PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

DECEMBER 1, 2018 to DECEMBER 31, 2018

I. ABATEMENT AND REVIVAL

A. ***Stone Through Stone v. Dean Dairy Holdings, LLC***

2017-CA-001179 12/14/2018 2018 WL 6579338

Opinion by Chief Judge Clayton; Judges Combs and Jones concurred.

The executor of an estate appealed from a circuit court order granting a motion to dismiss based on the executor's failure to timely revive an action pursuant to KRS 395.278 after the action was removed to federal court. The motion to dismiss was filed after the case was remanded to circuit court. The Court of Appeals affirmed. The Court held that the requirements of KRS 395.278, which governs the revival of an action upon a party's death, were not displaced by Federal Rule of Civil Procedure (FRCP) 25(a), which governs the substitution of parties in a federal action, because no direct conflict existed between the statute and rule. Additionally, the Court held that the executor's FRCP 25(a) motion was inadequate to serve as an application for revival under KRS 395.278, as it was mandatory to file both a motion under FRCP 25(a) and an application for revival under KRS 395.278. Finally, the Court held that KRS 413.270, Kentucky's tolling statute, did not apply to save the executor's claim. Thus, it was appropriate for the circuit court to grant the motion to dismiss.

II. ADMINISTRATIVE LAW

A. ***Kentucky Horse Racing Commission v. Motion***

2017-CA-001458 12/21/2018 2018 WL 6711284

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

The Court of Appeals affirmed in part, reversed in part, and remanded a judgment of the Franklin Circuit Court in a case involving an administrative action by the Kentucky Horse Racing Commission. The Commission found that appellees had violated certain administrative regulations concerning drugs found in a horse's system. The circuit court, however, held that the regulations at issue were unconstitutional and that the Commission acted arbitrarily when it imposed sanctions against appellees. In affirming in part, the Court held that the circuit court had jurisdiction over the appeal from the administrative action even though appellees did not perfect the appeal within the 30-day time period set forth in KRS 13B.140. It was undisputed that appellees filed their petition for appeal with the circuit court before the deadline, but they failed to serve summonses on all required parties. Appellees argued that they were not required to issue or serve a summons on anyone because KRS 13B.140(1) sets forth the appeal requirements and does not mention the issuance of a summons. The Court held that CR 3.01 requires the issuance of summonses and that this rule does not conflict with the statutory requirements of KRS 13B.140. It concluded, though, that the circuit court correctly allowed the case to proceed because the case was commenced in good faith. However, the Court reversed the circuit court's holding that the administrative regulations at issue - 810 KAR 1:018, Section 2(2)(c); 810 KAR 1:018, Section 2(3); and 810 KAR 1:018, Section 15 - were unconstitutionally arbitrary and concluded that the penalties imposed on appellees by the Commission should be reinstated..

III. ADOPTION

A. ***S.B.P. v. R.L.***

2018-CA-000136 12/14/2018 2018 WL 6579327

Opinion by Judge Nickell; Judges Jones and Taylor concurred.

Through counsel, and without the involvement of the Cabinet for Health and Family Services, prospective adoptive great-grandparents (L.'s) petitioned for the termination of parental rights (TPR). The termination would be voluntary as to Mother, who executed a notarized statement identifying herself as the three-year-old child's biological mother and agreeing to both TPR and adoption by the L.'s, but involuntary as to Father (S.B.P.), who opposed the L.'s having permanent custody of the child due to their age and preferred his own father to have custody. Shortly thereafter, the L.'s were granted leave to amend the petition to include a prayer for adoption - transforming the TPR petition into an adoption case. After an evidentiary hearing at which Mrs. L. was the sole witness and S.B.P., who is incarcerated, appeared only by appointed counsel with whom he had had little communication, the circuit court granted adoption and TPR as to both parents. The Court of Appeals vacated the circuit court's findings of fact, conclusions of law, and separate judgment of adoption due to noncompliance with KRS Chapter 199. The Court first held that the TPR petition was erroneously filed because the great-grandparents were not authorized to seek involuntary TPR in their own names under KRS 625.050(3); therefore, the involuntary TPR petition as to Father should have been dismissed. The Court then set forth the numerous ways in which the adoption proceeding failed to comply with Chapter KRS 199. In particular, the Court noted that KRS 199.480(1) requires several entities to be named as "parties defendant" in an adoption action, including the child. However, as a holdover from the erroneously-filed involuntary TPR petition, this adoption case was styled, "IN RE: THE INTEREST OF [A.R.P.], a minor child," which did not satisfy the statute. The Court also noted that the guardian *ad litem* appointed to represent A.R.P. was listed in the style of the case as a respondent, but there was no proof that the TPR petition was served on her. Moreover, the evidentiary hearing occurred without triggering the investigation and report by the Cabinet mandated by KRS 199.510(1). That report must state whether adoption is in the child's best interest and if the child is suitable for adoption. Because the L's had failed to strictly comply with the adoption statutes, the adoption could not stand.

IV. APPEALS

A. ***W.L.F. v. Cabinet for Health & Family Services***

2017-CA-001640 12/21/2018 2018 WL 6722297

Opinion and Order dismissing by Judge J. Lambert; Judges Maze and Smallwood concurred.

Father appealed from an order denying his motion to place his child with him or to schedule timesharing. Because the appeal was brought from an interlocutory order, the Court of Appeals dismissed. The family court had ordered Father to complete several requirements once he had been released from incarceration for assault prior to seeking custody or unsupervised visitation. Because Father had failed to complete these requirements, the family court denied his motion but stated that it would consider such a motion once he had completed the court-ordered requirements. The Court of Appeals held that the appeal was interlocutory because it did not finally adjudicate or conclusively determine the rights of the parties. The order at issue merely denied Father's motion for placement or for timesharing; it did not address his parental rights or any custody issues, and it did not preclude him from seeking further relief in the future.

