PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

MAY 1, 2020 to MAY 31, 2020

I. APPEALS

A. ***Howard v. Froman***

2017-CA-000192 05/01/2020 2020 WL 2097343

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

Howard brought this cross-appeal from an order interpreting certain provisions of a last will and testament regarding an $18,000 bequest. The Court of Appeals dismissed for failure to name indispensable parties - specifically, three individuals who also had an interest in the bequest.

B. ***T.S. v. Commonwealth***

2019-CA-000578 05/08/2020 2020 WL 2306584

Opinion and order denying reinstatement by Judge L. Thompson; Chief Judge Clayton concurred; Judge K. Thompson concurred in result only and filed a separate opinion.

Appellant sought reinstatement of two dependency, neglect, and abuse (DNA) appeals that were dismissed due to a failure to name an indispensable party. The notices of appeal named the "Commonwealth of Kentucky" - not the "Cabinet for Health and Family Services" - as the appellee even though the Cabinet filed the underlying DNA actions. The Court of Appeals denied the motion, noting that the Cabinet was an indispensable party pursuant to *Commonwealth, Cabinet for Health and Family Services v. Byer*, 173 S.W.3d 247, 249 (Ky. App. 2005), and that the Cabinet was not named in either the body or the captions of the notices as required to bring them within the Court's jurisdiction. *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990). The Court further held that appellant had presented no authority or argument for extending belated or reinstated appeal procedures to civil cases. In his concurring opinion, Judge K. Thompson asked for a definite statement of the

law either by this Court or our Supreme Court on whether naming the Commonwealth of Kentucky in the notice of appeal is sufficient to include the Cabinet as a party in a DNA or termination of parental rights case. He opined that naming the Commonwealth is the functional equivalent of naming the Cabinet because the Cabinet is merely the agency through which the Commonwealth acts. Here, it was obvious that appellant appealed from orders finding she abused or neglected her grandchildren and, therefore, there could be no rational argument that the Cabinet did not have notice of the appeals. Moreover, there was "no rational purpose" for requiring that the words "Cabinet for Health and Family Services" follow "Commonwealth of Kentucky" in the notices of appeal.

II. ARBITRATION

A. ***Legacy Consulting Group, LLC v. Gutzman***

2018-CA-001580 05/29/2020 2020 WL 2781708

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

This was an interlocutory appeal from an order denying a motion to compel arbitration in an action by an estate related to the sale of an annuity product to the decedent. The question in this case was whether the product purchased was an insurance product, which would be subject to the McCarran-Ferguson Act and therefore not subject to the arbitration clause the application contained, or whether it was a security product. KRS 417.050 exempts an arbitration clause from applying to insurance contracts. The Court of Appeals agreed with the estate that the product was a fixed annuity, and therefore an insurance product, based upon the 2015 income option election form, which provided that the decedent would receive monthly payments in the same amount from the "Fixed Account" portfolio. Therefore, the Court affirmed the circuit court's order denying the motion to compel arbitration.

III. COURTS

A. ***Armstrong v. Estate of Elmore***

2019-CA-001084 05/15/2020 2020 WL 2502205 Rehearing Pending

Opinion by Special Judge Buckingham; Judges Combs and Jones concurred.

This case arose out of an automobile accident in 2014 in which two individuals died. The case was previously the subject of an opinion by the Supreme Court of Kentucky wherein issues concerning the ownership of a vehicle were determined. *Travelers Indemnity Company v. Armstrong*, 565 S.W.3d 550 (Ky. 2018). After appellant filed wrongful death claims in the Warren Circuit Court, the main issues quickly became who was the statutory owner of the vehicle at fault and whose insurance was potentially responsible for damages resulting from the accident. The Supreme Court concluded in *Travelers* that "Elmore [the driver of the vehicle] was the statutory 'owner' of the vehicle, even though title was still in Martin [Cadillac's] name." Martin Cadillac was the licensed motor vehicle dealer that originally owned the vehicle. Martin subsequently sold the vehicle to DeWalt Auto Sales through an auction, and DeWalt took possession of it. DeWalt then sold the vehicle to Elmore for cash. On remand from the Supreme Court, appellant attempted to argue that DeWalt owned the vehicle; however, the circuit court determined that the law-of-the-case doctrine barred re-litigation of the issue because the Supreme Court had determined that Elmore was the statutory owner of the vehicle. The Court of Appeals agreed that the law-of-the-case doctrine applied and affirmed. The Court noted that the Supreme Court's belief that Elmore was the statutory owner of the vehicle was not essential to its determination in *Travelers*; it was essential to the Supreme Court's ruling to determine only that Martin Cadillac was not the owner. Nevertheless, because the Supreme Court made that determination, the Court of Appeals concluded that it was bound by it.

