PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JUNE 1, 2024 to JUNE 30, 2024

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I. CASEY'S LAW

A. H.N. v. R.H. (Ky. App. 2024).

2023-CA-1235-DGE 6/28/2024 2024 WL 3210278
Opinion by LAMBERT, JUDGE; EASTON, J. (CONCURS) AND ECKERLE, J. (CONCURS)

Casey's Law, KRS 222.430-222.437, requires two mental health professionals to provide certified reports to the trial court before an order of involuntary commitment to receive substance abuse treatment may be issued. As a matter of first impression, the Court held that an order of commitment issued pursuant to Casey's Law is fatally flawed if the reports of both mental health professionals are not certified, even if both professionals testify at the commitment hearing. The lack of certification was not a harmless error because Kentucky precedent holds that a court cannot properly grant relief if the statutory prerequisites to doing so have not been met, even if those statutory predicates may make no practical difference in the outcome of the proceedings.

II. CRIMINAL LAW

A. JOHIEM MARQUELLE BANDY v. COMMONWEALTH OF KENTUCKY (Ky. App. 2024).

2023-CA-0251-MR 6/07/2024 2024 WL 2869283
Opinion by CETRULLO, JUDGE; CALDWELL, J. (CONCURS) AND ECKERLE, J. (CONCURS)

This is an appeal from a judgment upon a jury verdict which found appellant guilty of second-degree strangulation as well as assault and criminal mischief charges. On appeal, Bandy argued that the trial court had erred in allowing testimony of his previous untruthfulness to police, and in failing to grant a mistrial after the jury inadvertently heard that he had prior similar charges. Bandy further argued that it was error to allow evidence of his prior conviction during the penalty phase since the conviction had been pardoned by a prior Governor. He argued that he should have been granted a directed

verdict on the strangulation charge and that imposition of two fines was improper as he was later determined to be indigent.

On appeal, we affirmed the trial court, finding that there was sufficient evidence to proceed to the jury on the strangulation charge and that the trial court did not abuse its discretion in ruling on any of the evidentiary rulings below. The conflicting statements on a prior occasion were limited to addressing Bandy's credibility. The prior similar charge came in through inadvertence, and the trial court offered to admonish the jury regarding the same. The defense declined that offer and insisted upon a mistrial. The trial court did not abuse its discretion in denying a mistrial. We also held that the evidence of a prior conviction presented during the sentencing phase, even though that conviction had been pardoned, was not an error. The pardon did not erase the fact of the conviction itself, which was admissible under the Truth in Sentencing Act, KRS 532.055.

B. COMMONWEALTH OF KENTUCKY v. RODNEY JONES (Ky. App. 2024).

2023-CA-1132-MR 6/14/2024 2024 WL 2982769
Opinion by THOMPSON, CHIEF JUDGE; A. JONES, J. (CONCURS) AND LAMBERT, J. (CONCURS)

The Court of Appeals reversed and remanded orders of the Breckinridge Circuit Court which granted bond to a criminal defendant who was accused of murder and kidnapping, both of which are capital offenses. The circuit court held that because the Commonwealth was not seeking the death penalty, bail was an option. The Court of Appeals reversed and held that Section 16 of the Kentucky Constitution states that bail is not available for criminal defendants who are accused of capital offenses, such as in this case, and the proof and presumption of guilt is great. The Court also held that RCr 4.02(1) also applied to deny bail. RCr 4.02(1) states that a defendant is bailable unless the penalty of death is an option and the proof and presumption of guilt is great. In this case, even though the Commonwealth chose not to seek the death penalty, it was still an option as a possible punishment for these capital offenses. The Court remanded for the circuit court to determine if the proof and presumption of the defendant's guilt was great.

C. COMMONWEALTH OF KENTUCKY v. JAMES LYNCH AND HONORABLE MARCIA THOMAS, GALLATIN DISTRICT JUDGE (Ky. App. 2024).

2023-CA-1445-ME 6/14/2024 2024 WL 298287
Opinion by EASTON, JUDGE; ECKLERLE, J. (CONCURS) AND LAMBERT, J. (CONCURS)

The Court of Appeals reversed and remanded orders of the Gallatin Circuit Court denying the Commonwealth's petition for a writ of prohibition. The circuit court determined that the Horizontal Gaze Nystagmus ("HGN") test could not be entered into evidence pursuant to Kentucky Rule of Evidence ("KRE") 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

The court further determined that the Commonwealth would not suffer grave injustice or irreparable injury if evidence of an HGN test was suppressed (blood test results had already been suppressed). The Court of Appeals determined that the Commonwealth had shown a sufficient great injustice or irreparable injury to meet the standard for a writ due to the circumstances in which the HGN test was conducted. The Court further determined that KRE 702 and *Daubert* were satisfied because police officers may give both lay and expert opinion in DUI cases. Additionally, this Court held that the HGN testing process does not need a *Daubert* hearing to determine admissibility; the test can be properly admitted through a police officer. The Court remanded to the circuit court with directions to grant the Commonwealth's petition for writ of prohibition.

