PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
APRIL 1, 2024 to APRIL 30, 2024

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I. ARBITRATION

A. LP LOUISVILLE LYNN WAY, LLC D/B/A SIGNATURE HEALTHCARE AT JEFFERSON MANOR REHAB & WELLNESS CENTER, ET AL v. ALBERT RAY WOODFORD, AS THE EXECUTOR OF THE ESTATE OF BETTY ANN WOODFORD, ET AL, 2023-CA-0099-MR (Ky. App. 2024)

2023-CA-0099-MR 4/19/2024 2024 WL 1686044
Opinion Affirming in Part, Reversing in Part, and Remanding by LAMBERT, J.; ACREE, J. (CONCURS) AND KAREM, J. (CONCURS)

Signature Healthcare appealed the denial of its motion to compel arbitration and stay the proceedings in an action brought by the estate of a former resident for negligence and wrongful death, the resident's beneficiaries, including her attorney-in-fact, being the real parties in interest to the latter. The Court of Appeals affirmed as to the claims of the estate and the resident's unnamed beneficiaries, reversed on the attorney-in-fact's individual wrongful death claim, and remanded the issue of a stay to the circuit court.

At issue was the validity of a voluntary pre-dispute arbitration agreement signed by the resident's attorney-in-fact. Because the agreement's clear and express terms provide that the signatory was acting in both their representative and individual capacities, the Court rejected the attorney-in-fact's claim that he had not signed in his representative capacity. Given the attorney-in-fact's admission he signed in his individual capacity, the circuit court's denial of arbitration on his wrongful death claim was in error. Regarding the claims of the resident's estate and her unnamed beneficiaries, applying the holdings of *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012) and *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 321 (Ky. 2015), *rev'd in part, vacated in part by Kindred Nursing Centers Ltd. Partnership v. Clark*, 581 U.S. 246, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017), the Court concluded that: (1) Signature Healthcare had the burden of proving that the attorney-in-fact was authorized to agree to arbitration on the resident's behalf and (2), because the resident's Power of Attorney instrument authorized only the management of her property and financial affairs, Signature Healthcare had failed to prove the existence of a valid agreement.

II. CRIMINAL LAW

A. ***CHRISTOPHER SMITH v. COMMONWEALTH OF KENTUCKY, 2023-CA-0110-MR (Ky. App. 2024)***

2022-CA-0686-MR/2022-CA-0687-MR 4/12/2024 2024 WL 1589633
Opinion Affirming in Part, Reversing in Part, and Remanding by CALDWELL, J.; ACREE, J. (CONCURS) AND LAMBERT, J. (CONCURS)

This Court held that if a court has a reasonable belief that an accused might not be competent at any time during a probation revocation proceeding, then the court must ensure the accused is competent prior to proceeding further. The United States Supreme Court used language in *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S. Ct. 1756, 1759-60, 36 L. Ed. 2d 656 (1973), indicating that competency is implicated in revocation proceedings. A criminal defendant must have the ability to assist counsel in preparing a defense, which is the core of a competency determination. Therefore, a trial court has a responsibility to ensure competency before conducting a probation revocation hearing.

III. FAMILY LAW

A. ***NATHAN R. LANKFORD v. JESSICA L. LANKFORD, 2023-CA-1174-ME/2023-CA-1283-ME***

2023-CA-1174/2023-CA-1283 4/26/2024 2024 WL 1813982
Opinion Reversing and Remanding by JONES, A., J.; CETRULO, J. (CONCURS) AND KAREM, J. (CONCURS)

Nathan Lankford appeals the Jefferson Circuit Court's orders dismissing an EPO on behalf of his child and Nathan's petition for a DVO to protect the child from his mother, Jessica Lankford, after she allegedly kicked the child down the stairs. The incident was reported the Cabinet. The family court issued an EPO, and after various continuances, the DVO hearing was not scheduled for several more weeks. In the interim, the circuit court sua sponte asked the Cabinet about the status of its investigation and the Cabinet reported it would not be investigating further. Instead of holding an evidentiary hearing, the family court dismissed the petitions stating it was the court's policy to do so when the Cabinet declines to act.

