

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JANUARY 1, 2016 to JANUARY 31, 2016

I. ADMINISTRATIVE LAW

A. *Vahle v. Kentucky Cabinet for Health and Family Services*

[2014-CA-001561](#) 01/22/2016 2016 WL 304083

Opinion by Judge Thompson; Judges Clayton and VanMeter concurred. Appellant was terminated from her employment with the Cabinet for Health and Family Services after she falsified records of clients concerning their eligibility for Medicaid benefits. The Kentucky Personnel Board reduced the penalty from termination to a thirty-day suspension. However, the Franklin Circuit Court reversed the Board and reinstated appellant's termination. The Court of Appeals reversed the circuit court, holding that the Board acted within its statutory authority to alter or modify the disciplinary action imposed.

II. ARBITRATION

A. *Imhoff v. Lexington Public Library Board of Trustees*

[2014-CA-000385](#) 01/15/2016 2016 WL 192017

Opinion by Judge Combs; Judges Dixon and D. Lambert concurred. The former executive director of the Lexington Public Library moved to confirm an arbitration award against the library's board of trustees on her breach of contract claim. The circuit court vacated the award with regard to consequential damages and post-judgment interest, but confirmed the award in the amount of \$256,940.62 - the former director's salary for the remainder of her four-year term. The parties brought an appeal and cross-appeal from the decision. The Court of Appeals vacated and remanded, holding that the former director waived her right to pursue arbitration when she opted to engage the judicial process by filing a civil breach of contract action. The former director initially indicated her intention to waive the arbitration provision of her employment contract and invoked the full judicial process without reference to the provision. However, she then proceeded to seek arbitration of the matter without any litigation in circuit court. The circuit court dismissed the action in deference to her request for arbitration. The Court of Appeals concluded that recourse to arbitration was inappropriate under the circumstances and that the circuit court erred in failing to find that the former director had waived her right to arbitrate by electing to file the civil action. Thus, enforcement of the arbitration award was a moot point. Consequently, the Court vacated the circuit court's judgment and remanded the matter for litigation to proceed.

III. ATTORNEY AND CLIENT

A. *Gleason v. Nighswander*

[2014-CA-000819](#) 01/08/2016 2016 WL 93788

Opinion by Judge Thompson; Judges Jones and D. Lambert concurred. Appellant appealed from a judgment following a bench trial awarding appellee \$18,704.17 for legal services and \$1,128.25 for reimbursement for a reporting service invoice. The circuit court dismissed appellant's counterclaim for professional negligence after he failed to produce an expert witness. The Court of Appeals affirmed, holding that appellant's counterclaim for professional negligence required an expert witness to establish the standard of care. The Court noted that whether an expert witness is required is a determination within the discretion of the trial court and that the trial court did not abuse its discretion in this case. The Court further held that appellant was given ample opportunity to produce an expert.

IV. CRIMINAL LAW

A. *Pulley v. Commonwealth*

[2013-CA-001740](#) 01/15/2016 2016 WL 192135

Opinion by Judge Thompson; Judges Dixon and Kramer concurred. The Court of Appeals granted discretionary review of an appeal affirming appellant's conviction for disorderly conduct following a jury trial after the district court denied a motion to suppress and a motion for directed verdict. Appellant confronted police at a traffic safety checkpoint after an officer removed appellant's firearm from his vehicle and checked the firearm's serial number. The Court of Appeals reversed, first holding that a traffic safety checkpoint stop could not be extended to check a motorist's firearm's registration where the officer lacked even reasonable suspicion that a crime had been committed. The mere presence of an openly carried firearm in a vehicle, which was permitted by law, could not justify a search or seizure. The Court then noted that even though the officer acted improperly by temporarily seizing the firearm, this action could not justify the suppression of evidence of any crime committed afterwards. Once a stop ceases to be coercive and becomes consensual, any evidence obtained afterward is not "fruit of the poisonous tree." The Court ultimately declined to resolve the suppression issue, however, concluding that the district court should have granted a directed verdict to appellant on the disorderly conduct charge because the Commonwealth failed to present any evidence sufficient to establish that appellant's conduct impacted the "public," as required by KRS 525.060. Instead, the evidence reflected that appellant's actions only affected the police, appellant's wife, and possibly the occupants of another vehicle.

