PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

NOVEMBER 1, 2017 to NOVEMBER 30, 2017

I. CONTRACTS

A. ***Bloomsz, LLC v. Van Bourgondien***

2016-CA-001347 11/09/2017 2017 WL 5180387

Opinion by Judge Dixon; Judges Acree and Jones concurred.

In this breach of contract action, the Court of Appeals affirmed a judgment finding that appellee was not personally liable to appellant for repayment of monthly advances that exceeded commissions earned while appellee worked as an independent contractor for appellant. Citing to the reasoning in *Amherst Sportswear Co., Inc. v. McManus*, 876 F.2d 1045 (1st Cir. 1989), the Court held that appellee's status as an independent contractor was not dispositive as to whether he was personally liable to appellant for monthly advances. Instead, the Court considered the duties performed and concluded that appellee had dedicated his time and ability to furthering the business interests of appellant, which indicated that the relationship was substantially one of employment. The Court also determined that the parties' compensation agreement was unambiguous and that there was no agreement between the parties that appellee would be personally liable for any advances that exceeded his commissions.

B. ***Rogers v. Family Practice Associates of Lexington, P.S.C.***

2015-CA-001991 11/09/2017 2017 WL 5180395

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

Following appellant's termination from Family Practice Associates, a dispute arose among the parties concerning the price Family Practice was entitled to pay to buy back appellant's shares in the practice. The price of the shares was meant to be governed by a stock purchase and restriction agreement; however, the parties disagreed as to which agreement -if any - applied. These disagreements led to appellant filing suit against Family Practice and its shareholders alleging numerous counts, including: forgery, falsification of

business records, breach of fiduciary duties, tortious interference with contract, and negligence *per se*. Family Practice counterclaimed for breach of contract. The circuit court granted summary judgment in favor of Family Practice and its shareholders on all claims. In so doing, the circuit court concluded that a fifth amended stock purchase agreement could not be enforced against appellant, but that appellant was instead bound by a fourth amended stock purchase agreement. The parties filed an appeal and cross-appeal, and the Court of Appeals affirmed as to both. On appeal, appellant argued that the circuit court erred in finding that any of the stock purchase and restriction agreements were binding on him; although appellant admitted that he had signed the fourth agreement, he contended that it was unenforceable against him because it had not been signed by every shareholder of Family Practice. The Court of Appeals disagreed, holding that because appellant had signed the agreement and had never challenged its validity, it was enforceable against him. On cross-appeal, the Court of Appeals rejected Family Practice's argument that the circuit court erred in finding that the fifth amended stock purchase agreement could not be enforced against appellant. The Court noted that appellant had never actually signed the agreement; therefore, there was no mutual assent among the parties. The Court further held that while a supermajority vote of Family Practice's board of directors worked to bind Family Practice, it did not work to bind the individual shareholders to any subsequent agreements that might arise out of a vote. Finally, the Court rejected appellant's claims that he entitled to negligence *per se* damages because he was unable to establish who was responsible for any damages he might have suffered.

II. CRIMINAL LAW

A. ***Anderson v. Commonwealth***

2016-CA-001002 11/03/2017 2017 WL 5013542

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

In a direct appeal from a conviction for manufacturing methamphetamine, the Court of Appeals affirmed the circuit court. The Court considered and rejected the following arguments by appellant: (1) the circuit court denied due process in ruling that the Commonwealth could use photographs of evidence on retrial without a missing evidence instruction, when the evidence itself had been mistakenly destroyed following appellant's first trial; and (2) the circuit court judge erred in denying a motion to recuse himself and the Commonwealth's Attorney on retrial, when both could have been called as witnesses relating to the destruction of evidence. With regard to the first issue, the Court found no due process violation because appellant could not show bad faith on the part of the Commonwealth and because the evidence had no apparent potential exculpatory value. The Court further held that a missing evidence instruction would not have been appropriate because the destroyed evidence was not exculpatory. With regard to the second issue, the Court held that there was no evidence of bias or conflict on the part of the circuit court judge or the Commonwealth's Attorney; therefore, the circuit court did not err in denying appellant's recusal motion.

B. ***Ferguson v. Commonwealth***

2016-CA-000788 11/09/2017 2017 WL 5180222

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

In an appeal from an order denying RCr 11.42 post-conviction relief, the Court of Appeals reversed and remanded for a new trial after holding that appellant received ineffective assistance of trial counsel. Appellant was tried and convicted for the shooting death of his nephew, whom appellant contended had died by suicide. In his motion, appellant alleged that his trial counsel failed to investigate, consult with experts, and adequately prepare for trial. In reversing, the Court concluded that appellant's counsel made no genuine effort to support his client's suicide defense at trial. Moreover, counsel was not prepared to call any witnesses other than appellant, did not consult with experts on ballistics or blood spatter, made no opening statement, and did not adequately challenge the Commonwealth's witnesses on cross-examination. Furthermore, at the circuit court's evidentiary hearing on appellant's RCr 11.42 motion, trial counsel admitted that he did not prepare for trial as he normally would because he believed appellant would represent himself, despite the fact that no motion to proceed *pro se* or as hybrid counsel had been presented to the trial court.

C. ***Lainhart v. Commonwealth***

2016-CA-001427 11/09/2017 2017 WL 5664750

Opinion by Judge Johnson; Judges Combs and D. Lambert concurred.

The Court of Appeals vacated an order revoking appellant's diversion agreement and imposing a three-year sentence for flagrant nonsupport. In revoking, the circuit court made a finding that appellant could not be effectively managed in the community because she "won't do as she agreed." The Court of Appeals held that the circuit court failed to comply with *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014) and KRS 439.3106 because while the lower court did make a finding that appellant could not be effectively managed in the community since she had not kept up on her child support payments, it failed to make any findings as to whether she posed a danger to her prior victims or to the community. The Court of Appeals additionally held that the circuit court failed to comply with *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011) because it failed to make a finding on the record regarding whether the nonpayment of child support was willful and, if not, whether alternative measures would adequately serve the Commonwealth's interests. Accordingly, the case was remanded for further findings.

