

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
FEBRUARY 1, 2015 to FEBRUARY 28, 2015

I. ADMINISTRATIVE LAW

A. *Estill County Fiscal Court v. Commonwealth Secretary of Labor*

[2013-CA-001501](#) 02/27/2015 2015 WL 832274 DR Pending

Opinion by Chief Judge Acree; Judges Jones and Nickell concurred. The Court of Appeals reversed the Franklin Circuit Court's order affirming the Kentucky Occupational Safety and Health Review Commission's (the Tribunal) citation of the Estill County Fiscal Court for discriminating against an employee for lodging a complaint about workplace safety (second-hand smoke). The Court of Appeals first determined that the Kentucky Occupational Safety and Health Act (KOSHA) was patterned closely upon the federal Occupational Safety and Health Act (OSHA). Both OSHA and KOSHA adopt an unusual administrative structure - described as a split-enforcement regime - that compartmentalizes quasi-legislative, quasi-executive, and quasi-judicial powers among different state actors. Under Kentucky's legislative scheme, all rule-making authority is confined to a single agency: the Kentucky Occupational Safety and Health Standards Board (Board). The Board never adopted the OSHA version of a regulation, nor did it create its own, that would denominate an employee-to-employer complaint (as opposed to a complaint to KOSHA, for example) as a protected activity under KRS 338.121(3)(a). When the Tribunal cited federal case law relying on a regulation that the Board never endorsed, the Tribunal effectively expanded the kinds of complaints protected by KRS 338.121(3)(a). The Court of Appeals held that a citation based on a prohibition never adopted in Kentucky was arbitrary and reversed the decision.

B. *Kentucky Retirement Systems v. Wimberly*

[2013-CA-001246](#) 02/27/2015 2015 WL 832272 DR Pending

Opinion by Judge J. Lambert; Chief Judge Acree concurred; Judge VanMeter dissented via separate opinion. The Court of Appeals affirmed the Franklin Circuit Court's order reversing the decision of the Board of Trustees of the Kentucky Retirement Systems to deny appellee disability retirement benefits.

The Court held that in this particular case, administrative *res judicata* did not apply because appellee had proven by new objective medical evidence that he was disabled. KRS 61.600(2) requires new evidence to be submitted upon a second application, and if no new evidence is submitted, *res judicata* applies. However, when new evidence is submitted, as in the instant case, *res judicata* does not bar a reviewing court from considering the evidence presented in an initial application and a subsequent reapplication to determine whether substantial evidence supports the disability determination. In this case, even though appellee did not appeal the denial of his first application, he was permitted by law to file a second application based on new objective medical evidence, he submitted new evidence with the second application, and the second application was filed before the denial of the first application was final. The Court further held that the issue of appellee's alleged alcoholism was properly before the circuit court. In dissent, Judge VanMeter opined that the circuit court erred in its conclusion of law that alcohol abuse can never constitute a preexisting condition under KRS 61.600(3)(d).

II. ATTORNEY AND CLIENT

A. *Chambers v. Hughes and Coleman, PLLC*

[2013-CA-002074](#) 02/13/2015 2015 WL 602820 Rehearing Pending

Opinion by Judge Kramer; Judges D. Lambert and Stumbo concurred. After settlement of a client's tort suit arising out of a motor vehicle accident for \$200,000, the law firm that previously represented the client on a contingency basis, but that had been terminated prior to the settlement, asserted an attorney's lien seeking the quantum meruit value of its services. The client's successor counsel opposed the lien, arguing that the law firm was terminated for cause related to its handling of reparation benefits obtained from the client's automobile insurer. The trial court determined that the law firm had not been terminated for cause and awarded the law firm \$49,995.00 of the \$66,666.66 contingent fee claimed by successor counsel. On appeal, the Court of Appeals reversed, holding that the law firm was fired for cause and, thus, forfeited its right to recover any quantum meruit fee.