IV. CRIMINAL LAW

A. ***Farmer v. Commonwealth***

2017-CA-000226 05/15/2020 2020 WL 2503492

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

Appellant was convicted of second-degree assault. On appeal, appellant argued, and the Commonwealth conceded, that there was insufficient proof to support the conviction. The Court of Appeals agreed and reversed the conviction. Appellant was prosecuted for assault under KRS 508.020(1)(b); to be convicted, the Commonwealth had to prove that the victim had sustained a physical injury through the use of a deadly weapon or dangerous instrument. The Commonwealth asserted at trial that appellant's fist was a dangerous instrument. However, in order for a fist to be considered a dangerous instrument, it must directly cause a serious physical injury pursuant to KRS 500.080(3). That a fist is capable of doing so is not enough. The Commonwealth did not introduce any evidence or medical proof to establish that the victim had sustained a serious physical injury and argued that she had only sustained a physical injury. Because there was not sufficient evidence to support the charge, appellant was entitled to a directed verdict of acquittal. In addition, the circuit court did not properly instruct the jury on this charge based upon an incorrect interpretation of KRS 500.080(3). Finally, the Court held that appellant was not subject to retrial on this charge based upon double jeopardy.

B. ***Young v. Commonwealth***

2018-CA-001415 05/22/2020 2020 WL 2601597

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

Appellant was convicted of second-degree assault and being a persistent felony offender. On appeal, he argued that the circuit court erred in denying his motion to continue, in denying his motion to strike a juror for cause, in denying his request for a missing evidence instruction, and in allowing the videotaped testimony of the late complaining witness. The Court of Appeals affirmed, holding that, as to all issues except the juror issue, appellant failed to meet his burden of proving that the circuit court abused its discretion. The juror issue was held to be not preserved for appellate review.

V. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. ***Lee v. King***

2019-CA-001174 04/24/2020 2020 WL 1970579 DR Pending

Opinion by Judge Lambert; Special Judge Buckingham and Judge Combs concurred.

Appellant challenged a domestic violence order. The Court of Appeals affirmed. The Court first rejected appellant's argument that the family court lost jurisdiction pursuant to KRS 403.735(2)(a) when it rescheduled the EPO hearing one day past the 14-day period, holding that appellant had waived the issue of particular-case jurisdiction by not raising the issue earlier in the proceeding and because he was present when the hearing was rescheduled. The Court also rejected his arguments that the family court judge should have recused and that there was insufficient evidence to support entry of the DVO. The Court specifically relied on other federal and state cases describing the cycle of violence in domestic violence situations. Appellant's original assault on appellee and the pattern of harassing conduct he used in his attempt to control and manipulate appellee supported entry of the DVO.

VI. EMINENT DOMAIN

A. ***Allard v. Big Rivers Electric Corporation***

2019-CA-000486 05/15/2020 2020 WL 2503487

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

This was an interlocutory appeal in a condemnation action from an order permitting Big Rivers to take possession of property owned by Allard for the construction of transmission lines. Big Rivers had purchased an easement from Allard, and it sought to modify the route of the easement so that the construction would not go through a cemetery on another property owner's land. Allard did not agree to this because the new route would cause the loss of a 300-year-old oak tree, and he suggested another alternate route. Big Rivers petitioned the circuit court to condemn the property included in its version of the modified route, which the circuit court granted in the interlocutory judgment. On appeal, the Court of Appeals rejected Allard's argument that he was entitled to an evidentiary hearing on the motion for an intermediate interlocutory judgment in addition to the hearing that was held. The Court also held that Big Rivers had not acted arbitrarily in petitioning the circuit court to condemn the modified easement; that Big Rivers, as the condemning body, has broad discretion in exercising its eminent domain authority; that it was not within Allard's power to dictate the route the transmission line should take; and that Big Rivers had negotiated with Allard in good faith.

VII. FAMILY LAW

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

2019-CA-000746 04/17/2020 2020 WL 1898378 Rehearing Pending

Opinion by Judge Goodwine; Judges Dixon and Taylor concurred.

