

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**JUNE 1, 2018 to JUNE 30, 2018**

**I. APPEALS**

**A. *J.E. v. Cabinet for Health and Family Services***

[2017-CA-001751](#) 06/29/2018

Opinion and Order dismissing by Judge Kramer; Judges Johnson and Maze concurred.

In these dependency, neglect, and abuse cases, appellants were ordered to show good cause why the appeals should not be dismissed as premature based on the fact that they were filed after adjudication but before disposition had occurred. Following consideration of appellants' response, the Court of Appeals dismissed the appeals as interlocutory. The Court noted that pursuant to KRS 620.155, a parent aggrieved by a proceeding in a dependency, neglect, or abuse case may appeal as a matter of right. The statute, however, does not delineate with particularity the type of proceeding that may be appealed. Juvenile proceedings such as this are bifurcated proceedings, *i.e.*, they consist of two distinct hearings, adjudication and disposition. At issue, then, was whether the rights of all parties had been fully adjudicated for purposes of appellate review in the absence of the completion of both the adjudication and disposition hearings. The Court concluded that disposition is the point of finality and that a disposition order, not an adjudication order, is the final and appealable order with regard to a decision of whether a child is dependent, neglected, or abused. Because these appeals were not taken from a final order, they were dismissed as interlocutory.

**B. *Jones v. Livesay***

[2016-CA-000959](#) 06/01/2018 2018 WL 2449126

Opinion by Judge Nickell; Judges Dixon and Kramer concurred.

This appeal in a divorce action challenged the family court's decisions regarding timesharing with the parties' minor child and the classification and

division of marital and non-marital assets. In affirming, the Court of Appeals addressed multiple procedural issues and how they limited the Court's ability to review the allegations of error. For example, the notice of appeal indicated that the appeal was taken from a denial of appellant's post-judgment motion to alter, amend, or vacate the family court's earlier findings of fact, conclusions of law, and decree of dissolution. Appellee moved to dismiss for failure to appeal from a final and appealable order. However, the Court permitted the appeal to continue because the policy of substantial compliance dictated that dismissal on this basis would be inappropriate. The Court also noted that appellant's briefs failed to comply with the requirements of CR 76.12(4)(c)(iv) and (v) by not including statements of preservation for any of her arguments and by failing to cite to the record on appeal. Further, appellant's arguments were bare bones, citing the general authority applicable to the point of law at issue and containing little else; appellant also attempted to raise issues for the first time on appeal. In light of this, the Court refused to search the record to create arguments for appellant and disregarded any unpreserved or unargued allegations of error. As to the sole properly-preserved issue, the Court discerned no error in an award to appellee of a non-marital interest in a farm purchased during coverture. Appellee properly traced the funds used to renovate a residence located on the property to a non-marital inheritance, and uncontradicted evidence supported the family court's determination.

## II. ARBITRATION

### A. *Ambac Assurance Corporation v. Knox Hills LLC*

[2017-CA-000149](#) 06/15/2018 2018 WL 2990839

Opinion by Judge Kramer; Judge J. Lambert concurred; Judge Taylor concurred and wrote a separate opinion.

In a breach of contract action, Knox Hills LLC sought an order staying the proceedings and compelling Ambac Assurance Corporation, pursuant to the terms of their contract, to arbitrate. Over Ambac's objection, the circuit court granted Knox Hills' motion and required the parties to submit their dispute to the arbitrator for two purposes: (1) to determine whether the arbitration agreement was enforceable; and, if so, (2) to resolve the parties' contract dispute. The arbitrator determined that the parties' arbitration agreement was enforceable, and the contract dispute was resolved in favor of Knox Hills. On appeal, Ambac argued that the circuit court should not have permitted the arbitrator to determine whether the parties were properly subject to binding arbitration. Ambac alternatively argued that the circuit court should not have affirmed the arbitrator's award because, contrary to the arbitrator's holding, arbitration was never required. The Court of Appeals agreed with Ambac as to both arguments and reversed. With respect to the first of Ambac's arguments, the Court agreed because Ambac's refusal to arbitrate was based upon a matter of substantive arbitrability (an issue typically decided in the first instance by the courts), as opposed to procedural arbitrability (an issue typically decided in the first instance by an arbitrator). Namely, Ambac's argument concerned whether a contract to arbitrate had ever been formed between Ambac and Knox Hills. With respect to Ambac's second argument, the Court also determined that no such contract had been formed and, accordingly, that the lower court had erred by affirming the arbitrator's award.

