PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

MARCH 01, 2022 to MARCH 31, 2022

I. CRIMINAL LAW

A. ***KEVIN RAY BURDINE V. COMMONWEALTH OF KENTUCKY***

2019-CA-1740-MR 03/04/2022 2022 WL 627191

Opinion by MAZE, IRV; COMBS, J. (CONCURS) AND DIXON, J. (CONCURS)

Appellant Kevin Ray Burdine appeals from the Fayette Circuit Court's order denying his motion to suppress a confession he claimed was the product of a "reverse-*Miranda*" interrogation technique. During a police interrogation while in custody on unrelated charges, Burdine confessed to a burglary. After the confession, the officer realized he had forgotten to read Burdine his *Miranda* rights. The officer stopped the interrogation and properly read Burdine his *Miranda* rights. Burdine again confessed to the burglary. The Court of Appeals affirmed the circuit court's denial of Burdine's motion to suppress the confession, concluding the trial court did not err in finding that the confession had been voluntary and that no improper interrogation techniques had been employed by the interrogating officer. Rather, the officer's failure to read Burdine his *Miranda* rights was simply occasioned by oversight, and there was no substantive evidence that the interrogation was coercive or that the officer had deliberately employed the technique to circumvent the suspect's *Miranda* rights. The Court also rejected Burdine's contention that the officer should have undertaken curative measures upon discovery of his mistake, citing *Oregon v. Elstad*, 470 U.S. 298, 309, 105 S. Ct. 1285, 1293, 84 L. Ed. 2d 222 (1985), for the proposition that "[p]olice officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions of when "custody" begins or whether a given unwarned statement will ultimately be held admissible."

II. FAMILY LAW

A. ***JESSICA ANDERSON V. CABINET FOR HEALTH AND FAMILY SERVICES, ET AL.***

2020-CA-0057-MR, 2020-CA-0059-MR 03/25/2022 2022 WL 879755

Opinion by McNEILL, J. CHRISTOPHER; COMBS, J. (CONCURS) AND JONES, J. (CONCURS)

Appellant Jessica Anderson appeals from an order from the Meade Circuit Court dismissing her petition for immediate entitlement to custody of her minor child under KRS 620.110 and from a separate order denying her motion to recuse. Anderson filed her petition fifteen days prior to an adjudication hearing involving the child. The district court issued an adjudication order on March 29, 2019, finding that the child was neglected or abused and granting Brittany Winsor custody. The district court entered a consistent disposition order on September 12, 2019. After the district court

entered the disposition order, Anderson moved for default judgment under her KRS 620.110 petition because neither the Cabinet nor Winsor had filed an answer. The circuit court denied the motion and dismissed her petition in December 2019. The Court of Appeals affirmed, concluding: 1) that Anderson's KRS 620.110 petition was rendered moot by the September 12, 2019 disposition order; 2) that CR 12.02's time limits did not apply to Anderson's petition because a petition is not a "pleading" and because custody should be determined according to what is best for the child; 3) that Anderson's case did not fall under the "public interest" exception to the mootness doctrine; and 4) that it was unnecessary to consider whether the circuit court erred with respect to recusal.

B. ***E. L. T. V. COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES, ET AL.***

2021-CA-1107-ME, 2021-CA-1109-ME 03/25/2022 2022 WL 879769

Opinion by THOMPSON, LARRY E.; COMBS, J. (CONCURS) AND DIXON, J. (CONCURS)

Appellant E.L.T. (the "Father") appeals from orders of the Jefferson Circuit Court, Family Division, terminating his parental rights to his two minor children. The Court of Appeals held that KRS 625.090(6), which states a trial court "shall" enter an order either granting or dismissing a petition to involuntarily terminate parental rights within thirty days after a final hearing, is not mandatory. The Court held that the legislative intent of the thirty-day time limit was to expedite the termination of the parental rights process, not to preclude the court from entering an order late. The Court also held that any error in entering an order after thirty days was harmless error in this case because the parent did not allege he suffered any prejudice due to the tardiness of the order. The Court also concluded that the circuit court did not err in admitting the juvenile court files into evidence, that a social worker's reading from a discharge summary was not inadmissible hearsay, and that the Cabinet met its burden of proving at least one of the factors in KRS 625.090(2) required before a court may terminate a parent's parental rights.

C. ***MICHAEL WAYNE HOSKINS V. CHRISTY M. ELLIOTT, ET AL.***

2020-CA-0563-MR 03/25/2022 2022 WL 880129

Opinion by ACREE, GLENN E.; DIXON, J. (CONCURS) AND MCNEILL, J. (CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION)

Appellant Michael Wayne Hoskins appeals from the Bell Circuit Court's order granting Christy Elliot, a nonrelative, visitation with Hoskins' minor child. The circuit court awarded Hoskins sole custody of the child but allowed Elliot visitation with the child by applying a best-interest analysis despite finding that Elliot failed to prove Hoskins was unfit. The Court of Appeals reversed the circuit court's award of visitation to Elliot, holding that the circuit court's award of visitation violated Hoskins' constitutionally recognized fundamental right of a fit parent to raise his child as he deems to be in the child's best interest, as stated in *Troxel v. Granville*, 530 U.S. 57 (2000). Judge McNeill concurred in result only and filed a separate opinion to address his disagreement with the majority's analysis, emphasizing the unique procedural and factual record of the case that included, among other things, the circuit court's prior orders granting Elliot permanent custody of the child and awarding Hoskins only supervised visitation.

