

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JULY 1, 2015 to JULY 31, 2015

I. ADOPTION

A. R.P., Jr. v. T.A.C.

[2014-CA-001325](#) 07/10/2015 2015 WL 4144998 Released for Publication

Opinion by Judge Combs; Judges D. Lambert and Taylor concurred. A stepfather sought to adopt his stepson, and the circuit court granted the petition and terminated the biological father's parental rights without his consent. The Court of Appeals affirmed, agreeing with the findings of the circuit court that the admitted conduct of the biological father constituted abandonment so as to justify the involuntary termination of his parental rights.

II. CRIMINAL LAW

A. Allison v. Commonwealth

[2012-CA-001395](#) 07/17/2015 2015 WL 4381355 DR Pending

Opinion by Judge Jones; Judge Clayton concurred; Judge Taylor concurred in result only. Appellant was found guilty of reckless homicide in the death of his infant daughter. At trial, appellant sought to introduce certain evidence as part of his defense, specifically a Consumer Products Safety Commission (CPSC) report concerning his daughter's death and a photograph from a forensic pathology textbook showing an infant trapped in a vertical position between the rails of a crib and the side of a mattress. The circuit court denied appellant's request and he appealed. On appeal, appellant raised several points of error. First, appellant argued that the refusal to allow the introduction of certain evidence prevented him from being able to present a meaningful defense. Next, appellant argued that the circuit court should have excluded an in-court demonstration, involving a CPR doll, performed by a witness for the Commonwealth. At trial, appellant objected to the demonstration on the basis that it was substantially similar to a demonstration that was recorded during his interview with police in which he used a CPR doll to show police how his infant daughter was positioned when he found her. He claimed that the video

was the best evidence, and therefore the in-court use of the doll should not be allowed. The circuit court overruled this objection. On appeal, appellant asserted that the circuit court should have excluded the demonstration because the doll was not representative of his infant daughter. Appellant conceded that he did not proffer this specific objection at trial and asked that this issue be reviewed for palpable error. The Court of Appeals affirmed as to all issues. The Court held that the CPSC report, while relevant, was not admissible under KRE 803(8) because it lacked trustworthiness in this instance. Further, the Court stated that even if the report was admissible under KRE 803(8), it believed the prejudicial effect far outweighed the probative value of the report. Regarding the forensic textbook photograph, the Court found this issue to be conclusively resolved by KRE 803(18), and noted that appellant's expert witness was free to testify concerning his reliance on the forensic textbook and to read portions from it to the jury; however, the rules of evidence prohibited the textbook from being introduced into evidence. Lastly, with respect to the in-court demonstration, the Court concluded that the jury had received enough information to understand the purpose of the demonstration and were provided with enough testimony regarding the dissimilarities between the CPR doll and a real child to prevent them from placing undue weight on it. As such, the Court did not believe that the in-court demonstration caused appellant to suffer the kind of "manifest injustice" the palpable error rule is intended to remedy.

B. Coberly v. Commonwealth

[2014-CA-000341](#) 07/17/2015 DR Pending

Opinion by Judge Taylor; Judges Combs and Kramer concurred. Appellant was convicted of first-degree criminal mischief pursuant to KRS 512.020 after being charged with damaging the tires of twelve vehicles and causing over \$5,000 in property damage. On appeal, he alleged that he was entitled to a directed verdict of acquittal because the Commonwealth improperly aggregated the damage to each of the twelve vehicles to meet the \$1,000 pecuniary loss threshold necessary to support the first-degree criminal mischief charge. Appellant maintained that he should have been charged instead with twelve separate misdemeanor counts of either second-degree criminal mischief or third-degree criminal mischief depending upon the specific damage to each vehicle. Reviewing for palpable error, the Court of Appeals affirmed. The Court first noted that KRS 512.020 specifically encompasses damage to “any property” within its ambit. Thus, under Kentucky law, it is permissible to combine damage to multiple items of property even if the multiple items had separate owners. The decisive question is whether the damage to the multiple items of property owned by separate individuals occurred at the “same time and the same place.” If so, there is but one offense of criminal mischief. In this case, the damage to the twelve vehicles occurred at the same time and the same place. Therefore, appellant’s conviction was valid.

