PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

OCTOBER 1, 2017 to OCTOBER 31, 2017

I. CONTRACTS

A. ***Mostert Group, LLC v. Mostert***

2016-CA-001081 10/20/2017 2017 WL 4700343

Opinion by Judge Combs; Judges D. Lambert and Nickell concurred.

This appeal concerned a breach of contract case involving the development of technology aimed at enhancing breeding decisions in the thoroughbred horse industry. At issue was what portion of the technology (source codes) was to be retained by its developer and what was to be entrusted to the company purchasing the computer software. The Court of Appeals held that summary judgment was improperly entered in favor of the developer of the technology and that he first breached the contract between the parties by improperly withholding the source codes.

II. CORRECTIONS

A. ***Meacham v. Department of Corrections***

2016-CA-001395 10/27/2017 2017 WL 4847694

Opinion by Judge Dixon; Judges Acree and Jones concurred.

The Court of Appeals affirmed an order dismissing appellant's petition for a declaration of rights. The Court concluded that appellant, an inmate at the Kentucky State Reformatory, was not entitled to educational good time credit for programs completed prior to the effective date of the 2010 amendment to KRS 197.045(1). The Court held there was no indication, express or implied, that the legislature intended the KRS 197.045(1) amendment to apply retroactively. Citing to *Commonwealth Dep't. of Agriculture v. Vinson*, 30 S.W.3d 162 (Ky. 2000), the Court reiterated that Kentucky law prohibits the amended version of a statute from being applied retroactively to events that occurred prior to the effective date of the amendment unless the amendment expressly provides for retroactive application. Consequently, appellant was not entitled to a sentence credit for programs completed before the effective date of the amendment.

B. ***Murrell v. Kentucky Parole Board***

2016-CA-000283 10/13/2017 2017 WL 4558237

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

A parolee sought declaratory and injunctive relief from the revocation of his parole by the Parole Board. In a matter of first impression, the Court of Appeals held that before entering a final revocation of parole, the Parole Board was required to make express findings on the record, oral or otherwise, demonstrating that the Board considered the requirements of KRS 439.3106 prior to revocation.

III. CRIMINAL LAW

A. ***Burnett v. Commonwealth***

2016-CA-001428 10/27/2017 2017 WL 4847691

Opinion by Judge Dixon; Chief Judge Kramer and Judge Nickell concurred.

Appellant challenged an order voiding his pretrial diversion on the charge of flagrant non-support for failure to pay child support and sentencing him to two years' imprisonment. The Court of Appeals vacated and remanded for the circuit court to enter additional findings of fact. The Court held that the circuit court's failure to make statutory findings required by KRS 439.3106, even though unpreserved, constituted palpable error. The matter was remanded to the circuit court for findings as to whether appellant could be managed in the community and whether he posed a significant risk to the community, as required by the statute. The Court of Appeals further held that the circuit court failed to make necessary findings in compliance with *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983) and *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011). In motions to revoke diversion for failure to comply with conditions requiring the payment of child support, due process required the circuit court to make specific findings as to: (1) whether appellant made sufficient bona fide attempts to make payments but was unable to do so through no fault of his own, and, if so, (2) whether alternatives to imprisonment might suffice to serve the interests of punishment and deterrence before revoking diversion. The circuit court's failure to do so constituted palpable error requiring reversal.

B. ***Commonwealth v. Adams***

2016-CA-001739 10/13/2017 2017 WL 4557600

Opinion by Judge Combs; Judges Clayton and D. Lambert concurred.

Appellant sought expungement of four felony convictions of stealing cattle on four separate occasions occurring over the course of several months. KRS 431.073(1) provides for expungement of one class D felony or a series of class D felonies arising out of the same incident. The circuit court granted expungement upon determining that the thefts arose from a single incident. The Court of Appeals reversed after examining case law construing the statute based on temporal separation and/or geographic distance between the acts. The Court determined that a series of thefts had occurred rather than a "single incident" within the meaning of the statute.

C. ***Masters v. Commonwealth***

2015-CA-001755 10/27/2017 2017 WL 4847577

Opinion by Judge D. Lambert; Judges Combs and Nickell concurred.

