

KENTUCKY COURT OF APPEALS

PUBLISHED OPINIONS

OCTOBER 2012

I. CRIMINAL LAW

A. COMMONWEALTH v. BEDWAY

[2011-CA-001235](#) 10/26/12

Opinion by Judge Dixon; Judges Caperton and Stumbo concurred.

Defendant, who requested to call his daughter to get phone number of attorney who had previously done work for family but was told he could only call attorney and not third party, was deprived of his statutory right under KRS 189A.105(3) to attempt to contact and communicate with an attorney after being arrested for driving under the influence and such deprivation mandated the exclusion of his breathalyzer test. Where request was timely, Commonwealth would not be negatively impacted and Court of Appeals could discern no legislative intent that suspect's right to contact an attorney was solely limited to an attorney that could be randomly located in a phone book or contacted on a collect-call phone.

II. EMPLOYMENT LAW

A. CANIFF v. CSX TRANSPORTATION, INC.

[2011-CA-000178](#) 10/19/12

Opinion by Judge Nickell; Judges Combs and Taylor concurred.

Trial court did not err in entry of summary judgment on employee's action for personnel injuries arising from his employment where he failed to present expert testimony regarding the applicable standard of care and the railroad's breach of that duty. Court of Appeals agreed with the trial court a lay juror would not possess sufficient knowledge of the working conditions at a rail yard to independently determine

whether the railroad put employee at an unreasonable risk of traumatic injury.

B. MASONIC HOMES OF KENTUCKY, INC. v. KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION

[2011-CA-001226](#) 10/19/12

Opinion by Judge Clayton; Chief Judge Acree and Judge Keller concurred.

Commission properly determined that employee was discharged for reasons other than misconduct connected with the workplace where referee determined that employee suffered from a psychological condition which prevents her from appreciating the harm to herself of her conduct; that she coped with stress in an abnormal manner; that she harmed herself without meaning to and without knowing her actions were inappropriate for the workplace; and that she did not commit misconduct in connection with her work because she was unable to control her reaction to stress and anxiety. While employee's actions would normally constitute misconduct, Court of Appeals upheld determination that an exception should apply in the form of a mitigating circumstance which justified or explained employee's admitted misconduct.

III. FAMILY LAW

A. J.D.C. v. CABINET FOR HEALTH AND FAMILY SERVICES

[2012-CA-000670](#) 10/26/12

Opinion by Judge Lambert; Judges Caperton and VanMeter concurred.

Trial court erred as a matter of law in denying putative father an evidentiary hearing prior to entry of paternity judgment. KRS 406.111 creates a "rebuttable presumption" of paternity when genetic testing result of 99% shows a particular man to be the father of a child which may be rebutted by a preponderance of the evidence. Putative father was therefore entitled to present evidence in an attempt to rebut presumption of paternity.

B. MAXWELL v. MAXWELL

[2012-CA-000224](#)

10/19/2012

Opinion by Judge Clayton; Judge Maze concurred; Judge Keller concurred in result only.

Trial court abused its discretion in awarding sole custody of children to father on basis that mother's sexual orientation and relationship with another woman would be harmful to the children and possible misconduct. Court of Appeals held that being a member of a same-sex partnership alone does not meet the criterion for sexual misconduct. No factual findings were entered to support the conclusion that mother's action was harmful to children, either now or in the future.

IV. NEGLIGENCE

A. BRIDGEFIELD CASUALTY INSURANCE COMPANY, INC. v. YAMAHA MOTOR MANUFACTURING CORPORATION OF AMERICA

[2011-CA-000684](#)

10/26/12

Opinion by Judge VanMeter; Judges Lambert and Thompson concurred.

Trial court did not err in granting summary judgment on workers' compensation insurer's claim for statutory and common law subrogation based on product liability theories of negligent design; negligent manufacturing; and breach of express and implied warranties arising from Yamaha's distribution of an allegedly defective Rhino for which insurer had paid compensation benefits. Court of Appeals held that because insurer's rights were strictly derivative of claims its insured could pursue, trial court properly applied the same one-year statute of limitations as would be applicable in a direct action by insured. Neither the discovery rule nor the equitable estoppel doctrine operated to toll statute of limitations because insured's injuries and the Rhino's potential role in causing the accident were immediately evident from the accident itself. Dismissal of breach of warranty claims was affirmed on basis

that there was no privity of contract or “buyer-seller relationship” between insurer and Yamaha.

V. TAXATION

A. TAX EASE LIEN INVESTMENTS 1, LLC v. HINKLE

[2011-CA-000652](#) 10/19/12

Opinion by Judge Thompson; Judges Combs and Lambert concurred. Trial court did not abuse its discretion in determining the reasonableness of litigation fees requested by third-party purchaser of tax liens, but it was error not to order a pro-rata distribution of the sale proceeds. It is the role of the trial court to follow the language of KRS 134.452(3)(c) to provide a third-party purchaser of a certificate of delinquency with a feasible means to recover and protect its tax lien and to safeguard the public against possible abuses of the judicial process by not allowing excessive attorney’s fees and costs to be imposed upon economically burdened citizens. The priority given liens resulting from unpaid *ad valorem* taxes in KRS 134.420(3) may be exercised by third-party purchasers of certificates of delinquency and a *pro rata* distribution of the proceeds of any judicial sale is required.