PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

JUNE 1, 2020 to JUNE 30, 2020

I. APPEALS

A. ***Clark v. Workman***

2019-CA-000805 06/26/2020 2020 WL 3582597

Opinion by Judge Acree; Judges Dixon and McNeill concurred.

In this child support appeal, the Court of Appeals focused on the fact that appellant's brief violated the rules of appellate procedure (specifically CR 76.12(4)) in eleven different ways, prompting a review for manifest injustice only. The Court first fully documented in footnotes an alarming trend in appellate rules violations, as follows: "In just the last two years, at least one hundred and one (101) Kentucky appellate opinions were rendered in which an attorney's carelessness made appellate rule violations an issue in his or her client's case. The prodigious number of attorneys appearing in Kentucky's appellate courts lacking the skill, will, or interest in following procedural rules is growing. In 2005, only two (2) Kentucky opinions addressed appellate rules violations. In 2010, the number jumped to eleven (11). In 2015, the number rose slightly to fourteen (14). The average for the last two years is more than three times that. If this is not a crisis yet, it soon will be if trends do not reverse." Reviewing the instant case, the Court found no manifest injustice: (1) in the family court's calculation of the father's presumed support obligation under KRS 403.211, KRS 403.212, and the AOC forms at $1,362.26; (2) in the family court's finding that nearly equal shared parenting time justified overcoming that presumption; and (3) in the family court's reduction of the presumed child support by more than $500 (about 37%). The family court's child support award was affirmed.

B. ***D.L.B. v. Commonwealth***

2019-CA-001168 06/26/2020 2020 WL 3582309

Opinion and order dismissing by Judge Caldwell; Judge Acree concurred; Judge K. Thompson dissented and filed a separate opinion.

Appellant challenged the circuit court's finding in a dependency, neglect, and abuse action that he physically abused his son. By a 2-1 vote, the Court of Appeals dismissed the appeal because appellant failed to properly name the Cabinet for Health and Family Services as a party on his notice of appeal and because the order appeared to be non-final. The Court noted that although appellant referred to the Cabinet in the caption of the notice of appeal, it was identified as a "Petitioner" rather than as an appellee. Moreover, there was no indication that the Cabinet received notice of the appeal since no Cabinet representative was listed on the certificate of service on the notice of appeal. Given the lack of any indication that the Cabinet received actual notice, the Court held that just including the Cabinet in the caption of the notice of appeal did not amount to substantial compliance with the requirements of CR 73.03. The Court further noted that the appeal was taken from the circuit court's adjudication order and that adjudication orders in DNA cases are not final and appealable orders. *J.E. v. Cabinet for Health and Family Services*, 553 S.W.3d 850 (Ky. App. 2018). In dissent, Judge K. Thompson opined that: (1) naming the "Commonwealth of Kentucky" as an appellee in the notice of appeal included the Cabinet, so there was no jurisdictional defect; (2) if there was a concern about notice to the Cabinet, Father should be allowed to amend his notice of appeal; and (3) our civil rules should be amended to conform to the federal rule so that appeals are not dismissed based on perceived technicalities.

II. FAMILY LAW

A. ***Satterfield v. Satterfield***

2019-CA-000011 06/26/2020 2020 WL 3582588

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

Wife appealed the family court's application of the fifteen-year statute of limitations to bar her claim to the portion of Husband's pension she was awarded in the decree dissolving their marriage. Husband had been ordered to execute a QDRO dividing the pension within 30 days of the decree but failed to do so. Almost 20 years later, Wife hired an attorney to look into her rights under the QDRO and at that time discovered that Husband had failed to comply with the decree. Her attorney then prepared the document and moved the court to enter the tendered QDRO into the record. Husband objected citing the fifteen-year statute of limitations set out in KRS 413.090(1). After considering memoranda in support of the parties' respective positions, the family court entered an order denying Wife's motion on the basis that the attempted execution fell outside the statutory period. In reversing the decision, the Court of Appeals held that given Husband's failure to abide by the terms of the dissolution decree, equity demanded that he be estopped from invoking the statute to bar Wife's attempt to remedy his failure to act. The Court also concluded that by invoking the statute of limitations, Husband would be unjustly enriched by his failure to abide by the terms of the decree. Finally, the Court held that the doctrine of laches was inapplicable where there was no unreasonable delay or possible prejudice to Husband. Because Wife had no reason to inquire into Husband's execution of the QDRO until such time as payment from the pension plan could be anticipated, the doctrine of laches did not bar Wife's assertion of the right to her share of Husband's pension at that time.