V. ATTORNEY AND CLIENT

A. ***Hornsby v. Housing Authority of Dry Ridge***

2017-CA-000718 12/14/2018 2018 WL 6579564

Opinion by Judge Dixon; Judges Acree and Thompson concurred.

The Court of Appeals granted appellants' motion for discretionary review to address the issue of whether a housing authority's executive director can file and proceed with a forcible detainer action on behalf of the housing authority in the absence of a licensed attorney. On appeal from the district court, the circuit court ruled that KRS 80.050 specifically vests the power to "sue and be sued" with the housing authority; thus, the executive director had not engaged in the unauthorized practice of law by filing and proceeding with the forcible detainer action against appellants. The Court of Appeals disagreed and reversed, holding that while it is clear that a housing authority as a "body corporate" has the power "to sue or be sued," nothing in KRS Chapter 80 grants such power to the executive director. Rather, the application to the district court for a writ of forcible detainer constitutes the institution of a "civil action," and regardless of the form used or the name otherwise given it, that application constitutes a complaint, which is a pleading. Citing to a Kentucky Bar Association Unauthorized Practice of Law Opinion, KBA U-38 (May 1983) and the unpublished opinion in *Bobbett v. Russellville Mobile Park, LLC*, 2007-CA-000684-DG, 2008 WL 4182001 (Ky. App. Sept. 12, 2008), the Court concluded that the housing authority's executive director, in filing the forcible detainer complaint and appearing at the hearing, was not acting on her own behalf, but rather in the interest of the housing authority. As such, she was engaging in the unauthorized practice of law, and the forcible detainer complaint against appellant had to be dismissed.

VI. CIVIL PROCEDURE

A. ***Meade v. Dvorak***

2017-CA-002025 12/21/2018 2018 WL 6711463

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

The Court of Appeals affirmed a judgment that disqualified appellant's expert witness and granted summary judgment in favor of appellees in this medical malpractice case. Appellant made his CR 26.02 medical expert disclosure before his medical expert had reviewed appellant's medical records and formed an opinion. Citing *Clephas v. Garlock, Inc.*, 168 S.W.3d 389 (Ky. App. 2004), the Court held that because appellant's CR 26.02 disclosure was made before his expert had a chance to review the medical records and form an opinion, appellant had failed to comply with CR 26.02. The Court also held that summary judgment was justified because the alleged medical negligence at issue was not so apparent that a lay person could recognize it; instead, it required expert testimony.

VII. CIVIL RIGHTS

A. ***Teen Challenge of Kentucky, Inc. v. Kentucky Commission on Human Rights***

2016-CA-001721 12/07/2018 2018 WL 6424015

Opinion by Judge Jones; Judges Johnson and Kramer concurred.

On January 8, 2015, the Lexington Fair Housing Council filed a complaint with the Kentucky Commission on Human Rights (and on January 13th with the Department of Housing and Urban Development) alleging that Teen Challenge's admission requirements discriminated against individuals on the basis of disability, familial status, and religion. The Commission notified all relevant parties, received pleadings, and conducted an investigation where three of Teen Challenge's employees were interviewed; however, it failed to enter a formal finding of probable cause. On November 10, 2015, HUD notified the Commission that it would be reactivating the complaint. As a result, the Commission's legal staff recommended that the Commission administratively close its action through "dismissal without prejudice." In March 2016, the Commission finally sent Teen Challenge an order inadvertently stating that there had been no finding of probable cause and that the complaint was dismissed. Shortly thereafter, though, they sent a corrected letter stating that the Commission intended to set aside the order and dismiss the complaint without prejudice instead. Teen Challenge objected, but the order finding no probable cause was set aside, and the complaint was dismissed without prejudice in April 2016. Teen Challenge subsequently sought a writ of mandamus to prohibit the Commission from affording any validity to the order dismissing the complaint without prejudice. The circuit court denied the writ and found that the Commission was entitled to correct its own clerical error by setting aside the previous order. The Court of Appeals reversed and remanded. The Court held that the Commission has a mandatory duty to investigate and make a probable cause determination in a timely manner pursuant to KRS 344.635 unless there is a reason as to why conducting a timely investigation is impracticable. In this case, the Commission failed to ever make a finding as to probable cause and instead referred the complaint back to HUD. The Court noted that there is no Kentucky authority that allows the Commission to refer its complaints to HUD. Moreover, while there was nothing to suggest that the Commission was prevented from cooperating with HUD when the complaint was first received, the Commission could not simply transfer the complaint and allow a federal agency to do its work. As to Teen Challenge's second argument, the Court held that while the Commission has the inherent authority to correct a clerical mistake in a timely manner when it is so obviously against the true intent of the Commission, it must still make an actual determination as to probable cause once an investigation is completed. Here, the "corrected" order dismissed the complaint without a determination on probable cause. The

Commission may not refuse to determine probable cause by simply administratively transferring the case to a federal agency.

