PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

AUGUST 1, 2017 to AUGUST 31, 2017

I. ADMINISTRATIVE LAW

A. ***Jett v. Kentucky Retirement Systems***

2016-CA-000868 08/04/2017 2017 WL 3317533 Rehearing Pending

Opinion by Judge Stumbo; Judges Dixon and J. Lambert concurred.

The Court of Appeals reversed a decision of the Franklin Circuit Court that affirmed the Kentucky Retirement Systems' denial of disability retirement benefits. KRS 61.600 requires that for an incapacity to be deemed permanent, it must be "expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person's last day of paid employment" The Kentucky Retirement Systems found that appellant's incapacity lasted longer than 12 months after her last day of paid employment, but because she was not following all treatment recommendations, it was not permanent. The Court of Appeals held that KRS 61.600 does not require a person to follow all medical advice in order for a disability to be deemed permanent.

II. ARBITRATION

A. ***Meers v. Semonin Realtors***

2016-CA-000498 08/04/2017 2017 WL 3317659

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

This appeal concerned the confirmation of an arbitration award for unpaid brokerage and agent fees from a real estate transaction. After noting that an arbitration award may only be set aside pursuant to the limited grounds set forth in KRS 417.160(1), the Court of Appeals affirmed. Meers first argued that the arbitrator failed to consider his evidence that, because he had obtained his loan through the federal government, he would have committed fraud in going through with the subject closing. The Court noted that KRS 417.160(1)(d) only addresses a situation where the arbitrator refuses to hear evidence; it does not address an arbitrator's decision to omit mention of such evidence in a ruling. Here, it was undisputed that the arbitrator heard Meers' evidence on the issue of fraud, and Meers admitted in his brief that he was able to testify about the issue during the arbitration hearing. In reality, Meers was seeking a review of the arbitrator's findings of fact on the issue of fraud, which a reviewing court is not permitted to do. Second, the Court held that Meers had failed to establish that the arbitrator was not impartial based upon his daughter's past employment with appellee. Proof of partiality under the statute must be direct, definite, and capable of demonstration.

III. ATTORNEY AND CLIENT

A. ***Polly v. Commonwealth***

2016-CA-001903 08/11/2017 2017 WL 3442395

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

Appellant, wishing to file a *pro se* RCr 11.42 motion, filed a motion to obtain his case file from his former attorney. He claimed that he had sent a letter to the attorney requesting the file, but he did not name the attorney as a party to the RCr 11.42 action. The circuit court denied the motion on the grounds that it lacked jurisdiction, presumably because the attorney was not a named party. The Court of Appeals held that under *Hiatt v. Clark*, 194 S.W.3d 324 (Ky. 2006), appellant was entitled to obtain at least a copy of his case file from his attorney. The Court also held that it was not necessary to name the attorney as a party when, as here, the appellant had initiated post-conviction proceedings. The Court vacated the order denying the motion, and the case was remanded for further proceedings to determine the status of appellant's case file and, if necessary, the entry of an order directing the file to be provided.

IV. AUTOMOBILES

A. ***Bruce Walters Ford Lincoln Kia v. Kentucky Motor Vehicle Commission***

2016-CA-000873 08/11/2017 2017 WL 3445201

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

An automobile dealership appealed a decision of the Kentucky Motor Vehicle Commission fining the dealership for improper use of a dealer license plate in violation of KRS 186.070 and its pertinent implementing regulations. The circuit court affirmed the Commission, but the Court of Appeals reversed and remanded. The Court noted that when vehicles bearing dealer plates are operated by non-salesperson dealer employees, operation of the vehicles is limited to testing the mechanical operation of the vehicle; transport of the vehicle to or from the dealer's place of business; and the necessary operation of the vehicle in furtherance of the dealer's business during the dealer's business hours. The Court held that there is no restriction that a non-salesperson employee of an automobile dealership may use a vehicle bearing dealer plates only with the intent of offering or advertising the vehicle for sale to the public.

V. CRIMINAL LAW

A. ***Commonwealth v. Riker***

2016-CA-000601 08/18/2017 2017 WL 3567836

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

In a case of first impression, the Court of Appeals affirmed the circuit court's conclusion that the excessively high cost of an independent blood test at the University of Kentucky Medical Center (a $450.00 pre-paid fee) effectively precluded appellee from exercising his right under KRS 189A.105(4) to obtain the statutorily mandated and potentially exculpatory test. The circuit court determined - and the Court of Appeals agreed - that the excessive cost of the blood test constituted a denial of due process because it deprived appellee of the right to obtain potentially exculpatory evidence and to challenge the results of an intoxilyzer test in a meaningful fashion.