III. FAMILY LAW

A. KUTTER v. KUTTER (Ky. App. 2024).

2023-CA-1091-MR 6/28/2024 2024 WL 3210398
Opinion by ECKERLE, JUDGE; EASTON, J. (CONCURS) AND LAMBERT, J. (CONCURS)

In their Marital Separation Agreement, John and Tara Kutter agreed to joint custody of their two children and a step-child. In addition, the parties agreed to send all three children to a private, religious school through Grade 12, with John paying those costs. The Family Court adopted the Agreement as part of the Decree.

Three years later, Tara obtained a DVO against John on her behalf and on behalf of the children. Based on the same allegations of abuse, the Cabinet instituted a DNA proceeding against John. Under the terms of the DVO, Tara received temporary sole custody of the children, with no-contact or visitation by John. The DNA order also included a no-contact provision against John. Tara and the children relocated following entry of these orders. Thereafter, Tara filed a motion to allow her to withdraw the children from private school. The Family Court granted the motion without a hearing, holding that Tara's status as temporary sole custodian automatically gave her the right to make educational and religious decisions for the children.

The Court of Appeals reversed and remanded for an evidentiary hearing. The Court first held that an award of temporary sole custody, particularly under a DVO, does not automatically alter other custodial terms of the Decree. The Court next held that, under the terms of the parties' Agreement, the educational and religious provisions were part of the joint custody arrangement. Consequently, the Court held that they remained subject to modification under KRS 403.180(6). However, the Court further held that such modification was governed by KRS 403.340, which requires an evidentiary hearing and findings showing that modification is warranted. Finally, the Court cautioned that a Family Court should not rely on evidence heard in separate matters, as that evidence is not part of the record on appeal.

IV. IMMUNITY

A. COMMONWEALTH OF KENTUCKY v. JENNIFER ELMORE AS ADMINISTRATRIX OF THE ESTATE OF THOMAS ELMORE, ET AL. (Ky. App. 2024).

2023-CA-0845-MR 6/28/2024 2024 WL 3210220
Opinion by THOMPSON, CHIEF JUDGE; ACREE, J. (CONCURS) AND L. JONES, J. (CONCURS)

The Court of Appeals affirmed an order of the Jefferson Circuit Court which held that sovereign immunity does not protect the Commonwealth Attorney's Office from having to comply with a subpoena *duces tecum* issued in a case in which the Commonwealth Attorney's Office is not a party. The Court held that sovereign immunity protects the Commonwealth and its agencies from lawsuits and protects the government coffers, but it does not protect the Commonwealth from all acts of the judiciary, including third-party subpoenas.

V. LEGISLATION

A. DAVENPORT EXTREME POOLS AND SPAS, INC., AND TRACY DAVENPORT v. ELIZABETH ANN MULFLUR, ET AL. (Ky. App. 2024).

2023-CA-0313-MR 6/14/2024 2024 WL 2982718
Opinion by ECKERLE, JUDGE; CALDWELL, J. (CONCURS) AND MCNEILL, J. (CONCURS)

This central issue in this case involves whether Kentucky's Uniform Public Expression Protection Act ("UPEPA") applies retroactively or violates the jural rights doctrine. The case stems from a lawsuit instituted by Davenport Extreme Pools and Spas, Inc. and Tracy Davenport (collectively "Davenport") against the Appellees alleging the Appellees committed acts of tortious interference and made defamatory statements. Prior to suit, Davenport had contracted to construct a pool for certain of the Appellees, and it does not appear that the pool was ever constructed, though substantial sums of money were deposited for its construction. The Appellees then made several social media posts and exchanged text messages with various parties indicating that they had poor experiences with Davenport, ostensibly encouraging other parties either to refrain from contracting with Davenport or to cancel their current contracts.

Shortly after the lawsuit was initiated, Kentucky's UPEPA statutes went into effect. These statutes permit parties who believe they are being targeted by businesses with Strategic Lawsuits Against Public Participation ("SLAPP") to utilize expedited dismissal procedures. These proceedings are expedited and include limited discovery and require the party who initiated the suit to present *prima facie* evidence of its claims.

