PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

FEBRUARY 1, 2019 to FEBRUARY 28, 2019

I. ADMINISTRATIVE LAW

A. ***Uradu v. Kentucky Board of Medical Licensure***

2018-CA-000097 02/22/2019 2019 WL 847696

Opinion by Judge Lambert; Judges Combs and K. Thompson concurred.

This case concerned an administrative appeal from an order upholding the decision of the Kentucky Board of Medical Licensure to place appellant's medical license on probation pursuant to KRS 311.595(17) after her license had been suspended by the State Medical Board of Ohio. The Court of Appeals reversed, holding that 201 KAR 9:081 § 9(4)(c), a regulation relied upon by the Board in its determination, was invalid because it exceeded the scope of the statute upon which it was based - KRS 311.595. That statute permits - but does not require - the Board to impose the same substantive sanction against a doctor as the discipline imposed in another state. In contrast, 201 KAR 9:081 § 9(4)(c) was mandatory in nature and required the Board to impose the same substantive sanction imposed in the other state. Thus, the regulation exceeded the scope of the Board's statutory authority and was invalid.

II. ADOPTION

A. ***E.K. v. T.A.***

2017-CA-001505 02/22/2019 2019 WL 848186

Opinion by Judge Goodwine; Judges K. Thompson and L. Thompson concurred.

Father filed a petition for involuntary termination of parental rights against Mother pursuant to KRS 625.050. Later that year, the circuit court entered an agreed order allowing the filing of an amended petition seeking adoption under KRS 199.502 and the addition of Stepmother as a party. The amended petition set forth two counts: Count I was a petition for adoption under KRS 199.502, and Count II was a request for involuntary termination of parental rights under KRS 625.050. The circuit court subsequently dismissed the amended petition for its failure to name the Cabinet for Health and Family Services as an indispensable party. The Court of Appeals reversed and remanded. The Court first noted that when there is a dual petition involving an adoption and involuntary termination of parental rights, the adoption supersedes the termination because KRS Chapter 199 encompasses KRS Chapter 625. Therefore, the circuit court incorrectly applied KRS Chapter 625 to the amended petition. The Court then held that the Cabinet was not an indispensable party under KRS Chapter 199 because the case involved a stepparent adoption where the child was not in the care, custody, and control of the Cabinet. Finally, the Court held that the amended petition strictly complied with KRS Chapter 199's requirements at the time Mother filed a motion to dismiss even though the Cabinet had not been notified of the filing of the amended petition. The Court concluded that the Cabinet's participation pre-petition was unnecessary for an adoption by a stepparent pursuant to KRS 199.470(4)(a), but noted that, on remand, there were post-petition requirements for Stepmother to fulfill. Specifically, KRS 199.510(1) requires the Cabinet's post-petition notification and participation in every adoption.

III. APPEALS

A. ***Koester v. Koester***

2018-CA-000270 02/01/2019 2019 WL 405498

Opinion dismissing by Judge Goodwine; Judges Dixon and Maze concurred.

Appellant challenged an order awarding appellee $1,270.52 for damages to an automobile. The Court of Appeals did not rule on the merits of the appeal and instead dismissed it for appellant's non-compliance with briefing requirements set forth in CR 76.12. Specifically, the Court held that appellant's brief did not comply with CR 76.12(4)(c)(iii), (iv), and (v) or common appellate procedure.

IV. ATTORNEY AND CLIENT

A. ***Doe v. Golden & Walters, PLLC***

2017-CA-001337 02/08/2019 2019 WL 489111

Opinion by Judge Combs; Chief Judge Clayton and Judge Jones concurred.

This case involved protracted litigation concerning a class action that had been before the Court of Appeals on three separate occasions. At issue was whether attorneys representing the named members of a class owed an expanded fiduciary duty to putative class members when no class had ever actually been certified by the circuit court. The Court held that an attorney-client relationship did not exist between appellants and the appellee attorneys under these circumstances and that the attorneys owed no fiduciary duty to the putative class members. Thus, the attorneys were entitled to summary judgment.

V. CHILD CUSTODY AND RESIDENCY

A. ***Brockman v. Brockman***

2018-CA-000763 02/01/2019 2019 WL 405312

Opinion by Judge Goodwine; Judges Dixon and Maze concurred.