III. CONTRACTS

A. *Harrell v. Unifund CCR Partners*

[2013-CA-001514](#) 02/06/2015 2015 WL 495294 DR Pending

Opinion by Judge Combs; Judge Caperton concurred; Judge VanMeter dissented without separate opinion. An assignee debt collector brought suit against a credit cardholder, seeking to recover the unpaid balance on the card. The cardholder counterclaimed, alleging that the collector's prayer for statutory prejudgment interest violated the Fair Debt Collection Practices Act (FDCPA). The circuit court dismissed the cardholder's counterclaim. On appeal, the Court of Appeals vacated and remanded, holding that dismissal was premature. The Court noted that the provisions of 15 U.S.C. § 1692(e)(2)(A) expressly prohibit debt collectors from falsely representing "the character, amount or legal status of any debt." Here, appellant argued - and the Court agreed - that Citibank, the original creditor, waived its right to charge interest once it charged off appellant's account and that Citibank's waiver was binding upon Unifund, the assignee creditor. The Court concluded that an attempt to collect statutory interest under these circumstances could, in fact, constitute a violation of the FDCPA as amounting to an unfair or deceptive practice and that a false representation included in the allegations of a debt collector's complaint can be actionable. Thus, where Unifund alleged that appellant owed interest that had been waived under principles of contract law and statutory construction, Unifund was not entitled to a summary dismissal of appellant's claim that it violated provisions of the FDCPA.

IV. CRIMINAL LAW

A. Commonwealth v. Leary

[2013-CA-000204](#) 02/27/2015 2015 WL 832286 DR Pending

Opinion by Judge Maze; Chief Judge Acree concurred; Judge Thompson dissented via separate opinion. The Commonwealth filed a pretrial motion *in limine*, requesting a ruling on whether it could withstand a motion for directed verdict on a first-degree trafficking charge if it did not prove the actual weight of the pure cocaine and heroin present in two lumps seized incident to appellee's arrest. The circuit court ruled that proof that appellee sold, or possessed with intent to sell, a substance containing some amount of heroin or cocaine, without proof that the substance actually contained more than two grams of heroin or four grams of cocaine, would be insufficient to support a conviction. The Commonwealth appealed, and the Court of Appeals reversed, holding that the quantity of the cocaine and heroin could be proven by the total weight of the substance sold without regard to its purity. In dissent, Judge Thompson wrote that he would affirm the circuit court and would "leave it to the General Assembly to amend KRS 218A.1412 if it desires to punish trafficking in cocaine and heroin based on the total weight of a mixture."

B. Rabe v. Commonwealth

[2014-CA-000066](#) 02/27/2015 2015 WL 832282 DR Pending

Opinion by Judge Jones; Judges Combs and Maze concurred. In an appeal following a conditional guilty plea to one count of marijuana trafficking, the Court of Appeals rejected appellant's argument that the search of his hotel room was unlawful and that the evidence resulting from that search should have been suppressed. The marijuana was found in appellant's room by a maintenance worker during a routine room inspection. The worker notified an assistant manager, who then notified police. A search warrant for the room was then obtained and executed. The Court held that the hotel employees were not acting as agents of the government when they conducted the work-related search of appellant's room and that the protection against unlawful searches and seizures only applies to public officers and not private individuals.

C. *Williams v. Commonwealth*

[2013-CA-001592](#) 02/27/2015 2015 WL 832278 DR Pending

Opinion by Judge J. Lambert; Judges Clayton and Thompson concurred. On discretionary review, the Court of Appeals affirmed the circuit court's ruling that the district court's order dismissing the case against appellant and suppressing blood alcohol tests obtained by the treating hospital was in error. The Court held that the hospital's tests did not constitute state action and, thus, suppression was not warranted. The Court further held that the Commonwealth did, in fact, object to the district court's dismissal of its case against appellant. Therefore, an appeal was proper.

