PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

JUNE 1, 2019 to JUNE 30, 2019

I. APPEALS

A. ***Commonwealth v. Robertson***

2018-CA-000662 06/21/2019 2019 WL 2554351

Opinion and Order dismissing by Judge Jones; Judges Dixon and Lambert concurred.

The Commonwealth sought review of an order granting appellee's motion to suppress. The order was entered on March 13, 2018. On March 20th, the Commonwealth filed a "motion to reconsider order to suppress" with the circuit court. In its motion, the Commonwealth asked the circuit court to "alter, amend or vacate its order entered on March 13, 2018." The motion for reconsideration was denied on March 30th, and the Commonwealth filed its notice of appeal on April 27th - 46 days after entry of the order granting the motion to suppress. After reviewing the Commonwealth's notice of appeal, the Court of Appeals issued an order directing the parties to show cause why the appeal should not be dismissed for failure to timely appeal. In so doing, the Court directed the parties to *Parker v. Commonwealth*, 440 S.W.3d 381 (Ky. 2014), which sets forth that a CR 59.05 motion does not operate to toll the time for filing a notice of appeal when the underlying order is interlocutory. In response, the Commonwealth argued that the Court should treat its motion for reconsideration not as a motion to alter, amend or vacate, but rather as a motion for additional findings of fact under CR 52.02. The filing of such a motion would have tolled the time for the Commonwealth to file its notice of appeal. However, the Court declined to treat the Commonwealth's motion in this fashion. Nowhere in the Commonwealth's pleading did it ever request additional findings; rather, the Commonwealth only asked the circuit court to apply different case law and reach a different result. Additionally, there was no need for additional fact-finding, as the circuit court's order already contained numerous findings of fact and conclusions of law. Consequently, the Commonwealth's notice of appeal was not timely filed and the appeal required dismissal.

II. ARBITRATION

A. ***Frankfort Medical Investors, LLC v. Thomas by and Through Thomas***

2018-CA-000056 06/14/2019 2019 WL 2479322

Opinion by Judge Lambert; Judges Dixon and Kramer concurred.

John Thomas, Sr. was admitted at The Lantern in January 2017. At that time, Thomas, through his son/power of attorney, signed an arbitration agreement (among other documents signed upon his admission). Thomas filed suit against the facility in April 2017, claiming injuries resulting from the facility's negligence during his stay; the complaint also sought redress for loss of consortium as well as punitive damages and recoupment of attorneys' fees and costs. The facility moved to dismiss the suit or, in the alternative, to stay the suit pending arbitration proceedings. The circuit court denied both motions after concluding that the arbitration agreement as drafted was unenforceable against Thomas. The facility appealed. The Court of Appeals affirmed, holding that: (1) the agreement's choice-of-law provision (which provided that arbitration should take place in Tennessee and that Tennessee law should apply) conflicted with KRS 417.200, which requires that arbitration take place in Kentucky; (2) the failure to name John Thomas, Sr. in the arbitration agreement made the document unenforceable against him; and (3) the agreement was by its own terms impossible to perform because its named exclusive arbitrator was, by a 2009 consent decree, barred from conducting arbitration proceedings.

III. CHILD CUSTODY AND RESIDENCY

A. ***Barnett v. White***

2018-CA-000958 06/28/2019 2019 WL 2656138

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

As a matter of first impression, the Court of Appeals affirmed a custody decree in which Father was denied equal timesharing with Child after the amended version of KRS 403.270(2) went into effect. This provision adds a rebuttable presumption in favor of joint custody and equal parenting time. The Court emphasized that under both versions of the statute, the trial court is given a wide amount of latitude in deciding the best interest of the child as to custody and timesharing, stating: "While the new version of KRS 403.270(2) puts a finger on the scale in favor of joint custody and equal timesharing by requiring only a preponderance of evidence to overcome, such a preference is a slight burden and the trial court continues to possess broad discretion in determining the best interest of the child as to who should have custody and where the child shall live." Because the parents' inability to get along here would have been a valid basis for granting sole custody, it was also an appropriate consideration supporting the trial court's decision to deviate from equal parenting time.

IV. CONSUMER PROTECTION

A. *American National University of Kentucky, Inc. v. Commonwealth ex rel. Beshear*

2018-CA-000610 06/14/2019 2019 WL 2479608

Opinion by Judge Maze; Judges Jones and Kramer concurred.

