PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

NOVEMBER 01, 2021 to NOVEMBER 30, 2021

I. CRIMINAL LAW

A. ***DOROTHEA BRADLEY V. COMMONWEALTH OF KENTUCKY***

2018-CA-1117 11/05/2021 2021 WL 5141902

Opinion by THOMPSON, KELLY; LAMBERT, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Appellant Dorothea Bradley was involved in a vehicle collision with Shanetta Thompson. Bradley plead guilty to a violation of KRS 304.39-080(5) (failure of an owner to maintain required insurance or security, first offense). The Commonwealth sought restitution on behalf of Thompson in the amount of $1,000, which represented the insurance deductible incurred by Thompson resulting from damage to her vehicle from the accident. After the Jefferson District Court ordered her to pay $1,000 in restitution, and the Jefferson Circuit Court affirmed, Bradley sought discretionary review with the Court of Appeals. She argued that her conviction under KRS 304.39-080(5) was not a crime that resulted in property damage to Thompson's vehicle; that a criminal restitution hearing is an inappropriate forum to resolve civil issues of causation, damages, and apportionment; that requiring restitution for an offense under KRS 304.39-080(5) creates negligence *per se* in violation of the right to a jury trial, usurps due process, and is contrary to precedent; that she was denied due process when the district court did not allow her to contest that she was at fault for the accident; and that the district court failed to make a factual finding regarding her ability to pay. The Court of Appeals agreed that Bradley's conviction under KRS 304.39-080(5) was not a crime that directly resulted to damage to Thompson's vehicle; however, the Court concluded that a motorist's failure to have or maintain insurance coverage in violation of applicable law may directly cause financial "damage" to insured motorists when such uninsured motorists are found to be at fault in or the cause of the underlying accident. The Court concluded that the district court did not properly allow Bradley to contest a finding of her fault in the accident. It also concluded that the district court erred by failing to make a necessary factual finding regarding Bradley's ability to pay the ordered restitution. The Court reversed and remanded the circuit court's opinion and order, instructing it to vacate and remand the judgment for the district court to conduct a full restitution hearing in conformance with *Jones v. Commonwealth*, 382 S.W.3d 22 (Ky. 2011), and to make factual findings regarding both Bradley's fault for the underlying accident and her ability to pay restitution.

B. ***EMOSHIA DUNCAN V. COMMONWEALTH OF KENTUCKY***

2021-CA-0019 11/05/2021 2021 WL 5141753

Opinion by MAZE, IRV; COMBS, J. (CONCURS) AND ACREE, J. (CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION)

In 2005, Appellant Emoshia Duncan entered a conditional guilty plea to second-degree robbery, possession of a handgun by a convicted felon, first-degree fleeing or evading police, first-degree wanton endangerment, and being a persistent felony offender in the first degree. In exchange for his guilty plea, the Commonwealth agreed to dismiss several other felony charges and recommend a total sentence of twenty-seven years' imprisonment. Under KRS 532.110(1)(c) and KRS 532.080(6)(b), the maximum aggregate sentence for these offenses was twenty years. However, the controlling case law at the time allowed a defendant to waive the maximum aggregate sentence limitation in KRS 532.110(1)(c) that otherwise would operate to his benefit. *See Johnson v. Commonwealth*, 90 S.W.3d 39, 44 (Ky. 2002) and *Myers v. Commonwealth*, 42 S.W.3d 594, 597 (Ky. 2001).

In 2010, the Kentucky Supreme Court revisited the holdings of *Johnson* and *Meyers* in *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010). The Supreme Court held that a trial court lacked authority to impose sentences in excess of the statutory maximum. Nevertheless, questions remained whether the holding in *McClanahan* was retroactive. In an unpublished case, *Rothfuss v. Commonwealth*, No. 2010-CA-000117-MR, 2010 WL 3361769 (Ky. App. Aug. 27, 2010), the Court of Appeals held that that the holding of *McClanahan* may not be applied retroactively to guilty pleas which were valid at the time they were entered. The holding in *Rothfuss* has been applied in other unpublished decisions by the Court of Appeals.

