

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JULY 1, 2017 to JULY 31, 2017

I. CHILD CUSTODY AND RESIDENCY

A. Williams v. Williams

[2016-CA-001203](#) 07/28/2017 2017 WL 3495927

Opinion by Judge Acree; Judges Combs and D. Lambert concurred.

Father appealed the family court's denial of his motion to modify visitation. The Court of Appeals affirmed. The central issue was whether a parent's initiation of custody proceedings automatically waived the children's psychotherapist-patient privilege under KRE 507. The Court concluded that it did not and articulated the procedure for family courts to use to determine when the privilege was waived. The Court also reaffirmed the broad discretion permitted family courts in the conduct of interviews of children.

II. CONSTITUTIONAL LAW

A. *Dermody v. Presbyterian Church (U.S.A.)*

[2015-CA-001613](#) 07/28/2017 2017 WL 3495911

Opinion by Judge Acree; Judge D. Lambert concurred; Judge Combs concurred and filed a separate opinion.

The Court of Appeals affirmed the circuit court's ruling that slander and libel claims brought by appellant, an ordained minister of the appellee church, could not proceed without violating the ecclesiastical-abstention doctrine. The Court held that there were no genuine issues as to a material fact regarding some of the alleged slanderous and libelous statements - that fact was the truth of the statements. Determining whether the remaining language was true or false (*i.e.*, that appellant had violated the church's ethics policy) would have required excessive government entanglement into an ecclesiastical controversy - a disagreement between a minister and his church about what constitutes unethical conduct by one of that church's ministers. The Court concluded that any further assessment of appellant's defamation claim other than that specifically addressed by the opinion would constitute "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 190, 132 S.Ct. 694, 707, 181 L.Ed.2d 650 (2012). Judge Combs, in a concurring opinion, expressed concern that the church's application of its superlative ethics standards, which equate managerial inability with unethical behavior, unnecessarily tainted appellant as unethical when his only real failure was his violation of internal administrative policy.

III. CRIMINAL LAW

A. *Abukar v. Commonwealth*

[2012-CA-001527](#) 07/21/2017 2017 WL 3124085

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

The Supreme Court of Kentucky remanded this case for the Court of Appeals to consider appellant's challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), after the prosecution in a rape case struck a juror who was a person of color and Muslim. The Court first held that the circuit court did not clearly err when it ruled that the prosecutor's reason for striking the juror was race-neutral and not a pretext for discrimination. The juror was struck after she stated that she did not drink alcohol. Because the intoxication of the victim at the time of her rape would be introduced into evidence and the juror's attitude toward drinking alcohol could influence her decision of guilt or innocence, the race-based *Batson* challenge was properly denied. The Court further held that a peremptory strike based on the juror's religious beliefs regarding the consumption of alcohol did not implicate the federal or state constitutions. In reaching this conclusion, the Court distinguished between a religious belief, which does not implicate *Batson*, and religious affiliation. The Court declined to address the issue of whether a peremptory strike based solely on religious affiliation would be unconstitutional.

B. Deville v. Commonwealth

[2016-CA-000403](#) 07/28/2017 2017 WL 3495776

Opinion by Judge J. Lambert; Judges Jones and Maze concurred.

Appellant was charged with wanton endangerment in the second degree for leaving her two-year-old son unsupervised. While appellant was asleep, the child - who was also asleep when appellant went to bed - woke up and left their home to play in a neighbor's yard; he was unsupervised for a minimum of forty-five minutes before being discovered by the neighbor. Appellant was tried and convicted of the offense, and she was sentenced to 45 days' incarceration and a \$200.00 fine. Appellant's conviction was affirmed on direct appeal to the circuit court, and she sought and was granted discretionary review. The Court of Appeals vacated and remanded, holding that a directed verdict of acquittal should have been granted at the conclusion of the Commonwealth's case in chief because of insufficient evidence of wanton behavior under KRS 508.070(1) and 501.020(3). The Court noted that there was no testimony that the two-year-old had ever exhibited this type of behavior. Evidence of him running ahead of appellant's mother on one occasion (so that she had to give chase to catch up with him) was not similar to him escaping from the house while his mother slept. Thus, it was not probative of foreseeability of this incident as it occurred. Nor was it a gross deviation from the standard of conduct that a reasonable person would observe in the situation. The Court pointedly noted that reasonable parents sleep when their children are sleeping. The matter was remanded to the district court for entry of a judgment of acquittal.

