PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

JANUARY 1, 2018 to JANUARY 31, 2018

I. COURTS

A. ***Coleman v. Campbell County Library Board of Trustees***

2016-CA-001642 01/05/2018 2018 WL 296875 DR Pending

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

Appellants challenged an order granting summary judgment to the Campbell County Library Board of Trustees. At issue was whether the holding of a prior opinion of the Court of Appeals, *Campbell Cty. Library Bd. Of Trustees v. Coleman*, 475 S.W.3d 40 (Ky. App. 2015), which harmonized statutes relating to public library *ad valorem* tax rates, was to be applied retroactively or prospectively only. In the earlier case, the Court decided that KRS 132.023 and KRS 173.790 were both applicable to *ad valorem* tax rates of a library taxing district formed by petition under KRS 173.720 and that the statutes could be harmoniously interpreted to complement each other. Appellants sought retrospective application of the decision, which would result in a refund of taxes that were in excess of the statutory amounts. The Library Board argued for the prospective application of the decision. The circuit court decided that the decision was to be applied prospectively. The Court of Appeals held that: (1) under Kentucky law, in the absence of an explicit directive the circuit court possessed the discretion on remand to make the retroactivity determination; (2) due process protections may be balanced against considerations of good-faith reliance and equity in making the determination; (3) there was no violation of the separation-of-powers doctrine; and (4) there was no abuse of discretion by the circuit court in the application of the three-factor test for retroactivity set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971). Thus, the decision of the circuit court was affirmed.

II. CRIMINAL LAW

A. ***Commonwealth v. Baldwin***

2016-CA-000712 01/05/2018 2018 WL 296979 DR Pending

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

The Commonwealth appealed an interlocutory order excluding expert testimony regarding DNA evidence in a murder case. In a 2-1 vote, the Court of Appeals vacated and remanded, holding that the circuit court was required to conduct a *Daubert* hearing when the Commonwealth sought to admit results from a probabilistic software program that identified appellee as the minor DNA contributor in the case.

III. EMPLOYMENT

A. ***Boggs v. CSX Transportation, Inc.***

2016-CA-001849 01/05/2018 2018 WL 296829 Rehearing Pending

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

Appellant challenged a judgment in favor of CSX Transportation, Inc. (CSX) in an action brought under FELA (the Federal Employers' Liability Act). The Court of Appeals vacated and remanded based on erroneous jury instructions. Appellant was a brakeman and locomotive engineer with CSX who claimed that during his employment, he was injured by excessive and harmful vibrations of the engine cab and its defective seats resulting in cumulative trauma, degenerative osteoarthritis, and disc disease in his back, neck, and shoulders. He further alleged that he suffered repetitive trauma injuries to his upper extremities attributable to overuse and improper placement of engine hand controls. The Court concluded that the jury was improperly instructed that it might determine whether appellant "knew or should have known" of the causal connection between his injury and his employment merely because he "might have suspected" that fact prior to the running of the pertinent statute of limitations. The Court held that appellant's inquires or suspicions were not enough to constitute knowledge of the required causal connection and that allowing the jury the latitude to infer knowledge from mere speculation or suspicion was reversible error.

IV. FAMILY LAW

A. ***C.B. v. Cabinet for Health and Family Services***

2017-CA-001011 01/26/2018 2018 WL 560187

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

Appellant challenged the circuit court's finding that his minor child was neglected or abused by appellant. The Court of Appeals reversed, first holding that the Cabinet for Health and Family Services had not met its burden of establishing risk of harm of neglect under KRS 620.100(3). Here, there was no allegation that appellant had ever engaged in any neglectful act directed toward the child. Instead, the Cabinet merely alleged that his substance abuse in the past put the newborn child at risk of physical harm. There was also no dispute that appellant had completed the case plan to the Cabinet's satisfaction. Given the tentative nature of the Cabinet's allegations, the Court held that the burden of proof was not met. The Court further held that there was insufficient evidence to demonstrate that the child was ever placed at "risk of harm" by appellant pursuant to KRS 600.020(1)(a) because appellant never experienced unsupervised visitation, much less actual custody, of the child.

