

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

I. APPEALS

A. *Anglin v. Justice & Public Safety Cabinet*

[2014-CA-001914](#) 12/23/2015 2015 WL 9311736

Opinion and order dismissing by Judge J. Lambert; Chief Judge Acree and Judge Maze concurred. Appellant appealed from an order denying his motion for reconsideration of an order granting the Justice & Public Safety Cabinet's motion to dismiss his petition for declaration of rights. The Court of Appeals dismissed the appeal on grounds that appellant's notice of appeal was untimely pursuant to CR 73.02(1). In so doing, the Court held that the "prison mailbox rule" set forth in CR 12.04(5) is limited to criminal cases, and does not apply in civil cases such as the one at issue. Thus, since the circuit court did not receive appellant's notice of appeal and the accompanying motion to proceed *in forma pauperis* until one day past the mandatory deadline, the Court of Appeals had no choice but to dismiss the appeal because its jurisdiction was never invoked.

B. *Flint v. Coach House, Inc.*

[2015-CA-000391](#) 12/04/2015 2015 WL 7810069 DR Pending

Opinion and order by Judge Maze; Judges Combs and VanMeter concurred. Appellant, a *pro se* litigant, sought to recuse the trial judge in a civil action. The circuit court denied the motion, and appellant appealed. The Court of Appeals dismissed the appeal due to a lack of subject-matter jurisdiction, holding that the order denying recusal was not a final and appealable order. The order disposed of only a single procedural issue and specifically reserved all other matters for further adjudication; moreover, it did not conclusively determine the rights of the parties, and the trial court did not include the recitations necessary to allow for appellate review pursuant to CR 54.02. The Court also sanctioned appellant for filing a bad faith appeal. The Court noted that appellant had prosecuted numerous lawsuits and appeals in state and federal courts - including 26 appeals with the Court of Appeals. The Court had dismissed seven of those appeals for failure to appeal from a final and appealable order,

and all of those dismissals were due to the appeals being taken from interlocutory orders denying motions to recuse a trial judge. Those prior dismissals were relevant as to whether appellant knew or should have known of the requirement of a final order before filing the subject appeal, and appellant's actions demonstrated a persistent unwillingness to abide by or even to familiarize himself with the Rules of Civil Procedure governing appeals. Therefore, the Court imposed sanctions pursuant to CR 73.02(4).

II. CONTRACTS

A. *Sara v. Saint Joseph Healthcare System, Inc.*

[2013-CA-001909](#) 12/23/2015 2015 WL 9311733

Opinion by Judge Maze; Judges Stumbo and Taylor concurred. Appellant challenged an order dismissing his claims against Saint Joseph Medical System, Inc. for violation of administrative due process and for breach of contract. The Court of Appeals affirmed, agreeing with the circuit court that Saint Joseph was not functioning as a "de facto" state agency and, consequently, its internal disciplinary proceedings were not subject to the requirements of KRS Chapter 13B. The Court further agreed that Saint Joseph's Medical Staff Bylaws did not constitute an enforceable contract between the parties. Appellant did not allege that he had a separate employment contract that incorporated the Bylaws. Furthermore, Saint Joseph drafted its Bylaws without input from the medical staff, and it retained the authority to modify those Bylaws without additional consultation. Although appellant agreed to abide by the Medical Staff Bylaws by applying for staff privileges, Saint Joseph did not agree to do anything more than it was obligated to by statute. Therefore, in the particular circumstances presented in this case, the hospital's fulfillment of its statutory obligation to adopt bylaws did not constitute new and valuable consideration necessary for a contractual relationship.

