

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JANUARY 1, 2020 to JANUARY 31, 2020

I. CONTEMPT

A. *Nienaber v. Commonwealth ex rel. Mercer*

[2018-CA-001815](#) 01/24/2020 2020 WL 398797

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

The Court of Appeals reversed and remanded an order of contempt based upon a finding that appellant failed to timely pay \$191.10 per month toward her child support and \$25.00 per month toward her arrearage owed to the Commonwealth. After finding appellant in contempt, the family court ordered her to pay a purge amount of \$500.00 or serve 90 days in jail, conditionally discharged for two years. At the time of the contempt hearing, appellant was unemployed, had no income, and, as a condition of her parole in another case, was required to start an inpatient treatment program as soon as a bed became available. Notably, the family court found that appellant would be unable to pay the purge before the court's deadline because she would be in inpatient substance abuse treatment for the next six months. In reversing the order of contempt, the Court of Appeals noted that the family court clearly found that appellant was unable to pay the purge amount. Thus, the family court abused its discretion in setting the purge amount as the court found it was impossible for appellant to pay it. The Court remanded for the family court to determine an attainable purge amount, if any, and to issue findings to support that determination. If there was no attainable purge amount, jail time could not be imposed. The Court also held that the family court did not abuse its discretion in failing to consider a non-monetary purge or in imposing a period of conditional discharge.

II. CRIMINAL LAW

A. *Bedford v. Commonwealth*

[2018-CA-001194](#) 01/31/2020 2020 WL 499732

Opinion by Special Judge Buckingham; Chief Judge Clayton and Judge L. Thompson concurred.

Appellant challenged a judgment wherein he was sentenced to a term of ten years' imprisonment for complicity to robbery in the first degree and to twelve months for assault in the fourth degree following a jury trial. The Court of Appeals affirmed. The Court first held that the circuit court did not abuse its discretion in requiring the jury to finish the trial on its last day rather than allowing the jury to return the following day for its deliberations. The final day of the three-day trial began at approximately 8:30 a.m., and the presentation of evidence was finished shortly after 4:00 p.m. Due to an extensive delay in preparing the jury instructions, the trial was delayed until 10:30 p.m. when the court finally instructed the jury on the law of the case. The jury remained in the building during this entire time. Following the reading of the instructions and the closing arguments of the attorneys, at 12:55 a.m. the jury retired to deliberate. Counsel for appellant requested the court to allow the jury to go home for the evening, but the court declined to do so. The jury returned its verdicts shortly after 3:00 a.m. The Court of Appeals noted that appellant's counsel never expressly objected to the circuit court's decision not to adjourn for the evening. The Court further noted that the jury had been advised that the trial would last three days, and at least one juror had flight plans for the following day. The jury was consulted, and no objection was made. Thus, the circuit court inferred, and properly so, that the jury wished to continue with the trial until completion. The Court also held that the circuit court did not err in refusing to allow appellant's counsel to cross-examine a witness concerning the witness's pretrial diversion status. The witness was apparently not a suspect and was not charged in connection with the subject robbery. The crime he allegedly committed occurred a year or so after this incident and was totally unrelated. Further, there was nothing to indicate that the witness had received any leniency in that case for his testimony in this case nor was there any indication that the witness had violated his diversion or was otherwise in danger of having it revoked. In short, there was nothing to indicate that the witness's testimony was influenced or that he had a bias favoring the Commonwealth merely because he was on pretrial diversion in another case.

B. Milam v. Commonwealth

[2018-CA-001892](#) 01/03/2020 2020 WL 34554

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

In a direct appeal from the circuit court's decision to void pretrial diversion and sentence appellant to a five-year term of imprisonment, the Court of Appeals vacated the judgment and remanded with instructions to dismiss the underlying charge as diverted. Appellant argued that the circuit court improperly extended his diversion period. The Commonwealth conceded error on this point, admitting that its motion before the circuit court was not a motion to *void* diversion but was, instead, a motion to *extend* diversion, which does not operate to toll the diversion period. The Court of Appeals agreed. Here, appellant's five-year diversion period expired the day the circuit court held a hearing on the Commonwealth's motion to extend the diversion period. There was no pending motion to void diversion. Under *Ballard v. Commonwealth*, 320 S.W.3d 69 (Ky. 2010) and *Tucker v. Commonwealth*, 295 S.W.3d 455 (Ky. App. 2009), the Commonwealth's motion to extend diversion was insufficient to preserve the circuit court's authority to subsequently void appellant's diversion. Consequently, the judgment voiding had to be vacated and the underlying charge dismissed as diverted in accordance with KRS 533.258(1).

