PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

AUGUST 1, 2019 to AUGUST 31, 2019

I. ADMINISTRATIVE LAW

A. *Spears v. Board of Trustees of LFUCG Policemen's and Firefighters' Retirement Fund*

2017-CA-001193 09/28/2018 2018 WL 4677515 DR Denied

Opinion by Chief Judge Clayton; Judges Kramer and Nickell concurred.

Appellant, a former police officer, challenged an opinion and order affirming the denial of his petition for disability retirement benefits by the Board of Trustees ("Board") of the Policemen's and Firefighters' Retirement Fund of the Lexington-Fayette Urban County Government. The Court of Appeals affirmed, holding that the Board's denial of disability benefits was fully in accordance with the provisions of KRS 67A.360 to 67A.690. Appellant resigned from the police force on June 30, 2014 - while his disability application was pending - rather than face a disciplinary hearing before the city council. On August 13, 2014, the Board denied the application pursuant to KRS 67A.500(1) because of appellant's voluntary withdrawal from employment for reasons unrelated to his disability. The Court held that the Board's decision was consistent with the plain terms of the statute and, therefore, was not arbitrary. The Court also rejected appellant's argument that the Board acted improperly when its staff encouraged him to submit a letter of resignation before the resolution of his application for disability benefits. The record did not reflect that appellant had raised the argument below, so it was unpreserved for appellate review.

II. ARBITRATION

A. ***GGNSC Frankfort, LLC v. Richardson***

2013-CA-000245 08/02/2019 2019 WL 3987758

Opinion by Judge K. Thompson; Judges Acree and Combs concurred.

The Court of Appeals affirmed in part, reversed in part, and remanded an order denying GGNSC's motion to compel arbitration and to dismiss or stay pending litigation after reconsidering its prior decision as directed by the Supreme Court of Kentucky. Fannie Lyon was admitted to a GGNSC long-term care facility. Upon her admission, the admission papers were signed by her attorney-in-fact, who signed a voluntary alternative dispute resolution agreement agreeing that all claims would be submitted to arbitration. Following Fannie's death, the administrator of her estate filed an action alleging negligence in her care and treatment at the facility, as well as a wrongful death claim. The Court of Appeals held that the wrongful death action was not precluded by the arbitration agreement; however, the personal injury and statutory claims that belonged to Fannie must be submitted to arbitration. Citing to the United States Supreme Court's decision in *Kindred Nursing Centers Limited Partnership v. Clark*, __U.S.__, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017) and *Kindred Nursing Centers Limited Partnership v. Wellner*, 533 S.W.3d 189 (Ky. 2017), the Court held that the power-of-attorney was sufficiently broad to confer upon the attorney-in-fact the power to enter into an arbitration agreement. The Court concluded that the language allowing the attorney-in-fact to "generally do and perform for me all that I may do if acting in my own person" - set forth in bold print and in a separate paragraph - conferred the power to enter into a pre-dispute arbitration agreement.

III. CHILD SUPPORT

A. ***Nelson v. Ecklar***

2018-CA-000429 08/30/2019 2019 WL 4123097

Opinion by Judge Dixon; Judges Kramer and Taylor concurred.

The Court of Appeals affirmed an order modifying appellant's child support obligation. The parties previously had entered into an agreement that made appellant responsible for "all reasonable expenses" for the child and specifically listed those expenses. Appellee later moved for a modification of child support, citing appellant's alleged failure to comply with the prior agreement and an increase in his income as grounds for modification. After a hearing, the family court found a material change of circumstances that warranted an increase in appellant's child support obligation. In support of the increase, the family court used the amount appellant testified he spent each month to comply with the parties' prior agreement, which was more than 15% less than his obligation under the child support guidelines. On appeal, the Court held that child support can be modified pursuant to KRS 403.213 even when the parties have previously agreed to an amount lower than that required under the child support guidelines. The Court further concluded that where the parties have an equal timesharing arrangement but do not have equal or near-equal incomes, the base monthly child support obligation should be allocated to each parent in proportion to the party's respective percentage of the combined monthly income. The Court affirmed the family court's granting a credit toward appellant's monthly obligation to address the parties' equal timesharing arrangement. Finally, the Court held that the family court properly abided by the parties' settlement agreement with regard to provision of the child's health insurance where the agreement did not contemplate the possibility of the child being covered by a plan belonging to anyone other than the parties.