III. CONTRACTS

A. ***UNIVERSITY OF KENTUCKY V. PETER REGARD, ET AL.***

DISCRETIONARY REVIEW GRANTED 06/08/2022

2021-CA-0020-MR 03/04/2022 2022 WL 627194

Opinion by JONES, ALLISON E.; CALDWELL, J. (CONCURS) AND CETRULO, J. (CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION)

In an interlocutory appeal from the trial court's decision to grant in part and deny in part the appellant's motion to dismiss on the basis of governmental immunity, the Court of Appeals affirmed in part, reversed in part, and remanded. The trial court determined the appellees' breach of contract claim seeking a refund of tuition and fees from the appellant was not barred by governmental immunity because: (1) it fell within KRS 45A.245's provision waiving immunity for lawfully executed written contracts with the Commonwealth; and (2) the appellees sought a refund of their own money and not damages from the state treasury, so governmental immunity was not implicated due to the differing source of funds. The appellant contended the trial court erred in both conclusions. The Court of Appeals reversed the trial court in part, holding the appellant's governmental immunity did not depend on the source of funds from which the appellees sought relief. However, the Court of Appeals affirmed the portion of the trial court's order finding the appellant had a lawfully executed written contract with the appellees based on electronic registration forms, particularly the Financial

Obligation Statement, as well as other documents associated with the registration process. The dissent parted with the majority regarding the existence of a written contract and would have upheld immunity on grounds that the documents in question only formed an implied contract. The Court of Appeals thereafter remanded this matter to the trial court for further proceedings.

IV. TORTS

A. ***WILMA STEPP, ET AL. V. CITY OF PIKEVILLE, ET AL.***

2021-CA-0028-MR 03/11/2022 2022 WL 727320

Opinion by LAMBERT, JAMES H.; COMBS, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Appellants Wilma and Kenneth Stepp appeal from the Pike Circuit Court's order granting summary judgment to Appellee the City of Pikeville on their claim for personal injury and loss of consortium. Wilma Stepp was injured when she fell in a landscaped area situated between two streets in Pikeville, Kentucky. After the Stepps filed an action against the City and the landscaping company responsible for the area where she fell, the City filed a motion for summary judgment and stated as grounds that the Stepps failed to comply with KRS 411.110, which requires, as a prerequisite to filing an action against a city, notice to the city of any injury arising out of any defect in the condition of a bridge, street, sidewalk, alley, or other public thoroughfare. The Pike Circuit Court agreed that the Stepps should have given notice to the City within 90 days of the injury and granted its motion for summary judgment. On appeal, the Stepps argued that the property in question was not a "public thoroughfare" and did not, therefore, require notice under the statute. The Court of Appeals affirmed, holding that notice under KRS 411.110 was required, and the circuit court properly granted summary judgment to the City. The Court of Appeals distinguished the facts in this appeal from those in *Krietemeyer v. City of Madisonville*, 576 S.W.3d 157 (Ky. App. 2018).

B. ***MARY EVANS V. BAPTIST HEALTH MADISONVILLE***

2021-CA-0201-MR 03/18/2022 2022 WL 815420

Opinion by COMBS, SARA W.; CALDWELL, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

Appellant Mary Evans appeals from an order of the Hopkins Circuit Court dismissing (without prejudice) her lawsuit against Appellee Baptist Health Madisonville (the "Hospital"). Evans was a patient in the Hospital's emergency room. She was suffering from seizures and was placed in a wheelchair, but when she asked for assistance to go to the restroom, she was told to walk. She fell and sustained serious injuries. She filed a negligence action against the Hospital, and the Hospital filed a motion to dismiss under CR 12.02, arguing, among other things, that she failed to comply with the mandatory, simultaneous filing requirements of KRS 411.167. This statute requires a plaintiff bringing a negligence or malpractice claim against a hospital to file with the complaint a certificate of merit or an affidavit stating that no cause of action is asserted for which expert testimony is required. The circuit court granted the motion, and the Court of Appeals affirmed, holding that regardless of whether Evans' action against the Hospital was for ordinary negligence or malpractice, KRS 411.167

required the filing of a certificate of merit or an affidavit stating that no cause of action was asserted requiring expert testimony, and Evans filed neither. The Court did not address Evans' argument that KRS 411.167 is unconstitutional because she did not state how it was preserved for review and because she failed to notify the Attorney General of the constitutional challenge as required by KRS 418.075.