Appellant challenged the circuit court's findings of fact, conclusions of law, and decree of dissolution of marriage, arguing that the court lacked subject matter jurisdiction to enter a divorce decree or to make a custody determination under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and committed palpable error when it allowed the guardian *ad litem* to argue and make recommendations on behalf of the minor child. The Court of Appeals affirmed. The Court held that: (1) subject matter jurisdiction was statutorily conferred upon the circuit court under KRS 23A.100; (2) personal jurisdiction was proper under KRS 403.140(1)(a) because appellee's temporary absence from the state did not affect her Kentucky residency during the 180 days prior to the filing of her petition; (3) the custody determination was proper under the UCCJEA because the child and parents had a significant connection with Kentucky pursuant to KRS 403.822(1)(b); and (4) there was no manifest injustice affecting appellant's substantial rights and, thus, no palpable error.

B. ***Carroll v. Carroll***

2018-CA-000790 02/08/2019 2019 WL 489623

Opinion by Judge Maze; Judge Taylor concurred; Judge Dixon dissented without separate opinion.

The parties were married in Illinois in 2014, prior to the recognition of same-sex marriage in Kentucky. At the time of the marriage, Kali was already pregnant. Shortly after the child's birth, Jessica filed a petition in Kentucky seeking joint custody of the child with Kali. The petition stated that the biological father was unknown and that Kali waived her superior right to sole custody. Based on the uncontested petition, the Hardin Family Court entered an order granting joint custody. Thereafter, the parties' relationship deteriorated, and in 2018 Kali filed a motion in Hardin Family Court to set aside the joint custody order pursuant to CR 60.02(c) & (d). She alleged that both parties had lied about the identity of the father being unknown. The family court denied the petition as untimely. On appeal, Kali noted that in *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), the Supreme Court of Kentucky held that a motion to set aside an agreed custody order was proper under either CR 60.02(c) or (d). Furthermore, the latter rule only requires the motion to be brought within a reasonable time. Consequently, Kali argued that the family court abused its discretion by finding that the motion was procedurally barred as untimely. However, by a 2-1 vote, the Court of Appeals disagreed and affirmed. The Court pointed out that, unlike here, the CR 60.02 motion in *Mullins* was brought less than one year after the agreed custody order. Thus, there was no question that the motion was timely under CR 60.02(c), and no need to address whether it was brought within a reasonable time under CR 60.02(d). The Court also noted that *Mullins* did not address the distinction between perjury and falsified evidence under CR 60.02(c) and "fraud affecting the proceedings, other than perjury or falsified evidence," under CR 60.02(d). In light of this, the Court concluded that *Mullins'* broad suggestion that relief under CR 60.02(d) was appropriate was *dicta* and was not controlling under the circumstances present in the current case. The Court then held that Kali's three-year delay in bringing the motion was unreasonable, noting that a motion for relief under CR 60.02(d) must be brought within "a reasonable time." Kali admitted that the facts supporting her motion were known to her, and she did not allege that she was unable to raise these facts within a reasonable time after the joint custody order was entered. Therefore, the Court concluded that the family court did not err in denying the motion.

C. ***R.B. v. S.M.***

2018-CA-000630 02/22/2019 2019 WL 847213

Opinion by Judge Dixon; Judges Kramer and Lambert concurred.

After Mother was arrested for DUI, Father was granted temporary emergency custody of his child in Kentucky pursuant to KRS 620.060. Mother had previously been granted custody in proceedings in Tennessee; however, no one informed the Kentucky court of this order. Almost three years later, Mother petitioned the court to rescind its order granting emergency temporary custody to Father. After a full hearing on the matter, the circuit court rescinded the order. Father subsequently raised the issue of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) for the first time. He contended that the circuit court was without subject matter jurisdiction to proceed on Mother's motion because - while Kentucky had jurisdiction to enter the original emergency order - it had lost jurisdiction to rescind that order pursuant to the provisions of the UCCJEA. Father argued that pursuant to KRS 403.822, since Tennessee was the "home state" for purposes of child custody, and as the emergency that had permitted Kentucky to assume jurisdiction had passed, only Tennessee possessed jurisdiction to amend any custody order in effect. The circuit court disagreed, determining that pursuant to KRS 403.828(3), once an emergency custody order was necessary, Kentucky retained jurisdiction until the "home state" made a subsequent custody determination, which was something it had not done. At issue on appeal was whether the circuit court retained jurisdiction to enter the order rescinding its temporary custody order. The Court of Appeals affirmed in part and vacated in part. The Court first held that pursuant to KRS 403.828(4), it was not the circuit court's obligation to discover the existence of custody decrees from other states. It was undisputed here that the circuit court properly exercised emergency jurisdiction, and the court had no reason to suspect that the provisions of the UCCJEA applied. Thus, as Mother had not sought to change the provisions of the Tennessee custody decree, the circuit court possessed jurisdiction under KRS 403.828(3) to rescind its own order. The Court of Appeals did determine, however, that the circuit court had improperly modified the Tennessee custody order by changing the location of visitation drop-offs, so it vacated that portion of the lower court's order.