IV. CIVIL PROCEDURE

A. ***Murphy v. Weber***

2018-CA-000645 08/02/2019 2019 WL 3987763

Opinion by Judge Lambert; Judges Maze and Taylor concurred.

Appellant challenged the dismissal of his complaint without prejudice due to his failure to appear for the jury trial. The Court of Appeals affirmed, holding that the circuit court did not abuse its discretion. The trial had been rescheduled eleven times over a period of several years, with at least six of the continuances being at appellant's request. The reasons given by appellant - not receiving the order scheduling the trial date, a problem with the calendar on his cellular phone, and his need to move his residence - were not sufficient to establish that the circuit court abused its discretion. The Court further noted that had the circuit court dismissed the complaint *with* prejudice, its review would have been more stringent pursuant to *Jaroszewski v. Flege*, 297 S.W.3d 24 (Ky. 2009).

V. CONSTITUTIONAL LAW

A. ***Jeffries v. Justice and Public Safety Cabinet***

2018-CA-001322 08/23/2019 2019 WL 3979121

Opinion by Judge Lambert; Judges Goodwine and Maze concurred.

Appellant was convicted in 1997 of rape and attempted first-degree rape as a youthful offender. He filed this action challenging his need to register under the Kentucky Sex Offender Registration Act (SORA), KRS 17.500 *et seq.* He claimed that SORA's retroactive application to him violated the Kentucky and United States Constitutions because it was an *ex post facto* law, was cruel and unusual punishment, and the registration was not rationally related to a legitimate governmental interest. The Court of Appeals affirmed the circuit court's judgment dismissing the petition, relying on *Buck v. Commonwealth*, 308 S.W.3d 661 (Ky 2010), which held that prior amendments to SORA did not make the statute punitive in nature and therefore did not violate the *ex post facto* clauses because it was remedial in nature and had a rational connection to a non-punitive goal to protect public safety. The Court rejected appellant's arguments that juveniles were exempt from registration or that SORA was intended to be punitive. It also rejected his arguments that KRS 17.545(2) and KRS 17.546(3) are unconstitutional. These statutes prohibit a sex offender from being on school or daycare grounds or from taking photographs of other children without permission. The Court held that these restrictions were minimally taxing and served a non-punitive purpose of protecting children. The statutes also contained exemptions if the sex offender obtained permission.

VI. CONTRACTS

A. ***Risner v. McCarty***

2018-CA-000394 08/09/2019 2019 WL 3756246 DR Pending

Opinion by Judge Lambert; Judge Spalding concurred; Judge Acree concurred in result only.

A vendor of property filed a complaint against the purchaser, alleging that he had given the purchaser the deed to the property with the express understanding that it would be re-conveyed to the vendor after the vendor had repaid a loan. The vendor also sought a declaratory judgment establishing the existence of a loan repayment agreement or a land contract between the parties. After a bench trial, the circuit court dismissed the vendor's claim and determined that the purchaser owned the property in fee simple absolute. The court did not find that any loan agreement or constructive trust existed between the parties as the vendor argued. The Court of Appeals affirmed. The Court first rejected the vendor's argument that the circuit court had abandoned its duty to make independent findings by essentially adopting the purchaser's tendered proposed judgment. The Court then held that: (1) the circuit court's decision was supported by substantial evidence as that court was permitted to judge the credibility of the witnesses and to discount the testimony of those it found lacking in credibility; (2) the circuit court did not err in concluding that notations on the checks to the purchaser were ambiguous; (3) the circuit court did not err in concluding that the Statute of Frauds applied to invalidate an alleged oral agreement between the parties; and (4) the circuit court did not err in finding that a constructive trust did not exist between the parties.

VII. CRIMINAL LAW

A. ***Commonwealth v. Morgan***

2018-CA-000719 08/23/2019 2019 WL 3978571

Opinion by Chief Judge Clayton; Judges Maze and Nickell concurred.

