

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
AUGUST 1, 2015 to AUGUST 31, 2015

I. AUTOMOBILES

A. *Fentress v. Martin Cadillac, Inc.*

[2014-CA-000177](#) 08/14/2015 2015 WL 4776297 DR Pending

Opinion by Judge Thompson; Judges Jones and Taylor concurred. The surviving spouse of a motorist who was killed in a collision with a stolen vehicle brought a negligence action against, among others, the automobile dealership that owned the vehicle and the motor vehicle salesman who was given the vehicle for his personal use, and who left the vehicle unlocked and with the key in the vehicle in the parking lot of his apartment complex. The circuit court awarded summary judgment to the dealership and salesman, and the Court of Appeals affirmed. The Court held that the salesman did not violate a statutory duty by leaving the vehicle unlocked and with the key inside, and that any breach of duty by the salesman was not the proximate cause of the motorist's death. The statute in question, KRS 189.430(3), which bars a person in control of a vehicle from leaving it unattended without locking the ignition and removing the key, applies only to public ways, and not to places like the subject parking lot, which was owned by the owner of the apartment complex and made available for the use of residents and guests. Moreover, the thief's actions in stealing the vehicle, and in driving recklessly while being chased by police, were a superseding cause of the motorist's death, and the thief's recklessness was not reasonably foreseeable. The Court further held that the dealership could not be held liable for any negligent hiring, training, or retention of the salesman.

II. BUSINESS ORGANIZATIONS

A. Griffin v. Jones

[2014-CA-000402](#) 08/14/2015 2015 WL 4776300 DR Pending

Opinion by Judge Kramer; Judges Clayton and Dixon concurred. Appellant invested large sums of money into an LLC and corporation formed by appellee's husband, who thereafter formed another LLC that operated as a management group for the previously-formed entities. Appellant did not own any shares or interest in the later-formed management group. Rather, appellee's husband was the management group LLC's sole member, and appellee was the president. Through the management group LLC, appellee and her husband commingled assets among the previously-formed entities and also caused the management group LLC to pay funds to them for their own personal use. Appellant subsequently filed claims alleging breach of fiduciary duty, fraud by omission, misappropriation, and unjust enrichment against appellee. The circuit court dismissed the claims due to a lack of standing. The Court of Appeals affirmed. At the onset, the Court observed that the analysis used to distinguish between a derivative and direct action must be based solely on the following questions: Who suffered the alleged harm - the corporation or the suing stockholder individually - and who would receive the benefit of the recovery or other remedy? The Court further observed that under Kentucky law, an action in which the holder can prevail without showing an injury or breach of duty to the corporation should be treated as a direct action; moreover, for the purpose of a CR 12.02(f) motion to dismiss, the duty of the court is to look at the nature of the wrong alleged, not merely at the form of the words used in the complaint, to determine for itself whether a direct claim exists. Under this analysis, the Court determined that regardless of how he labeled his causes of action, appellant's claims were derivative in nature, rather than direct. Laid bare, appellant's case against appellee was an impermissible attempt to convert a derivative claim into a direct claim through an exercise in semantics. Consequently, he lacked standing, as a matter of law, to directly pursue the claims he alleged against appellee and dismissal was merited.

III. CHILD SUPPORT

A. *Bootes v. Bootes*

[2014-CA-000816](#) 08/28/2015 2015 WL 5089905

Opinion by Judge VanMeter; Judges Clayton and Kramer concurred. On review from the Jefferson Circuit Court's order concerning child support and maintenance, the Court of Appeals affirmed in part, reversed in part, and remanded, holding that the circuit court erred by excluding Husband's income from a tax planning business from his "gross income" for purposes of child support calculations. Husband worked a seasonal second job preparing tax returns, and all proceeds from the business were given to his father to supplement his social security benefits and to improve his standard of living. Because of this, and the fact that Husband never reported income from the tax business on his personal income tax returns, the circuit court did not include that income when calculating Husband's child support obligations. The Court of Appeals determined that absent proof all proceeds went to an "ordinary and necessary expense" of the business, these funds constituted "gross income" received from self-employment or proprietorship of a business as defined in KRS 403.212(2)(c) and must be included in Husband's income for child support calculation purposes. The case was remanded for findings as to Husband's income from the tax business after ordinary and necessary expenses were deducted. The Court affirmed the circuit court's decisions concerning Wife's earning capacity, denial of maintenance, and refusal to award Wife attorney's fees.

