

KENTUCKY COURT OF APPEALS

PUBLISHED OPINIONS

NOVEMBER 2012

I. CIVIL PROCEDURE

A. SMITH v. FLYNN

[2011-CA-002101](#)

11/09/12

Opinion by Judge Combs; Judges Keller and Lambert concurred.

Trial court did not err in denying CR 60.02 motion to set aside default judgment on basis that defendant had been diagnosed with Alzheimer's disease and that he was incompetent for service of process. Because defendant admitted he has never been adjudicated incompetent, his alleged incompetence is not a valid defense for his failure to respond to the complaint as a matter of law. Furthermore, no meritorious defense has been presented where record demonstrated that defendant conceded liability for loss of trees and fence two years prior to diagnosis of dementia.

II. CRIMINAL LAW

A. THRASHER v. COMMONWEALTH

[2010-CA-001379](#)

11/30/12

Opinion by Judge Taylor; Judges Nickell and VanMeter concurred.

Circuit court was bound by KRS 454.425(4) to dismiss inmate's declaration of rights action where there was absolutely no evidence that inmate had exhausted administrative remedies by following procedures set out in CPP 17.4 to request a review or explanation of sentence calculation, including statutory good time credit.

B. REYNOLDS v. COMMONWEALTH

[2010-CA-002192](#)

11/09/12

Opinion by Judge Caperton; Judge Lambert concurred; Judge Keller concurred in result only by separate opinion.

Court of Appeals held that fidgeting alone is insufficient to justify a *Terry* stop for weapons and thus trial court erred in denying defendant's motion to suppress evidence obtained in course of search. Imposition of court costs reversed for a determination of whether: 1) defendant is a poor person as defined by KRS 453.190(2) and 2) whether he is unable to pay court costs now or in the foreseeable future.

C. WYATT v. COMMONWEALTH

[2011-CA-001446](#) 11/30/12

Opinion by Judge Clayton; Judge Keller and Maze concurred. Revocation of conditional discharge reversed where there was no evidence presented to trial court that actual notice of the conditions of probation, written or oral, had been given to the defendant at the time of sentencing as required by KRS 533.030(5).

D. McGORMAN v. COMMONWEALTH

[2010-CA-001971](#) 11/16/12

Opinion by Judge Clayton; Chief Judge Acree concurred; Judge Keller concurred in result only.

Trial court should have conducted evidentiary hearing on RCr 11.42 claim of ineffective assistance based on counsel's alleged failure to convey Commonwealth's offer to juvenile defendant or his parents. Juvenile and parents offered affidavits stating that they had not been approached with offer and trial counsel could not remember with certainty that he conveyed offer to juvenile, although he stated that he did convey it to parents. Counsel's failure to conduct an investigation, have juvenile's mental health status evaluated, and talk to prosecutor prior to juvenile's surrender to police for interrogation clearly affected his ability to receive a fair trial. Allowing interview with police under these circumstances constituted ineffective assistance of counsel. Because interview with police permeated trial

with unfairness, judgment was reversed and case remanded for new trial.

E. BRATCHER v. COMMONWEALTH

[2009-CA-001084](#) 11/02/12

Opinion by Judge Nickell; Judges Keller and Stumbo concurred. RCr 11.42 motions to vacate brothers' convictions for murder affirmed against claim of ineffective assistance of counsel. Neither brother was able to satisfy the *Strickland* standard of showing that counsel's performance was strategically unsound or unreasonable or that they were deprived of a fair trial with a reasonable result.

F. CHAMES v. COMMONWEALTH

[2011-CA-00173](#) 11/02/12

Opinion by Judge VanMeter; Judges Moore and Stumbo concurred. Trial court acted outside its jurisdiction in listing conditions of appellant's conditional discharge in judgment and sentence. Under KRS 533.043(3)(a), Department of Corrections, rather than trial court, is tasked with setting the conditions of post-incarceration supervision. Separation of powers doctrine precludes each of three branches of government from encroaching upon domain of other two branches and, as a result, trial court acted without authority to do so when it listed conditions that could be imposed upon the appellant's conditional discharge. It was also error to impose restitution under KRS 532.033(3) and (4) without setting a certain, specified amount to be paid to the victim.