This matter was before the Court of Appeals upon discretionary review of an order reversing and remanding a district court order denying appellee's motion to suppress the results of his breathalyzer test. Appellee argued that the arresting officer failed to comply with the provisions of KRS 189A.105(4), which requires that a person who submits to a requested alcohol and substance test be given a second warning concerning his or her right to have an independent blood test performed. In this case, the police officer failed to give the second warning. As to the issue of suppressing evidence when no constitutional rights have been violated, the Court noted that *Commonwealth v. Bedway,* 466 S.W.3d 468 (Ky. 2015) holds that suppression may be warranted upon the violation of a statutory right if there is prejudice to the defendant or if there is evidence of deliberate disregard of the statute. Here, the arresting officer did not testify that he forgot to give the warning. Further, the officer marked "no" on the informed consent form to the specific question of whether appellee sought an independent blood test. Therefore, the Court of Appeals agreed with the circuit court that the officer had deliberately disregarded the statutory mandate and that suppression of the breath test evidence was proper.

B. ***Crabtree v. Commonwealth***

2016-CA-001865 08/23/2019 2019 WL 3978581

Opinion by Judge Lambert; Judges Maze and Taylor concurred.

Appellant was convicted of first-degree burglary and sentenced to twenty years' imprisonment. His conviction was affirmed on direct appeal, and he subsequently sought RCr 11.42 relief, arguing that his trial and appellate counsel were ineffective. The circuit court denied the motion after holding an evidentiary hearing. On appeal, appellant argued that trial counsel and appellate counsel failed to object to and argue on appeal, respectively, the issue of certain representations made by the prosecutor during the penalty phase of trial. The Court of Appeals affirmed, holding that appellant had failed to demonstrate that he was prejudiced to such a degree that the outcome would have been different at either the trial or appellate level had the issue been raised.

C. ***Marcum v. Commonwealth***

2018-CA-000039 08/09/2019 2019 WL 3756247

Opinion by Chief Judge Clayton; Judges Jones and L. Thompson concurred.

In a direct appeal from appellant's conviction on charges of possession of methamphetamine, possession of drug paraphernalia, terroristic threatening, and receiving stolen property, the Court of Appeals reversed and remanded for a new trial. Appellant presented five arguments on appeal, the first of which asserted that the circuit court failed to ensure a knowing, intelligent, and voluntary waiver of his right to counsel pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The Court of Appeals agreed and held that the circuit court's *Faretta* colloquy failed to present specific information sufficient for appellant to be made fully aware of the dangers of self-representation. Because a *Faretta* violation constitutes structural error, the Court was required to reverse and remand for a new trial.

D. ***Martin v. Commonwealth***

2017-CA-001269 08/16/2019 2019 WL 3850904 Rehearing Pending

Opinion by Judge Lambert; Chief Judge Clayton and Judge Combs concurred.

Appellant challenged an order granting the Commonwealth's motion, filed pursuant to KRS 218A.410(1)(j) and 218A.415, to forfeit appellant's property - namely, his truck, an enclosed utility trailer, and the tools contained within the trailer - as a result of his convictions for theft, drug-related offenses, and possession of a handgun. The Court of Appeals affirmed in part and reversed and remanded in part, holding that appellant had sufficiently demonstrated that the circuit court had failed to make written factual findings pertaining to the traceability of the forfeited tools to drug-related activity.

E. ***Matthews v. Commonwealth***

2018-CA-000849 08/23/2019 2019 WL 3977830

Opinion by Judge Nickell; Judges Kramer and L. Thompson concurred.

Appellant was convicted of complicity to first-degree robbery and sentenced to twelve years' imprisonment. On appeal, he claimed that the circuit court twice abused its discretion - first by denying his pretrial request to be tried separately from co-defendant Anthony Ball and then by denying a requested mistrial after Ball suggested that police violated the law, prompting another jury admonition from the bench. The Court of Appeals found no reversible error and affirmed. As to the first argument, the Court held that joinder of the two defendants for trial was appropriate pursuant to RCr 6.20 and that appellant was not prejudiced by joinder under RCr 8.31. The Court further held that even assuming error had occurred, any such error was harmless. Though Ball acted as hybrid counsel during trial and at one point read aloud a line from his own police interview (which had been redacted), the defendants' roles in the hold-up were captured on both in-store and neighborhood video; moreover, both individuals confessed their involvement to police and their participation was beyond doubt. The Court further noted that the circuit court exerted and retained control over Ball in his role as hybrid counsel and that appellant was not prejudiced by Ball's actions in that capacity. The Court also held that Ball's filing of *pro se* motions and decision to ask to serve as hybrid counsel - without more - did not constitute grounds to sever the defendants' trials. Appellant's mistrial claim was based on admonitions the circuit court gave in the wake of Ball attempting to show that his confession was coerced. In rejecting this argument, the Court noted that mistrials should be granted sparingly and concluded that the circuit court's limiting admonition properly restricted the jury's use of testimony.