VIII. CONTRACTS

A. ***Webster v. Pfeiffer Engineering Company***

2017-CA-001736 12/07/2018 2018 WL 6423515

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

Appellant, an attorney, retained the services of an expert to assist in a product liability suit. In accordance with their "Expert Witness Retention Contract," the expert prepared reports, gave a deposition, and performed various other services. He submitted three invoices to the attorney over several months, but the attorney paid only part of the outstanding balance. The product liability case was ultimately dismissed on statute of limitations grounds, and summary judgment was granted to the defendant. The attorney appealed on behalf of his client, and the client ultimately settled for a payment of $5,000 in exchange for dismissal of the appeal. The attorney sent the $5,000 to the expert with a letter stating that he would try to pay as much as he could of the remaining balance on a monthly basis and expressing appreciation for the expert's help and forbearance. However, the attorney thereafter made no further payments whatsoever. The expert subsequently filed suit against him for breach of contract and unjust enrichment. The attorney responded that the expert breached the terms of their contract by not performing his duties in a workmanlike manner and by misrepresenting his qualifications as an expert. The circuit court granted summary judgment to the expert because an "account stated" existed. The Court of Appeals agreed and affirmed, characterizing an "account stated" as one between the parties in an amount acknowledged by the debtor. Here, the evidence showed that the attorney did not question the amount of the account owing or the expert's qualifications until after the expert filed suit against him and after the dismissal of the underlying federal lawsuit. This, along with the attorney's failure to request any additional details about the expert's work or to object to the expert's invoices, his partial payments, and his promise to pay as much as he could on the balance on a monthly basis, constituted an admission of his liability and conclusively established an account stated under Kentucky law.

IX. CRIMINAL LAW

A. ***Bains v. Commonwealth***

2017-CA-000581 12/21/2018 2018 WL 6712163

Opinion by Judge Jones; Judges Combs and Nickell concurred.

Appellant was charged with first-degree wanton endangerment, tampering with physical evidence, and two counts of possession of a controlled substance in the first degree. He reached an agreement with the Commonwealth that he would enter an *Alford* plea to the wanton endangerment charge and plead guilty to the tampering with physical evidence and possession changes. In return for his guilty plea, the Commonwealth would recommend three years of supervised pretrial diversion. At sentencing following entry of the plea, the circuit court determined that the Commonwealth was too lenient and proposed two alternative sentences. The court gave appellant two weeks to consider his options and, while it was not in the written order, verbally stated that he could withdraw his plea and begin proceedings anew. After two weeks, appellant chose to continue with his guilty plea and allow the court to impose a "correspondingly appropriate amount of time in jail" as an addition to his plea deal. The circuit court accepted the pretrial diversion agreement and ordered appellant to serve 90 days in jail, with extended hours work release. Appellant later had a bench warrant issued in his name after he failed to return to jail from work release. Upon being arrested under the bench warrant, appellant filed a motion to withdraw his guilty plea. The circuit court denied the motion, revoked his diversion, and sentenced him to one year's imprisonment. The Court of Appeals affirmed. The Court first held that KRS 533.030, made applicable to pretrial diversion through KRS 533.254(2), allows a trial court, in addition to conditions imposed, to require a period of imprisonment. Therefore, the circuit court did not exceed its authority or abuse its discretion by adding a period of jail time to appellant's pretrial diversion sentence. The Court also rejected appellant's argument that the circuit court erred in denying his motion to withdraw his guilty plea. Appellant contended that by adding a condition to the pretrial diversion agreement, the circuit court effectively rejected his plea agreement. The Court held that the imposition of an additional condition with respect to appellant's plea agreement did not constitute a rejection of that agreement. Instead, the circuit court acted within its authority in modifying the agreement and did not impose a greater sentence than the one recommended by the Commonwealth. The Court also concluded that there was no indication that appellant's plea was not voluntarily made. The circuit court conducted a full plea colloquy, appellant acknowledged that he understood during the plea, and he continued with his plea after the imposition of additional jail time had been determined. It was not until after appellant violated the terms of his pretrial diversion that he wished to withdraw the plea.

B. ***Collinsworth v. Commonwealth***

2016-CA-001936 12/07/2018 2018 WL 6424014

Opinion by Judge Thompson; Judge Combs concurred; Judge Kramer dissented and filed a separate opinion.

Appellant challenged an order revoking her probation in Kenton Circuit Court case number 15-CR-00654 on the basis that the sentence in that case should have been ordered to run concurrently with her sentences in Campbell Circuit Court case numbers 16-CR-00457 and 16-CR-00458. The Campbell offenses were committed while appellant was on probation. On October 19, 2016, appellant's probation officer recommended that her probation be revoked based on appellant's receiving two new felony convictions in the Campbell County cases. Notably, after being incarcerated for approximately six months, appellant was granted parole, effective November 17, 2016, in her Campbell County cases. She continued to be held in custody pursuant to her Kenton County case, and her probation hearing was held on December 6, 2016. After the circuit court ruled that appellant's probation would be revoked, she argued that the Commonwealth's delay in seeking revocation required her sentence in the Kenton County case to be ordered concurrent with her Campbell County cases pursuant to KRS 533.040(3). The circuit court rejected the argument, but in a 2-1 vote, the Court of Appeals reversed and remanded for the imposition of concurrent sentencing. The Commonwealth argued that KRS 533.040(3) did not apply and, instead, KRS 533.060(2) governed as set forth in *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996). However, the panel disagreed, holding that KRS 533.040(3) applies to sentences that are probated and then either continue to be probated or revoked upon the commission of additional crimes; thus, here it applied to the first case sentenced - the Kenton County case. In contrast, KRS 533.060(2) applies to subsequent felonies committed while on probation, *i.e.*, the felonies committed in the Campbell County cases. Citing *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008) and *Sutherland v. Commonwealth*, 910 S.W.2d 235 (Ky. 1995), the Court held that while KRS 533.060(2) and *Brewer* applied to appellant's Campbell County cases, her sentences for those cases were not before the Court. Instead, pursuant to KRS 533.040(3), because the Department of Corrections knew of appellant's Campbell County convictions more than 90 days prior to when her probation was revoked and because her revocation took place after she was paroled in the Campbell County cases, her sentence had to be imposed concurrently with the sentences in the Campbell County cases. In dissent, Judge Kramer opined that *Brewer* and *Commonwealth v. Love*, 334 S.W.3d 92 (Ky. 2011), were dispositive of the issue on appeal.

