**PUBLISHED OPINIONS**

**KENTUCKY COURT OF APPEALS**

**JUNE 1, 2014 to JUNE 30, 2014**

## I. APPEALS

### A. ***Krugman v. CMI, Inc.***

2012-CA-000544 06/13/2014 437 S.W.3d 167

Opinion and order dismissing by Judge Dixon; Judge Nickell concurred; Judge Taylor concurred and filed a separate opinion. Appellee successfully moved to strike appellants' initial brief, and a panel of this Court ordered appellants to file a brief that specifically complied with CR 76.12(4)(c)(v). Despite this directive, appellants' second brief still failed to fully comply with the rule. Appellee subsequently filed a motion to strike appellants' second brief and to dismiss the appeal. The Court of Appeals concluded that appellants' second brief was clearly deficient, which showed appellants' disregard for the procedural rules and an explicit order from the Court. Consequently, the Court granted appellee's motion to dismiss the appeal. Judge Taylor concurred with the result but indicated that he would affirm on the merits.

## II. ATTORNEY AND CLIENT

### A. ***Hughes v. Demoisey***

2010-CA-002093 06/13/2014 2014 WL 2632504 DR Pending

Opinion by Judge Thompson; Judges Maze and Stumbo concurred. Former clients brought a legal malpractice claim against their attorney seeking $5.4 million in damages; the attorney counterclaimed based on various theories to recover his attorney's fees in an underlying state action. The circuit court granted summary judgment in favor of the attorney on the malpractice claim, and in a subsequent order, ruled against the attorney on all but his *quantum meruit* claim. While the appeal and cross-appeal from these orders were pending, the circuit court granted the attorney's motion to transfer the matter to federal district court, which awarded the attorney $1.4 million on his *quantum meruit* claim. The Court of Appeals held that the legal malpractice claim was barred by the statute of limitations. The Court concluded that the claim accrued, and the one-year occurrence limitation period began to run, on the date the underlying litigation was resolved by an oral settlement agreement. The Court further held that the discovery limitation period provided for in KRS 413.245 was not applicable where the alleged malpractice was known by the plaintiffs when the settlement agreement was reached and the attorney-client relationship was informally terminated. Any injury became fixed and non-speculative at that point, regardless of any delay in executing a formal written settlement or agreement or dismissing the underlying litigation. As for the attorney's appeal from the trial court's dismissal of his counterclaims, the Court held that the appeal was rendered moot by virtue of his recovery on his *quantum meruit* claim in federal court. By electing to remove the case to federal court and recover on the basis of *quantum meruit*, the attorney elected that remedy and waived claims related to the existence of a contingency fee contract.

## III. CHILD SUPPORT

### A. ***Hawkins v. Hawkins***

2013-CA-001297 06/20/2014 437 S.W.3d 171

Opinion by Chief Judge Acree; Judge Maze concurred; Judge Thompson dissented and filed a separate opinion. Appellant sought reversal of the family court's order modifying child support, arguing the family court failed to take appellee's limited partnership income into consideration when calculating her total income for child support purposes. In affirming, the Court of Appeals clarified that it is a mistake to equate the taxable allocation of income from a limited partnership, as reported on Line 17 of a Form 1040, with an actual distribution of cash or property. The allocation of income to a limited partner represents that partner's proportionate share of tax liability for being a member of a limited partnership. Unlike a distribution of income - which is more akin to a wage or to cash - an allocation of income does not represent actual monies received by a limited partner. In this case, there was no evidence that the income allocated to appellee was actually distributed to her. In dissent, Judge Thompson stated that the matter should be reversed and remanded for the family court to make specific factual findings as to what income appellee received as a distribution from the partnership and to use this amount in calculating her total income before determining the amount of child support.