F. ***New v. Commonwealth***

2018-CA-001363 08/02/2019 2019 WL 3987756 DR Pending

Opinion by Judge Nickell; Judges Goodwine and Spalding concurred.

In a probation revocation appeal, the Court held that KRS 439.3106 does not require a trial court to impose sanctions short of revocation, nor must the trial court explain the rationale for its findings. The Court clarified that the focus in *Helms v. Commonwealth*, 475 S.W.3d 637 (Ky. App. 2015) was whether revocation based on a zero-tolerance provision was proper. Thus, the statement in *Helms* that "perfunctorily reciting the statutory language in KRS 439.3106 is not enough" does not mean that a court must provide detailed findings. Instead, as per precedent, under KRS 439.3106 the trial court is only required to find, based on the evidence of record, that a defendant: (1) "constitutes a significant risk to prior victims of the supervised individual or the community at large"; and (2) "cannot be appropriately managed in the community." Here, appellant's repeated drug usage and his submission of falsified paperwork to drug court was sufficient to support revocation.

G. ***Walker v. Commonwealth***

2018-CA-000944 08/09/2019 2019 WL 3756333

Opinion by Judge Lambert; Judges Maze and Taylor concurred.

Appellant challenged orders revoking his probation and sentencing him to twenty years in prison for burglary and theft charges. The Court of Appeals vacated and remanded, holding that the circuit court failed to comply with the mandatory criteria set forth in KRS 439.3106(1) and therefore the orders revoking appellant's probation were an abuse of discretion. The Court noted that the Commonwealth did not present any evidence and that the circuit court failed to make the necessary findings that appellant constituted a significant risk to prior victims or the community at large and that he could not be appropriately managed in the community. The Court rejected the Commonwealth's argument that appellant failed to preserve this issue for review, citing to *Burnett v. Commonwealth*, 538 S.W.3d 322 (Ky. App. 2017), in which the Court held that the failure to make the mandatory statutory findings constituted palpable error.

VIII. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. ***Williford v. Williford***

2018-CA-001249 08/23/2019 2019 WL 3977510

Opinion by Judge Acree; Judge L. Thompson concurred; Judge Nickell dissented and filed a separate opinion.

In this appeal from the entry of a domestic violence order (DVO), appellant argued that she was not afforded a full evidentiary hearing and that substantial evidence did not support a finding either that domestic violence and abuse had occurred or that it may occur again. By a 2-1 vote, the Court of Appeals affirmed, holding that a full evidentiary hearing was conducted and that the evidence was sufficient to support the challenged findings. Judge Nickell dissented because the family court failed to make additional findings beyond checking the boxes on the applicable AOC Form 275.3 and would have reversed and remanded for additional findings. In *dicta*, the majority addressed the dissent, noting that appellant did not raise that argument and citing *Pettingill v. Pettingill*, 480 S.W.3d 920 (Ky. 2015) as requiring nothing more of a trial court than completion of that form.

IX. EVIDENCE

A. ***Skarupa v. Owensboro Health Healthpark***

2018-CA-000771 08/02/2019 2019 WL 3987761

Opinion by Judge Maze; Judges Goodwine and Lambert concurred.

