PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

OCTOBER 01, 2020 to OCTOBER 31, 2020

I. CARRIERS

A. ***ANDRIA KENDALL VS COMMUNITY CAB COMPANY, INC., ET AL***

2019-CA-1074 10/02/2020 2020 WL 5849102

Opinion by DIXON, DONNA L.; CALDWELL, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

Appellant, a passenger who was sexually assaulted by her cab driver, sued the cab company for breach of the warranty of safe passage. The circuit court dismissed appellant's suit because it was filed past the one-year statute of limitations for personal injuries under KRS 413.140. The circuit court determined that although appellant had sued on a contract theory, her claims sought damages for personal injuries and, therefore, the five-year statute of limitations pursuant to KRS 413.120(2) was inapplicable. The Court of Appeals disagreed and reversed. The Court first noted that appellant's theory of liability was based upon an old and unique duty imposed on common carriers for the protection of their passengers. This contractual duty arises from the purchase of a ticket of passage with the carrier. After noting this duty continues to exist, the Court concluded that the type of damages sought is not determinative of a cause of action, but rather it is the theory of liability that governs the applicable statute of limitations. According to prior Supreme Court precedent, damages for personal injury are recoverable for breach of the warranty of safe passage.

II. CHILD CUSTODY AND RESIDENCY

A. ***JOLEEN BRENDA GONZALEZ (FORMERLY KNOWN AS JOLEEN B. DOOLEY) VS ANDRE W. DOOLEY***

2019-CA-1014 10/16/2020 2020 WL 6106481

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

Mother appealed after a dissolution action she initiated resulted in a decree awarding her joint custody with Father of their Child but designating Father as primary residential parent. Before Mother filed her petition, Father relocated to Kansas City (where his parents and other family members lived) to seek employment. He had taken Child with him and encouraged Mother to join them. Instead, Mother filed a divorce petition. She claimed the family court erred by failing to perform a post-petition best-interests analysis on Father's pre-petition relocation decision. The Court of Appeals disagreed, noting that KRS 405.020(1) recognizes that the constitutional right to rear a child is jointly possessed, pre-petition, by a child's mother and father. The Court concluded that although a family court should consider pre-petition conduct when determining custody under KRS 403.270(2), a post-petition best-interests analysis of pre-petition parental decision-making would be problematic and likely amount to unconstitutional government interference. The Court also reaffirmed that a family court cannot interfere with the minor, day-to-day decisions concerning a child made by the joint custodial parent with whom the child is residing at the time. The Court rejected Mother's other claims of family court error regarding the division of marital property.

B. ***MICHELLE CARVER VS LANCE G. CARVER***

2019-CA-1751 10/23/2020 2020 WL 6220051

Opinion by GOODWINE, PAMELA R; CALDWELL, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Mother appealed an order effectively modifying an existing custody arrangement. Father moved for a modification of custody. The Domestic Relations Commissioner heard the motion and recommended that the parents maintain joint custody of the child. However, the DRC further recommended that Father be designated as the primary residential custodian and make all decisions regarding the child's medical and educational needs. The family court accepted the DRC's recommendations and adopted the report. The Court of Appeals determined that the family court effectively modified custody of the child without properly applying KRS 403.340(3). The Court reviewed the DRC's report to determine whether it adhered to the requirements under KRS 403.340(3) in making its recommendations and concluded that it had not. Therefore, the Court reversed.

III. CHILD SUPPORT

A. ***HEIDI MARTIN MCCAIN VS DANNY NEAL MCCARTY***

2019-CA-1708 10/16/2020 2020 WL 6106610

Opinion by DIXON, DONNA L.; CLAYTON, C.J. (CONCURS) AND JONES, J. (CONCURS)

Appellant challenged an order denying her request to direct that appellee re-enroll their eldest child in his health insurance plan. The Court of Appeals affirmed. The Court addressed KRS 403.211(7)(c)3., which governs the provision of health care coverage to children. The Court concluded that the family court properly interpreted this section as referring to dependency on the insured parent *as a continuing obligation* as opposed to only at the time of emancipation, as appellant argued. Here, appellant testified that the emancipated children were now dependent upon her as opposed to appellee. As such, the final required element under the statute (*i.e.*, primary dependence on the insured parent for maintenance and support) was not met, and the family court properly denied appellant's motion to require that appellee provide coverage.