III. CORPORATIONS

A. *Gross v. Adcomm, Inc.*

[2014-CA-001031](#) 12/11/2015 2015 WL 8488900

Opinion by Judge Kramer; Judges Clayton and Stumbo concurred. In 2001, Sam Gross and Christopher Pearson incorporated Adcomm, Inc. Adcomm issued shares, with Gross and Pearson each receiving 50% of the shares. Adcomm's board of directors consisted of only Gross and Pearson. In 2005, Adcomm, in its individual capacity and at the direction of Pearson as its "director and vice-president," filed a complaint in Fayette Circuit court against Gross. Adcomm's complaint asserted that Gross was civilly liable for converting corporate assets and breaching various fiduciary duties. In response, Gross moved to dismiss Adcomm's complaint for lack of standing. Gross pointed out that no resolution from the board of directors had appointed Pearson as the president of Adcomm, authorized Adcomm to engage in litigation that was effectively against half of the directors on its own board, or authorized Adcomm to hire an attorney to prosecute its suit. However, Gross's motions were denied by the circuit court, and Gross was ultimately found civilly liable to Adcomm in the amount of \$169,672.35. Upon review, the Court of Appeals reversed. The Court noted that a corporation ordinarily enforces its own rights and files its own litigation, but whether a corporation decides to do so is subject to the majority vote of its board of directors. Accordingly, the question presented in this matter was: Who is entitled to assert and litigate the rights of an aggrieved corporation when, as here, the party who allegedly injured the corporation is a 50% shareholder, controls half of the corporation's board of directors, and does not want the corporation to pursue litigation? Because each shareholder held 50% of the shares, there could not be a majority vote. Under these facts, a shareholder could initiate a derivative proceeding. Alternatively, if the situation presents a ground for judicially dissolving the corporation, a court could appoint a receiver capable of enforcing the corporation's rights without interference from any of the directors. However, this action purported to be a direct corporate action. There was no resolution of Adcomm's board of directors that authorized Adcomm to file litigation against Gross, or to hire and pay any attorney to prosecute it. In light of Gross's twelve years of objections to this litigation, his 50% interest in Adcomm, and his role as the second of Adcomm's two directors, no such resolution would have ever been forthcoming. Absent such a resolution, Adcomm lacked authorization to file this litigation, was never properly a party to it, and its claims should have been dismissed as a matter of law.

IV. CRIMINAL LAW

A. *Blankenship v. Commonwealth*

[2014-CA-000562](#) 12/23/2015 2015 WL 9311686

Opinion by Judge Clayton; Judges Nickell and Thompson concurred. Appellant appealed the circuit court's order revoking her probation. She maintained that the circuit court abused its discretion when it revoked her probation without making findings pursuant to KRS 439.3106 and without considering other sanctions besides revocation. The Court of Appeals reversed and remanded, holding that the circuit court abused its discretion. Relying on *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), the Court held that in accordance with KRS 439.3106, the circuit court must make findings - oral or written - in a revocation proceeding about whether a probationer's conduct constitutes a significant risk to victims or the community at large and whether the probationer could be appropriately managed in the community. In addition, under the statute, the circuit court must determine whether revocation or a lesser sanction is appropriate.

B. *Clark v. Commonwealth*

[2014-CA-001800](#) 12/04/2015 2015 WL 7809510

Opinion by Judge J. Lambert; Judges Maze and Taylor concurred. On appeal from an order denying appellant's RCr 11.42 motion for post-conviction relief without an evidentiary hearing, the Court of Appeals affirmed. Appellant was charged under three indictments setting forth a variety of charges, including receiving stolen property, theft by unlawful taking, and forgery. In 2009, he entered a guilty plea, received a probated twenty-year sentence, and had his case transferred to drug court. Appellant's probation was revoked in 2013 based on new misdemeanor convictions and his failure to make full restitution as ordered. The Court of Appeals affirmed the circuit court's order denying appellant's subsequent motion for RCr 11.42 relief as untimely because the motion was not filed within three years from the entry of final judgment pursuant to RCr 11.42(10). Relying on *Commonwealth v. Carneal*, 274 S.W.3d 420 (Ky. 2008), the Court concluded that all of the issues relating to appellant's guilt and sentence were decided on February 20, 2009, when he received the probated twenty-year sentence. Therefore, in the absence of an appeal, the time for filing an RCr 11.42 motion began running from that date.

C. *Diaz v. Commonwealth*

[2014-CA-001883](#) 12/18/2015 2015 WL 9252593

Opinion by Judge Maze; Judges Dixon and D. Lambert concurred. Almost five years after her conviction, appellant filed a motion seeking to withdraw her guilty plea to misdemeanor facilitation to trafficking in marijuana. The circuit court denied the motion, and the Court of Appeals affirmed. Appellant's motion alleged that she was not informed that her conviction could have an adverse effect on her immigration status. However, the Court noted that at the time the plea was entered, defense counsel's failure to advise appellant of the immigration consequences of her plea did not fall outside of the range of reasonable assistance. The plea was entered prior to the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), which requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea. The Court further held that appellant's motion was not timely as it was made only after she was arrested on new drug charges.

