PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
FEBRUARY 1, 2024 to FEBRUARY 29, 2024

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I. CRIMINAL LAW

A. ***MICHAEL W. CLAY v. COMMONWEALTH OF KENTUCKY***

2023-CA-0105-MR 2/23/2024 2024 WL 736726
Opinion by KAREM, ANNETTE; GOODWINE, J. (CONCURS) AND MCNEILL, J. (CONCURS)

Michael W. Clay appealed from the Fayette Circuit Court's order denying his motion to suppress. Clay argued that the circuit court erred by failing to suppress evidence recovered as a result of a drug sniff at a traffic stop. The only issue on appeal was whether the officer had reasonable suspicion to permit the detention of Clay and the vehicle in which he was a passenger to perform a warrantless search. The Court of Appeals affirmed the circuit court. The Court first noted that the Court of Appeals had recently decided two unpublished cases on the issue of reasonable, articulable suspicion with differing results - *Jones v. Commonwealth*, No. 2018-CA-001181-MR, 2019 WL 2321654 (Ky. App. May 31, 2019) and *Warfield v. Commonwealth,* No. 2021-CA-1404-MR, 2023 WL 2718970. The Court determined that, looking at the totality of the circumstances in this case, the officer's observations formed a basis for reasonable, articulable suspicion to allow a deviation from the original purpose of the traffic stop. Further, the Court noted it was considering the officer's inferences based on objective observations and the criminal's methods of operation. Thus, the Court affirmed the circuit court's denial of Clay's motion to suppress.

II. DEFAMATION

A. ***DAVID RAMLER v. WILLIAM BIRKENHAUER AND STEVEN FRANZEN***

2022-CA-1283-MR 2/09/2024 2024 WL 501124
Opinion by EASTON, KELLY MARK; THOMPSON, CHIEF JUDGE (CONCURS) AND CALDWELL, J. (CONCURS)

This is an appeal from a Campbell County jury verdict and the Campbell Circuit Court's order dismissing Ramler's abuse of process counterclaim. While running for mayor of the City of Highland Heights, located within Campbell County, Ramler released a

pamphlet that discussed past comments made by Birkenhauer and Franzen ("Appellees"), who are both city officials, and labelled the Appellees as racist and sexist. Appellees filed a Complaint against Appellant for defamation and false light based on the contents of the pamphlet. At the end of a three-day trial, Appellant moved for directed verdict and filed a post-trial motion for judgment notwithstanding the verdict. Both were denied.

On appeal, Ramler argues his pamphlet is "pure opinion," which is protected speech. *Yancy v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1989). Pure opinion "occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character." RESTATEMENT (SECOND) OF TORTS § 566 cmt. b. Statements on matters of public concern must be sufficiently factual so that the statement may be proven false, or the statement must imply underlying facts which are provable as false before there can be liability under state defamation law. *Milkovich v. Lorain Journal Company*, 497 U.S. 1, 110 S. Ct. 2695, 11 L. Ed. 2d 1 (1990). In *Cromity v. Meiners*, 494 S.W.3d 499 (Ky. App. 2015), the Kentucky Supreme Court found that a radio host's statements concerning a police officer were statements of public concern; since the radio host fully disclosed the facts supporting his opinion, and the facts were not provable as false, his opinions were constitutionally protected. Because Appellant stated the facts he based his statements about the Appellees' in his pamphlet, and those facts were not provable as false, Ramler's speech was constitutionally protected. Therefore, the trial court should have dismissed Appellees' lawsuit as there was no viable claim to be brought.

This Court also determined that Ramler's statements labelling Appellees' as "racist" or sexist" are nonactionable rhetorical hyperbole, and the political statements made by Appellant are protected. *Welch v. American Publishing Company of Kentucky*, 3 S.W.3d 724 (Ky. 1999).

Appellees' false light claim also fails because the facts behind Ramler's opinion statements are true. The parties disagree on whether the facts Appellant based his opinions off were defamatory, not the actual facts. Thus, the Court reversed the jury verdict granting Appellees compensatory and punitive damages.

The Court determined that the trial court was correct in denying Ramler's abuse of process claim, because the Appellees' did not have an improper motive and they had responded to Ramler's request for a settlement offer. Thus, the Court affirms the trial court's summary judgment dismissing Ramler's abuse of process claim.

III. INSURANCE LAW

A. ***BREEDLOVE v. STATE FARM FIRE AND CASUALTY COMPANY, AND GARY BINION, 2022-CA-1105-MR (Ky. App. 2024)***

2022-CA-1105-MR 2/09/2024 2024 WL 501900
Opinion by JONES, ALLISON; COMBS, J. (CONCURS) AND MCNEILL, J. (CONCURS)

In a direct appeal from the trial court's grant of summary judgment to State Farm, as well as from the trial court's dismissal of the case against State Farm's adjuster, Gary Binion, the Court of Appeals affirmed. Appellant sued State Farm and Binion for bad faith under KRS 304.12-230, Kentucky's Unfair Claims Settlement Practices Act (UCSPA), following State Farm's initial denial of coverage for injuries resulting from a motor vehicle collision. State Farm's denial was predicated on its reliance on an erroneous police report which indicated that Appellant caused the collision. State Farm eventually paid Appellant's underlying claim when it recognized the error in the police report.

