PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS
JANUARY 1, 2017 to JANUARY 31, 2017

I. ADMINISTRATIVE LAW

A. ***Bartrum v. Kentucky Retirement Systems***

2016-CA-000094 01/20/2017 2017 WL 242674

Opinion by Judge Combs; Judges Dixon and Nickell concurred.

Appellant challenged a decision of the Franklin Circuit Court affirming the final order of the Board of Trustees of the Kentucky Retirement Systems. The Board denied appellant's application for disability retirement benefits. The Court of Appeals affirmed, holding that appellant had failed to sustain her burden of proving that she suffered a permanent disability. The Court noted that where the fact-finder denies relief to the party bearing the burden of proof or persuasion, the issue on appeal is not whether the fact-finder's denial is supported by substantial evidence. Instead, the issue on appeal is whether the evidence in the claimant's favor is so compelling that no reasonable person could have failed to have been persuaded by it.

B. ***Smith v. Teachers' Retirement System of Kentucky***

2015-CA-001224 01/13/2017 2017 WL 127728

Opinion by Judge VanMeter; Judges Combs and J. Lambert concurred.

On review of the Franklin Circuit Court's order affirming the Kentucky Teachers' Retirement Systems' (KTRS') determination that Kentucky Educational Development Corporation (KEDC) employee Stephen Smith's annual incentive pay was to be excluded from his annual compensation for purposes of calculating his retirement benefits, the Court of Appeals affirmed, holding that the circuit court and KTRS correctly applied KRS 161.220(10). In so holding, the Court of Appeals determined that, while ambiguous, KRS 161.220(10), as amended in 1992, reflects a legislative intent that "benefits or salary adjustments" not be included in a KEDC employee's "annual compensation" for pension purposes unless available to all other employees. In

this case, KTRS correctly determined that since incentive pay was available to some, but not all, KEDC employees, Smith's incentive pay would not be included in his annual compensation for retirement purposes and would be refunded to him. The Court rejected Smith's claim that the circuit court and KTRS erred in their factual finding that some, albeit not all, KEDC employees received incentive pay. Lastly, the Court found unpersuasive Smith's argument that KTRS's application of KRS 161.220(10) was arbitrary and capricious. The Court discarded Smith's attempt to compare himself to superintendents and other school administrators who have been statutorily authorized to receive salary credit for payments of unused annual leave days as part of a retiring member's annual compensation for the member's last year of active service. The Court concluded that the annual leave accrual to which Smith pointed was a property right that is expressly authorized by the statutory scheme governing retirement benefits - KRS 161.155(10), 161.220(9), and 161.540 - and did not alter the Court's application of KRS 161.220(10) to the facts of this case.

C. ***South Central Kentucky Properties, Inc. v. Commonwealth of Kentucky, Department of Transportation***

2015-CA-001486 01/27/2017 2017 WL 382406

Opinion by Judge Stumbo; Judges Combs and Maze concurred.

The Court of Appeals affirmed two orders of the Franklin Circuit Court dismissing appellant's cause of action against the Energy and Environmental Cabinet (EEC) and granting summary judgment in favor of the Department of Transportation (DOT). Appellant argued that the circuit court erred in failing to conclude that: 1) the DOT violated provisions of the Kentucky Constitution by allowing a DOT contractor to dump waste material into a DOT drainage easement on a sinkhole (while rejecting appellant's request to do so), thus constituting a taking without compensation; and 2) the EEC violated Kentucky administrative law by allowing the DOT to dump the waste material and in failing to conduct a hearing or offer any substantive response. The Court of Appeals affirmed, holding that appellant failed to exhaust its administrative remedies as to the EEC before bringing suit. Appellant did not make any application or formal request to dump debris into the sinkhole with the EEC; it merely contacted the local office. Therefore, no administrative action was initiated, let alone exhausted. The Court also held that the DOT was acting within the scope of its drainage easement and right-of-way over the entire area encompassing the sinkhole. Thus, the DOT was entitled to summary judgment.

