Kentucky Court of Appeals Published Opinions Summaries

January 2024-May 2024

Presented by: Hon. Judge Pamela R. Goodwine

Note to practitioners: These are the Opinions designated for publication by the Kentucky Court of Appeals for the specified time period. Practitioners should Shephardize all case law for subsequent history prior to citing it.

I. CRIMINAL

A. ***WALKER v. COMMONWEALTH, 2022-CA-0368-MR (Ky. App. 2024)***

2022-CA-0368-MR 3/01/2024 2024 WL 874190
Opinion by LAMBERT, JUDGE; CALDWELL, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Appeal from the denial of an application for expungement pursuant to KRS 431.073(1)(c) following a full pardon. This Court upheld the Adair Circuit Court's determination that the decision whether to grant an application was left to its sound discretion due to the General Assembly's use of the permissive word "may" in the statute. And the Court upheld the circuit court's consideration of the factors and balancing test set forth in KRS 431.073(4) in exercising its discretion, although that section is only applicable to applications filed under KRS 431.073(1)(d). There is nothing in the statute that prohibits the use of those factors in considering applications filed under (1)(a) – (c). Finally, this Court held that the circuit court did not abuse its discretion in denying the application based upon the welfare and safety of the public and the interest of justice, as Walker had been convicted of murdering his parents.

B. ***H.M. v. COMMONWEALTH OF KENTUCKY, 2022-CA-1016/2022-CA-1195/2022-CA-1196 (Ky. App. 2024)***

2022-CA-1016-MR 3/15/2024 2024 WL 1122572
2022-CA-1195-MR
2022-CA-1196-MR
Opinion by LAMBERT, JUDGE; COMBS, J. (CONCURS) AND GOODWINE, J. (CONCURS)

These consolidated appeals from an order of involuntary commitment issued pursuant to KRS Chapter 202C presented numerous matters of first impression. The Court explained that KRS 202C requires a two-step process, a guilt hearing followed by a commitment hearing, but an appeal may be taken only from a final order of commitment

issued after the commitment hearing. The Court held that a KRS 202C respondent may raise an insanity defense at the guilt hearing but affirmed the trial court's rejection of that defense here because it was supported by substantial evidence. As to the commitment phase, the Court held that the Commonwealth is not required to show that a respondent has previously been convicted of criminal offenses to satisfy KRS 202C.050(1)(c), which requires proof beyond a reasonable doubt that a respondent "has a demonstrated history of criminal behavior that has endangered or caused injury to others . . . ." The Court also rejected the Commonwealth's argument that a finding of guilt in the first stage of the KRS 202C proceedings is sufficient to satisfy KRS 202C.050(1)(c). Instead, the Commonwealth must present evidence that the respondent engaged in criminal misconduct (which may or may not have resulted in criminal convictions) which injured or endangered others beyond the conduct which led to the filing of charges from which the KRS 202C petition sprang. Finally, the Court rejected an argument that it is improper to house a person ordered committed under KRS 202C in the Kentucky Correctional Psychiatric Center instead of a regional mental health facility.

C. ***CHRISTOPHER SMITH v. COMMONWEALTH OF KENTUCKY, 2023-CA-0110-MR (Ky. App. 2024)***

2022-CA-0686-MR/2022-CA-0687-MR 4/12/2024 2024 WL 1589633
Opinion Affirming in Part, Reversing in Part, and Remanding by CALDWELL, JUDGE; ACREE, J. (CONCURS) AND LAMBERT, J. (CONCURS)

This Court held that if a court has a reasonable belief that an accused might not be competent at any time during a probation revocation proceeding, then the court must ensure the accused is competent prior to proceeding further. The United States Supreme Court used language in *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S. Ct. 1756, 1759-60, 36 L. Ed. 2d 656 (1973), indicating that competency is implicated in revocation proceedings. A criminal defendant must have the ability to assist counsel in preparing a defense, which is the core of competency determination. Therefore, a trial court has a responsibility to ensure competency before conducting a probation revocation hearing.