Our court held that while the family court can conduct some limited investigation prior to the evidentiary hearing, the DVO statutes do not allow for ex parte communications with the Cabinet for purposes of determining whether to move forward with the petition. The family court was required to hold an evidentiary hearing, per *Wright v. Wright*, 181 S.W.3d 49 (Ky. App. 2005). Because the family court determined the petition alleged facts which if true would amount to domestic violence, the family court was obligated to conduct a full hearing and base its decision solely on the evidence before it.

IV. TORTS

A. ***DEBORHA LLOYD v. NORTON HOSPITALS, INC. D/B/A/ NORTION's WOMEN'S AND CHILDREN'S HOSPITAL; CHRISTOPHER DALE HENLEY, M.D., DARREN CAIN, M.D.; DIAGNOSTIC X-RAY PHYSICIANS, PSC (DXP); AND SHELIA SLONE KCSA, 2023-CA-0748-MR (Ky. App. 2024)***

2023-CA-0748-MR 4/19/2024 2024 WL 1685440

Opinion Affirming in Part and Reversing in Part by CETRULO, J.; GOODWINE, J. (CONCURS) AND A. JONES, J. (CONCURS)

This is an appeal from summary judgments granted in favor of three defendants in a medical malpractice action. The injured party underwent surgery for a knee replacement in 2019 and after surgery, a suture needle was missing. The radiologists did not observe the needle on x-ray, and the surgical technician was unable to locate it. The surgical team elected not to reopen the patient's knee to look for the missing needle. Weeks later, it was confirmed that the needle had remained in the patient's body and needed to be removed, requiring a further surgery. The matter was litigated against several entities, and the trial court ultimately granted summary judgment to Norton Hospital, the Radiologists and the surgical technician, for various reasons.

On appeal, we reversed the summary judgment in favor of the Radiologists as it was based upon plaintiff's expert testimony being from an orthopedic surgeon, rather than a radiologist. The trial court erred in finding that plaintiff could not proceed against the Radiologists without testimony from an expert of the same specialty. We also reversed a summary judgment in favor of the surgical technician. The plaintiff did not produce expert testimony as to her negligence. However, this case presented the classic example for application of the *res ipsa loquitor* doctrine, which allows a jury to infer negligence from the mere fact of the retained foreign object which caused the need for the subsequent surgery. Thus, summary judgment as to that defendant was premature. The summary judgment in favor of Norton was affirmed.

B. ***KIMBERLY ROGERS v. ERIE INSURANCE EXCHANGE, ET AL, 2023-CA-0447-MR (Ky. App. 2024)***

2023-CA-0447-MR 4/19/2024 2024 WL 1686162

Opinion Affirming by TAYLOR, J.; CETRULO, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Rogers was involved in a vehicle accident while working as a driver for Lyft, Inc. The other driver involved in the accident was insured by State Farm, which paid the policy's liability coverage limits. Rogers' vehicle was insured by Erie Insurance Exchange, and

Lyft carried insurance with Allstate. Erie and Allstate denied Rogers uninsured motorist (UIM) benefits. The trial court granted Erie's motion for judgment on the pleadings, Allstate's motion for summary judgment, and Lyft's motion for summary judgment.

Under KRS 281.010(6), Lyft is considered a transportation network company (TNC). A prearranged ride is defined as beginning when a TNC driver accepts a requested ride via a mobile application and continues with the transportation of the rider, according to KRS 281.010(42). Rogers was engaged in a prearranged ride at the time of the accident per KRS 281.010(42) because she was logged into her Lyft mobile application, had accepted a ride, and was on the way to pick up her passenger. 601 KAR 1:113 is triggered when a TNC driver is engaged in a prearranged ride. Under 601 KAR 1:113 Section 3(4)(d), "[u]nderinsured vehicle coverage" is required "in accordance with KRS 304.39-320." UIM coverage is only mandated upon the request of the insured under KRS 304.39-320; UIM coverage is not compulsory. Lyft never requested UIM coverage and was not required to provide UIM coverage for Rogers.

