

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
MAY 01, 2022 to MAY 31, 2022

I. ADMINISTRATIVE LAW

A. PUBLIC SERVICE COMMISSION OF KENTUCKY AN INDEPENDENT AGENCY OF THE COMMONWEALTH V. METROPOLITAN HOUSING COALITION, ET AL.

[2019-CA-0542-MR](#)

05/27/2022

2022 WL 1699868

Opinion by McNEILL, J. CHRISTOPHER; ACREE, J. (CONCURS) AND DIXON, J. (CONCURS)

Appellant Public Service Commission of Kentucky (PSC) appealed from a March 5, 2019 order entered by the Franklin Circuit Court granting Appellees' petitions to intervene in the underlying administrative utility rate adjustment applications. Appellees include several entities representing the interests of individuals and utilities impacted by the potential rate adjustments. On appeal, the Court of Appeals held that the law of the case doctrine did not apply, that Appellees had a right under KRS 278.410(1) to appeal the PSC's denial of their motion to intervene, and that there is no interlocutory appeal from the PSC's order denying Appellees' motion to intervene. The Court, therefore, reversed the Franklin Circuit Court's order.

II. CIVIL PROCEDURE

A. BENNCHE, INC. V. SILVER CREEK TRANSPORT, LLC

[2020-CA-0389-MR](#)

05/20/2022

2022 WL 1592695

Opinion by THOMPSON, KELLY; COMBS, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Appellant Bennche, Inc. appealed from the orders of the Henderson Circuit Court denying its motion to set aside a default judgment in favor of Appellee Silver Creek Transport, LLC. In the underlying action, Silver Creek filed a complaint against Bennche under KRS 365.800 to 365.840, which governs the repurchase of inventory from retailers by suppliers. Silver Creek served Bennche through the Kentucky Secretary of State under the long-arm statute. The summons and complaint were not delivered and were returned to the Kentucky Secretary of State with a "Return to Sender, Unable to Forward, Return to Sender" stamp. After Bennche failed to respond to the complaint, judgment was entered against it. More than a year after the default judgment was entered, Bennche moved to set it aside. Bennche argued that it had not been served, that it had inadvertently failed to update its registered address with the Texas Secretary of State, that it did not have to repurchase the vehicles in question because they were not "farm equipment" and because it was not the entity that sold the vehicles, and that Silver Creek would not be prejudiced by setting aside the default judgment. The Court of Appeals affirmed, holding that Bennche failed to provide a valid excuse for the default, failed to demonstrate a meritorious defense, and failed to show the absence of prejudice to Silver Creek.

III. TORTS

A. JAMIE E. THOMAS V. BRIAN ALLEN

[2021-CA-0529-MR](#)

05/13/2022

2022 WL 1509718

Opinion by CLAYTON, DENISE G.; COMBS, J. (CONCURS) AND JONES, J. (CONCURS)

Appellant Jamie E. Thomas filed an appeal requesting the Court to reverse the Jefferson Circuit Court's grant of summary judgment in favor of Appellees Brian Allen and The Thirsty Pedaler, LLC (TTP) on Thomas's negligence claims arising from his fall from one of TTP's quadricycles. The Court of Appeals affirmed, holding that the pre-injury waiver Thomas signed was valid under *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005). The Court also held that the waiver did not violate public policy by attempting to contract away liability for damages caused by TTP's alleged failure to comply with safety statutes or local ordinances and that Thomas failed to present sufficient evidence that TTP had violated any safety statute or ordinance. The Court also determined TTP was not a common carrier because its primary purpose was to provide entertainment and not transportation.

B. BOBBY G. FISH, JR. V. STATE FARM AUTOMOBILE INSURANCE COMPANY

[2021-CA-0573-MR](#)

05/13/2022

2022 WL 1510372

Opinion by CLAYTON, DENISE G.; COMBS, J. (CONCURS) AND JONES, J. (CONCURS)

Appellant Bobby G. Fish, Jr. filed an appeal requesting the Court of Appeals to reverse the Boone Circuit Court's grant of summary judgment in favor of Appellee State Farm Automobile Insurance Company on Fish's claims brought under the Kentucky Unfair Claims Settlement Practices Act. On appeal, Fish argued there were genuine issues of material fact as to whether State Farm handled his claim in bad faith. The Court affirmed the circuit court's order in part and reversed and remanded it in part. The Court determined that under *Hollaway v. Direct General Insurance Company of Mississippi, Inc.*, 497 S.W.3d 733, 737-38 (Ky. 2016), the circuit court erred in granting summary judgment because Fish offered sufficient proof of each of the required elements of bad faith discussed in *Hollaway* to create genuine issues of material fact. However, the Court found that the circuit court properly denied Fish's request to amend his complaint to assert a fraud claim because Fish filed the motion almost ten years after filing his original complaint and because he provided no concrete reasons as to why the circuit court's denial was an abuse of discretion.

