PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

APRIL 01, 2022 to APRIL 30, 2022

I. TORTS

A. *MARIO SANCHEZ V. RODNEY MCMILLIN, M.D., ET AL.*

2020-CA-0052-MR 04/01/2022 2022 WL 981843

Opinion by JONES, ALLISON E.; LAMBERT, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

Appellant Mario Sanchez appealed from the order of the Jefferson Circuit Court dismissing with prejudice his medical malpractice claim for failure to file a certificate of merit with his complaint as required by KRS 411.167. In response to a motion to dismiss, Sanchez argued before the trial court that the statute was inapplicable to claimants represented by counsel. He argued that the Kentucky Rules of Civil Procedure already required counsel to sign client pleadings and that the attorney's signature satisfied the requirements of the statute. Additionally, Sanchez asserted he had substantially complied with the statute's requirements, arguing he submitted responses to discovery requests that contained the same sort of information that would be provided in the certificate of merit. Finally, in the alternative, Sanchez requested an extension of ten days to provide a certificate of merit. The trial court disagreed with Sanchez's interpretation of the statutory requirements. Furthermore, the trial court denied Sanchez's request for an extension to comply with the statute, ruling that the statute requires a certificate of merit to be "filed with the complaint" and that nothing in the statute permitted the trial court to extend the time to file it. The trial court then dismissed Sanchez's claim with prejudice. On appeal, the Court of Appeals agreed with the trial court that Sanchez's reading of KRS 411.167 was fundamentally incorrect. However, the Court also determined that the trial court erred when it found dismissal was required under these circumstances. Instead, the Court held that the trial court retained discretion to grant an extension for "excusable neglect" under CR 6.02(b). Accordingly, the Court vacated the trial court's dismissal of the case and remanded to the trial court for a determination of whether Sanchez was entitled to an enlargement of time pursuant to CR 6.02(b).

II. CONSTITUTIONAL LAW

A. *S. W. V. S. W. M., ET AL.; COMMONWEALTH OF KENTUCKY EX REL. DANIEL CAMERON, ATTORNEY GENERAL V. T.C., ET AL.; AND C.M. V. S.C., T.C., COMMONWEALTH OF KENTUCKY EX REL. DANIEL CAMERON, ATTORNEY GENERAL*

2020-CA-0307-DG 04/01/2022 2022 WL 981848
2020-CA-0525-DG
2020-CA-1096-DG

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

In these consolidated actions, S.W. and C.M., two individuals committed to involuntary inpatient drug treatment under the Matthew Casey Wethington Act for Substance Abuse Intervention ("Casey's Law") codified in KRS 222.430-.437, challenge the constitutionality of the statute. In S.W.'s case, the circuit court affirmed the district court's order of involuntary treatment. In C.M.'s case, the circuit court reversed the district court's order, finding, at a minimum, the standard of proof in Casey's Law unconstitutional. The Court of Appeals determined the probable cause standard of proof fails to meet the constitutional minimum standard in civil commitment cases. Instead, the heightened standard of "beyond a reasonable doubt" in *Denton v. Commonwealth*, 383 S.W.2d 681, 682 (Ky. 1964), and the conduct of final hearings in KRS 202A.070 apply in Casey's Law cases. The Court reversed the order of the circuit court in S.W.'s case and affirmed the order of the circuit court in C.M.'s case. Both cases were remanded with instructions to vacate the district courts' orders.

III. WORKERS' COMPENSATION

A. ***GREGG ROBERTS V. COMMONWEALTH DODGE, ET AL.***

2020-CA-0627-WC 04/22/2022 2022 WL 1194170

Opinion by LAMBERT, JAMES H.; COMBS, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

Appellant Gregg Roberts petitioned the Court of Appeals for review of the Workers' Compensation Board's opinion affirming the Administrative Law Judge's application of the amended version of KRS 342.730(4) to Roberts' award of benefits. The Court of Appeals affirmed based upon the holdings in two recent Supreme Court of Kentucky cases, *Cates v. Kroger*, 627 S.W.3d 864 (Ky. 2021), and *Dowell v. Matthews Contracting*, 627 S.W.3d 890 (Ky. 2021). In *Cates*, the Supreme Court examined the history of KRS 342.730(4) and held that the current version did not violate the Equal Protection Clause under the federal or state constitutions, as it was only based upon age. It also held that the General Assembly's decision to make its application retroactive was not an arbitrary exercise of legislative authority. In *Dowell*, the Supreme Court held that the Contracts Clause was not applicable in workers' compensation actions, as the system was controlled by legislative enactments rather than by a contract between an employer and an employee. In addition, the Supreme Court in *Dowell* held that a claimant's right to benefits becomes fixed and vests on the date of injury, but the right to a certain duration or amount of benefits does not vest until a final decision on a claim is entered. In this case, Roberts' injury occurred after 1996, and his award of benefits was still being litigated. Consequently, the 2018 amendments to KRS 342.730(4) applied.