## IV. CIVIL RIGHTS

**A.** ***Sangster v. Kentucky Bd. of Medical Licensure***

2012-CA-001831 06/20/2014 454 S.W.3d 854

Opinion by Judge Moore; Chief Judge Acree and Judge Jones concurred. Following disciplinary proceedings, the Kentucky Board of Medical Licensure (KBML) indefinitely restricted appellant's license to practice medicine and assessed him with costs. In addition to appealing this administrative decision, appellant filed a separate 42 U.S.C. § 1983 action for monetary damages against the KBML and its members in their individual capacities. As the basis for his § 1983 action, appellant asserted that the KBML's order was: 1) the product of the KBML's fraud and misconduct involving its administration of its authorizing legislation and the provisions of KRS 13B.005 *et seq.*; 2) in violation of constitutional and/or statutory provisions; 3) in excess of the statutory authority of the KMBL; 4) without support of substantial evidence on the whole record; 5) arbitrary, capricious, or characterized by abuse of discretion; 6) based on ex parte communications that substantially prejudiced appellant's rights and likely affected the outcome of his disciplinary proceedings; and 7) affected by a failure of the hearing officer conducting the proceeding to be disqualified due to bias. Rather than answering appellant's complaint, the KBML and its members moved to dismiss on grounds of immunity. Specifically, the KBML asserted immunity from suit based upon the Eleventh Amendment of the United States Constitution, and the members of the KBML, who had been sued in their individual capacities, asserted absolute quasi-judicial immunity. The circuit court granted appellees' motion to dismiss on both grounds. In affirming, the Court of Appeals held that it was unnecessary for the circuit court to have relied upon the Eleventh Amendment as a basis for dismissing appellant's damages suit against the KBML because the KBML is a state agency, and states, state agencies, and state officials sued in their official capacities for money damages are not "persons" subject to suit under § 1983. The Court further noted that while KRS 311.603 provides that the KBML and its members may be subject to liability where "actual malice is shown or willful misconduct is involved," it supplies no basis for a § 1983 suit against the KBML or its members. A state may not, by statute or common law, create a cause of action under § 1983 against an entity whom Congress has not subjected to liability, or define the defenses to a federal cause of action. Lastly, the Court held that under federal law, the individual members of the KBML were entitled to absolute quasi-judicial immunity from appellant's § 1983 action.

## V. CRIMINAL LAW

### A. ***Abukar v. Commonwealth***

2012-CA-001527 06/27/2014 2014 WL 2916879 DR Pending

Opinion by Judge Caperton; Judge Combs concurred; Judge Thompson concurred in part, dissented in part, and filed a separate opinion. The Court of Appeals reversed appellant's conviction for first-degree rape and remanded for a new trial. In so doing, the Court held that the trial court exceeded its discretion in declining to appoint an interpreter for appellant to use during trial following appellant's request that an interpreter be appointed. The Court determined that while appellant may have had a sufficient grasp of the English language to enable him to converse with the police, a higher mastery of the language might be necessary to thoroughly understand all of the complexities of a trial. Therefore, appointment of an interpreter was necessary to safeguard appellant's constitutional rights. In his partial dissent, Judge Thompson contended that while appellant's English was not perfect, he appeared to be able to communicate in English to a sufficient extent to understand the nature of the proceedings and any occasional lack of understanding did not substantially prejudice his rights.

**B.** ***Blevins v. Commonwealth***

2013-CA-000293 06/20/2014 435 S.W.3d 637

Opinion by Judge Stumbo; Judges Clayton and Combs concurred. The Court of Appeals reversed an order requiring appellant to pay restitution to the ASPCA in the amount of $338,810.63. Appellant was in possession of over 100 dogs in Rowan County. Following an investigation, the dogs were found to be living in inhumane conditions. The Rowan County government was unable to handle such a large number of dogs, so it contacted the ASPCA to request its assistance. The ASPCA volunteered to help and told Rowan County there would be no charge for its services. Appellant entered a conditional guilty plea to two counts of cruelty to animals and one violation of the Rowan County Kennel Ordinance. The district court accepted the plea and also ordered restitution be paid to the ASPCA on the grounds that, but for appellant's criminal acts, the ASPCA's participation would not have been necessary. In reversing, the Court noted that KRS 532.350(1) provides that restitution is "any form of compensation paid by a convicted person to a victim[.]" The Court held that the ASPCA was not a "victim" for the purposes of restitution because it is not an entity that was directly harmed by appellant's criminal conduct. Instead, the ASPCA voluntarily accepted Rowan County's request for help.