C. MARY LAWSON V. DAVID SMITH

[2021-CA-0816-MR](#)

05/27/2022

2022 WL 1697254

Opinion by CETRULO, SUSANNE M.; DIXON, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Appellant Mary Lawson appealed from the Carroll Circuit Court's summary judgment in favor of Appellee David Smith. Lawson was Smith's girlfriend's mother, and she was staying at Smith's house. On the night in question, Lawson woke up to use the bathroom, mistakenly opened a door leading to the basement, and fell down the stairs, causing injuries. She was aware of the stairs and

of the basement door's proximity to the bathroom door. It was undisputed that Lawson was a licensee. Further, as the Supreme Court has adopted the Restatement Second of Torts Section 342, the only duty owed by the homeowner was to not let a licensee come upon a hidden peril or willfully or wantonly cause her harm. Thus, the Court of Appeals held that the circuit court did not err in granting summary judgment because Lawson failed to submit any proof that Smith breached a duty that caused her to fall down steps she knew were there.

D. DANIEL MEKURIA V. JAMES MARTIN

[2020-CA-0926-MR](#)

05/27/2022

2022 WL 1695873

Opinion by CLAYTON, DENISE G.; COMBS, J. (CONCURS) AND JONES, J. (CONCURS)

Appellant Daniel Mekuria appealed from the Jefferson Circuit Court's dismissal of civil claims he asserted against various governmental entities and law enforcement officials arising from what he deemed was his wrongful arrest and prosecution for drug-related offenses. The Court of Appeals affirmed. In doing so, the Court first addressed two jurisdictional issues. First, the Court concluded Mekuria's notice of appeal was timely because the circuit court clerk incorrectly added the notice of appeal to the official court record, endorsed it, and electronically noted it as "filed" within the deadline even though Mekuria's counsel failed to pay the filing fee as required by CR 73.02(1), which is a prerequisite to a notice of appeal being filed. Second, Mekuria failed to name the Louisville/Jefferson County Metropolitan Government (Metro) in his notice of appeal. The Court concluded Metro was not an indispensable party because Mekuria had also named Greg Fisher, who had been named in his official capacity as the Mayor of the Louisville Metro Government, and thus as an agent of Metro. As long as the government entity receives notice and an opportunity to respond, official capacity suits are to be treated as a suit against the entity. As to the merits of the appeal, the Court held that the circuit court properly dismissed Mekuria's malicious prosecution claims because he, through his attorney, had stipulated to probable cause, and the Court rejected Mekuria's argument that the stipulation to probable cause should be set aside.

IV. ARBITRATION

A. NEW ALBANY MAIN STREET PROPERTIES, LLC D/B/A PORT OF LOUISVILLE ET. AL. V. R. WAYNE STRATTON, CPA

[2021-CA-0562-MR](#)

05/27/2022

2022 WL 1695881

Opinion by JONES, ALLISON E.; CLAYTON, C.J. (CONCURS) AND COMBS, J. (CONCURS AND FILES SEPARATE OPINION)

Appellants appealed the Jefferson Circuit Court's opinion and order dismissing Appellants' claims for failure to state a claim. The Court of Appeals affirmed. On appeal, Appellants contended: (1) the circuit court prematurely granted Appellees' motion to dismiss prior to discovery; (2) Appellees' defamatory statements in arbitration were not made in a "judicial proceeding" and were, therefore, not privileged; (3) paid expert witnesses were not entitled to absolute immunity under the judicial statements privilege; and (4) Appellants asserted a valid cause of action for professional malfeasance. In affirming the circuit court's dismissal, the Court of Appeals held: (1) the circuit court

properly assessed Appellants' complaint based on its allegations, and it was not required to allow discovery for the purpose of ascertaining whether Appellants could allege other claims; (2) the judicial statements privilege applies in arbitration, as arbitration is a "quasi-judicial proceeding;" (3) the judicial statements privilege applies to paid expert witnesses; and (4) an expert witness owes no duty of care to an adverse party, and so the circuit court did not err in dismissing Appellants' professional malfeasance claim against Appellee's expert as a matter of law. The concurrence agreed with the majority's reasoning but expressed concern that malicious statements, or those made in bad faith, currently face no legal repercussions due to the judicial statements privilege. By way of remedy, the concurrence suggested that the Supreme Court could fashion a rule through which a lack of candor to the tribunal would be punishable in contempt proceedings.