II. ARBITRATION

A. ***Diversicare Leasing Corp. v. Adams***

2015-CA-001061 01/06/2017 2017 WL 65451 DR Pending

Opinion by Judge J. Lambert; Judges Acree and Thompson concurred.

A nursing home resident, through her guardian, brought an action against the nursing home and nursing home administrator alleging negligence, medical negligence, corporate negligence, and violations of long term care resident's rights. The nursing home filed a motion to compel arbitration, and the circuit court granted the motion in part and denied it in part. The Court of Appeals affirmed the portion of the order denying the motion, holding that a readmission agreement could not be reformed to incorporate a prior agreement that contained an arbitration agreement because the nursing home was unable to establish with any certainty which unspecified document was intended to be incorporated.

III. CONTRACTS

A. ***Grego v. Jenkins***

2015-CA-001142 01/13/2017 2017 WL 127729

Opinion by Judge Thompson; Judges Combs and VanMeter concurred.

Appellant challenged a summary judgment entered in favor of Woodland Baptist Church and church chaperones who accompanied appellant at a youth ministry camp. The circuit court ruled that release forms signed by appellant's mother precluded her personal injury claim. The Court of Appeals reversed, holding that the releases did not exculpate the church from liability. Specifically, the releases did not mention the word "negligence" and did not explicitly release the church from liability for personal injuries. Furthermore, the releases could reasonably be construed to only release the church from vicarious liability in connection with medical treatment rather than its own conduct. Finally, the releases were broadly written and not specific as to the type of harm contemplated. The Court also declined to recognize an exception to release requirements for charitable organizations.

IV. CRIMINAL LAW

A. ***Flaugher v. Commonwealth***

2015-CA-001637 01/13/2017 2017 WL 127727

Opinion by Chief Judge Kramer; Judges Combs and Jones concurred.

The Court of Appeals vacated an order revoking appellant's shock probation. The Court noted that appellant was not present at the hearing in which he was granted shock probation because he was incarcerated at that time, so he was not orally informed by the circuit court of the conditions of his shock probation. Additionally, although appellant's counsel received a copy of the order granting shock probation, which contained the conditions of probation, appellant himself was not sent a written copy of the order granting shock probation by the court. The Court of Appeals held that because personal service upon the defendant of the conditions of his release is statutorily required under KRS 533.030(5), the service of the conditions upon appellant's defense counsel and not upon appellant himself was insufficient. Consequently, the Court concluded that the circuit court abused its discretion in revoking appellant's shock probation, and the Court vacated the order revoking.

B. ***Lundy v. Commonwealth***

2015-CA-000451 01/27/2017 2017 WL 382409

Opinion by Judge Thompson; Judges Combs and VanMeter concurred.

Appellant was found guilty of possession of marijuana and possession of drug paraphernalia. He alleged the following errors: (1) there was no consent to the search of his freezer and outbuilding located on his property; (2) the searches of the locked freezer and outbuilding were beyond the scope of the applicable search warrant and the items seized were not in plain view, in violation of the Fourth Amendment; (3) he was entitled to a directed verdict of acquittal because the Commonwealth failed to prove the plant material seized from his residence met the definition of marijuana in KRS 218A.010(22); and (4) he was entitled to a jury instruction defining "hemp." The Court of Appeals affirmed, first holding that consent was not an issue because the search was pursuant to a valid search warrant and within the scope of that warrant. The officers were entitled to search anywhere the items specified in the warrant may have been reasonably found, including the freezer and outbuilding. Next, the Court held that appellant was not entitled to a directed verdict on the basis that the Commonwealth failed to prove that he possessed hemp rather than marijuana. Although the Court concluded that industrial hemp is defined as a plant containing a .3-percent-or-less THC level, proof of the THC level was unnecessary in this case because appellant was not a licensed hemp grower or a manufacturer of hemp products or in possession of a hemp product. Ultimately, there was sufficient circumstantial evidence that the plant material was marijuana to submit the question to the jury. Finally, the Court held that appellant was not entitled to a jury instruction defining hemp because he could not legally possess hemp plants.