### III. CHILD CUSTODY AND RESIDENCY

#### A. Officer v. Blankenship

[2017-CA-001012](#) 06/15/2018 2018 WL 2991951

Opinion by Judge Jones; Judges Acree and Johnson concurred.

At issue was whether the parties had the ability to vest the family court with jurisdiction to adjudicate the custody of their two minor children under Kentucky's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) by agreeing that Kentucky qualified as the children's home state. Appellant asserted that the family court never had the authority to adjudicate custody notwithstanding the parties' property settlement agreement designating Kentucky as the children's home state; therefore, the family court's continuing jurisdiction over this matter was improper. Appellee contended that appellant had waived her ability to contest jurisdiction because she had initially agreed to the family court adjudicating custody and had failed to timely object to its exercise of jurisdiction thereafter. The Court of Appeals held that the family court never had subject matter jurisdiction to decide the custody of the parties' two minor children because, according to the UCCJEA, Kentucky was not the children's home state. Jurisdiction under the UCCJEA is in the nature of general subject matter jurisdiction; as such, it cannot be created by agreement, is not subject to waiver, and, if absent, renders the underlying judgment void. Because the family court never acquired jurisdiction over the initial custody decision, its subsequent orders attempting to modify custody, timesharing, and visitation were also void. The family court should have granted appellant's CR 60.02 motion to set aside the dissolution decree, to the extent that it resolved custody issues, and relinquished all custody determinations to an Oregon court.

#### **IV. CONTRACTS**

A. *Western Surety Company v. City of Nicholasville*

[2015-CA-000168](#) 06/08/2018 2018 WL 2749509

Opinion by Judge Nickell; Judge Kramer concurred; Judge Thompson concurred in result only.

JAH Nicholasville Investment, LLC, a real estate developer, proposed a new subdivision and hired Central Rock Mineral Company, LLC as the excavating and construction contractor. Appellant posted three payment bonds guaranteeing Central Rock's faithful performance of its contract with JAH. When JAH abandoned the project prior to completion - ultimately declaring bankruptcy - the City of Nicholasville sought payment on the bonds to finish the project from appellant, claiming a breach by Central Rock. Appellant balked and moved for summary judgment, arguing that Central Rock had performed its contract with JAH, was never declared in default, received no complaints about its work, and ceased working on the project only after JAH failed to pay invoices for completed work amounting to \$1.2 million. Appellant argued that JAH's failure to pay Central Rock (as specifically required by the bonds) excused further performance by Central Rock under its contract with JAH. Dual obligee riders, attached to each bond, listed the City (and other governmental entities) as additional obligees. Thus, when JAH failed to pay Central Rock pursuant to the terms of their contract, the City became obligated to pay Central Rock to keep the policy in force, but it made no payments. The circuit court denied summary judgment, finding that Central Rock had a valid contract with the City because all bonds identified Central Rock as "principal." The circuit court reasoned that by signing bonds and riders as "principal," Central Rock "stepped into JAH's shoes . . . undertaking completion of construction and improvement" of the entire development. The Court of Appeals reversed and remanded. The Court noted that in 1980, the City adopted subdivision development regulations consistent with KRS 100.281(4) requiring "good and sufficient surety to insure proper completion of physical improvements[.]" The surety was required to guarantee that the developer did not start and stop construction, leaving an unfinished, deteriorating and dangerous site - precisely what happened in this case. Under the City's regulations, JAH - the project developer - should have been identified as "principal." It was not, but the City accepted the flawed bonds and approved plats based on them. Because the bonds did not conform to the City's regulations, the bonds could not satisfy the posting of "good and sufficient surety" reflected in KRS 100.281(4) and could not become the basis for a valid contract between Central Rock and the City as the circuit court had found. The Court held that the City must bear responsibility for failing to ensure that appellant's bonds were correct and adequate for their intended purpose. The

Court further held that the circuit court could not rewrite the bonds to save the City from its own negligence.

## V. CRIMINAL LAW

### A. *Camacho v. Commonwealth*

[2017-CA-000275](#) 06/01/2018 2018 WL 2449242 DR Pending

Opinion by Judge Jones; Chief Judge Clayton and Judge Dixon concurred.