Failure to do so results in dismissal of the action. The prevailing party on any dismissal motion may then seek attorney's fees and costs related to the motion.

The Appellees sought to utilize this expedited dismissal procedure under the UPEPA, and Davenport claimed it was inapplicable because the statutes contain no express retroactivity language; they are substantive in nature; and they violate the jural rights doctrine. The Trial Court rejected these arguments and dismissed the case, finding there was no *prima facie* evidence to support the underlying tort claims.

The Trial Court then granted attorney's fees and costs to the Appellees. One of the Appellees only requested an amount limited to costs and fees incurred while preparing the motion itself, while the other Appellees requested additional sums related to the whole litigation, reasoning that these activities also related to the ultimate dismissal of the case. The Trial Court granted each party's request, finding the statute permits recovery of all fees and costs related to the motion, and each party had met that showing.

On appeal, a panel of this Court resolved the central issues in favor of the Appellees. While the statutory language does not mention retroactivity, the UPEPA is a procedural change that involves no substantive changes to any of the tort claims. Its mechanisms can be likened to a party utilizing existing motions to dismiss and motions for summary judgment. Indeed, many Federal Courts sitting in diversity jurisdiction, which must apply state substantive law and federal procedural law, have reached similar conclusions that most other states' Anti-SLAPP laws are wholly procedural and inapplicable in Federal Court.

Moreover, these procedural changes do not alter, abolish, or impair any common-law right of recovery. Thus, they do not violate the jural rights doctrine.

This Court also held that the Trial Court's rulings on the fees and costs were neither constitutionally infirm (because the fee provision was not void for vagueness) nor an abuse of discretion. Trial Courts are frequently vested with the authority to determine appropriate fee awards for prevailing parties, and this statute reads similarly to other provisions. The two different awards in this case were due to two different requests, not two different interpretations of the statute. The Trial Court properly applied one standard to grant both fee awards. No abuse of discretion occurred.

Finally, Davenport's other claims regarding whether they had made a *prima facie* case for tortious interference or defamation were meritless. As regards the tortious interference claims, at best Davenport could show that certain of the Appellees wanted another party to cancel a contract with Davenport. But the *prima facie* evidence ended there. The other party who ultimately did lawfully cancel the contract had a logical and entirely independent reason – unexpected NICU charges for their new baby – and forfeited a five-figure deposit with Davenport to cancel the contract without having any work done. Additionally, Davenport could not show that the Appellees had any malicious intent in wanting another person to cancel the contract – the Appellees

received no value, business or otherwise, from the party canceling the contract, and the stated reasons for warning the other parties were that the Appellees had allegedly not received the benefit of their bargain during their contract with Davenport. In other words, Appellees were solely engaging in public speech and warning others about their bad experiences with a company. Likewise, the various terms used by the Appellees about Davenport, including "thugs," did not rise to the level of defamatory language. The statements were opinion and at worst showed exaggerated hyperbole based on expressed facts or underlying facts that were not provable as false. Either way, the Appellees public and private discussions about their experiences with Davenport did not give rise to any actionable defamation.

Accordingly, this Court affirmed the Trial Court's orders.

VI. MALPRACTICE

A. KAISI v. JOHN ISAACS, SR. AND JOHN ISAACS AND ASSOCIATES, LLC (Ky. App. 2024).

2023-CA-0511-MR 6/21/2024 2024 WL 3075431
Opinion by EASTON, JUDGE; ACREE, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Kaisi hired Isaacs to create a scheme in which Kaisi would avoid paying federal taxes. Kaisi was subsequently indicted by the federal government and pled guilty to tax evasion and falsely claiming low-income eligibility for Medicaid medical coverage. Kaisi filed a complaint with in trial court against Isaacs, alleging breach of contract, negligence, emotional distress, and loss of reputation. The trial court dismissed Kaisi's complaint for failure to state a claim upon which relief may be granted. This Court affirmed the trial court because Kaisi's claim was barred by collateral estoppel and public policy. Because Kaisi pled guilty to a crime with a "wilful" mental state, issue preclusion supports collateral estoppel. Public policy also supported the trial court's decision. Therefore, the Court affirmed.