III. NEGLIGENCE

A. ***Bramlett v. Ryan***

2019-CA-000122 05/01/2020 2020 WL 2095904 DR Pending

Opinion by Judge Dixon; Special Judge Buckingham and Judge Kramer concurred.

Appellants' seven-year-old son drowned in appellees' swimming pool during a swim party. At least four adults were providing supervision around the pool at the time of the child's death. Appellants filed a negligence suit, but the circuit court entered summary judgment in favor of appellees. The Court of Appeals affirmed. The Court first held that the child was a licensee - not an invitee - on appellees' property; therefore, they owed a general duty of care to him. The Court compared the case to *Grimes v. Hettinger*, 566 S.W.2d 769 (Ky. App. 1978), *Hanners v. City of Ashland*, 331 S.W.2d 729 (Ky. 1959), and *Schauf's Adm'r v. City of Paducah*, 106 Ky. 228, 50 S.W. 42 (1899), and concluded that children aged seven or eight are considered old enough to appreciate the possible hazards of use of "confined waters," *i.e.*, swimming pools. Thus, there is no duty to warn children as young as seven concerning the hazards of bodies of water, such as private swimming pools, as in this case. There was also no evidence that the pool created an unreasonable risk triggering a duty to warn the child. Consequently, appellees could not be held liable for his death under a general duty to licensees since they had no obligation to specifically warn him of the hazards of swimming in a private swimming pool. Appellants also argued that appellees accepted an additional duty of care by undertaking the duty to supervise the children in the pool "to keep the area safe." The Court rejected this argument, noting that the evidence did not support it, and that appellants failed to present anything suggesting that the guests at the party were engaged in activities that created an unreasonable risk of harm to the child.

B. ***Johnson v. City of Versailles***

2018-CA-001647 06/12/2020 2020 WL 3116963 Rehearing Pending

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

While visiting the grave of her son, appellant was injured when the headstone on the grave fell over onto her. She brought this action against the City of Versailles, which had acquired the cemetery in the years following her son's burial. Appellant alleged that the monument had been damaged by a lawnmower and that the Public Works Director had noted that the headstone was loose and offered to repair it. The Public Works Director denied that this conversation took place. The circuit court dismissed the action, concluding that appellant was merely a licensee and, consequently, the City's only duty was to warn her of hazardous conditions of which it had actual knowledge. On appeal, the Court of Appeals agreed with the circuit court that KRS 381.697(1) does not impose an affirmative duty on a cemetery owner to inspect headstones or to proactively repair headstones which have not fallen. However, the Court concluded that the City owed duties to appellant as an invitee, not a licensee. The Court noted that appellant, as the original purchaser of the gravesite, had a business relationship with the cemetery beyond that of an ordinary visitor. Furthermore, her right to visit the grave of her son is an easement, and thus an ongoing property right. As a result, the Court concluded that appellant's interests in the cemetery plot created an ongoing mutuality sufficient to make her an invitee on the day of the injury. As an invitee, the City had an affirmative duty to discover unreasonably dangerous conditions and either eliminate or warn appellant of them. This duty did not make the City an insurer of appellant's safety; however, the Court recognized that there were genuine issues of material fact as to whether the City breached the duties it owed to appellant and, if so, whether that breach was the proximate cause of her injuries. These genuine issues of material fact precluded summary judgment, and the Court reversed and remanded the matter for further proceedings.