B. ***Duffy v. Duffy***

2016-CA-000983 01/19/2018 2018 WL 472634

Opinion by Judge Dixon; Judges Acree and Jones concurred.

The Court of Appeals affirmed a judgment wherein the circuit court determined that Matthew Duffy's unvested "restricted stock units" (RSUs) awarded through his employment with Amazon were marital property and subject to division by the court. The RSUs were transferred to Matthew and set aside in an account at Morgan & Stanley in his name. The account statements listed the total number of RSUs Matthew had received during his employment and delineated how many had vested and been sold, as well as how many non-vested RSUs remained in the account and on what date they were to vest. Citing to its recent opinion in *Dotson v. Dotson*, 523 S.W.3d 441 (Ky. App. 2017), the Court concluded that while the RSUs were speculative in the sense that full vesting may never occur, they were nonetheless more than merely a speculation. Rather, the RSUs represented an award to Matthew that could be enforced under the terms of the plan. Therefore, the circuit court did not err in finding that the value of Matthew's accrued ownership rights in the non-vested stock constituted marital property. The Court further determined that the circuit court correctly ruled that Matthew's decision to voluntarily resign from Amazon two months before his RSUs were due to vest was for the sole purpose of depriving Faustina Duffy of her proportionate share of the marital assets, and thus constituted a dissipation of marital assets.

V. IMMUNITY

A. ***Steffan v. Smyzer by and through Rankins***

2016-CA-001180 01/12/2018 2018 WL 566464

Opinion and order dismissing by Judge Dixon; Judges Acree and Stumbo concurred.

The Court of Appeals dismissed appellant's appeal from an opinion and order denying his motion for summary judgment based on immunity under the federal Paul D. Coverdell Teacher Liability Protection Act of 2001 (the Teacher Protection Act). The Court noted that in *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009), the Supreme Court of Kentucky recognized an exception to the general rule that a denial of a motion for summary judgment constitutes an interlocutory order in holding that "an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." Under *Prater*, however, only immunity from suit and, therefore, immunity from the burdens of litigation warrants an exception to CR 54.01's finality rule. Citing its recent unpublished opinion in *Walker v. Brock*, 2016 WL 4410706, 2014-CA-000868-MR and 2014-CA-000953-MR (Ky.App. Aug. 19, 2016), the Court of Appeals concluded that the Teacher Protection Act provides an exemption from liability rather than immunity from suit. Because it is a statutory defense to liability only, appellant's denial of immunity under the Teacher Protection Act "can be vindicated following a final judgment as with any other liability defense." Thus, the Court held that while *Prater* makes it clear that the denial of immunity from suit may be immediately appealable, a ruling concerning immunity from liability, as afforded by the Teacher Protection Act, is not. Accordingly, the circuit court's order was interlocutory in nature and, as such, the appeal was dismissed.

VI. INSURANCE

A. ***Consolidated Insurance Company v. Slone***

2016-CA-001070 01/05/2018 2018 WL 296975

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

School bus occupants, including students, who were injured while riding the bus filed a declaratory judgment action against Consolidated. They sought to stack the underinsured motorist (UIM) coverage in a fleet policy issued to the Magoffin County Board of Education to provide $31,500,000 in coverage. The circuit court declared that the UIM limit on each of the 63 school buses owned by the Board could be stacked. The Court of Appeals reversed and remanded, holding that the bus occupants who were not the named insured or family members of the named insured could not stack the UIM coverages where the policy was clear and unambiguous that the coverages could not be stacked by insureds of the second class. The Court noted that the "reasonable expectations" doctrine is not applicable to insureds of the second class and held that regardless of the mandatory nature of UIM coverage applicable to school buses and the fact that it was anticipated that students would be on a bus, the bus occupants could not be classified as anything other than insureds of the second class. The Court added that there was nothing unreasonable about the anti-stacking provision in the policy, noting that the total UIM premium was $5,049, and that the UIM coverage was not illusory as there was $500,000 in coverage. The Court further held that Consolidated was not estopped to deny stacking because of alleged representations made by its alleged agent to a Board member. There was no connection between such misrepresentation and the bus occupants' right to stack UIM coverages.