B. Skaggs v. Commonwealth

[2014-CA-001811](#) 01/22/2016 2016 WL 304123

Opinion by Judge Kramer; Judges Clayton and Dixon concurred. The Court of Appeals affirmed the circuit court's denial of appellant's RCr 11.42 motion to vacate. Appellant alleged that the circuit court's order sentencing her to conditional discharge was unconstitutional because six months after she was sentenced to conditional discharge, the Kentucky Supreme Court held in *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010), that KRS 532.043(5) was unconstitutional. The Court of Appeals first held that the circuit court properly determined that appellant's RCr 11.42 motion was untimely filed because she did not file her motion within three years after the *Jones* case was rendered. Appellant contended that her motion was not time-barred because the circuit court did not have subject matter jurisdiction to sentence her to conditional discharge, but the Court held that the circuit court had subject matter jurisdiction and that appellant's claim was therefore time-barred. The Court further concluded that the circuit court did not revoke appellant's conditional discharge (now referred to as "post-incarceration supervision"), which it was forbidden to do pursuant to *Jones*, and that appellant's arrest for failing to satisfy a condition of her "conditional discharge" must have meant that the Department of Corrections determined that appellant had violated her post-incarceration supervision set forth in the revised KRS 532.043. The circuit court had found that in order to challenge that authority, appellant should file a civil action in the county where she was presently being detained, and the Court of Appeals agreed, reasoning that the judicial branch may become involved in the executive branch's exercise of its power to execute sentences only via an appeal of an administrative action. Appellant also contended that because she entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), the requirement that she admit guilt as a condition of successfully completing her counseling course violated her constitutional right against self-incrimination. The Court disagreed, holding that because Kentucky has statutes in place to prevent appellant's admissions of guilt made during her required counseling from being used as the basis for criminal charges against her, the requirement that she admit guilt in order to complete counseling did not violate her right against self-incrimination. Finally, the Court held that there was no palpable error in this case and that appellant's remaining claims had not been raised in circuit court, so they were not properly before the Court.

C. *Smith v. Commonwealth*

[2013-CA-001288](#) 01/08/2016 2016 WL 93985

Opinion by Judge Kramer; Chief Judge Acree and Judge Thompson concurred. The Court of Appeals reversed in part, affirmed in part, and remanded in this direct appeal involving a conviction for manufacturing methamphetamine and first-degree possession of a controlled substance. The Court reversed in part after holding that the circuit court abused its discretion in denying appellant's motion for a continuance of the trial, which appellant requested because the two technicians who dismantled the methamphetamine laboratory at issue were deployed out of the country with the military at the time the trial was scheduled to occur. Appellant alleged that these two witnesses were indispensable because they could establish that no "active" methamphetamine laboratory was present, which appellant believed would assist with his defense. However, the Court of Appeals affirmed the circuit court's decision regarding appellant's remaining claims. The Court held that although the circuit court erred in allowing hearsay testimony from a police chief about an anonymous tip, the error was harmless because there was significant other evidence in the case showing that appellant and another male were in the vehicle when methamphetamine was being manufactured, and the judgment was not substantially swayed by the error of allowing in the hearsay testimony. The Court also held that there was no error in the jury instruction regarding complicity, and that the circuit court did not err in denying appellant's motion for a directed verdict because there was sufficient evidence that appellant was guilty of the offenses charged.

V. FEES AND COSTS

A. *Hunt v. North American Stainless*

[2015-CA-000088](#) 01/29/2016 2016 WL 350735

Opinion by Judge Thompson; Judges Kramer and Taylor concurred. In a breach of contract action, the Court of Appeals affirmed the circuit court's award of attorneys' fees, determining that the circuit court properly acted within its discretion by awarding only \$3,000 in attorneys' fees rather than the \$37,460.05 requested. Appellants had no basis for recovering attorneys' fees on the entire action where the fees were only recoverable under KRS 337.385(1) for a wage-and-hour counterclaim and the circuit court considered the appropriate "lodestar" factors in making its decision.

VI. IMMUNITY

A. University of Louisville v. Lillard

[2013-CA-001317](#) 01/08/2016 2016 WL 93834

Opinion by Judge Thompson; Judges D. Lambert and Maze concurred. The University of Louisville filed a complaint against appellee, a professor at the school, claiming that appellee wrongfully used a university credit card to purchase two laptop computers for his own benefit. Appellee asserted a counterclaim for breach of his written employment contract. The circuit court denied UL's motion to dismiss appellee's counterclaim on grounds of governmental immunity, and UL appealed. The Court of Appeals affirmed, holding that a provision of the Model Procurement Code (KRS 45A.245) containing a waiver of immunity for actions brought on written contracts applied to employment contracts such as the one at issue.

