATION v. FRANKLIN

[2012-CA-000811](#) 02/08/13

Opinion by Judge Clayton; Judges Moore and Nickell concurred.

Board violated Open Meetings Act when it authorized its attorney to pursue legal action to contest adequacy of a petition for a recall of six-cent tax. Because KRS 61.815(1)(c) prohibits the taking of final action in closed session, litigation exception is inapplicable to final action of Board authorizing litigation. Neither can Board legitimize unauthorized conduct taken at an improperly closed session by subsequent ratification.

V. EMPLOYMENT LAW

A. UNIVERSITY OF LOUISVILLE ATHLETIC ASSOCIATION, INC. v. BANKER

[2011-CA-001436](#) 02/01/13

Opinion by Judge Lambert; Judge Moore concurred; Judge Caperton dissented.

In reversing jury award of damages for a retaliatory discharge claim, Court of Appeals held that, where decision not to renew employee's contract had been contemplated prior to her exercise of protected activity, employee could not make *prima facie* case of causal connection between her discharge and her complaint to human resources department. Thus, trial court erred as a matter of law in refusing to grant defendant's motion for JNOV.

VI. FAMILY LAW

A. W. v. CABINET FOR HEALTH AND FAMILY SERVICES

[2012-CA-000875](#) 02/01/12

Opinion by Lambert; Judges Dixon and Taylor concurred. Court of Appeals affirmed termination of parental rights where record contains substantial evidence to support trial courts findings; where children were clearly abused and neglected as defined by Kentucky law and stipulated by the parents; where the trial court properly considered the factors to determine whether termination was in the children's best interest under KRS 625.090(1)(b); and where trial court properly found that many of the grounds existed justifying termination as required by KRS 625.090(2). In addition to having abandoned children for a period exceeding ninety days, parents did not complete all required substance abuse orders and recommendations, individual counseling services, or parenting classes; did not fully cooperate with the Cabinet and maintain regular contact with the children or the social worker; and failed to provide any material support for the children.

B. WAHLKE v. PIERCE

[2012-CA-000022](#) 02/08/13

Opinion by Judge Taylor; Judges Nickell and VanMeter concurred. Relocation of both parents and the child out of this Commonwealth prior to commencement of visitation modification proceeding divested the family court of exclusive, continuing jurisdiction by operation of KRS 403.824(1)(b). Thus, family court was without jurisdiction to rule on mother's motion to relocate with the parties minor child to Texas.

C. WOLFE v. WOLFE

[2012-CA-000578](#) 02/15/13

Opinion by Judge Stumbo; Chief Judge Acree concurred; Judge Combs concurred.

Court of Appeals held that the Kentucky Rules of Civil Procedure are applicable in domestic violence proceedings to the extent that they do not conflict with statutory procedures prescribed by the General Assembly. Because continuances and other procedural and statutory provisions allow for flexibility as to time frames alleviate any

apparent conflict between the civil rules and the statute, the time limits in domestic violence actions do not conflict with the rules of civil procedure.

D. MORGAN v. GETTER

[2012-CA-000655](#) 02/22/13

Opinion by Judge Combs; Judge Nickell concurred; Judge Clayton concurred in result by separate opinion.

Trial court properly denied mother's motion to question guardian ad litem concerning his report in custody proceeding. Because the GAL had been appointed as an advocate for the child, it would have been unethical for the GAL to be questioned concerning his report. Court of Appeals noted, however, that the potential for prejudice and inherent conflict created by a lack of clarity in the statute merits scrutiny by the General Assembly and/or Supreme Court to define the proper role of a GAL concerning child custody issues.

VII. IMMUNITY

A. EDMONSON COUNTY, KENTUCKY v. FRENCH

[2011-CA-000963](#) 02/08/13

Opinion by Judge Lambert; Judges Dixon and Taylor concurred.

County, fiscal court, elected fiscal court members, and county judge were all entitled to defense of sovereign immunity on claim that ice accumulation of courthouse steps allegedly due to deficient guttering and drainage caused plaintiff to fall and suffer injuries. Defendant county and fiscal court, as well as individual fiscal court members and judge executive in their official capacities, were entitled to immunity. Because complaint failed to specify whether claims against judge executive and individual fiscal court members were in their individual capacities, complaint was construed to allege claim in official capacities only.

B. ROACH v. HEDGES

[2011-CA-001856](#) 02/15/13

Opinion by Judge Clayton; Judges Combs and Thompson concurred.

Trial court properly held that principals, plant operator, and maintenance worker were immune from suit under the Kentucky Recreational Use Statute, KRS 411.190(3)-(4), for injuries alleged sustained due to negligence in maintenance of school playground. By adopting a broad definition of “owner” to include those “in control of the premises,” Court of Appeals held that the legislature intended to eliminate negligence liability by removing the duty of care from individuals who have sufficient control to render them liable absent the statute’s application.

C. FARMER v. COMMONWEALTH

[2012-CA-001659](#) 02/15/13

Opinion by Judge Thompson; Judge Caperton concurred; Chief Judge Acree dissented.

Court of Appeals held that an order denying immunity from prosecution under KRS 503.085 is immediately appealable under the rationale of *Breathitt County Bd. of Educ. v. Prater* holding that an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment.