Appellant challenged the constitutionality of KRS 161.190, a statute addressing teacher abuse. Appellant, a graduate school student, was convicted of violating the statute after he got into a verbal disagreement with a principal who reneged on a deal to help appellant complete a school project. During the disagreement, the principal asked appellant to leave the school premises multiple times. Appellant responded by calling the principal a profane name and proposing that the two resolve their differences by fighting outside. The Breckinridge District Court held the statute constitutional and the Breckinridge Circuit Court affirmed. The Court of Appeals granted discretionary review and also affirmed. KRS 161.190 makes it unlawful for any person to direct speech or conduct toward a teacher, classified employee, or school administrator when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school. The Court of Appeals held that KRS 161.190 was not unconstitutionally vague and that it was neither overbroad nor unconstitutional as applied to these circumstances.

IV. EDUCATION

A. ***Roach v. Wilson***

2015-CA-001798 10/06/2017 2017 WL 4451171

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

Appellant, a school bus driver and employee of the Carlisle County Board of Education, appealed from a judgment in a tort action awarding Donna Wilson and her husband $1,910,347. Wilson - who was also a BOE employee - was injured when a bus driven by appellant during a field trip left the roadway and crashed into a ravine. Appellant argued that the fellow-employee immunity provision of the Workers' Compensation Act precluded the tort action against her. She further argued that the jury's finding that she was voluntarily intoxicated while operating the school bus involved in the crash was not supported by substantial evidence. The Court of Appeals affirmed, holding that appellant's voluntary intoxication while driving the bus so far removed her from the course of her employment that the Act, including the fellow-employee immunity granted under KRS 342.690(1), did not apply. The Court also held that sufficient evidence was presented at trial to support that appellant was under the influence of prescription drugs at the time of the crash and that the crash was caused by her intoxication.

V. INSURANCE

A. ***Comley v. Auto-Owners Insurance Company***

2016-CA-001305 10/06/2017 2017 WL 4448528

Opinion by Judge J. Lambert; Judges Combs and Johnson concurred.

A homeowner challenged a summary judgment dismissing his complaint against his homeowners' insurer. The homeowner sought recovery under his homeowners' policy for water damage caused to his house following a water main break. The Court of Appeals affirmed, holding that the homeowner's claim was excluded from coverage under his policy's water damage exclusion, which stated that water damage from a flood or surface water was excluded, "regardless of the cause." The Court rejected the argument that the exclusion was limited to natural occurrences and held that the policy language was not ambiguous or unreasonable. The Court also declined to consider the homeowner's argument that the explosion exception to the water damage exclusion applied in this case because the argument was not properly preserved below.

VI. INTEREST

A. ***Marango v. Kentucky Retirement Systems***

2016-CA-001056 10/13/2017 2017 WL 4557610

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

Appellant had successfully challenged his retirement calculation after the Kentucky Employees Retirement Systems (KERS) reduced his monthly benefit, and the matter was remanded to the Franklin Circuit Court for entry of judgment reflecting the original monthly amount. Upon remand, appellant sought interest on the lump sum arrearages, but the circuit court declined after determining that there was no specific statute allowing interest on the judgment. On appeal, appellant argued that his retirement benefit was contractual in nature; therefore, KRS 45A.245 (pertaining to certain contracts) allowed the recovery of interest. The Court of Appeals disagreed and affirmed, holding that it was not improper for the circuit court to deny interest on the judgment. The Court noted that a statute waiving immunity must be strictly construed and cannot be read to encompass the allowance of interest unless so specified. KRS 61.510 - .705, the statutes governing KERS, contain no such provision allowing for interest on judgments obtained against it. The Court further held that the Kentucky Model Procurement Act, KRS 45A.005 - .990, which deals with the competitive bidding process in the Commonwealth, is not applicable to retirement benefits.

VII. NEGLIGENCE

A. ***Chamis v. Ashland Hospital Corporation***

2015-CA-001071 10/13/2017 2017 WL 4558459

Opinion by Judge Nickell; Judge Maze concurred; Judge Jones dissented and filed a separate opinion.

A patient who suffered from right-side paralysis brought a negligence action against a hospital after he fell from his hospital bed. The patient alleged that hospital staff failed to follow a care plan that required all four of his bed rails to be raised. Following the patient's death, his widow - the executrix of his estate - was substituted as the plaintiff in the action. The circuit court granted summary judgment to the hospital because the estate offered no expert testimony as to the applicable standard of care. In so doing, the circuit court rejected the estate's argument that this was an ordinary negligence case - as opposed to a more complex medical malpractice action - and that the doctrine of *res ipsa loquitor* applied because the widow testified that the decedent had limited mobility and could not get over the bed rails had they been in the "up" position. By a 2-1 vote, the Court of Appeals affirmed, holding that whether expert testimony is required in a hospital fall case depends on whether hospital personnel were exercising professional judgment as opposed to rendering nonmedical, administrative, ministerial or routine care, or simply carrying out doctor's orders. In this case, determining whether the decedent was at a high risk of falling, what position the bed rails should have been in, and what other measures and precautions were needed required an exercise in professional judgment. Jurors would not automatically know of other options and whether they were advisable. Therefore, expert testimony as to the standard of care was necessary and, in the absence of such, summary judgment was appropriate. In dissent, Judge Jones argued that to the extent the estate argued that the hospital's failure to follow its own care plan was the proximate cause of the decedent's fall, the claim sounded in ordinary negligence; therefore, no expert medical testimony was necessary to establish the standard of care. Judge Jones further contended that based on conflicting testimony, it should have been left to a jury to determine whether the decedent had the ability to get himself over the rails had they been up.