C. ***O'Daniel v. Commonwealth***

2016-CA-000009 01/20/2017 2017 WL 242676

Opinion by Judge Stumbo; Judges Combs and Maze concurred.

Appellant was granted discretionary review of the district court's denial of his motion to suppress and his subsequent DUI conviction. Appellant challenged the validity of his breath test, arguing that the arresting officer violated KRS 189A.103(3)(a), which requires a police officer to observe the person taking the breath test for 20 minutes before administering the test. Specifically, appellant argued that the officer did not properly observe him at the "location" in which the breath test was given for 20 minutes prior to administering the test. In this case, the location would be the Caldwell County Jail. The officer testified that he did not observe appellant for 20 minutes at the location in which the breath test was given. Instead, he testified that he observed him during the ride from the Lyon County Jail to the Caldwell County Jail, which lasted longer than 20 minutes. The Court of Appeals affirmed, holding that a police officer's observation of a person in his or her cruiser can satisfy the intent of the statute even though the statute states the observation should be done "at the location of the test." Here, appellant did not allege that he put something in his nose or mouth that could have interfered with the breath test. Thus, the officer's observation of appellant was sufficient.

D. ***Owens v. Commonwealth***

2014-CA-000779 01/27/2017 2017 WL 382410

Opinion by Judge Acree; Judges J. Lambert and Taylor concurred.

The Court of Appeals affirmed an order denying appellant's motion for post-conviction DNA testing. The Court explained that the relevant statute, KRS 422.285, requires a multi-step analysis by the trial court to determine the availability of relief. This analysis includes assessing: (1) the petition (and supplements and response); (2) the petitioner; and (3) the evidence, to confirm that each meets the requirements of the statute. Only after addressing these three preliminary steps can the trial court reach step (4), the more substantive and ultimate question - is there a reasonable probability that the DNA evidence the petitioner seeks would have made a difference had it been available at or before trial? The Court held that, in this case, the items of evidence for which the petitioner sought DNA testing did not qualify under the statute. The first item was not "in the possession or control of the court or Commonwealth," KRS 422.285(1)(a), and testing of the second item would not "resolve an issue not previously resolved." KRS 422.285(5)(c) and (6)(c). The Court further held that appellant was not entitled to funds to hire a blood-spatter expert under KRS 31.110(1)(b) and that appellant presented no meritorious grounds for RCr 11.42 relief.

V. CUSTODY

A. ***Jones v. Jones***

2015-CA-001284 01/20/2017 2017 WL 242703

Opinion by Judge D. Lambert; Judges Jones and Taylor concurred.

Appellant brought two appeals from a series of orders entered in a child support and custody matter. The first appeal arose out of the entry of an order awarding joint custody of appellant's biological child to appellant and his sister, Suszanne Jones. The second appeal arose out of orders issued subsequent to the custody order, one order directing appellant to pay child support to Suszanne, and two orders directing him to pay a total of $3,000 in prospective attorney fees to Suszanne. At issue on appeal was whether the trial court properly awarded a share of custody to Suszanne, and whether the trial court adhered to the necessary procedures in issuing its subsequent rulings. The Court of Appeals concluded that the trial court erred in finding that Suszanne was a *de facto* custodian of the child and, consequently, in awarding joint custody and attorney fees. Thus, it reversed as to both appeals. The Court particularly noted that Kentucky courts have repeatedly held that when a nonparent shares the parenting responsibilities with a natural parent, the nonparent cannot, as a matter of law, acquire *de facto* custodian status. Here, the trial court explicitly found that appellant, the child's natural parent, had cared for the child and supported him financially. Therefore, the trial court abused its discretion in finding that Suszanne met the criteria to be a *de facto* custodian.

VI. DAMAGES

A. ***Hazel Enterprises, LLC v. Ray***

2015-CA-000628 01/13/2017 2017 WL 127732

Opinion by Judge Maze; Judges Jones and Nickell concurred.