Appellant was tried and found guilty of three counts of first-degree sexual abuse, victim under twelve years of age. On appeal, appellant argued that the circuit court erred when it denied his motion for a directed verdict. Alternatively, he argued that he was denied his right to present a defense when the circuit court refused to allow him to question one of the victims about her claim that her uncle had subjected her to the same type of sexual abuse that she accused appellant of committing against her. The Court of Appeals affirmed. Following the rule set forth in *Ross v. Commonwealth*, 531 S.W.3d 471 (Ky. 2017), regarding the content of a witness's statements, the Court held that the circuit court did not err when it denied appellant's motion for a directed verdict. The victims' testimony describing appellant's role in abusing them was not so extraordinarily implausible or inherently impossible that it was manifestly without probative value or patently unworthy of belief. Moreover, the conduct described by the victims was sufficient to support the charges of sexual abuse against each victim. Accordingly, the circuit court was correct in allowing the case to move forward. In addressing appellant's alternative argument, the Court held that appellant was given the opportunity to present his defense to the jury because the circuit court allowed testimony that the children could have come up with these allegations from their exposure to other sexually explicit sources. Accordingly, the Court held that it was harmless error for the circuit court to exclude the victim's statements concerning her uncle.

**B. Carr v. Commonwealth**

[2017-CA-001457](#) 06/01/2018 2018 WL 2449115 DR Pending

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

Appellant challenged the denial of his motion to suppress evidence uncovered during a vehicle stop on grounds that a police officer improperly detained him beyond the completion of the initial purpose for the stop. After pulling the appellant over for weaving in traffic, the officer printed a warning for careless driving. Before giving appellant the printed warning, the officer asked appellant to exit the vehicle and speak with him. The officer testified that he did this to explain the printed warning, and to further investigate appellant's possible impairment. Upon speaking to appellant outside of the vehicle, the officer noticed that appellant's pupils were dilated and that his speech was slurred. Appellant failed two field sobriety tests, after which he consented to a body search and was found to be in possession of illegal drugs. On appeal, appellant argued that all evidence obtained after the officer printed the warning and returned to his driver's window should have been suppressed. The Court of Appeals affirmed, holding that the detention of appellant was reasonably related to the purpose of the vehicle stop. The clear purpose of the stop was to investigate appellant's erratic driving and to issue a citation or effect an arrest if warranted. This purpose did not terminate immediately at the point when the warning was printed. Rather, the purpose of the stop - to investigate why appellant was driving erratically - continued while the officer was speaking to appellant and explaining the warning to him after he exited the vehicle.

C. *Commonwealth v. Bennett*

[2017-CA-000397](#) 06/22/2018 2018 WL 3075812

Opinion by Judge Nickell; Judge Dixon concurred; Judge Thompson concurred in result only.

The Commonwealth appealed an order granting appellee's motion to dismiss charges and grant immunity from prosecution on self-defense grounds pursuant to KRS 503.085. The Court of Appeals reversed the dismissal and grant of immunity and remanded for reinstatement of the charges. The charges stemmed from a shooting following an altercation involving several people. In granting the motion to dismiss, the circuit court relied on appellee's explanation of the events to find probable cause for justification and, consequently, immunity from prosecution. However, the proper standard is whether the circuit court, based on the record before it, had a substantial basis for finding probable cause to believe appellant's use of deadly force was unlawful - not whether his self-defense was justified. The circuit court made no findings on whether appellee's escalation of force was reasonable or justified, particularly when the shooting victim and at least one endangered bystander did not appear to take part in any physical aggression. The Court of Appeals noted that KRS 503.120 qualifies self-defense justification when an innocent third-party is injured or the level of force used was unreasonable. Because the circuit court applied the wrong legal standard, its grant of appellee's motion to dismiss was erroneous. On remand, the circuit court was directed to consider all evidence currently in the record and all aspects of self-defense to determine - under the totality-of-the-circumstances standard - if probable cause existed to suggest appellee's act of shooting was an unlawful use of force.

D. *Commonwealth v. Crosby*

[2017-CA-000572](#) 06/29/2018 2018 WL 3193074

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

A district court found that a police department had operated an unconstitutional traffic safety checkpoint. The district court further found that suppression of the blood alcohol content (BAC) test results of a suspected drunk driver snared in the checkpoint was necessary because, before administering the test, the breathalyzer technician did not observe the driver “at the location of the test for a minimum of twenty (20) minutes,” as required by KRS 189A.103(3)(a). The circuit court agreed, as did the Court of Appeals, which affirmed suppression unanimously. The checkpoint was determined to have been unconstitutional because it did not sufficiently comply with the four factors set forth in *Commonwealth v. Buchanan*, 122 S.W.3d 565 (Ky. 2003). The BAC test result was properly suppressed because the full twenty-minute observation period did not occur at the test location as statutorily required.