Grandparents and Father separately appealed a family court order denying Grandparents' motion to be considered for placement of their grandchild, M.M. The parties contended that the family court erred by: (1) failing to place M.M. in their custody after an Interstate Compact on the Placement of Children (ICPC) approved home study; (2) failing to comply with KRS 620.090 and 922 KAR 1:140; and (3) failing to apply the best interest standard. The Court of Appeals affirmed. Grandparents first argued that an ICPC approved home is absolute grounds to house a child. However, the Court held that being an approved household is far from an absolute. The ICPC merely gives the "sending agency's state" more viable options for placement. Nowhere in the statute does the ICPC mandate the family court, or the Cabinet, to send a child to an ICPC approved home. As to the second argument, the Court reiterated that while the Cabinet must consider relative placement over other options, it is not required to choose relative placement over other options. The evidence here supported the decision not to place M.M. with Grandparents. Finally, the Court concluded that the family court properly considered the factors in KRS 620.023 in determining the child's best interest.

B. ***T.C. v. M.E.***

2019-CA-000431 05/01/2020 2020 WL 2092019

Opinion by Judge Acree; Judges Caldwell and Lambert concurred.

On discretionary review, the Court of Appeals reversed a district court order finding abuse. Father (T.C.) and Mother (M.E.) divorced but were awarded joint custody of their young Son with Mother as the primary residential parent. While Son was visiting Father, he injured his arm as the two were playing just before the return trip to Mother. Father examined Son's arm and saw no obvious trauma but calmed him and gave him Children's Tylenol. When Father and Son met up with Mother, Father informed her of the injury and asked her if they should take Son to the emergency room. Mother declined and said she would give Son ibuprofen and arrange a doctor visit the next day. A week later, Mother petitioned the Whitley District Court for an emergency protective order (EPO) claiming Son's injury was caused by Father's physical abuse. The court denied the EPO but referred the petition to the Cabinet for Health and Family Services. The court also used the order denying Mother's petition to initiate a separate dependency, neglect, and abuse (DNA) action, contrary to KRS 620.070(1) which allows only interested parties to initiate such actions. Two weeks later, the court conducted a temporary removal hearing; Father had yet to be served with any pleading or order in any case and did not appear. Mother's counsel falsely represented that, "we filed a motion to halt visitation," in the divorce case in circuit court. The court entered an order that Mother cooperate with the Cabinet, including that she not allow any contact between Son and Father. Father was never served with that order and attempted to contact Son over the Christmas holidays. Mother filed a second petition for an EPO falsely alleging the Cabinet had investigated and concluded Father had broken and dislocated Son's arm. A different division of the district court granted the EPO, serving the order on Father, and ordered the case to be heard in the other division where the DNA case was pending. The two cases were to be heard together three months later during the removal hearing. At that hearing the Cabinet reported it had found no substantiation for abuse by Father. When the Cabinet told the district court it was not opening a case, the court violated separation of powers and usurped the Cabinet's executive function by ordering the Cabinet to open a case and to case plan with the parties. The court awarded sole custody to Mother and ordered a battery of requirements from drug testing to anger management to be met by Father and Mother. No evidence had been presented at any hearing to this point and Father, acting *pro se*, asked the basis for the order; the court said, "the EPO is the basis," and ended the hearing. An adjudication hearing was scheduled for a month later. Father was represented by counsel. Without any proof being offered by Mother or the Cabinet, the

court said, “I’m finding abuse. Any questions anybody?” At this point, Father’s counsel asked that Father be put under oath to testify as to how Son was injured. This testimony is the only evidence in the record and it failed to support anything other than an innocent accident that happened while Father and Son were playing. Nevertheless, the court did not change its finding of abuse. For reasons that should be obvious from this summary, the Court of Appeals reversed the order. Primarily, the basis of the Court’s decision is that no evidence, substantial or otherwise, supported a finding of abuse.

VIII. IMMUNITY

A. ***Franklin-Simpson County Board of Zoning Adjustment v. Drakes Creek Holding Co., LLC***

2017-CA-001655 05/08/2020 2020 WL 2297004

Opinion by Judge Acree; Judges Dixon and Maze concurred.