D. *Eldridge v. Commonwealth*

[2014-CA-001192](#) 12/23/2015 2015 WL 9311673

Opinion by Judge J. Lambert; Chief Judge Acree and Judge Taylor concurred. Appellant challenged a judgment, entered pursuant to conditional guilty pleas, sentencing him to four one-year sentences for second-degree trafficking in a controlled substance. The sentences were ordered to be served consecutively for a total of four years. Appellant argued that he could not be sentenced to more than three years' imprisonment by operation of KRS 218A.1413(2)(b) and KRS 532.080. The Court of Appeals affirmed the judgment, citing the recent opinion of *Commonwealth v. Gamble*, 453 S.W.3d 716 (Ky. 2015), in which the Kentucky Supreme Court held that "the sentencing court must ignore the contrary penalty range for Class D felonies as detailed in KRS 532.060(2)(d) specifically, but not the PFO provision." Therefore, based upon the PFO statute, the maximum sentence the circuit court was authorized to impose was twenty years, and the court did not commit any error in sentencing appellant to a total of four years' imprisonment.

E. *Gray v. Commonwealth*

[2014-CA-000813](#) 12/18/2015 2015 WL 9252679

Opinion by Judge Combs; Judges Dixon and D. Lambert concurred. Appellant was convicted of theft by unlawful taking, over \$500. On appeal, the Court of Appeals affirmed. The Court first held that an instruction on the lesser-included offense of theft by unlawful taking, under \$500, was not warranted. The only evidence regarding the value of the stolen wire was that it was worth far in excess of \$500, and the defense never contested the value of the copper wire stolen from the victim. The Court next held that the trial judge's instruction to the jury to go back and deliberate further, after the jury informed the bailiff it was having trouble reaching a verdict, did not improperly coerce a guilty verdict, so as to warrant reversal. The Court noted that rather than instructing the jury regarding the desirability of a verdict, the trial judge merely instructed the jury to go back and deliberate further to see if they could not come to a resolution. The trial judge's statement did not include an indicia of coercion, and it merely encouraged further deliberation that ultimately resulted in an agreement among the jury members. Finally, the Court held that the Commonwealth's failure to prove the dates of appellant's prior felony convictions, and its introduction of the indictments underlying those convictions during the penalty phase of appellant's prosecution, did not deny appellant his fundamental right to a fair trial or result in a manifest injustice. The date of appellant's prior felony offenses, and his age at the time of each offense, were printed prominently on the certified judgments offered into evidence.

F. *Gritton v. Commonwealth*

[2014-CA-000725](#) 12/04/2015 2015 WL 7813413

Opinion by Judge D. Lambert; Judge J. Lambert concurred; Judge Clayton concurred and filed a separate opinion. Appellant was indicted on four counts of trafficking in a controlled substance and one count of endangering the welfare of a minor. The Commonwealth agreed to dismiss the charges in exchange for a forfeiture hearing on a truck allegedly purchased with illicit funds from drug transactions. The circuit court ordered forfeiture, and appellant appealed. The Court of Appeals reversed, holding that the findings were insufficient to support the conclusion that the truck had been purchased with illicit funds. The findings only showed that appellant was the true owner of the truck - not that he bought the truck with illicit funds. Moreover, it did not follow from appellant's lack of employment that he bought the truck with illicit funds. Appellant had received disability income for more than ten years prior to the forfeiture hearing and had recently received \$15,000 following the forfeiture of \$285,000 in 2012. Even if coupled with the circuit court's finding that the truck was purchased in a manner to circumvent the IRS, appellant's lack of employment only indicated, at most, that the down payments for the truck may have originated from unreported income. In concurrence, Judge Clayton expressed her concern regarding the wording of the forfeiture statute, KRS 218A.410.