E. *Commonwealth v. Roden*

[2017-CA-000002](#) 06/01/2018 2018 WL 2449122

Opinion by Judge Nickell; Judges Combs and Jones concurred.

The Commonwealth appealed from an order suppressing a lockbox and contents belonging to appellee. The box was seized during a warrantless search of a stolen vehicle appellee was driving when stopped by police. It was opened during an inventory search of the entire vehicle prior to impoundment and was found to contain syringes and drugs. The circuit court suppressed the lockbox and its contents based on *Florida v. Wells*, 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990) because, prior to the stop, the Richmond Police Department had not adopted a policy addressing the handling of closed containers by officers during an inventory search. On appeal, the Commonwealth argued that appellee had no reasonable expectation of privacy in a stolen car. The Court of Appeals reversed and remanded, concluding that the case turned on standing, not on the adoption of a police policy on inventory searches. To seek suppression of the lockbox and its contents, appellee had to prove that he had standing, a burden requiring proof of “a subjective expectation of privacy in the object of the challenged search,” and that “society is prepared to recognize that expectation as legitimate.” *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1510 (6th Cir. 1988) (citations omitted). Here, appellee did not testify and offered no proof regarding the issue; he also did not dispute that the car was stolen. In light of this, and on the strength of *United States v. Hargrove*, 647 F.2d 411 (4th Cir. 1981), the Court held that appellee had no reasonable expectation of privacy in the stolen car or its contents.

F. *Sykes v. Commonwealth*

[2017-CA-000872](#) 06/08/2018 2018 WL 2749347

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

Appellant challenged the portion of a judgment convicting him of carrying a concealed deadly weapon. He argued that the Commonwealth failed to prove that the weapon in the waistband of his pants was concealed and that the circuit court should have granted a directed verdict of acquittal on that charge. The Court of Appeals affirmed, rejecting appellant's argument based upon the testimony of the arresting officers that the firearm was under appellant's shirt and was not visible until he raised his arms after exiting his car. This created a factual question for the jury to decide, so the circuit court properly denied appellant's motion for a directed verdict.

## VI. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. *Hawkins v. Jones*

[2017-CA-001941](#) 05/11/2018 2018 WL 2171333

Opinion by Judge Clayton; Judges Dixon and Jones concurred.

After a hearing, the family court granted a domestic violence order (DVO) to the petitioner, Joshua Jones. The respondent, Kathryn Hawkins, was incarcerated at the time of the hearing and was therefore unable to attend. The family court was aware of Hawkins' incarceration. The evidence presented at the hearing was merely a reiteration of the testimony on the affidavit from an earlier emergency protective order (EPO). The Court of Appeals held that pursuant to *Rankin v. Criswell*, 277 S.W.3d 621 (Ky. App. 2008), a DVO cannot be granted solely based on the contents of the DVO petition. Hawkins was not given a meaningful opportunity to be heard, and a new date should have been set to allow her to attend. The DVO was vacated and the case was remanded for a full evidentiary hearing.

## VII. EMINENT DOMAIN

### A. *Kuchle Realty Company, LLC v. Commonwealth*

[2016-CA-000828](#) 06/01/2018 2018 WL 2449127

Opinion by Judge Thompson; Chief Judge Clayton and Judge Dixon concurred.

Kuchle Realty Company objected to a condemnation petition filed by the Kentucky Transportation Cabinet, Department of Highways seeking to condemn property owned by Kuchle for construction of an intersection turn lane. Kuchle argued that the Cabinet failed to comply with federal and state law and its own policy manual during the condemnation process. After a hearing, the circuit court granted the condemnation petition. The Court of Appeals affirmed. The Court held that the provisions of 42 U.S.C. § 4651, which is part of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, and the regulations enacted pursuant to that Act are advisory. Therefore, noncompliance with those provisions does not affect the validity of a state condemnation. The Court further held that while federal law limits the conditions upon which federal funds will be granted for transportation projects, noncompliance does not affect the state's power of eminent domain. Finally, the Court concluded that there was substantial evidence that the Cabinet did not act fraudulently or with bad faith in the condemnation process and, therefore, the circuit court properly granted the condemnation petition.

