

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
MAY 1, 2023 to MAY 31, 2023**

Note to practitioners: These are the Opinions designated for publication by the Kentucky Court of Appeals for the specified time period. Practitioners should Shephardize all case law for subsequent history prior to citing it.

I. FAMILY LAW

A. W.H.J. v. J.N.W., ET AL.

[2022-CA-1055-ME](#)

5/19/2023

2023 WL 3556222

Opinion by CALDWELL, JACQUELINE M.; DIXON, J. (CONCURS) AND ECKERLE, J. (CONCURS)

Father W.H.J. appealed the Warren Circuit Court's order granting Stepfather J.A.W.'s petition to adopt W.H.J.'s son asserting, among other arguments, he was improperly denied appointment of counsel. The Court of Appeals reversed on the grounds the clear and convincing evidence standard was not applied by the trial court. Despite W.H.J.'s failure to specifically raise this error on appeal, the Court identified it as grounds for reversal due to the necessity of examining the trial court's findings before assessing the arguments on appeal, and citing *Barker v. Commonwealth*, 341 S.W.3d 112 (Ky. 2011), the Court stated it was a glaring fundamental error naturally connected with review of the issues raised. The Court acknowledged this omission could be corrected more expeditiously by allowing the trial court to issue a new decision applying the proper standard to the existing evidence but reasoned the Kentucky Supreme Court's decision in *N.S. v. C and M.S.*, 642 S.W.2d 589, 590 (Ky. 1982) compelled remand with instructions for the trial court to conduct a new trial under the clear and convincing evidence standard. Turning to the asserted error concerning the appointment of counsel, the Court determined the trial court did not sufficiently and plainly inform W.H.J. of this right. The trial court was further instructed on remand to determine if W.H.J. desired and qualified to have counsel appointed.

II. LIENS

A. FERGUSON ENTERPRISES, INC. v. DREAMLAND HOSPITALITY, LLC.

[2022-CA-0361-MR](#)

5/05/2023

2023 WL 3261398

Opinion by DIXON, DONNA L.; CETRULO, J. (CONCURS) AND EASTON, J. (CONCURS IN RESULT AND FILES SEPARATE OPINION)

Ferguson Enterprises, Inc. (Ferguson) appealed from grant of summary judgment to Dreamland Hospitality, LLC (Dreamland). Dreamland hired Huhn Plumbing Co., LLC (Huhn) for construction work on a hotel property. Huhn contracted with Ferguson to provide materials. Dreamland paid Huhn for materials, but Huhn failed to pay Ferguson. Ferguson notified Dreamland of its intent to file a lien against real estate for its construction materials. Ferguson filed the lien and later tried to reach settlement with Dreamland but was never paid. Ferguson then filed suit against Dreamland in

Jefferson Circuit Court and moved the trial court to enforce an asserted settlement agreement, but the trial court denied the motion finding no valid settlement agreement existed. Ferguson moved the trial court for summary judgment, and Dreamland moved to dismiss the case, which was treated as a cross-motion for summary judgment. The trial court granted summary judgment to Dreamland finding the materialman's lien was not perfected because it "was not the correct amount."

The Court of Appeals vacated and remanded. The Court held the trial court erred by improperly granting summary judgment because of a factual dispute concerning whether the amount of the lien was correct at the time it was filed. KRS 376.080(1) requires a lien statement to include, "the amount due [the provider of the materials], with all just credits and set-offs known to [the provider.]" Kentucky law requires strict compliance with this statute, and the key issue herein concerned whether credit that was given on the date the lien was filed was known to Ferguson prior to filing its lien. Because this is disputed, it was reasoned the trial court could not grant summary judgment to either party. The Court further held the trial court did not err in its determination that no settlement agreement had been created because a person with whom Ferguson negotiated settlement had no authority to bind Dreamland. Lastly, the Court held because there was no settlement agreement, Ferguson was not entitled to attorney fees.

Judge Kelly Mark Easton concurred in result "[b]ecause the amount of 'just credits and set-offs known to' Ferguson when it filed its lien was a disputed fact," and authored a separate opinion noting there was a lack of Kentucky precedents applying KRS 376.080's "all just credits and set-offs" language. Judge Easton cited the Missouri case of *Almat Builders and Remodeling, Inc. v. Midwest Lodging LLC*, 615 S.W.3d 70, 79 (Mo. App. 2020) for guidance which addresses liens containing incorrect amounts due to mistake or error.