C. *Durrant v. Commonwealth*

[2014-CA-000821](#) 07/24/2015 2015 WL 4497987 DR Pending

Opinion by Judge Kramer; Judges Clayton and Nickell concurred. Appellant, the victim's teacher, was convicted of using a minor in a sexual performance, possessing matter portraying a sexual performance by a minor; and unlawful use of electronic means to induce a minor to engage in sexual activity. The Court of Appeals affirmed, holding that allowing the victim and prosecutor to read from a spreadsheet of text messages produced by a third-party text-messaging service provider in response to a search warrant was not error because although the spreadsheet was not authenticated by the third-party service provider, appellant did not dispute that he sent and received the text messages contained in the spreadsheet at trial. Further, although appellant voiced objections regarding authentication of the spreadsheet, he waived any authentication error by adopting a trial strategy that presumed the communications in the spreadsheet were in fact between the victim and himself. Additionally, the Court held that denial of appellant's motion for a mistrial was not in error because the trial judge's admonishment properly cured any prejudicial effect of the victim's statement of prior bad acts. Likewise, the circuit court properly denied appellant's request for inclusion of a lesser-included charge because the requested lesser-included offense required proof of a fact not required by the greater offense. Finally, the Court found no violation of appellant's constitutional rights as a result of alleged cumulative error.

D. Grundy v. Commonwealth

[2014-CA-000494](#) 07/24/2015 2015 WL 4497943 Rehearing Denied

Opinion by Judge J. Lambert; Judges Jones and Maze concurred. The Commonwealth petitioned to revoke appellant's probation, alleging the commission of a separate offense during the probationary period. The circuit court granted the petition and imposed a one-year probation revocation sentence. The Court of Appeals reversed after concluding that appellant had completed his probationary term prior to the circuit court's revocation. On remand, the circuit court vacated its revocation order but did not vacate appellant's one-year sentence. Appellant then filed a motion to alter, amend, or vacate the order and requested entry of an order in conformity with the direction of this Court. The circuit court denied the motion and appellant appealed. Reviewing the case for a second time, the Court of Appeals held that its previous determination on appeal that the circuit court lacked the authority to revoke appellant's probation after he had already completed the probationary term did not affect the validity of the underlying judgment of conviction. The Court's previous opinion only addressed the validity of the revocation order - not the validity of the original conviction - and there was no dispute that the circuit court had jurisdiction to enter the original judgment of conviction. Therefore, appellant received all of the relief to which he was entitled in the circuit court's order on remand.

E. *King v. Commonwealth*

[2013-CA-001840](#) 07/02/2015 2015 WL 4071551 Released for Publication

Opinion by Judge J. Lambert; Judges Stumbo and Taylor concurred. Appellant sought review of a judgment following a jury verdict convicting him and his co-defendant of trafficking in a controlled substance. The Court of Appeals affirmed. First, the Court held that appellant was not denied the right to a unanimous verdict when the trial court sent the jury to deliberate further when, upon polling the jury, one juror indicated that she was uncertain in her verdict. The Court explained that the trial court acted in accordance with KRS 29A.320(3), and there was no indication that the initial verdict was given involuntarily or that the indecisive juror was subsequently coerced in any way. Second, the Court found no palpable error in the trial court's refusal to strike for cause a juror who was a uniformed police officer. The issue was inadequately preserved because appellant failed to identify the juror he would have stricken with the peremptory challenge he used to strike the police officer; thus, appellant received the jury he wanted. Third, the uniformed police officer's responses to questioning during voir dire were not palpable error because they did not constitute testimony, did not require the jurors to commit in advance to a particular view of the evidence, and did not bias the remaining jurors. Finally, the Court held that the closing argument made by co-defendant's counsel drew reasonable inferences from the evidence, and consequently the trial court did not abuse its discretion in denying appellant's objection to the remarks.

F. *McVey v. Commonwealth*

[2014-CA-000957](#) 07/10/2015 2015 WL 4141823 Released for Publication

Opinion by Judge J. Lambert; Judges Jones and Maze concurred. Appellant, who was indicted on charges of trafficking in a controlled substance, entered into a pretrial diversion agreement which provided that he was not allowed to possess firearms. The Commonwealth moved to void the agreement after appellant reported to police that he had been robbed of several firearms. The police recovered the firearms and were told by the alleged robbers that appellant was selling bad drugs. Following a hearing, the circuit court voided the diversion agreement. Appellant challenged the sufficiency of the circuit court's findings, and its reliance on the robbers' hearsay testimony, arguing that there was no evidence that he posed a significant risk to prior victims or the community or that he could not be managed in the community, as required prior to revocation under KRS 439.3106 (1) and (2). After noting that hearsay testimony is permissible at revocation proceedings, the Court of Appeals applied the holdings of *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014) and *McClure v. Commonwealth*, 457 S.W.3d 728 (Ky. App. 2015), and concluded that the circuit court's findings that appellant possessed firearms, had relapsed into drug use, and was allegedly involved in a disagreement over a drug transaction that led to the robbery, were sufficient to prove that his activities posed a significant risk to the community, and that there was nothing in the statute that required the circuit court to impose lesser sanctions prior to voiding the diversion agreement.