C. ***Fegan v. Commonwealth***

2017-CA-001517 12/07/2018 2018 WL 6423585

Opinion by Judge Smallwood; Judges Acree and Johnson concurred.

The Court of Appeals affirmed an order denying an RCr 11.42 motion alleging ineffective assistance of counsel. First, the Court held that trial counsel was not ineffective for failing to file a motion to suppress evidence of methamphetamine manufacturing found in the trunk of a car. Citing *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the Court held that because appellant stated that he did not own the car, he had no expectation of privacy and, therefore, no standing to challenge the search at trial. The Court also determined that trial counsel was not ineffective for failing to review a co-defendant's written statement before allowing appellant to plead guilty because counsel testified that she spoke to the co-defendant instead. This was an acceptable strategy and did not constitute error. The Court further concluded that trial counsel was not ineffective for failing to investigate the attempted traffic stop that precipitated events because appellant was not indicted on any traffic offenses. Finally, the Court held that trial counsel was not ineffective for failing to investigate the deputy who searched the trunk and found the drug-related items. As appellant's case progressed, the deputy was placed under investigation for stealing drugs from a police evidence locker. The Court held that this argument was too speculative because appellant did not indicate what an investigation into the deputy might have uncovered.

D. ***Hall v. Commonwealth***

2017-CA-000703 12/07/2018 2018 WL 6424010

Opinion by Judge Maze; Judges Acree and Combs concurred.

Appellant challenged an order revoking his probation and sentencing him to his remaining three-year term. He argued that the circuit court failed to make the required findings (pursuant to KRS 439.3106) to revoke his probation, and that its decision to revoke his probation amounted to an abuse of discretion. The Court of Appeals held that the circuit court made sufficient findings that were supported by substantial evidence. Thus, it affirmed. The Court noted that while the circuit court's revocation order did not precisely parallel the language of KRS 439.3106, it adequately set out the findings required by the statute. Moreover, the evidence was more than sufficient to support revocation of probation in this case. Appellant admitted to using controlled substances while under supervision, and he expressly refused to enroll in a long-term drug treatment program as directed by the circuit court. His payment of restitution had been inconsistent even since his most recent release, and he absconded from supervision for nearly seven years. Citing to *McClure v. Commonwealth*, 457 S.W.3d 728 (Ky. App. 2015), the Court also rejected appellant's argument that KRS 439.3106 required that the circuit court consider revocation only as a last resort.

E. ***Koteras v. Commonwealth***

2017-CA-000506 12/21/2018 2018 WL 6711465

Opinion by Judge Nickell; Judges Kramer and J. Lambert concurred.

Appellant filed an RCr 11.42 motion claiming ineffective assistance of trial counsel. He was convicted on eight counts of first-degree sexual abuse of his daughter when she was between the ages seven and eleven. The circuit court denied the motion, and the Court of Appeals affirmed. The Court first noted that appellant's brief was rife with errors, the most flagrant being inclusion of a detailed summary of two family court cases that were not part of the record on appeal. Post-conviction appellate counsel sought to have those files certified as part of the appellate record, but the circuit court denied supplementation as "unnecessary, and a waste of time." The brief also contained a number of factual misstatements, all of which culminated in the Commonwealth moving to strike appellant's brief. This motion was granted in part. As to the merits, the Court addressed - and rejected - nine alleged errors. Notably, the defense team's decision not to secure a forensic psychological evaluation of the child - even though recommended by a defense expert - was held to be reasonable trial strategy because it could have opened the door to other evidence that the defense team had fought to exclude. Additionally, the Court concluded that the defense team was not ineffective in failing to seek an admonition about a victim advocate standing behind the jury box as the child testified and using hand signals to remind her to speak loudly. Distinguishing the case from *Sharp v. Commonwealth*, 849 S.W.2d 542 (Ky. 1993), where a family friend of the child victim gestured and signaled to the victim during her testimony, the Court noted that KRS 421.575 specifically allows a victim advocate to be in the courtroom to support and confer with the victim.

F. ***Lynem v. Commonwealth***

2017-CA-001632 12/07/2018 2018 WL 6423518

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

After leaving a gas station, two police officers driving behind appellant checked his license plate number in the Automated Vehicle Information System (AVIS). AVIS indicated that they should verify proof of insurance. The officers pulled appellant over, after which he left the car and fled, discarding a rock of crack cocaine. Appellant sought to suppress this evidence, arguing that the AVIS notification provided insufficient evidence to support a reasonable suspicion to pull him over. The Court of Appeals, citing to its unpublished opinion in *Willoughby v. Commonwealth*, No. 2015-CA-000466-MR, 2017 WL 1290645 (Ky. App. Apr. 7, 2017), *disc. review denied* (Oct. 25, 2017), held that the information officers receive through AVIS is sufficiently reliable and accurate to furnish a "reasonable, particularized and objective basis" to conduct an investigatory stop. In dicta, the *Willoughby* decision questioned under what circumstances running a plate through the AVIS system may constitute an invasion of privacy. Appellant argued, relying on this dicta, that the stop in his case was pretextual because evidence was presented that the officers had noticed appellant, who has a very distinctive appearance, in the service station, did not like the way he looked, and knew he would flee if they followed him. Citing *Traft v. Commonwealth*, 539 S.W.3d 647 (Ky. 2018), the Court held that the officers' underlying motives for checking the license number in AVIS were irrelevant because there is no expectation of privacy in a license plate.