V. CUSTODY

A. *Commonwealth, Cabinet for Health and Family Services v. C.L.H.*

[2014-CA-000881](#) 02/13/2015 2015 WL 602680 DR Pending

Opinion by Judge Maze; Judges Nickell and Taylor concurred. The Cabinet for Health and Family Services filed an action to terminate Father's parental rights. The circuit court granted Father's motion for directed verdict and dismissed the petition. On appeal, the Court of Appeals affirmed, holding as a matter of law that Father's lengthy incarceration, by itself, did not support a finding of abandonment necessary to support termination of his parental rights. Instead, incarceration is merely a factor to consider when examining a parent's conduct. Evidence reflected that Father was involved in the child's life prior to his conviction and incarceration; Father completed his General Equivalency Degree (GED) and participated in educational and drug treatment programs while in prison; and Father maintained regular monthly visits with the child while in prison, which were positive and beneficial to the child.

B. *M.A.B. v. Commonwealth, Cabinet for Health and Family Services*

[2014-CA-000320](#) 01/16/2015 456 S.W.3d 407

Opinion by Judge Maze; Judges Nickell and Stumbo concurred. The Court of Appeals affirmed the termination of Mother's parental rights to her four children. In affirming, the Court held that the trial court could *sua sponte* take judicial notice of its previous order finding the children to be neglected, and that the intervening adjudication of the children as dependent two years after the trial court had found that they were neglected did not affect the Cabinet's burden to prove that a trial court had previously found the children to be abused or neglected. The Court further held that clear and convincing evidence supported the trial court's findings that there existed at least two statutory grounds for termination of Mother's parental rights, as well as the conclusion that termination was in the children's best interests.

VI. DEATH

A. *Flick v. Estate of Wittich by and through Wittich*

[2009-CA-002378](#) 02/06/2015 2015 WL 495537 DR Pending

Opinion by Judge Maze; Judge Kramer concurred; Judge J. Lambert dissented without separate opinion. A murder victim's parents, as the personal representatives of the victim's estate, filed a wrongful death complaint against the individual convicted of the murder. The circuit court entered a judgment on a jury verdict awarding \$2,900,000 in compensatory damages and \$53,000,000 in punitive damages. The Court of Appeals dismissed the subsequent appeal for failure to join necessary and indispensable parties, namely the co-administrators of the estate; however, the Supreme Court reversed and remanded for review on the merits. On remand, the Court of Appeals reversed, holding that the victim's parents knew or had reason to know of both the injury and that it may have been caused by appellant's conduct. This triggered the extended two-year limitations period applicable to wrongful death actions brought by personal representatives, no later than the date of the indictment. Since this action was not brought within the applicable two-year period, the circuit court erred by not dismissing the complaint.

VII. EMPLOYMENT

A. *Gateway Area Development District, Inc. v. Cope*

[2013-CA-001855](#) 02/13/2015 2015 WL 602726 DR Pending

Opinion by Judge Clayton; Chief Judge Acree and Judge Kramer concurred. Gateway Area Development District, Inc. (GADD) appealed the circuit court's decision in a case involving the Kentucky Whistleblower Act, codified in KRS Chapter 61. GADD maintained that the circuit court erred when it failed to grant GADD's motions for directed verdict and judgment notwithstanding the verdict. GADD argued that it was entitled to a directed verdict because it was not an "employer" as contemplated under the Whistleblower Act, and that Cope's disclosure did not qualify as a protected disclosure under the Act. In addition, GADD contended that the circuit court erred when it took judicial notice that GADD was an "employer" under KRS 61.102(2) and when it awarded Cope attorney's fees. In the cross-appeal, Cope claimed that the circuit court erred when it denied his motion to restore his request for punitive damages. The Court of Appeals reversed and remanded. The Court first held that GADD was entitled to a directed verdict. Under the Whistleblower Act, a claimant must establish four elements. Two of the four elements were contested by GADD - whether, for purposes of the Act, it was a state employer and whether Cope's disclosure was protected. The Court concluded that although GADD is a governmental entity, Cope failed to establish that it was a political subdivision of the Commonwealth and, therefore, an "employer" within the meaning of the Act. Second, the Court held that Cope's filing of Form SS-8 with the IRS for a determination of whether he was an employee or an independent contractor for the district was not a good faith disclosure as contemplated under the Act. As noted in *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247 (Ky. App. 2004), reports of publicly known information are not afforded protection under KRS 61.102. Additionally, the Court observed that although the federal government modified its whistleblower statutes in 2013, the Commonwealth has not amended its Whistleblower Act; therefore, review must be conducted pursuant to the holdings of previously-decided Kentucky cases. Finally, the Court held that the circuit court erred in granting Cope's motion for judicial notice that GADD was a political subdivision of the state. Judicial notice of an adjudicative fact may only be taken if the fact is not subject to a reasonable dispute. Here, the evidence and legal analysis demonstrated that GADD's status as an "employer" under the Act was neither generally known nor specifically referenced by any unquestionable authority. Since the Court reversed the circuit court, the remaining issues regarding the efficacy of an award of attorney's fees and Cope's cross-appeal concerning punitive damages were rendered moot.

