

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
OCTOBER 1, 2015 to OCTOBER 31, 2015

I. CORRECTIONS

A. Ramirez v. Nietzel

[2014-CA-001343](#) 10/16/2015 474 S.W.3d 147

Opinion by Judge D. Lambert; Judges Maze and Thompson concurred. Appellant was accused of participating in an assault on two other inmates. Appellant claimed he was asleep in his dorm at the time of the assault. At the ensuing disciplinary hearing, appellant pled not guilty and requested to call fellow inmates Louis Pena-Martinez and Henry Rodgers, one of the victims, as witnesses. Appellee, the hearing officer, allowed the introduction of Pena-Martinez's statement to the investigating officer that appellant was asleep in his dorm when the incident occurred. However, in her opening remarks she refused to let the victim testify, stating that to do so would be unduly hazardous to institutional and correctional goals. She also denied appellant's request that she view the security footage of the area where the assault took place, as well as appellant's request to admit the victim's written statement that appellant was not involved in the assault, citing the same grounds. No other witnesses were called and no witnesses who were called identified appellant as a participant in the assault. Approximately twelve minutes after the beginning of the hearing, appellee found appellant guilty of physical action against another inmate resulting in death or serious physical injury and for conspiring, aiding, and attempting to cause serious physical harm to another inmate. The case eventually proceeded to the Kentucky Supreme Court and was remanded back to the Boyle Circuit Court, which once again affirmed the disciplinary determination. On appeal, the Court of Appeals reversed, holding that appellant's due process rights were violated by appellee's refusal to consider the exonerating testimony or written statement of inmate Rodgers. Nothing in the record demonstrated that permitting one of the known victims to testify on behalf of the accused would present any hazard to institutional safety or correctional goals. The Court further held that appellant's due process rights were violated because appellee failed to follow Kentucky Corrections Policies and Procedures and make a specific independent finding that the confidential information she relied upon in finding appellant guilty was reliable.

II. CUSTODY

A. Glodo v. Evans

[2015-CA-000185](#) 10/23/2015 474 S.W.3d 550

Opinion by Judge Clayton; Judges Nickell and Thompson concurred. Appellant challenged an order awarding permanent custody of her three minor children to appellees, their paternal grandparents (the children's father had waived custody). The Court of Appeals vacated and remanded. The Court noted that appellees did not have standing as *de facto* custodians. Therefore, they were required to establish, by clear and convincing evidence, that appellant was an unfit parent. The Court's review of the record revealed a "dearth of evidence" that appellant was an unfit mother. Instead, all the circuit court offered in support of its decision was a conclusory opinion that she was unfit. The Court concluded that because no other findings were provided, there was not clear and convincing evidence that appellant was unfit. Consequently, the custody decree was vacated and remanded.

B. Ryan v. Ryan

[2015-CA-000010](#) 10/02/2015 473 S.W.3d 637

Opinion by Judge Clayton; Judges Nickell and Thompson concurred. Appellant appealed from an order suspending his allotted parenting time with his daughter and imposing supervised visitation pending completion of drug testing and counseling. He contended that the circuit court unreasonably restricted his visitation rights in violation of KRS 403.320(3) in finding that visitation with him would seriously endanger the child's mental, moral, and emotional health. The Court of Appeals agreed with appellant and reversed and remanded. The Court concluded that a hair follicle test indicating marijuana use by appellant in the previous 10 to 12 months, standing alone, did not support a finding of child endangerment necessary to restrict his visitation rights. Consequently, the circuit court's decision was an abuse of discretion.