## VIII. FAMILY LAW

### A. *Morton v. Tipton*

[2017-CA-001305](#) 06/22/2018 2018 WL 3076950

Opinion by Judge Thompson; Judges Dixon and Nickell concurred.

Appellants, the maternal grandparents and custodians of two children, appealed from an order awarding grandparent visitation to appellee, the children's paternal grandfather. At issue was whether the preponderance of the evidence standard was properly applied and, if so, whether the circuit court abused its discretion in awarding visitation. The Court of Appeals affirmed, holding that when a grandparent seeks visitation against the wishes of a non-parent awarded custody in a dependency proceeding, the proper standard to be applied is the preponderance of the evidence standard. The Court noted that the constitutional rights of the parents are not implicated when the parents do not have custody or established visitation rights and that the non-parent custodian does not have any constitutional right to raise the child as he or she sees fit. In such cases, there is no presumption that the non-parent will act in the child's best interest. The Court further held that the circuit court did not abuse its discretion in awarding limited supervised visitation to appellee. In determining the children's best interests, the circuit court properly considered the factors set forth in *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012).

**B. Normandin v. Normandin**

[2016-CA-000392](#) 06/01/2018 2018 WL 2450534 Rehearing Pending

Opinion by Judge Nickell; Judge J. Lambert concurred; Judge Taylor dissented and did not file a separate opinion.

Appellant challenged the calculation of maintenance and child support, the division of marital property, and an award of attorney's fees. Appellee's employer awarded Restricted Stock Units (RSUs) based on subjective criteria, conditioned on restrictions, and vesting on a three-year schedule. Appellant argued that the RSUs awarded during marriage and vesting within three years of the parties' divorce should be divisible marital property or included in appellee's income. Appellant also claimed that the non-marital portion of appellee's 401k retirement account was incorrectly divided, that child support was calculated without considering extraordinary needs, and that attorney's fees should have been awarded to her. Following a hearing, the family court found that appellee's unvested RSUs were not marital property or income; it calculated maintenance and child support accordingly. In a 2-1 vote, the Court of Appeals affirmed, holding that the unvested RSUs were a mere expectancy and that appellee had no present rights to future RSUs that may never vest. The Court further noted no abuse of discretion in the family court's findings of fact and upheld the classification of marital property under a *de novo* review.

## IX. HEALTH

### A. *Jennings v. Berea Area Development, LLC*

[2016-CA-001823](#) 06/15/2018 2018 WL 2990896

Opinion by Judge J. Lambert; Judge Acree concurred; Chief Judge Clayton concurred in result only.

Appellants, on behalf of an estate and wrongful death beneficiaries, brought this action against a long-term care facility alleging negligence, medical negligence, corporate negligence, wrongful death, and violations of the long-term Residents' Rights Act (KRS 216.515). After a jury verdict in favor of appellants, the circuit court granted the facility's motion for a new trial after the Supreme Court of Kentucky issued its decision in *Overstreet v. Kindred Nursing Centers Ltd. P'ship*, 479 S.W.3d 69 (Ky. 2015). *Overstreet* held that "actions otherwise brought to enforce rights created exclusively by KRS 216.515 must be brought by the 'resident or his guardian' pursuant to KRS 216.515(26), and therefore do not survive the resident's death." The Court of Appeals affirmed, also pursuant to *Overstreet*. In response to appellants' argument that the circuit court erred in ordering a total retrial on liability and damages rather than simply setting aside the portions of the verdict pertaining to recovery under KRS 216.515, the Court held that a complete retrial was necessary because, as the circuit court found, the erroneous inclusion of evidence and instructions to the jury tainted the entire verdict.

## X. IMMUNITY

### A. *A.H. v. Louisville Metro Government*

[2016-CA-001874](#) 06/08/2018 2018 WL 2749454

Opinion by Judge J. Lambert; Chief Judge Clayton and Judge Acree concurred.

Appellants challenged a summary judgment finding the Louisville Metro Department of Corrections and its director immune from a lawsuit filed on behalf of an inmate's children following his death in custody. The Court of Appeals affirmed. The Court held that KRS 71.040 did not apply to the director based on the application of KRS 67B.030(2), which addresses the liabilities of the jailer and sheriff after a merger into a metro county government. Following such a merger, the duties of prisoner incarceration are passed to a metropolitan correctional services department and are no longer held by a sheriff or jailer; therefore, as an employee of the department, the director was not subject to liability in his individual capacity. The Court also held that the department and the director (in his official capacity) were entitled to governmental immunity pursuant to *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009). Finally, the Court held that appellants could not sustain a claim for constitutional violations because Kentucky does not recognize a cause of action arising from the violation of the state constitution.

