

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
MAY 1, 2018 to MAY 31, 2018

I. ARBITRATION

A. *New Meadowview Health and Rehabilitation Center, LLC v. Booker*

[2017-CA-000073](#) 05/04/2018 2018 WL 2070840

Opinion by Judge Maze; Chief Judge Kramer and Judge Johnson concurred.

In 2007, Mona Hardin executed a durable power-of-attorney (POA) that designated her husband William as her attorney-in-fact. In 2012, William executed documents to admit Mona as a resident to Meadowview's facility in Louisville. After Mona died in 2016, her estate brought an action against Meadowview for negligence, wrongful death, and violation of the Long-term Resident's Rights Act. Meadowview moved to compel arbitration under an agreement that William purportedly executed at the time of her admission. However, Meadowview only presented the signature page of the agreement and attempted to establish the rest of the agreement through the testimony of its corporate counsel. The circuit court denied the motion to compel arbitration. The Court of Appeals affirmed. The Court first noted that Meadowview had the initial burden of establishing the existence of an enforceable agreement. The Court held that the signature page of the arbitration agreement was insufficient to establish a complete agreement, and that the testimony of corporate counsel about Meadowview's customary admission practices could not establish that entire contract was presented to William at the time of its execution. Second, the Court held that the POA unambiguously stated that it became effective upon Mona's disability or incapacity. KRS 386.093(5) sets out the evidence required to establish such disability or incapacity. The Court concluded that Meadowview failed to present sufficient evidence to meet the statutory standard to invoke the POA. Lastly, the Court held that Meadowview failed to establish that it reasonably relied upon William's apparent authority to execute the arbitration agreement.

II. CONTRACTS

A. *Lamb v. Light Heart, Inc.*

[2017-CA-000314](#) 05/04/2018 2018 WL 2070834

Opinion by Judge Johnson; Judges Dixon and Taylor concurred.

Appellant and Colleen London signed a document, prepared by Lamb, that purported to establish a cost-plus agreement between the two concerning a remodeling of an old house. The property in question was actually owned by appellee Light Heart, Inc. After the project went sour, Lamb filed suit against London and Light Heart seeking \$27,000, the 10% profit he claimed due under the cost-plus agreement. Following a bench trial, the circuit court entered a judgment in favor of Light Heart. The Court of Appeals affirmed, holding that a valid contract did not exist between the parties. The document signed by Lamb and London contained no beginning date, ending date, definition of work to be done, amount of the contract, or terms of when the contract would be complete. Thus, the Court held that the document was not a contract; at best, it was an open-ended week-to-week agreement setting out the rate of pay per hour for Lamb's work.

III. CRIMINAL LAW

A. *Alexander v. Commonwealth*

[2017-CA-000660](#) 05/11/2018 2018 WL 2167296

Opinion by Judge Nickell; Judge Combs concurred; Judge Jones concurred in result only.

Appellant challenged an order granting the Commonwealth's motion to dismiss an indictment against her without prejudice. She contended that the circuit court should have denied the motion and permitted the matter to proceed to trial. She also urged the Court of Appeals to hold that trial courts have the inherent power to grant expungement in cases such as hers. The Court of Appeals affirmed. Appellant successfully challenged a traffic support as unconstitutional, and the circuit court granted her motion to suppress evidence seized from her vehicle. Having no other evidence to support the charges, the Commonwealth verbally moved to dismiss the indictment without prejudice at a subsequent pretrial conference. Appellant opposed the motion, asserting that a dismissal without prejudice could never be expunged or removed from her record. The circuit court expressed its displeasure with the Commonwealth's position but concluded that it had no authority to dismiss an indictment with prejudice absent the Commonwealth's consent. In affirming, the Court of Appeals noted that motions to dismiss pending prosecutions must be sustained unless clearly contrary to manifest public interest. Under the facts of the case, the circuit court did not abuse its discretion in granting the motion. The Court further held that trial courts do not possess an inherent power to expunge criminal records under circumstances such as those presented in the instant matter. Expungement is a privilege granted by statute, the express limits of which cannot be extended by judicial *fiat*.