Appellant filed a negligence action against appellees Owensboro Health and Thomas B. Smith, alleging that Smith negligently performed a massage causing her to suffer a stroke. In the course of discovery, appellant's experts testified by deposition and their depositions were later used at trial. Prior to trial, Owensboro Health allowed its experts to review the depositions to dispute the conclusions reached by appellant's experts. At trial, appellant argued that this violated the separation-of-witnesses rule that had been invoked in the pre-trial order. Consequently, she maintained that Owensboro Health's experts should have been excluded and, in the absence of contrary testimony, that she was entitled to a directed verdict on the issue of liability. The circuit court denied the motions. The matter proceeded to the jury, who found in favor of Owensboro Health and Smith. On appeal, appellant argued that Owensboro Health had violated KRE 615 by allowing its experts to review her experts' deposition testimony. The purpose of the rule is to ensure that witnesses do not alter their own testimony based on what they hear from other witnesses. Appellant argued that allowing one party's expert to review the deposition testimony of the other party's expert effectively defeats the purpose of the rule, allowing an expert to directly address and comment on the other witness's testimony. The Court of Appeals disagreed and affirmed. While Kentucky has never ruled on the issue, the Court noted that federal cases consistently hold that FRE 615 does not apply between deposition and trial. The Court of Appeals agreed with this reasoning and held that when a party seeks to prevent disclosure of his or her expert's pre-trial deposition, the appropriate remedy is to seek a protective order under CR 26.03. The Court further held that KRE 615 only requires sequestration of witnesses prospectively from the point in time that the rule is invoked. Owensboro Health's experts had already reviewed the depositions at issue at the time the motion was made for separation of witnesses. Consequently, the Court found no violation of KRE 615 and concluded that the circuit court did not abuse its discretion by denying the motion to exclude Owensboro Health's experts.

X. FAMILY LAW

A. ***Baker v. Baker***

2018-CA-001023 08/23/2019 2019 WL 3977511

Opinion by Judge Lambert; Judges Maze and Taylor concurred.

Wife filed a post-dissolution motion seeking an interest in Husband's railroad retirement benefits. In an equitable ruling, the family court found that Husband's failure to inform Wife of his retirement after she had asked, and his failure to fulfill his duty under the settlement agreement to effectuate her receipt of her portion of the benefits, resulted in unjust enrichment on Husband's part. The Court of Appeals affirmed the circuit court's judgment, which ordered Husband to pay Wife two years of back due benefits.

XI. GOVERNMENT

A. ***Aubrey v. Kentucky Retirement Systems***

2018-CA-000622 08/30/2019 2019 WL 4123093

Opinion by Judge Kramer; Judges Dixon and K. Thompson concurred.

Appellants initiated a declaratory action against the Commonwealth and KERS, challenging the validity and constitutionality of KRS 61.637(17) in its amended form. They primarily argued that the post-2008 version of KRS 61.637(17) impermissibly and retroactively impaired their contractual rights and violated the impairment of contract clause of the Kentucky Constitution. Appellants asserted that the new legislation impaired their "rights" to future statutory reemployment opportunities that existed during employment under prior legislative enactments. The amended version of the statute imposed a one-month waiting period for hazardous duty employees between retiring from a participating employer and new full or part-time employment with another participating employer. The amendment also imposed a penalty for violating the waiting period and required employees to certify that they did not have a prearranged agreement for future reemployment prior to initial retirement. The circuit court ruled in favor of the Commonwealth and KERS after determining that the enactment of KRS 61.637(17) was proper and otherwise consistent with the contract clause of the Kentucky Constitution. Upon review, the Court of Appeals adopted the circuit court's reasoning and affirmed. The Court explained that appellants were not guaranteed a vested "right" to future statutory reemployment opportunities as they existed under prior legislative enactments. Post-retirement reemployment with the Commonwealth or any of its subdivisions or agencies cannot be considered a vested right of any kind because it is always optional with both parties. Likewise, mere reliance by benefited parties on legislative enactments and their unilateral beliefs concerning what the statute will mean to them in the future cannot create an enforceable contractual right that is not otherwise manifest in the words of the legislation. At most, appellants had relied upon a legislative policy that the General Assembly was at liberty to revise and repeal.

XII. INSURANCE

A. ***Joiner v. Kentucky Farm Bureau Mutual Insurance Company***

2017-CA-000473 08/02/2019 2019 WL 3987764

Opinion by Judge Acree; Judges Kramer and Taylor concurred.

The Court of Appeals affirmed the circuit court's dismissal of appellant's claim that appellee violated the Kentucky Motor Vehicle Reparations Act by failing to pay basic reparations benefits (BRB). The Court held that KRS 304.39-230(1) establishes the limitations period for filing suit when no BRB have been paid. It also held that the same statute operates as a statute of repose when the reparations obligee is a third-party insured such as a pedestrian. Furthermore, for such reparations claimants, proof of net loss must be submitted to the reparations obligor within the same limitations period established by KRS 304.39-230(1). Appellant's submission of a billing statement showing a "zero" balance did not constitute the predicate proof of loss that would have created the insurer's obligation under KRS 304.39-040 or that would have entitled appellant to reparations under KRS 304.39-030. The Court also held that when the medical expenses of a tort claimant are paid by the Kentucky Medical Assistance Program, the tort claimant shall be deemed to have made to the Cabinet for Health and Family Services an assignment of his rights to third-party payments to the extent of the medical assistance paid on his behalf.

