PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

MAY 1, 2019 to MAY 31, 2019

I. ABATEMENT AND REVIVAL

A. ***Currin v. Estate of Benton***

2018-CA-000075 05/03/2019 2019 WL 1968003

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

The Court of Appeals reversed and remanded a judgment involving a dispute over a house located in Boone County. John C. Benton was the owner of a farm spanning between Boone and Kenton counties. Part of the property located in Boone County had a house. Benton deeded the house to the Currins for one dollar and other consideration. However, after some time passed, Benton filed suit against the Currins alleging failure of consideration and fraud in the inducement. Before the case could be heard, Benton passed away. Following Benton's passing, his counsel filed a motion under CR 25.01 to substitute "the Estate of John C. Benton, Jr." as plaintiff to the action. However, the claim was never revived under KRS 395.278. Because of this, the Currins argued to the circuit court that the claim was not properly revived. The circuit court rejected this argument, finding that compliance with CR 25.01 alone was sufficient so long as the motion was made within one year, as required by KRS 395.278. The case proceeded to trial and a jury found that the deed was not intended to be a gift to the Currins and that the Currins had not fulfilled their agreement with Benton. The Court of Appeals reversed and remanded, holding that KRS 395.278 must be complied with in order to successfully revive a case; thus, the circuit court erred in determining that so long as a CR 25.01 motion is made within the one-year statute of limitations prescribed by KRS 395.278, then revival is sufficient. Rather, in order for revival to be successful, both a timely motion under CR 25.01 and a timely application under KRS 395.278 must be filed.

II. ARBITRATION

A. ***Golden Gate National Senior Care, LLC v. Rucker***

2015-CA-001270 05/31/2019 2019 WL 2306944

Opinion by Judge Lambert; Chief Judge Clayton concurred; Judge Dixon concurred in result only.

This appeal was from an order determining that appellants' arbitration agreement was invalid and denying the motion to dismiss or stay appellee's claims. Loraine Brown had been admitted at Golden Living Center in 2008 and again in 2014. Although Brown had signed an arbitration agreement in 2008, upon readmission in 2014 she (through her power of attorney - her daughter, Barbara Rucker) declined to sign. Brown filed suit against the facility in 2014, claiming injuries resulting from the facility's negligence during her stay that year and in violation of the Long-Term Care Residents Rights Act, KRS 216.510, *et. seq*. The facility filed a motion to dismiss or, in the alternative, to stay the lawsuit pending arbitration proceedings. The circuit court denied the motion, concluding that the power of attorney did not authorize the waiver of a right to jury trial; that the act of declining the 2014 arbitration agreement nullified the 2008 agreement; and that the agreement was by its own terms impossible to perform. On appeal, the Court of Appeals affirmed, holding that: (1) the power of attorney did not authorize waiver of a right to jury trial, citing *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), and *Genesis Healthcare, LLC v. Stevens*, 544 S.W.3d 645 (Ky. App. 2017); and (2) the 2014 decision to decline the arbitration agreement superseded the 2008 agreement, citing *Kirby v. Scroggins*, 246 S.W.2d 453 (Ky. 1952). The Court declined to address the issue of impossibility to perform since there was no valid agreement.

III. CHILD CUSTODY AND RESIDENCY

A. ***Kruger v. Hamm***

2018-CA-000553 05/10/2019 2019 WL 2063922

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

After the circuit court awarded appellees/non-parents custodial rights to appellant's/Mother's child, Mother appealed. Mother argued that the circuit court's order was erroneous because: (1) the non-parents were not *de facto* custodians; (2) Mother did not waive her parental rights; (3) Mother was not, and the circuit court did not find her to be, unfit; and (4) the court misapplied judicial estoppel to justify the award of custodial rights to the non-parents. The Court of Appeals found all of Mother's arguments persuasive and vacated the award. The Court first rejected the non-parents' argument that, by participating with them in initiating a non-adversarial custody petition, Mother waived her right to contest the non-parents' standing. The Court next held that no evidence supported the circuit court's finding that the non-parents were *de facto* custodians and that, even assuming the non-parents had standing under Kentucky's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), there was no showing by clear and convincing evidence that Mother was an unfit custodian. Moreover, there was no evidence that Mother had waived her superior custodial rights. The only evidence offered in this regard was Mother's agreement to be represented to the circuit court as a joint petitioner for custody against the child's father on a petition prepared by a lawyer paid by the non-parents. The Court found such evidence lacking and incapable of supporting the claim that Mother had waived her custodial rights. Finally, the Court held that judicial estoppel did not apply. In so doing, it rejected the circuit court's effective finding that Mother's filing of the joint petition was inconsistent with a denial that she intended to waive her superior rights to custody of her child.