The Attorney General sued a for-profit university under the Kentucky Consumer Protection Act (KCPA) for posting allegedly misleading post-graduate employment statistics on its website. The university argued that it could not be found liable because its website was created by an independent contractor. The circuit court disagreed and found that the alleged independent contractor, an administrative services company, was the university's agent and that the university willfully violated the KCPA. As a penalty, the circuit court fined the university $20 for every day the willfully-misleading employment statistics remained on its website. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court first agreed that the alleged independent contractor was an agent of the university. The company and the university: (1) were solely owned by the same person (who also served as president of both); (2) had the same individuals on their boards; (3) used and could edit the same software containing information about students; and (4) had no written contract between them. The Court then held that a "willful" consumer protection violation can occur through inexcusable carelessness and that KCPA claims need only be proven by a preponderance of the evidence. Consequently, there was no error in the circuit court's conclusion that the university had violated the KCPA. However, the Court then reversed and remanded for further proceedings as to the circuit court's imposition of a per-day civil sanction, concluding that the court's manner of calculating consumer protection violations was an abuse of discretion. The Court held that every consumer protection violation must be based on a separate, affirmative act or decision by a defendant. The mere presence of false, misleading, and deceptive employment rates on the university's website for a certain length of time did not create multiple willful violations of the KCPA. Along with its reasoning, the Court provided guidance on how trial courts may impose sanctions "per violation" under the KCPA for material published online.

V. CRIMINAL LAW

A. ***Kyle v. Commonwealth***

2018-CA-001354 06/14/2019 2019 WL 2479319

Opinion by Judge Lambert; Judges Goodwine and Maze concurred.

The Court of Appeals affirmed appellant's conviction of theft by unlawful taking (over $500). In so doing, the Court considered and rejected appellant's arguments that the circuit court erred in: (1) permitting the Commonwealth to present evidence in violation of KRE 404(b); (2) denying his motions for directed verdict; and (3) failing to instruct the jury on the lesser-included offense of theft by unlawful taking (under $500). Regarding the first issue, the Court did not consider appellant's argument on the merits because the issue had been waived. As to the second issue, the Court found no error as the Commonwealth presented sufficient evidence for a jury to find appellant guilty beyond a reasonable doubt. The Court also found no error in the third issue because the evidence presented did not support an instruction on a lesser-included offense.

B. ***McCarthy v. Commonwealth***

2017-CA-001927 06/14/2019 2019 WL 2479324

Opinion by Judge Combs; Chief Judge Clayton and Judge K. Thompson concurred.

Appellant was convicted of driving under the influence, fourth offense, and was sentenced to two years' imprisonment. On appeal, he argued that the circuit court erred in allowing the Commonwealth to introduce evidence of his refusal to take a warrantless blood test. The Court of Appeals affirmed in part, reversed in part, and remanded. In response to appellant's arguments regarding his refusal to take a blood test, the Commonwealth contended that it was commenting on his refusal merely to explain to the jury why there was no blood test result. The Court, however, agreed with appellant, holding that the commentary had violated appellant's exercise of his constitutional right to resist a warrantless search and that reversal was merited despite the circuit court's admonition that the comments could not be used to imply any motivation on the part of appellant in refusing the test. Just as the Fifth Amendment right to remain silent cannot be subject to commentary, so, too, is the Fourth Amendment right to resist a warrantless search immune from comment.

C. ***Vincent v. Commonwealth***

2017-CA-001123 06/28/2019 2019 WL 2656151

Opinion by Judge Maze; Judges Acree and Combs concurred.

In an appeal from the denial of appellant's RCr 11.42 motion, the Court of Appeals affirmed, holding that appellant received constitutionally effective representation by his two trial attorneys. Appellant was tried and convicted on three counts of first-degree sodomy involving a child under age twelve. He was thereafter sentenced to a term of twenty years' imprisonment, and the Supreme Court of Kentucky affirmed the conviction on direct appeal. Appellant then filed a timely motion to vacate sentence under RCr 11.42, alleging that: (1) trial counsel were ineffective in failing to have him evaluated for an intellectual disability and in failing to move for suppression of his incriminating statements to police on that basis; and (2) trial counsel were ineffective in failing to call experts on false confession and intellectual disability at trial. With regard to appellant's first issue, the Court agreed with the circuit court that a motion to suppress on the basis of intellectual disability would not have succeeded and would merely have resulted in divulging trial strategy to the Commonwealth. Moreover, the record reflected that appellant's will was not overborne to the point at which his admissions to police were coerced. With regard to appellant's second issue, the Court held that appellant's trial attorneys were not ineffective for failing to call expert witnesses at trial. The attorneys testified how their trial strategy relied upon presenting a surprise defense based on appellant's intellectual disability through lay witnesses; expert testimony would have necessitated pretrial disclosure to the Commonwealth. Because it is not the function of an appellate court to usurp or second guess counsel's trial strategy, the Court could not conclude that trial counsel were ineffective on this issue.