B. ***Shackelton v. Estate of Fries***

2017-CA-000121 08/02/2019 2019 WL 3987760

Opinion by Judge Acree; Judge Kramer concurred; Judge K. Thompson concurred in part, dissented in part, and filed a separate opinion.

In this review of the circuit court's dismissal of appellant's claims against a tortfeasor for personal injuries and against the tortfeasor's insurer for failure to pay underinsured motorist (UIM) benefits, the Court of Appeals addressed two primary issues: (1) relation back of an amended complaint under CR 15.03; and (2) the viability of a UIM claim when the underlying claim against the tortfeasor can no longer be maintained. Reluctantly applying *Gailor v. Alsabi*¸ 990 S.W.2d 597 (Ky. 1999), the Court affirmed the dismissal of appellant's claims against the tortfeasor because the complaint was filed after the tortfeasor died (and before the existence of the tortfeasor's estate) and because the amended complaint - which was filed after the limitations period expired - did not relate back under CR 15.03. Although the Court followed *Gailor*, it criticized its rationale as unjust when applied to the facts of this case and urged the Supreme Court of Kentucky to consider advancing Kentucky jurisprudence to address that issue. Judge K. Thompson dissented, in part, on grounds similar to the majority's criticism of *Gailor*, stating that reversal was appropriate to allow limited discovery regarding whether the tortfeasor's insurer, which negotiated with the tort claimant after the insured's death and before the existence of the estate, engaged in conduct that would justify estopping application of *Gailor* to the extent of insurance coverage. The Court was unanimous regarding the second issue and held that a UIM claim against an insurer was not dependent upon the pursuit or even the viability of the underlying tort claim. Such a claim could go forward independently. However, the Court reiterated the holding in *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1993) that "proof the offending motorist is a tortfeasor and proof of the amount of damages caused by the offending motorist are … essential facts that must be proved before the insured can recover judgment in a lawsuit against" an insurer for UIM benefits.

XIII. OPEN RECORDS

A. ***Louisville/Jefferson County Metro Government v. Courier-Journal, Inc.***

2018-CA-001560 08/09/2019 2019 WL 3756332

Opinion by Judge Maze; Judges Goodwine and Lambert concurred.

The Courier-Journal filed an open records request seeking production of Louisville Metro's bid proposal to Amazon.com's HQ2 project. Louisville Metro provided a redacted version but withheld the portions relating to its offers of financial incentives and prospective site locations. The circuit court held that the full proposal was subject to production under the Open Records Act. The Court of Appeals affirmed. The Court first held that the proposal was not exempt under KRS 61.878(1)(d) because Amazon had extensively publicized its interest in relocating. The Court then addressed Louisville Metro's argument that the proposal was preliminary and exempt under KRS 61.878(1)(i) and (j). In a number of opinions, the Attorney General's office had concluded that rejected bid proposals that do not result in a completed negotiation with an approved agreement never reach the level of a "final" agreement. In the absence of a "final" action, the Attorney General's longstanding interpretation was that unaccepted offers, proposals, or supporting correspondence remain preliminary and not subject to disclosure. The Court of Appeals disagreed with this interpretation, concluding that "final" action occurs when the ultimate issue is definitively resolved, either by action or by a decision not to take action. Once Amazon excluded Louisville Metro from its list of finalists, the proposal was no longer subject to change and lost its status as preliminary. Therefore, the Court affirmed the circuit court's order requiring production of the unredacted proposal.