III. EMPLOYMENT

A. *Kentucky Retirement Systems v. Stephens*

[2014-CA-000039](#) 10/09/2015 2015 WL 5895314 DR Pending

Opinion by Judge Clayton; Judge Jones concurred; Judge VanMeter dissented and filed a separate opinion. Appellee was employed by the Cabinet for Health and Family Services. In May 2008, she also began working on an “as needed” basis with a corporation called Communicare. Although Communicare is a private business, it is also a participating agency in KERS. Appellee did not participate in KERS with Communicare; however, she did participate in KERS through her job at the Cabinet. In January 2009, appellee retired from her position with the Cabinet after completing a Form 6120, Certification of Service. In July of that year, seven months after she retired from the Cabinet, appellee became a full-time employee with Communicare and completed a Form 2001, Membership Information, on which she indicated that she had been employed with Communicare since May 2008. In June 2010, KERS notified appellee that her employment with Communicare put her in violation of KRS 61.590(5)(c), KRS 61.637, and 105 KAR 1:390. As a result, she was notified that her retirement benefits would be voided and that she would be required to repay all benefits she had received from KERS, including health insurance premiums from January 2009 until July 2010 in the amount of \$55,291.26. Following an administrative hearing, the hearing officer concluded that at the time appellee applied for retirement from the Cabinet, she was employed both by the Cabinet and Communicare. The hearing officer also determined that, while appellee’s job for Communicare at the time of her retirement was a non-participating position due to her part-time status, she did not have the three-month break in participation before starting her full-time, participating position with Communicare as required by statute. The hearing officer also rejected appellee’s argument that KERS should be equitably estopped from recovering the amounts paid to her. Consequently, appellee was required to repay the retirement benefits she had received from January 2009 until July 2010. The Board of Trustees of the Kentucky Retirement Systems accepted the hearing officer’s recommendations and ordered appellee to repay the benefits and health insurance premiums. The Franklin Circuit Court reversed and remanded the Board’s decision, and KERS appealed. The Court of Appeals affirmed the circuit court, holding that the doctrine of equitable estoppel barred KERS from seeking repayment of any retirement benefits and health insurance premiums paid on appellee’s behalf. Although appellee’s part-time employment violated the applicable retirement statutes, appellee had met with a benefits counselor prior to her retirement and there was no evidence that the counselor had explained the retirement benefit ramifications of part-time work in a non-participating position with a participating agency. Moreover, Communicare failed to abide by its duty to report appellee’s part-time

employment to KERS. Under these circumstances, equitable estoppel applied.

IV. JUVENILES

A. *A.S. v. Commonwealth*

[2014-CA-002095](#) 10/30/2015 474 S.W.3d 555

Opinion by Judge Kramer; Judges Clayton and Stumbo concurred. The Court of Appeals reversed in this juvenile matter, construing that the Commonwealth's failure to file an appellee brief was a confession of error pursuant to CR 76.12(8)(c). Nonetheless, in an abundance of caution, the Court reviewed the full record and noted that the record patently showed several errors, including that the juvenile's constitutional rights were violated in that: (1) the circuit court found her to be beyond control and committed her to the custody of the Cabinet for Health and Family Services, despite the fact that she was never charged with beyond control or notified of any such charge; (2) the juvenile's right to present a defense was violated due to the fact that she was not aware that she would have to defend against a beyond control charge; (3) the juvenile's right to cross-examine witnesses was violated when the Commonwealth's Attorney was permitted to summarize the testimony the Commonwealth's witnesses would provide without actually requiring them to testify; and (4) the juvenile's medical records were disclosed without her authorization and without the Commonwealth satisfying the required safeguards to obtain the disclosure of the records without her permission.

V. NEGLIGENCE

A. *Commonwealth of Kentucky, Transportation Cabinet, Department of Highways v. Collins*

[2014-CA-000688](#) 10/30/2015 2015 WL 6559466 DR Pending

Opinion by Judge Kramer; Chief Judge Acree and Judge Dixon concurred. Leonard Collins, Jr. was operating a school bus traveling in the southbound lane of US Highway 119 in Letcher County, Kentucky, and was fatally injured in a collision with a tractor-trailer traveling in the northbound lane. The area of US Highway 119 where the accident occurred is a “non-designated” highway and by statute restricts vehicles of certain sizes without a permit. The tractor portion of the vehicle that collided with the bus that Mr. Collins was operating was not authorized to be on that section of the road due to its size and was not otherwise properly permitted for travel on that portion of the road. At the time of the accident, the Transportation Cabinet’s division of vehicle enforcement, working together with local law enforcement and state police, was charged with the responsibility of enforcing state and federal laws with respect to vehicle sizes. Mr. Collins’s estate filed suit against the Cabinet in the Kentucky Board of Claims. The theory of the estate’s case was that if the Cabinet had enforced the length and width restrictions applicable to commercial vehicles more vigorously, the accident involving Mr. Collins might not have occurred. Ultimately, the Board of Claims found that the Cabinet had a ministerial duty to enforce length and width regulations on US Highway 119, but that the Cabinet could not be expected to prevent every violation of those regulations. The Cabinet had otherwise carried out its enforcement duty in a reasonable manner and, consequently, it had not breached any duty. Following the estate’s administrative appeal, the circuit court determined that the overwhelming evidence of record demonstrated, to the contrary, that the Cabinet had breached its enforcement duties regarding the aforementioned length and width restrictions at the time of Mr. Collins’s accident. Accordingly, it reversed the Board of Claims and remanded solely for a determination of the Cabinet’s comparative liability. Upon review, the Court of Appeals reversed. The Court explained that no duty owed directly to Mr. Collins had been breached by the Cabinet. Specifically, the regulation of traffic is a function of government, initiated and implemented for the protection of the general public, similar to fire protection, police protection, or flood protection. But a governmental agency owes no legal duty to individual members of the public to fully perform that function. Therefore, a failure of performance does not constitute a tort committed against an individual who may incidentally suffer injury or damage, in common with others, by reason of such default.

