**PUBLISHED OPINIONS**

**KENTUCKY COURT OF APPEALS**

**MAY 1, 2017 to MAY 31, 2017**

## I. ADMINISTRATIVE LAW

### A. ***Strauss v. Kentucky Board of Medical Licensure***

2015-CA-000700 05/12/2017 2017 WL 2209952

Opinion by Judge Stumbo; Judges Combs and Maze concurred.

The Court of Appeals reversed and remanded a circuit court order affirming an order of the Kentucky Board of Medical Licensure. The Board's order found that appellant had violated three statutes in relation to his medical practice and placed appellant on probation. The Court held that the Board's hearing officer violated KRS 13B.110(1) by not recommending to the full Board a penalty or other remedy after finding appellant had violated the statutes. The Court also determined that the Board violated KRS 13B.120(1) by not reviewing the entire record before entering an order against appellant. The Court ordered the circuit court to direct the hearing officer to recommend a penalty and to direct the Board to consider the entire record before entering an order against appellant.

## II. ARBITRATION

### A. ***Northern Kentucky Area Development District v. Snyder***

2015-CA-001167 05/12/2017 2017 WL 2209953

Opinion by Judge Thompson; Chief Judge Kramer and Judge Nickell concurred.

Appellee asserted claims under the Kentucky Whistleblower Act and the Kentucky Wages and Hours Act after her employer, the Northern Kentucky Area Development District (NKADD), terminated her employment. NKADD filed a motion to stay the proceedings and to compel arbitration based on an arbitration agreement executed by it and appellee as a condition of appellee's employment. The circuit court denied the motion and NKADD appealed. The Court of Appeals affirmed, holding that NKADD did not have authority to enter into the arbitration agreement as a condition of appellee's employment. The Court particularly held that KRS 417.050(1) and KRS 336.700(2) are preempted by the Federal Arbitration Act only as those statutes are applied to private employers. The FAA did not preempt the legislature's authority to restrict the power of political subdivisions such as NKADD to enter into arbitration agreements with employees. KRS 417.050(1) and KRS 336.700(2) expressly prohibit political subdivisions from making an agreement to arbitrate rights arising under state and federal law as a condition of employment. Therefore, NKADD's motion to compel arbitration of appellee's claims was correctly denied.

## III. BANKS AND FINANCIAL INSTITUTIONS

### A. ***Scott v. Forcht Bank, NA, Successor in Interest to Laurel National Bank***

2015-CA-000594 05/12/2017 2017 WL 2209913

Opinion by Judge Jones; Judges Clayton and Nickell concurred.

This case concerned the issuance of a loan for the purchase of two undeveloped lots and the alleged oral promise of a second loan. Appellant appealed from an order granting a motion for judgment on the pleadings in favor of appellee and dismissing appellant's claims for breach of contract, breach of promise, promissory estoppel, detrimental reliance, and various emotional damages. The trial court concluded that appellant's claims were barred, as a matter of law, by the statute of frauds. On appeal, appellant maintained that he detrimentally relied on the alleged oral promises of appellee regarding the second loan, and - as such - appellee should be estopped from claiming the affirmative defense of statute of frauds. The Court of Appeals disagreed and affirmed. Regarding the application of the doctrine of estoppel, as applied to the statute of frauds, the Court noted that a claim of promissory estoppel alone is not sufficient to defeat the statute of frauds; actual fraud must be proven. The Court examined *Sawyer v. Mills*, 295 S.W.3d 79 (Ky. 2009), and determined that appellant had failed to show that he reasonably relied on any alleged oral promise to his detriment. Further, the Court noted that the initial loan made by appellee was reduced to writing, signed by appellant, and contained a merger clause. Finally, the Court noted that appellant had also failed to plead any facts to suggest that a fiduciary relationship existed between him and appellee.

## IV. CONTRACTS

### A. ***Mid-South Drywall, Inc. v. 2001 Bryant Road, LLC***

2015-CA-000825 05/26/2017 2017 WL 2332689

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

A subcontractor appealed from a summary judgment and subsequent orders entered in favor of the general contractors in a construction project. Appellant, the subcontractor, had abandoned the job after receiving no fewer than six notices of deficiencies (in quality of work and scheduling defaults) from Bryant Road. Appellant conceded that it was the breaching party, yet sought damages for the work it performed subject to a just offset by Bristol Group for damages sustained as a result of the breach. The circuit court granted summary judgment to Bristol and Bryant Road on the issue of liability but reserved the issue of damages for trial; it ultimately ruled that appellant was not entitled to damages. On appeal, appellant reiterated its arguments that it was entitled to present evidence of damages for the work it had performed, and that the circuit court erred in ruling that it could not recover, under the substantial performance doctrine, even if it was the breaching party. The Court of Appeals affirmed, holding that: (1) the breaching party bears the liability for nonperformance (*Hall v. Rowe*, 439 S.W.3d 183 (Ky. App. 2014)); and (2) case law supported the circuit court's ruling in favor of the general contractors (*Hall*, *supra*, and *Fay E. Sams Money Purchase Pension Plan v. Jansen*, 3 S.W.3d 753 (Ky. App. 1999)).

