

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
MAY 1, 2016 to MAY 31, 2016

I. ADMINISTRATIVE LAW

A. *Kentucky State Police v. Scott*

[2014-CA-001081](#) 05/13/2016 2016 WL 2866533

Opinion by Judge Combs; Judge Dixon concurred; Judge D. Lambert dissented and filed a separate opinion. This appeal concerned a judgment entered in favor of appellees, two arson investigators employed by the Kentucky State Police. Appellees sued KSP for alleged violations of their right to equal protection of the law after discovering that another individual had been hired to fill a vacant arson investigator position at a higher rate of pay. They alleged that the individual made more money because he had registered as a Republican voter within a week of applying for his new job. Following a hearing, the circuit court found that KSP did not have a rational basis for paying the new hire more than appellees. The court further concluded that KSP had violated appellees' state constitutional rights and awarded them injunctive relief, back pay, benefits, attorneys' fees and costs. On appeal, KSP argued that the circuit court's judgment was improper because appellees failed to exhaust their administrative remedies by filing a timely appeal to the Kentucky Personnel Board when their internal grievances were initially rejected. The Court of Appeals disagreed and affirmed. The Court noted that the issues raised by appellees were constitutional in nature, and that exhaustion of administrative remedies is not required when constitutional issues are the crux of a complaint because adjudication of a constitutional matter is beyond the purview of an administrative tribunal. Consequently, because the Personnel Board lacked subject-matter jurisdiction over appellees' equal protection claim, this matter was properly before the circuit court. In dissent, Judge Lambert argued that appellees should have been required to exhaust their administrative remedies.

II. APPEALS

A. *Icon-Lex Development, LLC v. REI Real Estate Services, LLC*

[2014-CA-001643](#) 05/13/2016 2016 WL 2855298

Opinion and order dismissing by Judge VanMeter; Judges Combs and J. Lambert concurred. Upon review of an order granting judgment on the pleadings in a case involving an easement, the Court of Appeals dismissed the appeal, finding that the Court had no jurisdiction. The Court held that when an easement has been judged to be appurtenant, and thus benefits a specific piece of land rather than a specific person, the current owner of the benefitted parcel is undoubtedly affected by the Court's decision on appeal and, therefore, is an indispensable party to the appeal. Under the appellate civil rules, failure to name an indispensable party on appeal is an incurable jurisdictional defect requiring dismissal. Consequently, because the current owner of the subject property was not made a party to the appeal, dismissal was merited.

III. CONTEMPT

A. *Spencer v. Commonwealth*

[2014-CA-002024](#) 05/13/2016 2016 WL 2855253

Opinion by Chief Judge Acree; Judges Combs and Jones concurred. The Court of Appeals reversed and remanded an order holding appellant in contempt for failing to pay child support. The Court found that fixing the contempt purge amount at the full child-support arrearage amount owed did not provide appellant with a true opportunity for purging. For that reason, the Court held that the family court abused its discretion when it ordered a term of imprisonment but failed to set an attainable purge amount.

IV. CORRECTIONS

A. *Lawless v. Conover*

[2015-CA-000039](#) 05/20/2016 2016 WL 2981580

Opinion by Chief Judge Acree; Judge D. Lambert concurred; Judge VanMeter dissented and filed a separate opinion. The Court of Appeals reversed and remanded an order dismissing an inmate's petition for review of the constitutionality of her prison disciplinary proceeding by which an adjustment officer found the inmate guilty of committing physical action resulting in injury of an employee. The Court held that the inmate was denied meaningful access to the courts and her due process rights when the surveillance video documenting the subject altercation was not made part of the administrative record and, contrary to *Ramirez v. Nietzel*, 424 S.W.3d 911 (Ky. 2014), was neither made available to nor viewed by the circuit court for consideration before issuing its decision.