VIII. TAXATION

A. ***Fayette County Clerk v. Kings Right, LLC***

2015-CA-001928 10/20/2017 2017 WL 4700381

Opinion by Judge Dixon; Judges Clayton and Thompson concurred.

In separate appeals, the Court of Appeals reversed orders ruling that the Kentucky Board of Tax Appeals erred in upholding appellant's refusal to refund the purchase price of certificates of delinquency to appellees. The Court concluded that the circuit courts erroneously found that the transfer of real property to the Transportation Cabinet satisfied the tax liabilities represented by certificates of delinquency and, as such, appellees, who were third-party purchasers of the certificates, were entitled to a refund under KRS 134.551(2)(a)(1)(b). The Court held that KRS 132.220 dictates that the owners of real property on the assessment date remain liable for the tax "notwithstanding they may have sold or parted with it." As such, to conclude, as the circuit courts did, that the tax liabilities were "satisfied" when the property was subsequently sold to the Transportation Cabinet would render the language of KRS 132.220 meaningless. KRS 134.551(2) provides for a refund to a third-party purchaser only under specific limited circumstances, and the inability to institute an action to enforce the lien as provided for in KRS 134.546(2)(b) is not a circumstance warranting a refund. The Court determined that the Board of Tax Appeals correctly concluded that although appellees could not stand in the shoes of the state and enforce the tax liens against the state, they still had the ability to enforce the certificates of delinquency against the January 1st owners because the tax liability represented by the certificate of delinquency was not satisfied prior to the purchase of the certificate of delinquency, but remained outstanding against the original owner. Finally, the Court noted that although KRS 134.551 authorizes a refund under limited circumstances, it does not in any way alleviate a third-party purchaser's responsibility to perform due diligence in researching the property subject to the certificate of delinquency.

IX. TRIALS

A. ***Deleo v. Deleo***

2015-CA-001706 10/27/2017 2017 WL 4847880

Opinion by Judge Thompson; Judges Clayton and Dixon concurred.

Appellant appealed from the findings of fact, conclusions of law, and judgment of the Jefferson Family Court. She alleged that the family court abused its discretion when it denied her motion for a continuance of a trial date so that her newly retained counsel could attend the trial. The Court of Appeals agreed. The case involved not only property and maintenance issues, but also appellant's fundamental rights as a parent to custody and visitation with her minor children. While the Court recognized the family court's discretion in such matters, it held that the family court was required to consider the totality of the circumstances in deciding whether to deny or grant a continuance and that the family court abused its discretion when it considered only the delay that would be caused by a continuance. In considering the issue, the Court of Appeals examined all relevant factors, including the length of delay; prior continuances; inconvenience; cause of the delay; complexity of the case; and identifiable prejudice. While not all of the factors weighed in favor of a continuance, the totality of the circumstances - including that custody of the children was awarded to appellant's ex-spouse and that her visitation was suspended without any finding that the child would be seriously endangered - required reversal and remand.

X. TRUSTS

A. ***Kincaid v. Johnson, True & Guarnieri, LLP***

2014-CA-001807 10/06/2017 2017 WL 4448704

Opinion by Judge Jones; Judges Acree and Thompson concurred.