## V. CRIMINAL LAW

### A. ***Turner v. Commonwealth***

2016-CA-000119 05/12/2017 2017 WL 2209954 DR Pending

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

Appellant challenged a judgment and sentence entered upon a jury verdict finding him guilty of several drug-related crimes. The chief issue on appeal was whether appellant's sentence for second-degree trafficking in a controlled substance was impermissibly enhanced in violation of KRS 532.080(10). Appellant argued that because his sentence for violating KRS 218A.1413(1)(c) a second time was already enhanced under KRS 218A.1413(2)(b)2, further enhancement on the basis of his status as a persistent felony offender (PFO) was prohibited by KRS 532.080(10). The Court of Appeals rejected appellant's claim and affirmed. In so doing, the Court noted that conviction of a second or subsequent violation of KRS 218A.1413(1)(c), carrying a Class D felony penalty of one to five years, could be enhanced to a Class C felony penalty of five to ten years if PFO status was proven.

## VI. CUSTODY

### A. ***C.K. v. Cabinet for Health and Family Services***

2016-CA-000139 05/19/2017 2017 WL 2200492

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

Appellant challenged the denial of his petition for immediate entitlement to custody of his daughter, which was filed pursuant to KRS 620.110. The child's mother and brothers were killed in a house fire, and the child was placed in the custody of her maternal grandmother. Appellant lived in South Carolina and neither the Cabinet nor the child's Kentucky family knew his contact information. At the time of the fire, appellant had not visited the child in more than two years. In denying the petition, the circuit court made no finding as to appellant's fitness as a parent, but stressed that the grandmother was the child's only close relative who could be found when her mother and siblings died. The circuit court further observed that the grandmother and child shared a close bond, while appellant had not been in his daughter's life for at least two years. The circuit court also acknowledged that appellant would likely receive custody of the child in the future due to the law's preference for parental custody; however, the court concluded that removing the child from the grandmother at that time would inflict further trauma on the child. Appellant argued on appeal that because no court had found him to be unfit for custody, the circuit court erred in denying his petition for immediate entitlement to custody, but the Court of Appeals affirmed. The Court specifically held that despite the fact that a KRS 620.110 petition for immediate entitlement is treated as an original action akin to a writ of *habeas corpus*, it nonetheless remained the case that in determining the temporary custody of a child found to be dependent, neglected, or abused, the circuit court shall make its determination based on the best interests of the child. In this case, substantial evidence supported the circuit court's findings of fact and ultimate ruling regarding the child's best interests.

## VII. FAMILY LAW

### A. ***Agnich v. Tyler***

2016-CA-000653 05/05/2017 2017 WL 1788089

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

This case involved a motion to modify a timesharing agreement permitting one parent to relocate with the parties' two minor children, who had special needs, to another state. Because the parties were joint custodians, but could not agree on relocation, the family court was tasked with making the decision for them. The Court of Appeals vacated and remanded for additional proceedings. The Court concluded that the family court's findings did not support its ultimate conclusion that relocation was in the best interest of the children. Noting that the children had special needs, the Court held that the family court failed to make findings to support a conclusion that the services they would actually receive if allowed to relocate would be more beneficial to their overall development, especially when obtaining those services would involve major (and fairly constant) disruptions to their lifestyles and living situations. Additionally, in light of *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014), on remand the Court directed the family court to consider appointment of a GAL to represent the interests and special needs of the children. Lastly, the Court noted that it may also be necessary for the family court to consider whether a medical or psychological evaluation of these children could aid it in better understanding and identifying the needs of the children *vis-à-vis* the availability of services in differing locales, as well as the likely impact this relocation might have on the children's overall development and parental bonds.