III. PUBLIC PENSIONS

A. **KENTUCKY RETIREMENT SYSTEMS, NOW KENTUCKY PUBLIC PENSIONS AUTHORITY v. DEPARTMENT OF PUBLIC ADVOCACY**

[2022-CA-0518-MR](#)

5/12/2023

2023 WL 3397512

Opinion by EASTON, KELLY MARK; CETRULO, J. (CONCURS) AND DIXON, J. (CONCURS)

The Kentucky Retirement Systems (now named the Kentucky Public Pensions Authority (KPPA)) appealed an order of the Franklin Circuit Court reversing the administrative decision of the KPPA Board of Trustees. The administrative decision required the Department of Public Advocacy (DPA) to pay actuarial costs associated with a greater than ten percent increase in the salary of one of its former employees for one of the last five years of her employment. KPPA maintained that DPA engaged in pension spiking while DPA asserted that the former employee's pay increase was associated with a career advancement as defined in KRS 61.598. Noting that the underlying facts were undisputed, the Court of Appeals affirmed the lower court's order on the reasoning the salary increase of DPA's former employee was purposed for correcting chronic underpayment and was the result of a reallocation to a higher classification, and thus, this constituted a career advancement. The Court stated that the General Assembly approved a budget increase for DPA from which all attorneys employed within received a pay increase, and the Personnel Cabinet restructured salaries of the agency based on professional experience. The Court noted because of the Personnel

Cabinet's control over the restructuring, "It would be unfair for agencies to be assessed with actuarial costs for raises not solely determined by them." KPPA's argument that KRS 61.598 did not require an intent as an element of pension spiking was rejected by the Court which reasoned that the "substance of the reason for a compensation increase" controlled.

IV. TELECOMMUNICATIONS

A. T-MOBILE SOUTH LLC (D/B/A T-MOBILE USA), SUCCESSOR-IN-INTEREST TO POWERTEL MEMPHIS, INC. v. KENTUCKY COMMERCIAL MOBILE RADIO SERVICE EMERGENCY TELECOMMUNICATIONS BOARD (N/K/A KENTUCKY 911 SERVICES BOARD)

[2022-CA-0191-MR](#)

5/05/2023

2023 WL 3260971

Opinion by CALDWELL, JACQUELINE M.; ECKERLE, J. (CONCURS) AND KAREM, J. (CONCURS)

DISCRETIONARY REVIEW GRANTED 10/18/2023

T-Mobile South LLC appealed a Franklin Circuit Court judgment concluding that T-Mobile was not entitled to a common law refund of, or interest on, over \$600,000 in service charges paid to the Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board ("CMRS Board") on prepaid wireless service from 2003 to 2005. On appeal, T-Mobile argued *Virgin Mobile U.S.A., L.P v. Commonwealth ex rel. Commercial Mobile Radio Service Telecommunications Board*, 448 S.W.3d 241 (Ky. 2014), and *City of Covington v. Powell*, 59 Ky. 226 (1859) provided a common law refund remedy because it mistakenly paid a fee it did not owe. The Court of Appeals affirmed the lower court and reasoned that the language T-Mobile cited in *Virgin Mobile* was *dicta*, and the decision was not intended to "explicitly hold that any provider was entitled to a common law refund based solely on mistakenly paying a fee that was not actually owed." The Court stated the common law refund precedents discussed in *Virgin Mobile* were "clearly held" not to apply to the circumstances of that case which involved a justification of underpayment of service charges incurred later. After a discussion of longstanding common law refund precedents, the Court determined that, to be entitled to a common law refund of fees paid to a governmental entity based on mistake of law or fact, there must be either: 1) both invalid authority requiring the payment and an involuntary payment; or 2) misrepresentation by the government entity. The Court concluded T-Mobile failed to show its payments were involuntary as defined by longstanding precedent because they were not collected by "summary process of fine or imprisonment," and there was no showing of "actual, intentional misrepresentation."

V. TORTS

A. MYRANDA JUAREZ v. BROOKE SCHILLING, ET AL.

[2021-CA-1065-MR](#)

5/05/2023

2023 WL 3261402

Opinion by JONES, ALLISON; CALDWELL, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Appellant, a volunteer member of the Parent Teacher Association at her children’s elementary school, was interrupted while she finished breastfeeding her infant child in the school gymnasium by Appellees, staff members of the school. Appellees allegedly told Appellant she could not openly breastfeed. Appellant contended that this incident caused her anxiety and distress. She filed suit in Jefferson Circuit Court against Appellees, alleging a violation of her right to breastfeed under KRS 211.755, and this statutory violation constituted a claim of *per se* negligence under KRS 446.070. Appellant further alleged the statutory violation was a form of workplace gender discrimination cognizable as a civil rights violation under KRS Chapter 344. The trial court granted summary judgment to Appellees, finding that the Appellant did not suffer an actual injury and that the Appellees did not “interfere” with Appellant’s breastfeeding by merely asking her to move to an office. The trial court also found that KRS Chapter 344 did not apply to the Appellant for a claim of sex discrimination in the workplace as she was not an employee of the school, and she failed to provide expert proof allowing emotional damages. Finally, the trial court found that the Appellees were protected against suit based on qualified official immunity.

