PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS
FEBRUARY 1, 2016 to FEBRUARY 29, 2016

I. ADMINISTRATIVE LAW

A. ***Moses v. Kentucky Board of Medical Licensure***

2014-CA-000783 02/12/2016 2016 WL 551431 Rehearing Pending

Opinion by Judge J. Lambert; Judges Combs and VanMeter concurred. The Court of Appeals affirmed an opinion and order upholding the revocation of appellant's license to practice medicine by the Kentucky Board of Medical Licensure. The Court held that the record reflected that the evidence against appellant was largely unchallenged at the hearing; the hearing officer was not biased or otherwise obligated to recuse himself; and the Board did not deprive appellant of due process of law by following established statutory procedures. The Court concluded that the record supported the Board's findings against appellant, and the Board properly revoked his license accordingly.

II. APPEALS

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

2013-CA-002019 02/05/2016 2016 WL 446668

Opinion and order dismissing by Judge J. Lambert; Chief Judge Acree and Judge Taylor concurred. Appellant challenged an opinion and order of the Fayette Circuit Court affirming a decision by the Kentucky Horse Racing Commission that it was not required to release information about its licensees under Kentucky's Open Records Act. During the pendency of the appeal, appellant passed away. The Court addressed the need for the estate to comply with CR 25.01 and KRS 395.278 to properly revive the action and substitute the executrix. The Court ultimately held that a justiciable controversy regarding the open records request did not survive appellant's death because the estate would have the opportunity to properly seek the information necessary to obtain the payments from the horse owners and to litigate the issue of whether any funds are owed. Accordingly, the Court dismissed the appeal as moot.

B. ***W.L.C. v. Commonwealth of Kentucky, Cabinet for Health and Family Services***

2015-CA-000164 02/12/2016 2016 WL 551610

Opinion by Judge Nickell; Judges Stumbo and VanMeter concurred. In two separate cases, the circuit court terminated the parents' parental rights to two minors - a girl and a boy. Mother filed a notice of appeal only as to Daughter, and then filed an amended notice of appeal to add Son, which the circuit court entered. The Court of Appeals affirmed the termination of Mother's parental rights as to Daughter but struck the amended notice of appeal, holding that the amended notice of appeal did not "cure" Mother's failure to include Son in the original notice of appeal or in a separate notice of appeal. Jurisdiction over Son and his case was never transferred to the Court, and the Court could not just assume that Mother always intended to appeal as to both children. The Court noted that the use of an amended notice of appeal in this case was questioned by a separate motion panel before the case was assigned to a merits panel for decision. CR 73.02(1) specifies the limited number of post-judgment motions for which an amended notice of appeal may be filed, and *Flick v. Estate of Wittich*, 396 S.W.3d 816 (Ky. 2013), specifies the limited circumstances in which a notice of appeal may be amended. This case did not appear to fit within the stated parameters and prompted the motion panel to issue a show cause order to Mother to explain why the amended notice of appeal should not be stricken. Mother responded that she had intended to appeal as to both children all along, but the Court ultimately held that it could not "simply read into a notice of appeal an 'intention' or language that does not appear therein." Because Mother failed to substantially comply with CR 73.02, the Court determined that sufficient cause had not been shown to allow the appeal of Son's TPR order to proceed. Therefore, it struck the amended notice of appeal.

III. CARRIERS

A. ***Royal Consumer Products, LLC v. Saia Motor Freight Line, Inc.***

2014-CA-000945 02/26/2016 2016 WL 748176

Opinion by Judge Maze; Judges Jones and Stumbo concurred. A shipper brought suit against a freight carrier, seeking actual and foreseeable consequential damages resulting from the carrier's failure to make timely and conforming shipments. The carrier counterclaimed, seeking recovery of the balance on its unpaid freight invoices. The circuit court entered a partial summary judgment finding that the shipper was not entitled to consequential damages, and that the carrier's tariff controlled. However, the circuit court further concluded that the carrier's cancellation of discounts was *prima facie* unreasonable. Following a bench trial, the circuit court awarded a net judgment in favor of the carrier in the amount of $37,417.09, as well as attorneys' fees in the amount of $138,336.30, and $15,723.94 in costs. Both parties appealed. The Court of Appeals affirmed in part, reversed in part, vacated in part, and remanded. The Court first held that the provision of the Carmack Amendment to the Interstate Commerce Act that limits a carrier's liability pursuant to a tariff applied here to the shipper's claims against the freight carrier, at least with regard to the actual damages sought by the shipper for goods damaged in shipment. The Court next held that a genuine issue of material fact existed as to whether or not the freight carrier provided the shipper a fair opportunity to choose between levels of liability, which precluded summary judgment on the shipper's claims concerning actual and consequential damages due to untimely or non-conforming shipments of goods. The Court also held that there were genuine issues of material fact as to whether or not the carrier's action to rescind its discounted freight charges constituted a "severe" and "*prima facie* unreasonable" penalty, and whether the entire tariff, including the carrier's published and discounted rates, must apply.