C. *Mundy v. Commonwealth*

[2016-CA-001194](#) 07/28/2017 2017 WL 3495928

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

Appellant argued that the circuit court erred in denying his motion to suppress evidence (a gun and drugs) found on his person because he was detained for an unreasonably long time during a police investigation of an alleged car theft. The police received a call from a woman reporting that she was pursuing her stolen car along the interstate. When the police arrived, they found two vehicles parked at the interstate exit, the woman who made the call, and three men (including appellant). As one of the officers checked the men's licenses, the woman explained that she had lent the car to her boyfriend with the understanding that only he would drive it, but he had allowed the three men to use it without her permission. She said that she did not want to press charges. Meanwhile, the police discovered that one of the men's licenses (not appellant's) was suspended. As they proceeded to arrest him, appellant reached inside his waistband. The police tackled him and found a handgun and drugs. Appellant argued that he should have been free to go immediately after the police learned that the woman was not planning to press charges. The Court of Appeals affirmed, holding that appellant was not detained for an unreasonably long period. While the police were investigating the circumstances of the woman's call and arresting the man with the suspended license, appellant behaved in a suspicious manner that caused the police to act to protect themselves. Their actions were in compliance with *Davis v. Commonwealth*, 484 S.W.3d 288 (Ky. 2016), in that the officers' actions were reasonably related in scope to the circumstances justifying the initial interference, and *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), which permits an officer to briefly detain an individual for investigative purposes and to frisk that person for weapons. The police were investigating a potentially volatile and dangerous situation, and no evidence was adduced that they detained appellant beyond the time reasonably necessary to complete that investigation.

IV. EMPLOYMENT

A. *Kentucky Unemployment Insurance Commission v. Hourigan*

[2016-CA-000628](#) 07/21/2017 2017 WL 3124090 DR Pending

Opinion by Judge J. Lambert; Judges Dixon and Stumbo concurred.

The Court of Appeals considered an order reversing the decision of the Kentucky Unemployment Insurance Commission (KUIC) to deny benefits to appellee, which had in turn reversed a referee's decision to award benefits. The Court reversed the circuit court's decision, holding that KUIC properly determined that appellee had committed misconduct and was ineligible for benefits pursuant to KRS 341.370(1)(b) when he was terminated for failing to report harassment of another employee pursuant to the company's sexual harassment/personal conduct policy. The company's policy was reasonable and uniformly enforced, and appellee, as a supervisor, had been trained in his reporting duties under the policy.

V. IMMUNITY

A. *Nave v. Feinberg*

[2015-CA-000275](#) 07/28/2017 2017 WL 3495914 Rehearing Pending

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

Appellant challenged three orders dismissing her claims against a licensed psychologist, a social worker employed in the psychologist's office, and an attorney representing her former husband. The claims related to a custodial evaluation performed during the course of a marital dissolution action. The Court of Appeals affirmed, holding that the psychologist and social worker were entitled to quasi-judicial immunity pursuant to *Stone v. Glass*, 35 S.W.3d 827 (Ky. App. 2000), because they were appointed by the circuit court to perform a custodial evaluation in the dissolution action. The Court further held that the attorney was entitled to absolute immunity pursuant to the judicial statements privilege because appellant's claims arose from either the dissolution or Cabinet proceedings and therefore involved a judicial proceeding in which the attorney was representing his client. The Court also agreed that appellant's claims were barred by the one-year statute of limitations and failed to state a claim upon which relief could be granted.

VI. INTEREST

A. *Fox Trot Properties, LLC v. DLX, Inc.*

[2015-CA-001515](#) 07/21/2017 2017 WL 3124086

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

In an appeal from an order granting a motion to reduce and abate interest on a 1995 judgment, the Court of Appeals affirmed, holding that due to appellant's intentional interference with appellee's rights to certain coal refuse property, appellee was unable to market or sell the coal refuse to pay the judgment. Because of this, appellee did not have an adequate remedy at law and would continue to suffer irreparable harm if appellant had not been enjoined from enforcing the judgment. The Court relied upon *Hart v. Brand*, 8 Ky. (1 A. K. Marsh.) 159 (1818), and other similar law to hold that when a debtor is ready, able, and intends to pay a judgment, but is prevented from doing so by the creditor, the creditor is not entitled to interest.

VII. JUDGMENT

A. *Kentucky Tax Bill Servicing, Inc. v. B&P Apartments, Inc.*

[2015-CA-001322](#) 07/21/2017 2017 WL 3124315 DR Pending

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

After a deficiency judgment was entered in a prior consolidated foreclosure action involving multiple properties, the lienholder that acquired a property tax certificate of delinquency assessed against one of the properties brought its own foreclosure action against the property owner. The circuit court granted summary judgment dismissing the action on ground of *res judicata*. The Court of Appeals reversed and remanded, holding that the deficiency judgment entered in the prior action was not a judgment on the merits as to the lienholder's interest; thus, *res judicata* did not bar the lienholder's foreclosure action. The deficiency judgment favored one creditor to the exclusion of all others and did not apply to the lienholder's interest in the property at issue; moreover, the property that the lienholder held an interest in had never been sold as a result of the prior action. Accordingly, the deficiency judgment did not finally resolve the lienholder's legal rights in the property, making *res judicata* inapplicable.