III. FAMILY LAW

A. THOMPSON v. PORTER

[2011-CA-001055](#) 11/30/12

Opinion by Judge Clayton; Chief Judge Acree concurred; Judge Keller dissented.

Summary judgment held prematurely granted on mother's claim for continued child support benefits after father's death. Majority held that genuine issues of material fact precluded summary disposition including whether appellees' filing of probate of estate in wrong county without notice to child resulted in claimed injuries. In addition, majority concluded that appellees' failure to respond to mother's discovery requests precluded entry of summary judgment as premature.

B. SPREACKER v. VAUGHN

[2011-CA-002011](#) 11/30/12

Opinion by Judge Combs; Judge Nickell concurred; Judge Caperton dissented.

Trial court did not err in determining paternal great-aunt of minor child to be *de facto* custodian where ample evidence supported findings that great-aunt provided support while child's parents provided none. Although public assistance may have provided medical care for the child, substantial evidence supported finding that great-aunt was child's primary caregiver and financial supporter. Calculation of statutory period was not tolled by mother's response in course of proceedings where she admitted that she had not commenced any proceedings to regain custody of child as required by KRS 403.270(1)(a).

C. H. v. CABINET FOR HEALTH AND FAMILY SERVICES

[2012-CA-000194](#) 11/09/12

Opinion by Judge VanMeter; Chief Judge Acree and Judge Dixon concurred.

Trial court did not err in denying motion to dismiss judgment terminating appellant's rights to minor child. Although appellant alleged his inclusion as a party to termination action was error because he was not the putative father of child, and therefore not a necessary party, Court of Appeals held that neither KRS 625.060 nor KRS 625.065 bar inclusion of a putative father who does not meet the criteria of KRS 625.065(1) as a party to the proceeding; each statute

simply states that a putative father who does meet the criteria is a necessary party. Appellant suffered no manifest injustice from finding that had no parental rights to child.

D. TRUMAN v. LILLARD

[2012-CA-000160](#) 11/02/12

Opinion by Judge Nickell; Judges Taylor and VanMeter concurred. Trial court did not err in denying appellant's motion for joint custody, visitation, and to set child support in relation to the adopted child of her former partner. Former partner had not waived her superior right to custody and appellant demonstrated no legal basis that would entitle her to custody or visitation with child.

E. PALMER v. BURNETT

[2012-CA-000318](#) 11/02/12

Opinion by Chief Judge Acree; Judges Dixon and VanMeter concurred.

Biological grandmother lacked standing to pursue visitation after having voluntarily terminated her parental rights to the child's mother. Trial court properly dismissed grandparent visitation action filed by biological grandmother and her husband after concluding that they were not child's grandparents for purposes of KRS 405.021, the grandparent visitation statute. Termination of parental rights constitutes a permanent severance of the parent-child relationship, including the future right to a relationship with the child's children.

IV. PROPERTY

A. SLONE v. CALHOUN

[2011-CA-000571](#) 11/30/12

Opinion by Judge Taylor; Judge Nickell concurred; Judge Combs dissented.

Court of Appeals reversed trial court's dismissal of complaint for damages under a land contract on basis that forfeiture provision in contract precluded any claims advanced by plaintiff. Majority held

that, based upon trial court's legal ruling that the parties had entered into an installment land contract, Supreme Court precedent compelled a holding that forfeiture of buyers' payments upon default was invalid and unenforceable in Kentucky. Not only did buyer have an equitable ownership in the property to the extent of the monthly payments she made thereon, but she also had redemption rights under KRS 426.530. Despite fact that appellant did not raise argument in prehearing statement, trial court's error in failing to apply proper law regarding installment land contracts resulted in palpable error and manifest injustice warranting appellate review.

