PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

FEBRUARY 01, 2021 to FEBRUARY 28, 2021

I. CRIMINAL LAW

A. ***DERWIN NICKELBERRY v. COMMONWEALTH OF KENTUCKY***

2019-CA-0626 02/19/2021 2021 WL 642364

Opinion by CALDWELL, JACQUELINE M.; KRAMER, J. (CONCURS) AND MAZE, J. (CONCURS)

Derwin Nickelberry appealed from findings of fact and conclusions of law rendered by the Jefferson Circuit Court after remand following his appeal of the trial court's denial of his motion for relief under Rule of Criminal Procedure 11.42. Nickelberry alleged the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 215 (1963), by failing to turn over statements given by two of his co-defendants during investigations of similar crimes committed in other counties. The Court of Appeals affirmed the trial court's determination that no *Brady* violation occurred. It further held that a post-conviction claim alleging a violation of *Brady* is subject to *de novo* review by the appellate courts.

II. JURISDICTION

A. ***DIADAN HOLDINGS, LTD. v. SHAWN A. DRISCOLL***

2020-CA-0664 02/05/2021 2021 WL 402549

Opinion by THOMPSON, LARRY E.; CALDWELL, J. (CONCURS) AND COMBS, J. (CONCURS)

The Court of Appeals affirmed an order of the Jefferson Circuit Court which held that a default judgment entered in favor of DiaDan Holdings, Ltd. against Shawn Driscoll from a court in Nova Scotia, Canada could not be enforced in Jefferson Circuit Court. The trial court concluded that the Nova Scotia court did not have personal jurisdiction over Mr. Driscoll. For a foreign judgment to be enforced in Kentucky, the judgment must be valid under the foreign state's own laws. The Court of Appeals held that Nova Scotia did not have personal jurisdiction over Mr. Driscoll because he did not have "real and substantial" connections to Nova Scotia under Canadian law. The Court additionally examined Kentucky's long-arm statute and federal due process requirements for personal jurisdiction and determined that they also supported the conclusion that the Nova Scotia court did not have personal jurisdiction over Mr. Driscoll.

III. TERMINATION OF PARENTAL RIGHTS

A. S.S. v. CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY, ET AL.

2020-CA-0508 02/12/2021 2021 WL 519718

Opinion by ACREE, GLENN E.; MCNEILL, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

Appellant Mother appealed the family court order terminating her parental rights relative to her youngest of two children, a son. After Mother gave birth, she suffered from medical conditions, including the flu, that hindered her ability to care for her son, leaving most of the responsibility to Father. At the age of two months, the child exhibited symptoms that caused Mother to believe the child may have contracted the flu, and Mother instructed Father to take the child to the doctor. The doctor sent Father and the child home with instructions to monitor the child. Other symptoms presented, and Mother asked Father to take the child to the hospital emergency room where the child was diagnosed with spina bifida, a lump on his back, and other symptoms, including broken bones at different stages of healing. The circumstances were reported to the Cabinet for Health and Family Services. The police became involved, and charges of first, second, and third degree criminal abuse were brought against Mother and Father. The Cabinet worked with Mother and confirmed she had complied with her case plan. When the child was three, a jury returned a verdict in the criminal case acquitting Mother on all charges and convicting Father on a count of second degree (wanton) criminal abuse. The Cabinet subsequently encouraged Mother to pursue sole custody, but it then filed petitions to terminate the parental rights of Mother and Father. At the end of the termination hearing, the family court encouraged Mother and the foster mother to negotiate a "middle ground." The family court later entered an order terminating the parental rights of both Mother and Father. Only Mother appealed the order. The Court of Appeals concluded the evidence did not satisfy the standard of clear and convincing proof and reversed the order terminating Mother's parental rights.

IV. TORTS

A. LAWRENCE MILLER, JR. v. BRITTANY BUNCH, ADMINISTRATIX OF THE ESTATE OF AUTUMN RAINE BUNCH, ET AL.

2019-CA-1856 02/05/2021 2021 WL 402552

Opinion by CLAYTON, DENISE G.; GOODWINE, J. (CONCURS) AND KRAMER, J. (CONCURS)

The Court held that Mandy Jo's Law, Kentucky Revised Statutes (KRS) 411.137 and KRS 391.033, which precludes parents from recovery of damages for the wrongful