V. COURTS

A. *DKM Coal Corporation, Inc. v. Crawford*

[2013-CA-001936](#) 05/13/2016 2016 WL 2855871

Opinion by Judge J. Lambert; Judges Maze and Taylor concurred. Determining that no material issue of fact existed with regard to the ownership of coal tipping rights, the Court of Appeals affirmed the circuit court's entry of summary judgment in favor of appellees. Notably, the Court held that a sublessee's shareholders' admission, in open court at a hearing before the circuit court, that they owed damages to a sublessor's shareholder, was a judicial admission that could be used against sublessee's shareholders under the Kentucky Rules of Evidence. The Court further held that its prior holding in the same matter that a sublease contract's reference to "personal liability" imposed liability on the corporate sublessee's individual shareholders was the law of the case on a subsequent appeal in the same case, regardless of any discussion of the applicability of the term "person" to corporations in the later-decided United States Supreme Court case of *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). The Court also held that a delay of approximately four years after the Court issued its opinion in a prior appeal did not require dismissal of sublessors' breach of sublease action for failure to prosecute. Most of the delays were attributable to the sublessees, an extensive delay occurred when the sublessees appealed from an interlocutory order, and further delay occurred when the sublessees obtained a new attorney who later withdrew.

VI. CRIMINAL LAW

A. *Lydon v. Commonwealth*

[2014-CA-001719](#) 05/13/2016 2016 WL 2855061

Opinion by Judge Maze; Judges Clayton and Thompson concurred. Appellant filed an appeal following his conditional guilty plea to charges of marijuana possession and possession of drug paraphernalia. Appellant argued that the circuit court erred in affirming the district court's decision overruling his motion to suppress evidence observed and photographed when police entered his home without a warrant. The Court of Appeals agreed and reversed, concluding that officers lacked any recognized exigent circumstance justifying their warrantless entry into appellant's home. The subject incident occurred when officers were looking for a juvenile who was involved in an incident earlier that day, and they received information that the juvenile was at appellant's apartment. The officers conducted a knock and announce at the front door of appellant's apartment. When appellant answered the door, one of the officers informed him that he had reliable information that a juvenile was inside the home. When appellant denied that anyone else was inside his apartment, the officer, who could smell burning marijuana from his position just outside the apartment's front door, replied, "[S]o the burnt marijuana that I smell coming from the residence is yours?" Before appellant could answer, the officers entered the home. The Court of Appeals noted that the only indicia of criminal activity at the time of entry was the odor of burning marijuana, which can create probable cause but is insufficient, by itself, to create exigent circumstances justifying a warrantless entry. By the time the officers saw the juvenile for whom they were searching, they had exceeded the bounds of their knock and talk and were in a place they had no legal right or justification to be.

VII. EMPLOYMENT

A. Conley v. Pulaski County Board of Education

[2014-CA-001349](#) 05/27/2016 2016 WL 3049985

Opinion by Judge Jones; Judges J. Lambert and Maze concurred. Appellants, employees of the Pulaski County Board of Education, filed a joint complaint against the Board, individual Board members, and the Board's Superintendent, alleging political retaliation in violation of KRS 161.164. The circuit court entered summary judgment in favor of the Board and its members on the basis that appellants failed to show that either the Board or its members were involved in the employment-related decisions at issue. The circuit court also granted summary judgment to the Superintendent, who was involved in the employment-related decisions affecting appellants, on the basis that appellants failed to produce any evidence demonstrating that they engaged in any "political affiliation" prior to the adverse employment actions about which they complained. The Court of Appeals affirmed the decision of the circuit court. The Court held that appellants failed to allege any "political opinions" or "political activities" that they took part in that allegedly resulted in their adverse employment actions. The Court explained that any number of things could constitute the expression of a political opinion or a political affiliation: making a political donation, writing an editorial, serving as a reference, displaying a yard sign, belonging to a politically-affiliated group, speaking on behalf of or against an individual's candidacy, and so on. In this case, however, the Court found that appellants did not allege that they engaged in any of these or similar activities. The only activity offered by appellants was appearing at a demotion hearing in response to a subpoena many months after appellants' colleague sought the Superintendent position. Appellants' testimony at that hearing did not concern any political activities. The Court held that because there was simply no evidence of an actionable political opinion or affiliation, appellants' claim under KRS 161.164 failed, regardless of whether it was against the Superintendent, the Board, or the individual board members.