XIV. PROPERTY

A. ***Fee v. Cheatham***

2018-CA-000796 06/28/2019 2019 WL 2712604 Rehearing Denied

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

Charles and Mary Fee appealed from an order finding that they did not have an easement by prescription or an easement by estoppel to a roadway on the property of Richard and Gail Cheatham. The Fees purchased a tract of land in Laurel County in 1992. At the time of purchase, ingress and egress to the Fees' property were by use of a roadway from Highway 552 and terminating at or near the Fee property line. In 1993, the Cheathams purchased a piece of property bordering the Fee property. The roadway in question sits on the property owned by the Cheathams. In July 2016, the Cheathams erected a gate on the roadway, which blocked ingress and egress from the Fees' property via Highway 552. The Fees filed this lawsuit thereafter. Following a bench trial, the circuit court found that the Fees did not have an easement by estoppel or an easement by prescription. Reversing in part, the Court of Appeals held that the circuit court erred when it found that the Fees did not have an easement by prescription. The Fees satisfied the necessary elements to acquire an easement by prescription between 1992 and 2016. However, the Court discerned no error in the circuit court's finding that the Fees had not acquired an easement by estoppel and therefore affirmed that portion of the judgment.

XV. STATUTE/RULE INTERPRETATION

A. ***Saber Management-Kentucky, LLC v. Commonwealth ex rel. Beshear***

2018-CA-000999 08/23/2019 2019 WL 3977513

Opinion by Chief Judge Clayton; Judges Maze and Nickell concurred.

Saber Management-Kentucky, LLC ("Saber") appealed from an order granting summary judgment in favor of the Commonwealth on the parties' Joint Petition for Declaration of Rights and Agreed Case concerning the sale of preneed, *i.e.*, prior to death, burial vaults in Kentucky. Saber argued on appeal that burial vaults should be included in the definition of "cemetery merchandise" contained in KRS 367.932(17) under the language "other similar personal property commonly sold by or used in cemeteries," which would bring burial vaults under the auspices of a "preneed cemetery merchandise contract" under KRS 367.932(18). The Court of Appeals disagreed with Saber and affirmed, holding that the products listed in KRS 367.932(17) as "cemetery merchandise" were items that embellish or decorate a gravesite, unlike a burial vault, which could not be considered a "similar" item of adornment. Rather, a burial vault's only use is not for decoration but "in connection with the final disposition of a dead human body" and falls within the plain meaning of KRS 367.932(3)'s definition of a "preneed burial contract." Further, the Court held that to read the statutory language otherwise would create a conflict between the two statutes.

B. ***Transportation Cabinet v. Robards***

2018-CA-000778 08/30/2019 2019 WL 4123057

Opinion by Judge K. Thompson; Judges Goodwine and Kramer concurred.

The Transportation Cabinet appealed from an order denying its petition to enforce a final order of the Secretary of the Cabinet, which required appellee to remove an advertising device located within 660 feet of Interstate 65. In 2013, the Cabinet learned that appellee had placed a semi-trailer on his property within 660 feet of I-65 with a vinyl sign tied to it advertising for a quilt outlet. Appellee was paid a monthly fee for displaying the advertisement. The Cabinet determined that appellee was maintaining an advertising device contrary to the Kentucky Billboard Act, KRS 177.830 *et seq.*, and ordered that the vinyl sign be removed. Appellee did not appeal but also did not remove the sign. After the Cabinet filed the subject action, appellee removed the sign. However, the removal of the sign revealed a painted-on sign beneath it advertising for the same entity. The Cabinet amended its complaint, alleging that the pained-on sign was the equivalent of the vinyl sign and requesting that the circuit court order its removal. However, the circuit court ruled that because appellee used the semi-trailer to store agricultural equipment and hay, it was not an advertising device and, therefore, the Billboard Act did not apply. The Court of Appeals reversed and remanded to the circuit court for an order directing that the advertisement be removed. The Court held that there was no exception to the Billboard Act for advertisements on agricultural equipment where the advertisement is within 660 feet of an interstate, it is clearly visible to travelers, the purpose is to gain the attention of travelers, and a monthly fee is received for maintaining the advertisement. The Court further held that replacing one advertisement with another did not comply with the Cabinet's order.

XVI. TAXATION

A. ***Ridge v. Finance and Administration Cabinet, Department of Revenue***

2018-CA-001517 08/16/2019 2019 WL 3850790

Opinion by Judge Spalding; Judges Goodwine and L. Thompson concurred.

At issue was whether severance payments made from a Kentucky employer to a Tennessee resident were subject to Kentucky income tax even though the taxpayer was no longer working in Kentucky when he received the payments. The Court of Appeals held that the severance payments were taxable as income pursuant to KRS 141.020(4) during the year received and that Kentucky can constitutionally tax severance payments made to an out-of-state resident.