C. ***GARY R. PLACEK V. JOHN ELMORE, ET AL.***

2021-CA-0373-MR 03/18/2022 2022 WL 815465

Opinion by MAZE, IRV; COMBS, J. (CONCURS) AND DIXON, J. (CONCURS)

Appellant Gary R. Placek appeals from a summary judgment of the Hart Circuit Court, dismissing his claims for personal injury from an automobile accident as time-barred. Placek filed an action for damages in connection with a collision between his motor home and a tractor-trailer operated by Appellee Elmore and owned by Appellee Gibco Motor Express. The trial court granted Appellees' motion for summary judgment on the ground that Appellant's claim was barred by KRS 304.39-230(6)'s two-year statute of limitations. On appeal, Appellant argued that because Med Pay was a basic or added reparations benefit and his last payment was made on October 14, 2014, his action was timely filed on October 13, 2016. Appellees argued that Med Pay is neither a basic nor added reparations benefit; therefore, because the last basic or added reparations benefit payment was made on September 5, 2012, Appellant's complaint was filed outside the applicable limitations period. The Court of Appeals affirmed on the grounds that in *Lawson v. Helton Sanitation, Inc.*, 34 S. W. 3d 52 (Ky. 2000), the Supreme Court found that Med Pay payments are not the equivalent of basic or added reparations benefits and do not toll the limitations period.

V. WORKERS' COMPENSATION

A. ***CHRISTOPHER RYAN CUNNINGHAM V. KROGER LIMITED PARTNERSHIP I***

2021-CA-0704-MR 03/25/2022 2022 WL 880150

Opinion by CLAYTON, DENISE G.; CETRULO, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Appellant Christopher Ryan Cunningham appeals from a Boyle Circuit Court order granting summary judgment to Appellant Kroger Limited Partnership I ("KLP I"), which owns and operates a Danville, Kentucky Kroger grocery store, on the basis of "up-the-ladder" immunity under the Kentucky's Workers' Compensation Act. Cunningham was employed by Penske Logistics, LLC, which had a shipping contract with Kroger Limited Partnership II ("KLP II"), a dairy producer. Cunningham made regular deliveries of milk from KLP II to the Danville Kroger. KLP II is a subsidiary of The Kroger Co., which in turn is a limited partner of KLP I. Cunningham was injured when a dock door fell on him during a delivery to the Danville Kroger. He received workers' compensation benefits from Penske and then filed a tort action against KLP I. KLP I raised the defense of employer's immunity under Kentucky Revised Statutes (KRS) 342.610(2)(b), which extends tort immunity up-the-ladder from a subcontractor that employs an injured worker to the entities that contracted with the subcontractor. Cunningham argued that this defense was unavailable to KLP I because it did not have a contract

with Penske; it was a sibling, rather than a "parent" of KLP II; and the summary judgment undermined the policy of narrowly construing statutes which are in derogation of common law rights. The Court of Appeals affirmed because, for purposes of up-the-ladder immunity, a formal contract is not necessary, nor is the sibling v. parent distinction dispositive. The Court emphasized a fact-specific approach that looks beyond formal corporate structures to the functional interaction of the different entities. The record showed that KLP I and KLP II had an ongoing, mutually beneficial business relationship. Relying on *Cabrera v. JBS USA, LLC,* 568 S.W.3d 865 (Ky. App. 2019), the Court held that when KLP II contracted with Penske to deliver milk to KLP I, it did so as a representative and for the benefit of KLP I and that the work under the contract was a regular or recurrent part of the business of operating the grocery store. As to Cunningham's policy argument, the Court stated that this fact-specific approach is not intended to shield employers from tort liability but to ensure that contractors and subcontractors provide workers' compensation coverage.

VI. INSURANCE

A. ***JOHN BYRNES V. NATIONWIDE MUTUAL INSURANCE COMPANY***

2021-CA-0706-MR 03/11/2022 2022 WL 728037

Opinion by CETRULO, SUSANNE M.; CLAYTON, C.J. (CONCURS) AND GOODWINE, J. (CONCURS)

Appellant John Byrnes appeals from an order of the Jefferson Circuit Court granting summary judgment to the appellee insurer on a claim by Byrnes, an attorney, for fees under KRS 304.39-070. This case arose out of an automobile accident that occurred in November 2015. Attorney Byrnes represented his client against the at-fault party and settled the case with the at-fault party's carrier. His client's carrier (Nationwide), which had paid basic reparation benefits, then was able to recover those sums from at-fault party's insurer. Attorney Byrnes filed an action claiming attorney's fees from Nationwide under the authority of KRS 304.39-070. The circuit court granted summary judgment to Nationwide and dismissed the claim. On appeal, the Court of Appeals found that the holdings in *Baker v. Motorists Ins. Companies,* 695 S.W.2d. 415 (Ky. 1985), and *MFA Insurance Company v. Carroll*, 687 S.W. 2d 553, 555 (Ky. App. 1985), supported the trial court's denial of any attorney's fee in this case because Byrnes did not prove that he conferred a benefit upon Nationwide, which pursued its own claim for subrogation rights.