VI. CONTEMPT

A. ***C.C. v. Commonwealth ex rel S.B.***

2017-CA-001375 02/08/2019 2019 WL 489079

Opinion by Judge Acree; Judges Kramer and L. Thompson concurred.

On the advice of counsel, appellant admitted to contempt for failing to comply with a child support order. The family court sentenced him to 180 days conditionally discharged for two years if he complied with the support order. A few months later, after appellant again failed to comply, he went before the court and admitted violating the conditions of his discharged sentence. The Commonwealth recommended 30 days to serve, with the remaining 120 days conditionally discharged. Sentencing was scheduled for two months later, but the Commonwealth agreed that if appellant maintained compliance during those two months, it would change its recommendation to continuation of the conditional discharge of the original contempt sentence. However, appellant failed to appear at the sentencing hearing, and the recommended sentence of 30 days was entered. Appellant argued on appeal that the family court erred because no purge amount was ever set; he was deprived of the opportunity to present defenses available under *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); and sentence was entered in his absence. The Court of Appeals affirmed, holding that: (1) the family court's failure to set a purge amount was not error because appellant never requested a purge amount; (2) appellant waived any *Bearden* defenses by admitting to contempt, waived them again by admitting to violating the conditions of his contempt sentence discharge, and waived them a third time by electing not to appear at the sentencing hearing for the latter violation to present them; and (3) sentencing for violating the conditions of the discharge of a contempt sentence is not a critical stage of the proceeding, so there was no error in imposing sentence in appellant's absence - particularly where such absence was voluntary.

VII. CONTRACTS

A. ***River City Fraternal Order of Police Lodge 614, Inc. v. Louisville/Jefferson County Metropolitan Gov***

2018-CA-000344 02/01/2019 2019 WL 406112 Rehearing Pending

Opinion by Judge Nickell; Judges Jones and Taylor concurred.

River City Fraternal Order of Police Lodge 614, Inc. (FOP) appealed from an opinion and order denying its motion for summary judgment and dismissing its breach of contract claims against the Louisville/Jefferson County Metropolitan Government (Metro). FOP and Metro had a collective bargaining agreement (CBA) allowing "advisory arbitration" as part of its grievance procedure. When a Metro police officer challenged her dismissal by the Chief of Police, the claim was heard by the Louisville Metro Police Merit Board. A two-day hearing revealed that Metro routinely provided the Chief and Merit Board with the complete disciplinary file of any officer facing charges. This custom contravened the CBA, which limits the age of reprimands and suspensions considered in determining discipline. When Metro upheld the officer's termination, she filed a civil suit focusing solely on whether dismissal was appropriate. Termination was upheld as based on the officer's own admissions and as supported by substantial evidence. Alleging that Metro had violated the CBA by providing the Chief and Merit Board with stale disciplinary data, FOP pursued a separate grievance, as set out in the CBA. Both the Chief and the Board acknowledged awareness of the officer's entire disciplinary file, but they maintained that stale information was not considered in deciding the ultimate penalty. The claim of breach of contract was submitted to "advisory arbitration," a term undefined in the CBA. The advisory arbitrator recommended a two-pronged remedy: (1) Metro should cease providing stale disciplinary information; and (2) Metro should "consider" reducing the officer's termination to a suspension. Metro subsequently ceased providing old information and considered reducing the officer's penalty, but it ultimately determined that termination was essential. Notably, the CBA specified that disciplinary decisions reside with Metro alone. FOP filed a civil suit claiming that the advisory arbitrator's recommended remedy should be followed in full. The circuit court dismissed the suit, finding that Metro had fully complied with the arbitrator's recommendation. Moreover, the appropriateness of termination was already being heard separately by a different division. The Court of Appeals affirmed. In so doing, it defined "advisory arbitration" as "nonbinding arbitration resulting in a recommendation the parties are free to consider but not required to adopt." Applying the CBA according to its terms, the Court held that the arbitrator's suggested resolution was nothing more than a suggestion with which Metro fully complied. It changed its custom and no longer provides an officer's entire file. Metro then considered reducing the officer's termination. However - as was its prerogative - Metro decided that the

egregiousness of her actions demanded termination. FOP could reasonably expect nothing more under the terms of the CBA.