In 2020, Duncan filed a motion in the Fayette Circuit Court under CR 60.02(e), arguing that his twenty-seven-year sentence was void under *McClanahan*. Based on *Rothfuss*, the circuit court denied the motion because Duncan's sentence was valid at the time it was entered. The Court of Appeals reversed, citing the holdings in *McClanahan* and *Phon v. Commonwealth*, 545 S.W.3d 284 (Ky. 2018). In both cases, the Supreme Court emphasized that a sentence exceeding the statutory maximum is beyond the jurisdiction of a circuit court to impose and is therefore void *ab initio*. In light of this clear rule, the Court of Appeals concluded that the holding of *Rothfuss* was no longer tenable. Consequently, the Court of Appeals reversed the circuit court's order denying Duncan's CR 60.02 motion and remanded the matter with directions to vacate his sentence and impose a new sentence not to exceed twenty years. Judge Acree concurred in result only and filed a separate opinion to urge consideration of how Kentucky courts should address CR 60.02 motions predicated on jurisprudential changes in the law.

II. FORCLOSURE

A. ***GLENN D. AUGENSTEIN V. DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF SOUNDVIEW***

2018-CA-1831 11/05/2021 2021 WL 5142113

Opinion by MAZE, IRV; ACREE, J. (CONCURS) AND COMBS, J. (CONCURS)

Appellee Deutsche Bank filed a foreclosure action against Appellant Glenn D. Augenstein. The trial court granted summary judgment to Deutsche Bank, finding that Augenstein defaulted on his mortgage, and the trial court ordered the Master Commissioner to sell the real estate at issue to satisfy the judgment. Augenstein, *pro se*, appealed and argued that Deutsche Bank's records lacked trustworthiness, that he did not have an opportunity to respond to Deutsche Bank's motion, that the trial court erred by not issuing a CR 77.02 notice to dismiss for lack of prosecution, that he was denied access to the trial court record, that the trial court erred in denying his motion to compel discovery, that his due process rights were violated, that the Chief Justice of the Kentucky Supreme Court erred by not disqualifying two judges, that the trial court erred by failing to require Deutsche Bank's attorneys to prove that they represented Deutsche Bank, and that the trial court erred in denying his motion for a more definite statement. The Court of Appeals affirmed the trial court's order granting Deutsche Bank's motion for summary judgment.

III. OPEN RECORDS

A. ***UNIVERSITY OF KENTUCKY V. LACHIN HATEMI, M.D.***

2019-CA-0731, 2019-CA-0794 11/05/2021 2021 WL 5142666

Opinion by ACREE, GLENN E.; CALDWELL, J. (CONCURS) AND K. THOMPSON, J. (CONCURS IN RESULT ONLY)

Pursuant to the Open Records Act, Appellee Lachin Hatemi, M.D. asked Appellant University of Kentucky for minutes of meetings of UK Medical Center department heads (and others) who advised the dean of the medical school on various issues. After an adequate search, Appellant timely responded that no records were responsive to his request (discovery would show, and the circuit court would hold, no minutes were ever created). Appellee sought review by the Attorney General pursuant to KRS 61.880(2), but did not make a *prima facie* showing that the records do exist as required by *Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333 (Ky. 2005), and Appellee produced no evidence to the AG that called into doubt the adequacy of the agency's search. Such circumstances call for the AG's finding that Appellant satisfied its Open Records Act obligation. However, the Assistant Attorney General assigned to conduct the review undertook an investigation to determine whether the group constituted a "public agency" required by the Open Meetings Act to create minutes by KRS 61.835. The AAG so found and, upon such finding, concluded Appellant "violated KRS 61.880(1) by impeding the timely release of committee meeting minutes when it failed to conduct an adequate search for the minutes." Appellant appealed to circuit court pursuant to

KRS 61.882(1) invoking subject matter jurisdiction "to enforce the provisions of KRS 61.870 to 61.884[,]" the Open Records Act. Appellee counterclaimed that Appellant wilfully withheld public records in violation of KRS 61.882(5) and was entitled to compensation. The circuit court held: (1) the requested records never were created; (2) the group of Appellant's employees was "a 'public agency' under the Open Meetings Act . . . required to record and keep meeting minutes under KRS 61.835"; (3) because Appellant failed to comply with the Open Meetings Act, the court would not grant Appellant's request to overturn the AG finding that it violated KRS 61.880(1); and (4) the Appellant did not wilfully withhold minutes that never existed. Appellant appealed; Appellee cross-appealed. The Court of Appeals concluded the AG decision (16-ORD-101) must be reversed because the AAG arrogated authority from KRS 61.880(2)(c) to conduct an unauthorized investigation in aid of Appellee's request for AG review and there was no evidence to support finding a violation of KRS 61.880(1). As for the circuit court's judgment, the Court of Appeals: (1) reversed the circuit court's judgment to the extent it found violations of the Open Meetings Act without subject matter jurisdiction to do so; (2) reversed the circuit court's denial of the Appellant's demand that the AG decision be reversed, holding that Appellant did not fail to comply with KRS 61.880(1); but (3) affirmed the circuit court's judgment that Appellant did not wilfully withhold records in violation of KRS 61.882(5).