B. *McCann v. Sullivan University System, Inc.*

[2014-CA-000392](#) 02/27/2015 2015 WL 832280 DR Pending

Opinion by Judge J. Lambert; Judges Clayton and Thompson concurred. A former employee of a private university brought a putative class action against the university for unpaid wages and overtime under both state law and the Fair Labor Standards Act of 1938 (FLSA). The university removed the case to federal court. After voluntary dismissal of the FLSA claims, the state law claims were remanded to state court. The circuit court denied the former employee's motion to certify a class, and the Court of Appeals affirmed, holding that KRS 337.385, which governs an employer's liability for unpaid wages, barred the former employee from maintaining a class action.

VIII. FAMILY LAW

A. K.W. v. J.S.

[2013-CA-002174](#) 02/13/2015 2015 WL 602681 Released for Publication

Opinion by Judge Kramer; Chief Judge Acree and Judge Clayton concurred. J.S. (“Father”) agreed to entry of a judgment of paternity with respect to twins that he knew or should have known were not his biological children. K.W. (“Mother”) appealed an order of the family court discontinuing Father’s child support. Father cross-appealed the denial of his CR 60.02 motion to set aside the agreed judgment of paternity. The Court of Appeals affirmed the denial of Father’s motion, holding that the family court’s decision was supported by substantial evidence in the form of testimony that: (1) Father knew or should have known he was not the biological father because the twins appeared to be a different ethnicity than both Father and Mother; (2) Father continued a paternal relationship with the twins for years after tests confirmed he was not the biological father; and (3) Father entered into the paternity agreement to receive tax benefits. Similarly, the Court upheld the family court’s finding that Father failed to prove the essential elements of fraud, the misrepresentation of any material fact, or inducement with respect to the agreed judgment of paternity. Under the circumstances, Father was estopped from asserting a position inconsistent with his conduct and his motion was properly denied. The Court then reversed the family court’s order discontinuing support, holding that children are entitled to support from their legal parents, and that discontinuing the support of a legal parent was an abuse of discretion.

B. McVicker v. McVicker

[2013-CA-001271](#) 02/06/2015 2015 WL 495559 Rehearing Denied

Opinion by Judge J. Lambert; Judge Jones concurred; Chief Judge Acree concurred via separate opinion. In an appeal in a dissolution action, the Court of Appeals reversed in part, vacated in part, and remanded the family court's judgment. The Court held that the husband had not sufficiently traced his non-marital interest in the marital residence through documentary evidence (the husband contended that he used pre-marital funds to pay for property purchased just prior to the marriage, and used the proceeds from the sale of that property for property purchased during the marriage, but the later properties were purchased before the prior property had been sold); that the husband failed to adequately trace funds given to him by his parents into an investment account and was not therefore entitled to a non-marital interest in those funds; that the family court abused its discretion in dividing the marital investment account based solely on findings related to the parties' adult disabled son and without considering the statutory factors; and that the family court abused its discretion in denying the wife's motion for maintenance due to its failure to consider the statutory factors and to properly apply the statute. The concurring opinion addressed the need to cite to the specific pages of the certified record pursuant to CR 76.12(4)(iv) and (v) and to not provide citations to documents attached to the brief in an appendix.