B. Commonwealth v. Brown

[2016-CA-001641](#) 05/18/2018 2018 WL 2271149

Opinion by Judge D. Lambert; Judge J. Lambert concurred; Judge Acree concurred and filed a separate opinion.

The Commonwealth challenged an interlocutory order that granted appellee's motion to suppress the results of blood alcohol testing. The Court of Appeals reversed and remanded, holding that the circuit court improperly concluded that appellant did not give express consent to the testing. Following an automobile accident that resulted in the death of her passenger, appellant was airlifted and hospitalized at the University of Louisville Medical Center. A police officer travelled to the hospital to obtain a blood sample from her. The officer testified that appellant had an obvious head injury, which he described as "a deep gash on her forehead that parted her hair," and a broken leg. He twice testified that he "allowed the medical staff to do their thing," and waited for a doctor's permission before speaking to appellant, who was still strapped to a backboard. He also testified that during their conversation, appellant recalled that there had been a collision, but neither recalled the specifics of the collision nor understood why he was there. The officer proceeded to read the standard KSP implied consent warning to appellant, which he also read into the record at the suppression hearing. The warning cautioned that refusal to submit to testing would result in a doubled jail sentence if appellant was convicted, appellant's driver's license being suspended, and appellant being ineligible for an ignition interlock license. The officer testified that he stopped after each paragraph of the warning to ask appellant whether she understood the warning, and she responded in the affirmative each time. He then asked for permission to obtain a blood sample, and "she told me that was fine." The Court of Appeals held that given these facts, the circuit court erred in finding that appellant had failed to give consent.

IV. EMPLOYMENT

A. *Larison v. Home of the Innocents*

[2016-CA-001910](#) 05/11/2018 2018 WL 2167323

Opinion by Judge Jones; Judges D. Lambert and Taylor concurred.

The Home of the Innocents (HOTI) employed appellant as a certified nursing assistant. Appellant suffered a severe stroke that rendered her fully incapacitated for over four months and unable to fully speak for nearly a year after her separation from HOTI. In response, appellant's husband Charles contacted HOTI and requested paperwork under the Family Medical Leave Act (FMLA) on her behalf. After HOTI forwarded the FMLA paperwork to Charles on August 11, 2014, he emailed a request to HOTI for "discharge papers for resignation under medical" on August 13th. HOTI then processed appellant's resignation as having been requested on August 13th, despite Charles never sending a follow-up email, as requested by HOTI. On August 22nd, Charles submitted the completed FMLA paperwork to HOTI. However, by the time HOTI received the FMLA request papers, appellant's employment with HOTI had already been terminated. Two months later, appellant filed a civil complaint against HOTI for discriminatory and unlawful discharge on the basis of a disability or a perceived disability in violation of KRS Chapter 344.010 *et seq.*; failure to accommodate; and retaliation and unlawful discharge in violation of KRS 344.280. After a discovery period, HOTI moved for summary judgment on all claims. The circuit court granted HOTI's motion after finding that there were no genuine issues of material fact that would make it possible for appellant to prevail at trial. On appeal, appellant challenged the circuit court's findings regarding her disability discrimination claim and her failure to accommodate claim. The Court of Appeals held that appellant could not establish a *prima facie* case of either disability discrimination or failure to accommodate because she was unable to perform the essential functions of her employment position, with or without accommodation, after her stroke. As a matter of law, then, HOTI was entitled to summary judgment on those claims. In reaching this decision, the Court emphasized that appellant's complaint alleged only state law claims and did not pursue any federal-law-based claims under the Americans with Disabilities Act or the FMLA. Therefore, it could offer no opinion on the viability of any claim under those provisions.

V. FAMILY LAW

A. *Simms v. Estate of Blake*

[2017-CA-000306](#) 05/11/2018 2018 WL 2167322 Rehearing Pending

Opinion by Judge Jones; Judge Nickell concurred in result only and filed a separate opinion; Judge Combs dissented and filed a separate opinion.