IV. CONTRACTS

A. *Evans v. JNT, Inc.*

[2014-CA-000542](#) 08/21/2015 2015 WL 4967254 DR Pending

Opinion by Judge Maze; Chief Judge Acree and Judge D. Lambert concurred. Following the purchase of a Jaguar that had extensive body and engine damage that substantially diminished its value, appellants filed suit alleging claims for breach of contract, intentional misrepresentation, negligent misrepresentation, breach of express and implied warranties, violation of the Kentucky Consumer Protection Act (“KCPA”), and violation of the damage disclosure requirements of KRS 186A.540. The circuit court granted summary judgment to appellees. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court agreed with the circuit court that appellants’ claims for breach of contract, negligent misrepresentation, and breach of express and implied warranties were precluded based upon the “As Is” clause in the Jaguar’s purchase contract. However, the Court also concluded that the “As Is” clause did not preclude the claim for intentional misrepresentation or the claims for violations of the damage disclosure requirements of KRS 186A.540 and the KCPA.

V. CRIMINAL LAW

A. *Brann v. Commonwealth*

[2012-CA-001656](#) 08/21/2015 2015 WL 4969851

Opinion by Judge J. Lambert; Judges Kramer and Stumbo concurred. On remand from the Supreme Court of Kentucky, the Court of Appeals vacated an order revoking appellant's probation and remanded the case for further consideration in light of *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014) and KRS 439.3106. Because the circuit court did not articulate that it had considered KRS 439.3106 in its order revoking appellant's probation, further proceedings were required pursuant to *Andrews*.

B. *McGaha v. Commonwealth*

[2014-CA-000834](#) 08/28/2015 2015 WL 5089880

Opinion by Judge J. Lambert; Judges Jones and Maze concurred. The Court of Appeals affirmed an order denying appellant's RCr 11.42 motion without an evidentiary hearing. In affirming, the Court first held that trial counsel was not ineffective in failing to question jurors about racially prejudicial remarks made by the victim and their own possible racial prejudice. This was a matter of trial strategy, and such questioning would not have elicited the response appellant was seeking, but instead would have put the jurors in the unquestionably awkward position of having to admit to being racist, if they were. The Court next rejected appellant's argument that trial counsel was ineffective for failing to question a particular juror about her relationship with the victim's family because he had failed to raise and preserve the issue in his RCr 11.42 motion. The Court also found no ineffective assistance in trial counsel's failure to seek expert witnesses in the fields of accident reconstruction or gunshot residue, and it further held that the record refuted appellant's claims that his counsel failed to attempt to introduce the victim's racist comments, to seek an extreme emotional disturbance instruction, or to offer mitigation evidence during sentencing. Finally, the Court determined that appellant failed to establish ineffective assistance by his appellate counsel because the issues presented in support of his claim were not "ignored issues," but were instead raised on direct appeal. Moreover, appellate counsel was not obligated to file a reply brief.

C. **Richardson v. Commonwealth**

[2014-CA-000851](#) 08/14/2015 2015 WL 4776296 Rehearing Pending

Opinion by Judge Maze; Chief Judge Acree and Judge D. Lambert concurred. The Commonwealth moved to void the pretrial diversion of appellant, who had entered an *Alford* plea on a charge of receipt of stolen property, following his implication two months prior in twelve counts of cruelty to animals in the second degree. The circuit court voided appellant's pretrial diversion and sentenced him to two years in prison. On appeal, the Court of Appeals reversed and remanded, holding that, pursuant to the "unequivocal language of KRS 533.256(2)," the circuit court was required to comply with the revocation provisions set forth in KRS 439.3106 in determining whether to void appellant's pretrial diversion.