IV. EMINENT DOMAIN

A. *COMMONWEALTH OF KENTUCKY, KENTUCKY HERITAGE LAND CONSERVATION FUND BOARD V. EAST KENTUCKY POWER COOPERATIVE, INC., ET AL.*

2020-CA-0882-MR 04/22/2022 2022 WL 1194180

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

Appellant Commonwealth of Kentucky, Kentucky Heritage Land Conservation Fund Board (the "Board") filed an interlocutory appeal from the Bullitt Circuit Court's order denying its motion to dismiss Appellee LG&E's action under KRS 416.570(1) to condemn property for construction of a natural gas pipeline. The Board owns a conservation easement upon the property in question. The Board argued on appeal that the circuit court erred in refusing to dismiss the condemnation action because: 1) it is immune from suit under the doctrine of sovereign immunity; 2) the General Assembly has not waived sovereign immunity by express language or overwhelming implication; 3) LG&E lacks the authority to condemn public property by statute; and 4) the doctrine of public prior use prohibits the condemnation of the property at issue. The Court of Appeals affirmed, holding that sovereign immunity does not bar the commencement of condemnation proceedings against a state-owned conservation easement. As a preliminary matter, the Court determined that the Board's sovereign immunity defense was required to be raised, if at all, in an answer or other pleading, as required by KRS 416.600 and not in a motion to dismiss. The Court also determined, as a matter of first impression, that the plain language of KRS 382.850(2) constitutes a waiver of sovereign immunity by necessary implication. KRS 382.850(2) provides that a conservation easement "shall not operate to impair or restrict any right or power of eminent domain created by statute, and all such rights and powers shall be exercisable as if the conservation easement did not exist."

V. FAMILY LAW

A. *WADE B. LEWIS V. LAURA R. FULKERSON*

2020-CA-0978-MR 04/22/2022 2022 WL 1194024

Opinion by McNEILL, J. CHRISTOPHER; LAMBERT, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Appellant Wade B. Lewis appealed from an order of the Oldham Circuit Court finding that he made a gift to his then wife, Appellee Laura R. Fulkerson, in the amount of $1,700,000 by depositing that sum into a transfer on death trust established for her. On appeal, Lewis argued that the circuit court failed to apply the clear and convincing standard to Fulkerson's claim that the $1,700,000 was gifted to her and that it erred in ruling in Fulkerson's favor. The Court of Appeals affirmed, holding that although reasonable minds may differ given the unique facts of this case, the circuit court did not clearly err. There was sufficient language in the trust to allow the circuit court to conclude that Lewis intended to gift the money to Fulkerson. There was also evidence that, at the time of the transfer, the marriage was on less than solid ground, that Fulkerson was staying in the marriage because she felt financially

insecure, that Lewis had established a pattern of making "peace offerings" in the form of gifting valuable assets to Fulkerson, and that there were other ways Lewis could have transferred money upon his death to Fulkerson if that was his intent.

B. *J. L. R. V. A. L. A., ET AL.*

2021-CA-1485-ME 04/22/2022 2022 WL 1194213

Opinion by COMBS, SARA W.; CLAYTON, C.J. (CONCURS) AND GOODWINE, J. (CONCURS)

Appellant J.L.R., who is the biological mother of the child at issue, appealed from the Madison Circuit Court's "Judgment of Termination of Parental Rights." This was a putative adoption case. The Court of Appeals addressed the ongoing confusion in the interrelationship between KRS Chapter 199 (adoption) and KRS Chapter 625 (termination of parental rights). The Court determined that the circuit court erroneously allowed dual petitions to be filed under both chapters instead of giving primacy and deference to KRS Chapter 199. The Court also concluded that the circuit court erroneously named the birth parents in its judgment and erroneously captioned the judgment as a "Judgment of Termination of Parental Rights" rather than a "Judgment of Adoption." The Court of Appeals affirmed the substance of the circuit court's judgment but vacated the judgment and remanded with directions that the circuit court remove the names of the birth parents and enter a judgment of adoption in accordance with KRS 199.250 rather than a termination.