death and loss of consortium of their deceased child upon a finding of abandonment, applies to a child who is a viable fetus. For purposes of Mandy Jo's law, abandonment is defined as "neglect and refusal to perform natural and legal obligations to care and support, withholding of parental care, presence, opportunity to display voluntary affection and neglect to lend support and maintenance." *Kimbler v. Arms*, 102 S.W.3d 517, 522 (Ky. App. 2003). Appellant is the biological father of a child who was stillborn. Appellant argued he was entitled to a share of the settlement proceeds for her wrongful death because he was unaware he was her biological father until DNA testing was performed after her death. The Court held that substantial evidence supported the trial court's finding that Appellant was aware he was the child's father because he ceased all contact with the child's mother when she informed him she was pregnant, apart from giving the mother a $25 money gram and going to the hospital and holding the child after she was born. Appellant further argued he was not given any opportunity to develop a relationship with the child as she died at birth and, consequently, he could not have abandoned her. The Court rejected this argument because if this were the case, all parents with a claim for the wrongful death of a viable fetus would be excused from the application of Mandy Jo's law regardless of whether or not they fulfilled their parental obligations to support the child. The Court characterized the parental relationship as including the obligation to provide nurture, care, support, and maintenance prior to the child's birth. Beyond giving the mother the money gram, Appellant provided no additional support, attended no medical appointments with the mother, and did not contribute to or attend the child's funeral services. Because the trial court's finding that Appellant had intentionally not fulfilled his parental obligations was supported by substantial evidence, the Court affirmed the trial court's ruling that Appellant had abandoned the child and was precluded by Mandy Jo's law from recovery of damages from the settlement proceeds for her wrongful death and loss of consortium.

B. SHIRLEY BELL v. NLB PROPERTIES, LLC; ET AL.

2020-CA-0231 02/05/2021 2021 WL 402553

Opinion by KRAMER, JOY A.; DIXON, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Shirley Bell alleged that the automatic wash bay in the car wash owned and operated by Appellees malfunctioned during her use, causing another vehicle to collide with her vehicle. Applying the business premises exception of Kentucky's Motor Vehicle Reparations Act ("MVRA"), the Court of Appeals affirmed the circuit court's dismissal of Bell's action against Appellees. Bell's cause of action was subject to a one-year statute of limitations as a personal injury, rather than the two-year statute of limitations provided under the MVRA.

C. ***ANNE LEONHARDT v. LAURA PREWITT***

2019-CA-1215 02/05/2021 2021 WL 402545

Opinion by LAMBERT, JAMES H.; COMBS, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Anne Leonhardt appealed from an order of the Fayette Circuit Court dismissing her negligence and premises liability claims against Laura Prewitt in her individual capacity as Executive Director of the Kentucky Horse Park, which arose from Leonhardt's falling in the Park's stadium. Affirming, the Court of Appeals held the circuit court did not err in its determination that Prewitt could not be held individually liable for Leonhardt's injuries as Prewitt had not acted in bad faith or exceeded the scope of her authority. Accordingly, the circuit court properly held that the elements of qualified immunity were satisfied.

D. ***ANNE LEONHARDT v. JONATHAN LANG, ET AL.***

2019-CA-1283 02/05/2021 2021 WL 402534

Opinion by MAZE, IRV; CALDWELL, J. (CONCURS) AND KRAMER, J. (CONCURS IN RESULT ONLY)

In a companion case to *Leonhardt v. Prewitt*, 2019-CA-1215-MR, the Court of Appeals affirmed the decision of the Fayette Circuit Court that appellant Leonhardt's claims against two additional employees of the Kentucky Horse Park, whom she did not name in her previous circuit court action, were barred by the doctrine of *res judicata*. The Court concurred in the circuit court's assessment that the parties in the two actions were effectively identical; that the appellees in the second action filled the role of the "Unknown Defendant" in the first case; that the appellees' identity was known to Leonhardt in time to join them as party-defendants in the first action; and that the actions arose from the same factual situation and advanced identical claims. Citing *Yeoman v. Commonwealth, Health Policy Board*, 983 S.W.2d 459 (Ky. 1998), the Court concluded that because the two suits arose from the same controversy, the previous suit must be deemed to have adjudicated every matter which was or could have been brought in support of the cause of action. Thus, the Court held that even if it were to conclude that the appellees were not the Unknown Defendant, Leonhardt could and should have prosecuted any claims she might have against them in her initial action.

V. UNIFORM COMMERCIAL CODE

A. VERSAILLES FARM, HOME AND GARDEN, LLC v. HARVEY HAYNES, ET AL.

2020-CA-0626 02/12/2021 2021 WL 519722

Opinion by KRAMER, JOY A.; CLAYTON, C.J. (CONCURS) AND GOODWINE, J. (CONCURS)

Versailles Farm, Home and Garden (VFHG) appealed from an order dismissing its complaint against Farmers Tobacco Warehouse (FTW). VFHG alleged it was due proceeds from the sale of the 2013 tobacco crop of Harvey Haynes, as demonstrated in its security agreement and financing statement, and that FTW converted said proceeds to cover debts owed by Haynes to FTW. VFHG acknowledged that FTW's financing statement was filed earlier and, accordingly, FTW had an interest in the same 2013 tobacco crop. However, VFHG argued that, because the security agreement between FTW and Haynes did not contain a future advances clause, any monetary advances from FTW to Haynes after the date of FTW's security agreement could not be secured by the same collateral (*i.e*., the 2013 tobacco crop). In affirming the circuit court on other grounds supported by the record, the Court of Appeals held that to effectively argue the lack of a future advances clause, VFHG should have reviewed FTW's financing statement and security agreement prior to lending the funds to Haynes, which it did not do. To its peril, VFHG loaned funds to Haynes without any investigation into the state of the collateral.