IV. CHILD SUPPORT

A. ***Martin v. Cabinet for Health and Family Services***

2017-CA-001940 05/10/2019 2019 WL 2063692 Rehearing Pending

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

Appellant and his then-wife pursued dissolution proceedings in Hardin Family Court and established the parties' monthly support obligation for their three children at $0. Six months after dissolution, appellant's ex-wife assigned to the Cabinet for Health and Family Services her right to - and authorized the Cabinet to collect on her behalf - "all current and/or past-due child support, medical support and spousal support payable to me for the benefit of myself and/or my minor child(ren)." The Cabinet subsequently filed an action in Nelson Circuit Court to pursue the ex-wife's rights, and that court ordered appellant to pay $161.00 per month in child support and $25.00 per month toward an arrearage. The Court of Appeals vacated and remanded. Addressing a preliminary matter of jurisdiction, the Court noted that both the Hardin and Nelson courts had subject matter jurisdiction. The Court then noted that, as the court first exercising particular case jurisdiction in a divorce, custody, and support case, Hardin Family Court maintained a continuing jurisdiction over support provisions that pertained to wholly dependent persons, such as appellant's minor children. However, when the subject action was brought in Nelson Circuit Court, appellant answered the complaint, thereby waiving any objection to particular case jurisdiction. The Court determined that nothing prohibited the separate action in Nelson Circuit Court, even though this approach ran counter to the concept of unified family courts, with their holistic approach to families (the "one-family, one-judge" idea). The Nelson Circuit Court, by proceeding, succeeded the Hardin Family Court in the exercise of particular case jurisdiction. Regarding the substance of the appeal, the Court held that the Nelson Circuit Court erred because it treated the Cabinet complaint as seeking to establish a support obligation under KRS 403.211 and because it failed to give merit to the Hardin Family Court's establishment of the initial support obligation of $0. Rather than applying KRS 403.211, the Nelson Circuit Court should have applied KRS 403.213. The Court also noted that the Cabinet failed to alert the Nelson Circuit Court in its complaint of the Hardin Family Court's initial ruling. Also, the complaint satisfied none of the pleading requirements of FCRPP 9(4). Consequently, because the Nelson Circuit Court applied the wrong statute, and because the Cabinet failed to comply with FCRPP 9(4), the child support order was vacated with instructions to dismiss the case without prejudice.

V. CONTRACTS

A. ***River City Fraternal Order of Police Lodge 614, Inc. v. Louisville/Jefferson County Metropolitan Gov***

2018-CA-000344 05/17/2019 2019 WL 2150347

Opinion by Judge Nickell; Judges Jones and Taylor concurred.

River City Fraternal Order of Police Lodge 614, Inc. (FOP) appealed from an opinion and order denying its motion for summary judgment and dismissing its breach of contract claims against the Louisville/Jefferson County Metropolitan Government (Metro). FOP and Metro had a collective bargaining agreement (CBA) allowing "advisory arbitration" as part of its grievance procedure. When a Metro police officer challenged her dismissal by the Chief of Police, the claim was heard by the Louisville Metro Police Merit Board. A two-day hearing revealed that Metro routinely provided the Chief and Merit Board with the complete disciplinary file of any officer facing charges. This custom contravened the CBA, which limits the age of reprimands and suspensions considered in determining discipline. When Metro upheld the officer's termination, she filed a civil suit focusing solely on whether dismissal was appropriate. Termination was upheld as based on the officer's own admissions and as supported by substantial evidence. Alleging that Metro had violated the CBA by providing the Chief and Merit Board with stale disciplinary data, FOP pursued a separate grievance, as set out in the CBA. Both the Chief and the Board acknowledged awareness of the officer's entire disciplinary file, but they maintained that stale information was not considered in deciding the ultimate penalty. The claim of breach of contract was submitted to "advisory arbitration," a term undefined in the CBA. The advisory arbitrator recommended a two-pronged remedy: (1) Metro should cease providing stale disciplinary information; and (2) Metro should "consider" reducing the officer's termination to a suspension. Metro subsequently ceased providing old information and considered reducing the officer's penalty, but it ultimately determined that termination was essential. Notably, the CBA specified that disciplinary decisions reside with Metro alone. FOP filed a civil suit claiming that the advisory arbitrator's recommended remedy should be followed in full. The circuit court dismissed the suit, finding that Metro had fully complied with the arbitrator's recommendation. Moreover, the appropriateness of termination was already being heard separately by a different division. The Court of Appeals affirmed. In so doing, it defined "advisory arbitration" as "nonbinding arbitration resulting in a recommendation the parties are free to consider but not required to adopt." Applying the CBA according to its terms, the Court held that the arbitrator's suggested resolution was nothing more than a suggestion with which Metro fully complied. It changed its custom and no longer provides an officer's entire file. Metro then considered reducing the officer's termination. However - as was its prerogative - Metro decided that the