VI. FEES AND COSTS

A. ***VP Louisville, LLC v. NBH Bank, N.A.***

2017-CA-000055 06/28/2019 2019 WL 2666203

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

The law firm of Hinshaw & Culbertson, LLC (H&C) was hired by Smiling Hospitality, the court-appointed receiver in a foreclosure action. The firm billed $206,203.52 in attorneys' fees. VP Louisville objected to the fees and an evidentiary hearing was held. In an April 2016 order, the circuit court ruled that pursuant to the receiver order, Smiling Hospitality could hire and pay counsel. However, the court further concluded that some of the fees were unnecessary and that H&C's hourly rate must be reduced. The circuit court also ruled that the time and expenses billed for defending attorneys' fees were not to be compensated. H&C subsequently reduced its fees by $84,272 and deducted amounts billed that the circuit court found were unnecessary and fees billed for defending attorneys' fees. Smiling Hospitality submitted a letter from H&C explaining its compliance with the circuit court's order along with its motion seeking final discharge and guidance on disbursement of the remaining funds. VP Louisville objected to the approval of fees and argued that it was due $144,668.03 from Smiling Hospitality. In December 2016, the circuit court issued an order discharging Smiling Hospitality and authorizing it to pay H&C. On appeal, VP Louisville argued that the circuit court's December 2016 order was not in accord with the rates and deductions established by the April 2016 order. It further contended that the circuit court was required to state the evidence relied upon in approving the submitted fees. The Court of Appeals affirmed, holding that a circuit court is to be afforded deference when interpreting its own order and that there was nothing inconsistent in the court's orders here. At no time did the circuit court enter a judgment against Smiling Hospitality and, as to the attorneys' fees, the court set forth the specific rates to be charged and, wisely, did not allow H&C attorneys' fees for defending attorneys' fees. The Court further concluded that the circuit court was not required to make additional findings of fact when it reviewed the fees charged.

VII. IMMUNITY

A. ***Cox v. Cross***

2016-CA-001945 06/21/2019 2019 WL 2554214

Opinion by Judge Lambert; Judges Combs and Taylor concurred.

This case arose from an incident in which a sheriff's deputy, while executing a warrant of arrest, ran over two Kentucky state troopers who were assisting and pursuing the subject on foot. The circuit court initially ruled that the sheriff was entitled to absolute and qualified official immunity. The Court of Appeals and Supreme Court of Kentucky disagreed, holding that KRS 70.040 was a clear waiver of the sheriff's official immunity for the tortious acts or omissions of his deputies. Upon remand, the circuit court granted two summary judgments: to Barney Jones, Sheriff of Barren County, in both his individual and official capacities, and Deputy Sheriff Leland Cox, in his individual capacity. On appeal, the Court of Appeals again sent the case back to the circuit court, holding that because there were pending issues, the case was not final. The matter was remanded "for a decision on the pending motion to amend the complaint and proceedings not inconsistent with this opinion." Following remand, the circuit court entered an order granting appellees' motion to vacate summary judgment and denying appellants' motion to dismiss the amended complaint. In vacating summary judgment, the circuit court concluded that Deputy Cox, in his individual capacity, and Sheriff Jones, in his official capacity, remained as defendants in the action and ordered that discovery begin as to Cox's alleged negligence. Cox and Jones appealed. On appeal for a third time, the Court of Appeals affirmed, holding that: (1) the circuit court properly vacated summary judgment on the issue of Cox's entitlement to qualified official immunity for his alleged negligent driving; (2) the circuit court did not abuse its discretion in granting the fourth renewed motion to vacate summary judgment because it failed to comply with the law of the case; (3) Sheriff Jones was putatively liable under KRS 70.040, and he could in turn seek redress from Deputy Cox for those acts that Cox performed in his official capacity; and (4) the issue of Cox's individual liability was properly before the circuit court; accordingly, it was not precluded from ruling on it.