B. ***Jones v. Commonwealth***

2016-CA-001346 08/11/2017 2017 WL 3442427

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

At sentencing on an assault charge, upon concluding that he was not a "poor person," the circuit court ordered appellant to pay court costs of $160.00 within six months of being released from service of a three-and-a-half-year prison term. The circuit court subsequently granted appellant *in forma pauperis* status for appeal purposes, finding that he was a pauper within the meaning of KRS 453.190 and KRS 31.110(2)(b). Appellant sought palpable error review of the imposition of court costs, arguing that doing so violated KRS 23A.205. The Court of Appeals concluded that the imposition of costs was a sentencing issue and, therefore, was not waived by the failure to raise the issue before the circuit court. The Court analyzed the statutory framework and controlling precedent to conclude that the circuit court erred in imposing costs as appellant was unable to pay at sentencing and likely would not be able to do so within one year of final sentencing. The Court then held that imposing costs on an indigent defendant constituted palpable error requiring reversal.

VI. ELECTIONS

A. ***Stoecklin v. Fennell***

2016-CA-001780 08/11/2017 2017 WL 3442424

Opinion by Judge Thompson; Chief Judge Kramer and Judge Clayton concurred.

The Court of Appeals affirmed an opinion and order dismissing an action for injunctive relief and declaration of rights and certifying the election of a city commissioner. The sole issue on appeal was whether signing a candidate's nomination petition earlier than allowed by KRS 118.315(2) rendered voters' signatures ineffective, depriving the candidate of having a valid nomination petition and voiding her subsequent election. The Court determined that this provision was intended to ensure that voters signed the petition for the next election and would still likely be residents for such an election. The fact that the petition was signed a few days early was insignificant given that the nomination petition was signed by eligible registered voters, submitted timely, otherwise followed all statutory requirements, and was not noted to have any error by the county clerk. Therefore, the Court concluded that the date on which the petition was signed is a mere directory requirement as to timing that does not affect the merits of the election, and the petition substantially complied with KRS 118.315(2).

VII. EMPLOYMENT

A. ***Conley v. Mountain Comprehensive Care Center, Inc.***

2016-CA-000454 07/21/2017 2017 WL 3129215 DR Pending

Opinion by Judge J. Lambert; Judges Acree and Clayton concurred.

Appellant, a licensed clinical social worker and a certified drug and alcohol counselor, had been employed as Director of the Therapeutic Foster Care Program at Mountain Comprehensive Care Center, Inc. (MCCC) since 2009. In 2012, she was terminated from employment for alleged violations of confidentiality policies and for failing to work with community partners (specifically the Department for Community Based Services). Appellant subsequently filed a wrongful termination case in which she alleged that MCCC discriminated against her because of her age. The circuit court found that appellant had, in fact, made a *prima facie* case for age discrimination but then found that the employer provided legitimate and non-discriminatory reasons for the termination. Thus, the burden of proof shifted back to appellant to submit "proof of cold hard facts creating an inference showing age discrimination was a determining factor in the discharge." *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226, 229 (Ky. 1984). The circuit court found appellant's evidence to consist of subjective beliefs and theories rather than the specific evidence of pretext necessary to avoid summary judgment. Summary judgment in favor of MCCC was affirmed by the Court of Appeals. The Court held that the circuit court applied the proper standard of review regarding age discrimination. Moreover, the denial of appellant's CR 59.05 motion to alter, amend, or vacate was consistent with Kentucky's at-will employee doctrine.

B. ***Greissman v. Rawlings and Associates, PLLC***

2016-CA-000055 08/18/2017 2017 WL 3567838

Opinion by Judge J. Lambert; Judge Clayton concurred; Judge Maze concurred in result only and filed a separate opinion.

These appeals arose from an action in which appellant alleged that she was wrongfully terminated by her employer when she refused to sign a Confidentiality and No Solicitation Agreement that she believed was prohibited by the Kentucky Bar Association Ethics Rules, specifically SCR 3.130 (5.6). The circuit court granted summary judgment and dismissed appellant's complaint, which she challenged on appeal. The employer filed a cross-appeal from an earlier order denying its motion to dismiss. The Court of Appeals held that the circuit court erred as a matter of law in denying the employer's motion to dismiss, which mooted the appeal from the final judgment. The dispositive issue addressed whether SCR 3.130 (5.6), which prohibits an attorney from agreeing to restrict his or her rights to practice after leaving an employer, supported a wrongful termination claim arising from a violation of public policy. The Court held that the public policy exception to Kentucky's terminable-at-will doctrine addressed in *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985) is limited to public policy created in constitutional or statutory provisions - not public policy set forth in the Supreme Court Rules; therefore, the circuit court erred in denying the motion to dismiss. Because the circuit court later dismissed the complaint on other grounds, its judgment was affirmed. In his separate opinion concurring in result only, Judge Maze urged the Supreme Court to consider this issue because it places attorneys in the untenable position of either having to sign an agreement in contravention of Rule 5.6 or facing termination with no legal remedy. Judge Maze opined that Kentucky's Rules of Professional Conduct create enforceable public policy in this area equal in weight to public policy created in the Constitution or statutory provisions. He further argued that the Supreme Court has the exclusive power to make disciplinary rules for its members and that the legislature has no authority to set public policy in this field.