**C.** ***Hawley v. Commonwealth***

2013-CA-001163 06/13/2014 435 S.W.3d 61

Opinion by Judge Lambert; Judge Moore concurred; Judge Maze concurred in result only and filed a separate opinion. The Court of Appeals affirmed a judgment convicting appellant of manufacturing methamphetamine and possession of a controlled substance pursuant to a conditional guilty plea. The Court upheld the denial of appellant's motion to suppress evidence seized in a warrantless search of a house and garage belonging to appellant's grandfather because appellant did not have a legitimate expectation of privacy in the house and garage. Appellant's grandfather was no longer living at the house, appellant was at the house during the search at his mother's direction to do housework, and appellant only occasionally stayed at the house for one or two nights to protect it from break-ins. The Court further held that even if appellant had standing to challenge the search, the search was justified under the plain view and exigent circumstances exceptions. Police smelled a strong chemical odor indicating the presence of a methamphetamine lab immediately upon arriving at the property, and a plastic bottle found outside of the garage appeared to have been used in the manufacture of methamphetamine. As a result, police were concerned about potential injury to the house's occupants due to asphyxiation or explosion. In concurrence, Judge Maze stated that appellant's lack of standing to challenge the search should be solely dispositive of the case.

## VI. HEALTH

### A. ***Commonwealth of Kentucky, Board of Chiropractic Examiners v. Barlow***

2013-CA-000552 06/27/2014 454 S.W.3d 862

Opinion by Judge Moore; Judges Taylor and VanMeter concurred. Two medical doctors rendered opinions to an insurance carrier for the purpose of assisting the carrier in determining whether to pay or deny personal injury protection (PIP) benefits to individuals involved in motor vehicle accidents who later sought chiropractic treatment. The Kentucky Board of Chiropractic Examiners sought an injunction in Franklin Circuit Court against both doctors, contending that they had violated KRS 312.200(3) because: (1) it had not licensed and trained either doctor pursuant to KRS 312.200(3); and (2) both doctors had rendered opinions regarding the reasonableness and necessity of chiropractic treatment and, in its view, had therefore conducted unauthorized "peer reviews" within the meaning of KRS 312.015(4). The circuit court dismissed the Board's suit, and the Board subsequently appealed. In affirming, the Court of Appeals interpreted these statutory provisions to mean that if an individual evaluates the appropriateness, quality, utilization, and cost of health care and health service provided to a patient by a Kentucky chiropractor, but has done so without the license and training described in KRS 312.200(3) and without purporting to do so under the purview of KRS 312.200, that individual has not conducted a "peer review" within the meaning of these statutory provisions and is not, therefore, subject to any kind of action or censure from the Board.

## VII. IMMUNITY

### A. ***Rivera v. Lankford***

2012-CA-002057 06/06/2014 2014 WL 2536914 DR Pending

Opinion by Chief Judge Acree; Judges Caperton and VanMeter concurred. The Court of Appeals affirmed in part and reversed in part a judgment of the Jefferson Circuit Court granting summary judgment in favor of the Louisville Jefferson County Metro Government and several employees of the Louisville Zoo, in their individual capacities, on the basis of their qualified official immunity, and granting summary judgment in favor of the Louisville Zoo Foundation and three other Louisville Zoo employees after having determined they owed no duty to the plaintiffs. The underlying suit came about after the Green Train at the Louisville Zoo overturned. The Court first concluded that the Louisville Jefferson County Metro Government is a county government entitled to sovereign immunity. Next, the Court reversed the trial court's finding that Louisville Zoo Director John Walczak was protected by qualified official immunity. Distinguishing *Autry v. Western Kentucky University*, 219 S.W.3d 713 (Ky. 2007), the Court held that Walczak could not delegate away his ministerial statutory duties and, therefore, was not entitled to qualified official immunity. The Court also held that the majority of the remaining zoo employees were likewise not entitled to qualified official immunity because certain statutes imposed upon them defined ministerial duties related to the operation or maintenance of the Green Train. Finally, the Court held that the Louisville Zoo Foundation and three zoo employees were entitled to summary judgment because they owed no duty to the plaintiffs with respect to the operation or maintenance of the Green Train.