The Franklin-Simpson County Board of Zoning Adjustment (the Board) appealed an order denying summary judgment and denying a grant of governmental immunity in favor of Drakes Creek Holding Co., LLC. The Court of Appeals reversed and remanded with instructions to dismiss Drakes Creek's detrimental reliance and tortious interference claims against the Board. The Court concluded that the Board was an agent of Simpson County and was performing an integral state function; therefore, it was entitled to governmental immunity. The Court further held that governmental immunity was no bar to Drakes Creek's claim of inverse or reverse condemnation. However, the Court concluded that Drakes Creek could not establish a "taking" under the facts presented. Therefore, dismissal of that claim was appropriate.

B. ***Saunier v. Lexington Center Corporation***

2018-CA-001290 04/17/2020 2020 WL 2781709

Opinion by Judge Lambert; Judge Dixon concurred in result only; Judge Jones concurred in part and filed a separate opinion.

This was an appeal from a personal injury action in which appellant Mark Saunier claimed to have been injured when he tripped over an electrical cable protector and fell at Rupp Arena while attending a University of Kentucky basketball game. The Court of Appeals affirmed. First, the Court held that the circuit court properly held that UK was immune from suit. The concurring opinion discussed whether the agency (UK) was performing an essential governmental function, as opposed to a proprietary function, citing to *Schwindel v. Meade County*, 113 S.W.3d 159 (Ky. 2003), and the Supreme Court's discussion of a public school interscholastic softball tournament and whether that converted a board of education's function from governmental to proprietary. Second, the Court rejected appellants' evidentiary arguments, including the decisions to permit the lease between the Lexington Center Corporation and UK to be admitted, to permit witnesses to testify about their interpretation of the lease, and to not define "institutional control" but permit the lay witnesses to do so. The Court also held that appellants' argument relating to including a duty or apportionment instruction as to the UK fire marshals on duty at the time of the fall was moot because the jury never reached that instruction. Finally, the Court found no error in the summary judgment dismissing appellants' business and economic loss claim based upon the jury's defense verdict and because a letter of intent to purchase the Sauniers' company was not a contract for sale but was merely a proposal.

C. ***Wallace v. Martin***

2018-CA-001260 05/29/2020 2020 WL 2781710

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

Appellant, who was fired from his job as a school bus driver following a disciplinary incident with a child but was subsequently acquitted of a fourth-degree assault charge resulting from the incident, sued Officer Ben Martin and the school superintendent for malicious prosecution, abuse of process, and defamation. Martin was responsible for the criminal complaint against appellant. The circuit court granted Martin's motion for summary judgment on grounds of qualified immunity, and this appeal followed. The Court of Appeals reversed, rejecting the finding of immunity. The Court noted that qualified immunity is not a blanket shield for all tort claims, but only generally protects negligent acts. It then held that Martin was not entitled to qualified immunity as to appellant's claim of malicious prosecution pursuant to *Martin v. O'Daniel*, 507 S.W.3d 1 (Ky. 2016). In *Martin*, the Supreme Court reasoned that one who acts with malice is not entitled to immunity, for if one has no malice, one needs no immunity, since proof of malice is a necessary element to prevail on a claim of malicious prosecution. In an issue of first impression, the Court of Appeals then determined the same reasoning of *Martin* equally applies to claims of defamation *per se*. To be entitled to qualified immunity, one must act in good faith. Since liability for defamation *per se* turns on the necessity of proof of malice, acting with malice and acting in good faith are mutually exclusive. Thus, if Martin acted in good faith, he could not have defamed appellant and there would be no need for immunity. Consequently, the circuit court erred in granting summary judgment to Martin on appellant's defamation claim based on qualified immunity.

IX. INSURANCE

A. ***Marshall v. Kentucky Farm Bureau Mutual Insurance Company***

2019-CA-001059 05/22/2020 2020 WL 2601372

Opinion by Special Judge Buckingham; Judges Combs and Jones concurred.

Appellant's husband was killed in an ATV accident. She filed a wrongful death suit seeking damages against the driver of the ATV. At the time of the accident, the driver was insured under a homeowner's insurance policy issued by Kentucky Farm Bureau that covered his residence. The Farm Bureau policy specifically excluded coverage for the use of "motorized land conveyances," which included ATVs. However, one of the exceptions to the exclusion from coverage was for a vehicle or conveyance not subject to motor vehicle registration which is "used to service an insured's residence[.]" The circuit court concluded that homeowner's coverage did not apply to the ATV, and the Court of Appeals affirmed. The Court first held that the word "service" as used in the exception was not ambiguous. It then agreed with the circuit court's conclusion that the ATV was never used to service the driver's residence. The driver testified that he never used the vehicle, either before or after the accident, to perform yard work or other tasks for his residence. He testified that he used it to give rides to children around the neighborhood, to hunt, and in connection with his landscaping business on one occasion. In light of this evidence, summary judgment in favor of Farm Bureau was appropriate.