VIII. FEES AND COSTS

A. *Hencye v. White*

[2013-CA-002079](#) 05/27/2016 2016 WL 3050079

Opinion by Judge Thompson; Judge D. Lambert concurred; Judge Dixon dissented. Appellant challenged an order directing her to pay \$8,000 of her ex-husband's attorneys' fees incurred as a result of alleged discovery violations after she requested appointment of a parenting coordinator. The Court of Appeals reversed, holding that under KRS 403.220, attorneys' fees cannot be awarded absent a finding of a disparity in income between the parties and, further, that the conduct of the party seeking attorneys' fees must be considered. Additionally, the Court held that CR 37 cannot justify an award of attorneys' fees where there was not a "pending" action, and that a request for the appointment of a parenting coordinator, standing alone, did not satisfy this requirement in the absence of any motion to modify custody or parenting time. The Court also held that appellant could not be ordered to pay attorneys' fees incurred as a result of her current husband's noncompliance with the family court's orders to produce a HIPPA release.

IX. IMMUNITY

A. *Beward v. Whitaker*

[2013-CA-000773](#) 05/06/2016 2016 WL 2609308

Opinion by Judge J. Lambert; Judges Jones and Stumbo concurred. On remand from the Supreme Court of Kentucky, the Court of Appeals reversed its original holding in which it affirmed the circuit court's interlocutory decision that two high school principals were not entitled to qualified official immunity for injuries a student sustained in a hallway that was left unsupervised because the teacher assigned to supervise that station pursuant to the supervision schedule was absent that day. The Court originally held that the principals' duty to enforce the supervision schedule and to supervise the hallway was ministerial, and thus they were not entitled to immunity. However, on reconsideration in light of the Supreme Court's holding in *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014), the Court held that because the supervision schedule did not include any direction or rule to address when a teacher or administrator assigned to a post was absent, it did not create a ministerial duty to ensure that the station was manned in the absence of a teacher. The principals had a general supervisory duty to make the hallway assignments and to walk the hallways as part of their job requirements. In the absence of a clear directive as to what to do when a teacher assigned to a post was absent, it was left to the principals' discretion as to how to proceed, entitling them to qualified official immunity.

B. *Rasche v. Berman*

[2012-CA-001766](#) 05/20/2016 2016 WL 2981636

Opinion by Judge J. Lambert; Judges Kramer and VanMeter concurred. On remand from the Supreme Court of Kentucky for further consideration in light of *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014), the Court of Appeals affirmed the circuit court's determination that various employees of the Jefferson County Board of Education were entitled to qualified official immunity. The Court held that the employees' decision as to whether to close school due to inclement weather and the manner in which school parking lots were cleared amounted to discretionary functions. As such, qualified official immunity attached.

X. INSURANCE

A. *Brown v. Mitsui Sumitomo Insurance Company*

[2013-CA-001191](#) 05/06/2016 2016 WL 2609303

Opinion by Judge Nickell; Judges Dixon and Kramer concurred. Appellant was injured in a work-related motor vehicle accident while riding in his employer's vehicle. Appellant filed for and received workers' compensation benefits from his employer's workers' compensation carrier. Knowing the Workers' Compensation Act provides an exclusive remedy, appellant mistakenly believed that his employer, Trim Masters, Inc., and its underinsured motorist (UIM) carrier, Mitsui Sumitomo Insurance Company, were immune from suit. However, KRS 342.690(1) does not prohibit suit against a UIM carrier after payment of a workers' compensation claim. Two days shy of two years from the collision, appellant filed suit against the tortfeasor and against his own UIM carrier, State Auto; he did not file suit against Mitsui. In response, State Auto asserted that its UIM coverage was secondary to that provided by Mitsui and sought leave to file a third-party complaint against Mitsui. Appellant initially opposed the motion, but then conceded that Mitsui should have been named as a defendant and moved to file an amended complaint to add them. State Auto also moved for summary judgment. The circuit court sustained both motions and named Mitsui as a defendant. Mitsui answered the complaint asserting that Trim Masters' insurance policy required a UIM claim to be filed within two years of accrual and moved for judgment on the pleadings since the amended complaint was filed nearly three years after the collision. The circuit court found that: (1) two years was a reasonable contractual window in which to file suit; (2) appellant's failure to name Mitsui as a defendant when he filed against the tortfeasor and his own personal UIM carrier was fatal because he had to exhaust UIM benefits from Mitsui (the primary carrier) before he could pursue benefits from State Auto (the secondary carrier); and (3) as a third-party beneficiary under his employer's policy, appellant could enforce the policy's terms, but he had to enforce all of its terms and not only the ones that benefitted him. Thus, UIM benefits had to be claimed within two years of accrual. The Court of Appeals affirmed. Since appellant had filed suit against the tortfeasor and his own UIM carrier within two years, there was no reason he could not have filed against his employer's UIM carrier at the same time. The Court noted that appellant's counsel need not have waited until his investigation was complete before filing suit; so long as he did due diligence to believe Mitsui was potentially liable, the complaint could have been filed.