IV. OPEN RECORDS

A. ***City of Taylorsville Ethics Commission v. Trageser***

2019-CA-000152 06/19/2020 2020 WL 3400764

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

Trageser maintains a website where he posts news and commentary relating to the City of Taylorsville and local government officials, and he frequently utilizes the Open Records Act. Trageser submitted an ORA request seeking copies of responses to an ethics complaint. These responses were withheld as exempt without additional information. Trageser appealed the decision to the Attorney General. The Attorney General concluded that the documents should have been disclosed to Trageser. The City appealed the decision and also filed a claim against Trageser seeking compensatory and punitive damages on the ground that he violated the City's rights by obtaining an interoffice memorandum by a means other than through the ORA. The circuit court concluded that the City failed to state a claim upon which could relief could be granted and later awarded Trageser attorney's fees and statutory penalties. The Court of Appeals affirmed. The Court first held that the circuit court was not precluded from viewing or citing to the Attorney General's opinion in conjunction with its review. As to the circuit court's dismissal of the City's claim for damages, the Court held that the ORA does not provide that it is the exclusive means through which a member of the public may obtain government records. It is designed to assist members of the public in obtaining government records; however, nowhere does it prohibit a member of the public from publishing a document obtained by other means even if the document falls within one of the exemptions listed under the statute. Thus, while the government can use the ORA as a shield, it cannot use it as a sword. Finally, the Court held that the circuit court did not abuse its discretion with respect to its award of attorney's fees, and the Court remanded the case for a supplemental award of attorney's fees for costs incurred on appeal.

V. TORTS

A. ***Bardstown Capital Corporation v. Seiller Waterman, LLC***

2018-CA-001886 06/12/2020 2020 WL 3108238

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

Appellants challenged a summary judgment dismissing a wrongful use of civil proceedings claim and an order dismissing an abuse of process claim arising from an underlying appeal by homeowners from a zoning decision. The Court of Appeals reversed the summary judgment dismissing the wrongful use of civil proceedings claim based upon the application of the "sham" exception to the Noerr-Pennington doctrine. The Court agreed with appellants that application of this exception was a question of fact and that there remained disputed issues of material fact regarding whether there was a reasonable basis for the original zoning appeal by the homeowners and what their subjective motivation for filing it was (*i.e.*, whether the homeowners only intended to delay the matter in order to extract a higher purchase price for their properties). Thus, summary judgment was inappropriate. However, the Court affirmed the dismissal of the abuse of process claim as filed outside of the one-year statute of limitations period. It held that such claims accrue at the time the conduct of the plaintiff occurred, not when the underlying litigation terminates, thereby reaffirming the holding in *DeMoisey v. Ostermiller*, Nos. 2014-CA-001827-MR and 2014-CA-001864-MR, 2016 WL 2609321 (Ky. App. May 6, 2016). Because appellants filed this claim outside of the limitations period, dismissal was proper.

VI. WORKERS' COMPENSATION

A. ***Wonderfoil, Inc. v. Russell***

2019-CA-001671 06/05/2020 2020 WL 3022867 N/A Filed in S. Ct.

Opinion by Judge Goodwine; Judges Dixon and Taylor concurred.

Wonderfoil, Inc. challenged an opinion of the Workers' Compensation Board reversing and remanding the administrative law judge's denial of compensation for medical expenses. It sought a reversal of the Board's holding that appellee timely submitted medical expenses under 803 KAR 25:096 § 11. Appellee submitted the medical expenses years after the dates of service but before the ALJ entered an award. The ALJ denied appellee compensation for the medical expenses because he did not submit them within 60 days from the dates of service under 803 KAR 25:096 § 11. However, the Board held that the 60-day submission requirement only applies post-award. The Court of Appeals agreed with the Board and held that because medical expenses are not compensable until an award is entered, an employee is not required to submit medical expenses until an interlocutory or final award has been entered.