G. Heflin v. Commonwealth

[2015-CA-000405](#) 12/04/2015 2015 WL 7808552

Opinion by Judge J. Lambert; Judges Maze and Taylor concurred. In an appeal from an order denying appellant's RCr 11.42 motion for post-conviction relief without an evidentiary hearing, the Court of Appeals affirmed. Appellant was tried and convicted of charges including burglary, rape, and sodomy under two indictments following a 1984 jury trial. The circuit court denied appellant's motion as barred by RCr 11.42(3), which prohibits successive motions for RCr 11.42 relief, and found that appellant had at least constructive knowledge of the Commonwealth's plea offers when he filed his prior motion for post-conviction relief. In affirming, the Court of Appeals held that the motion was procedurally barred as successive by RCr 11.42(3), and that the three-year period in which to file a motion was not tolled based on appellant's access to and citations to the record in earlier motions for relief. The Court further held that appellant was not entitled to a judgment on the pleadings based on the Commonwealth's failure to respond to his motion within twenty days, and that it was within the circuit court's discretion to grant an extension of time to the Commonwealth.

H. Riley v. Commonwealth

[2014-CA-001285](#) 12/04/2015 2015 WL 7813613

Opinion by Judge J. Lambert; Judges Combs and Thompson concurred. On appeal from a judgment convicting appellant of first-degree bail jumping and for being a second-degree persistent felony offender, the Court of Appeals affirmed. The Court held that appellant's argument that the circuit court erred in excluding his testimony was unpreserved. He contended that the circuit court should not have restricted his testimony as being non-responsive because he was trying to explain his conduct to the jury; therefore, he was unable to tell the jury why he did not appear for trial on a pending felony charge. However, appellant failed to preserve this issue by offering an avowal or by otherwise specifying the content of the testimony he wanted to offer.

V. DAMAGES

A. *Mo-Jack Distributor, LLC v. Tamarak Snacks, LLC*

[2013-CA-001845](#) 12/04/2015 2015 WL 7811327

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

Mo-Jack Distributors and Charles Clark filed a breach of contract action against Tamarak Snacks and Richard Cohen. Cohen counterclaimed, alleging that Clark forged his name on the alleged written contract, and requested attorney's fees and punitive damages. At trial, Cohen's only evidence of damages was that he incurred attorney's fees in defending the action. During the trial, Clark moved to amend his complaint to assert breach of an oral contract. However, he did not tender a jury instruction on the claim and did not object to the trial court's proposed instructions, which did not include an instruction on breach of an oral contract. The jury found that Clark had forged the alleged contract and awarded Cohen \$65,000 in compensatory damages and \$95,000 in punitive damages. On appeal, the Court of Appeals reversed, holding that the jury could not award attorney's fees as compensatory damages where not authorized by contract or statute. The case was remanded for an award of nominal damages and a retrial on the issue of the amount of punitive damages. The Court further held that the trial court may award attorney's fees based on equity if the amount of punitive damages awarded is far below the amount of attorney's fees incurred. Finally, the Court held that any alleged error in not instructing the jury on Clark's breach of an oral contract claim was not preserved.

VI. FAMILY LAW

A. *Shown v. Shown*

[2013-CA-001523](#) 12/18/2015 2015 WL 9265316

Opinion by Judge D. Lambert; Judge Combs concurred; Judge VanMeter concurred in result only. On appeal from an order regarding the division of the parties' retirement accounts, the Court of Appeals vacated and remanded. The Court held that the circuit court failed to take additional proof necessary to enter sufficient findings of fact to divide the marital portions of the parties' respective teachers' retirement and Simplified Employee Pension-Individual Retirement Account (SEP-IRA). Specifically, the circuit court failed to delineate its consideration of the factors required by KRS 403.190(1), and took no proof as to what portion of appellant's account was akin to protected Social Security benefits.