VIII. CORRECTIONS

A. ***Peyton v. Sims***

2018-CA-001062 02/15/2019 2019 WL 639391

Opinion by Judge Combs; Judges Dixon and Goodwine concurred.

This case involved a prisoner's petition for declaration of rights in which appellant asserted a due process right to enjoy visitation with his mother while incarcerated. The prison authorities denied appellant's request because his mother had been his co-defendant in his murder trial. The circuit court dismissed the petition and the Court of Appeals affirmed. The Court held that appellant did not have a protected liberty interest in visitation with his mother and that the circuit court correctly found that the Department of Corrections has the absolute discretion to deny visitation based on a visitor's involvement in an inmate's criminal behavior.

IX. CRIMINAL LAW

A. ***Hess v. Commonwealth***

2016-CA-001500 02/01/2019 2019 WL 405319

Opinion by Judge Taylor; Chief Judge Clayton and Judge Kramer concurred.

The Court of Appeals vacated an order revoking appellant's probation for absconding from supervision. The Court first rejected the Commonwealth's argument that the appeal should be dismissed pursuant to the fugitive disentitlement doctrine because - while the appeal was pending - appellant was granted parole, from which she had absconded. The Court declined to apply the doctrine because appellant participated in the revocation process that was the subject of the appeal - meaning the issues before the Court were not directly related to her alleged subsequent absconsion - and because application of the doctrine would deprive appellant of her constitutional right under Section 115 of the Kentucky Constitution to seek redress on appeal. The Court held that the fugitive disentitlement doctrine yields to the constitutional right to file one appeal, absent a valid waiver thereof. The Court then held that the revocation of appellant's parole without considering the factors of KRS 439.3106 required vacatur of the circuit court's decision. The circuit court erred by stating that KRS 439.3106 need not be considered when revocation proceedings stem from absconding supervision. There is no such exception, so the circuit court was obligated to make the requisite statutory findings.

B. ***Jones v. Commonwealth***

2017-CA-001538 02/01/2019 2019 WL 406113

Opinion by Judge Maze; Judges Jones and Lambert concurred.

Following a jury trial, appellant was convicted of first-degree trafficking in methamphetamine, first-degree trafficking in tramadol, and trafficking in a legend drug (gabapentin). On appeal, appellant first argued that the Commonwealth failed to prove that he possessed the drugs. The arresting officers arrived at a residence where appellant was staying and found him and a co-defendant sleeping in a bedroom. A baggie of white powder and numerous loose pills and capsules were in plain view on a dresser in that bedroom. The Court of Appeals held that this evidence was sufficient to warrant a finding that appellant was in constructive possession of the drugs. The Court further held that a jury could reasonably infer intent to traffic based upon the quantity of drugs found. However, the Court then held that the circuit court abused its discretion by allowing the Commonwealth to introduce evidence of appellant's seven-year old trafficking conviction as proof of his intent to traffic in this case. While the prior conviction was marginally relevant to the possession issue, the Court concluded that the Commonwealth's use of it clearly violated KRE 404(b). The Court also held that the evidence was insufficient to prove that appellant possessed or trafficked in a legend drug. The capsules purporting to contain the drug were not tested, and the Commonwealth's expert did not otherwise identify them other than to state that they "possibly" contained gabapentin. Consequently, appellant was entitled to a directed verdict on the charge of trafficking in a legend drug. The Court reversed all three trafficking convictions and remanded for a new trial on the counts of trafficking in methamphetamine and trafficking in tramadol.

C. ***Steele v. Commonwealth***

2016-CA-001723 02/01/2019 2019 WL 405314

Opinion by Judge Lambert; Judges Jones and K. Thompson concurred.