IV. CONVERSION

A. ***Baerg v. Ford***

2014-CA-000762 02/19/2016 2016 WL 683118

Opinion by Judge D. Lambert; Judge Dixon concurred; Judge Combs dissented and filed a separate opinion. Appellees sued appellants for conversion, and the circuit court granted summary judgment in appellees' favor. In a split decision, the Court of Appeals reversed. Attorney Seth Johnston formed two LLCs (Villa Paridisio, LLC and ATI Ventures, LLC) on behalf of appellee Angela Ford and opened bank accounts for these entities at various banks. Johnston subsequently purchased a $150,000 cashier's check from one of the banks (Republic Bank) with funds from ATI Ventures' account. Johnston, as the only signatory on ATI Ventures' account, was ostensibly acting in his capacity as Ford's representative. However, unbeknownst to Ford, Johnston negotiated the check to an individual named Zafir Nassar, who subsequently negotiated the check to appellant Faisal Shah for $12,000. Shah deposited the check in his personal banking account at Chase Bank and then wrote a personal check to a distribution company owned by Nassar for $138,000. While Johnston was opening bank accounts for Ford and causing money to be drawn on one of them without her knowledge, he also assisted appellants Harold and Kathleen Baerg, two real estate investors, in completing certain real estate transactions. One such transaction was a Section 10311 real estate exchange in which the Baergs sold an apartment complex in Texas for $1.1 million. At closing, the Baergs allowed the sales proceeds to flow into the bank account of an intermediary company organized and managed by Johnston called Emerald Riverport, LLC. The Baergs eventually acquired like kind property in California, albeit after Johnston usurped the sales proceeds for his personal use and paid the seller of the California property with wire-transferred funds from Ford's Villa Paridisio account. Ford sued Johnston for his wrongdoings. She also sued Shah and the Baergs for common law conversion. In her complaints, Ford alleged that Shah and the Baergs exercised dominion and control over the $150,000 cashier's check and Villa Paridisio's funds, respectively, and intended to deprive her of her property. Ford also alleged that the Baergs knew or should have known about Johnston's illicit wire transfers because Emerald Riverport did not appear as the originator on the face of any payment order initiated by Johnston. In response, Shah and the Baergs both countered that the loss must lie with Ford because she was in the best position to monitor the activity of Johnston. They also claimed that neither the cashier's check nor the wired funds could be converted under Kentucky law. The circuit court ultimately accepted Ford's position, granted her motion for summary judgment, and ordered Shah and the Baergs to pay Ford. In reversing, the Court of Appeals first agreed with Shah that any loss with respect to the cashier's check must lie with Ford because she authorized Johnston to engage in transactions with Republic Bank on her

behalf. Ford cloaked Johnston with apparent authority to engage in transactions with Republic Bank by directing him to open the account and by failing to either remove his signature from the account's signature card or add hers. Republic Bank thus reasonably issued an enforceable cashier's check to Johnston, and when Johnston subsequently transferred the check to Nassar, Ford's rights in the check also transferred. The Court next agreed with the Baergs' argument that Ford could not satisfy the elements of a common law conversion claim against them because she relinquished title to the funds once the beneficiary's bank accepted Johnston's authorized transfers. Valid title to the funds passed to the seller of the California property upon completion of the funds transfers. The funds were transferred pursuant to Johnston's authority - not stolen - and Ford did not allege that the beneficiary's bank either knew or should have known about Johnston's fraud or otherwise accepted the funds in bad faith. Therefore, Ford was divested of any continuing interest in the funds the moment the beneficiary's bank accepted them from Johnston, and her conversion claim failed as a matter of law. In dissent, Judge Combs argued that the summary judgment should have been affirmed because Shah and the Baergs were aware of the fraudulent conduct of Johnston and colluded with him in manipulating the fraudulent transfer of funds.

V. CORRECTIONS

A. ***Mobley v. Payne***

2014-CA-001366 02/26/2016 2016 WL 748158

Opinion by Judge D. Lambert; Judges Clayton and J. Lambert concurred. An inmate petitioned for judicial review of disciplinary proceedings in which he was found guilty of attempting to arrange the delivery of contraband into prison. The circuit court dismissed the petition, and the inmate appealed. The Court of Appeals reversed and remanded, holding that the manner in which the prison disciplinary proceedings were conducted violated the inmate's due process rights. Neither the adjustment hearing officer nor the warden reviewed the entirety of recorded telephone calls made by the inmate to his wife, which the inmate claimed would have exonerated him, despite the inmate's request to do so. This failure constituted a violation of 501 KAR 6:020(15.6), which allows an inmate to present documentary evidence in his defense for the adjustment hearing officer's review.

