

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
OCTOBER 1, 2018 to OCTOBER 31, 2018

I. BUSINESS ORGANIZATIONS

A. Tavadia v. Mitchell

[2017-CA-001358](#) 10/19/2018 2018 WL 5091048

Opinion by Judge Dixon; Judges Combs and Maze concurred.

The Court of Appeals reversed an order dismissing appellants' claims of breach of fiduciary duty, misappropriation and conversion of company assets, forgery, and fraud. The circuit court found that even though appellee had fraudulently signed appellant Behram Tavadia's name to a loan application and personal guaranty without his knowledge or permission, his claims of fraud and forgery should be dismissed because he did not prove that he had suffered any compensatory damages. The Court of Appeals disagreed and, citing to *Mo-Jack Distributor, LLC v. Tamarak Snacks, LLC*, 476 S.W.3d 900 (Ky. App. 2015), held that the circuit court, having determined that the evidence supported a finding of liability on appellee's behalf, should have ruled in favor of appellants on the claims of fraud and forgery even in the absence of damages, and then should have considered nominal damages and addressed the claims for punitive damages and attorneys' fees. The Court further held that the circuit court erred in finding that the evidence did not support piercing the corporate veil to hold appellee personally liable to appellants for her company's debts. The Court agreed with appellants that the circuit court ignored evidence that appellee had engaged in fraudulent and morally culpable conduct and was unjustly enriched as a result of her actions. There was no dispute that the company was undercapitalized and did not follow necessary formalities, or that appellee essentially had sole control of operations. The Court noted that appellee used company monies to pay for lavish personal expenses at a time when the company was failing to satisfy creditors and was incurring substantial overdraft charges. The Court further held that the circuit court erroneously concluded that although appellee had comingled funds when she deposited the proceeds from the sale of company equipment into her bank account, because she did so at a time when failure of the company was imminent it would be unjust to hold her personally liable. The Court determined that once appellants proved that

appellee had diverted company monies into her personal account, she was under an obligation to show that she spent those funds on business expenses. The Court concluded that to continue to recognize the company and permit appellee to avoid liability would be condoning her personal use of company funds to the detriment of the company and appellants as investors, which would promote injustice and would excuse appellee's morally culpable behavior.

II. CHILD CUSTODY AND RESIDENCY

A. *Dellapenta v. Goldy*

[2017-CA-001301](#) 10/26/2018 2018 WL 5304201

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

The Court of Appeals vacated an order granting sole custody of two minor children to appellee. Appellant, who resided in Colorado, sent the two children to live with appellee in Kentucky during the summer. Appellee then initiated custody proceedings in Kentucky while the children were residing with him. Appellant argued that Colorado was the home state of the children and that Kentucky did not have jurisdiction to determine custody issues. The circuit court determined that neither Colorado nor Kentucky was the children's home state because the children had not resided in either state for the requisite six months before the commencement of custody proceedings. The Court of Appeals held that Kentucky did not have jurisdiction to determine custody because Colorado was the children's home state. The Court concluded that the children's presence in Kentucky was only temporary and that the parties intended for the children to return to Colorado; therefore, the time the children spent in Kentucky counted toward Colorado's six-month residency requirement.

III. CIVIL PROCEDURE

A. *Curty v. Norton Healthcare, Inc.*

[2018-CA-000099](#) 10/12/2018 2018 WL 4936421

Opinion by Judge Nickell; Judges Johnson and Maze concurred.

Appellant was employed by Norton for less than a year before her employment was terminated for excessive absenteeism. She subsequently filed suit alleging claims of retaliation and unlawful discharge in violation of the Kentucky Civil Rights Act (KCRA), disability discrimination, and Workers' Compensation Act retaliation. Appellant propounded written discovery but failed to request production of her medical records. Norton moved for summary judgment. While the motion for summary judgment was pending, appellant moved the circuit court to compel production of her medical records without proffering evidence that she had actually requested them. The circuit court eventually granted summary judgment on all but appellant's disability discrimination claim. The circuit court denied appellant's motion to compel as premature, determining that appellant had not attempted to obtain her medical records through methods available to her under CR 26.01. Norton moved for summary judgment again and the circuit court granted the motion, finding that the record compelled the conclusion that appellant was not "disabled" as defined under the KCRA and that Norton's decision makers did not perceive her as such. On appeal, appellant argued that the circuit court erred by not allowing her access to her medical records when it denied her motion to compel their production. The Court of Appeals affirmed the denial of the motion to compel, holding that under CR 37.01(b)(i), a party moving to compel the production of discovery must first make a discovery request and the request must be denied. Here, appellant failed to request her medical records from Norton; therefore, the circuit court did not err in denying her motion to compel same. The Court of Appeals also affirmed the circuit court's entry of summary judgment in favor of appellees.