VIII. FAMILY LAW

A. ***Baldwin v. Mollette***

2016-CA-001693 08/25/2017 2017 WL 3642960

Opinion by Judge Clayton; Chief Judge Kramer and Judge Taylor concurred.

Appellant appealed the family court's denial of visitation. The Court of Appeals reversed and remanded, holding that the family court failed to consider the statutory requisites in KRS 403.320(1) and to ascertain whether visitation would have endangered seriously the children's physical, mental, moral, and emotional health. Additionally, the Court made two procedural observations. First, it noted that a person with a power of attorney is not permitted to act as an "attorney-in-fact" for another. Second, the Court explained that motions for visitation must be proffered on the docket where custody has been determined. In this matter, the motion was made in the paternity docket, but the order of permanent custody had not been entered in the paternity action.

IX. JUVENILES

A. ***D.M.K. v. Calvert***

2015-CA-001452 08/11/2017 2017 WL 3443091 Rehearing Pending

Opinion by Judge Maze; Judge J. Lambert concurred; Judge Dixon dissented and filed a separate opinion.

Appellant, a juvenile, was charged with first-degree wanton endangerment after his four-year-old sister was killed by gunshot after grabbing and discharging a gun obtained by appellant. Thereafter, the Commonwealth moved to transfer appellant to circuit court for trial as a youthful offender. Proceeding under the discretionary transfer provisions of KRS 635.020(3), the district court found that appellant met the age requirement and had the requisite number of prior juvenile adjudications, but it concluded that the Commonwealth had failed to establish probable cause that appellant had committed first-degree wanton endangerment. Rather, the district court only found probable cause for second-degree wanton endangerment, a misdemeanor, which would not support transfer. The Commonwealth then filed a petition in the circuit court seeking a writ of mandamus ordering the district court to find probable cause for two counts of first-degree wanton endangerment (for the two children who were in appellant's room at the time of the incident). Following a hearing, the circuit court granted the writ. By a 2-1 vote, the Court of Appeals affirmed, although on different grounds than those set forth in the circuit court's order. The Court first held that the issuance of a writ was an applicable remedy under these circumstances because the district court's probable cause determination would not be subject to direct appellate review and because the Commonwealth demonstrated that "a substantial miscarriage of justice will result if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Cox v. Braden*, 266 S.W.3d 792, 797 (Ky. 2008). Addressing the issue of probable cause, the Court acknowledged that when discretionary transfer is sought under KRS 635.020(3), the district court is required to make certain determinations pursuant to KRS 640.010. However, the district court here misinterpreted its role in the probable cause determination under KRS 640.010(2)(a) because in a discretionary transfer case, that provision directs the district court to determine "if there is probable cause to believe that an *offense* was committed, [and] that the child committed the *offense*, ..." (Emphasis added). The district court's probable-cause determination, then, should be focused on whether there is probable cause to support the named offense. However, in cases where the offense can be prosecuted as either a felony or a misdemeanor, the district court is not responsible for determining whether there is probable cause for the felony charge - that determination is left to a grand jury. Thus, the district court here applied the wrong legal standard when it addressed whether appellant was

properly charged with felony or misdemeanor wanton endangerment. The Court of Appeals held that the writ was properly granted because there clearly was probable cause under KRS 640.010(2)(a) to believe that appellant had committed the offense of wanton endangerment. The matter was then remanded back to the district court for additional findings as to whether transfer was appropriate under the discretionary factors of KRS 640.010(2)(b).

X. LIENS

A. ***Prodigy Construction Corporation, Inc. v. Brown Capital, Ltd.***

2014-CA-001668 08/04/2017 2017 WL 3317537

Opinion by Judge J. Lambert; Judges Dixon and Maze concurred.

A construction company made improvements to a church on property owned by appellees. The church went bankrupt, defaulted on the lease, and failed to make payments to the construction company. The construction company subsequently filed a mechanic's lien on the property and sued the owners under a *quantum meruit* theory. The owners were granted summary judgment on all issues, and the construction company appealed in two separate actions. The Court of Appeals affirmed in both, holding that: (1) the construction company's lien was defective for failing to use the language "subscribed and sworn to" required by KRS 376.080; (2) statements allegedly made by the owners in the church's bankruptcy proceedings did not prevent it from challenging the validity of the lien. *Reece v. Dixie Warehouse & Cartage Co.*, 188 S.W.3d 440 (Ky. App. 2006); (3) recovery by the construction company based upon a theory of *quantum meruit* did not apply under the facts and circumstances presented. *Quadrille Bus. Sys. v. Kentucky Cattlemen's Ass'n, Inc.*, 242 S.W.3d 359 (Ky. App. 2007); and (4) the construction company's failure to file a supersedeas bond or to request a stay entitled the owners to the release of the bond posted. KRS 376.250(4); *3D Enterprises Contracting Corp. v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 174 S.W.3d 440 (Ky. 2005).