IV. CIVIL PROCEDURE

A. ***BRAYDEN MICHAEL JONES, A MINOR, BY AND THROUGH HIS MOTHER AND DULY APPOINTED CONSERVATOR VS IC BUS, LLC, ET AL***

2018-CA-1440, et al. 10/09/2020 2020 WL 5987523 Rehearing Pending

Opinion by DIXON, DONNA L.; ACREE, J. (CONCURS) AND CLAYTON, C. J. (CONCURS)

These appeals were brought on behalf of preschool children from a judgment against them for claims arising out of a school bus rollover crash in which two of the children were killed and several were injured. The parties raised numerous issues on appeal stemming from various summary judgment decisions, directed verdict denials, instructional error, and a jury verdict. On an issue of first impression, the Court of Appeals reversed the circuit court's order joining Jones, one of the children injured who had not filed suit, under CR 19.01 and requiring him to file a complaint against his wishes. Comparing the near identical federal rule for joinder, the Court first determined that Jones was not a necessary party to the litigation. Under cases analyzing the federal rule, the inconvenience of the trial court and defendants, as well as added trial expense, were not factors to be considered in support of joinder under the rule. Rather, the test is whether the interests of those already parties are separable from the non-party. Herein, the interests were clearly separable. Neither does the possibility of inconsistent judicial rulings—should the non-party file suit later—require joinder. The purpose of CR 19.01 is to prevent inconsistent obligations, not inconsistent results. The Court further held that even had Jones been properly determined a necessary party, the trial circuit exceeded its authority by requiring Jones to file a complaint under the Rule. CR 19.01 permits a trial court to join an unwilling non-party as "a defendant, or in a proper case, an involuntary plaintiff." Forcing a non-party to file suit against his will is violative of CR 11, which requires counsel to certify that reasonable inquiry has been made and that all pleadings filed are well grounded and warranted by existing law. Next, the Court considered the circuit court's rulings concerning appellants' strict liability claims against the bus manufacturer. Observing that Kentucky requires proof of feasible design alternative in crashworthiness claims, the Court reversed the circuit court's dismissal of Appellants' claim of defective roof design, determining that appellants had offered sufficient proof of feasible alternatives to present such a claim to the jury. The Court held that the circuit court erred by determining there was insufficient proof of practicability of the design alternatives proffered. Here, appellants had presented proof of safer design, lessened injuries by safer design, and a method of establishing enhanced injuries attributable to defective design. The Court also reversed the defense jury verdict on appellants' defective bus clip design claim due to instructional error. The Court further determined that the circuit court erred by dismissing appellants' failure to warn claim. The Court affirmed the circuit court's dismissal of appellants' claims for breach of warranty and breach of the Kentucky Consumer Protection Act.

V. CRIMINAL LAW

A. ***COMMONWEALTH OF KENTUCKY VS HOLLY COMBS***

2018-CA-0840 10/30/2020 2020 WL 6370497

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

The Commonwealth challenged an interlocutory order granting appellee's motion to suppress her blood test following her arrest for DUI. The Commonwealth argued that the circuit court erred because appellee validly offered her consent after being read the implied consent warnings, which included a warning that if she failed to take the blood test she would be penalized, and her mandatory minimum sentence would be doubled. As to appellee's testimony regarding her consent to give blood, the circuit court only found that she "testified that she was read the implied consent form which included being advised that failure to give blood would result in penalties being enhanced and additional penalties." The circuit court's conclusions of law included summaries of what could constitute an exigent circumstance (the court found none here) and determined that pursuant to *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186, 195 L. Ed. 2d 560 (2016), "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." The Court of Appeals reversed, noting that the relevant question was whether appellee's receiving an accurate warning that DUI law imposes mandatory minimum sentences on convicted defendants who refuse consent could render her consent involuntary. The Court concluded that it did not. Citing to *Commonwealth v. Brown*, 560 S.W.3d 873 (Ky. App. 2018), which was decided after the circuit court's ruling below, the Court noted that unlike the laws at issue in *Birchfield*, Kentucky does not have a separate crime for refusing to consent to a blood test. Here, the circuit court made no finding as to whether appellee's consent was a result of being warned about the doubling of mandatory minimum sentences if she refused consent, apparently assuming that *Birchfield* foreclosed any consent to a blood draw after the implied consent warnings were read from ever being voluntary. The Court concluded that this assumption was in error and that reversal and remand for a new suppression hearing was necessary.