G. ***Randolph v. Commonwealth***

2017-CA-000744 12/07/2018 2018 WL 6424006

Opinion by Judge Maze; Judges Combs and Dixon concurred.

Appellant instigated a prison melee and was subsequently convicted of fourth-degree assault, third-degree assault, and being a first-degree persistent felony offender. He contended that the jury should have been instructed on the self-protection defense. The Court of Appeals held that the evidence at trial did not support a self-protection instruction and affirmed. Appellant was housed at the Rowan County Detention Center and attacked another inmate in his cell without provocation. A correctional officer then entered the cell and attempted to subdue appellant. Both appellant and the correctional officer were injured in the ensuing fracas. At trial, multiple witnesses testified that the correctional officer and appellant both threw punches, but they were uncertain which man threw the first punch. However, it was undisputed that the correctional officer attempted to pull appellant off the inmate he was attacking before any punches were thrown. The Court of Appeals held that appellant was not entitled to invoke the self-protection defense under the "initial aggressor doctrine." The purpose of this doctrine is to prevent a defendant from instigating a course of conduct then claiming that he was acting in self-defense when that conduct unfolds. Here, because the correctional officer was using lawful force in response to appellant's unprovoked attack on another inmate, the circuit court correctly refused a self-protection instruction.

H. ***Stine v. Commonwealth***

2017-CA-000835 12/21/2018 2018 WL 6712160

Opinion by Judge Maze; Judges Acree and Combs concurred.

Appellant, along with two co-defendants, participated in a robbery in which the victim was stabbed and beaten. The victim's wallet, cell phone, and vehicle were also stolen. Appellant was subsequently indicted for complicity to first-degree robbery and theft by unlawful taking, value over $500. At trial, appellant admitted to participating in the robbery but testified that it was his co-defendants who had stabbed and beaten the victim; therefore, he asked for an instruction on second-degree robbery as a lesser-included offense. The circuit court declined the instruction, and appellant was convicted of the charged offenses. On appeal, appellant argued that his convictions violated double jeopardy. The Court of Appeals agreed and reversed appellant's theft conviction, holding that convictions for robbery and theft violate double jeopardy when based on the same incident of theft. Under the "single larceny rule," the taking of multiple items of property at the same time and place constitutes a single larceny offense. Because the victim's wallet, cell phone, and vehicle were taken during the same robbery, the Court held that appellant's convictions for robbery and theft were based on a single theft and violated double jeopardy. The Court affirmed appellant's conviction for complicity to first-degree robbery, holding that when a defendant intends to commit a robbery, the lack of intent of an aggravating circumstance does not lessen criminal liability. Because appellant's intent to participate in the robbery was not contested, he was not entitled to an instruction on second-degree robbery as a lesser-included offense.

I. ***Taylor v. Commonwealth***

2017-CA-000837 12/21/2018 2018 WL 6712157

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

Following a jury trial, appellant was convicted of reckless homicide. The conviction resulted from an incident in which appellant shot and killed his friend outside of a gentlemen's club following a fist fight. On appeal, appellant argued that the circuit court erred by denying his motion for immunity pursuant to the self-defense provisions of KRS 503.085. The Court of Appeals rejected this argument, holding that, based on police testimony, the circuit court had a substantial basis for finding probable cause existed to believe that appellant's use of deadly force was not legally justified. The officer testified that, based on his investigation, while the victim was (by all accounts) the initial aggressor when the men were inside the club, the fist-fighting outside the club had terminated by the time that appellant retrieved the gun and shot the victim multiple times. The officer further explained that his investigation indicated that the victim had repeatedly apologized to appellant and even put his arm around appellant in a non-aggressive manner before appellant shot him. The Court also noted that although appellant is diminutive in stature, he indicated to police that the victim was very intoxicated and that he kept falling to the ground as he swung his fists. Appellant admitted to the detectives that he had several opportunities to get the better of the victim with his fists and that the victim was unarmed when appellant shot him. In fact, there was evidence indicating that the victim had never been armed at the scene. Appellant's decision to flee the scene, his disposal of the weapon following the shooting, and his initial denial of involvement in the shooting provided additional support for the finding of probable cause. Consequently, the circuit court did not err by rejecting appellant's claim of immunity and concluding that the criminal prosecution could proceed.

X. EMPLOYMENT

A. ***Barnett v. Central Kentucky Hauling, LLC***

2017-CA-001746 12/21/2018 2018 WL 6711321

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

This was a case of first impression on the issue of alleged discrimination against an employee based on an associational disability. Appellant alleged that his employer fired him in violation of the Americans with Disabilities Act (ADA) because of his absences from work related to caring for his disabled wife. The circuit court dismissed his complaint, and the Court of Appeals affirmed. The Court held that the Kentucky Civil Rights Act (KCRA), KRS Chapter 344 - which was enacted two years after the implementation of the ADA - does not extend to Kentuckians the ADA's specific, codified protection from associational disability discrimination. Therefore, appellant's complaint required dismissal.