G. *Wagner v. Commonwealth*

[2013-CA-000515](#) 07/10/2015 2015 WL 4145612 DR Pending

Opinion by Chief Judge Acree; Judges Clayton and Kramer concurred. The Court of Appeals held that a defendant who exercises hybrid representation is entitled to assert a claim of ineffective assistance of counsel, but only with regard to those portions of representation that were explicitly undertaken by trial counsel. Accordingly, the Court found to be error the circuit court's conclusion that appellant's decision to invoke hybrid representation barred all future allegations of ineffective assistance of counsel.

III. DAMAGES

A. *Service Financial Company v. Ware*

[2013-CA-002121](#) 07/24/2015 2015 WL 4571712

Opinion by Chief Judge Acree; Judges Stumbo and Taylor concurred. The Court of Appeals granted discretionary review to address appellant's appeal of an opinion by the Franklin Circuit Court affirming a Franklin District Court order of default judgment that limited post-judgment interest on a retail installment contract to 12% per annum. Appellant is the assignee of a retail installment contract executed by appellee. Appellee defaulted, and appellant filed suit to collect on the contract. After appellee failed to respond to the lawsuit, appellant moved for default judgment and, citing KRS 360.040 - which allows a court to deviate from the statutory post-judgment interest rate of 12% when a party has agreed to accruing interest on a written obligation - requested post-judgment interest at the rate of 15% per annum, the purported interest rate contained in the contract. The district court denied the claim of 15% post-judgment interest and allowed only 12% post-judgment interest. The circuit court affirmed, finding the damage claim to be an unliquidated sum. The Court of Appeals granted discretionary review and affirmed on the alternative ground that the contract sued upon was a retail installment contract in which appellee agreed to pay the cash price of the vehicle plus a time price differential (finance charge), but did not agree to the accrual of interest at any rate, much less a rate in excess of that stated in KRS 360.040. Because the contract bore no interest, appellant was only entitled to post-judgment interest at the statutory rate of 12% per annum.

IV. EVIDENCE

A. Harrington v. Argotte

[2014-CA-001050](#) 07/31/2015 2015 WL 4597536

Opinion by Judge Taylor; Judges Jones and Thompson concurred. The circuit court entered a directed verdict dismissing appellant's medical negligence action against appellee. After appellant presented her opening statement, appellee moved for a directed verdict pursuant to CR 50.01. Appellee argued that appellant admitted during her opening statement that no expert witness would testify as to whether appellee breached the standard of care as to appellant's claim of lack of informed consent. The circuit court sustained the motion for directed verdict, thus concluding the trial proceedings without any evidence being presented. The Court of Appeals reversed and remanded. The Court noted that the language of CR 50.01 plainly contemplates the introduction of some evidence at trial before granting a directed verdict. An opening and closing statement at trial does not constitute "evidence" but rather is intended to merely inform the jury of the case and the issues therein. The Court acknowledged that a directed verdict may be rendered after opening statement in very limited cases where counsel made an admission unequivocally fatal to her cause of action. However, in this case, the circuit court prematurely determined that expert testimony was required to demonstrate the standard of care and breach thereof by appellee. In a medical negligence claim, the law recognizes an exception where expert testimony is unnecessary if the failure to disclose is so obvious that a layperson can recognize the necessity of such disclosure to a patient. The circuit court viewed this exception as only being triggered in cases where no consent was given by the patient. The Court of Appeals disagreed with this perspective and noted that the application of the exception is highly fact-specific and is dependent upon whether the failure to disclose is obvious and apparent to a layman based upon the underlying facts as established by the evidence introduced at trial. As no evidence was heard or introduced before the directed verdict was granted, the circuit court could not have properly determined whether the exception to the general rule requiring expert testimony was applicable. Therefore, reversal was merited.