IV. CONTEMPT

A. *Sidbottom v. Watershed Equine, LLC*

[2016-CA-000268](#) 10/26/2018 2018 WL 5304268

Opinion by Judge D. Lambert; Judges Taylor and Thompson concurred.

Appellant challenged an order holding him in contempt. Appellant settled a dispute with appellee wherein he agreed to pay \$18,000, plus post-judgment interest. When appellant failed to pay, appellee sought post-judgment discovery regarding the amount owed. The day before a scheduled deposition, appellant sent counsel for appellee an email reply explaining his unavailability. When he did not show for the deposition, appellee filed a show cause motion with the circuit court, and a hearing was held on that motion. During the hearing, appellant testified as to his financial situation and his assets. He also admitted his failure to make payments in accordance with the payment schedule outlined in the settlement agreement. The circuit court orally determined that appellant had sufficient assets to pay the amount of the original settlement. There was also an oral finding that appellant could pay the respective fees and costs for appellee to bring the show cause motion. The circuit court subsequently entered a written order finding appellant in contempt of court, but it allowed him to avoid imprisonment if he paid \$22,013.12, the total amount owed, within thirty days. On appeal, appellant claimed that he was wrongly held in contempt for failing to attend the deposition. He also claimed that his constitutional rights were violated because he faced incarceration for failing to pay a debt. The Court of Appeals agreed, the contempt order was vacated, and the case was remanded for a new hearing. The Court first held that the circuit court failed to make sufficient written findings regarding appellant's ability to pay the judgment against him. The Court then held that requiring appellant to either pay a money judgment balance or be placed in jail violated § 18 of the Kentucky Constitution, which restricts imprisonment for a debt owed in order to prevent the resurgence of debtor prisons. The Court noted that appellant's alleged violation was failing to appear for a post-judgment deposition, a discovery abuse. Therefore, a proper sanction would have been one authorized under CR 37.04, which allows a court to enforce any just sanction against a party who has failed to appear at a deposition after receiving proper notice. Forcing appellant instead to pay the full judgment amount within an arbitrary time period or face imprisonment was an abuse of the circuit court's discretion.

V. CRIMINAL LAW

A. *McKinzie v. Commonwealth*

[2017-CA-000647](#) 10/05/2018 2018 WL 4836778

Opinion by Judge Thompson; Judges Combs and Kramer concurred.

Appellant challenged an order denying him jail-time credit for time spent on pretrial home incarceration without bond posted. The circuit court found that the statutory law in effect when appellant was sentenced did not allow credit for pretrial home incarceration. The Court of Appeals affirmed. The Court first noted that amendments to KRS 532.120(7) and KRS 532.245(1) allowing for jail-time credit in these circumstances were not in effect when appellant was sentenced. The Court then held that appellant was not “in custody” as used in KRS 532.120(3) while on home incarceration; therefore, he was not entitled to credit under that provision.

B. Yopp v. Commonwealth

[2017-CA-000309](#) 10/26/2018 2018 WL 5304251

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

Appellant challenged an order denying his motion to suppress certain statements and evidence on the basis that they were the product of an illegal traffic stop. The case began with an intercept of three packages containing illegal drugs by U.S. Postal Inspectors, who subsequently notified the Greater Hardin Narcotics Task Force. The Task Force pursued an investigation and made contact with the intended recipients of two of the packages, who each identified appellant as the intended “final” recipient of the packages. Upon receiving this information, an officer reviewed appellant’s Facebook page and noticed a picture of a black Chevy truck that purportedly belonged to him. During this time, other officers continued to watch the residence where they had left the third package outside in plain sight. They observed a truck similar to the one seen on appellant’s Facebook page driving back and forth in front of the premises with the package sitting outside. A record check on the truck’s license plate revealed that it belonged to appellant. A K-9 officer then performed a traffic stop of the truck; appellant gave permission to search the vehicle and told the officer that there was a pistol in the truck. As the officer took his dog around the exterior of the truck, it alerted to the presence of drugs. A subsequent search revealed a .45 caliber pistol and a jar with marijuana residue inside the vehicle. Appellant was then read his *Miranda* rights, and he consented to a search of his residence, where more drugs and guns were found. The Court of Appeals affirmed the denial of the motion to suppress, holding that the identification of appellant as the “final destination” of the drug packages, the confirmation of his identity via Facebook, the confirmation of the truck belonging to him by license plate check, and the witnessing of the truck driving back and forth in front of the address of the intended destination of the third drug package all combined to create reasonable suspicion for the stop. The Court also rejected appellant’s arguments regarding improper custodial interrogation, noting that appellant was Mirandized multiple times after the stop; volunteered his vehicle, house, and cell phone for search by the Task Force; signed a consent form allowing a search of his residence; and chose to aid in the Task Force’s investigation.