XI. IMMUNITY

A. ***Albright v. Childers***

2017-CA-000669 12/21/2018 2018 WL 6711326

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

In 2015, brothers Cameron and Kyle Pearson were engaged in a physical altercation over a handgun in the parking lot of a gun store. Albright, the owner of the gun store, heard gunshots and took his own gun outside to investigate. Seeing the two fighting, he ordered them to drop the gun. When they failed to stop, Albright fired his gun, killing Cameron and wounding Kyle. As a result of the incident, Albright was charged with murder and first-degree assault. However, following a hearing, the circuit court found that Albright was immune from prosecution under the provisions of KRS 503.085. The Court of Appeals affirmed that ruling and the Supreme Court of Kentucky denied discretionary review. While the criminal matter was pending, Cameron's estate and Kyle brought civil actions against Albright and the gun store. After the criminal action was dismissed, Albright moved to dismiss the civil claims, arguing that collateral estoppel barred the estate and Kyle from re-litigating the issue of immunity. The circuit court disagreed and denied the motion for summary judgment. The Court of Appeals reversed, holding that a finding of criminal immunity under KRS 503.085 bars a civil action arising from the same conduct from going forward. The Court noted that collateral estoppel requires: (1) identity of issues; (2) a final decision or judgment on the merits; (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. While the parties were not identical, KRS 503.085 makes clear that the standard of liability is the same for both criminal and civil actions, creating a unique situation where collateral estoppel may apply between civil and criminal issues. Here, the Commonwealth fully litigated the issue of immunity in the criminal matter and had failed to meet its burden of going forward under the statute. While the parties were different in the civil claim, Cameron's estate and Kyle had the same interests as the Commonwealth and, therefore, were not prevented from a full and fair opportunity to present their case. Finally, with the Supreme Court's denial of discretionary review, the finding of immunity was now final. Consequently, the Court concluded that collateral estoppel barred Cameron's estate and Kyle from re-litigating the issue of immunity and that the circuit court erred by denying Albright's motion for summary judgment on that basis.

B. ***Draper v. Trace Creek Girls' Softball, Inc.***

2017-CA-001484 12/14/2018 2018 WL 6579334

Opinion by Judge Goodwine; Judge Maze concurred and filed a separate opinion; Judge Nickell concurred and joined the separate opinion.

Appellant challenged grants of summary judgment to both the City of Campbellsville and Trace Creek Girls' Softball, Inc. on recreational immunity grounds pursuant to KRS 411.190. KRS 411.190(1)(c), (3), and (6)(b) provide immunity to the owner of land if it is used for a recreational purpose, provided that no fee or admission price is asked in return for permission to use the land. The Court of Appeals affirmed the finding of immunity, holding that KRS 411.190 was applicable to the facts of these cases. The Court held that both the City and Trace Creek fell under the definition of "owner" set out in KRS 411.190(1)(b), and that the statutory definition of "recreational purpose" set forth in KRS 411.190(1)(c) was broad enough to include activities conducted by organized team sports. Additionally, the Court held that the fee appellant paid to Trace Creek was not a fee for permission to enter the land; instead, the fee helped cover the cost of providing umpires, equipment, and softball-related expenses incurred in organizing the games. The Court also noted that Trace Creek did not pay the City a fee for its use of the softball fields. Thus, no exception to recreational immunity applied. In his concurring opinion, Judge Maze emphasized the parties' agreement that Trace Creek was responsible for the fields during games and that it also provided equipment for and maintenance of the field. Based on these facts, Trace Creek had sufficient control of the premises to be entitled to immunity under KRS 411.190.

XII. INDEMNITY

A. *CLK Multifamily Management, LLC v. Greenscapes Lawn & Landscaping, Inc.*

2017-CA-000577 04/27/2018 2018 WL 1980754 Released for Publication

Opinion by Chief Judge Clayton; Judges Dixon and D. Lambert concurred.

CLK Multifamily Management, LLC filed a third-party complaint against Greenscapes Lawn & Landscaping, Inc. seeking indemnification in a slip and fall case. The circuit court granted Greenscapes's motion to dismiss the complaint and denied CLK's subsequent motions to alter, amend, or vacate and for leave to amend the complaint. The primary issue on appeal was whether a clause in a snow removal contract between CLK and Greenscapes barred CLK from seeking indemnification. The Court of Appeals held that it did and affirmed. The clause in question read as follows: "Liability: Contractor [Greenscapes] shall only be liable for the gross negligence, bad faith & willful misconduct of the Contractor, its agents or employees. Greenscapes will not be liable for any slip and fall accidents caused by snow, ice or wet conditions." The Court held that even strictly construing the provision against Greenscapes, its meaning was sufficiently clear that CLK knew what it was contracting away. The Court noted that: (1) the clause expressly exonerated Greenscapes from all liability except for instances of gross negligence, bad faith, and willful misconduct; (2) the clause clearly indicated an intent to release Greenscapes from the precise personal injury alleged here: a slip and fall accident; (3) it was virtually impossible to construe the clause as intended to do anything other than provide protection for Greenscapes against negligence claims; and (4) the hazard at issue here, the ice and snow, was clearly within the contemplation of the provision because it was specifically mentioned. Thus, the exculpatory clause unmistakably and clearly set out the negligence for which liability by Greenscapes was to be avoided. The Court also held that because of the valid exculpatory clause in the snow removal agreement, Greenscapes was protected against a common law indemnity claim. The Court also rejected CLK's argument that a vendor service agreement signed by Greenscapes provided the basis for a contractual indemnity claim against Greenscapes. The agreement did not contain any express language imposing a contractual duty on Greenscapes to indemnify CLK for damages resulting from the negligent removal of ice and snow by Greenscapes.