B. ***Department of Corrections v. Russell***

2018-CA-000200 06/28/2019 2019 WL 2666150

Opinion by Judge Spalding; Judges Acree and Lambert concurred.

Russell, a state inmate and participant in a Department of Corrections work release program, lost the lower part of his left leg while working for the Department of Military Affairs when a tree he was helping to cut fell on him. The Board of Claims determined that the act of felling a tree was a discretionary act and that at the time of the accident, Russell was under the exclusive control of Military Affairs; therefore, sovereign immunity applied and Russell had no cause of action. On appeal, the Franklin Circuit Court held that the Board erred: 1) in finding KRS 441.125(2)(b) inapplicable to Russell's claim; 2) in concluding that the Department of Corrections was entitled to immunity under KRS 44.073(2) because the act of felling a tree is discretionary; and 3) in concluding that at the time of his injury, Russell was under the exclusive control of Military Affairs. The Court of Appeals affirmed. Applying the analysis set forth in *Haney v. Monsky*, 311 S.W.3d 235 (Ky. 2010), the Court first held that the dominant nature of the act of felling a tree must be construed to be ministerial. The Court then held that the Board of Claims erred as a matter of law in concluding that at the time of the accident Russell was under the exclusive control of Military Affairs and that the only duty the Department of Corrections owed Russell was under its agreement with Military Affairs. The Court noted that while the circuit court incorrectly concluded that KRS 441.125(2)(b) applied here, the circuit court correctly observed that the Department of Corrections owes a general duty to its prisoners on work release to exercise ordinary care for their protection. This general duty extends even to periods when the prisoners may be under the supervision of another department and arises from the "special relationship" penal institutions have with prisoners in their custody. Because Russell was in state custody at the time of the accident and the allegedly negligent conduct was committed by a state actor or actors, the Department of Corrections was required to exercise ordinary care for his protection.

VIII. INSURANCE

A. ***Messer v. Universal Underwriters Insurance Company***

2017-CA-000293 06/21/2019 2019 WL 2557330

Opinion by Judge Acree; Judges Lambert and Spalding concurred.

The Court of Appeals affirmed the circuit court's grant of summary judgment dismissing appellant's bad faith claim brought pursuant to the Kentucky Unfair Claims Settlement Practices Act, KRS 304.12-230. The bad faith claim was abated while the parties litigated the underlying tort action, an auto accident involving appellant and the employee of appellee's insured. The police report indicated that appellant caused the accident. Appellee's insured said that its employee was driving its vehicle without permission, and non-permissive use was excluded from coverage under the policy of insurance. Consequently, appellee denied the claim because it had no contractual obligation under the policy and further disputed the claim because the insured's employee's liability was not beyond dispute. Appellee made nuisance value offers to appellant until a jury resolved the permission use fact question and appellant was found to have a contractual obligation to cover the accident. However, appellee continued to dispute the claim because liability was not beyond dispute and damages were in doubt. During the five months after the coverage question was resolved, the parties' negotiations led to settlement of the underlying claim for the limits of the liability policy. When litigation of the bad faith claim resumed, appellee moved the circuit court for summary judgment, which was granted. The Court of Appeals affirmed because there was no obligation to pay the claim until the coverage issue was resolved, the insured's employee's liability was never beyond dispute, and appellee's conduct could not, as a matter of law, be outrageous or otherwise constitute bad faith.

IX. JURISDICTION

A. ***Stewart v. Kentuckiana Medical Center, LLC***

2017-CA-001960 06/07/2019 2019 WL 2399492

Opinion by Judge Maze; Judges Acree and Combs concurred.