The owner of a certificate of delinquency on property taxes brought an action against a real property owner seeking foreclosure upon and sale of the owner's real property. After a final judgment and order of sale was entered, the property owner moved for avoidance of post-judgment interest accrued from the order. The circuit court granted the motion and overruled the certificate owner's motion to reconsider. The Court of Appeals affirmed, holding that the sum to which the certificate owner was entitled constituted "unliquidated damages"; therefore, the circuit court had discretion over the award and rate of post-judgment interest. The Court further held that the circuit court did not abuse its discretion in permitting the property owner to avoid payment of post-judgment interest. The Court noted that the property owner tendered full and unconditional payment in almost immediate compliance with the circuit court's order, but the certificate owner refused payment in hopes of recovering additional, unspecified expenses. The Court concluded that the certificate owner should not benefit from a 15-month delay for which it was solely responsible after rejecting payment and deciding not to appeal the judgment.

VII. EMPLOYMENT

A. ***Tucker v. Bluegrass Regional Mental Health Mental Retardation Board***

2015-CA-001229 01/20/2017 2017 WL 242705

Opinion by Judge J. Lambert; Judges Nickell and Taylor concurred.

Appellant challenged a summary judgment entered in favor of appellee in a wrongful termination action alleging gender discrimination and retaliation. The Court of Appeals affirmed, first holding that appellant failed to establish a *prima facie* case of gender discrimination because she failed to show that she was subjected to an adverse employment action. Although she claimed that she was paid less than her male colleagues, appellee provided data, which appellant was unable to refute, to show that this was not the case. Thus, as a matter of law, summary judgment was appropriate on her claim of discrimination. The Court also held that appellant failed to establish all four elements of her retaliation claim. Although appellant satisfied the first three prongs of the retaliation test (she filed an EEOC complaint, appellee was aware that she filed the complaint, and appellee took an adverse action in ultimately terminating appellant's employment after she refused to participate in a three-month correction plan following the allegedly inappropriate filing of a 202A petition for the involuntary hospitalization of a client), she failed to offer evidence of the fourth element: that there was a causal connection between the protected activity (filing the EEOC complaint) and the termination. Appellee received notice in August 2013 that appellant had filed the EEOC charge; however, appellee did not commence its proceedings against appellant concerning the allegedly inappropriate filing of the 202A petition until eight months later. The Court concluded that without any additional evidence of retaliatory conduct, there was an insufficient temporal relationship to meet the standard for showing causation.

VIII. FAMILY LAW

A. ***Keeton v. Keith***

2016-CA-000407 01/20/2017 2017 WL 242669

Opinion by Judge Combs; Judges Dixon and Nickell concurred.

The divorced parties in this case disputed the proper venue for the schooling of their minor child. The circuit court adopted the recommendation of the Domestic Relations Commissioner (DRC) that the child be enrolled in the school district where the mother now resided. In addition to its decision on the enrollment of the child, the court, *sua sponte*, directed the mother to seek child support. The Court of Appeals vacated and remanded, first holding that the circuit court erred in concluding that KRS 159.010 controlled the issue of where the child should attend school. Instead, school placement should have been dictated by the best interests of the child. The Court further held that the circuit court erred in ordering, *sua sponte*, the mother to seek child support in the absence of a pending motion on that issue. A court cannot unilaterally modify child support in the absence of a written request for modification. The circuit court's order was tantamount to such an attempted modification and, therefore, was inappropriate.

IX. IMMUNITY

A. ***Jacobi v. Holbert***

2015-CA-001929 01/20/2017 2017 WL 242677

Opinion by Judge Combs; Judges Dixon and Nickell concurred.

In an action alleging professional negligence, appellant sought relief pursuant to CR 60.02. Appellant claimed to have received erroneous legal advice regarding his parole eligibility from his attorney, who was an employee of the Department of Public Advocacy (DPA). The attorney asserted the defense of qualified official immunity as an employee of an agency of state government. In response, appellant argued that the attorney's status as a public employee effectively rendered him an agent of the prosecution and, thus, in conflict with the best interest of his criminally charged client. The circuit court dismissed the action, and the Court of Appeals affirmed. The Court first held that the DPA attorney was entitled to the shield of immunity as a public employee since the DPA is an agency of state government and its attorneys are employees of the Commonwealth. Moreover, appellant did not claim that the DPA attorney acted in bad faith or outside the scope of his employment - he only claimed that the attorney failed to represent him adequately. Under these circumstances, the attorney was entitled to qualified official immunity. The Court also held that there was no conflict of interest, emphasizing that the Commonwealth has dual duties that are not mutually exclusive: both to prosecute wrongdoing and to provide an adequate Sixth Amendment access to counsel to an indigent defendant.