egregiousness of her actions demanded termination. FOP could reasonably expect nothing more under the terms of the CBA.

VI. CRIMINAL LAW

A. ***Haley v. Commonwealth***

2018-CA-000312 05/03/2019 2019 WL 1966807

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

Appellant was convicted on one count of murder and one count of first-degree assault and was sentenced to thirty years' imprisonment. He subsequently filed an RCr 11.42 motion to vacate his judgment and sentence, citing ineffective assistance of counsel, and a later supplement to that motion. The circuit court denied the motion, and the Court of Appeals affirmed. Of note, the Court held that: (1) defense counsel's failure to retain a ballistics expert to testify at trial in rebuttal to the Commonwealth's ballistics expert did not prejudice appellant, and thus could not amount to ineffective assistance; (2) defense counsel's failure to present jail records proving that appellant was incarcerated at the time of the previous shooting at the victim's home did not prejudice appellant, and thus could not amount to ineffective assistance; and (3) appellant's claim that he was denied effective assistance of counsel when his counsel failed to effectively cross-examine and impeach the victim with prior inconsistent statements did not relate back to appellant's original, timely-filed motion to vacate sentence and could not be added to the motion outside of the three-year limitations period for RCr 11.42 motions.

B. ***Powers v. Commonwealth***

2018-CA-000153 05/24/2019 2019 WL 2236817

Opinion by Judge Lambert; Judge Acree concurred in result only; Judge Spalding concurred in result by separate opinion.

Appellant challenged his conviction on charges of sodomy and rape. The Court of Appeals affirmed, with two Judges concurring in result only. The opinion held that the circuit court did not abuse its discretion when it refused to permit appellant to introduce evidence of the victim's sexual behavior after the assault pursuant to KRE 412 (Kentucky's rape-shield law) because it did not meet any of the listed exceptions set forth in KRE 412(b)(1). The Court noted that the evidence was not being offered to provide that a person other than appellant was the source of the semen, injury, or other physical evidence; to prove the victim consented; or to provide other direct evidence related to the charged offense. It then held that the offered evidence of the victim's subsequent consensual sexual encounter with her boyfriend did not fall under any of these exceptions and was therefore inadmissible. Next, the Court found no palpable error with respect to appellant's argument that the Commonwealth Attorney engaged in misconduct relating to mentions of appellant's confession, the familial relationship between him and the victim, and video evidence that the victim did not move for 40 minutes. Finally, the Court found no abuse of discretion in the circuit court's decision not to hold a hearing pursuant to *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), to address appellant's allegation of misconduct related to a juror's deliberation. The Court concluded that certain statements made by the juror as to her verdict were reasonable inferences that she could make based on the evidence. In his concurring opinion, Judge Spalding concluded that the sexual behavior evidence was admissible pursuant to KRE 412(b)(1)(C); however, any error in this regard was harmless due to the overwhelming evidence of appellant's guilt. He otherwise agreed with the analysis of the majority opinion.

C. ***Yates v. Commonwealth***

2017-CA-000520 05/31/2019 2019 WL 2307039 Rehearing Pending

Opinion by Judge Acree; Judges Kramer and Taylor concurred.