B. ***EHMUAD LYJUAN TUCKER VS COMMONWEALTH OF KENTUCKY***

2018-CA-1603, 1641 & 1773 10/09/2020 2020 WL 5987512

Opinion by ACREE, GLENN E.; COMBS, J. (CONCURS) AND MAZE, J. (CONCURS)

In this consolidated appeal, appellant challenged the circuit court's denial of his motion to suppress evidence obtained from a search of his cell phone. Appellant contended the search warrant at issue was overbroad, failing to include a date restriction on contents to be searched and failing to reference any specific crime for which the police were to search for evidence, resulting in an unconstitutional general search of his cell phone contents. The Court of Appeals affirmed, finding the search warrant, when qualified by the limitations in the accompanying officer affidavit, was sufficiently particularized. And, relying on *Applegate v. Commonwealth*, 577 S.W.3d 83 (Ky. App. 2018), the Court concluded that the investigating officers were justified in searching any files which could reasonably have contained evidence relating to the crime on which the warrant was based.

C. ***COMMONWEALTH OF KENTUCKY VS JAMES NEAL HENSLEY***

2019-CA-1360 10/23/2020 2020 WL 6226107

Opinion by MAZE, IRV; TAYLOR, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

The Commonwealth challenged an order dismissing its case against appellee on the basis that his right to a speedy trial was violated. The Court of Appeals affirmed. Appellee was indicted in April 2019 on charges of possession of drug paraphernalia and first-degree possession of a controlled substance (third or greater offense). At a May 2019 pretrial conference, the Commonwealth confirmed that lab test results of substances seized from appellee's hotel room in January 2019 had not been received, and a second conference was scheduled for June 19, 2019. At that conference, appellee informed the court of his desire to schedule a trial date; however, the Commonwealth complained that due to a lab backup, test results might not be available by the August 26 trial date. At that point the circuit court granted appellee's motion for a speedy trial. Five days prior to the August 26 trial date, the Commonwealth sought another continuance on the basis that the lab results had not been received; this resulted in the circuit court's granting of appellee's motion to dismiss the charges against him on the basis that the delay in providing the lab test results was too long and violated appellee's right to a speedy trial. The court noted that the delay was prejudicial because the state's own agencies could not provide evidence against a defendant who was being held in custody. In affirming the denial of the Commonwealth's motion to continue, the Court of Appeals held that there was no abuse of discretion because it could be inferred from the circuit court's order that it had properly considered each of the necessary factors in deciding whether to grant a continuance, including the timing of the Commonwealth's continuance motion and the complexity of the case. The Court also held that the circuit court did not abuse its discretion in granting appellee's speedy trial motion or in its decision to dismiss the indictment with prejudice. The Court concluded that dismissing the case without prejudice would gut the entire purpose of the speedy trial motion and would have the same effect as denying appellee's right to a speedy trial.

VI. DAMAGES

A. ***ALL THAT N MORE, LLC, ET AL VS ROMAN KUSYO, ET AL***

2019-CA-0928 10/30/2020 2020 WL 6370501

Opinion by JONES, ALLISON E.; CLAYTON, C.J. (CONCURS) AND DIXON, J. (CONCURS)

Appellants, a construction company and its owners, appealed orders that granted default judgment against the company and awarded damages to appellees based on a home construction contract. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court first held that the circuit court did not abuse its discretion in refusing to set aside the default judgment. However, the Court agreed with appellants that an award providing repayment of draws/installment payments as well as the cost to complete construction resulted in a double recovery to appellees. Because the completion amount overlapped the amount awarded on the basis of the overpaid draws, the circuit court inadvertently awarded appellees a double recovery. Therefore, this portion of the award required reversal. Citing to *Nesselhauf v. Haden*, 412 S.W.3d 213 (Ky. App. 2013), the Court also agreed with appellants that a prayer for attorney's fees in the *ad damnum* clause of the complaint was not sufficient, in and of itself, to state a cause of action to recover those fees. Accordingly, the award of attorney's fees was also reversed.

VII. IMMUNITY

A. ***LOUISVILLE GAS AND ELECTRIC COMPANY VS JOSE RAMIREZ GALVAN, ET AL***

2019-CA-0961 10/16/2020 2020 WL 6106958

Opinion by ACREE, GLENN E.; CLAYTON, C.J. (CONCURS) AND LAMBERT, J. (CONCURS)

Appellant contracted with the direct employer of appellee to erect large scale scaffolding throughout the interior of its boilers. Appellee was injured and brought suit against appellant for personal injuries. Appellant claimed "up-the-ladder" immunity pursuant to the Workers' Compensation Act's exclusivity clause. The circuit court denied the motion and appellant appealed. The Court of Appeals reversed, concluding that appellant had submitted sufficient evidence that it secured workers' compensation coverage under KRS 342.340(1) and that erection of large scale scaffolding was a regular or recurrent part of its business, a question critical to appellant's claim that it qualified as a contractor under KRS 342.610(2)(b).