XVII. TERMINATION OF PARENTAL RIGHTS

A. ***T.R.W. v. Cabinet for Health and Family Services***

2018-CA-001157 05/10/2019 2019 WL 2068490

Opinion by Judge L. Thompson; Judges Taylor and K. Thompson concurred.

Mother challenged the termination of her parental rights. The Court of Appeals affirmed. Of note, the Court held that there was substantial evidence in the record to support the family court's neglect findings, including the fact that the child was born with amphetamines in her system, Mother's continuous abuse of drugs, Mother's failure to pay child support, and Mother's inability to complete her case plan. The Court also held that the evidence supported the family court's finding that there was no reasonable expectation of improvement by Mother. At the time of the termination of parental rights trial, the child had been out of Mother's care for almost 3 years. During that time, Mother was unable to complete her protective parenting class despite attempting six times. In addition, Mother was involved in two abusive relationships and kept falling back into her drug using habits during this time. She also did not provide child support or other necessities to the child. The Court also noted that Mother did not testify at trial in order to give her opinion on the changes she had made in her life and her expectations for the future. The Court further held that the family court did not err when it admitted into evidence files from the dependency, neglect, and abuse (DNA) proceedings of the child and her three siblings or court records regarding a domestic violence action filed by Mother against Father.

XVIII. TRIALS

A. ***Keeney v. Billy Trent Construction, LLC***

2018-CA-000891 08/09/2019 2019 WL 3756336

Opinion by Judge Spalding; Judges Dixon and Taylor concurred.

Appellants brought an action against a contractor stemming from a construction and building dispute. The contractor filed a counterclaim. Counsel for the contractor moved for a directed verdict after counsel for appellants delivered his opening statement at trial, and the circuit court sustained the motion. On appeal, appellants challenged this decision, as well as the circuit court's decision not to vacate a subsequent agreement to resolve the contractor's counterclaim because it was entered into "under duress." The Court of Appeals reversed the directed verdict, holding that CR 43.02(a) does not require the plaintiff to state evidence in their opening statement on each and every element of their claim. A party is only required to refrain from making any statements that would be fatal to their claim. However, the Court affirmed as to the circuit court's decision not to vacate the counterclaim settlement agreement, holding that absent proof of violence or threat that would produce a just fear of great injury to the person, there could be no duress. Since such threats were not alleged, the circuit court was affirmed as to this issue.

B. ***Thompson v. McCoy***

2018-CA-000527 08/23/2019 2019 WL 3977585

Opinion by Judge Nickell; Judges Acree and L. Thompson concurred.

Thompson sued neighboring farm owner McCoy for damages resulting from repairs McCoy made to a creek and the county road running beside it. Thompson argued that the changes caused flooding and erosion. McCoy indicated that he installed a concrete retaining wall at the creek's edge and repaired the road so he could reach his property. Thompson had no issue with the repairs until 2015, when McCoy installed a third section of concrete wall after an "extraordinary flooding event." Thompson's own expert testified that he would have taken the same remedial steps had he owned the land. In a bench trial, the circuit court entered a directed verdict on behalf of all defendants on causation and damages. The parties then presented proof in a boundary dispute based on competing surveys. The circuit court found McCoy's survey more accurate because it followed the relevant deeds; in contrast, Thompson's surveyor had added a call unsupported by the deeds and relied on his client's memory to locate the creek bed. The Court of Appeals affirmed, but for reasons not argued by the parties. The Court first noted that a directed verdict is improper in an action tried by the circuit court without a jury. However, it concluded that early dismissal still would have been appropriate here under CR 41.02(2) and was fully supported by findings of fact, as required by CR 52.01. The Court then addressed Thompson's arguments pertaining to two site visits made by the trial judge in the presence of counsel. He argued that the judge erroneously relied on his own perceptions of the property rather than making findings and drawing conclusions based solely on the evidence presented. The record showed no jury trial was requested, and Thompson never objected to the judge visiting the site to get the lay of the land. The Court held that the judge could rely on personal knowledge gained during the site visits. To say otherwise would allow for a waste of judicial time and resources. Moreover, the trial judge stated in his findings that the proof he heard at trial confirmed his personal observations.