These appeals and cross-appeals arose from an award of attorney fees to Johnson, True & Guarnieri, LLP (JTG) following a settlement in a trust dispute. JTG represented Brett and Kevin Kincaid (the Kincaid brothers), who were trust beneficiaries. Numerous allegations of error were raised on appeal and cross-appeal concerning the amount of attorney fees awarded to JTG, how those fees were calculated, and at what time those fees should be paid. The Court of Appeals affirmed the award in its entirety. The Court first agreed with the circuit court's finding that there had been an hourly-rate fee agreement between JTG and the Kincaid brothers. In so doing, the Court relied on an engagement letter that JTG had sent to the brothers indicating that they would be billed on an hourly-rate basis, as well as monthly invoices and letters sent by JTG. The Court disagreed with JTG's assertion that the engagement letter worked as JTG's offer to represent the Kincaid brothers, which the brothers did not accept. The Court noted that at the time the engagement letter had been sent, JTG had already begun work on its representation of the brothers. Accordingly, the Court held that the engagement letter served to memorialize the hourly-rate fee arrangement the parties had already agreed on, which was further evidenced by subsequent billing and communications between the parties. The Court next rejected JTG's arguments that the fee agreement had been modified and that JTG had waived the Kincaid brothers' breach of the agreement. While the Court agreed with JTG that a modification of the fee agreement would not have to be in writing to be effective, the Court held that there had been no contract modification. JTG's desire to modify the fee agreement had been memorialized in writing, but there was no evidence that the Kincaid brothers had ever agreed to a modification. The Court additionally held that the Kincaid brothers' failure to object to JTG's desire to modify was insufficient to constitute a modification of the original fee agreement. The Court also considered the application of KRS 412.070, Kentucky's common fund statute, in examining whether the common fund fees owed to JTG under the statute were immediately payable and whether the funds owed by the unnamed and unborn beneficiaries should be paid to reimburse the Kincaid brothers or be paid to JTG. Looking to the language of KRS 412.070, the Court held that the statute mandated that the common fund fees owed to JTG were required to be paid before distribution. Next, the Court rejected the Kincaid brothers' argument that the circuit court erred in determining their proportionate share of the amount of trust funds recovered for them by JTG. The Court noted that while JTG had not offered any expert testimony, it did offer evidence to support its claim that the Kincaid

brothers' proportionate share of the total recovery was only $8 million. Finally, the Court rejected the Kincaid brothers' argument that JTG had violated SCR 3.130(1.5) by requesting a fee under the common fund statute.

XI. WORKERS' COMPENSATION

A. ***First Class Services, Inc. v. Hensley***

2016-CA-001367 10/13/2017 2017 WL 4557936

Opinion by Judge J. Lambert; Judges Dixon and Stumbo concurred.

Employee, a truck driver, was injured in a motor vehicle accident on his way home from work. The rig belonged to the employer; the truck driver worked from home, receiving his dispatches there. On the day of the accident, the driver had fallen ill and returned home earlier than usual. The employer argued that this was a departure from the employee's routine, thus relieving the employer of liability. The Workers' Compensation Board ultimately ruled in the employee's favor, and the employer appealed. The Court of Appeals affirmed, holding that the employer failed to meet its burden of demonstrating "overwhelming favorable evidence" in support of its position that the employee was not providing a service to it or that the employee was not a "traveling employee." *Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano*, 366 S.W.3d 456 (Ky. 2012). Because the employee's route began and ended at home, returning home early because of illness did not introduce a significant departure from that routine. The Court further distinguished this case from the unpublished decision, cited by the employer, of *Cole v. Cardinal Country Stores, Inc.*, No. 2013-CA-000787-WC, 2013 WL 5522800 (Ky. App. Oct. 4, 2013). Not only were the factual situations different, but there were published decisions on the issue; therefore, there was no need to rely on an unpublished decision. CR 76.28(4)(c).

B. ***McCoy Elkhorn Coal Corporation-Insolvent Employer v. Sargent***

2017-CA-000449 10/13/2017 2017 WL 4557808

Opinion by Judge Dixon; Judges Acree and Jones concurred.

The Court of Appeals affirmed a decision of the Workers' Compensation Board determining that the Kentucky Coal Employers Self-Insurance Fund (KCESIF) was responsible for payment of enhanced benefits awarded because of intentional safety violations by the insolvent employer, McCoy Elkhorn. KCESIF argued that it was a guaranty fund rather than an insurance carrier; consequently, the assessment of enhanced benefits pursuant to KRS 342.165(1) unfairly penalized KCESIF because McCoy Elkhorn was insolvent. However, the Court held that KCESIF could not escape responsibility for the enhanced benefits that would have been the obligation of the insolvent employer. The Court relied on *AIG/AIU Ins. Co. v. South Akers Mining Co., LLC*, 192 S.W.3d 687 (Ky. 2006), which established that an award of benefits pursuant to KRS 342.165(1) was increased compensation owed to the worker, not a penalty against the employer. The Court concluded that because *AIG/AIU* established that KRS 342.165(1) did not impose a "penalty," KCESIF could not rely on the language of KRS 342.910(2) exempting guaranty funds from liability for assessed penalties.