III. DISCOVERY

A. *Reynolds Consumer Products, LLC v. Commissioner of Department of Workplace Standards*

[2018-CA-000821](#) 01/03/2020 2020 WL 34590

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

When the appellee state agency, investigating an industrial accident in Kentucky, subpoenaed appellant's report prepared in anticipation of litigation over a separate accident in Virginia, appellant claimed work-product privilege. Declining to recognize the privilege, the circuit court ordered compliance with the subpoenas. The Court of Appeals first rejected appellant's argument that the state agency lacked subpoena power. The harder question was whether the work-product privilege applied. Appellee argued that the privilege only prevented discovery in the Virginia litigation in anticipation of which the work product was prepared. The Court disagreed. Drawing implications from *O'Connell v. Cowan*, 332 S.W.3d 34 (Ky. 2010), the Court noted the non-case-specific, over-arching purpose of the privilege, stated by the Supreme Court of Kentucky as follows: "The work-product doctrine is designed to protect an adversary system of justice, and is rooted in the United States Supreme Court's decision in *Hickman v. Taylor*[, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)]." The Court then adopted from *O'Connell* the principles that: (1) work-product protection applies to materials prepared for any litigation, and (2) the protection survives the termination of the litigation for which it was prepared. After noting that our courts had already rejected appellant's final argument urging adoption of the self-critical analysis privilege, the Court reversed and remanded. The circuit court was given instructions and guidance to apply existing jurisprudence to determine which specific documents were prepared in anticipation of litigation anywhere, and then to determine whether such privileged documents might nevertheless be discoverable on the ground that appellee is unable to obtain its substantial equivalent without undue hardship.

IV. EDUCATION

A. *Doe v. Logan*

[2019-CA-000183](#) 01/24/2020 2020 WL 398796

Opinion by Judge Goodwine; Chief Judge Clayton and Judge Dixon concurred.

Appellants, former public middle school students, filed suit against certain public middle school employees alleging that the employees violated school policies by failing to report sexual abuse of the students as juveniles by a former special-education paraeducator. On appeal, the students challenged an order granting summary judgment in favor of the employees. The circuit court found: (1) the employees were entitled to qualified official immunity; (2) the students had no private right of action under Kentucky's Constitution; and (3) the claims of former student Richard II were time-barred. The students argued that the circuit court erred in finding the employees were entitled to qualified official immunity because: (1) the Fayette County Board of Education maintains specific policies regarding the prevention and reporting of sexual harassment/discrimination; (2) such policies remove any element of discretion in ascertaining whether harassment/discrimination occurred; and (3) the employees witnessed firsthand behavior that required them to report abuse and they failed to do so. The students further argued that allowing public school employees to be protected by immunity against suit for sexual assault, while private school employees must face litigation, violated the Equal Protection Clause of the Kentucky Constitution, and that Richard II's claims were not time-barred. The Court of Appeals affirmed the circuit court's findings that: (1) the employees were entitled to qualified official immunity because their actions or inactions were discretionary in nature; they acted within the scope of their authority; and they acted in good faith; (2) that the students had no private right of action for their state constitutional claims pursuant to *St. Luke Hospital, Inc. v. Straub*, 354 S.W.3d 529 (Ky. 2011); and (3) that Richard II's claims were time-barred pursuant to KRS 413.140(1)(a).

V. FAMILY LAW

A. Roper v. Roper

[2018-CA-000979](#) 01/17/2020 2019 WL 7597585

Opinion by Judge Jones; Chief Judge Clayton and Judge L. Thompson concurred.

Appellant Craig Roper challenged the circuit court's findings of fact, conclusions of law, and decree dissolving his marriage with appellee Erin Roper. He also challenged a supplemental decree that decided issues of child support, spousal maintenance, and marital property. In particular, Craig argued that the circuit court lacked subject matter jurisdiction over child support and timesharing since the parties and their children were all residing in Texas at the time the supplemental decree was entered. With respect to jurisdiction, the Court of Appeals held that the circuit court's supplemental decree addressing child support, entered following a previous temporary support order, was considered a modification order under the Uniform Interstate Family Support Act (UIFSA). Therefore, the circuit court had continuing exclusive jurisdiction to modify the temporary support order under KRS 407.5205(1)(b). However, as to custody/timesharing, the Court reversed the circuit court's *sua sponte* order modifying such where, at the time of modification, the parties did not live in Kentucky and had lived in Texas for over a year. The Court held that the circuit court lacked jurisdiction to modify custody or parenting time pursuant to KRS 403.824(1). The Court affirmed as to the circuit court's division of marital property, but vacated its spousal maintenance award and remanded for consideration of Craig's ability to pay the ordered maintenance while meeting his own reasonable and necessary expenses. The Court noted that the circuit court did not consider additional income from Erin's IRA in its analysis, and that because it failed to consider all of Erin's financial resources and erroneously concluded, based on its own findings, that Craig had the ability to support himself, further consideration was merited.

VI. INSURANCE

A. *Thomas v. Perkins*

[2017-CA-001875](#) 01/03/2020 2020 WL 34592

Opinion by Judge L. Thompson; Judges Combs and Jones concurred.

The Court of Appeals affirmed a circuit court's finding that both Jerry Perkins and his wife, Bessie Perkins, were involved in child care services at their home. Therefore, a homeowner's liability policy issued by State Farm Fire & Casualty Company did not apply to injuries sustained by children being cared for at the home due to a "child care services exclusion" term in the insurance policy.