Appellant was convicted of criminal abuse in the first degree, for which he was sentenced to seven years' imprisonment. On appeal, he argued that the circuit court erred by admitting the *curriculum vitae* of a physician called as an expert witness by the Commonwealth. The Court of Appeals found no error and affirmed. The Court first rejected appellant's relevancy-based objection to admitting the *curriculum vitae*, concluding that it was properly admitted because it set forth the physician's professional background - a necessary component of an expert's qualifications - and shed light on her credibility. The Court also rejected appellant's unpreserved argument that the *curriculum vitae* was needlessly cumulative. The Court held that allowing the evidence was not palpable error because its prejudicial effect did not outweigh its probative value, its admission did not threaten appellant's due process rights, and there was little if any probability that the trial would have had a more favorable outcome for appellant had the evidence not been admitted.

VII. DAMAGES

A. ***Trilogy Healthcare of Fayette I, LLC v. Techau***

2017-CA-001841 05/31/2019 2019 WL 2306943

Opinion by Judge Kramer; Judges Acree and Goodwine concurred.

Trilogy Healthcare of Fayette I, LLC d/b/a The Willows at Hamburg appealed following a jury trial in which Joel and Neil Techau, individually and as co-executors of the estate of Kenneth Techau (their deceased father), were awarded compensatory and punitive damages. The Techaus' suit alleged violations of KRS 216.515 (the Residents' Rights statute) during Kenneth's brief stay at the Willows, as well as causes of action for negligence and punitive damages. The circuit court also awarded attorneys' fees to the Techaus pursuant to KRS 216.515(26). The Court of Appeals affirmed in part, reversed in part, and remanded. The Court first held that the claims under KRS 216.515 did not survive Kenneth's death. Therefore, there was no legal authority for an award of attorneys' fees under KRS 216.515(26). The Court then held that a punitive damages instruction was proper because the record supported the finding of the jury that The Willows acted with gross negligence. Finally, the Court concluded that the punitive damages award was not excessive because: (1) the evidence of the degree of reprehensibility of The Willows was substantial; and (2) the egregious conduct of The Willows, combined with the minimal award of compensatory damages, supported the amount of punitive damages imposed by the jury.

VIII. EMPLOYMENT

A. ***University of Louisville v. Britt***

2016-CA-001036 05/03/2019 2019 WL 1969511 Rehearing Pending

Opinion by Special Judge Henry; Judges Maze and Nickell concurred.

Appellee, a former professor at the University of Louisville, brought a breach of contract claim following her termination. At issue was whether the circuit court erred in denying the University's motion for summary judgment predicated upon its alleged entitlement to the protection of sovereign immunity on the breach of contract claim. The Court of Appeals reversed, holding that the contract at issue was an implied contract that did not fall within the waiver of sovereign immunity set out in the Kentucky Model Procurement Act, KRS 45A.245. The Court concluded that appellee's recommendation and re-appointment letters from a University dean and provost could not be construed to be a written contract within the context of KRS 45A.245 and that, even if they could, they did not waive the university's sovereign immunity defense because they did not constitute a contract conferring entitlement to tenure, the only contract matter at issue.

IX. FAMILY LAW

A. ***Ford v. Ford***

2017-CA-001491 05/10/2019 2019 WL 2063696

Opinion by Judge Jones; Judges Kramer and K. Thompson concurred.

The Court of Appeals affirmed several orders in connection with the dissolution of the marriage between Paula and John Ford. The parties participated in mediation in order to divide their residential and commercial real property; however, neither party requested that the assets be formally appraised. As part of the mediated agreement, the parties agreed that Paula would receive the "Steamboat Property" in its entirety, and in exchange for her interest in a commercial property, "Southgate Plaza," Paula would receive a lump sum payment of $135,000. The circuit court adopted this mediated agreement, but shortly after the divorce was finalized, Paula sought to vacate the order as unconscionable because she did not believe that she received her equitable interest in Southgate Plaza. The circuit court denied Paula's motion to vacate. On appeal, Paula argued that the circuit court erred in denying her CR 59.05 motion. The Court noted, though, that orders denying CR 59.05 relief are interlocutory and, therefore, non-appealable. Second, Paula argued that the circuit court erred in concluding that the settlement agreement was not unconscionable as its findings regarding the value of the marital property assigned to each party were not supported by substantial evidence. She contended that the circuit court relied exclusively on John's statements in his response. The Court rejected this argument, noting that the record did not support this contention. The Court also noted that the circuit court conducted a hearing to rule on the issue on unconscionability, but video of the hearing was not included in the record. Under these circumstances, the Court assumed that the circuit court's decision was supported by the record. Finally, the Court rejected Paula's argument that the circuit court's analysis of whether the agreement was unconscionable was erroneous in that it considered her non-marital property, without acknowledging that John likewise retained significant non-marital property. Both parties had substantial marital and non-marital assets, and in the final order, Paula received approximately 53% of the parties' marital estate. The possibility of a mere discrepancy in the amounts received by each party under the settlement was not enough to render the agreement unconscionable.