C. *CHRISTINA E. WAGGONER V. ROBERT DEAN WAGGONER*

2021-CA-1208-ME 04/29/2022 2022 WL 1275267

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

Appellant Christina E. Waggoner appealed from the Jefferson Family Court's order denying her motion to dismiss and its entry of a domestic violence order ("DVO") against her. Appellee Robert Dean Waggoner sought a DVO against Christina, his wife, after an altercation at the marital residence when he went to retrieve belongings from an outbuilding on the property. In the days preceding the DVO hearing, attorneys for the parties reached a tentative agreement that provided for Christina to move back into the house, for Robert to access the property to retrieve his tools, for an agreed order to be entered in the dissolution case dismissing the DVO petition, and for mediation of the remaining issues. At the scheduled DVO hearing, counsel for the parties informed the judge they were circulating an agreed order and asked to pass the DVO hearing. The judge wrote a brief summary of the terms of the agreement on the docket sheet. When the parties next appeared, Robert's attorney informed the court that Robert had changed his mind about proceeding with the agreement because Christina had emptied their joint bank accounts. After a hearing, Christina filed a motion to dismiss the DVO case and to enforce the settlement agreement. The family court denied the motion because it was not expressly adopted by both attorneys on the record. The Court of Appeals affirmed, holding that what occurred was not sufficient to create a binding oral settlement agreement between the parties because the agreement was presented to the trial court as a work in progress, its exact terms were never read into the record, the attorneys and the parties were not present at the same time before the court, the court was not given an opportunity to ask the parties if they agreed to the terms

of the settlement, and the language used by the court and the attorneys throughout the proceedings was replete with conditional and contingent terms.

VI. CRIMINAL LAW

A. ***DEVIN THOMPSON V. COMMONWEALTH OF KENTUCKY***

2020-CA-1132-MR 04/15/2022 2022 WL 1122787

Opinion by CLAYTON, DENISE G.; COMBS, J. (CONCURS) AND JONES, J. (CONCURS)

Appellant Devin Thompson appealed from the Hardin Circuit Court's order directing him to pay restitution jointly and severally with two other defendants following his guilty plea for receiving stolen property under $10,000.00. Thompson argued that the trial court abused its discretion and deprived him of due process by ordering him to jointly and severally pay $26,559, which was the total amount of restitution due the victim. The Court of Appeals affirmed. In doing so, the Court determined that, under *Commonwealth v. Morseman*, 379 S.W.3d 144, 148 (Ky. 2012), Thompson's plea agreement properly included an agreement that he would pay restitution for the total remaining amount of stolen money that had not yet been returned even though he pled guilty to receiving stolen property for a lesser amount. The Court also concluded that Thompson's plea agreement was enforceable under *Morseman* even though it did not include a specific dollar amount for the restitution. Further, the Court noted that, under KRS 533.030(3), when there are multiple defendants, trial courts have discretion as to whether to apportion restitution. Finally, because the trial court held an adversarial hearing at which it heard evidence from both sides and at which Thompson was able to present evidence and cross examine witnesses, the Court determined that Thompson's due process rights had not been violated.

B. ***LANCE CONN, ET AL. V. KENTUCKY PAROLE BOARD***

DISCRETIONARY REVIEW GRANTED 12/07/2022

2020-CA-1495-MR 04/22/2022 2022 WL 1194186

Opinion by CETRULO, SUSANNE M.; DIXON, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Four current Kentucky state inmates appealed the Franklin Circuit Court's order denying their motion for summary judgment that challenged the Kentucky Parole Board's (the "Board") authority to issue a serve-out on a life sentence and requested reinstatement of their parole eligibility. All four Appellants were given a life sentence and were not found guilty of a charge that would qualify them for a sentence of life without parole, but all four Appellants were given a serve-out on their life sentences by the Board. On appeal, Appellants argued that by giving a serve-out, the Board essentially changed a life sentence to a life without parole sentence, which exceeds the power given to them by statute and violates the separation of powers doctrine. The Court of Appeals affirmed, concluding that the Legislature has not prohibited the Board from authorizing serve-outs for life sentences and that the Board has discretion under KRS 439.340 to do so. The Court further held that pursuant to *Simmons v. Commonwealth*, 232 S.W.3d 531 (Ky. App. 2007), the Board's ordering a serve-out does not invade the functions reserved for the judicial or legislative branches of government.

C. ***DANIEL MORELAND V. COMMONWEALTH OF KENTUCKY***

DISCRETIONARY REVIEW GRANTED 09/14/2022

2021-CA-0621-MR 04/08/2022 2022 WL 1051762

Opinion by THOMPSON, LARRY E.; CALDWELL, J. (CONCURS) AND COMBS, J. (CONCURS)

Daniel Moreland appealed from an order of the Clinton Circuit Court revoking his probation. In 2010, Daniel Moreland received a "split sentence" of ten years' imprisonment followed by a ten-year period of probation. After his release, and during his purported probationary period, the Commonwealth moved to revoke Moreland's probation because he violated the terms of his probation. Moreland did not contest the violations and instead argued there was no statutory mechanism to allow for probation after a sentence had been completed. The circuit court revoked Moreland's probation. On appeal, the Court of Appeals reversed the circuit court's order revoking Moreland's probation and held that Moreland's sentence was contrary to KRS Chapter 533. Because it was an illegal sentence, Moreland was not on probation upon his release and could not have violated its purported terms.