B. ***Nichols v. Zurich American Insurance Company***

2019-CA-000071 05/29/2020 2020 WL 2781705

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

Appellant challenged orders granting summary judgment in favor of Zurich American Insurance Company on appellant's insurance bad faith claims. The Court of Appeals affirmed. Appellant argued he lacked certain critical evidence in responding to Zurich's motion for summary judgment. He sought Zurich's post-litigation claim file and communications. The circuit court compelled production of post-litigation conduct and communications concerning settlement offers and negotiations. Appellant claimed the court's refusal to compel all post-litigation conduct and communications was contrary to *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006). However, *Knotts* held an insurer's post-filing claims conduct is generally inadmissible. This does not entirely prohibit trial courts from allowing discovery or admission of such evidence but, instead, requires courts to weigh its relevance against the prejudice to the insurer. Appellant also sought Zurich's underwriting file. However, his assertion that the underwriting file could have been used to establish elements of his bad faith claim ignored the evidence in the record. Zurich had a reasonable basis in law or fact for denying appellant's claim based on policy language. Since nothing in the underwriting file negated the reasonable basis for Zurich denying appellant's underinsured motorist claim, the circuit court did not err in finding production of the underwriting file irrelevant. Appellant also moved the circuit court to exclude the introduction of evidence of the case's litigation history at trial, contending it was unfair to disallow discovery of Zurich's post-litigation conduct and communications and then allow Zurich to introduce such evidence at trial. The Court of Appeals noted that *Knotts* directs courts to be concerned about prejudice to insurers. The litigation history of this case was equally known to these parties; therefore, the circuit court did not err in denying the motion. Finally, the Court held that the circuit court did not err in granting summary judgment on appellant's claim for interest and attorney's fees.

X. JURISDICTION

A. ***Murphy v. Frontier Professional Baseball, Inc.***

2019-CA-000073 05/01/2020 2020 WL 2092020

Opinion by Chief Judge Clayton; Judges Caldwell and Combs concurred.

A Kentucky law firm and several of its partners (the Firm) brought suit in Boone Circuit Court against (1) a former client who they represented in federal district court in Indiana and (2) the defendants in that federal action. The former client settled the Indiana litigation without the participation of the Kentucky firm and threatened to bring malpractice claims against the Firm. The Firm raised numerous claims in the Kentucky litigation, including failure to pay legal fees, tortious interference, and conspiracy between their client and the defendants in the Indiana litigation, and sought a declaration of rights regarding the assignment of the former client's malpractice claims against the Firm to the defendants in the federal action. The circuit court dismissed the action, in part on the basis that exercising personal jurisdiction over the former federal defendants did not comport with federal due process standards under *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968). Although the circuit court found it had personal jurisdiction over these parties pursuant to KRS 454.210(1) and (2), Kentucky's long-arm statute, because they transacted business and contracted to supply services in Kentucky, the exercise of jurisdiction was nonetheless improper because the underlying cause of action arose from the litigation in federal court in Indiana. The circuit court further found that neither the activities of these parties, nor the consequences of those activities, had a substantial enough connection with Kentucky to make jurisdiction reasonable. The Court of Appeals agreed, holding that the Firm had not shown an adequate causal nexus between these parties' contacts with Kentucky and the Firm's causes of action, which all related to the Indiana litigation. The circuit court also dismissed the Firm's claims against its former client, in part because the former client had already filed a malpractice claim against the Firm in commercial court in Indiana. The Court of Appeals affirmed the dismissal because pursuing these claims against the former client separately in two different courts would not further judicial efficiency or attain consistency of results.

XI. NEGLIGENCE

A. ***Pringle v. South***

2019-CA-000029 05/08/2020 2020 WL 2296997

Opinion by Judge Caldwell; Judges Acree and Kramer concurred.