VI. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. *Thurman v. Thurman*

[2017-CA-002033](#) 10/12/2018 2018 WL 4936431

Opinion by Judge Taylor; Judge Combs concurred; Judge Dixon concurred in result only.

Appellant challenged a November 22, 2017 domestic violence order. The Court of Appeals vacated and remanded because the record did not reflect that appellant was properly served with a summons and notice of the November 22nd hearing date. The Court noted that the record contained a summons that was issued, directing appellant to appear on November 22nd, but there was no return or proof that he was ever served with it. To the contrary, the summons contained a written notation dated November 20, 2017, stating that three different attempts to serve it had been unsuccessful. The Court also noted that KRS 403.730(1)(b) states that service of a summons in response to a DVO petition “shall be made upon the adverse party personally.” As to appellee’s argument that appellant told her he was aware of the hearing, her testimony to this effect only supported a conclusion that he knew of the November 22nd hearing - not that he was properly served with a summons to appear on that date. Kentucky courts have consistently held that mere knowledge of the pendency of an action is not sufficient to give a court jurisdiction over a person. Instead, proper service of process is necessary for a court to obtain personal jurisdiction over a party.

VII. ESTATES

A. *Reynolds v. Randolph*

[2016-CA-001163](#) 10/26/2018 2018 WL 5304451

Opinion by Judge Jones; Judges Kramer and D. Lambert concurred.

Appellants were the five children of David T. Reynolds, who died intestate in 2003. Appellees included Reynolds's widow, Susan D. Randolph; Pamela Potter, an attorney hired by Randolph to represent her in the administration of Reynolds's estate; and Garis Pruitt, an attorney hired by Randolph to pursue a wrongful death action on behalf of appellants and herself as Reynolds's statutory beneficiaries. Pruitt filed a wrongful death action against two companies and reached settlement agreements with both. However, appellants never received the proceeds due to them from the first settlement, as those proceeds were converted by Pruitt's paralegal/bookkeeper. This conversion was not revealed to appellants until 2009, more than four years after the settlement had been reached. Adding to that, the proceeds from the second settlement were erroneously paid into Reynolds's estate, rather than to appellants. As a result of that error, appellants did not receive the proceeds due to them from the second settlement until over six years later. Reynolds's estate was settled in 2012, with appellants receiving distributions from the second settlement and the probate assets due to them. Appellants did not appeal from the final settlement order. In 2014, appellants filed the underlying suit, which sought to hold Pruitt, Potter, and Randolph liable for breach of their professional/fiduciary duties. Following some discovery, the circuit court entered summary judgment in favor of all defendants. The Court of Appeals affirmed in part, reversed in part, and remanded. As to appellants' claim against Randolph for breach of her fiduciary duties in the handling of Reynolds's estate, the Court held that, under KRS 395.617(2), appellants had thirty days after entry of the final settlement order to bring an adversary action in circuit court against Reynolds. Because appellants had failed to do so, the district court's order regarding administration of the estate was binding and precluded any further litigation against Randolph. The Court also determined that nothing in the record supported appellants' claims against Randolph with respect to the wrongful death proceeds. Looking next to appellants' claims against Potter, the Court held that Randolph's hiring of Potter for assistance with administration of Reynolds's estate did not create a fiduciary relationship between Potter and appellants. Moreover, Potter had not caused the wrongful death proceeds to be erroneously paid into the estate, and nothing about her conduct suggested a breach of duty. Thus, summary judgment in Potter's favor was appropriate. As to Pruitt, the Court held that questions of fact existed as to whether he had breached his fiduciary duty with respect to the wrongful death proceeds; however, any claims asserted by the four oldest appellants against

Pruitt were barred by the applicable statute of limitations. Consequently, the Court affirmed the summary judgment in Pruitt's favor as to the four oldest appellants, but reversed and remanded as to the breach of fiduciary duty claim against Pruitt asserted by the youngest appellant.

VIII. FAMILY LAW

A. *Hamilton v. Duvall*

[2017-CA-001898](#) 10/26/2018 2018 WL 5304163

Opinion by Judge Acree; Judges Jones and Thompson concurred.