B. ***Turner v. Ritchie***

2015-CA-000869 01/06/2017 2017 WL 65453 Rehearing Pending

Opinion by Judge J. Lambert; Judges Acree and Thompson concurred.

This interlocutory appeal was taken from an order denying school officials' request for qualified official immunity in an action seeking damages resulting from the sexual abuse of a student by a teacher. The Court of Appeals reversed the circuit court's order pursuant to *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014), holding that the officials' actions or inactions in responding to allegations of potential sexual abuse by the teacher were discretionary in nature because the reporting statute (KRS 620.030) requires reasonable cause before making a report that a child is dependent, neglected, or abused. The Court also held that there was no evidence that the failure of school officials to report that the teacher exchanged text messages with two other female students, including some sexually explicit messages, was done in bad faith. Thus, the officials were entitled to qualified official immunity. In reaching this conclusion, the Court rejected the contention that a subjective bad faith analysis was required and that the question of whether bad faith existed must be decided by a jury.

X. INDEMNITY

A. ***Louisville/Jefferson County Metro Government v. Braden***

2015-CA-001238 01/27/2017 2017 WL 382408

Opinion by Judge Maze; Judges Clayton and Combs concurred.

Appellee John Lewis was a police officer with the Louisville Metro Police Department (LMPD). Lewis's departmental vehicle, an unmarked van, also served as his take-home vehicle. LMPD owned this vehicle but permitted Lewis to use it for official and personal tasks pursuant to a voluntary departmental program. As a condition of this privilege, Lewis signed a personal use agreement setting forth, in part, that Louisville Metro would provide him with liability protection for up to $100,000 per accident while the van was being used for personal tasks. In the personal use agreement, Lewis also stated that he understood that he might be responsible for any claim that exceeded $100,000 and that he could obtain supplemental, private insurance (Lewis did not do so). One day after leaving work, picking up his children, and stopping at a drug store, Lewis was involved in an auto accident that resulted in the death of Don Braden. Braden's wife and administratrix subsequently filed suit against Lewis, and Louisville Metro intervened to file a defense. However, Louisville Metro also filed a motion for declaratory judgment on the question of its liability for Lewis's liability beyond $100,000 pursuant to the personal use agreement and the applicable collective bargaining agreement between LMPD and Louisville Metro. Lewis and Braden each filed motions for declaratory judgment opposing Louisville Metro's position and asking the court to hold that Louisville Metro must indemnify Lewis for damages beyond $100,000 because Lewis was acting within the scope of his employment at the time of the accident. The trial court granted Braden's and Lewis's motions for declaratory judgment, reasoning that, at the time of the accident, Lewis was operating his vehicle in compliance with LMPD's standard operating procedures (SOPs) regarding its take-home vehicle policy. For this reason, the trial court concluded that Lewis "was acting within the scope of his employment at the time of the accident" for purposes of the Claims Against Local Governments Act (CALGA). KRS 65.200, *et seq*. The Court of Appeals disagreed, holding that the trial court's exclusive reliance upon Lewis's compliance with LMPD SOPs was misplaced. At the time of the accident, Lewis was not operating within the scope of his employment for purposes of triggering Louisville Metro's statutory obligation to defend and indemnify him under CALGA. Immediately prior to the accident in this case, Lewis was off-duty; he had run two personal errands, had his children in the vehicle with him, and was on his way home; he was not responding to a call for assistance; he did not have his lights and sirens activated; and his vehicle was unmarked. Thus, Lewis was performing no realizable police action at the time of the accident and, per the

personal use agreement, Louisville Metro was not obligated to indemnify him beyond the first $100,000 for which he was found liable.