Appellants challenged the dismissal of Brenda Pringle's medical malpractice claim and her husband's loss of consortium claim for their failure to identify an expert witness who could establish the applicable standard of care. The Court of Appeals affirmed. Appellants attempted to rely on testimony from a doctor who was a contractor-consultant for the Kentucky Board of Medical Licensure and who reviewed allegations Brenda brought against appellee before that agency. Appellants did not hire the doctor, nor does he appear from the record to have been engaged to provide expert testimony. The Board filed a motion to quash the subpoena served on the doctor. The Board argued that the doctor agreed to act, as part of its function, as the regulator of the medical profession, that he was compensated for his time spent on Brenda's complaint to the Board at a reduced fee, and that allowing such contractors to be lassoed into associated court actions would have a chilling effect on the willingness of physicians to provide this service. The circuit court agreed and granted the motion to quash. Appellants did not appeal this decision. The court subsequently granted summary judgment to appellee. In affirming, the Court of Appeals held that a party to a medical negligence action cannot compel involuntary expert testimony from a physician or other medical professional whose expert opinion, if any, is the product of his or her work for the Board of Medical Licensure pursuant to KRS 311.591 and 201 KAR 9:240 Section 5(5)(a) and (b).

XII. OPEN RECORDS

A. ***Department of Kentucky State Police v. Trageser***

2017-CA-000750 03/27/2020 2020 WL 1491404

Opinion by Judge Acree; Judges Kramer and Taylor concurred.

The Court of Appeals affirmed the Franklin Circuit Court's judgment affirming the Attorney General's opinion that certain records of the Kentucky State Police must be disclosed in response to a Kentucky Open Records Act (KORA) request. The Court first noted that KORA encourages free and open examination of public records and strictly construes all exceptions. The Court agreed with KSP that investigative or preliminary documents are excepted from the disclosure requirements of KORA, but also held that such documents lose that status and must be produced once they are expressly incorporated into the agency's final action. The Court also held that KRS 61.878(1)(a) does not allow the wholesale withholding of a document or documents merely because they contain some personal data. That statute authorizes redaction of such information. Because of the ability to assure the protection of personal information by redaction, the Court rejected KSP's argument that requiring disclosure of documents containing personal information will have a chilling effect on investigations by causing fear of civilian cooperation.

XIII. TORTS

A. ***Hensley v. Traxx Management Company***

2018-CA-000928 05/08/2020 2020 WL 2297001 Rehearing Pending

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

Laura Frances Hensley, the Administratrix of the Estate of James Elijah Hensley, appealed from pre-trial orders that dismissed the Estate's wrongful death action against Thoroughbred Energy, LLC, and Shell Oil Company. The Estate also appealed from a judgment entered in favor of Traxx Management Company following a second trial. James Hensley robbed a gas station/convenience store in Rockcastle County. As he fled the station, he threatened that he would kill the clerk and his family if the clerk called the police. After the robbery, Hensley headed to a getaway car. The clerk testified that he became upset at Hensley's threat to kill his family and decided to pursue him. Standing outside the station, at the edge of the property, the clerk fired his pistol several times in Hensley's direction. One of the shots struck Hensley in the back, killing him. In affirming in part, the Court of Appeals held that the circuit court did not err by granting summary judgment to Thoroughbred Energy on the basis that it was not the clerk's employer and did not control his actions. Under the undisputed facts of this case, neither Shell Oil nor Thoroughbred Energy exercised control over the clerk's actions following the robbery. Once Hensley fled, the clerk left his post at the store and pursued him in the interests of the clerk's own safety and that of his family. This independent act was his alone. There was also no evidence to support the claim that Thoroughbred Energy was liable under any theory related to the condition of the premises. The Court also rejected the Estate's argument that the circuit court erroneously granted Shell Oil's motion to dismiss the Estate's action against it, without prejudice, based upon improper venue (the action was filed in Fayette County). Shell Oil presented an affidavit to indicate that it had no office, place of business, chief officer, or agent in Fayette County. It also presented documentary evidence to indicate that the station was not its place of business. The Estate offered nothing to establish that venue was proper in Fayette County, and it opposed transfer of the action to Rockcastle County, so dismissal was appropriate. Finally, the Court held that Traxx (which employed the clerk) was entitled to judgment notwithstanding the jury verdict rendered in the first trial in 2015. The act complained of here occurred within the context of an independent course of conduct that was not intended by the clerk to serve any purpose of his employer whatsoever. The clerk pursued, shot, and killed Hensley only after Hensley made a direct threat against the clerk and his family as he fled the scene following the robbery. Under these circumstances, Traxx had no ability to prevent the clerk from acting as he did. The clerk was not acting within the scope of his employment and, consequently, as a matter of

law, Traxx could not have been found to be vicariously liable for his actions.