VI. CRIMINAL LAW

A. ***Brooks v. Commonwealth***

2014-CA-001226 02/19/2016 2016 WL 675430

Opinion by Judge D. Lambert; Judges Maze and Thompson concurred. Appellant entered a conditional guilty plea to possession of a controlled substance not in original container following the denial of his motion to suppress. On appeal, the Court of Appeals reversed. The Court first held that an anonymous tip received by police did not create a reasonable suspicion to justify the subject traffic stop. The tipster reported that they had just seen what appeared to be a domestic dispute between the occupants of a black car in which appellant was a passenger; however, the tipster did not allege that any criminal activity had occurred. The Court further held that information available to the police officer at the time of the stop was insufficient to create an objectively reasonable belief that an occupant of the vehicle was in need of immediate aid; therefore, the emergency aid exception to the warrant requirement did not apply to allow the stop.

VII. CUSTODY

A. ***Wells v. Toye***

2015-CA-000911 02/26/2016 2016 WL 748044

Opinion by Judge Kramer; Judges Clayton and Stumbo concurred. Appellants challenged the dismissal of their petition for *de facto* custodian status after the circuit court held that they lacked standing because the child was placed with them by the Cabinet for Health and Family Services. The child was removed from the biological mother's custody shortly after birth and placed with appellants by the Cabinet when the child was eight days old. At that time, the identity of the child's father was unknown. A year later, upon learning that he was the biological father of the child, Toye petitioned the court for custody. The termination of Toye's parental rights was subsequently reversed on appeal. Appellants thereafter petitioned the circuit court to qualify as *de facto* custodians. Toye objected to appellants' petition, alleging that they lacked standing to qualify as such under *Swiss v. Cabinet for Families and Children*, 43 S.W.3d 796 (Ky. App. 2001). The circuit court agreed with Toye, dismissed appellants' petition for *de facto* custodian status, and returned the child to Toye's custody. The Court of Appeals affirmed. In doing so, the Court reaffirmed its holding in *Swiss* that foster parents may not use the *de facto* custodian statute to seek custody of the foster child when the child was placed with them by the Cabinet.

VIII. FAMILY LAW

A. ***Crabtree v. Crabtree***

2015-CA-000898 02/12/2016 2016 WL 551287

Opinion by Judge Dixon; Judges Nickell and VanMeter concurred. The Court of Appeals affirmed the entry of a domestic violence order that was based upon a finding that appellee had established by a preponderance of the evidence that domestic violence and abuse had occurred and was likely to occur again in the future. In affirming, the Court rejected appellant's argument that his repeated threats to kill himself in front of appellee and their children was insufficient to establish that he committed domestic violence and abuse against them, as such is defined in KRS 403.720. While appellant contended that his threat was not directed at hurting any family members, the consequence of his statements was to terrorize the recipients of the information. Moreover, while his children may not have heard their father's threat, they were ensnared in the threat as well. Accordingly, the Court concluded that the circuit court's findings were not clearly erroneous, and the issuance of the domestic violence order was proper.

IX. IMMUNITY

A. ***Taylor v. Maxson***

2014-CA-000743 02/19/2016 2016 WL 675429

Opinion by Judge Jones; Judges Combs and Maze concurred. Appellant filed several open records requests with the Education and Workforce Development Cabinet concerning civil actions that appellant had pending against the Unemployment Insurance Commission. Appellant filed a complaint against appellee in his individual and official capacities for failing to timely respond to her request, claiming intentional infliction of emotional distress. The circuit court granted appellee's motion to dismiss, finding that appellant's claims were barred by governmental immunity and qualified official immunity. The Court of Appeals affirmed, but for slightly different reasons than those articulated by the circuit court. With respect to the official capacity claims, the Court found that the Commonwealth had partially waived its immunity but that the waiver was confined to the damages set forth in KRS 61.882(5). The Commonwealth, however, had not waived immunity for the type of damages sought by appellant, *i.e.*, tort-based damages for emotional distress. Turning to appellant's individual capacity claims, the Court held that KRS 61.882(5) limited appellant to filing suit against the responding agency; therefore, appellant could not sue the individual agency employee for violation of the Open Records Act. The Court further held that any statements the individual employee made to the Attorney General as part of its adjudicatory proceeding were immune from suit.