IV. REAL PROPERTY

A. ***JOHNNY MCCOY, ET AL. V. JENNIFER LYNN HORN, EXECUTRIX OF THE ESTATE OF JACKIE JORDAN, ET AL.***

2020-CA-0065 11/05/2021 2021 WL 5142675

Opinion by McNEILL, J. CHRISTOPHER; ACREE, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

In 2017, Appellee Jackie Jordan conveyed a remainder interest in certain real property to Appellants Johnny and Michelle McCoy. Jordan retained a life estate in the real property and continued to live in the home. He purchased an insurance policy on the home and its contents, paid the premiums, and was the sole insured. In 2018, the home was destroyed by fire. Jordan filed a petition for a declaration of rights, arguing that he was the sole beneficiary of the insurance proceeds. The McCoys counterclaimed, asserting that, as remaindermen, they were entitled to a share of the proceeds. Both parties moved for summary judgment, and the circuit court entered an order granting Jordan's motion and denying the McCoys' motion. The Court of Appeals affirmed the trial court's order, stating that Kentucky follows the majority rule, which holds that a life tenant is not required to keep the premises insured for the benefit of the remainderman. Each may insure his own interest, but absent a stipulation or agreement, neither has any claim upon the proceeds of the other's policy.

V. EQUINE LAW

A. ***MULL ENTERPRISES LIMITED D/B/A YEOMANSTOWN STUD V. MGG INVESTMENT GROUP LP***

2020-CA-0434, 2020-CA-0478 11/12/2021 2021 WL 5264189

2020-CA-0821, 2020-CA-0900

2020-CA-0960

Opinion by GOODWINE, PAMELA R.; ACREE, J. (CONCURS) AND JONES, J. (CONCURS)

Appellant MGG Investment Group LP challenged judgements of the Fayette Circuit Court dismissing or granting summary judgment on its claims against appellees. Appellee, Yeomanstown, cross-appealed the circuit court's dismissal of Appellant's claims against it without prejudice. Appellant loaned Zayat Stables thirty million dollars secured by Zayat's equine collateral. Zayat then sold such collateral to appellees in violation of its financing agreement with Appellant. After Zayat defaulted on the loan, Appellant filed suit for breach of contract and fraud; and, later, it amended its complaint to include various claims against appellees as purchasers of the equine collateral. The circuit court dismissed the claims against Yeomanstown without prejudice based on the applicability of KRS 413.242 and KRS 413.125. The court dismissed or granted summary judgment on the claims against the remaining appellees based on application of the Food Security Act ("FSA"), 7 U.S.C. 1631. The Court of Appeals affirmed the trial court's application of the FSA, holding the subject-horses and breeding rights qualified as "farm products" under 7 U.S.C. 1631(c)(5), appellees are "buyers in the ordinary course of business," and the breeding rights were sold by the same party which created the security interest therein. The Court also determined KRS 413.242 is constitutional and bars Appellant's claims against Yeomanstown because there has not yet been a final judgment on its claims against Zayat. Furthermore, the Court held Appellant was not entitled to application of the discovery rule or equitable tolling because exercise of reasonable diligence would have uncovered Zayat's sale to Yeomanstown.

VI. TRUSTS AND ESTATES

A. ***KENNETH BRANDON KEITH INDIVIDUALLY, ET AL. V. DEBRA CROSS EXECUTOR OF THE ESTATE OF JUDITH MAGERS KEITH***

2020-CA-0682, 2020-CA-0700 11/05/2021 2021 WL 5141746

Opinion by CLAYTON, DENISE G.; GOODWINE, J. (CONCURS) AND MAZE, J. (CONCURS)

The widow of a decedent who disposed of the bulk of his personal property to his sons from a previous marriage, primarily through joint accounts held in survivorship, renounced his will and brought a lawsuit alleging fraud on the dower. The trial court held that she succeeded in proving an unrebutted *prima facie* claim of fraud on the dower and conducted a bench trial to determine which assets should be included in the dower share calculation under KRS 392.020. The Court of Appeals affirmed, holding that the decedent's disposal of the bulk of his personal

property to his sons was sufficient evidence of his intent to deprive his spouse of her dower share, and, consequently, she was not required to prove she would be left destitute by the disposition of his property or to show that the disposition of the property occurred shortly before his death. The Court also affirmed that the appellants were not entitled to a jury trial and that funds held by the decedent and his sons in financial accounts with a beneficiary election, joint checking accounts, and amounts forgiven in a promissory note were subject to the fraud on the dower claim. As to the calculation of the dower share, the Court affirmed that the assets which passed directly to the surviving spouse outside the will would not form part of the total estate to be divided under KRS 392.020. On cross-appeal, the Court rejected the argument that debts on the marital residence and a vehicle which passed to the widow via survivorship should be paid by the estate. The Court affirmed the trial court's decision not to award prejudgment interest, as the damages in this case were unliquidated, and its decision not to award post-judgment interest. It also affirmed the trial court's award of an executor's fee and the amount of the attorney's fee in the underlying probate case.