VI. DAMAGES

A. *LePort v. Allstate Insurance Co.*

[2013-CA-001076](#) 08/21/2015 2015 WL 4969816 DR Pending

Opinion by Judge Nickell; Judges Kramer and J. Lambert concurred. Appellant was the backseat passenger in a pickup truck (insured by Allstate) that was rear-ended by another pickup truck driven by Kermit Stone. Stone pled guilty to driving under the influence in a separate criminal proceeding. Appellant settled with Stone and his insurance carrier for the policy limits and then sought underinsured motorist (UIM) benefits from Allstate. At trial, Stone did not appear and Allstate was the only defendant. Because Stone's liability was conceded, and the parties stipulated to past medical expenses, the only questions to be decided were whether appellant was injured and, if so, to what extent. The jury awarded zero dollars as to appellant's pain and suffering and future medical expense claims, and the circuit court entered a judgment in accordance with the verdict. On appeal, the Court of Appeals affirmed. The Court first held that introducing evidence of Stone's impairment by oxycodone at the time of the collision would have been irrelevant and prejudicial and was properly excluded by the circuit court. Revealing the impairment could have influenced jurors to punish Allstate in contravention of the rule on balancing probative value against prejudicial effect. The Court next held that the jury's award of zero dollars was reasonably related to the evidence and did not warrant a new trial. The Court also held that an explanation of UIM coverage and limits was not needed or relevant since Allstate was identified as the defendant and acknowledged contractual liability. The Court further held that appellant had failed to properly preserve her argument that the circuit court abused its discretion in answering a jury question posed during deliberations.

B. Nami Resources Company, LLC v. Asher Land and Mineral, Ltd.

[2012-CA-000762](#) 08/14/2015 2015 WL 4776376 DR Pending

Opinion by Judge Dixon; Judges J. Lambert and Nickell concurred. Appellant/cross-appellee, NAMI Resources Company, LLC (“NRC”) appealed from a jury verdict awarding appellee/cross-appellant Asher Land and Mineral, Ltd. (“ALM”) \$1,308,403.60 in compensatory damages and \$2,686,000.00 in punitive damages for breach of contract and fraud. ALM cross-appealed, challenging the circuit court’s summary judgment in favor of NRC on its conversion claim, as well as the refusal to allow ALM to amend its complaint to assert a claim for encroachment/trespass. As to the direct appeal, the Court of Appeals affirmed, holding that: (1) by awarding the full amount of compensatory damages, the jury obviously believed that, except for third-party transportation expenses and marketing fees, the other deductions included in NRC’s royalty calculations did not reflect expenses actually incurred; (2) severance tax is an excise tax that is not in lieu of other taxes imposed upon landowners/lessors, and that royalties themselves are subject to taxation under KRS Chapter 141; (3) because ALM accepted royalty payments in reliance upon NRC’s representations contained in those statements, it was entitled to pursue both breach of contract and fraud actions for intentional underpayment of such royalties; (4) Kentucky law does not extend the economic loss rule beyond the realm of commercial product sales and, as a result, ALM’s fraud claim was not barred; (5) while there was conflicting evidence as to ALM’s reliance on NRC’s royalty statements, the evidence was nevertheless sufficient to create a jury question as to whether ALM reasonably relied on the alleged misrepresentations by NRC during the time in question; (6) sufficiently reprehensible conduct on the part of NRC was proven and the punitive damages award was commensurate with the Due Process Clause; (7) the compensatory damage award was not so flagrantly against the evidence as to suggest it was the result of passion or prejudice; (8) NRC’s failure to object to opposing counsel’s closing argument waived any argument on appeal; (9) NRC was not prejudiced by the circuit court’s exclusion of evidence of ALM’s dismissed forfeiture claim because the jury was repeatedly made aware of such through testimony and remarks of counsel; (10) evidence of NRC’s offer to provide ALM access to, and copies of, its books and records was contained in a letter to the Board of Directors of ALM that included language of settlement and was properly excluded under KRE 408; and (11) the instructions were proper. The Court of Appeals also affirmed as to the cross-appeal, holding that: (1) Good Friday is designated by the General Assembly as a “holiday” in KRS 18A.190(1)(c) and is therefore a “legal holiday” for the purpose of time computation under CR 6.01; (2) Good Friday is also a day that the circuit court clerk’s office was legally closed, and therefore KRS 446.030 extended the

filing deadline to the following Monday; and (3) the circuit court did not abuse its broad discretion in denying ALM's motion to amend its complaint five years after litigation began.

VII. FAMILY LAW

A. *Kirilenko v. Kirilenko*

[2014-CA-000615](#) 08/21/2015 2015 WL 4967256 Rehearing Pending

Opinion by Judge Maze; Judges Kramer and D. Lambert concurred. Appellant challenged the circuit court's application of Kentucky law to characterize her ex-husband's Connecticut state disability retirement benefits as his non-marital property. She argued that Connecticut law applied to determine the divisibility of those benefits, and that those benefits may be marital under Connecticut law. The Court of Appeals agreed that under the particular facts of this case, Connecticut had the most significant relationship to the asset in question. Therefore, the Court reversed and remanded for additional findings of fact and conclusions of law concerning the divisibility of those benefits under Connecticut law. The Court noted that the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws (1971) may not be appropriate for all personal property and interests acquired during a marriage, but it determined that the test was applicable to the disability retirement benefits at issue. Because appellee's right to receive disability benefits was contractual based upon a statutorily-created retirement plan, his right to receive those benefits accrued in Connecticut and the benefits were payable pursuant to Connecticut law. Therefore, the Court held that Connecticut had the most significant relationship to that asset and, consequently, the characterization and distribution of those benefits should be determined under Connecticut law.