The Court of Appeals affirmed in part, reversed in part, and remanded. The Court agreed with the trial court that Appellant was not an employee of the school, meaning she was not covered by the workplace protections of KRS Chapter 344. Further, the Court agreed that Appellant could not recover emotional distress damages because she failed to provide expert proof of those damages pursuant to the rule in *Osborne v. Keeney*, 399 S.W.3d 1, 17 (Ky. 2012). However, the Court of Appeals concluded that the Appellees were not protected from suit on the grounds of qualified official immunity because compliance with the clear mandate of the breastfeeding statute was a ministerial duty. Finally, the Court held that the trial court erred in deciding that Appellant did not provide enough evidence of injury, as a finding of *per se* negligence could have resulted in nominal damages, to which punitive damages could theoretically have attached. The Court of Appeals remanded the matter to the circuit court for further proceedings.

B. JAIME MORALES v. CITY OF GEORGETOWN, KENTUCKY, ET AL.

[2022-CA-0009-MR](#)

5/12/2023

2023 WL 3398192

Opinion by ACREE, GLENN E.; McNEILL, J. (CONCURS) AND THOMPSON, C.J.
(CONCURS)

DISCRETIONARY REVIEW GRANTED 09/20/2023

Appellant, a former special deputy with the Scott County Sheriff’s Office (SCSO), was shot during a mission to apprehend a fugitive and became paralyzed as a result. Because the fugitive never discharged his weapon, it is almost certain a fellow member of law enforcement shot Appellant. Most, but not all, mission participants were members of the Special Response Team (SRT), a team consisting of members from both the Georgetown Police Department (GPD) and the SCSO. It was disputed whether the mission was an official SRT operation. Appellant sued GPD Lieutenant James Wagoner, GPD Officer Joseph Enricco, the City of Georgetown (City), and the GPD for negligence. Appellant argued Wagner, as one of the SRT Commanders, negligently failed to create and communicate a tactical and operational plan to apprehend the fugitive, failed to adequately supervise the mission, failed to adequately train team members, failed to enforce training attendance requirements, and failed to ensure all team members wore protective equipment during the mission. Appellant alleged Enricco negligently discharged his firearm during the mission. And, Appellant asserted the City and GPD were directly liable for failure to enforce training requirements and

vicariously liable for the actions of Enricco and Wagoner. The Scott County Circuit Court granted summary judgment for all defendants, applying qualified official immunity to each defendant. The circuit court also determined the City and GPD were entitled to immunity under the Claims Against Local Governments Act (CALGA), KRS 65.200 *et seq.* Appellant appealed, challenging the circuit court's application of qualified official immunity.

The Court of Appeals affirmed in part, reversed in part, and remanded. The Court determined the circuit court properly applied qualified official immunity to Wagoner for his creation and communication of an operational plan to apprehend the fugitive, for his supervision of the mission, and for conducting SRT trainings and selecting training material. Each of these are discretionary, rather than ministerial, functions, and therefore, qualified official immunity applies to alleged negligent performance of these actions. However, the Court concluded the obligation to enforce training requirements is ministerial, and the circuit court therefore erred in applying qualified official immunity to Wagoner for that obligation. Further, the Court identified three genuine questions of material fact related to Wagoner's alleged obligation to ensure team members wore their protective equipment during the mission, and the Court accordingly determined the circuit court prematurely granted summary judgment on this point. The Court also determined Wagoner would only be entitled to immunity under CALGA for his discretionary acts and obligations. As to Enricco, the Court determined the circuit court did not err in applying qualified official immunity to his decision to exercise deadly force during the mission to apprehend the fugitive because it was discretionary. As to the City and GPD, the Court concluded they may ultimately be vicariously liable for Wagoner's actions should primary liability attach to him because CALGA does not shield governmental entities from vicarious liability for the ministerial actions of its employees. The Court also affirmed the dismissal of direct liability claims against the City and GPD because alleged incompetent performance of governmental decision-making is not a subject of tort liability.