The Court of Appeals reversed an order allowing paternal grandparents visitation/timesharing according to the family court's standard timesharing schedule for parents - amounting to more than 150 days per year. The paternal grandparents had sought this amount of visitation because their son, the child's father, had died. Mother, who was found by the family court to be a fit parent, had allowed some grandparent visitation. Noting that all prior Kentucky decisions regarding grandparent visitation addressed situations in which the parent denied grandparent visitation entirely, the family court deemed Mother's concession an admission that grandparent visitation was in the child's best interest. The family court concluded that the standard parental visitation was appropriate because it would not be harmful to the child, because there was a loving relationship between the child and the grandparents, and because it would not deprive Mother of much time with the child due to her work schedule. Citing to *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) and *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012), the Court of Appeals held that the family court's order was not founded on any special factors that might justify interference with Mother's fundamental right to make decisions concerning the rearing of her child, and that the Due Process Clause does not permit a court to infringe on the fundamental right of parents to make child-rearing decisions simply because a judge believes that a "better" decision could be made.

B. K.S. v. B.S.

[2018-CA-000122](#) 10/19/2018 2018 WL 5091047

Opinion by Judge J. Lambert; Judge Combs concurred; Judge Thompson dissented and filed a separate opinion.

Mother appealed an order granting Father's motion to re-establish visitation with their minor child. In a 2-1 vote, the Court of Appeals vacated the ruling, finding clear error in the family court's statement that it had not found that Father had sexually abused the child in the companion juvenile action. In that action, the family court found the allegations of sexual abuse set forth in the juvenile petition to be true, and the Court of Appeals affirmed the ruling on appeal. The Court also held that the family court abused its discretion in permitting visitation because it failed to consider any of the expert testimony concerning harm the child might experience in re-establishing visitation. The case was remanded for further proceedings. In dissent, Judge Thompson submitted that it did not matter whether the family court's statement that it did not find that sexual abuse had occurred in the juvenile case was correct or incorrect. This was a different case with different evidence. What mattered is whether the family court abused its discretion when it awarded visitation.

IX. JUVENILES

A. *C.F. v. Commonwealth*

[2018-CA-000502](#) 10/05/2018 2018 WL 4836774

Opinion by Judge Nickell; Judges Johnson and Maze concurred.

The Jefferson County Attorney filed a juvenile petition alleging that appellant was habitually truant. Denying appellant's request for a continuance, the circuit court committed appellant to the Cabinet for Health and Family Services without holding a formal dispositional hearing. The circuit court did not take sworn testimony and the parties were not allowed to present evidence or to cross-examine witnesses. On appeal, appellant argued that the circuit court violated his due process right to a dispositional hearing. The Commonwealth conceded that the dispositional hearing was statutorily deficient. The Court of Appeals reversed and remanded for further proceedings. The Court held that although the question of what constitutes sufficient due process for a status offender dispositional hearing had never been directly addressed by Kentucky courts, a basic tenet of due process is that each party must be permitted the opportunity to present and controvert evidence. KRS 630.120(3) expressly provides that at the disposition of a status offender, the court may rely on oral and written reports "provided that the child, the child's parents, their counsel, the prosecuting attorney, the child's counsel, or other interested parties as determined by the judge shall be afforded an opportunity to examine and controvert the reports." Here, appellant was not afforded a dispositional hearing comporting with these statutory dictates or with his due process right to a meaningful and fair proceeding.

X. NEGLIGENCE

A. Howard v. Spradlin

[2017-CA-001478](#) 10/26/2018 2018 WL 5304188

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

This appeal concerned a building owner (appellant) whose commercial property was destroyed when a truck parked on the property ignited and caught the eaves of the building on fire. The truck had been parked in the building's parking lot after the building - which was being leased for use as a grocery store - had closed. The issues presented were whether the truck's owner (appellee) was a trespasser and whether he could be liable for negligence when the fire was set by an unknown third party who had broken into the truck. The building owner argued that appellee could be liable under the theory of negligence *per se* because he was a criminal trespasser in violation of KRS 511.080(1). The circuit court entered summary judgment in favor of appellee, and the Court of Appeals affirmed. The Court first held that there was no material issue of fact regarding whether appellee had permission to park in the parking lot. The grocery store operators filed affidavits stating that appellee was not trespassing on the night of the fire and that they had never objected to him parking his truck on the grocery store lot after hours. Additionally, there was no signage to indicate to anyone that a vehicle could not be parked on the lot after hours. Consequently, the Court held that summary judgment was properly granted on the theory of trespass and negligence *per se*. The Court further held that appellee could not be liable for common-law negligence. Parking a truck does not pose a foreseeable risk of harm, and the act could not breach any duty owed to the premises owner. Moreover, the third party's act of burning the truck was an intervening superseding cause.