**B.** ***White v. Norton Healthcare, Inc.***

2013-CA-000023 06/13/2014 435 S.W.3d 68

Opinion by Judge Jones; Judges Lambert and Stumbo concurred. Mother, individually and on behalf of her minor daughter, filed a complaint against a hospital, physicians, and the physicians' employer alleging medical negligence and violation of KRS 620.030 - Kentucky's statute governing reporting suspected child abuse. The circuit court granted appellees' motion for summary judgment after finding that appellees had not violated KRS 620.030 and that they were immune from civil liability pursuant to KRS 620.050. In affirming, the Court of Appeals held that under the standards set forth in *Norton Hospitals Inc., v. Peyton*, 381 S.W.3d 286 (Ky. 2012), there was no evidence to support appellant's contention that appellees acted in "bad faith" or negligently in making a report of suspected child abuse and placing an involuntary hold on the minor. Sufficient undisputed facts were present to support appellees' subjective belief of possible abuse, which entitled them to immunity pursuant to KRS 620.050. Moreover, the Court held that summary judgment was not granted prematurely because, under Kentucky law, statutory immunity is designed to relieve a defendant from the burdens of litigation. Thus, a defendant should be able to invoke immunity at the earliest stage of a proceeding.

## VIII. NEGLIGENCE

### A. ***McKinley v. Circle K***

2013-CA-000289 06/20/2014 435 S.W.3d 77

Opinion by Judge VanMeter; Judges Combs and Dixon concurred. In this premises liability action, the Court of Appeals held that the trial court erred in granting summary judgment based on a finding that appellee did not have a duty to protect appellant from "open and obvious" snow and ice conditions on its premises, where appellant had slipped and fallen. The Court noted that the Supreme Court of Kentucky had revised the analysis to be conducted in "open and obvious" cases such as this one in *Shelton v. Ky. Easter Seals Soc'y, Inc.*, 413 S.W.3d 901 (Ky. 2013). Because appellant was an invitee, appellee owed him not only a general duty of reasonable care, but also the more specific duty associated with the land possessor-invitee relationship to protect invitees from unreasonable risks posed on the property. The question then becomes whether appellee fulfilled the relevant standard of care owed to appellant, which is a question of breach, not duty. Based on the evidence in this case and the requirements of *Shelton*, the Court concluded that a genuine issue of material fact existed as to whether appellee could have foreseen the harm to appellant and whether it acted reasonably in fulfilling its duty to invitees to protect against the risk of physical injury from the ice and snow. As a result, reversal was merited.

## IX. ORIGINAL ACTIONS

### A. ***Doe v. Coleman***

2014-CA-000293 06/20/2014 436 S.W.3d 207

Opinion and order granting petition for a writ of prohibition by Judge Jones; Judges Stumbo and VanMeter concurred. The chair of a county airport board of directors brought a defamation action against several anonymous users of a website for posting allegedly defamatory statements on the website. The users moved to quash a subpoena requiring disclosure of their identities. The circuit court denied the motion, and the users filed a petition for a writ of prohibition. In granting the petition, the Court of Appeals held that the chair failed to demonstrate a *prima facie* defamation case so as to warrant disclosure of the users' identities. In reaching this decision, the Court set forth the appropriate factors for a trial court to consider before revealing the identity of anonymous internet users in a defamation case.