The circuit court found that appellant had abandoned the care and maintenance of his son, Brandon Michael Blake, during his minority and concluded that appellant was foreclosed by Mandy Jo's Law, KRS 391.033 and KRS 411.137, from receiving a distribution from Brandon's estate or any of the proceeds recovered for Brandon's wrongful death. On appeal, appellant asserted that the finding that he had abandoned Brandon was at odds with the undisputed fact that he was never delinquent in paying his court-ordered child support for Brandon. As a result, appellant argued that he did not willfully abandon Brandon, and he sought reversal of the circuit court's conclusion that Mandy Jo's Law barred him from recovering from Brandon's estate and wrongful death proceeds. Alternatively, appellant sought to vacate the circuit court's order and to remand this matter for additional proceedings. In a 2-1 vote with three separate opinions written, the Court of Appeals affirmed. Of note, the majority opinion provided that a preponderance of evidence standard, the default standard in ordinary civil actions, is the appropriate standard of proof in a Mandy Jo's Law proceeding. The Court then noted that "care and maintenance" are interrelated components of a parent's overall responsibilities for his or her minor children and that these words must be combined to define a parent's overall responsibilities. The ultimate question is whether the parent abandoned his or her child, and no one factor is determinative of that issue. Here, while appellant provided child support for Brandon, he failed to perform virtually every other obligation as a parent. Consequently, the circuit court did not err in making a finding of abandonment. Of further note, both the concurring and dissenting opinions expressed considerable concern about the conduct of appellees during the probate process.

VI. INSURANCE

A. *Ritchie v. Turner*

[2016-CA-000686](#) 03/23/2018 2018 WL 1444246 DR Pending

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

The Court of Appeals affirmed a judgment finding no insurance coverage for a middle school teacher who sexually abused a minor student. The school had purchased a special endorsement covering acts of sexual abuse or misconduct. Two exclusions in the insurance policy, one excluding coverage for criminal acts and the other excluding coverage for willful violations of penal statutes, were cited by the circuit court in declaring coverage unavailable. Appellants argued that these exclusions were void because they made coverage for sexual abuse or misconduct illusory by excluding damages related to criminal acts - such as sexual abuse in this case. The Court of Appeals held that the exclusions applied and that coverage was not illusory because only the perpetrator of sexual abuse or misconduct was excluded from coverage. Employees who supervised, hired, trained, or investigated a perpetrator were covered by the sexual abuse endorsement.

VII. LANDLORD/TENANT

A. *Stowe v. Realco Limited Liability Company*

[2015-CA-000876](#) 05/11/2018 2018 WL 2167338

Opinion by Judge Nickell; Judges Jones and Maze concurred.

In an action for unpaid rent and damages resulting from a breach of a commercial lease, appellant argued that the claims should be barred because the provisions of KRS 383.160 applied, creating a one-year holdover tenancy when appellee did not institute proceedings to recover the premises within 90 days of the expiration of the parties' lease. The circuit court concluded that the express language of the lease controlled, denied appellant's motion for summary judgment on his counterclaim, and denied his motion seeking a ruling that the lease term had been extended by statutory language. Appellant's continued reliance on KRS 383.160 was rejected multiple times, and the circuit court ultimately granted summary judgment in favor of appellee. On appeal, appellant again argued that KRS 383.160 was controlling and that the circuit court erred in not so finding. The Court of Appeals held that KRS 383.160 is a gap-filling provision and that appellant's reliance on the statute was improper. Plain and unambiguous language in the lease agreement regarding the rights and intentions of the parties in the event of a holdover explicitly covered the situation, so there was no need to resort to applying KRS 383.160. The lease terms created a month-to-month tenancy and appellee was not prohibited from taking steps to remove appellant from the premises based on his breach of the lease.

VIII. PROPERTY

A. *Harms v. Chase Home Finance, LLC*

[2016-CA-001324](#) 05/11/2018 2018 WL 2167326

Opinion by Judge D. Lambert; Judges Acree and Thompson concurred.