V. FAMILY LAW

A. COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES V. LATANYA BATIE, ET AL.

[2021-CA-0580-ME](#)

05/13/2022

2022 WL 1510614

Opinion by ACREE, GLENN E.; GOODWINE, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

Appellant Cabinet for Health and Family Services appealed the Boyd Circuit Court's order granting custody of twin minor children, S.W. and P.W., to Latanya Batie, who is the twins' grandmother, and to Arnold Batie, IV, who is the twins' uncle (collectively the Baties). The twins' parents abandoned them at the maternity ward. The Cabinet lost contact with the parents shortly thereafter when they moved to Ohio without identifying any relatives interested in having the twins placed with them. By the time the Baties, through their own efforts, identified themselves to the Cabinet and expressed interest in having custody of the twins, the Cabinet no longer had temporary custody because an order of commitment had been entered. The Baties filed an action for custody and claimed standing based on *Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004). In reversing the trial court, the Court of Appeals noted the distinction between standing and intervention and concluded *Baker* was distinguishable on its facts in that the appellants in *Baker* sought intervention while their cousin was still subject to the KRS 620.090(1) temporary custody order favoring the Cabinet, which implicates the right of known relatives to be "evaluated for relative placement" under KRS 620.090(2). The Baties, however, were not relatives known to the Cabinet until well after the KRS 620.090(1) temporary custody order was replaced by an order of commitment to the Cabinet pursuant to KRS 620.140(1)(d). Consequently, the preference for relative placement under KRS 620.090(2), which gave rise to the right to be evaluated for placement, ended before the Baties were known to the Cabinet; therefore, they could not claim the present interest *Baker* identified to allow intervention in a pending adoption. The Court of Appeals also reversed the circuit court's *sua sponte* application of equitable estoppel to prevent the Cabinet from asserting the lack-of-standing defense. The Court further concluded that the Baties' lack of standing made the circuit court's custody orders voidable and not void *ab initio*. The Court reversed the circuit court and remanded with instructions to dismiss the Baties' petition.

VI. TRUSTS AND ESTATES

A. ANGELA MASON IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF NORMA CATHERINE MASON-STIKES, DECEASED V. HOWARD L. STIKES, BOTH INDIVIDUALLY AND IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF WILLIAM T. STIKES, JR. DECEASED

[2021-CA-0587-MR](#)

05/06/2022

2022 WL 1435442

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

This is an appeal from a Jefferson Circuit Court opinion and order granting Appellees' motion to dismiss. The decedent, Appellee Howard L. Stikes' father, left spousal survival benefits to his wife, Norma Catherine Mason-Stikes (Norma), via a post-nuptial agreement. Howard incorrectly listed his father as "widowed" on the death certificate despite Norma surviving him, and Norma claimed the inaccuracy deprived her of spousal survival benefits. Shortly after Norma submitted a claim against the estate, she passed away, and her daughter, Angela Mason (Angela), took over the benefits claim and further claimed Howard committed fraud by inaccurately completing the death certificate. Howard filed a motion to dismiss on various grounds, and the circuit court granted the motion. On appeal, the Court of Appeals held the circuit court erred in concluding Angela did not have standing. Kentucky law provides that ancillary administration may be implemented where a debt or demand is owed to the decedent, and it may precede domiciliary administration when necessary to preserve a claim or protected right. The Court also held that the circuit court erred by determining there was no actual controversy regarding Angela's claims against the estate. When taken as true as required under a CR 12.02(f) motion to dismiss, Angela's allegations stated a claim and suggested she could be entitled to relief. The trial court erred in basing its dismissal upon information provided by Howard and his attorneys, even if it is later determined her fraud claim is moot. The Court, therefore, reversed and remanded the trial court's opinion and order with instructions to set aside the dismissal and to allow the case to proceed on its merits.

VII. CRIMINAL LAW

A. COMMONWEALTH OF KENTUCKY V. PARADISE BURKHEAD

[2021-CA-0873-MR](#)

05/06/2022

2022 WL 1435435

Opinion by GOODWINE, PAMELA R.; CLAYTON, C.J. (CONCURS) AND COMBS, J. (CONCURS)

The Commonwealth appeals an order of the Jefferson Circuit Court. In 2020, a juvenile petition was filed against Burkhead in Jefferson District Court, and her case was transferred to Jefferson Circuit Court. In 2021, while amendments to KRS 635.020 and KRS 604.010 were pending, Burkhead moved the circuit court to return her case to district court for a new transfer hearing. After the amendments to those juvenile transfer statutes became effective, the circuit court granted Burkhead's motion and returned her case to district court for a new transfer hearing applying the amended

statutes. On appeal, the Commonwealth argued that although the amendments to the statutes were procedural, they should not apply retroactively in Burkhead's case because the transfer proceedings had concluded before the amended statutes became effective. The Court of Appeals determined, under KRS 446.110, procedural amendments apply retroactively in ongoing cases with no final decision on the merits. Additionally, this result aligns with the legislature's intent to rehabilitate and reform delinquent youth. Thus, this Court affirmed the circuit court's order.