V. FAMILY LAW

A. *Estate of Mills v. Mills*

[2013-CA-001384](#) 07/02/2015 2015 WL 4034974 Rehearing Pending

Opinion by Judge J. Lambert; Judges Clayton and D. Lambert concurred. After husband's will was submitted for probate, wife filed a motion seeking a determination as to whether the parties were still married at the time of husband's death, in light of a dissolution of marriage decree that had been entered and then set aside years earlier. The district court entered an order finding that the dissolution decree did not dissolve the parties' marriage. Husband's estate appealed, and the circuit court entered an order also finding that husband and wife remained married at the time of husband's death. The Court of Appeals granted the estate's motion for discretionary review and affirmed, holding that the dissolution of marriage decree never became final because both parties timely filed CR 52 and CR 59 motions to set aside the subject order and to grant a new trial, which the trial court granted. This prevented the decree of dissolution from ever becoming a final judgment.

VI. LANDLORD/TENANT

A. *Wildcat Property Management, LLC v. Franzen*

[2014-CA-000964](#) 07/10/2015 2015 WL 4148288 DR Pending

Opinion by Judge Clayton; Judges D. Lambert and J. Lambert concurred. Appellant, a residential landlord, brought an action against certain tenants for unpaid rent. The circuit court determined that the tenants' lease was void, and therefore the Uniform Residential Landlord and Tenant Act (URLTA), KRS 383.500 - 383.715, did not apply. In reaching this determination, the circuit court denied appellant's motion for summary judgment and partially granted the tenants' summary judgment motion. The Court of Appeals vacated the decision and remanded for a determination of damages. The Court noted that the circuit court's ruling that the lease was void because of the conditions of the premises suggested a duty on the part of a landlord outside of the provisions of URLTA. However, in Kentucky, it is well-established that a tenant takes the premises as he or she finds them and that, in general, no implied warranty of habitability exists. Instead, a tenant must look to the rental agreement or statutory provisions for remedies when a rental unit is defective or requires repair. Moreover, URLTA clarifies the duties of landlords and tenants who entered into residential leases. It also provides a working definition of "habitability" and provides remedies and the procedures to access remedies in its statutory directives. In sum, the circuit court erred in denying appellant's summary judgment motion and granting tenants a partial summary judgment since its ruling would nullify the procedures and processes set forth in URLTA.

VII. WORKERS' COMPENSATION

A. *Cruse v. Henderson County Board of Education*

[2014-CA-001439](#) 07/10/2015 2015 WL 4159419 Rehearing Denied

Opinion by Judge Stumbo; Chief Judge Acree and Judge Taylor concurred. The Court of Appeals affirmed a decision of the Workers' Compensation Board finding that the Administrative Law Judge did not err in determining that most of appellant's work injuries were temporary and had resolved within one year. The Court also affirmed the finding of the Board that KRS 342.730(4), which terminates workers' compensation benefits on the date that the employee qualifies for old-age Social Security retirement benefits, does not violate the federal Age Discrimination in Employment Act found at 29 U.S.C. § 623(a)(1). The Court further held that KRS 342.730(4) does not violate the equal protection clause of the United States Constitution by limiting the duration of benefits based on the employee's age.

B. *Liberty Mutual Fire Insurance Company v. Cato*

[2014-CA-000403](#) 07/10/2015 2015 WL 4145064 DR Pending

Opinion by Judge Combs; Judges J. Lambert and Stumbo concurred. The estate and widow of an employee who was electrocuted while working on storage tanks owned by his employer's customer brought a wrongful death action against the electrical utilities responsible for the high voltage power lines on the customer's property. The employer's workers' compensation insurer intervened to recover the workers' compensation death benefits it paid. After settlement of the estate's and widow's claims against the utilities, the circuit court awarded summary judgment to the estate and widow, finding that the insurer had waived its subrogation rights against the utilities. Therefore, it could not recover the workers' compensation death benefits it paid to the widow out of the widow's wrongful death settlement with the utilities. The insurer appealed and the Court of Appeals affirmed. The subject waiver was contained in an endorsement to a policy with the employer, which was based in Texas, and was held to be a binding waiver as to the alleged tortfeasors in Kentucky. The waiver agreed to waive subrogation against any person or organization for whom the employer agreed by written contract to furnish the waiver, and the employer's contract with the customer required it to obtain insurance waiving subrogation against, among others, the customer's invitees, such as the utilities. The Court further held that any underlying choice of law issues were rendered moot by the Court's holding that the waiver was enforceable.