

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JULY 1, 2019 to JULY 31, 2019

I. ADMINISTRATIVE LAW

A. Alvey v. Davis

[2018-CA-000418](#) 07/26/2019 2019 WL 3367198

Opinion by Judge Lambert; Judge L. Thompson concurred; Judge Dixon concurred in result only.

Appellant, a secretary/bookkeeper, was terminated from her employment at an elementary school for cause. On her first appeal to the circuit court, the matter was remanded to the school board's hearing officer for more specific findings. The board once again upheld the termination, and the circuit court affirmed. The employee appealed, arguing that there was not substantial evidence to support the board's findings, that she was denied due process, and that the hearing officer was unqualified and biased. The Court of Appeals affirmed, holding that: (1) the evidence was sufficient to support the employee's termination; (2) the Board's procedure provided the employee with the necessary due process requirements (namely, notice, a hearing, and judicial review); and (3) there was no evidence in the record to support the employee's allegations that the hearing officer was biased or unqualified.

II. APPEALS

A. *Recbar, LLC v. Drake*

[2019-CA-000528](#) 07/12/2019 2019 WL 3047191

Opinion and Order dismissing by Judge Nickell; Judges Acree and Kramer concurred.

Appellant filed an appeal from a denial of a motion for summary judgment. The motion was filed pursuant to KRS 413.241, Kentucky’s Dram Shop Act, on the basis that the statute does not permit “first-party” claims against dram shops. Appellee moved to dismiss the appeal on the grounds that it was interlocutory. In response, appellant argued that a defense under KRS 413.241 is similar to “claims of governmental immunity or workers’ compensation immunity,” two circumstances in which it is recognized that an interlocutory appeal may be had. The Court of Appeals disagreed and dismissed the appeal, holding that KRS 413.241 does not guarantee dram shop owners absolute immunity from suit but, rather, provides a liability defense. Because of this, an interlocutory appeal was not authorized and dismissal was merited.

III. ARBITRATION

A. *Golden Gate National Senior Care, LLC v. Dolan*

[2017-CA-001357](#) 07/12/2019 2019 WL 3047425

Opinion by Judge K. Thompson; Judges Acree and Nickell concurred.

The Court of Appeals affirmed an order denying appellants' motion to compel arbitration and to dismiss or stay pending litigation. David Dolan was admitted to a Golden Gate long-term care facility. The admission papers were signed by his attorney-in-fact, who also signed an alternative dispute resolution (ADR) agreement agreeing that all claims would be submitted to arbitration. The facility made clear at the time of admission that signing an ADR agreement was not a prerequisite to admission and was voluntary. Dolan subsequently filed a lawsuit alleging negligence in his care and treatment at the facility. The Court held that Dolan's power of attorney was insufficiently broad to confer upon the attorney-in-fact the power to enter into an arbitration agreement. The Court noted that by the express terms of the power of attorney, the powers were limited to doing whatever was "requisite, necessary and proper to be done." Since the ADR agreement was optional, it did not meet this requirement and, therefore, was not binding on Dolan.

IV. CHILD CUSTODY AND RESIDENCY

A. *French v. French*

[2018-CA-000878](#) 07/12/2019 2019 WL 3048356

Opinion by Judge Acree; Judges Goodwine and Kramer concurred.

After several years of joint custody and peaceful and equal timesharing, Father pursued custody modification for an award of sole custody or, in the alternative, increased timesharing. Mother responded in kind. The family court denied both parties' motions for sole custody but granted Mother's motion for more timesharing. Father appealed, curiously arguing that the absence of sufficient changes in circumstances did not justify a modification of custody. However, because the family court did not modify custody, the Court of Appeals affirmed. The Court also concluded that the family court's modification of timesharing was not an abuse of discretion. Notably, the Court's opinion began with a review of the multiple ways in which appellant had failed to comply with CR 76.12. Before imposing the sanction of reviewing the case for manifest injustice only, the Court noted that Kentucky appellate opinions have expressed no concern that acceptance of legal professionals' mere substantial compliance with appellate rules: (1) will negatively impact public respect for a judiciary that allows lawyers to violate its rules rather than to simply criticize them; (2) will negatively impact the quality of appellate advocacy; and (3) will erode the bar's respect for process and procedure.