**B. Estate of David v. Pounds**

[2016-CA-000793](#) 06/15/2018 2018 WL 2992401

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

The events leading to this appeal arose when Ubong David drowned while fishing in a private pond. The owner of the pond, appellee Samuel Boone, had invited appellees Rick and Darren Pounds to fish on the property. The Pounds, in turn, invited David. While on the property, David and Darren Pounds took a small fishing boat out on the pond. The boat subsequently capsized and David drowned, resulting in his death. His estate sued, claiming that Boone and the Pounds were negligent; however, the circuit court determined that they were immune from liability under KRS 150.645(1). The estate appealed and argued several points, including that KRS 150.645(1) is unconstitutional. The Court of Appeals affirmed in part and reversed in part. The Court held that KRS 150.645(1) is constitutional as it is virtually identical to KRS 411.190, Kentucky's recreational use statute, which had previously been held to be constitutional. The Court further held, however, that while the owner of the property was immune from liability under KRS 150.645(1), the Pounds were not because they were not owners, lessees, or occupants of the property. Therefore, the Court remanded the case for a determination of whether the Pounds owed a duty to David.

## XI. JUDGMENT

### A. *Humber v. Lexington-Fayette Urban County Government*

[2016-CA-000546](#) 06/29/2018 2018 WL 3202980

Opinion by Judge Nickell; Judges Johnson and Kramer concurred.

After seventeen years of unsuccessful litigation in federal courts, appellants brought a state action seeking to impose liability on appellee for the sexual misconduct of the director of a nonprofit entity that received grant funding from appellee. The circuit court dismissed the complaint on *res judicata* grounds over appellants' objections and assertions that they had been unable to fully and fairly litigate issues of mental incompetence in the federal actions. On appeal, appellants asserted that an inability to litigate mental incompetency in the prior actions rendered the application of *res judicata* inappropriate and urged reversal. Upon determining there to be identity of parties and identity of causes of action, and that the prior actions were decided on the merits, the Court of Appeals concluded that claim preclusion applied, thereby rendering the dismissal appropriate. The Court also concluded that appellants' argument that they were denied a full and fair opportunity to litigate issues in federal court was disingenuous, as appellants had failed to produce evidence of abuse after years of opportunity to do so and discovery had not been hampered in any way. The Court further noted that the same issue had been raised and rejected more than once in the federal actions.

## **XII. LIBEL AND SLANDER**

### **A. Palmer v. Alvarado**

[2017-CA-000302](#) 06/29/2018 2018 WL 3193078

Opinion by Judge Maze; Judges Jones and Kramer concurred.

This appeal arose from a unanimous jury verdict awarding appellee \$125,000 in compensatory damages and \$75,000 in punitive damages for defamation and false light. Appellant, an incumbent, was running for re-election against appellee, a local doctor. Appellant ran a thirty-second advertisement criticizing appellee's opposition to Kentucky legislation intended to regulate the prescribing of controlled substances. The ad included spliced video footage of a recorded courtroom proceeding in Montgomery County. In that proceeding, the trial judge expressed concern over appellee's prescribing of pain medicine to a defendant. The commercial highlighted this concern but did so by rearranging the trial judge's statements. Appellee sued appellant for defamation and publicity placing a person in a false light. After the unanimous jury verdict in favor of appellee, appellant appealed. The Court of Appeals reversed, holding that the statements were either true or political opinion and that appellee could not meet the burden of falsity and actual malice. Additionally, the Court noted that the "gist" of the trial hearing was accurately depicted in the commercial.

### XIII. LIMITATION OF ACTIONS

#### A. *RLB Properties, Ltd. v. Seiller Waterman, LLC*

[2017-CA-000024](#) 06/01/2018 2018 WL 2449119 Rehearing Pending

Opinion by Judge Smallwood; Judge Taylor concurred; Chief Judge Clayton concurred in result only.