II. FAMILY LAW

A. ***NATHAN R. LANKFORD v. JESSICA L. LANKFORD, 2023-CA-1174-ME/2023-CA-1283-ME***

2023-CA-1174/2023-CA-1283 4/26/2024 2024 WL 1813982
Opinion by JONES, JUDGE; CETRULO, J. (CONCURS) AND KAREM, J. (CONCURS)

Nathan Lankford appeals the Jefferson Circuit Court's orders dismissing an EPO on behalf of his child and Nathan's petition for a DVO to protect the child from his mother, Jessica Lankford, after she allegedly kicked the child down the stairs. The incident was reported the Cabinet. The family court issued an EPO, and after various continuances, the DVO hearing was not scheduled for several more weeks. In the interim, the circuit court sua sponte asked the Cabinet about the status of its investigation and the Cabinet reported it would not be investigating further. Instead of holding an evidentiary hearing, the family court dismissed the petitions stating it was the court's policy to do so when the Cabinet declines to act.

Our court held that while the family court can conduct some limited investigation prior to the evidentiary hearing, the DVO statutes do not allow for ex parte communications with the Cabinet for purposes of determining whether to move forward with the petition. The family court was required to hold an evidentiary hearing, per *Wright v. Wright*, 181 S.W.3d 49 (Ky. App. 2005). Because the family court determined the petition alleged facts which if true would amount to domestic violence, the family court was obligated to conduct a full hearing and base its decision solely on the evidence before it.

B. J.P.T. v. Cabinet for Health and Family Services, 2023-CA-0218-ME

2023-CA-0218-ME 5/03/2024 2024 WL 1946175
Opinion by ACREE, JUDGE; CALDWELL, J. (CONCURS) AND LAMBERT, J. (CONCURS)

This opinion addresses both procedural and substantive issues in an appeal of a Dependency, Neglect, or Abuse (DNA) adjudication and disposition. Procedurally, the Court indicated that Appellant's substantial non-compliance with the Rules of Appellate Procedure (RAP) governing brief-writing justified striking the brief and dismissing the appeal. However, after reviewing Appellant's counsel's history of repetitively violating the same rules in five appeals in the past five years, and documenting that history in the opinion, the Court determined the proper remedy was to fine counsel. Counsel was fined $1,000 by separate Order. Substantively, the Court addressed Appellant's arguments: (1) that the family court's orders were not supported by substantial evidence; and (2) that there was no proof Appellant intended to injure Child. The Court found there was substantial evidence that Child was injured at the hands of Appellant who acknowledged playing with Child by picking him up by the upper arms and tossing him on a bed. Appellant's second argument was not persuasive because the infliction of physical injury under KRS 600.020(1)(a)(1)–(2) does not require intent to injure, only that the injury occurred "by other than accidental means." Elaborating upon the holding in *Cabinet for Health & Fam. Servs. v. P.W.* that "a parent need not intend to abuse or neglect a child in order for that child to be adjudged an abused or neglected child[,]" 582

S.W.3d 887, 895 (Ky. 2019), the Court of Appeals distinguished between intentional acts and purposeful acts, as follows:

"For the purposes of this statute, we do not define the adjective 'accidental' by the absence of *intent*; we define it by the absence of human agency—*i.e.*, a person's engaging in a *purposeful* act even if the outcome was unintended. [ACCIDENTAL, Black's Law Dictionary 18 (11th ed. 2019) (hereinafter "Black's") (emphasis added)]. Black's defines 'purposeful' as something '[d]one with a specific aim in mind; deliberate.' PURPOSEFUL, Black's 1483. Deliberate action is still purposeful, even if the intended outcome does not come to fruition and, instead, some other consequence results from that deliberate action."

The Court of Appeals affirmed the family court's adjudication and disposition orders in this DNA case.

C. G.M.A. v. COMMONWEALTH OF KENTUCKY; D.S.; N.E.A.; AND S.E.A., A MINOR CHILD, 2023-CA-0941-ME

2023-CA-0941-ME 5/03/2024 2024 WL 1945596
Opinion by ECKERLE,JUDGE; KAREM, J. (CONCURS) AND LAMBERT, J. (CONCURS)

In July 2021, G.M.A. (an attorney) filed a dependency/neglect/abuse (DNA) petition on behalf of his newly-born granddaughter. The petition alleged that granddaughter had been living with him and his wife, M.A., since shortly after her birth, and that her parents were unable to care for granddaughter due their mental-health and substance-abuse issues. The family court granted temporary custody to grandparents.

Subsequently, grandparents filed a motion for child support and to propound interrogatories to parents. The family court denied the motion, holding that grandparents were not parties to the action. Rather, only the Commonwealth, through the county attorney's office or the Cabinet for Health and Family Services, was a party with standing to file such motions. Shortly after this ruling, grandparents entered into an informal adjustment of the DNA petition with parents.