B. COMMONWEALTH, UNINSURED EMPLOYERS FUND v.
COUNTY OF HARDIN PLANNING AND DEVELOPMENT
COMMISSION

[2011-CA-001553](#) 11/09/12

Opinion by Judge Dixon; Judges Moore and Thompson concurred. Circuit court had jurisdiction to determination the validity of a lien under KRS 342.770 following a determination that property owner was not the employer and therefore not subject to the lien as an uninsured employer. Court of Appeals also held that UEF was not entitled to dismissal on grounds that the property owner failed to exhaust administrative remedies where there was no specific remedy available in the administrative system. Property owner's claim for inverse taking was properly lodged in circuit court. UEF's continuation of lien after determination that property owner was not the employer unconstitutionally encumbered property and therefore constituted a compensable taking.

V. TAXATION

A. COMMONWEALTH, FINANCE AND ADMINISTRATION
CABINET, DEPARTMENT OF REVENUE v. COMMONWEALTH
AGRI-ENERGY, LLC

[2011-CA-000512](#) 11/16/12

Opinion by Judge VanMeter; Chief Judge Acree and Judge Moore concurred.

Failure to extend deadline for filing application for tax credit held to be arbitrary and capricious where the official reporting form to apply for the credit was not available until the day it was due. Court of Appeals affirmed the finding of the board and trial court that to demand the application be filed on the same day the form was officially provided was unreasonable.

B. DAYTON POWER AND LIGHT COMPANY v. DEPARTMENT OF REVENUE, FINANCE AND ADMINISTRATION CABINET
[2011-CA-001438](#) 11/02/12

Opinion by Judge Combs; Judge Dixon concurred; Judge VanMeter dissented.

Franklin Circuit Court correctly determined that utility company's franchise should be taxed separately under KRS 132.020(1)(r), changing the utility's state tax obligation and making it subject to local taxes. KRS 132.208 exempts intangible personal property from state and local taxes except that which is assessed under Chapter 136. Statutory exemption must be narrowly construed, compelling conclusion that the franchise of a PSC is not subject to the exemption and was not entitled to be spread over and among other types of assets. Utility could not avail itself of doctrine of contemporary construction which, as in this case, cannot be invoked to memorialize or ratify an agency's mistake.

VI. TORTS

GIBSON v. RAYCOM TV BROADCASTING, INC.
[2011-CA-001347](#) 11/02/12

Opinion by Judge Clayton; Judges Combs and Thompson concurred. Summary judgment was properly granted on contractor's defamation claim against television station where statements made during broadcast were substantially accurate; no malice on the part of station or homeowner who contacted station was proven; information regarding unsatisfactory workmanship was legitimate; and because station is a

media defendant, constitutional free speech issue was implicated. Whether statements were defamatory *per se* is immaterial to analysis where statements were true or substantially true.

VII. WORKERS' COMPENSATION

A. DECKER v. CONTROL SYSTEMS, INC.

[2012-CA-000468](#)

11/02/12

Opinion by Judge VanMeter; Judges Keller and Taylor concurred.

Court of Appeals affirmed dismissal of workers' compensation claim on basis that claimant failed to file claim within two years after receipt of the last voluntary payment of benefits. Despite claimant's contention that he did not receive last TTD check until June 6, 2008, and that he did not remember receiving notice from Department of Workers Claims, substantial evidence supported ALJ's findings that claimant received check on June 2, 2008; that employer complied with its duty to notify Department of the termination of TTD; and the Department mailed claimant a letter informing him of the limitations date for filing a claim for benefits expired on May 25, 2010, which was two years from the date TTD benefits ceased. Court of Appeals found no basis for applying doctrine of equitable estoppel where there was no evidence claimant was lulled into filing outside limitations period.