Appellant challenged an order of the Jefferson Circuit Court dismissing her medical malpractice and related claims against Kentuckiana Medical Center (KMC), Dr. Anis G. Chalhoub, Dr. John D. Rumisek, and their practice groups. In 2014, appellant, an Indiana resident, went to the emergency room at KMC in Clarksville, Indiana. The consulting cardiologist, Dr. Chalhoub, diagnosed her with bradycardia and sick sinus syndrome and, based on this diagnosis, Dr. Rumisek installed a pacemaker and performed several follow-up procedures at KMC. After each of the surgeries, appellant followed-up with the physicians at their Louisville offices. In 2016, appellant's new cardiologist advised her that she never had sick sinus syndrome and that the pacemaker was not medically necessary. Based on this information, appellant filed her medical malpractice suit. The defendants moved to dismiss, arguing that appellant's action was barred by her failure to comply with the medical review panel requirements of the Indiana Medical Malpractice Act, IC §34-18-8-4. KMC separately argued that Kentucky could not exercise personal jurisdiction over it. The circuit court agreed on both points and granted the motions to dismiss without prejudice. The Court of Appeals affirmed. The Court first agreed that Kentucky could not exercise personal jurisdiction over KMC. Appellant was an Indiana resident, her alleged injury took place entirely in Indiana, and KMC was a foreign corporation that did business exclusively in Indiana. Thus, under KRS 454.210(2)(a), there was no basis for Kentucky to exercise personal jurisdiction over it. The Court then held that while appellant's malpractice claims against Dr. Chalhoub and Dr. Rumisek were subject to Indiana law, they were not barred for lack of subject-matter jurisdiction or particular-case jurisdiction because the medical panel review requirements of the Indiana Medical Malpractice Act only applied to actions filed in an Indiana court. Nevertheless, the Court concluded that the circuit court properly dismissed the claims against Dr. Chalhoub and Dr. Rumisek due to appellant's attempt to engage in forum shopping. The circuit court had personal jurisdiction over some, but not all, of the defendants, and appellant's claims had only a minimal connection with Kentucky. Moreover, all the claims could be brought in an Indiana court once appellant complied with the medical review panel requirements. Under these circumstances, the Court held that the doctrine of *forum non conveniens* warranted a stay or dismissal of the complaint without prejudice with leave to file in Indiana. Therefore, the Court of Appeals affirmed the circuit court on this basis.

X. LIBEL AND SLANDER

A. ***Estepp v. Johnson County Newspapers, Inc.***

2017-CA-001651 06/28/2019 2019 WL 2655845

Opinion by Judge K. Thompson; Judges Acree and Dixon concurred.

The Court of Appeals affirmed the grant of summary judgment on a claim of defamation brought against a newspaper for articles stating that an electrical cooperative president was "removed from" and "relieved of" his employment. The Court held that a mere statement of discharge from employment, regardless of the exact words used, is not *per se* defamatory. It is only when the publication also contains an insinuation that the dismissal was for misconduct that it becomes potentially defamatory. However, when the "gist and sting" lies in the reason charged for the dismissal - and that underlying basis is, in fact, true - there can be no *per se* defamation. Therefore, where it was true that the president stole a petition, an implication that he subsequently was terminated for cause could not be defamatory. Summary judgment was also properly granted to the newspaper on the president's claim for intentional infliction of emotional distress or outrage as the newspaper could properly interview a board member about the manner of the president's departure from his employment after a public controversy and was not bound by any agreement that the president had with the cooperative about who could comment on his departure.

XI. SUMMARY JUDGMENT

A. ***Royal Consumer Products, LLC v. Buckeye Boxes, Inc.***

2018-CA-000694 06/28/2019 2019 WL 2665938

Opinion by Chief Judge Clayton; Judges Acree and Taylor concurred.

Appellant filed a breach of contract claim against appellee. Appellee moved for summary judgment, arguing that appellant's corporate representative under CR 30.02(6) provided inadequate testimony regarding appellant's damages, which was a judicial admission that appellant had sustained no damages - a required component of the breach of contract claim. The circuit court agreed and granted summary judgment in favor of appellee. The Court of Appeals affirmed. The Court first concluded that the testimony of appellant's CR 30.02(6) designee did not rise to the level of a judicial admission under Kentucky law, as his statements were not "deliberate and unequivocal," but rather indicated "an absence of knowledge about the crucial facts" similar to the testimony in *McCallum v. Harris*, 379 S.W.2d 438 (Ky. 1964). However, the Court then held that the designee's testimony was still binding on appellant, and that appellant's failure to proactively rehabilitate the designee's testimony, substitute a new CR 30.02(6) witness, or provide further timely evidence of the damages suffered as a result of appellee's alleged breach of contract made summary judgment appropriate.