Appellants challenged a judgment that reformed a mortgage and deed based on the equitable principle of mutual mistake. Appellants argued that the unjust enrichment claim asserted by Chase Home Finance, Inc. (Chase) was time-barred and that, even if not so precluded, the circuit court exceeded its authority in reforming the deed in addition to the mortgage. The Court of Appeals affirmed, holding that the circuit court did not err in ordering the reformation of the mortgage and deed or in entering judgment against appellants for unjust enrichment. The Court first held that pursuant to KRS 413.130(3), Chase's claim of mistake because of a discrepancy in the deed was subject to a ten-year statute of limitations. Here, the mistake was made in 2002, discovered in 2010, and the amended complaint seeking reformation and damages for unjust enrichment was filed by Chase in 2011. Therefore, the claim was timely. The Court next held that because there was no dispute regarding the mutual mistake of the parties as to the property conveyed, the proper remedy was to reform the mortgage and deed to match the parties' intentions. Finally, the Court held that the elements of unjust enrichment were satisfied in this case.

IX. STATUTES

A. *Crook v. Maguire*

[2015-CA-000379](#) 05/11/2018 2018 WL 2168796

Opinion by Judge Jones; Judge Nickell concurred; Chief Judge Kramer concurred in part, dissented in part, and filed a separate opinion.

After appellant received a call from the Madisonville Police Department in July 2005, he went to the police station for an interview. The police questioned appellant for two or three hours regarding a number of controlled substance prescriptions that had been written for appellant by appellee, one of appellant's former treating physicians. Appellant subsequently filed suit against appellee seeking emotional distress damages based upon negligent infliction of emotional distress (NIED), intentional infliction of emotional distress (IIED), negligence *per se*, and violation of KRS 411.210, which addresses actions for identify theft. Appellant maintained that his interview with the police was distressing because the interviewing officer told him that if he had been involved in appellee's scheme he could be arrested. The circuit court dismissed appellant's claims because he had failed to present expert medical or scientific proof that his alleged emotional distress and mental anguish significantly affected his everyday life or required significant treatment. The Court of Appeals affirmed the circuit court with respect to all claims except for appellant's claim pursuant to KRS 411.210. The Court noted that a claim under KRS 411.210 is grounded in statute, and, pursuant to *Indiana Insurance Company v. Demetre*, 527 S.W.3d 12 (Ky. 2017), the expert evidence requirement set forth in *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012) applies only to IIED and NIED claims. The requirement of expert testimony does not attach to emotional damages claimed as part of statutory or contractually-based causes of action. While appellant did not have expert medical testimony to support his claim for emotional damage, he testified about the distress the identify theft and related events caused him. Additionally, appellant's pastor testified that appellant was emotionally upset by these events. This was sufficient; no expert testimony was required for appellant to recover emotional distress damages under his statutory cause of action. Accordingly, the Court reversed the grant of summary judgment as to that claim and remanded for further proceedings.

X. TRIALS

A. Neal v. Floyd

[2017-CA-000120](#) 05/04/2018 2018 WL 2070839

Opinion by Judge Johnson; Judge Dixon concurred; Judge Taylor dissented without filing a separate opinion.

Dr. Floyd performed open heart surgery on appellant's husband on January 16, 2012. There were complications both during and after the surgery that led to the husband's death three days later. Appellant subsequently filed a medical malpractice action against Dr. Floyd, and the case proceeded to trial. During *voir dire*, appellant's attorney questioned prospective jurors about their views on non-economic damages and the potential that his law firm's reputation might influence their verdict. One juror expressed some concern, but the circuit court denied appellant's motion to strike the juror for cause. As a result, appellant was forced to use one of her peremptory strikes. She later filed an appeal after a defense verdict. In a 2-1 vote, the Court of Appeals determined that the circuit court abused its discretion by failing to strike the juror for cause, so the case was remanded for a new trial.

B. Zewoldi v. Transit Authority of River City

[2015-CA-000452](#) 05/18/2018 2018 WL 2271350

Opinion by Judge D. Lambert; Judge Thompson concurred; Judge Smallwood concurred in result only.