B. Eberle v. Nationwide Mutual Insurance Co.

[2013-CA-000898](#) 05/06/2016 2016 WL 2609311

Opinion by Judge Jones; Judges J. Lambert and Stumbo concurred. This appeal concerned coverage under a homeowner's insurance policy issued by Nationwide Insurance Company to Michael Bishop. The circuit court determined that Nationwide was not obligated to provide coverage for injuries appellant sustained when Bishop shot him because the injuries were caused by conduct expressly excluded from coverage in Nationwide's policy. On appeal, the Court of Appeals determined that Nationwide's criminal acts exclusion applied to an "act or omission which is criminal in nature" such that it constituted a felony or misdemeanor under Kentucky's Penal Code. Under this definition, offenses punishable only by a fine would not be covered by the criminal acts exclusion because such offenses are violations, not misdemeanors or felonies. *See* KRS 500.080; KRS 431.060. Traffic infractions are likewise excluded from Kentucky's definition of a misdemeanor. *See* KRS 500.080. Bishop pled guilty to wanton endangerment in the first degree, a Class D felony. The Court noted that intentionally pointing a gun at an unarmed child is the type of conduct every citizen should know is wanton and criminal. The Court refused to accept that Bishop could have reasonably expected such core criminal conduct to fall outside of Nationwide's criminal acts exclusion. Accordingly, the Court held that the exclusion applied in this case. The Court then determined that Bishop's *Alford* plea collaterally estopped him from denying civil liability and that the conviction established Bishop's factual guilt irrespective of the fact that the conviction was obtained through entry of an *Alford* plea.

XI. JUVENILES

A. *Perkins v. Commonwealth*

[2014-CA-000412](#) 05/06/2016 2016 WL 2609305

Opinion by Judge Nickell; Judges Dixon and Jones concurred. A 16-year-old was charged with robbing a man at gunpoint. The Commonwealth moved to try the juvenile as a youthful offender and chose to proceed under both KRS 635.020(2), which requires the district court to consider the factors enumerated in KRS 640.010(2)(b) before transferring a case to circuit court, and KRS 635.020(4), under which transfer is automatic upon the district court finding that a juvenile 14 years or older committed a felony in which a firearm was used. The district court conducted one hearing on both provisions. After finding the three elements needed for automatic transfer, the district court heard testimony about the other factors, but ultimately determined it lacked jurisdiction to go further because once KRS 635.020(4) was satisfied, transfer was automatic and jurisdiction had passed to the circuit court. Appellant entered a conditional guilty plea to an amended charge of second-degree robbery and a charge of possession of a handgun by a minor, first offense, and appealed. In affirming, the Court of Appeals notably held that KRS 635.020(4) does not require the juvenile the Commonwealth seeks to transfer to circuit court to personally wield or use the firearm to commit the subject felony. Instead, the statute requires only “that a firearm [be] used in the commission of that felony.”