B. *Oaisi v. Alaeddin*

[2017-CA-000333](#) 07/12/2019 2019 WL 3048362

Opinion by Judge Taylor; Chief Judge Clayton and Judge Maze concurred.

Appellant challenged an order declining to register documents from courts in Dubai, United Arab Emirates (UAE) in a custody action. The Court of Appeals affirmed. Citing KRS 403.806, the Court held that while the subject documents reflected some sort of a child custody determination, appellant had failed to show that the determination had been made in substantial conformity with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), as required under KRS 403.806(2). Specifically, appellant offered no evidence whatsoever as to how the Dubai courts reached their custody determination - including whether the best interests of the children were considered. This failure was fatal to her petition and supported the family court's ruling that the Dubai documents did not conform with the jurisdictional requirements for Kentucky law in regards to child custody and thus were not entitled to be registered under the UCCJEA.

V. CHILD SUPPORT

A. Moody v. Demala

[2017-CA-001386](#) 07/19/2019 2019 WL 3242426

Opinion by Judge Lambert; Judges Dixon and L. Thompson concurred.

Mother appealed from an order awarding Father, as child support payments, a portion of their three children's monthly social security benefits. The parties shared joint custody of the children. Father, disabled since birth, received benefits, with the children's monthly benefits based on his disability. Father was ordered to share 50% of the children's benefits with Mother. Shortly after the dissolution decree, Mother, who had been injured in a motor vehicle accident, began receiving her own disability benefits. Because her award was larger than Father's, the children's benefits were increased accordingly, and 100% of the children's benefits went to Mother. Father filed a motion to modify support, arguing that because he had shared the children's benefits with Mother, she should be ordered to do the same now that the benefits were going directly to her. The circuit court agreed with Father and ordered that the modification be backdated to November 2014, when Father filed his motion for modification. On appeal, Mother argued that the circuit court erred in dividing the children's benefits and in failing to use the child support guidelines in making its determination. Mother further contended that it was erroneous to make the order retroactive to November 2014. The Court of Appeals affirmed, holding that: (1) Mother failed to demonstrate that the circuit court abused its discretion; (2) strict application of the child support guidelines was not applicable in this situation; and (3) the circuit court did not err in ordering the modification retroactive to the date Father filed his motion.

VI. CIVIL RIGHTS

A. Smith v. Lewis

[2018-CA-000180](#) 07/05/2019 2019 WL 2896018

Opinion by Judge Kramer; Chief Judge Clayton concurred; Judge Combs concurred in part, dissented in part, and filed a separate opinion.

Appellant and his medical practice appealed from a judgment entered in favor of appellee for retaliatory hostile work environment, the tort of outrage, front pay, and attorneys' fees and costs. The Court of Appeals affirmed in part and reversed in part. As to the retaliation claim, the Court rejected appellants' argument that the claim should have been dismissed because the PLLC had less than eight employees, as well as their corresponding request to apply the "employer" definition applicable to KRS 344.040, the discrimination statute, to KRS 344.280, the retaliation statute. The Court noted that the retaliation provision of the Kentucky Civil Rights Act (KCRA) states that "it shall be an unlawful practice for a person, or for two (2) or more persons to ... retaliate...." KRS 344.280. "Person" is defined in the KCRA to include "one (1) or more individuals, labor organizations, joint apprenticeship committees, partnerships, associations, corporations...." KRS 344.010(1). Accordingly, both appellant and the PLLC were "persons" who could be held liable for retaliation under KRS 344.280. As to the outrage claim, the Court held that while the merits of appellee's claim supported the jury's verdict, the claim was subsumed by her retaliation claim under the KCRA. Thus, the outrage judgment was reversed. In her partial dissent, Judge Combs asserted that *Wilson v. Lowe's Home Ctr.*, 75 S.W.3d 229 (Ky. App. 2001) governed the outrage issue and would permit that claim to proceed.

VII. CRIMINAL LAW

A. *Brown v. Commonwealth*

[2018-CA-001180](#) 07/26/2019 2019 WL 3367195

Opinion by Chief Judge Clayton; Judges Spalding and K. Thompson concurred.