VII. TORTS

A. DEMETRUIS NORTHERN-ALLISON v. JOHN SEYMOUR (Ky. App. 2024).

2022-CA-0379-MR 6/14/2024 2024 WL 2982469
Opinion by ACREE, JUDGE; EASTON, J. (DISSENTS) AND ECKERLE, J. (CONCURS)

Appellant pleaded guilty to resisting arrest. He subsequently sued the arresting officers for assault and related torts. The Jefferson Circuit Court originally granted summary

judgment in favor of Appellees by interpreting *Heck v. Humphrey*, 512 U.S. 477 (1994) as holding his plea of guilty to resisting arrest barred his civil claims. *Northern-Allison v. Seymour*, 2020-CA-0637-MR, 2021 WL 1164438, at *2 (Ky. App. Mar. 26, 2021) ("*Northern-Allison I*"). The Court of Appeals in *Northern-Allison I* reversed the summary judgment holding the circuit court misapplied *Heck*. However, the Court further held Appellees were entitled to qualified official immunity and remanded with instructions to determine only whether Appellees should be deprived of such immunity by having performed their discretionary duty in bad faith. On remand and after a hearing, the circuit court held that by pleading guilty to resisting arrest, Appellant waived his defense under KRS 503.060(1) that the police officers used excessive force to effect the arrest, thereby barring Appellant's subsequent civil claim. The circuit court also held Appellees were entitled to qualified official immunity because Appellant "has been unable to demonstrate that the officers acted in bad faith" and that Appellant's "pleading guilty to Resisting Arrest demonstrates that the officers were acting reasonably and in good faith." The Court of Appeals affirmed by applying the doctrine of issue preclusion after finding each of the doctrine's five elements were present, namely: (1) Appellant was a party to his criminal proceeding and a final judgment in the instant civil case will bind him; (2) the issue in Appellant's criminal case—whether the officers acted in bad faith by using excessive force—is a decisive issue in the civil claim; (3) the issue was actually litigated by the criminal adjudication based on his guilty plea that waived the defense of Appellees' use of excessive force; (4) the issue was actually decided against Appellant in the prior action by Appellant himself; and (5) it was necessary to decide the issue in the prior criminal action consistently with the circuit court's duty under *Boykin v. Alabama*, the purpose of which includes "forestall[ing] the spin-off of collateral proceedings[.]" 395 U.S. 238, 244 (1969). Judge Easton dissented and filed a separate opinion, unable to agree "with the conclusion on one element of issue preclusion—the identity of the issue addressed in the prior adjudication."

B. DAYELIN GONZALEZ ALVAREZ v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY (Ky. App. 2024).

2023-CA-0013-MR 6/28/2024 2024 WL 3210270
Opinion by KAREM, JUDGE; CALDWELL, J. (DISSENTS) AND A. JONES, J. (CONCURS)

Alvarez appealed from the Jefferson Circuit Court's order granting Allstate's petition under Kentucky Revised Statute 304.39-280(3) to conduct a second Examination Under Oath. The Court of Appeals affirmed the circuit court. The Court first noted that, to expedite fraud investigations, the Motor Vehicle Reparations Act provides for the disclosure of certain information by basic reparations benefits claimants. If a dispute arises between the claimant and the reparation obligor regarding "information required to be disclosed, the claimant or reparation obligor may petition the Circuit Court ... for an order for discovery including the right to take written or oral depositions." KRS 304.39-280(3). Moreover, the Court saw no abuse of discretion in the circuit court's good-

cause determination in this case. As in *State Farm Mutual Automobile Insurance Company v. Adams*, 526 S.W.3d 63 (Ky. 2017), some of the issues listed by Allstate pertained to the acquisition of accident-related information. Moreover, Allstate's claim investigation deemed Alvarez's claim suspicious and suggestive of solicitation. Indeed, the day after the subject automobile collision, Alvarez went to a medical provider known by Allstate to solicit in violation of Kentucky law. Further, the medical provider billed Alvarez for an "extensive amount of chiropractic treatment" resulting from a "non-injury collision" with "minor" damage to both vehicles. Allstate further expressed concerns that the medical provider billed for services not rendered and that an unlicensed individual performed the treatments allegedly rendered to Alvarez. Thus, the Court saw nothing "arbitrary, unreasonable, unfair, or unsupported by sound legal principles" in the circuit court's good-cause determination. *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citation omitted). The dissent held the trial court abused its discretion in that Allstate had already examined Alvarez under oath concerning the circumstances of the accident itself in the first EUO. And Allstate had not requested records related to Alvarez's medical care through the means specifically provided for in the MVRA. *See* KRS 304.39-280(1)(b)-(c). Therefore, not having been denied this information to which it was entitled on request, Allstate was not entitled to depose Alvarez about any issues related to her medical treatment pursuant to KRS 304.39-280(3). Thus, there was no good cause to order a deposition about medical treatment issues regardless of Allstate's expressing concerns about possible solicitation.