VIII. LANDLORD/TENANT

A. *Joiner v. Tran & P Properties, LLC*

[2015-CA-001794](#) 07/21/2017 2017 WL 3124088

Opinion by Judge J. Lambert; Judge Nickell concurred; Judge Taylor concurred in result only.

Tenants brought an action against their former landlord and the landlord's rental agent for damages arising from mold and rental amount issues. The circuit court granted partial summary judgment in favor of the landlord and rental agent, and the Court of Appeals affirmed. The Court held: (1) that damages for breach of a landlord's duty to repair were limited to the cost of the repair; (2) that appellants were not entitled to damages for negligence *per se* due to a violation of the Louisville Shelter Code because KRS 446.070 does not apply to ordinances; and (3) that the Kentucky Consumer Protection Act does not apply to individual real estate transactions.

IX. MUNICIPAL CORPORATIONS

A. *Southeast Bullitt Fire Protection District v. Southeast Bullitt Fire and Rescue Department*

[2016-CA-000030](#) 07/28/2017 2017 WL 1806770 Released for Publication

Opinion by Judge Stumbo; Judges Combs and Maze concurred.

A fire department brought an action against a fire protection district seeking a declaration that a contract between the parties for fire protection services was enforceable. The circuit court found the contract valid and enjoined the district from declaring it unenforceable. The Court of Appeals affirmed, holding: (1) that the department provided "professional services" and, thus, advertisements for public bidding on a contract with the district were not required; (2) the contract did not violate a constitutional provision (Ky. Const. § 157b) requiring the district to have a balanced budget; and (3) the department was not a public utility and, thus, the requirement of public bidding for a franchise did not apply.

X. NEGLIGENCE

A. *House v. Jewish Hospital & St. Mary's Healthcare, Inc.*

[2015-CA-001205](#) 07/28/2017 2017 WL 3495923

Opinion by Judge Acree; Chief Judge Kramer and Judge Johnson concurred.

In a medical malpractice case involving an “empty-chair” defendant, the circuit court granted the participating defendant’s motion for a partial directed verdict of negligence against the “empty-chair” defendant (and thereby effectively against the plaintiff) at the close of plaintiff’s case and before the presentation, during the participating defendant’s case, of contradictory evidence. The Court of Appeals reversed the circuit court’s grant of a partial directed verdict, holding that the ruling was premature and that “[n]o directed verdict may be entered against an empty-chair defendant prior to the close of all evidence.” In reaching this conclusion, the Court noted that the circuit court failed to consider shifting burdens of presentation and proof in “empty-chair” cases such as this, as described in *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64 (Ky. 2010). In the participating defendant’s cross-appeal, the Court of Appeals held: (1) that it had no jurisdiction to review the denial of a summary judgment motion made after a trial on the merits; (2) that it could not reverse the circuit court’s denial of a directed verdict where there was not a complete absence of proof on a material issue and where there were disputed issues of fact upon which reasonable minds could differ; and (3) that it was not error for the circuit court to allow the plaintiff’s expert to testify about the hospital’s duty to train its nursing staff regarding its own policies, and that such testimony did not constitute a fundamental change in the plaintiff’s theory of liability.

XI. TAXATION

A. *Hazel Enterprises, LLC v. Mitchuson*

[2015-CA-000904](#) 07/07/2017 2017 WL 2883222 Released for Publication

Opinion by Judge Maze; Judges Acree and Taylor concurred.

The purchaser of a certificate of delinquency for an unpaid property tax bill brought suit against the property owners. The circuit court entered judgment in the purchaser's favor but granted summary judgment in favor of the owners with respect to the purchaser's claim for interest and attorneys' fees. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court first held that pursuant to KRS 134.125 and KRS 134.452, the purchaser was entitled to interest accruing from the date that it purchased the certificate of delinquency through the circuit court's entry of judgment in its favor at the statutory rate of 12% per annum. However, the Court then held that the purchaser was not entitled to attorneys' fees because it was difficult, if not impossible, to discern from the purchaser's affidavit and other items in the record precisely what fees included in its initial demand for payment were attributed to work actually performed as of the date of the demand. This lack of clarity constituted a failure on the part of the purchaser to document its fees to the satisfaction of KRS 134.452(3). Therefore, it was within the circuit court's discretion to deny the request for fees.