A motorist is only entitled to UIM coverage when a policy's UIM coverage exclusion is so ambiguous and unclear that the insured's reasonable expectation of coverage defeats the UIM exclusion. *Philadelphia Indem. Ins. Co., Inc. v. Tryon*, 502 S.W.3d 585, 593-94. Because Erie's UIM exclusion was applicable and unambiguous, Rogers could not have reasonably expected UIM coverage at the time of her accident. Furthermore, public policy does not require Lyft or Erie to provide UIM coverage, as UIM exclusions do not offend the public policy of the Commonwealth. *Id*. at 592. Therefore, the circuit court property rendered judgment in favor of Lyft, Allstate, and Erie.

V. EMINENT DOMAIN

A. ***ISAAC W. BERNHEIM FOUNDATION v. LOUISVILLE GAS AND ELECTRIC COMPANY, ET AL., 2023-CA-0458-MR (Ky. App. 2024)***

2023-CA-0458-MR 4/19/2024 2024 WL 1686031
Opinion Affirming by MCNEILL, J.; THOMPSON, C.J. (CONCURS) AND COMBS, J. (CONCURS)

Louisville Gas & Electric Company (LG&E) is constructing an underground natural gas pipeline, part of which runs through property owned by Isaac W.Bernheim Foundation (Bernheim). LG&E attempted to purchase an easement from Bernheim, but initiated a condemnation proceeding under the Eminent Domain Act of Kentucky (KRS 278.502) when negotiations failed. The land which LG&E condemned was purchased by Bernheim with grant money from the Kentucky Heritage Land Conservation Fund (Fund) and was conditioned on Bernheim's conveying to the Commonwealth "a conservation easement in perpetuity over all land acquired, in whole or in part, with fund proceeds." 418 KAR 1:050 § 6(1). The land was also to be maintained for the conservation purpose for which it was acquired. 418 KAR 1:050 § 6(1)(b); KRS 146.560(2). Bernheim challenged LG&E's right to take, arguing it lacked authority to condemn public property subject to public conservation use and encumbered by a

government-held conservation easement. The trial court granted LG&E an interlocutory judgment pursuant to KRS 416.610.

This case has been on appeal before (*Kentucky Heritage Land Conservation Fund Board v. Louisville Gas and Electric Company*, 648 S.W.3d 76, 78 (Ky. App. 2022)); however, Bernheim was not a party. We held in the previous case that "the plain language of KRS 382.850(2) authorizes a statutory right of eminent domain to prevail over a conservation easement because a conservation easement is assumed not to exist upon the exercise of a statutory right of eminent domain. If it is assumed that the Board's conservation easement does not exist, then there is no prior use to impede the exercise of LG&E's right of eminent domain." *Kentucky Heritage*, 648 S.W.3d at 89. In the current appeal, Bernheim first argued that this Court "misapprehended th[e] significant distinction" that the prior public use doctrine arises not from KRS 382.850(2), but from KRS 146.560 and 146.570. However, because a conservation easement exists, KRS 382.850(2) applies. Bernheim's argument that LG&E's power to condemn is limited to private property also fails because "KRS 382.850(2) expresses the Legislature's intention that a conservation easement cannot be used to impede the exercise of any statutory power of eminent domain that the Legislature has otherwise conferred by statute. If the existence of the conservation easement is disregarded, as KRS 382.850(2) instructs, then LG&E would undoubtedly have the power to condemn the property at issue." *Kentucky Heritage*, 648 S.W.3d at 88. Essentially, this Court's interpretation of KRS 382.850(2) from *Kentucky Heritage* stands. The full interpretation of KRS 382.850(2) calls for exercising the statutory right of eminent domain as if the conservation easement did not exist. 648 S.W.3d at 86. Therefore, the trial court's interlocutory judgment was affirmed.