Appellant, serving a 24-year sentence from earlier convictions, was indicted for intimidating a participant in the legal process during a pretrial hearing on three charges of solicitation to murder and being a second-degree persistent felony offender. Due to confusion arising from the readings of KRS 439.3401 and 501 KAR 1:030 Section 3(4), appellant's attorney advised appellant that his parole eligibility hearing date would not be affected by a guilty plea. However, appellant's parole eligibility date was extended by one year and five months, prompting his motion to withdraw the guilty plea pursuant to RCr 8.10 due to ineffective assistance of counsel. The circuit court denied the motion to withdraw, concluding that while appellant had received incorrect legal advice from his defense counsel about the effect the plea deal would have on his parole eligibility, any such error was not so gross nor were the consequences so dire as to amount to ineffective assistance of counsel. The Court of Appeals agreed and affirmed. The Court noted that considering the aggravating factors that plagued appellant (*i.e.*, his prior convictions), there was no definitive way to ascertain that the mistakes made by defense counsel were so gross as to impact appellant's parole hearing date in a way that would violate the Sixth Amendment. A parole hearing date is collateral in nature and parole is not guaranteed. Moreover, while having to wait an additional one year and five months to receive a parole hearing might have seemed unfair to appellant, the circuit court did not abuse its discretion when denying the motion to withdraw the guilty plea because it was made voluntarily. Facing the prospect of potentially receiving one year by proceeding to trial, as opposed to the additional two years agreed to in the voluntary guilty plea, did not rise to the standard of not being "rational under the circumstances" for the circuit court to reject the plea bargain.

B. Passmore v. Commonwealth

[2018-CA-000134](#) 07/19/2019 2019 WL 3242212

Opinion by Judge Kramer; Judges Nickell and L. Thompson concurred.

After appellee Jesse Passmore was arrested and charged with multiple offenses, the district court fixed his bail in the amount of \$25,000 and added two nonfinancial conditions, directing him “not to violate any local, state, or federal laws” and to “not be in possession of any firearm or deadly weapon.” The circuit court later assumed jurisdiction after a grand jury indicted Jesse on all counts. Jesse was arraigned, whereupon the circuit court entered an order regarding the terms of Jesse’s bail. The order provided that “[b]ail shall remain at \$25,000 full cash,” and also included the following sentence: “The Defendant shall comply with the following non-financial condition(s) of release: _____.” Appellant Cassandra Passmore posted a cash bond in the requisite amount of \$25,000, and Jesse was released on bond. Months later, Jesse was arrested again and taken into custody. Cassandra moved the circuit court to exonerate the \$25,000 bond that she had posted on Jesse’s behalf after Jesse was held in custody. Subsequently, the Commonwealth filed a motion asking for a determination that Jesse had forfeited his \$25,000 bond because he had “willfully violated the terms of his release by picking up a new felony arrest and possessing a firearm.” The circuit court agreed with the Commonwealth, holding that the district court’s nonfinancial conditions of Jesse’s bail “carried over”; that Cassandra should have been aware of those conditions because they were noted in the district court’s record; and that a nonfinancial condition to the effect of “no new violations of the law” was, foreseeably, a condition and basis of forfeiture implicit in every bail bond. The Court of Appeals reversed, concluding that the district court’s two nonfinancial conditions were not conditions of the bail set by the circuit court. Nowhere in its record did the circuit court attach any conditions upon Jesse’s bail or specify that it was continuing any of the conditions set by the district court. Once jurisdiction over Jesse’s bail passed from the district court to the circuit court, the circuit court was required to fix bail. When the circuit court did so, the district court’s prior bail order expired. Thus, any requirements that attended the district court’s order did not automatically “carry over,” but instead became moot and unenforceable. Nonfinancial conditions such as the ones at issue must - whether by virtue of a checked box, filled-in blank, or otherwise - be explicitly stated in an effective court order and ensuing bond agreement.

VIII. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. *Tipan v. Tipan*

[2018-CA-001504](#) 07/26/2019 2019 WL 3367192

Opinion by Judge Nickell; Judges Kramer and L. Thompson concurred.