XIII. NEGLIGENCE

A. ***Burger v. Wright***

2017-CA-001883 12/07/2018 2018 WL 6423513

Opinion by Judge Nickell; Judge Smallwood concurred; Judge Acree concurred and filed a separate opinion.

The underlying action stemmed from a medical malpractice action filed against appellee for his treatment and care of appellant's late husband, Clinton Driscoll, after Driscoll sustained a leg fracture in an ATV accident. Driscoll's leg was surgically repaired by another doctor, who instructed him to avoid weight-bearing activities. However, Driscoll subsequently engaged in weight-bearing activities that opened his wound during a hunting trip. After his wound worsened and he experienced increased pain, swelling, and a fever, Driscoll went to the emergency room, where he was administered antibiotics and discharged with instructions to follow-up with appellee the following day. When he was initially evaluated by appellee, Driscoll's vital signs were normal, and neither Driscoll nor appellant mentioned Driscoll's hunting trip or weight-bearing activities to appellee. Nonetheless, appellee was concerned that Driscoll's leg might be infected and ordered him admitted. Driscoll's condition continued to deteriorate, and within days he became delirious, was diagnosed with severe sepsis, experienced renal failure, and subsequently perished. Appellant filed the subject suit and the case proceeded to trial, where the jury returned a defense verdict. On appeal, appellant argued that a new trial was merited on grounds that: (1) the circuit court erroneously failed to disqualify a certain juror, and (2) evidence of Driscoll's negligence was irrelevant and unduly prejudicial, and apportionment instructions should not have been presented to the jury. The Court of Appeals rejected the arguments and affirmed. The Court first held that the circuit court did not err in declining to disqualify the juror. The juror qualification form asked potential jurors about their involvement in prior claims or litigation. During *voir dire*, no additional questions were posed regarding juror involvement in any type of litigation aside from medical malpractice actions. On the fifth and final day of trial, appellant discovered that the juror had failed to disclose an automobile accident he had been involved in. Appellant was already moving to strike the juror because of questions he had asked during trial. When the discrepancy was addressed by the circuit court, the juror appeared to give truthful answers, and the court found that the juror's omission was not deliberate, intentional, or material. The Court of Appeals agreed. The Court also noted that appellant's argument concerning the juror's prior litigation history was disingenuous considering that another juror was not challenged despite indicating on the qualification form that a personal injury action had been filed against her or a family member. As to appellant's second argument, the Court cited *Pauly v. Chang*, 498 S.W.3d

394 (Ky. App. 2015), and held that evidence of Driscoll's accident, weight-bearing activities, and hunting trip was relevant to his duty to provide an accurate medical history. Thus, the issue of any comparative negligence resulting from the inaccurate medical history he had given to appellee constituted a factual question for the jury. In his concurring opinion, Judge Acree addressed the issue of Kentucky lawyers continuing to improperly appeal from non-final, interlocutory denials of motions brought pursuant to CR 59.01 and CR 59.05.

XIV. ORIGINAL ACTIONS

A. ***Anthony v. McLaughlin***

2017-CA-002004 12/14/2018 2018 WL 6579331

Opinion by Judge Smallwood; Judge Maze concurred in result and filed a separate opinion; Judge J. Lambert concurred and joined the separate opinion.

The Court of Appeals reversed and remanded a judgment denying a petition for a writ of prohibition. In a forcible detainer action, the Jefferson District Court determined that the Frankfort Avenue Church of Christ did not own a piece of property and that it had been improperly collecting rent from the occupier of the property. The district court found that appellant owned the property and that Frankfort Avenue should pay over to him $8,100 in rent it had collected. Frankfort Avenue then filed a CR 59.05 motion to amend or vacate the judgment. Appellant argued that CR 59.05 is inapplicable to detainer actions and that Frankfort Avenue's only recourse was to appeal the decision within seven days pursuant to KRS 383.255. However, the district court found that CR 59.05 applied and amended the order. Appellant sought a writ of prohibition from the Jefferson Circuit Court, arguing that the district court lacked jurisdiction to amend its order after the seven-day time period for appeal had lapsed and that CR 59.05 did not apply to detainer actions. The circuit court denied the writ. On appeal, all three Judges held that the writ should have been granted because the $8,100 in controversy exceeded the district court's jurisdictional amount of $5,000 found in KRS 24A.120(1); therefore, the district court was without subject matter jurisdiction to rule on the detainer action. The panel also unanimously agreed with appellant that CR 59.05 does not apply to detainer actions. However, Judge Smallwood opined that a writ was not merited for that reason because appellant had other remedies available to him and would not have suffered irreparable harm. Judge Maze (joined by Judge J. Lambert) concluded, though, that because the district court was without jurisdiction to consider Frankfort Avenue's CR 59.05 motion, the circuit court clearly abused its discretion by denying the petition for a writ of prohibition on this ground - even if an adequate remedy by appeal existed.