Appellant presented three arguments on appeal. First, he argued the trial court lacked subject-matter jurisdiction because the bad faith claims were unripe when he filed the complaint. Second, he argued the trial court erroneously dismissed the claim against Binion, State Farm's employee adjuster. Third, he argued the trial court erroneously granted summary judgment to State Farm.

The Court of Appeals rejected Appellant's arguments. First, we held the trial court did not lack subject-matter jurisdiction based on unripeness when the bad faith claims were filed alongside the underlying negligence claims. The trial court bifurcated and stayed the bad faith claims until the underlying claims were resolved, which has been the Kentucky Supreme Court's preferred method for handling bad faith claims for several decades; *see Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993). Furthermore, Appellant's claimed issue actually appeared to be that of particular-case jurisdiction, which may be waived.

Second, in clarifying an unsettled area of law in Kentucky, we held the trial court properly dismissed the claim against Binion, as UCSPA requires contractual privity for bad faith claims. *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 100 (Ky. 2000). Third, and finally, we held the trial court properly granted summary judgment to State Farm. After more than three years, and after violating multiple pretrial discovery orders, Appellant had failed to produce any evidence indicating State Farm engaged in outrageous conduct which would be necessary for a finding of bad faith.

IV. SOVEREIGN IMMUNITY

A. ***VANESSA BURNS v. BEATRICE AISTROP, 2023-CA-0110-MR (Ky. App. 2024)***

2023-CA-0110-MR 2/09/2024 2024 WL 501830
Opinion by MCNEILL, J. CHRISTOPHER; COMBS, J. (CONCURS) AND JONES, J. (CONCURS)

Appellee tripped and fell on a Louisville, Kentucky public sidewalk. She filed suit seeking damages against the City of Louisville and Appellant. Appellant is the Director of Louisville Metro Public Works, which has many responsibilities, including road and sidewalk maintenance. The Jefferson County Attorney filed a motion to dismiss the City of Louisville and Appellant in her official capacity, based on sovereign immunity. The trial court granted the motion. Appellant filed a motion for summary judgment based on her qualified immunity, which the trial court denied.

The Court reversed the trial court. The Court determined that Appellant's actions were discretionary. Immunity applies to a public official who was negligent when the negligent action was discretionary (those acts which involve an exercise of judgment, personal deliberation, discretion, etc.). *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). Appellant's deposition indicated that no individual was specifically tasked with assessing the quality of the sidewalks within the city. Further, once a complaint was filed, an assessment of the deficiency would be completed by a city employee with the correct skills. There was no indication that Appellant was in any way connected to the city division tasked with sidewalk repair. *See Wales v. Pullen*, 390 S.W.3d 160 (Ky. App. 2012) (granting the Director of the Louisville Metro Department of Public Works' motion for summary judgment because none of his duties involved executing orders or specific acts; therefore, his duties were discretionary.) Thus, the Court reversed the trial court's denial of Appellant's motion for summary judgment.

V. WAGE AND HOUR

A. ***KEVIN MEIER v. JEFF WYLER ALEXANDRIA, INC. AND JEFF WYLER AUTOMOTIVE FAMILY, INC.***

2022-CA-1371-MR 2/09/2024 2024 SL 501139
Opinion by CALDWELL, JACQUELINE; JONES, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Meier appealed from the Boon Circuit Court's summary judgment dismissing his claims of illegal wage deductions. Meier was a car salesman at Jeff Wyler. He was paid a set amount twice a month, and he could earn additional income in commissions and bonuses under a written pay plan. The pay plan made it so additional payments for

commissions and bonuses could be reduced for certain negative factors, such as imperfect customer service surveys, failed mystery shopper assessments, and low conversation rates on potential trade-in deals. Meier and his manager would sign off on a sheet which contained the calculations for his payment after adding commissions and bonuses and subtracting amounts for negative factors. Meier believed the reductions in his earnings to violate Kentucky law. He filed suit, claiming that Jeff Wyler's reductions in his earnings were "fines" prohibited by law. The trial court granted summary judgment in Jeff Wyler's favor and dismissed Meier's lawsuit.

At the heart of this issue is the interpretation and application of KRS Chapter 337, Kentucky's wage and hour statutes. The trial court interpreted KRS 337.060 to prohibit deductions only from agreed-upon wages, and that under the undisputed facts, there was no deduction from the wages agreed upon between Meier and Jeff Wyler. There was only a dispute about how the calculations were done to get to the wages. Our Court determined that the trial court may have errored by interpreting KRS 337.060 in such a way, but the interpretation was harmless under the undisputed facts. Our Court did not entirely agree with the trial court's interpretation of the term "notwithstanding" in KRS 337.060(2) as to mean "exceptions" stated in KRS 337.060(1). However, this Court ultimately agreed with the trial court that the deductions Meier is complaining about are not fines because the word "fine" has a particular meaning in the law which does not include deductions from wage bonuses like the ones in this case. Thus, the Court affirmed the trial court's summary judgment.