VI. WORKERS' COMPENSATION

A. *Miller v. Go Hire Employment Development, Inc.*

[2014-CA-000379](#) 10/09/2015 473 S.W.3d 621

Opinion by Judge Nickell; Judge J. Lambert concurred; Judge Kramer concurred in part, dissented in part, and filed a separate opinion. Employee alleged work-related injuries to her chest, back, right arm, and both legs arising from a motor vehicle accident. Her employer vigorously denied liability for any work-related carpal tunnel syndrome (CTS). Finding all alleged injuries to be work-related, the ALJ awarded medical benefits and permanent partial disability (PPD) benefits based on an aggregate 11% whole person impairment rating pursuant to the AMA Guides, encompassing a 5% rating attributable to employee's uncontested back condition and a 6% rating attributable to her contested CTS. The Workers' Compensation Board vacated the ALJ's determination of work-related CTS and award of medical benefits for CTS and remanded the matter with instructions for the ALJ to specify factual findings supportive of any such legal conclusion. The Board also reversed the ALJ's award of any PPD benefits, concluding that the ALJ erred in finding a 6% impairment rating for CTS because the rating was improperly assigned prior to the employee reaching maximum medical improvement (MMI). On appeal, the Court of Appeals affirmed in part, reversed in part, and remanded. The Court first affirmed the Board's decision to vacate and remand the ALJ's conclusion that employee sustained work-related CTS and the award of medical benefits due to the ALJ's failure to provide a sufficient explanation of the basis for the decision. The Court held that the employer was entitled to know the evidentiary basis of the ALJ's findings of fact and conclusions of law. Moreover, appellate review requires the ALJ to recite basic facts supporting his/her ultimate legal conclusion to establish whether the opinion is supported by substantial evidence and reasonable. Next, the Court reversed the Board's reversal of the ALJ's award of PPD benefits based, in part, on the 6% impairment rating assigned to employee's contested CTS. The Court held that the Board should have vacated the award of PPD benefits in the same manner it had vacated medical benefits, thereby not precluding the ALJ from awarding PPD benefits if justified by further evidentiary findings establishing that employee sustained work-related CTS. The Court agreed with the Board that MMI is required for an assignment of an impairment rating under the AMA Guides. However, where a treating physician provisionally opined, "If no further treatment for [CTS] is approved, then she is at [MMI]," the ALJ might reasonably infer from the opinion specifically addressing CTS - and the employer's vigorous denial of recommended medical treatment for the condition - that employee had, in fact, reached MMI, thereby justifying an assignment of a rating and allowing the ALJ to weigh it in determining PPD benefits. The Court noted that the treating physician caused some confusion when opining generally that employee had not

reached MMI relative to her constellation of conditions, including her uncontested back. In addition, the Court noted the employer's evaluating physician, who opined that employee reached MMI at a later date, was logically referencing only employee's uncontested back condition since he found "no evidence for [CTS]." Because the ALJ had adopted the MMI date offered by the employer's evaluating physician, the Court held that when more than one work-related injury is alleged, the ALJ's opinion must specify the condition to which the factual findings pertain. If, on remand, the ALJ found employee's CTS to be work-related, and if the ALJ found that employee had reached MMI as of the date her treating physician assigned a 6% impairment rating, the ALJ would be free to weigh the rating for CTS in determining employee's PPD benefits. In dissent, Judge Kramer submitted that the treating physician's opinions, no matter how construed, could not qualify as evidence capable of sustaining an award of PPD relative to any work-related CTS. The dissent characterized the treating physician's assessment as a hypothetical or conditional impairment rating prohibited by the AMA Guides, citing the unpublished case of *Czar Coal Corp. v. Jarell*, Nos. 2007-SC-000233-WC & 2007-SC-000234-WC, 2008 WL 746605 (Ky. Mar. 20, 2008).