B. ***Wattenberger v. Wattenberger***

2016-CA-001899 05/03/2019 2019 WL 1966811

Opinion by Judge Lambert; Judge K. Thompson concurred; Judge Jones concurred in result only.

Husband appealed from an order dividing the marital property, assigning debt, and awarding maintenance in the dissolution of his marriage. The parties were married for over 30 years, and their two children were adults. Wife petitioned for dissolution and requested division of the parties' assets, maintenance, and that Husband be held responsible for their son's student loan debt. The circuit court granted Wife maintenance, assigned the student loan debt to Husband, and ordered the marital residence sold, with Wife receiving 65% of the proceeds. The Court of Appeals vacated and remanded, holding that: (1) the circuit court made no findings regarding the threshold requirements for maintenance (KRS 403.200(1)); (2) the record lacked an appraisal for the marital home and the reason for the 65/35 split of the sale proceeds; and (3) the record lacked findings regarding the division of other assets and assignation of the student loan debt. The circuit court was ordered to make further findings on remand.

X. IMMUNITY

A. ***Energy and Environment Cabinet, Department for Natural Resources v. Harmon***

2016-CA-001192 05/10/2019 2019 WL 2063702

Opinion by Judge Acree; Judges Maze and Nickell concurred.

The Kentucky Board of Claims dismissed appellees' tort claims against the Energy and Environment Cabinet, Department of Natural Resources (the Cabinet), as barred by the one-year limitations period for claims based on the waiver of immunity found in the Board of Claims Act, KRS 44.110. Although the claims were filed within the ninety-day window of Kentucky's "savings statute," KRS 413.270, they were filed outside the one-year limitations period set forth in the Act. The Pike Circuit Court reversed the Board's decision, finding that appellees' claims were properly before the Board pursuant to KRS 413.270, and remanded the case to the Board for appropriate proceedings. The Court of Appeals reversed the circuit court and reinstated the Board's order dismissing. The Court held that the legislature's limited waiver of immunity embodied in KRS 44.110 requires claims against the state to be filed within one year from accrual, regardless of the forum chosen. If the claim is filed in the wrong forum but in due time to claim the limited waiver of immunity contained in the Act, the period of waiver is suspended in accordance with KRS 413.270. Conversely, a claim filed in any forum against the Commonwealth or its agencies claiming immunity more than a year after the claim accrues falls outside the limited waiver of immunity, is untimely under KRS 44.110, and must be dismissed.

XI. INSURANCE

A. ***Watson v. United States Liability Insurance Company***

2018-CA-000475 05/24/2019 2019 WL 2236428

Opinion by Judge Kramer; Judges Jones and K. Thompson concurred.

Appellant filed a dram-shop action against various defendants in 2009, approximately one year after he was severely injured in an automobile accident. He settled with one defendant, Pure Country, LLC, in 2012. In August 2017, as his suit continued against other named defendants, appellant amended his complaint to assert a third-party bad faith claim against appellee United States Liability Insurance Company (USLI), Pure Country's insurer. In his tendered amended complaint, appellant alleged that during the on-going dram shop litigation - before his claims against Pure Country ultimately settled - USLI had acted in violation of the Unfair Claims Settlement Practices Act (UCSPA), KRS 304.12-230. USLI moved to dismiss the UCSPA claim on limitations grounds. Citing the five-year limitations period applicable to bad faith claims, it argued that appellant's claim had accrued no later than June 30, 2012, when appellant and Pure Country had "settled in principle" because Pure Country had emailed a negotiated settlement agreement to appellant. Appellant, on the other hand, argued that his bad faith claim had not accrued until December 2012, when he ultimately executed the settlement agreement and was paid the settlement amount. The circuit court granted USLI's motion. Reversing, the Court of Appeals explained that third-party bad faith claims against insurers asserted under the purview of the UCSPA cannot be maintained, and thus cannot accrue, until after: (1) a judgment fixing liability against the insured has been entered; or (2) the insured becomes legally obligated to pay pursuant to terms of the insurance contract. Accordingly, appellant's third-party bad faith claim against USLI accrued in December 2012, when he accepted Pure Country's offer of settlement by executing the settlement agreement and USLI then paid him the consideration, thereby forming a binding contract - a legal obligation. Because appellant asserted his third-party bad faith claim against USLI in August 2017, his claim was within the allotted five-year limitations period and was therefore timely.