VII. ORIGINAL ACTIONS

A. Patterson v. Winchester

[2015-CA-001388](#) 01/22/2016 2016 WL 304053

Opinion and order by Judge Jones; Judges Combs and Thompson concurred. Father and Mother were engaged in a custody dispute in Whitley Circuit Court when Mother sought, and was granted, a Domestic Violence Order (DVO) against Father in the Fayette Family Court. Father sought relief from the Fayette County DVO in Whitley County, which granted him relief from that part of the order denying him visitation with the children. Mother then filed petitions for writs in the Court of Appeals seeking to stop the Whitley Circuit Court from allowing visitation. The Court of Appeals denied relief, but noted its "disapproval of the fractured and haphazard progression of this matter." Although a person may obtain a DVO in a court other than the court hearing the underlying custody dispute, when such a dispute exists, the proper procedure is for the second court - either *sua sponte* or on motion of a party - to transfer the DVO action to the court where the custody action is already pending. The purpose of the family court system is to remedy the fractionalization of family jurisdiction by applying the "one judge, one family" approach.

VIII. TERMINATION OF PARENTAL RIGHTS

A. *T.W. v. Cabinet for Health and Family Services*

[2015-CA-000627](#) 01/22/2016 2016 WL 304042

Opinion by Judge Thompson; Judges Combs and J. Lambert concurred. Appellants filed appeals challenging the termination of their parental rights. The Court of Appeals reversed and remanded, holding that appellants were entitled to a new termination of parental rights hearing after they were denied effective assistance of counsel. The Cabinet alleged that one or both appellants had physically abused their child. Appellants denied abusing the child and, at the time of the hearing, the perpetrator of the abuse was unknown. Appellants were represented by the same counsel. Appellants alleged that their statutory right to counsel was denied when the termination hearing was commenced after counsel requested to withdraw based on a conflict of interest. His request was denied and the Cabinet presented its witnesses. No cross-examination was conducted by appellants' counsel. Although counsel was later permitted to withdraw and separate attorneys were appointed to represent appellants, the Court of Appeals held that representation by the same attorney - who was admittedly not conflict-free - at the first day of the termination hearing constituted a deprivation of counsel and that prejudice was presumed. Therefore, the case was remanded for a new termination hearing.

IX. TORTS

A. *Auslander Properties, LLC v. Nalley*

[2014-CA-000022](#) 01/29/2016 2016 WL 350726

Opinion by Judge Stumbo; Judges Jones and Maze concurred. The Court of Appeals affirmed a judgment on a jury verdict finding appellant liable for injuries sustained by appellee Joseph Nalley. Appellant hired Nalley to perform maintenance work at rental properties, and Nalley was injured during the performance of this work due to a lack of safety equipment. The Court held that as it pertained to Nalley, appellant was an employer for the purposes of the Kentucky Occupational Safety and Health Act (KOSHA) and the federal Occupational Health and Safety Act (OSHA). A violation of OSHA/KOSHA regulations created a cause of action for Nalley pursuant to KRS 446.070.

X. WORKERS' COMPENSATION

A. *American Woodmark Corp. v. Mullins*

[2015-CA-000880](#) 01/22/2016 2016 WL 304085

Opinion by Judge Thompson; Judges Clayton and Nickell concurred. Danny Mullins filed a workers' compensation claim after he sustained a work-related injury while operating a forklift for American Woodmark. He later amended his Form 101 to include an intentional safety violation. American Woodmark did not file a Form 111 within the required time. On appeal, the issues presented to the Court of Appeals were as follows: (1) whether American Woodmark demonstrated good cause for untimely filing its Form 111 or, alternatively, whether Mullins waived the untimely filing when he did not move for a default judgment; (2) whether the Workers' Compensation Board erred in remanding the case to the Administrative Law Judge for a determination of the extent of any impairment caused by each injury alleged in Mullins's Form 101; and (3) whether there was sufficient evidence of an intentional safety violation. The Court held that the ALJ did not abuse his discretion when he found that American Woodmark did not demonstrate good cause for untimely filing its Form 111 when the only evidence was that the Form 101 was not timely forwarded to counsel for American Woodmark. The Court further held that a motion for default judgment was not required to trigger the provisions of KRS 342.270 and 803 KAR 25:010 § 5(2) and, therefore, allegations in the Form 101 were properly deemed admitted. Consequently, there was no error in the Board's remand to the ALJ. Finally, the Court held that the ALJ did not err in assessing a safety violation penalty where there was testimony that American Woodmark was aware of the hazards that contributed to Mullins's injuries.

XI. ZONING

A. *Huxol v. Daviess County Fiscal Court*

[2014-CA-001397](#) 01/22/2016 2016 WL 304052

Opinion by Judge D. Lambert; Chief Judge Acree and Judge Jones concurred. This appeal was brought from a circuit court order that upheld the Daviess County Fiscal Court's decision to rezone 692 acres of agricultural land for coal mining use. The Court of Appeals affirmed, holding that substantial evidence supported the circuit court's affirmance of the decision approving the application to amend the zoning classifications of the subject properties from urban agriculture and rural agriculture to coal mining. The Court further held that neighboring landowners were not denied due process of law.