VII. NEGLIGENCE

A. *Pauly v. Chang*

[2014-CA-000404](#) 12/11/2015 2015 WL 8488910 DR Pending

Opinion by Judge Dixon; Judges Clayton and Combs concurred. On appeal and cross-appeal from a judgment entered in accordance with a unanimous jury verdict in favor of appellees/cross-appellants Phillip K. Chang, M.D. and Timothy W. Mullett, M.D. in a medical malpractice and wrongful death action, the Court of Appeals affirmed. The Court first held that appellees University of Kentucky Medical Center and University Hospital of the Albert B. Chandler Medical Center, Inc. (collectively “UKMC”), who were dismissed prior to trial on grounds of governmental and qualified official immunity, were properly dismissed from the case pursuant to *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997), and its progeny. The Court also held that three UKMC employees were properly dismissed from the case on qualified immunity grounds. The Court next held that the circuit court did not err in excluding evidence pertaining to UK’s Interdepartmental Trauma Quality Conference Assurance Review and its resulting written analysis of the decedent’s treatment at UKMC. Testimony reflected that the purpose of the Trauma Conference was to conduct a “highly critical” examination that exceeded any standard of care analysis. The doctor describing the conference explained that the conference was designed to address system improvement and did not evaluate any individual doctor’s compliance with the requisite standard of care. Appellants/cross-appellees’ own surgery expert agreed with this characterization of the conference during his testimony. The Court further noted that even if it were to agree that the Trauma Conference concluded that a deviation from the standard of care had occurred, there was insufficient information to know whether the deviation applied to Drs. Chang or Mullett. Moreover, even assuming that evidence pertaining to the Trauma Conference was relevant, any probative value was outweighed by the danger of unfair prejudice and confusion of the jury. The Trauma Conference minutes did not contain any information that was directly relevant to the specific issue of whether Dr. Chang or Dr. Mullett deviated from the standard of care in their diagnosis and treatment of the decedent and, thus, the minutes would have served no other purpose than to confuse the jury. The Court also concluded that the Trauma Conference minutes did not constitute proper impeachment evidence. Next, the Court held that the circuit court did not err in limiting evidence relating to another patient who arrived at the UKMC emergency department shortly after the decedent’s death with substantially the same injuries yet survived. As to the cross-appeal, the Court rejected the argument that appellees/cross-appellants should have been allowed to introduce evidence as to the decedent’s fault in causing the fall that necessitated his medical treatment. The Court agreed with those jurisdictions holding that a plaintiff’s

negligence that merely provides the occasion for the medical care, attention, and treatment that subsequently results in a medical malpractice action should not be considered by a jury assessing fault. The fact that a patient has injured himself, negligently or non-negligently, has no bearing on the duty of the hospital and health care providers to treat him in accordance with the appropriate standard of care.

VIII. OPEN RECORDS

A. *Cabinet for Health and Family Services v. Todd County Standard, Inc.*

[2012-CA-000336](#) 12/11/2015 2015 WL 8488911 Rehearing Pending

Opinion by Judge Taylor; Judges Maze and Stumbo concurred. Appellee, a newspaper that had made an open records request to the Cabinet for Health and Family Services concerning a child who had allegedly died as the result of abuse or neglect, filed a complaint against the Cabinet seeking enforcement of an Attorney General opinion determining that the Cabinet had violated the Open Records Act by failing to timely respond to the newspaper's request and by failing to affirmatively establish that it did not possess records relating to the child. The circuit court granted summary judgment in favor of the newspaper, awarded \$9,893.51 in attorney's fees and \$175.51 in costs to the newspaper, and imposed \$6,625.00 in statutory penalties against the Cabinet. The Court of Appeals affirmed in part and reversed in part. The Court first held that the circuit court properly enforced the Attorney General's opinion by ordering the Cabinet to produce any records related to the child. While the Attorney General did not determine that the records were, in fact, accessible, under the Act, he was prevented by the Cabinet from reaching the issue. The Cabinet repeatedly claimed that it possessed no records, and only after suit was filed in circuit court did the Cabinet admit to even possessing records. Moreover, by refusing to respond to the Attorney General's questions during the statutory review process, the Cabinet frustrated his review and the timely release of records under the Act. The Court also held that the newspaper was entitled to attorney's fees and costs and that the Cabinet was subject to statutory penalties under KRS 61.882(5). The Cabinet had willfully denied the newspaper's request, as it repeatedly misrepresented that it possessed no documents, and the Cabinet's actions were an attempt at misdirection and obfuscation designed to prevent public disclosure. Finally, the Court held that the newspaper was not entitled to post-judgment interest under KRS 360.040 because the Cabinet is a state agency entitled to the protection of governmental immunity.

IX. WORKERS' COMPENSATION

A. *Diop v. Zenith Logistics*

[2015-CA-000822](#) 12/23/2015 2015 WL 9434538

Opinion by Judge J. Lambert; Judges Combs and VanMeter concurred. Appellant challenged an opinion of the Workers' Compensation Board reversing an ALJ award based on a lack of medical evidence of causation. The Court of Appeals reversed, holding that the Board misconstrued controlling case law and that there was substantial evidence to support the ALJ's conclusion that appellant's injury arose in the course and scope of her employment. The ALJ did not abuse his discretion in relying on appellant's testimony in conjunction with the providers' medical records filed in the case.