The Court of Appeals affirmed in part, reversed in part, and remanded an opinion and order dismissing RLB Properties' claims against Seiller Waterman, LLC, and three of its employed attorneys. RLB brought numerous claims against these attorneys for their participation in a lawsuit in which a piece of RLB's property was encumbered by a mechanic's lien. RLB claimed that the lawsuit was frivolous and sought damages for negligence, negligent supervision, wrongful use of civil proceedings, abuse of process, slander of title, filing an illegal lien, and civil conspiracy. The Court of Appeals affirmed the dismissal of the claims for negligence, negligent supervision, wrongful use of civil proceedings, and abuse of process, but it reversed the dismissal of the slander of title, filing of an illegal lien, and civil conspiracy claims and remanded for further proceedings. The circuit court dismissed the lien claims because it found that they had been brought outside of the one-year statute of limitations for claims brought against professionals set forth in KRS 413.245. Generally, the statute of limitations for the claims of slander of title and the filing of an illegal claim is five years; however, because the claims arose out of the professional services of an attorney, the circuit court determined that the shorter statute of limitations in KRS 413.245 applied. The Court of Appeals noted that KRS 413.245 concerned claims of professional malpractice but that the allegations in RLB's complaint were that the lien had been filed maliciously and in bad faith. Because the case was dismissed prior to discovery, the Court held that the lien claims could continue if RLB was able to show some affirmative evidence that the lien was filed in bad faith, thereby bringing the claims under the general five-year statute of limitations. The Court also reversed the dismissal of the civil conspiracy claim because it was based on the lien claims and could potentially have merit.

**B. Stamper v. Community Financial Services**

[2016-CA-001533](#) 06/01/2018 2018 WL 2449124

Opinion by Judge Jones; Judges Combs and Taylor concurred.

Community Financial Services instituted this action against Stamper following his default on a note with a stated maturity date of April 2002. Stamper defaulted on the note in April 2000. Community Financial brought suit against Stamper to collect on his debt in January 2016. In Stamper's answer to Community Financial's complaint, he admitted that he had defaulted on the note, but contended that the action was time-barred pursuant to the fifteen-year statute of limitations set forth in KRS 413.090(2). Stamper argued that the action against him had accrued on September 15, 2000, the date on which Community Financial had informed him that it would declare the entire balance on the note due if Stamper did not set up a payment plan. The circuit court disagreed and granted summary judgment in favor of Community Financial. The Court of Appeals agreed with the circuit court that Community Financial's claim had not accrued until April 2000; however, it nonetheless concluded that the claim was time-barred. The Court held that the circuit court had erred in finding that KRS 413.090(2) contained the applicable statute of limitations. The record was clear that the note at issue was a negotiable instrument. Accordingly, any actions on the note were governed by the six-year statute of limitations found in KRS 355.3-118. Because Community Financial had not brought its action against Stamper within the six-year period found in KRS 355.3-118, the action was time-barred and the circuit court's decision required reversal.

#### XIV. ORIGINAL ACTIONS

##### A. WPSD TV v. Jameson

[2018-CA-000277](#) 06/01/2018 2018 WL 2450510

Opinion and Order by Judge Jones; Judges Johnson and J. Lambert concurred.

Petitioners, WPSD TV, The Paducah Sun, and the Marshall County Tribune-Courier, sought - and were granted - a writ of mandamus and prohibition. Petitioners sought: (1) release, by the Marshall Circuit Court, of the recording of the criminal arraignment held in Case No. 18-CR-00030; (2) to allow media access to further criminal proceedings held in the case; (3) relief from what petitioners believed to be a sealed gag order in the case; and (4) access to the circuit court record in the case. These proceedings arose from the school shooting at Marshall County High School on January 23, 2018. The records and proceedings in the case were sealed while the shooter - a minor - challenged the transfer of the case from district to circuit court. The Court of Appeals held that the improper denial of public access to a criminal trial is an error that is capable of repetition, evading review. Therefore, the question was reviewable upon a petition for writ of mandamus even if the issue was technically moot. The Court then held that nothing in Kentucky's statutory law justified closing the proceedings to the public once the shooter was transferred to circuit court, indicted, and arraigned - even if the validity of the transfer was being challenged. The Court further held that without a hearing conducted pursuant to *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658 (Ky. 1983), there was no other justification for closing any hearings or for sealing any records.

**XV. PROPERTY**

A. *Holladay v. Alexander*

[2015-CA-001718](#) 06/15/2018 2018 WL 2992976

Opinion by Judge Dixon; Judges Acree and Nickell concurred.