Appellant challenged several evidentiary rulings made during the trial of his personal injury action against the Transit Authority of River City (TARC) and its employee, Carolyn Bryant. Appellant contended that the circuit court improperly excluded expert witness testimony (due to an untimely CR 26 disclosure) and documentary evidence, abused its discretion in failing to grant a continuance, and erroneously failed to give a jury instruction as to punitive damages. The Court of Appeals reversed in part and remanded, concluding that the circuit court erred as to the exclusion of his expert's testimony, as to the admissibility of his medical records, as to the admissibility of Bryant's employee records, and in the denial of a continuance. The Court held that by limiting appellant's ability to present expert medical evidence as to the causation of his injury and of his potential damages, the circuit court allowed appellees' expert testimony - which was almost exclusively about causation - to be heard, unchallenged, by the jury, despite a disclosure of that expert witness only six days prior to trial. Moreover, appellant's disclosure, while admittedly untimely, occurred well in advance of the trial date, allowing appellees time enough to retain an expert of their own. Appellees had actual knowledge of appellant's medical history and of the expert's opinions months ahead of the trial date, so the purpose of CR 26, to prevent prejudicial surprise, was not impaired by appellant's late disclosure. The Court also held that appellant's medical records and Bryant's employee records were admissible pursuant to KRE 803(6) and 902(11) and should have not been excluded. Finally, the Court held that the circuit court abused its discretion in denying appellant's motion for a continuance because basic discovery requests remained outstanding, witnesses had yet to be deposed, and appellees had yet to even identify some of the witnesses they would later call to give trial testimony. The only factor conceivably justifying the denial of the continuance would be the inconvenience to the witnesses and the circuit court, but this inconvenience did not outweigh the competing interest of avoiding significant prejudice to appellant.

XI. WRITS

A. *Delahanty v. Commonwealth*

[2017-CA-000186](#) 05/25/2018 2018 WL 2372794

Opinion by Judge Jones; Chief Judge Kramer and Judge Johnson concurred.

Jefferson District Court Judges Sean Delahanty and Stephanie Pearce Burke brought this appeal challenging the Jefferson Circuit Court's grant of a writ of mandamus/prohibition. At issue was whether the county attorney's "Drive Safe Louisville" (DSL) program and KRS 186.574(6) were unconstitutional, as determined by the district court judges. As part of the DSL program, the county attorney would move the district court for dismissal of certain traffic citations once traffic offenders had completed the program. The county attorney filed a petition for a writ of prohibition/mandamus with the circuit court, in which he requested that the circuit court prohibit Judges Delahanty and Burke from taking any action on Judge Delahanty's opinion declaring DSL and KRS 186.574(6) unconstitutional and require both judges to give full force and effect to KRS 186.574(6). The circuit court granted the writ, concluding that Judge Delahanty had been acting outside of his jurisdiction when he *sua sponte* ruled that KRS 186.574(6) was unconstitutional and because the county attorney had no other avenue for redress. The Court of Appeals first disagreed with the circuit court that Judge Delahanty had lacked subject matter jurisdiction to enter the order at issue. District courts have jurisdiction to hear traffic offenses; accordingly, Judge Delahanty did have subject matter jurisdiction to act on the DSL cases pending before him. Nonetheless, the Court affirmed the grant of the writ. Because Judge Delahanty's order had granted the Commonwealth the relief it requested - dismissal of the DSL cases - there was no authority under which the county attorney could have adequately challenged the order and obtained relief, absent seeking a writ. The Court held that Judge Delahanty had committed numerous errors in his act of declaring KRS 186.574(6) unconstitutional: (1) he *sua sponte* considered and ruled on constitutional issues; in doing so, he failed to apply the presumption that the statute was constitutional; (2) he failed to provide the county attorney with proper notice and due process; (3) he failed to notify the Attorney General that he was challenging the constitutionality of KRS 186.574(6); and (4) he violated the separation of powers doctrine. Notably, the Court held that it was not necessary to make a finding of irreparable harm in this case, as the grant of a writ would be appropriate under the "special cases exception." Judge Delahanty's error in entering the order declaring KRS 186.574(6) unconstitutional and the district court's continuing error in relying on that order, created an unorganized and unjust system in Jefferson County, such that correction of those errors was necessary in the interest of orderly judicial administration.