Daughter filed a domestic violence petition seeking protection from Father for herself and her minor siblings. Daughter and her siblings had fled their home country of Ecuador with their mother in 2016 to escape alleged abuse by Father. Mother moved to Texas and was actively seeking asylum. Father came to Kentucky in 2018 and began harassing, threatening, and stalking Daughter and her siblings, precipitating the filing of the petition. Father moved for dismissal, requested an expedited hearing date, and attempted to register a foreign order regarding a custody agreement related to the minor children. At the hearing on the petition, the circuit court stopped proof before Daughter, the first witness sworn, completed testifying. The court expressed its beliefs that it had jurisdictional issues, that custody issues would be more appropriately dealt with in Mother's asylum action, that immigration issues should be handled in a different forum, and that even if domestic violence had occurred, a DVO would not protect Daughter from what would occur in Ecuador. Over Daughter's objection, the circuit court dismissed the petition, noting on the docket sheet: "Ct. does not believe DV proceeding is appropriate way to proceed." Daughter appealed. The Court of Appeals reversed and remanded upon concluding that the circuit court did not afford the parties a "full evidentiary hearing" as required by *Wright v. Wright*, 181 S.W.3d 49 (Ky, App. 2005). The Court held that the circuit court erred in prohibiting counsel from completing proof before announcing its decision. Finally, the Court noted that the circuit court did not fulfill its duty to enter written findings of fact and conclusions of law revealing the rationale for its decision, which are mandatory in DVO proceedings.

IX. SUMMARY JUDGMENT

A. Turner v. C & R Asphalt, LLC

[2017-CA-001153](#) 07/05/2019 2019 WL 2896041

Opinion by Judge Lambert; Judges Acree and Spalding concurred.

Appellant was hired as a remodeler for a home project in Lexington. He advised the homeowner that he was incapable of performing the work on the driveway, so the homeowner authorized appellant to contract with an asphalt company to do the paving. After work was completed, the homeowner refused to pay the asphalt company, which then proceeded to file a lien on the property and a lawsuit against the homeowner and other parties, including appellant. Appellant, the homeowner, and the asphalt company filed motions for summary judgment. The circuit court granted the asphalt company's motion for summary judgment against appellant (finding that he was personally liable) for the contract price, plus awarded interest, costs, and attorneys' fees. The other motions were denied. The Court of Appeals vacated and remanded, holding that summary judgment against appellant was not appropriate because the asphalt company failed to show that he could not prevail under any circumstances. The Court further held that the facts of the remaining claims were inextricably intertwined with the summary judgment granted to the asphalt company and that the resolution of the remaining claims should not be hindered by the premature finding that appellant was personally liable.

X. TORTS

A. *Littrell v. Bosse*

[2018-CA-001137](#) 07/26/2019 2019 WL 3367196

Opinion by Judge Spalding; Judges Dixon and Taylor concurred.

Appellant, a former police officer and instructor at Georgetown College, challenged the summary disposition of his claims of contractual interference, outrage, witness intimidation, harassment, and official misconduct against Georgetown Police Chief Michael Bosse and the City of Georgetown. The Court of Appeals affirmed. The claims stemmed from a conversation in which appellant and Chief Bosse discussed appellant's Facebook posts concerning pending litigation between the police department and an officer who worked with appellant when he was with the department. Appellant contended that Chief Bosse attempted to get him to lie during his upcoming testimony in that litigation and that he refused to do so. Appellant's attorney subsequently sent Chief Bosse a letter about their conversation and warned him about interfering with his job at the college. However, either because he had already done so, or because he was undeterred by the letter, Chief Bosse contacted counsel for the college with information about the Facebook posts that eventually reached a provost. The college took no action against appellant, assuring him that the college would protect his First Amendment rights so long as he abided by the college handbook and even renewing his contract, but he resigned from his teaching position the following year. In affirming, the Court of Appeals first held that the circuit court did not err in refusing to apply the Restatement (Second) of Torts §766A to appellant's claim that Chief Bosse had intentionally interfered with his contractual relations with the college. The Court noted that Kentucky had yet to adopt that section of the Restatement. Moreover, even if Chief Bosse had attempted to interfere with appellant's contractual relationship with the college, the fact remained that he was unsuccessful because the college renewed appellant's contract. Harm without injury is not a tort. The Court also rejected appellant's arguments relating to his intentional infliction of emotional distress claim, holding that summary judgment was appropriate because his claim was not supported by expert medical or scientific proof. Finally, the Court rejected appellant's arguments relating to his claims that Chief Bosse had violated KRS 524.040, 525.080, and 522.030(1)(a).