**B.** ***Ashley v. Ashley***

2016-CA-001468 05/05/2017 2017 WL 1788456

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

A husband challenged the entry of a DVO following a petition filed by his wife and an order denying his motion to reconsider the entry of the DVO. The Court of Appeals held that the family court did not abuse its discretion in entering the DVO and affirmed. The Court specifically held that while the wife had not established that a physical injury had occurred (the husband knocked a tortilla chip off of her arm), she had established by a preponderance of the evidence that she was in fear for her and her children's safety based upon her testimony regarding arguments between the parties and the husband's threat to commit suicide. The wife also established that domestic violence may occur again based upon the escalation of their arguments, the husband's alcohol use, and his suicide threat.

**C.** ***Walker v. Walker***

2016-CA-001191 05/05/2017 2017 WL 1788087

Opinion by Judge D. Lambert; Judge Combs concurred; Judge Thompson concurred in result only.

Appellant challenged the issuance of a DVO against him and specifically asked the Court of Appeals to determine: (1) whether the doctrine of *res judicata* precluded the issuance of a second DVO against an individual in a situation where no new incidents of domestic violence had occurred; and (2) whether the trial court abused its discretion in issuing the order based on the evidence of record. The Court answered "No" to both questions and affirmed. The Court particularly noted that KRS 403.735 expressly allows courts to look back and consider prior protective orders in reissuing DVOs and that KRS 403.740 only requires a court to determine whether domestic violence had occurred at some point in the past..

## VIII. HEALTH

### A. ***Cabinet for Health and Family Services v. Saint Joseph Health System, Inc.***

2015-CA-001356 05/19/2017 2017 WL 2209910

Opinion by Judge Combs; Chief Judge Kramer and Judge J. Lambert concurred.

The Cabinet for Health and Family Services (and its included agency, the Department for Medicaid Services) appealed from an order addressing the Cabinet's practice of reimbursing Critical Access Hospitals (CAH) for outpatient laboratory services provided to Medicaid patients at the reduced level designated as the Medicare technical component rate, rather than the full Medicare reimbursement rate of 101% pursuant to KRS 216.380(13). The circuit court upheld the position of CAH, who challenged the Cabinet's reduced reimbursement rates, and the Court of Appeals affirmed, holding that the full Medicare reimbursement rate of 101%, per KRS 216.380(13), should govern.

## IX. JUDGMENT

### A. ***Chen v. Lowe***

2015-CA-001065 05/19/2017 2017 WL 2209911

Opinion and order dismissing by Judge Jones; Judge Combs and Chief Judge Kramer concurred.

A former student, who had been expelled from law school and who had been denied re-admission to school, brought an action against the dean of the law school, in the dean's individual and official capacities, seeking judicial review of the denial of his readmission. The student also alleged breach of contract, unjust enrichment, fraud, and misrepresentation. The circuit court denied the dean's CR 12.02 motion to dismiss in his individual capacity. The dean sought judicial review by the Court of Appeals, but the Court dismissed the appeal, on motion of the former student, on grounds that the appeal was interlocutory. The Court acknowledged that it has jurisdiction to hear appeals from interlocutory orders that deny substantial claims of immunity under *Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009); however, the Court determined that the circuit court's order did not make a final ruling on the issue of immunity. Rather than deny the dean's claims of immunity, the circuit court's order found that there were genuine issues of material fact regarding his entitlement to immunity, thus leaving the immunity issue unresolved. Additionally, the Court addressed the dean's argument that because he filed a CR 12.02 motion to dismiss rather than a CR 56.02 motion for summary judgment, the circuit court erred in finding that there were genuine issues of material fact. The dean argued that this could not be, as under a CR 12.02 motion all of the allegations in a plaintiff's complaint are required to be taken as true. The Court rejected this argument, noting that in denying the motion to dismiss, the circuit court had considered matters outside of the pleadings. Therefore, the motion to dismiss was automatically converted into a motion for summary judgment and there was no error by the circuit court in finding that there were genuine issues of material fact.

## X. LIMITATION OF ACTIONS

### A. ***Hearn v. Family Dollar Holdings, Inc.***

2015-CA-001540 05/05/2017 2017 WL 1788090

Opinion by Judge Combs; Judges Maze and Stumbo concurred.