X. INSURANCE

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

2014-CA-001559 02/26/2016 2016 WL 748388

Opinion by Judge VanMeter; Judge Jones concurred; Judge Stumbo dissented and filed a separate opinion. On review from a grant of summary judgment, which found that a loss of consortium claim was not excluded from underinsured motorist (UIM) policy language excluding bodily injury coverage sustained by an insured while occupying or operating a motorcycle, the Court of Appeals reversed. The Court held that a spouse's loss of consortium claim is not an independent injury but, rather, derivative of the other spouse's personal injury claim. Therefore, the exclusion of bodily injury coverage for an insured precludes recovery by his or her spouse under a loss of consortium claim. In making this determination, the Court rejected the holding in *Hoskins v. Kentucky Farm Bureau Mut. Ins. Co.*, No. 2011-CA-001454-MR (Ky. App. Oct. 12, 2012). In her dissenting opinion, Judge Stumbo relied on the reasoning in *Hoskins*, noting that ambiguities in an insurance contract are to be resolved in favor of the insured. Judge Stumbo further reasoned that limitations of insurance coverage must be clearly defined and expressed in order to be enforced. Since the plaintiffs' policy did not explicitly bar recovery for loss of consortium or derivative claims, Judge Stumbo would have affirmed the judgment of the circuit court.

XI. LIBEL AND SLANDER

A. ***Williams v. Blackwell***

2014-CA-001728 02/19/2016 2016 WL 675415

Opinion by Judge VanMeter; Judges Combs and Nickell concurred. On review from a grant of summary judgment in a defamation action, the Court of Appeals affirmed, holding that the opinions expressed in an official audit report of a county sheriff's office were constitutionally protected since the report clearly articulated all of the facts upon which the allegedly defamatory opinion statements were based. A former Livingston County sheriff brought the suit against three auditors of the Auditor of Pubic Accounts after their report concerning the sheriff's office's finances while he was sheriff included statements of opinion questioning the propriety of the compensation he received from leasing vehicles he owned to the Fiscal Court for use in the police fleet. However, under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), an allegedly defamatory statement is only actionable when the statement itself can be proven false or when the statement implies underlying facts which can be proven false. Given the fact that the auditor's statements of opinion were accompanied by explicit, detailed, and verifiable supporting facts, the Court held that the statements were constitutionally protected and, thus, inactionable for defamation. The Court also concluded that the mileage reimbursements paid to a publicly-elected sheriff by Livingston County, a county government, were clearly within the scope of the audit of the sheriff's office, as was the sheriff's maximum allowed salary. Therefore, since the lease agreement was within the scope of the audit, any facts underlying the auditors' opinions about the lease were also within the audit's scope and were covered by the pure opinion privilege. Finally, the Court held that summary judgment also would have been appropriate under a theory of qualified official immunity.

XII. OPEN RECORDS

A. ***Cabinet for Health and Family Services v. Courier-Journal, Inc.***

2012-CA-000179 02/19/2016 2016 WL 675495

Opinion by Judge Maze; Judge Stumbo concurred; Judge Taylor concurred in part, dissented in part, and filed a separate opinion. Two newspapers brought actions against the Cabinet for Health and Family Services for violations of the Open Records Act. The actions related to the denial of open records requests for access to records pertaining to child fatalities/near fatalities caused by abuse or neglect. The circuit court ordered the Cabinet to produce the requested records subject to certain redactions, awarded the newspapers attorneys' fees and costs, and imposed statutory penalties against the Cabinet. The Cabinet appealed, and one newspaper cross-appealed. While the appeals were pending, the Cabinet turned over 140 redacted records. The circuit court subsequently held a hearing on the Cabinet's redactions, ordered the records produced with minimal redactions, imposed $756,000 in statutory penalties against the Cabinet, ordered it to pay the newspapers' costs and attorneys' fees, and entered a final judgment. As a result, the Cabinet brought another appeal. The Court of Appeals affirmed. The newspapers first argued that the Cabinet's appeals were mooted by the Cabinet's production of the records in accordance with the circuit court's orders. The Court of Appeals concluded that the public interest exception to the mootness doctrine was inapplicable, and held that the portion of the appeals dealing with the propriety of the circuit court's orders to produce the requested records was moot. The Court then agreed that the newspapers were entitled to attorneys' fees, costs, and statutory penalties under the Open Records Act because the evidence supported the circuit court's finding that the Cabinet acted "willfully" in denying the newspapers access to the requested records. In his partial dissent, Judge Taylor opined that the circuit court abused its discretion by awarding $756,000 in statutory penalties under KRS 61.882(5).