B. Stanziano v. Cooley

[2017-CA-001430](#) 07/05/2019 2019 WL 2896037

Opinion by Judge Nickell; Judges Combs and K. Thompson concurred.

A former mental patient of Eastern State Hospital shot and killed attorney Mark Stanziano approximately six weeks after being discharged. Stanziano's widow and estate sued Eastern State and mental health professionals who had treated the patient on claims of wrongful death and medical malpractice. The circuit court determined that the physicians were shielded from liability by the provisions of KRS 202A.400 and further concluded that Stanziano had failed to carry her burden of proof to proceed against Eastern State. A claim of sovereign immunity by Eastern State was denied as moot. On appeal, Stanziano asserted that the circuit court erred in concluding that the physicians were entitled to summary judgment under KRS 202A.400 absent a showing that they had treated the patient in good faith and within acceptable professional guidelines (as required by KRS 202A.301) and further erred in concluding that the personal immunity granted by KRS 202A.400 extended to cover Eastern State. On cross-appeal, Eastern State asserted that it was entitled to sovereign immunity. The Court of Appeals affirmed as to the direct appeal and concluded that the cross-appeal was moot. The Court concluded that because the patient had not communicated to anyone at Eastern State an actual threat to inflict harm on Mark Stanziano, the statutory duty to warn under KRS 202A.400 was not triggered. Moreover, Stanziano failed to establish the applicability of any common law duty and failed to produce evidence that the physicians had breached the standard of care. Thus, summary judgment in their favor was appropriate. The Court next rejected Stanziano's assertion that the circuit court erroneously applied the provisions of KRS 202A.400 to a non-covered entity. The circuit court made no mention of the statute in granting summary judgment to Eastern State and instead relied on the doctrine of *respondeat superior*. As its servants had not been negligent, no liability could be imputed to Eastern State.

XI. WORKERS' COMPENSATION

A. *Morgan v. Bluegrass Oakwood, Inc.*

[2019-CA-000423](#) 07/26/2019 2019 WL 3367190

Opinion by Judge Kramer; Judges Nickell and L. Thompson concurred.

On February 17, 2014; June 14, 2015; and April 19, 2016, appellant respectively sustained three work-related injuries while employed by Bluegrass Oakwood, Inc. as a “residential associate.” Ultimately, the Workers’ Compensation Board affirmed an order of an Administrative Law Judge (ALJ) that considered appellant’s three injuries and awarded her permanent partial disability (PPD) income benefits enhanced by the double multiplier set forth in KRS 342.730(1)(c)2. On appeal, appellant argued that the ALJ misapplied the law to his own factual findings relating to the enhancement of her award, and that her award should have instead been enhanced by the triple multiplier set forth in KRS 342.730(1)(c)1. The Court of Appeals agreed. According to the ALJ’s findings and the evidence that he specifically deemed credible, when appellant returned to work at various times after sustaining her February 17, 2014 injury, she returned to a type of work (*i.e.*, that of a residential associate) that she lacked the physical capacity to perform. There was no proof in the record that appellant had been paid any wages - much less weekly wages equal to or greater than what she had earned as a residential associate (as required by KRS 342.730(1)(c)2) - since April 19, 2016, the date the ALJ determined that appellant’s work injuries had eventually caused her to stop working in that position. Because the ALJ was not at liberty to speculate that appellant could work in some other type of position for an equal or greater wage, there was no meaningful difference between appellant’s situation and the situation in which a claimant who lacked the physical capacity to return to her pre-injury employment decided not to return to work at all. The Court reversed with directions that appellant’s award be enhanced by the triple multiplier set forth in KRS 342.730(1)(c)1.