XI. LIMITATION OF ACTIONS

A. ***Victory Community Bank v. Socol***

2015-CA-000005 01/13/2017 2017 WL 127733 Rehearing Pending

Opinion by Judge VanMeter; Judges Combs and J. Lambert concurred.

Victory Community Bank brought an action against a real estate appraiser, alleging breach of contract, negligence, fraud, and civil conspiracy. The circuit court granted summary judgment for the appraiser on statute of limitations grounds, and the Court of Appeals affirmed. The Court held that the Bank had failed to bring its action within the applicable time period based on when the Bank reasonably should have discovered that the appraiser had allegedly overvalued some real property securing a loan made by the Bank. The Court noted that a civil action against a real estate appraiser must be brought within one year from "the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured." KRS 413.140(3). In this case, the Court determined that the statute of limitations began to run no later than February 3, 2011, the date of the Bank's detailed inquiry into the problems with the original appraisal, which had been performed in 2005. The Bank and the appraiser executed a tolling agreement that extended the statute of limitations until February 28, 2012; by that date, the Bank knew that the appraisal was seriously defective and was, therefore, put on notice of the appraiser's role as a potential wrongdoer. However, the Bank did not file its action until March 2, 2012, which was outside the period provided by the tolling agreement. Accordingly, the Court of Appeals affirmed the trial court's dismissal of the Bank's action on statute of limitations grounds.

XII. MORTGAGES

A. ***Hays v. Nationstar Mortgage LLC***

2015-CA-000121 01/06/2017 2017 WL 65454

Opinion by Judge Stumbo; Judges D. Lambert and Thompson concurred.

The Court of Appeals reversed and remanded a foreclosure judgment in which the trial court, relying on *Kentucky Legal Systems Corp. v. Dunn*, 205 S.W.3d 235 (Ky. App. 2006), found that purchase money mortgages have priority over judgment lien creditors irrespective of timing and notice. The Court of Appeals held that *Dunn* had been effectively overruled by *Mortgage Electronic Registration Systems, Inc. v. Roberts*, 366 S.W.3d 405 (Ky. 2012), which reiterated that Kentucky is a "race-notice" jurisdiction and that a prior interest in real property takes priority over a subsequent interest that was taken with actual or constructive notice of the prior interest.

XIII. NEGLIGENCE

A. ***Cales v. Baptist Healthcare System, Inc.***

2015-CA-001103 01/13/2017 2017 WL 127731 DR Pending

Opinion by Judge Thompson; Chief Judge Kramer concurred; Judge Nickell concurred and filed a separate opinion.

Appellants brought a negligence and products liability action against a manufacturer and hospital, alleging the improper off-label use of the Infuse Device, an implantable device for use in connection with surgery involving fusion of the lumbar spine, and failure to warn of the off-label use. The circuit court dismissed appellants' product liability claims against the hospital based on federal pre-emption by the Medical Device Amendments (MDA) and dismissed the medical malpractice claim on the ground that the hospital had no duty to inform appellants of the Federal Drug Administration (FDA) regulatory status of a medical device used in the surgery. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court first held that the product liability claims were pre-empted because once approved by the FDA, a medical device could be used in any manner deemed appropriate, including off-label uses. The MDA contains an express pre-emption provision and, therefore, the device could not be considered unreasonably dangerous. The Court further held that the "middleman statute" of the Kentucky Product Liability Act (KRS 411.340) precluded any product liability claim. As an aside, the Court also noted that the appellants' claims in this regard were not properly alleged as product liability claims because the allegations concerned the use of the product rather than whether the product was defective. However, the Court then held that appellants' other medical negligence claims could be maintained and should not have been dismissed. While the off-label use of medical devices is not inherently unreasonable or dangerous, the physician is still held to common law medical practice standards with respect to that use and owes a duty to his or her patient; that duty would likewise fall upon the hospital. Additionally, medical malpractice could also arise from the failure to obtain informed consent. Finally, the Court held that inconsistent allegations in the appellants' complaint did not preclude their medical malpractice action. The Court pointed out that under our civil rules, a party may assert alternative causes of action.