VII. EMPLOYMENT LAW

A. ***BROWN & BROWN OF KENTUCKY, INC. V. DAVID C. WALKER; AND BROWN & BROWN OF KENTUCKY, INC. V. DAVID C. WALKER, ET AL.***

2020-CA-1265-MR, 2020-CA-1322-MR 04/15/2022 652 S.W.3d 624

Opinion by TAYLOR, JEFF S.; COMBS, J. (CONCURS) AND DIXON, J. (CONCURS)

Appellant Brown & Brown of Kentucky, Inc. ("Brown") appealed from findings of fact, conclusions of law, and a judgment (the "Judgment") entered by the Jefferson Circuit Court relating to claims arising from an employment agreement between Brown and Appellees David C. Walker ("Walker") and CBI Holdings LLC ("CBI"). Walker and CBI cross-appealed. The claims arose from the agreement's noncompete and nonsolicitation restrictive covenants. Walker and CBI cross-appealed from the same Judgment. The Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings. Specifically, the Court reversed the circuit court's decision that Brown failed to demonstrate causation and was not entitled to lost-profit damages as to some of Brown's former commercial clients. The Court also concluded that the circuit erred by failing to extend the time the restrictive covenant was in effect, as provided in the agreement. The Court also concluded that CBI was not a stranger to the agreement and that Brown's intentional interference with a contract by a third party failed as a matter of law. The Court vacated the circuit court's award of attorney's fees because the reasonableness of that award may be affected by its reversal on the other issues. Regarding the cross-appeal, the Court held the circuit court erroneously awarded lost profits based upon gross revenues instead of net revenue. The Court also held that under the agreement's terms, Brown needed only to demonstrate that it incurred a loss of anticipated profits by Walker's servicing Brown's former clients and that Brown did not need to demonstrate its former clients ended the relationship due to Walker's solicitation of them. Last, the Court held that Walker did not qualify as a prevailing party under the agreement and was not, therefore, entitled to an award of attorney's fees

under its terms.

VIII. ADMINISTRATIVE LAW

A. ***STEPHANIE GWALTNEY V. COMMONWEALTH OF KENTUCKY, BOARD OF SOCIAL WORK***

2021-CA-0136-MR 04/15/2022 2022 WL 1122498

Opinion by CALDWELL, JACQUELINE M.; GOODWINE, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Appellant Stephanie Gwaltney appealed from a Franklin Circuit Court judgment denying her request for a declaratory judgment. Appellee Kentucky Board of Social Work (the "Board") filed an administrative complaint against Gwaltney, alleging she had been romantically involved with a client in violation of certain administrative regulations. Shortly thereafter, Gwaltney filed a declaratory judgment action. In the declaratory judgment action, she alleged the romantic relationship with the client began after she ceased providing care to the client and that the regulations prohibiting relationships after cessation of care exceeded their enabling statutes and violated the Kentucky Constitution. The trial court determined the matter was not ripe for review and declined to issue a declaratory judgment until the conclusion of the administrative proceeding. The Court of Appeals affirmed, holding that the trial court properly exercised its discretion under KRS 418.065 in declining to issue a declaratory judgment before the administrative hearing concluded because her declaratory judgment action may have been rendered moot if she prevailed at the administrative hearing or if any discipline imposed after fact-finding was not based upon either of the two administrative provisions she claimed were invalid and unconstitutional.

IX. CORPORATE LAW

A. ***WILLIAM MILES ARVIN, JR., ET AL. V. DAREN CARTER, ET AL.***

2021-CA-0151-MR 04/22/2022 2022 WL 1194022

Opinion by DIXON, DONNA L.; ACREE, J. (CONCURS) AND K. THOMPSON, J. (CONCURS IN RESULT ONLY)

This case was previously on appeal in *Unbridled Holdings, LLC v. Carter*, 607 S.W.3d 188 (Ky. App. 2020) ("*KPM I*"). In *KPM I*, the Court of Appeals vacated the trial court's judgment dismissing a petition for dissolution of Kentucky Property Management, LLC ("KPM") and Unbridled holdings, LLC and remanded for additional proceedings. In doing so, the Court referred to a non-exhaustive list of seven factors in *Gagne v. Gagne*, 338 P.3d 1152 (Colo. Ct. App. 2014), that courts should consider when determining if it is not reasonably practicable to carry on the business of a limited liability company such that dissolution is required under KRS 275.290. On remand, the trial court reaffirmed its prior judgment, and the Court of Appeals affirmed, concluding that Appellant William Miles Arvin, Jr. failed to present adequate proof of deadlock or any of the other *Gagne* factors to satisfy the "not reasonably practicable standard."