VIII. MUNICIPAL CORPORATIONS

A. ***SANITATION DISTRICT 1 VS DANIEL LOUIS WEINEL***

2019-CA-1002 10/02/2020 2020 WL 5849097 DR Pending

Opinion by MAZE, IRV; ACREE, J. (CONCURS) AND COMBS, J. (CONCURS)

The Sanitation District sought to assess monthly stormwater service fees against appellee's property. Appellee lived in a rural part of Campbell County which did not have sanitary sewers, and there were no stormwater sewers directly serving his property. After appellee refused to pay the fees, the District brought a small-claims action to collect the arrearage. The district court dismissed the action, concluding that KRS 220.510 and 220.515 only authorized the District to collect fees from "users" of its system. The court interpreted the statutory language to mean properties where the District actually provides drainage systems, or where a "plan for improvement" has been made and approved and "work is begun on plans and specifications for the improvement." On appeal, the circuit court agreed with this interpretation. On discretionary review, the Court of Appeals reversed. The Court noted that the 1994 amendments to KRS Chapter 220 specifically granted sanitation districts the authority to comply with federal regulations intended to address public health risks associated with storm water runoff. As held in *Wessels Co., LLC v. Sanitation Dist. No. 1*, 238 S.W.3d 673 (Ky. App. 2007), the District is tasked with the management of stormwater drainage for all properties within its service area. Unlike sanitary sewer systems, which only serve connected properties, the District's stormwater drainage plan serves all watersheds within its service area. Given the District's statutory mandate to manage stormwater drainage for the entire service area, the Court concluded that KRS 220.510 must be construed broadly to effectuate the purposes of the enactment. Since appellee's property clearly drained to a watershed within the District's service area, the Court found that his property was a "user" of the District's stormwater drainage plan, even though it was not physically connected to a stormwater drain. Therefore, the Court held that the District was authorized to impose stormwater drainage fees on appellee's property.

IX. NEGLIGENCE

A. ***SANDRA PORTER VS EVAN HUNTER ALLEN***

2019-CA-0115 10/09/2020 2020 WL 5987508

Opinion by ACREE, GLENN E.; CALDWELL, J. (CONCURS) AND KRAMER, J. (CONCURS)

Appellant challenged a judgment entered upon a jury verdict in the personal injury tort action she brought against appellee. The action stemmed from an automobile accident. She alleged that the circuit court erred by: (1) preventing her from presenting evidence of an impairment rating; and (2) improperly instructing the jury on KRS 304.39-060's threshold requirements for pursuing a tort claim. The Court of Appeals held that the circuit court properly excluded evidence of appellant's impairment rating because it could have misled the jury or confused the issues under KRE 403, as impairment ratings are primarily used in workers' compensation actions. Additionally, the Court concluded that sufficient evidence was presented to warrant an instruction on the threshold requirements for pursuing a tort claim because there was conflicting evidence on whether appellant met the $1,000 threshold under the Kentucky Motor Vehicle Reparations Act and whether her injury was permanent. Thus, the Court affirmed.

X. TERMINATION OF PARENTAL RIGHTS

A. ***S. B., ET AL VS CABINET FOR HEALTH AND FAMILY SERVICES COMMONWEALTH OF KENTUCKY, ET AL***

2019-CA-1529 10/16/2020 2020 WL 6106485

Opinion by CLAYTON, DENISE G.; KRAMER, J. (CONCURS) AND MCNEILL, J. (CONCURS)

The maternal grandfather and step-grandmother of a minor child appealed from an order denying their motion to intervene in the action to terminate the parental rights of the child's biological father and from an order denying their motion to hold the termination proceedings in abeyance. The Court of Appeals affirmed. Citing to *Commonwealth, Cabinet for Health and Family Services v. L.J.P.*, 316 S.W.3d 871 (Ky. 2010), the Court noted that grandparents do not have a right to intervene in a parent's termination proceedings under either prong of CR 24.01. Here, the family court found that Grandparents had no statutorily-conferred right to intervene and there were other means by which Grandparents could achieve relief, noting that their interest as maternal grandparents in visitation or custody would be unaffected by the termination action against Father. The Court of Appeals agreed. The Court also agreed that permissive intervention was inappropriate under CR 24.02.