VII. LANDLORD/TENANT

A. *Phillips v. M & M Corbin Properties, LLC*

2018-CA-001496 01/17/2020 2020 WL 251582

Opinion by Judge Lambert; Judges Caldwell and Combs concurred.

The Court of Appeals accepted discretionary review to address the applicability of a local rule related to notice of motions in forcible detainer actions and whether a non-attorney property manager is permitted to represent an LLC. First, the Court held that the case was not moot (although the tenant no longer lived on the premises) based upon the application of the public interest exception to the mootness doctrine. The questions raised were of a public nature, there was a need for additional guidance, and the questions were likely to recur in future cases. Second, the Court held that the local rule providing for five days' notice for filing motions was inapplicable in forcible detainer proceedings because these are special statutory proceedings that require only three days' notice of the time and place of the trial. Third, the Court held that the property manager was not permitted to file the forcible detainer complaint or appear for the LLC because she was not a licensed attorney and was therefore engaged in the unauthorized practice of law in doing so. This made the petition void and subject to dismissal. The matter was remanded to the district court for dismissal of the petition.

VIII. TERMINATION OF PARENTAL RIGHTS

A. *S.J. v. Cabinet for Health and Family Services*

[2019-CA-000555](#) 01/31/2020 2020 WL 499727

Opinion by Judge Maze; Judges Acree and Combs concurred.

Appellant appealed orders terminating her parental rights to her three children. The children were placed in the custody of the Cabinet for Health and Family Services after being discovered unattended in a hotel room in Paducah. Appellant did not return to Kentucky to attend a temporary removal hearing and was incarcerated in Missouri for violating her parole three weeks later. The Cabinet moved to terminate appellant's parental rights while she was still incarcerated. The circuit court granted the request, finding that appellant abandoned her children through her "voluntary participation in a criminal lifestyle." The Court of Appeals reversed the orders terminating appellant's parental rights, holding that appellant's history of minor property crimes did not constitute a criminal lifestyle permitting the termination of her parental rights. The Court further held that while there was sufficient evidence to support the circuit court's finding that appellant abandoned her children, for a time, by leaving them with an inappropriate caregiver, the uncontroverted evidence was that she left the children with the caregiver sometime in April 2017 and they were discovered unattended on May 5, 2017. While grounds for temporary removal, this act could not, on its own, provide sufficient evidence that appellant abandoned her children "for a period of not less than ninety (90) days[.]" KRS 625.090(2)(a). Moreover, because there was no evidence appellant failed to provide food, clothing, or shelter for her children when she was not incarcerated, there was insufficient evidence to find those statutory grounds for termination.

IX. WORKERS' COMPENSATION

A. *Dixie Fuel Company, LLC v. Wynn*

[2018-CA-000984](#) 01/31/2020 2020 WL 499736

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

Appellant filed an interlocutory appeal pursuant to *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009), seeking review of an order denying its motion for summary judgment. In the motion, appellant sought up-the-ladder immunity from a personal injury claim filed by appellee Jacob Wynn pursuant to the exclusive remedy provision set out in KRS 342.690(1) of Kentucky's Workers' Compensation Act. The Court of Appeals reversed, holding that the circuit court erred in denying the motion. The Court agreed with appellant that it only had to establish that it met the statutory definition of contractor under KRS 342.610(2)(a) to be entitled to immunity, not that it also had to establish that the work was regular or recurrent pursuant to subsection (2)(b), because of the use of the word "or" between the two subsections. The Court also held that this interpretation of the statute did not violate public policy or Wynn's equal protection rights.

B. Lone Mountain Processing v. Turner

[2018-CA-001011](#) 01/17/2020 2020 WL 251583

Opinion by Judge Maze; Judges Acree and Combs concurred.

Appellee filed a claim against Lone Mountain (his most-recent employer) seeking benefits for coal workers' pneumoconiosis. The Administrative Law Judge found, and the employer agreed, that appellee established the presence of complicated coal workers' pneumoconiosis. In awarding benefits, the ALJ found that the tier-down provisions in the pre-1996 version of KRS 342.730(4) were applicable to appellee's award. On appeal, the Workers' Compensation Board affirmed, pointing to the then-recent opinion in *Parker v. Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017). While the petition for review was pending, the General Assembly enacted amendments to KRS 342.730(4) which provided that income benefits would terminate when the employee reached the age of 70 or 4 years after the date of last exposure, whichever last occurred. The amendment further provided for retroactive application to all claims that had not been fully adjudicated or were in the appellate process as of the effective date of July 14, 2018. The Supreme Court of Kentucky concluded that the amendments clearly provided for retroactive application. *Holcim v. Swinford*, 581 S.W.3d 37 (Ky. 2019). Likewise, the Court of Appeals held that the 2018 amendments satisfied the conditions for retroactive application. Consequently, the Court reversed and remanded the matter to the ALJ for entry of an award applying the 2018 version of KRS 342.730(4).