D. ***Price v. Commonwealth***

2016-CA-001426 11/09/2017 2017 WL 5180384

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

Appellant challenged an order voiding his pretrial diversion agreement arising from his indictment for flagrant nonsupport. The Court of Appeals vacated and remanded, holding that while the circuit court had found that appellant could not be managed in the community, it had not made any finding that he was a significant risk to the community. A court must make both findings pursuant to KRS 439.3106 before it may void a diversion agreement. The Court also held that the circuit court erred in failing to make findings of fact under *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011) relating to appellant's failure to pay child support. The matter was remanded for the circuit court to make findings on both issues.

E. ***Snodgrass v. Commonwealth***

2016-CA-001687 11/17/2017 2017 WL 5504390

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

Appellant accepted a plea agreement after being indicted on several charges dealing with controlled substances. As part of her plea agreement, appellant reserved the right to argue for a lesser (or alternative) sentence than the ten-year sentence recommended by the Commonwealth. During the final sentencing hearing, the Commonwealth introduced evidence of complaints sent to the police department through e-mails, the department's investigation and lengthy surveillance of appellant's home, and previous uncharged criminal activity. Appellant objected to the introduction of this evidence, arguing that it consisted of uncharged bad acts, unverified community complaints, and a dismissed charge. The Court of Appeals affirmed and held that the evidence was admissible pursuant to KRS 532.050 and KRE 1101(d), which allow for the introduction of evidence at sentencing that might otherwise be inadmissible at trial. Appellant was given a copy of her pre-sentencing investigative report, and she was afforded the opportunity to call witnesses and to cross-examine all witnesses called at the final hearing. Therefore, appellant was afforded a meaningful judicial sentencing as required by Kentucky law.

III. FAMILY LAW

A. ***Dixon v. Dixon***

2016-CA-001571 11/03/2017 2017 WL 5013538

Opinion by Judge Johnson; Judges Combs and D. Lambert concurred.

The Court of Appeals affirmed a judgment denying a claim by appellant for maintenance and child support arrearages, based upon the doctrine of laches. As part of a marital settlement agreement, appellee was to pay maintenance and child support, and appellant was to make mortgage payments on the marital residence. However, in lieu of the maintenance and child support payments, appellee began making the mortgage payment. While appellant initially objected, this arrangement continued until the residence was sold. During this time, appellant indicated in court documents that no past support payments were due. After child support and maintenance ceased, the issue was raised before the family court. Appellant claimed past due arrearages and alleged that the mortgage payments were gifts. The family court determined that it would be unconscionable to enforce the original agreement when appellant's actions were contrary to her present assertions. Consequently, the court applied the doctrine of laches and denied appellant's claim. The Court of Appeals upheld the family court's decision, finding no abuse of discretion. In so doing, the Court noted that the family court had broad discretion in the establishment, enforcement, and modification of child support. In this case, the family court's decision was found to be reasonable, fair, and supported by the law.

B. ***Priest v. Priest***

2016-CA-001270 11/09/2017 2017 WL 5180390

Opinion by Judge Johnson; Judges Combs and D. Lambert concurred.

Husband had served ten years in the military when he and Wife divorced. As part of the divorce settlement, Wife claimed her share of Husband's military pension. At the time of the divorce, Husband had not completed his military service, so Wife's share of this retirement could not be determined. On appeal - the second involving the parties - the issue was whether the circuit court correctly applied the formula of the Defense Finance and Accounting Service (DFSA), as outlined in *Poe v. Poe*, 711 S.W.2d 849 (Ky. App. 1986) and *Snodgrass v. Snodgrass*, 297 S.W.3d 878 (Ky. App. 2009), in determining Wife's marital share of Husband's pension. The Court of Appeals reversed in part after determining that the circuit court erred in its calculation of appellant's adjusted retirement pay. Most notably, though, the panel reviewing the case concluded that the result reached after applying the DFSA formula seemed inconsistent with Kentucky law regarding the division of marital assets. The panel noted that for ex-spouses of military veterans, their marital portion of the military retirement actually shrinks the longer the military ex-spouse serves after the divorce. The panel opined that, in light of this result, the current application of *Poe* did not appear to be consistent with divorce law in Kentucky, and it invited the Supreme Court of Kentucky to examine the matter.

IV. INSURANCE

A. ***Merritt v. Catholic Health Initiatives Inc.***

2016-CA-001470 11/17/2017 2017 WL 5504916

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

Appellant Harold Merritt, Jr. filed a complaint alleging negligence on the part of the medical providers employed by Catholic Health Initiatives, Inc. (CHI), arguing that the providers' actions resulted in the death of his wife and child following complications arising from his wife's pregnancy. After filing the negligence claim, Merritt filed a motion for declaratory judgment arguing that CHI and its insurer, First Initiatives Insurance, Ltd., had acted in bad faith during settlement negotiations and were liable for such pursuant to the Unfair Claims Practices Settlement Act (UCSPA). The circuit court determined that First Initiatives was exempt from the UCSPA, denied the motion for declaratory judgment, and granted appellees' motion for summary judgment. The Court of Appeals affirmed, holding that as a pure foreign captive self-insurance entity wholly owned by CHI, First Initiatives was not engaged in the "business of insurance" and, therefore, was not subject to the UCSPA. The Court reasoned that self-insurers are not engaged in the "business of insurance" because there is no risk shifting or risk distribution, which are necessary components of an insurance contract.