Appellant challenged the portion of a judgment convicting him of possession of material portraying a minor in a sexual performance. The Court of Appeals affirmed, rejecting appellant's argument that the circuit court should have granted a directed verdict based on his lack of knowledge or possession of the floppy discs containing the material. The Court noted that KRS 531.355 criminalizes the knowing possession of such material, and in *Crabtree v. Commonwealth*, 455 S.W.3d 390 (Ky. 2014), the Supreme Court of Kentucky confirmed that proof of actual knowledge may be established by circumstantial evidence. The Court of Appeals agreed that in this case, there was sufficient evidence of appellant's knowing possession of the floppy discs containing child pornography to allow the case to proceed to the jury. The file names introduced by the Commonwealth clearly established the subject of the photographs on several of the floppy disks as being child pornography. Moreover, there was sufficient circumstantial evidence to support that appellant possessed the floppy disks based upon the location where his wife found them in the portion of the cluttered basement where appellant kept many of his possessions, including his computer equipment. Testimony also established that appellant was the only person who went to the basement. The Court also held that the circuit court did not abuse its discretion in permitting the Commonwealth to introduce evidence of adult pornographic material found on the floppy discs pursuant to KRE 401. The similar types of photographs on both the floppy disks and appellant's iPad established evidence of his possession and ownership of the floppy disks that contained child pornography.

X. LIMITATION OF ACTIONS

A. ***Norohna v. Zolkiewicz***

2017-CA-000882 06/08/2018 2018 WL 2752550

Opinion by Chief Judge Clayton; Judge Johnson concurred; Judge Nickell concurred in result only.

The sole issue in this appeal was whether the circuit court erred in determining that the claims of appellants Nirmala Noronha and International Data Group (IDG), a now-dissolved company, for indemnity and unjust enrichment were time-barred by the five-year statute of limitations set forth in KRS 413.120. The claims arose from the Internal Revenue Service's assessment of taxes against Noronha for IDG's failure to pay federal withholding taxes. The Court of Appeals affirmed. Citing to *Affholder, Inc. v. Preston Carroll Co., Inc.*, 27 F.3d 232 (6th Cir. 1994), the Court held that Noronha's indemnity claim accrued when she acquired knowledge of the IRS's assessment of IDG's withholding taxes in 2001 - not when she started making payments to the IRS in 2011. Thus, the statute of limitations expired in 2006 instead of 2015, rendering the subject claims time-barred.

XI. WORKERS' COMPENSATION

A. ***Cabrera v. JBS USA, LLC***

2017-CA-001658 02/08/2019 2019 WL 489076

Opinion by Judge Kramer; Judges Dixon and Lambert concurred.

After collecting workers' compensation benefits for injuries suffered while on the job, appellant then asserted negligence and/or strict liability claims against several entities that were not his direct employer, but were associated in various ways with the pork processing facility where he was injured. The circuit court dismissed most of appellant's claims after determining that each of the sued entities qualified as his statutory employers under the Worker's Compensation Act and were therefore entitled to workers' compensation immunity. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court first agreed that appellant's claims were properly dismissed against the entity that had directly contracted for the sanitation services that he was performing when he was injured. For the same reasons, the Court also agreed that appellant's claims were properly dismissed against a second entity that owned the pork processing facility where he performed sanitation services. However, the Court then held that the circuit court should not have dismissed appellant's claims against a wholly-owned subsidiary of the company that owned the processing facility. Prior to when it became a subsidiary, this entity had designed, fabricated, manufactured, and installed the conveyor system that had injured appellant. The subsidiary argued that it was entitled to summary judgment based on workers' compensation immunity because its parent company was entitled to such immunity. Specifically, it noted that where an entity considered an employer under the Act is also a manufacturer of equipment used by its statutory employees, any statutory employee injured by that equipment in the course and scope of his or her work cannot sue the employer in tort (*i.e.*, based upon the employer's "dual capacity" as a manufacturer). Rather, the statutory employee's exclusive remedy remains workers' compensation. As the Court explained, however, that rule only applies where one entity functions in two or more roles or capacities, such as "employer" and "manufacturer." It does not apply in cases dealing with two separate entities. Thus, unless the subsidiary qualified as appellant's employer or up-the-ladder contractor, it was not entitled to immunity from tort liability for its own, independent acts of negligence. Because the subsidiary never argued that it qualified as appellant's statutory employer for purposes of workers' compensation immunity, the circuit court erred in dismissing the claims against it. The Court likewise reversed regarding an entity whose name had been changed. In general, a mere change of a corporation's name does not create a new corporation, destroy the identity of the corporation, nor in any way affect the corporation's rights and obligations. Consequently, the Court reversed to this extent, but qualified its decision by

noting that appellant was nevertheless limited to only one potential recovery.