XII. JUVENILES

A. ***L.H. v. Commonwealth***

2016-CA-001551 05/17/2019 2019 WL 2147517

Opinion by Judge Acree; Judge Jones and Special Judge Henry concurred.

After granting discretionary review, the Court of Appeals interpreted KRS 635.060(4)(a)(1) as authorizing commitment to the Department of Juvenile Justice upon a finding that a juvenile has three prior adjudications. The Court rejected appellant's definition of "adjudication" as including the disposition hearing relative to each adjudication, noting that the statute's plain language does not require adjudications *and* dispositions. The Court also held that nothing in the juvenile code supported appellant's argument that multiple adjudications "merge" into one when the juvenile court conducts one disposition hearing to resolve all prior adjudications. Finally, the Court concluded that appellant's guilty plea did not violate the requirements of *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

XIII. NEGLIGENCE

A. ***Dexter v. Hanks***

2018-CA-000362 05/10/2019 2019 WL 2063925

Opinion by Judge Jones; Judges Goodwine and Nickell concurred.

In this premises liability case, appellant was working on appellee's roof when he slipped and fell, suffering two broken ankles. Summary judgment was granted in favor of appellee after the circuit court concluded that there was no breach of duty and after finding appellant to be an independent contractor. In affirming, the Court of Appeals relied primarily upon *Auslander Properties, LLC v. Nalley*, 558 S.W.3d 457 (Ky. 2018) and addressed the standard of care owed to independent contractors, as opposed to the more lenient standard for ordinary business invitees. A landowner owes ordinary business invites a duty to discover unreasonably dangerous conditions on the land and either eliminate or warn of them. However, a landowner only owes an independent contractor a duty to warn of hidden or latent defects that the landowner has actual knowledge of and that the contractor does not or cannot discover. As the circuit court did not err in finding appellant to be an independent contractor, no duty was breached when appellee did not warn him about the dangers of being on the roof. Appellant had superior knowledge of the condition of the roof, having been on it several times before, and the inherent dangers of working on a roof are readily apparent.

B. ***Ford v. Reiss***

2017-CA-001656 05/03/2019 2019 WL 1967657 Rehearing Pending

Opinion by Judge Lambert; Judges Maze and Taylor concurred.

A patient filed a medical negligence claim against a hospital, asserting that the treating physician negligently failed to diagnose and address a rare neurosurgical emergency, allegedly resulting in permanent injuries to the patient. Following a jury trial and defense verdict, the circuit court entered judgment in favor of the hospital. The Court of Appeals affirmed. Of note, the Court considered and rejected appellant's argument that the circuit court erroneously failed to strike three jurors for cause, forcing her to use peremptory strikes to eliminate them from the jury pool. The Court noted that the argument was not properly preserved for review because the patient's juror strike sheet failed to identify the jurors whom she would have struck. The Court also held that testimony referring to the patient as "sophisticated" because she was an obstetrician/gynecologist was admissible, despite her argument that this was a backdoor approach to place blame on her after the circuit court had already granted summary judgment as to comparative fault. The Court concluded that this argument lacked merit because it was conclusory and unsupported by legal authority. Finally, the Court held that the patient had waived her argument that the circuit court erred in permitting the hospital to advise the jury panel during *voir dire* that she bore the burden of proof and to describe that burden.