VII. LANDLORD / TENANT

A. ***ANYCONNECT US, LLC V. WILLIAMSBURG PLACE, LLC***

2021-CA-0044 11/05/2021 2021 WL 5141919

Opinion by GOODWINE, PAMELA R.; CLAYTON, C.J. (CONCURS) AND MCNEILL, J. (CONCURS)

Appellant AnyConnect (US) LLC ("Tenant") appeals from an order granting Appellee Williamsburg Place, LLC's ("Landlord") motion for summary judgment following default of a three-year commercial lease (the "Lease"). Tenant paid rent due under the Lease for the first year. Tenant, however, ceased paying rent beginning November 1, 2017, when the monthly rent increased from $4,354 to $5,340. On December 8, 2017, Landlord sent Tenant a notice of default letter. Tenant vacated the property, and Landlord filed suit asserting a claim for $128,160 in rent due under the Lease, pre-judgment interest at the legal rate, post-judgment interest, costs, and attorney's fees. The trial court granted summary judgment in favor of Landlord, awarding damages in the amount of $128,160, plus pre-judgment interest at 6%, attorney's fees, and costs. Tenant appealed, arguing that the trial court erred: 1) in its calculation of damages; 2) in its award of prejudgment interest; and 3) in its award of attorney's fees. The Court of Appeals affirmed the trial court's order granting summary judgment as to Tenant's liability to Landlord for unpaid rent due under the Lease's three-year term and for prejudgment interest, finding Landlord's damages were liquidated. The Court of Appeals reversed the order as to the amount of damages awarded and its award of attorney's fees. The Court of Appeals found that genuine issues of material fact exist as to whether Landlord adequately mitigated its damages and that attorney's fees were neither statutorily authorized nor specifically authorized under the Lease.

VIII. DOMESTIC VIOLENCE

A. ***JAMES CHRISTOPHER SEWELL V. ELIZABETH INGRID SWEET***

2021-CA-0340 11/19/2021 2021 WL 5405855

Opinion by MAZE, IRV; ACREE, J. (CONCURS) AND COMBS, J. (CONCURS)

Appellee Elizabeth Ingrid Sweet filed a petition for an interpersonal protective order ("IPO") against Appellant James Christopher Sewell. The Lewis Family Court granted the temporary order and scheduled a hearing on Sweet's petition. At the hearing, Sweet testified to the incidents identified in her petition, as well as other incidents not cited in her petition. At Sewell's request, the family court continued the hearing to allow him time to gather his witnesses and exhibits. At the second hearing, Sweet again provided testimony and evidence supporting her allegations against Sewell. Sewell also testified but did not produce any definitive evidence or witnesses to support his version of events. Subsequently, the Lewis Family Court found that acts of dating violence and stalking occurred and granted the IPO.

The Court of Appeals affirmed the IPO based on the findings of dating violence and abuse, but not stalking. First, the Court found that the family court did not violate Sewell's constitutional right to due process when it allowed Sweet to testify to alleged dating violence incidents not included in the filed petition. The Court observed that a protective order cannot be granted solely based on the contents of the petition and that due process requires that each party be given a meaningful opportunity to be heard. The Court also pointed out that that no Kentucky authority requires an individual to list every alleged act in the petition for a protective order. Finally, the Court noted that the family court allowed Sewell additional time to gather witnesses and evidence in response to Sweet's testimony about other incidents.

Second, the Court of Appeals concluded that the Lewis Family Court's finding that stalking occurred and is likely to occur again is not supported by substantial evidence. The Court noted that while Sewell's unwelcomed visits to Sweet's workplace and home may have been irritating, his actions did not meet the statutory definition of stalking because the behavior did not amount to a threat with the intent to place Sweet in reasonable fear of sexual contact, physical injury, or death. Nevertheless, the Court found substantial evidence to support Sweet's allegations that dating violence and abuse had occurred and was likely to occur again. Consequently, the Court affirmed the issuance of the IPO on this ground.