IX. JUDGMENT

A. *DCI Properties-DKY, LLC v. Coppage Construction Company, Inc.*

[2013-CA-001932](#) 02/27/2015 2015 WL 832268 Rehearing Pending

Opinion by Judge Stumbo; Judges Maze and Nickell concurred. The Court of Appeals reversed and remanded an order dismissing DCI Properties' cause of action. The cause of action was brought pursuant to KRS 376.220(3), which makes a person liable for damages when that person asserts a lien in excess of the amount actually due against a contractor that is constructing a public improvement. The trial court order dismissed the claim by finding that it should have been brought as a compulsory counterclaim in a prior enforcement of lien action Coppage brought against DCI Properties, and it was therefore barred by *res judicata*. The Court of Appeals held that until the prior lien enforcement action was completed, DCI Properties' injury was only speculative because it was not known whether Coppage's lien was valid or excessive. Therefore, DCI Properties' excessive lien action was not a compulsory counterclaim to Coppage's initial lien enforcement action and was not barred by *res judicata*.

X. NEGLIGENCE

A. *Horsley v. Smith*

[2011-CA-002202](#) 02/13/2015 2015 WL 602813 DR Pending

Opinion by Chief Judge Acree; Judge VanMeter concurred; Judge Dixon dissented without separate opinion. The Court of Appeals affirmed a jury verdict in favor of a physician in a medical malpractice case despite appellant's claim that the jury was improperly instructed. The trial court instructed the jury that a physician owes a duty to his patient to exercise the degree of care and skill of a reasonably competent ophthalmologist acting under similar circumstances. However, the trial court declined to instruct that obtaining a patient's informed consent to surgery was a separate and additional legal duty. The Court of Appeals held that obtaining informed consent to surgery is just one of the many medical responsibilities expected of a physician who must abide by a standard of care defined by the medical profession itself for each of those medical responsibilities; the failure to obtain informed consent, like the failure of any of those medical responsibilities, constitutes the breach of a single legal duty. While there may be many such breaches, there is only one legal duty, just as the trial court had instructed. The Court also held that the trial court did not err in excluding appellant's exhibit, did not err in denying appellant's directed verdict motion, and did not err in declining to strike appellee's answer to the complaint.

XI. TORTS

A. *J.S. v. Berla*

[2013-CA-001792](#) 02/06/2015 456 S.W.3d 19

Opinion by Judge VanMeter; Chief Judge Acree and Judge J. Lambert concurred. In an action brought against Berla by the father of children involved in a custody proceeding in which Berla was a psychologist appointed by the court to conduct a custody evaluation, the circuit court concluded that Berla was immune from civil and criminal liability for statements made to the Cabinet for Health and Family Services and the circuit court. On appeal, the Court of Appeals affirmed. The Court held that KRS 620.050 protects mandatory reporters of child abuse or neglect from civil or criminal liability as long as they are acting in good faith, or when they subjectively believe they are discharging a duty imposed on them by law. Next, the Court held that Berla, as a court-appointed psychologist, was entitled to quasi-judicial immunity and that her written report was further protected by the judicial proceedings privilege since the report was made during the course of a judicial proceeding and the content was relevant to the proceedings. Lastly, the Court held that the father failed to state a claim upon which relief could be granted when he alleged that Berla breached her contract under the UCC by becoming an advocate for the mother. Berla's court-appointed task did not fall under the authority of the UCC and, further, breach of good faith does not give rise to an independent cause of action under either the UCC or Kentucky law.

XII. WITNESSES

A. Lokk v. CMI, Inc.

[2013-CA-000661](#) 02/27/2015 457 S.W.3d 330

Opinion by Judge J. Lambert; Judges Dixon and Taylor concurred. The Court of Appeals affirmed an order dismissing appellant's petition to enforce a certificate and order from a Georgia state court regarding electronic discovery of the source code for the Intoxilyzer 5000 pursuant to Kentucky's Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, KRS 421.230 to 421.270. The Court held that the certificate was defective on its face because it did not contain a seal of the Georgia court pursuant to the statute, and neither the certificate nor the order contained any information about the date and time the witness would be required to testify. Because the certificate and order were facially invalid, the circuit court did not need to hold a hearing on materiality and necessity pursuant to KRS 421.240(1).