C. ***Kentucky Guardianship Administrators, LLC v. Baptist Healthcare System, Inc.***

2017-CA-000665 05/03/2019 2019 WL 1967122

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

The conservator of a patient brought an action against a hospital and doctor alleging that a failure to properly administer potassium, combined with the patient's consumption of QT-prolonging medications, resulted in cardiac arrhythmia and cardiac arrest. Following a jury trial, the circuit court entered judgment in favor of the hospital. The Court of Appeals affirmed as to all three appeals brought by the parties. Of note, the Court held that: (1) there was no error in limiting the testimony of the patient's medical expert, a pharmacist, to areas within his expertise; (2) the hospital's incident report was properly excluded pursuant to *Pauly v. Chang*, 498 S.W.3d 394 (Ky. App. 2015); (3) there was no error in limiting questioning regarding an unauthenticated and unexplained medical "audit trail"; (4) any cross-examination of a nurse regarding rehearsal of her testimony was inadmissible under the attorney-client privilege; (5) any error in allowing the doctor to testify that he would have treated his daughter the same way that he treated the patient was harmless; (6) the record did not indicate that the hospital was guilty of independent negligence; thus, no jury instruction regarding such was required; and (7) any issues regarding proximate cause and ostensible agency were for the jury.

D. ***Saufley v. Reed***

2017-CA-000050 05/03/2019 2019 WL 1968008

Opinion by Judge Taylor; Judges Jones and Maze concurred.

Cattle farmers brought an action against a neighboring property owner for negligence, stemming from an incident in which the farmers' cattle allegedly died from consuming yew bushes growing on the owner's property that had extended across the fence line onto the farmers' property. The circuit court granted the property owner's motion for summary judgment, and the Court of Appeals affirmed. The Court held that the property owner owed no legal duty to the cattle farmers as concerned the poisonous yew bushes growing on his property. The Court concluded that the circuit court properly applied the "Massachusetts Rule," which sets forth that landowners are limited to using only self-help when vegetation from a neighbor's property grows across boundary lines - *i.e.*, trimming the vegetation back to the boundary line. The Court noted that there was no dispute that the farmers failed to trim the branches of the bushes back to the property line; moreover, there was no indication that they had even raised any concern about the bushes.

XIV. OPEN RECORDS

A. ***Cabinet for Economic Development v. Courier-Journal, Inc.***

2018-CA-001131 05/17/2019 2019 WL 2147510

Opinion by Judge Kramer; Judges Jones and Maze concurred.

This open records case arose from an announcement that Braidy Industries, Inc. would build a $1.3 billion aluminum plant in Greenup County. A day after the announcement, the Kentucky Economic Development Finance Authority (KEDFA) authorized the transfer of $15 million in bond funds to the Kentucky Economic Development Partnership (KEDP). On the same date, KEDP authorized a $15 million capital contribution into Commonwealth Seed Capital, LLC (CSC). The contribution came with the requirement that it be used to facilitate an investment in Kentucky of at least $1 billion. CSC approved the investment of the $15 million to purchase direct equity in Braidy, which resulted in the issuance of stock in Braidy to CSC. This investment resulted in CSC's 20% ownership of Braidy. Thus, $15 million in public funds were used to purchase a 20% ownership stake in a private company. Thereafter, a reporter for the Courier-Journal submitted an Open Records Act request to the Cabinet asking for copies of all documents that the Cabinet had received showing the names of stockholders/investors in Braidy. In response, the Cabinet produced two KEDFA board reports, which identified entrepreneur Craig T. Bouchard and CSC as possessing a "20% or more" ownership in Braidy. The Cabinet refused to produce anything more, however, asserting that the identities of other stockholders or investors in Braidy were exempt from the Act. The Attorney General and Franklin Circuit Court subsequently determined that the Cabinet had violated the Act by refusing to release the documentation in its possession identifying Braidy's shareholders' names, and the Cabinet was directed to produce any documentation responsive to the Courier-Journal's request for *in camera* review. On appeal, the Court of Appeals likewise held that the various statutory exceptions to the Act relied upon by the Cabinet did not apply under the circumstances presented. Disclosure of documentation indicating only Braidy's shareholders' names, the Court explained, would not result in an unwarranted invasion of personal privacy. Shareholder names are not generally regarded as confidential or proprietary, nor was there any showing that public disclosure of Braidy's shareholder names would permit competitors an unfair commercial advantage over Braidy or its investors. Braidy's shareholders' names also did not retain a "preliminary character" under KRS 61.878(1)(i) or (j) because the Cabinet had relied upon the identities of Braidy's investors as part of the basis for its own investment decision and final agency action. Moreover, to the extent that any documentation in the Cabinet's possession included exempt confidential or proprietary information aside from Braidy's shareholders' names, such information could be properly redacted.