VII. LANDLORD/TENANT

A. ***Groves v. Woods***

2016-CA-001546 01/26/2018 2018 WL 560417

Opinion by Judge Clayton; Judges Stumbo and Thompson concurred.

Appellants challenged the grant of summary judgment to appellees in a negligence action in which appellant Sarah Groves alleged that she was injured by a horse. Appellees John and Hazel Woods were landowners who had a verbal lease with appellants. The parties disputed whether appellants rented only the house and yard or had rented the entire property. Appellants argued that they were tenants of the entire property, including the adjacent fenced pasture with a barn. On occasion, appellees Terry and Tammy Harris boarded Hank, a Tennessee Walking Horse, on the Woods' property. Appellants knew that Hank was on the property. Sarah argued that she was injured by Hank while on or near the pasture and filed suit for damages. In affirming summary judgment, the Court of Appeals first concluded that appellants were tenants as to the entire property and, as such, the Woods' only duty as landlords was to warn appellants of known latent defects at the time of the lease agreement, as held in *Carver v. Howard*, 280 S.W.2d 708 (Ky. 1955). In their complaint, appellants admitted that they knew a horse - Hank - was boarded on the property. Consequently, the Woods could not be liable for failure to warn them of a known latent defect, and the circuit court's grant of summary judgment was appropriate as a matter of law.

VIII. PROPERTY

A. ***Coblentz v. Day***

2015-CA-001262 01/26/2018 2018 WL 560192

Opinion by Judge Nickell; Judges Combs and Dixon concurred.

Fourteen years after appellants acquired title to their farm, appellee began claiming that he owned a portion of the farm through adverse possession. Appellee then brought an action alleging that the deed to appellants' farm was void under the champerty statute, KRS 372.070, which voids a conveyance of land by a grantor to a grantee when the land is being held adversely by a third party. The circuit court entered summary judgment in appellee's favor on the champerty claim despite the absence of proof that appellee had established all statutory elements for adverse possession. The Court of Appeals reversed and remanded, holding that the absence of evidence that appellee had satisfied all elements of adverse possession created genuine issues of material fact as to whether the deed to the farm was void for champerty. Therefore, summary judgment should not have been granted.

IX. TERMINATION OF PARENTAL RIGHTS

A. ***J.L.C. v. Cabinet for Health and Family Services***

2016-CA-000609 10/20/2017 2018 WL 619879

Opinion by Judge Taylor; Judges Acree and Johnson concurred.

Appellant challenged the termination of her parental rights as to her three biological children. The Court of Appeals affirmed. Most notably, the Court rejected appellant's assertion that the family court erred by failing to recognize that the Cabinet violated KRS 620.090 and 922 KAR§ 1:140 by not placing the children with a relative following their removal from appellant's custody - thus denying her "due process" of law. Specifically, appellant argued that the children should have been placed with a maternal aunt rather than in foster care. After expressing "grave doubt" that a violation of KRS 620.090 and/or 922 KAR § 1:140 would result in a constitutional due process violation claim, the Court noted that the Cabinet is not mandated to choose relative placement over other placement options. Moreover, the record indicated that the Cabinet did attempt to place appellant's children with a relative but the attempt was unsuccessful. Thus, appellant's argument was without merit. The Court further held that the family court did not err by determining that it was in the children's best interest to terminate appellant's parental rights.

X. TRIALS

A. ***Quattrocchi v. Nicholls***

2016-CA-000428 01/05/2018 2018 WL 297129 Rehearing Pending

Opinion by Judge Maze; Judges Dixon and Johnson concurred.

This appeal and cross-appeal arose from a judgment confirming a jury verdict in favor of Paul Nicholls, M.D. and dismissing the medical negligence claim brought by Ann Quattrocchi. Quattrocchi argued that the circuit court improperly excluded evidence of a surgical incident that led to her sciatic nerve palsy. The Court of Appeals reversed and remanded as to the direct appeal and affirmed as to the cross-appeal after concluding that exclusion of the evidence and the failure to grant a continuance amounted to an abuse of discretion.