The Holladays appealed from a ruling that their improvements to a parking easement located on neighboring property owned by the Alexanders exceeded the scope of the easement. The Alexanders filed a cross-appeal challenging the circuit court's earlier order finding that the easement was valid. The Court of Appeals affirmed the ruling upholding the validity of the parking easement, but it reversed the ruling that the Holladays' improvements to the parking easement exceeded its scope. The Court first held that the easement agreement was a valid express easement and, as such, the conveyance language determined the rights and liabilities of the parties. The Court then determined that the circuit court erroneously concluded that even though a concrete parking pad was the equivalent of the paved area specifically provided for in the easement agreement, the Holladays' construction of retaining walls around the pad gave the appearance that they owned the area in fee simple and thus equated to a taking of the property, which exceeded the scope of the easement. The Court noted that the language of the easement unambiguously provided that: (1) a parking area on the Alexanders' property (servient estate) was to be established; (2) the Holladays and their predecessor, as the dominant estate holder, were tasked with the responsibility of creating and maintaining the parking area; and (3) the parking area was for the benefit of the dominant estate. The walls were constructed outside the easement area and, regardless of the physical appearance of the parking area as a whole, the actual part within the easement complied with the language of the easement agreement. The Court further noted that there is no basis in Kentucky law to find that the appearance of the surrounding area of an easement alone dictates whether or not it exceeds the scope of the easement language. Finally, the Court rejected the circuit court's reasoning that an easement is limited to ingress and egress only, and held that parking easements can provide parking rights to one party to the exclusion of the other without exceeding the scope of the easement. Simply because one party has the right to park in the easement, thus blocking the other party from doing so, does not violate Kentucky law so long as the easement language unambiguously provides for such.

## XVI. STATUTE/RULE INTERPRETATION

### A. *Skeens v. University of Louisville*

[2016-CA-001534](#) 06/01/2018 2018 WL 2449123 Rehearing Pending

Opinion by Judge Johnson; Judges Jones and Kramer concurred.

The Court of Appeals reversed an order determining that appellant was ineligible for a tuition waiver at the University of Louisville School of Law pursuant to KRS 164.2841. Appellant, who was the stepchild of a firefighter killed in the line of duty, applied for a tuition waiver when he applied to law school. The University contended that the statute only applies to the natural-born child of an eligible parent; therefore, since appellant was a stepchild, he did not qualify for the waiver. In reversing, the Court noted that KRS 164.2841 does not define either “parent” or “child.” The Court further noted, though, that 739 KAR 2:040, “Survivor benefits for death of a firefighter,” defines a child as including a stepchild. Consequently, because a stepchild is treated identically to a natural-born child under the regulation, reversal was merited.

## XVII. TORTS

### A. *DeMoisey v. Ostermiller*

[2017-CA-000730](#) 06/01/2018 2018 WL 2449117

Opinion by Judge Dixon; Judges J. Lambert and Maze concurred.

The Court of Appeals affirmed an order dismissing appellants' claims for wrongful use of civil proceedings/malicious prosecution and abuse of process against appellee. Appellants argued that the circuit court erred in dismissing their claim for wrongful use of civil proceedings as being time-barred under KRS 413.140(1)(c) because the statute of limitations could not have begun to run until the Court of Appeals decided appellee's cross-appeal, which concerned whether the claim for wrongful use of civil proceedings should have been dismissed with prejudice. However, the Court held that it did not need to reach the statute of limitations issue because appellants did not prevail on the merits in an underlying legal malpractice action between the parties; therefore, they could not maintain a claim for wrongful use of civil proceedings regardless of when it was filed. Dismissal of a suit for technical or procedural reasons that do not reflect on the merits of the case is not a favorable termination of the action for purposes of the tort. Here, because the underlying legal malpractice action against appellants was dismissed as being time-barred, there was no determination of its merits. The Court further rejected appellants' argument that the circuit court erred in finding that *res judicata* barred their abuse of process claim. The circuit court ruled that appellants' claim was substantively identical to the one litigated in a related case in a different division, and thus the Court's opinion in that matter, which remanded the case for entry of an order dismissing the abuse of process claim with prejudice, was binding on the instant case. Appellant argued that the Court's opinion changed then-existing law with respect to the manner in which the statute of limitations is calculated on abuse of process claims. The Supreme Court of Kentucky denied discretionary review in that matter but ordered the opinion to not be published. It was appellants' position that to apply the unpublished opinion to their abuse of process claim, when it could not be used as precedent to change the calculation of the statute of limitations of any other litigant's abuse of process claim, was unconstitutional. The Court observed that although this argument was novel and thought provoking, it would be better addressed by the Supreme Court.