XII. PROPERTY

A. *B.G. Dunnington Revocable Trust v. Shaw*

[2015-CA-000239](#) 05/27/2016 2016 WL 3050043

Opinion by Judge Stumbo; Judges Dixon and Maze concurred. The Court of Appeals affirmed a judgment which found that a contract for the purchase of real property could not be altered even though the number of acres listed in the deeds was incorrect. The Court held that even though the number of acres listed was incorrect, the metes and bounds description was accurate. Since this was not a sale of land by the acre, the metes and bounds description prevailed over a description given by acres. The Court also held that the 10% Rule described in *Manning v. Lewis*, 400 S.W.3d 737 (Ky. 2013), did not apply in this case.

XIII. STANDING

A. *Pam I, LLC v. Elmo Greer & Sons, LLC*

[2014-CA-002076](#) 05/27/2016 2016 WL 3049734

Opinion by Judge VanMeter; Judges Combs and D. Lambert concurred. Upon review of an order dismissing appellant's action for damages to its leasehold interest due to an alleged lack of standing, the Court of Appeals vacated and remanded the case for further proceedings. The Court held that the circuit court erred in finding that appellant, as a lessee/tenant of certain property allegedly damaged by blasting, had no standing to bring the claim because it had no ownership interest in the property. Pursuant to *Walden v. Conn*, 84 Ky. 312, 1 S.W. 537 (1886), and its progeny, a tenant has a right of action for damages to its leasehold interest during the term of the tenant's right to possession. The Court noted that the circuit court's reliance on *Fletcher Lumber Co. v. Fordson Coal Co.*, 311 Ky. 19, 223 S.W.2d 175 (1949), was inappropriate given the fact that *Fletcher* only addressed whether possession of property split between a lessor and lessee was sufficient to establish a claim of title due to adverse possession. The holding in *Fletcher* did not in any way bear upon whether a tenant has standing to bring a cause of action for damages to a leasehold estate. Consequently, the circuit court's order dismissing appellant's claims due to a lack of standing was erroneous.

XIV. TORTS

A. *Burchett v. Burchett*

[2015-CA-000198](#) 05/13/2016 2016 WL 2855384

Opinion by Judge D. Lambert; Judges Combs and VanMeter concurred. This appeal was brought from an order finalizing dismissal of a wrongful death suit against an automotive dealer and his insurer. Amanda Burchett and Erick Blair (Blair) bought an automobile from David Perry, d/b/a Louisa Auto Mart (Perry). Blair crashed the automobile six days later while driving intoxicated. Amanda Burchett and Benjamin Burchett II were riding with Blair at the time. Benjamin was killed in the crash. Sandra Burchett, as the representative of Benjamin's estate, later filed a wrongful death action against Blair and Perry. In the complaint, she alleged: (1) that Perry violated KRS 186A.220 because he sold the automobile to Blair and Amanda and neither one had insurance; (2) that Perry violated KRS 186.620 by authorizing and permitting a person without a driver's license to drive an automobile; (3) that Perry negligently entrusted the automobile to Blair and Amanda; and (4) that Perry remained the owner of the automobile because he sold it to individuals who did not have insurance in violation of KRS 186A.220. The circuit court granted Perry's motion for summary judgment as to the violations of KRS 186A.220 and held a jury trial to decide two issues: whether Perry delivered title documents to Blair and Amanda on the day of the sale (yes), and whether Amanda had a driver's license (no). Based on the jury's determination, the circuit court ruled that title to the automobile transferred on the day of the sale, eliminated any issues relating to Perry's alleged liability, and dismissed Perry from the action. On appeal, Sandra argued: (1) that Perry breached a statutory duty of care by authorizing or knowingly permitting Blair to drive the automobile because Blair did not have a driver's license; (2) that Perry had a duty to verify that Blair and Amanda were insured; and (3) that a jury issue remained as to whether Perry negligently entrusted the vehicle to Blair and Amanda because he should have known that neither Blair nor Amanda had a driver's license or insurance. The Court of Appeals rejected all three arguments and affirmed. Because Perry delivered the necessary title documents to Blair and Amanda on the day of sale, Blair and Amanda became the owners of the automobile on that day. Moreover, since Perry was no longer the owner, he was under no duty to prevent either Blair or Amanda from driving the automobile on the day of the accident. Finally, because Perry transferred the title documents to Blair and Amanda directly, and did not retain the certificate of title with the consent of the new owners to file it with the county clerk, he did not have to verify whether Blair or Amanda was insured. The Court further held that because the accident occurred after the sale, the negligent entrustment claim against Perry failed as a matter of law.