B. ***Kernel Press, Inc. v. University of Kentucky***

2017-CA-000394 05/17/2019 2019 WL 2147514

Opinion by Judge K. Thompson; Judge L. Thompson concurred; Judge Taylor dissented without separate opinion.

The Kernel Press appealed an order ruling that documents included in a Title IX investigation file requested from the University of Kentucky under the Open Records Act were exempt from disclosure under the Family Educational Rights and Privacy Act (FERPA) because they could not be reasonably redacted to protect the privacy of the students identified. The file regarded student allegations of sexual harassment against a UK professor. The Court of Appeals concluded that FERPA precluded UK from releasing to the Kernel unredacted education records contained in the file, but this alone was not determinative of the case. The Court emphasized that not all records maintained by a university are "education records." Rather, the records must be directly related to a student. The file at issue here contained information such as a camera user manual, university policies, and scheduling notes that were not education records covered by FERPA because they did not implicate privacy interests. The Court also concluded that even those records in the investigation file that directly related to a student were not prohibited from disclosure by FERPA if properly redacted. Noting that the Open Records Act required UK to respond to an open records request with specificity and that it had the responsibility to redact exempt material and release the remaining materials, the Court held that UK's blanket claim that all materials in the file were exempt was an insufficient response. Additionally, UK's "index" filed in the circuit court was insufficient to meet its burden of showing that all records in the file were exempt, and UK had made no attempt to separate exempt from non-exempt records, redact personally-identifying information, or provide sufficient evidence that the records were exempt. Moreover, UK had made no showing that records could not be redacted to eliminate student-identifying information. The Court further held that UK violated the Act when it refused to release any requested records to the AG for *in camera* inspection. Although FERPA precludes even the AG's *in camera* review of unredacted education records, the Court held that it did not preclude inspection of redacted records or those records that are not education records. Accordingly, the Court remanded the case with directions that UK comply with the Open Records Act.

XV. TRIALS

A. ***Louisville SW Hotel, LLC v. Lindsey***

2017-CA-000856 05/17/2019 2019 WL 2147355

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

This action was filed after a minor drowned in a hotel swimming pool. The child's Estate alleged that the pool was overcrowded and so abysmally cloudy that the child's body could not be seen in time to be resuscitated. A jury apportioned 65% fault to the child's mother and 35% to the hotel. It awarded $205,579.25 in medical expenses and $6,191 in funeral expenses. The jury awarded zero damages for the child's power to labor and earn money, for his physical pain and suffering, and for loss of consortium, but it awarded $3 million in punitive damages against the hotel. The Court of Appeals affirmed as to the hotel's appeal but reversed and remanded as to the cross-appeal filed by the Estate and the child's parents. Of note, the Court held that the circuit court did not err when it permitted the Estate to introduce health department reports concluding that the hotel had previously violated pool water testing and logging procedures where the Estate alleged that the same misconduct occurred on the date of the drowning. The Court noted that the reports were relevant to the hotel's knowledge of the need for, and importance of, testing the pool water and keeping required logs. Any issue as to the remoteness of the reports went to the weight to be given to them by the jury. The Court also held that financial records of the hotel from the few months prior to the drowning were admissible to show a need for increased staffing. The Court further concluded that the circuit court did not err in refusing to instruct the jury that the child was a trespasser when he drowned. Although neither he nor his mother was a registered guest when he drowned, he was the guest of a registered guest and it could be reasonably anticipated by the hotel that the child would use the pool. As to damages, the Court held that: (1) there was sufficient evidence to support an award of punitive damages; (2) the award of zero damages for loss of power to labor and earn wages required a new trial because there was an inference that the child would have had some power to earn money; (3) the award of zero damages for the child's pain and suffering also required a new trial because there was expert testimony that drowning victims suffer physical pain, as well as evidence that the child was conscious while struggling to stay afloat; and (4) a new trial was required on the issue of the parents' loss of consortium claim. The Court held that once a parent-child relationship is established, there is an inference that the relationship has intrinsic value and some amount of damages must be awarded.