Appellant challenged an order dismissing her personal injury action against appellees based upon appellant's failure to commence the action within the applicable period of limitations. On March 28, 2014, appellant filed a complaint alleging that she had suffered personal injuries on March 30, 2013, while shopping at a Family Dollar Store as a result of Family Dollar's negligence. Although summonses were issued, service of process was never attempted. Counsel for appellant advised the trial court that because settlement negotiations were under way, summonses had not been served. After these alleged negotiations foundered, counsel had summonses reissued and served. However, the trial court dismissed the case because the one-year statute of limitations had run in the meantime. The Court of Appeals affirmed dismissal based on the literal mandate of CR 3, which provides that a civil action "is commenced by the filing of a complaint with the court and the issuance of a summons ... in good faith." In this case, the initial summons was issued on March 28, 2014, the same day on which the complaint was filed. However, appellant did not attempt to serve any of the defendants with the summons. She acknowledged to the trial court that she intended to postpone commencement of the litigation because the parties were attempting to negotiate a settlement. (Family Dollar denied that such negotiations had occurred.) Under these circumstances, appellant's delay constituted a lack of good faith that prevented the action from being commenced until summonses were reissued on May 18, 2015 - well outside the limitations period. The Court further noted that the trial court could not, *sua sponte*, extend the statute of limitations. Thus, dismissal was merited.

## XI. PROPERTY

### A. ***Vorherr v. Coldiron***

2015-CA-000763 05/26/2017 2017 WL 2332691

Opinion by Judge Dixon; Judges Combs and Nickell concurred.

The Court of Appeals reversed orders granting summary judgment in favor of appellees in an access easement dispute. The Court first held that the trial court procedurally erred by: (1) ruling retroactively that its 2013 summary judgment order in favor of appellees was final and appealable despite the existence of remaining issues and the trial court's explicit denial of a request to make said order final and appealable; and (2) ruling that its 2014 order denying appellants' motion for summary judgment on a remaining issue was, in effect, a grant of summary judgment in favor of appellees, despite appellees not having moved for summary judgment. With regard to the substantive issues, the Court held that the trial court properly determined that a latent ambiguity existed because the property description in the deed and the language of the access easement conflicted. However, even if the location of an easement is insufficiently described, if its location can be ascertained from extrinsic evidence, the insufficient description will not prevent enforcement of the easement. Thus, despite recognizing the existence of a latent ambiguity, the trial court nevertheless erred by refusing to consider parole evidence, especially the tendered expert opinions, as an aid to the proper construction of the language used. Because the latent ambiguity created a material issue of fact, summary judgment was improper.

## XII. TERMINATION OF PARENTAL RIGHTS

### A. ***H.M.R. v. Cabinet for Health and Family Services***

2016-CA-000427 05/19/2017 2017 WL 2200485

Opinion by Judge Jones; Judge Johnson concurred; Judge Thompson concurred in result only.

Father appealed the trial court's amended order terminating his parental rights over Child. The Court of Appeals reversed. On appeal, Father argued that the trial court had erred in finding that he had abandoned Child such that it would constitute abuse and neglect. While he acknowledged that he had not visited with Child since Child had been in foster care, Father blamed this inaction on the failure of the Cabinet for Health and Family Services to establish a case plan for him or to provide him with any clear directives. The Court noted that there were things that Father could have done to be more proactive; however, the Court stated that it was plain from the record that Father had never been given a case plan. The trial court's amended order terminating Father's parental rights over Child made repeated references to Father's failure to work his case plan in undergoing its analysis of abandonment and its best interest analysis. The Court concluded that these analyses could not stand, as there was never a case plan for Father despite his repeated requests for one. In reversing the trial court, the Court emphasized the high esteem in which courts should hold parental relationships and the severity of the involuntary termination of parental rights, stating that utmost caution must be used when doing so. Such caution was not used in this case; as such, the Court reversed.

## XIII. ZONING

### A. ***Herndon v. Wilson***

2014-CA-001381 05/19/2017 2017 WL 2209912

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

Appellants challenged a summary judgment entered in favor of appellees. The parties' dispute dealt with alleged violations of a zoning setback variance by appellees in the construction of a new house on a lot adjacent to appellants' property on Williamstown Lake in Grant County and alleged damages suffered by appellants as a result thereof. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court first agreed with appellees that, as a matter of law, the Grant County Zoning Ordinance at issue did not create a private cause of action for appellants to seek damages through the Zoning Ordinance itself. Therefore, appellants were not entitled to assert any claims for damages directly related to the Zoning Ordinance or the variance. However, the Court further held that appellants had adequately pled a cause of action for nuisance via their assertions that appellees' construction of their home, inside the setback variance, had infringed upon the quiet and peaceful enjoyment of appellants' property and had caused water to run and drain upon the property. The Court concluded that material issues of genuine fact still existed as to the nuisance claim and that summary judgment on this claim was, therefore, inappropriate.