VIII. INSURANCE

A. PRYOR v. COLONY INSURANCE

[2012-CA-000227](#) 02/01/13

Opinion by Judge Clayton; Judges Combs and Nickell concurred. Language in a commercial general liability policy precluding coverage for liability arising out of injuries to employees, as well as language in an endorsement broadening the exclusion by barring coverage to anyone performing duties related to the conduct of the insured’s business, supported entry of summary judgment on claims related to the death of person hauling timber for the insured. Even if trial court had construed decedent to have been acting as an independent contractor at the time of his death, that status falls within scope of endorsement which precluded coverage for performing duties related to the conduct of the insured’s business.

IX. PROPERTY LAW

A. PAYNE v. RUTLEDGE

[2011-CA-000953](#) 02/08/13

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

In a dispute over a shared driveway, Court of Appeals affirmed the entry of summary judgment on one property owner's claim that the other property owners had breached an agreement concerning maintenance of the driveway easement, requiring termination of the easement and damages. Court of Appeals upheld the circuit court's conclusion that one property owner could not unilaterally decide to pave the driveway, which had always been merely dirt or gravel, and then require the other property owner to contribute one-half of the expenses. There was no error in the circuit court's findings that paving the drive with concrete was beyond the subject matter of the easement and maintenance agreement; that it was necessary to obtain the consent of the adjoining property owners prior to requiring them to defray the cost of paving; and that no basis had been established for rescinding the agreement.

X. TRUSTS

A. VANDER BOEGH v. BANK OF OKLAHOMA

[2011-CA-000921](#) 02/08/13

Opinion by Judge Moore; Judge Stumbo concurred; Judge Thompson concurred in result.

Court of Appeals upheld decision of the circuit court in trustee's action pursuant to KRS 386.675 for instruction regarding how to fulfill its fiduciary obligations to beneficiaries concerning mining lease and royalty payments from lease. Properly applying the "prudent investor" standard to the evidence presented, circuit court did not err in concluding that it is was in the best interests of all beneficiaries to keep lease in force despite alleged royalty shortfall where there was no evidence of certainty that another lessee capable of operating quarry could be found; that many beneficiaries depended

on royalties and would suffer financial hardship during lengthy period of time required to terminate lease and find another operator; and evidence concerning alleged breach by operator was speculative. Alleged mining permit violation could not form basis for breach of lease agreement in absence of final order, by the entity authorized to make that determination, that a permit violation exists. Contrary to appellants' argument, nothing in circuit court order prohibits trustee from exercising its discretion to terminate lease if lessee commits a default in the future.

XI. WORKERS' COMPENSATION

A. JJ'S SMOKE SHOP, INC.,

[2012-CA-000851](#) 02/01/13

Opinion by Judge VanMeter; Judges Caperton and Lambert concurred.

Employer failed to present sufficient evidence to KRS 342.680 presumption that employee's murder was work-related where the ALJ had discretion to draw reasonable inferences from evidence. ALJ properly found that it was because of employee's knowledge of and access to store security system that he was lured into perpetrator's car under pretext of buying drugs, forced to disable the alarm and open store doors and safe, and then murdered on store premises in the course of a robbery. ALJ's refusal to accept as true employer's evidence that death was not work-related did not convert the rebuttable presumption into an irrebuttable one.

B. TWIN RESOURCES, LLC v. WORKMAN

[2012-CA-001504](#) 02/22/13

Opinion by Judge Moore; Judges Keller and Lambert concurred. Court of Appeals affirmed *sua sponte* determination of the Workers' Compensation Board that the Chief Administrative Law Judge acted in excess of his statutory and regulatory authority in resolving a post-

award medical fee dispute. It is within the province of the Board to determine a question of law, such as whether an ALJ's opinion is in conformity with Chapter 342 and thus Board had authority to raise question of whether the CALJ acted without or in excess of his statutory or regulatory powers on its own motion. After CALJ determined that the motion to reopen the medical fee dispute was supported by a *prima facie* showing, the Board correctly concluded that under 803 KAR 25:012 ss 1(6)(c) the CALJ's only option was to assign the motion for further proof time and an adjudication on the merits and he could not assign the medical fee dispute to himself or otherwise retain jurisdiction.

XII. ZONING

A. YOCUM v. THE LEGISLATIVE BODY OF THE CITY OF FORT THOMAS

[2011-CA-002191](#) 02/01/13

Opinion by Judge Clayton, Judge Combs and Nickell concurred. The 14-day notice provision of KRS 100.212 and an identical city ordinance were upheld against the claim that they are unconstitutional in failing to afford interested persons a meaningful opportunity to be heard. Court of Appeals noted that the appellant in fact appeared before the planning commission and presented evidence and did not ask for additional time to prepare. Further, there is no requirement that appellant be allowed to present evidence before the city council which is authorized to follow the commission's recommendation without a hearing. Because appellant was afforded a meaningful opportunity to be heard before the planning commission, he cannot establish that the statute and ordinance are violative of his right to due process.

B. MASONIC HOMES OF KENTUCKY, INC. v. LOUISVILLE METRO PLANNING COMMISSION

[2011-CA-002041](#) 02/08/13

Opinion by Judge Dixon; Chief Judge Acree and Judge VanMeter concurred.

Because KRS 100.987 specifically vests planning commission with subject-matter jurisdiction to regulate the placing of cellular towers within metropolitan Louisville, question of whether a particular party was able to pursue an application under that statute is a question of standing, not jurisdiction. Thus, appellant's failure to object to the applicant's standing at the administrative level constituted waiver of the issue which precluded party opposing application from raising it for the first time in the circuit court.