B. ***McCoy v. Family Dollar Store of Kentucky, Ltd.***

2015-CA-000926 01/06/2017 2017 WL 65452

Opinion by Judge J. Lambert; Judges Acree and Thompson concurred.

In an appeal taken from the entry of summary judgment in favor of appellees in a premises liability case arising from appellant's fall in a retail parking lot, the Court of Appeals affirmed, holding that appellees did not breach their duty of care by the presence of a wheel stop in the parking lot. The wheel stop was not defective or damaged, and it did not create an unreasonably dangerous condition requiring the need to warn invitees about the condition. The Court also held that appellant's expert's opinion was not before the circuit court to review and, therefore, could not be the basis for a factual dispute regarding the safety of wheel stops so as to preclude summary judgment.

XIV. OPEN RECORDS

A. ***Finance and Administration Cabinet, Kentucky Department of Revenue v. Sommer***

2015-CA-001128 01/13/2017 2017 WL 127730

Opinion by Judge Combs; Judge J. Lambert concurred; Judge VanMeter dissented by separate opinion.

A tax attorney petitioned for review of a decision of the Attorney General which found that final rulings of the Department of Revenue in tax protest proceedings that had not been appealed to the Board of Tax Appeals were exempt from disclosure under the Open Records Act. The Franklin Circuit Court overrode the Attorney General's opinion and ordered the Department to provide suitably redacted copies of such final rulings. By a 2-1 vote, the Court of Appeals affirmed, holding that the Kentucky Taxpayers' Bill of Rights, which gives taxpayers a right of privacy with regard to information provided on their state tax returns, did not exempt final rulings of the Department from disclosure under the Open Records Act. In reaching this decision, the Court noted that the information requested could be made available without jeopardizing the privacy interests of individual taxpayers by simply redacting personal identifiers. Moreover, even after redaction of taxpayer information, the Department's final rulings would contain useful information relative to implementation of the tax laws, as every final ruling was required to contain a general statement of the issues in controversy as well as the Department's position with respect to them.

XV. PUBLIC OFFICIALS

A. ***McCuiston v. Butler***

2015-CA-001063 01/06/2017 2017 WL 65447

Opinion by Judge Clayton; Judges Stumbo and VanMeter concurred.

McCuiston, as administratrix of the estate of her daughter, appealed the trial court's grant of summary judgment to Butler and the City of Henderson in a wrongful death action. Butler was a 911 operator who answered a non-emergency call from appellant's daughter, Joyce, who was reporting a non-active theft. At the conclusion of the call, Joyce said that she was dehydrated and unable to come to the door. Nonetheless, she did not request any medical intervention but only asked the responder to knock when he arrived and she would yell for them to come in. Butler never relayed this information to the deputy sheriff who responded to the call. The deputy sheriff went to the designated address and knocked, but no one answered. Three days later, Joyce's friends went to the residence and found her dead. The medical examiner attributed her death to natural causes but determined that it was scientifically impossible to determine the date and time of death. Following the filing of the wrongful death suit, appellees moved for summary judgment, arguing that Butler owed no legal duty to Joyce and that his actions did not proximately cause her death. The trial court agreed that summary judgment was appropriate but, in doing so, found that as a public official, Butler owed a duty to Joyce based on the "special relationship" doctrine. The Court of Appeals reached a different conclusion and held that Butler had no duty towards Joyce because his actions did not create a special relationship between the two. The Court noted that Kentucky courts have not extended the "special relationship" doctrine to all calls to 911 dispatchers. In this case, Butler only acted in the prescribed manner for a 911 dispatcher and performed his responsibilities in the typical manner; he did nothing beyond his public job responsibilities that would create a "special relationship" with Joyce. The Court further noted that Joyce's death was not uniquely foreseeable based on her relationship with Butler. Therefore, since Butler had no legal duty to Joyce, the grant of summary judgment was proper.