XV. RECORDS

A. ***Purdue Pharma L.P. v. Boston Globe Life Sciences Media, LLC***

2016-CA-000710 12/14/2018 2018 WL 6580507

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

The Commonwealth of Kentucky sued Purdue Pharma for violating Kentucky law by misleading health care providers, consumers, and officials regarding the risks of addiction to OxyContin. The Commonwealth alleged that the misrepresentation led doctors to overprescribe the drug, and that overprescribing resulted in excessive Medicaid spending on OxyContin and programs to address abuse associated with the drug. Litigation generated some 17 million pages of discovery. The circuit court entered an "Agreed Qualified Protective Order" allowing the parties to unilaterally designate information, documents, depositions, and exhibits as confidential. The agreed order also provided that documents designated as confidential would not be subject to the Attorney General's disclosure obligations under Kentucky's Open Records Act, and it required that any motions or pleadings filed with the court containing or attaching confidential documents be filed under seal. The parties eventually reached a $24 million settlement. Their agreement said that the protective order would remain in effect, and that the parties were not to disclose confidential documents. The circuit court entered judgment approving and adopting the settlement agreement. A member of the press, Boston Globe Life Sciences Media, LLC d/b/a STAT, subsequently intervened and moved to unseal the circuit court record, which Purdue Pharma adamantly opposed. The circuit court granted STAT's motion but stayed the order until review by the appellate courts. The Court of Appeals affirmed. In so doing, it rejected Purdue Pharma's arguments that *U.S. v. Amodeo*, 71 F.3d 1044 (2nd Cir. 1995), as adopted and interpreted by *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724 (Ky. 2002) and *Courier-Journal, Inc. v. McDonald-Burkman*, 298 S.W.3d 846 (Ky. 2009), required reversal because none of the documents to which STAT sought access were used by the circuit court to adjudicate the case. After harmonizing *Noble*, *McDonald-Burkman*, and *Fiorella v. Paxton Media Group*, 424 S.W.3d 433 (Ky. App. 2014) with Kentucky's "long-standing [common-law] presumption of public access to judicial records" (referenced but not discussed in the three cases), the Court of Appeals held that the circuit court did not abuse its discretion when it unsealed the record for STAT's access.

XVI. STANDING

A. ***Stars Interactive Holdings (IOM) Ltd. v. Commonwealth ex rel. Tilley***

2016-CA-000221 12/21/2018 2018 WL 6712631

Opinion by Judge Jones; Judge Acree concurred; Judge Johnson dissented in part as to liability and concurred in part as to damages without filing a separate opinion.

The Commonwealth instituted the underlying action against numerous online poker playing forums and casinos - including appellants - seeking to recover damages under Kentucky's Loss Recovery Act (LRA). The complaint and subsequent amended complaints made general allegations that appellants provided real-money gambling on poker games to Kentuckians; that appellants took a percentage of the amount bet, won, or lost as a "rake"; and that thousands of Kentuckians had lost sums of five dollars or more while playing on the forums offered by appellants. The Commonwealth asserted that it had standing to bring the action under KRS 372.040, which allows for "any other person" to sue the "winner" in a gambling transaction on behalf of the "loser" if the "loser" does not do so himself within six months of the transaction. Neither the complaint nor the amended complaints identified the specific transactions at issue, the names of any affected Kentuckians, the specific locations the gambling took place within the Commonwealth, the amounts bet, or any other specific information. After years of litigation, the circuit court granted partial summary judgment in favor of the Commonwealth and awarded it $870,690,233.82 in treble damages, plus post-judgment interest. The Court of Appeals reversed and remanded. The Court first addressed whether the Commonwealth was the proper party to bring a suit under the LRA and ultimately concluded that it was not. The Court held that the common meaning of the word "person" did not include the Commonwealth, and that the legislative history of the LRA indicated that it was meant to be used by private citizens. Further, the Court determined that allowing the Commonwealth to bring suit under the LRA would thwart one of its purposes - ensuring that a losing gambler and his family are not left impoverished as a result of the gambler's vice - by allowing the Commonwealth to take what could, absent the Commonwealth's suit, be recovered through a suit by the gambler's own representative. The Court additionally held that KRS 372.040 contemplated that the plaintiff would be able to identify a specific act of illegal gambling prior to receiving a judgment. A prerequisite for bringing a claim under KRS 372.040 is that the "loser" or his creditor has not brought a claim under KRS 372.020 within six months of delivering payment to the "winner." Therefore, the Court concluded that for there to be a cause of action for a third party, there must be a specific, definite person who failed to bring suit under KRS 372.020. Without that specific information, no plaintiff can demonstrate a valid cause of

action under KRS 372.040.

XVII. TERMINATION OF PARENTAL RIGHTS

A. ***F.V. v. Cabinet for Health and Family Services***

2017-CA-001576 12/21/2018 2018 WL 6711278

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

The Court of Appeals vacated and remanded an order terminating appellant's parental rights to his two minor children. Appellant was arrested on an outstanding DUI warrant while riding as a passenger in the mother's car. As a non-citizen from Guatemala, he was transferred to the custody of Immigration Control and Enforcement (ICE) and was detained. During appellant's detention, the Cabinet for Health and Family Services filed petitions for termination of parental rights as to each child. The United States Immigration Court entered a decision in appellant's favor in a removal proceeding after finding that he had not been convicted of an offense that would bar cancellation of removal. Specifically, the court was convinced that appellant - who had been attending Alcoholics Anonymous meetings and parenting classes while detained - would continue to rehabilitate himself from dependence on alcohol. Although he had not been a model father, after his release appellant "cleaned up his act" and undertook a program of rehabilitation - avoiding drug and alcohol use, obtaining suitable employment, finding adequate housing, and attempting to have the Cabinet establish a case plan for him. However, despite appellant's best efforts, the Cabinet convinced the family court that there was "no reasonable expectation of improvement" and urged termination, which the court granted. The Court of Appeals vacated the decision, holding that the criteria justifying the extreme measure of termination of parental rights had not been met. Appellant had demonstrated significant improvements since his release, so the evidence did not support the Cabinet's assertion that there was "no reasonable expectation" of such. The Court further held that appellant's failure to pay child support before his paternity was established was insufficient to support a finding under KRS 625.090(2)(e) or (g).