B. *Navy v. Massie*

[2014-CA-001052](#) 08/14/2015 2015 WL 4879643 DR Pending

Opinion by Judge D. Lambert; Judge Thompson concurred; Judge VanMeter dissented and filed a separate opinion. A maternal grandmother petitioned for grandparent visitation. The circuit court denied the petition. The Court of Appeals, by a 2-to-1 vote, vacated and remanded, holding that the heightened "clear and convincing evidence" standard did not apply to the visitation request in this case because the child was residing with a paternal aunt and uncle instead of his parents pursuant to an order entered in a dependency court proceeding. Instead, application of a lesser "best interest" standard was warranted. An uncle and an aunt by marriage did not automatically acquire the same fundamental liberty interest as parents simply by receiving custody of a child.

VIII. HEALTH

A. *Sietsema v. Adams*

[2013-CA-001159](#) 08/14/2015 2015 WL 4776304 DR Pending

Opinion by Judge Stumbo; Judges Kramer and D. Lambert concurred. The Court of Appeals reversed and remanded orders of the circuit court granting summary judgment to appellees. Appellant was an inmate at the Hardin County Detention Center and appellees were tasked with the medical care at the facility. Appellant alleged that he almost died from an obstructed bowel due to a lack of proper medical care. The circuit court granted summary judgment in favor of appellees Dr. John Adams and Elizabeth Walkup, A.R.N.P. due to appellant's lack of an expert witness. The circuit court also granted summary judgment in favor of appellees Southern Health Partners, Inc. ("SHP") and nurses who were SHP employees because it believed they were entitled to qualified official immunity. In reversing, the Court of Appeals held that the *res ipsa loquitur* exception to the medical expert rule applied to Adams and Walkup. As to SHP and its nurses, the Court held that they were not entitled to immunity because SHP is a private corporation that was not created by Kentucky or its agencies; therefore, SHP and its nurses are not state agents. The Court also held that fact issues remained as to whether actions of the health care provider and nurses exacerbated appellant's pain and suffering from an obstructed bowel, thus precluding summary judgment.

IX. SUMMARY JUDGMENT

A. *Cubar v. Town & Country Bank and Trust Company*

[2014-CA-000983](#) 08/28/2015 2015 WL 5173536

Opinion by Chief Judge Acree; Judges Stumbo and Taylor concurred. The Court of Appeals addressed the *pro se* arguments of a self-proclaimed “sovereign citizen” who brought this appeal from the circuit court’s grant of summary judgment on appellee’s foreclosure complaint. The Court held that a summary judgment will not be reversed when an appellant’s brief lacks “a factually cognizable and legally coherent challenge,” but instead relies on “bald accusations” and “nonsensical arguments” grounded in “deeply flawed legal premises.”

B. *Douglas v. Advanced Pain Medicine, P.S.C.*

[2013-CA-001691](#) 08/14/2015 2015 WL 4776251 DR Pending

Opinion by Judge Thompson; Judges Combs and Stumbo concurred. In an appeal from a grant of summary judgment in a medical negligence action, the Court of Appeals affirmed in part, reversed in part, and remanded. Appellant filed a medical malpractice complaint against a medical office and physician based on their failure to timely diagnose and treat appellant’s thyroid cancer. The Court affirmed the dismissal of appellant’s claim that she was injured by the physician’s negligence because his delay in diagnosis allowed her cancer to progress to a terminal condition. The Court noted that there was no factual basis to establish this claim because experts did not testify, based on reasonable medical probability, that the patient would have had a greater than 50% chance of recovery had her cancer diagnosis been made while under the physician’s care. However, the Court reversed the portion of the summary judgment addressing appellant’s claims that the physician’s delay in diagnosis caused her prolonged pain and resulted in more extensive surgeries. Expert testimony raised a factual issue as to whether appellant’s intense pain would have been alleviated had surgery been performed earlier and as to whether the delay resulted in more extensive surgeries based on tumor growth.