B. DeMoisey v. Ostermiller

[2014-CA-001827](#) 05/06/2016 2016 WL 2609321

Opinion by Judge Jones; Chief Judge Acree and Judge Clayton concurred. This appeal and cross-appeal arose out of a civil action wherein appellants/cross-appellees, J. DeMoisey Fox and the DeMoisey Law Office, PLLC (“DeMoisey”), asserted claims against appellee/cross-appellant, attorney Peter L. Ostermiller, for tortious interference with contractual relations, tortious interference with prospective contractual relations/business advantage, and abuse of process. The claims arose out of Ostermiller’s advice to and representation of Infocon Systems, Inc. (“Infocon”), a former client of DeMoisey. The Court of Appeals held that DeMoisey could not rely on an alleged contingency fee agreement that had previously been determined to violate the Kentucky Rules of Professional Conduct to support a tortious interference with contractual relations claim. The Court also held that DeMoisey had failed to allege a cognizable tortious interference with prospective contractual relations/business advantage claim because in the absence of a valid contingency fee agreement, his only expectancy was to receive a fee in *quantum meruit*. With respect to the cross-appeal, the Court determined that the abuse of process claim should have been dismissed with prejudice because it was time barred. The Court held that successful termination of the underlying action is not an element of an abuse of process claim and, therefore, the statute of limitations on such a claim begins to run when the conduct comprising the abuse takes place.

C. *Goins v. Lafoe*

[2014-CA-001476](#) 05/27/2016 2016 WL 3050234

Opinion by Judge Dixon; Judges Combs and D. Lambert concurred. The Court of Appeals affirmed an order granting summary judgment for appellees on the grounds that appellant's tort claims were time-barred. Appellant asserted that the five-year limitations period set forth in KRS 413.120(2) applied to her claims, which she characterized as statutory violations of the penal code. The Court held that appellant could not circumvent the applicable statute of limitations (KRS 413.140(1)(a)) by characterizing her tort claims in this manner. Appellant's cause of action concerned physical injuries she allegedly suffered at the Lexington-Fayette Urban County Government Detention Center. Consequently, the one-year statute of limitations applicable to personal injury actions applied. Since appellant waited nearly five years before filing suit, her claims were time-barred. The Court also held that appellant's plea agreement in a related criminal action barred her subsequent claim of malicious prosecution as a matter of law.

XV. WORKERS' COMPENSATION

A. *Austin Powder Company v. Stacy*

[2014-CA-000918](#) 05/20/2016 2016 WL 3024188

Opinion by Judge J. Lambert; Judges Combs and Taylor concurred. In this workers' compensation case, both the employee (Stacy) and the employer (Austin Powder) petitioned the Court of Appeals for review of the Workers' Compensation Board's decision. In his petition, Stacy asserted that the Board erred in remanding for findings related to the date of manifestation and for a determination of the percentage of his cumulative trauma that was attributable to his work for Austin Powder. The Court agreed and held that this was improper pursuant to the *Hale v. CDR Operations, Inc.*, 474 S.W.3d 129 (Ky. 2015), in which the Supreme Court of Kentucky held that the apportionment scheme set forth in *Southern Kentucky Concrete Contractors, Inc., v. Campbell*, 662 S.W.2d 221 (Ky. App. 1983), did not apply under the current version of the Workers' Compensation Act and that the Board may not set aside a valid stipulation of fact (date of manifestation) *sua sponte*. The Court then rejected the arguments Austin Powder raised in its petition, holding that the administrative law judge was within his discretion in relying upon certain medical evidence and that Stacy was entitled to medical benefits for his hearing loss claim, even though his impairment rating did not rise to the level that he was entitled to income benefits.