Thereafter, grandparents filed motions for permanent custody and for a finding that they were *de facto* custodians. The family court denied the motions, concluding that the matters were not ripe in light of the informal adjustment. Later, grandparents filed motions alleging that the parents violated the terms of the informal adjustment and asserting rights to intervene as *de facto* custodians. The family court denied the motions, again concluding that grandparents were not parties to the case and lacked standing to intervene.

While the matter was pending, G.M.A. was elected as county attorney. The family court entered a *sua sponte* order disqualifying his office and directing the appointment of an outside county attorney. The family court also entered orders sealing the record and the proceedings from any participation by non-parties, including G.M.A. and M.A. Eventually, the family court dismissed the DNA petition, concluding that parents complied with its terms.

The Court of Appeals reversed, noting that KRS 620.100(5) allows custodians the rights to notice of, and a right to be heard in, any proceeding held with respect to the child, even when they are not expressly made parties. Furthermore, the Court emphasized that 620.070(1) allows "any interested person" to file a DNA petition. In addition, the Court pointed out that an informal adjustment is necessarily "an agreement reached among the parties," KRS 600.020(36), which is inconsistent with the Commonwealth's current position that custodial grandparents may never be parties to a DNA petition. The Court concluded that, when filed by an "interested person" with proper standing, the petitioner in a DNA action is accorded the status of party plaintiff.

Thus, the family court erred by holding that grandparents were not parties to the action, sealing the record and closing the proceedings, and refusing to hear their motions regarding parents' noncompliance with the informal adjustment. But since grandparents agreed to the informal adjustment, they were estopped from bringing substantive motions concerning custody and child support while the informal adjustment was in effect. Finally, the Court held that the family court properly disqualified G.M.A. after he was elected county attorney.

III. IMMUNITY

A. ***IVES v. HMB PROFESSIONAL ENGINEERS, INC. (Ky. App. 2024)***

2021-CA-1187-MR 5/24/2024 2024 WL 2487850
Opinion by JONES, JUDGE; ACREE, J. (CONCURS) AND LAMBERT, J. (CONCURS)

In four direct appeals from the trial court's grant of summary judgment to the engineers and engineering firms involved in the case, the Court of Appeals reversed and remanded for further proceedings. The four appeals stem from a catastrophic automobile accident which killed Hiram Ives and seriously injured his business partner, Jennings Copley. The family and estate of Ives filed suit against Copley and the various engineers and engineering firms which oversaw the widening of the portion of Interstate 65 where the accident occurred. Following discovery, the trial court granted summary judgment to the engineer parties on the basis of immunity and that the claims were preempted by federal law.

The Court of Appeals reversed. First, it disagreed with the trial court's finding of immunity, holding a private, engineering consultant was not immunized from liability simply because its roadway design plan was approved by a sovereign entity. Here, the mere fact that the engineer parties contracted with the Kentucky Transportation Cabinet did not transform them into state actors or quasi-state actors for purposes of immunity.

Second, the Court of Appeals held that neither the federal statutes nor the federal regulations pertinent to the National Highway System contain express statements of preemption. Further, Kentucky's common law negligence and wrongful death causes of action appear to be in harmony with federal law, and therefore, the trial court incorrectly concluded that federal preemption barred the state law claims.

IV. LEGAL MALPRACTICE

A. ***MILLERS LANE CENTER, LLC (KY), AND MILLER LANE CENTER, LLC (FL) v. MORGAN & POTTINGER, P.S.C.; JAMES P. MCCROCKLIN; AND MOSLEY & TOWNES, PLLC, 2022-CA-0368-MR (Ky. App. 2024)***

2022-CA-0368-MR 5/10/2024 2024 WL 2096721
Opinion by EASTON, JUDGE; KAREM, J. (CONCURS) AND TAYLOR, J. (CONCURS)

This is an appeal from two consolidated cases in which the trial court dismissed Millers Kentucky, LLC's 2021 claim for lack of standing; dismissed Millers Florida's claims because it had attempted to assign any proceeds from its malpractice claim, depriving it of standing; and dismissed Mark Brewer's claims of lost value in his membership interest in Millers Florida and emotional distress due to lack of standing. Millers Florida, LLC (which included members Brewer and Harold) operated and leased-out a warehouse in Louisville, Kentucky to a recycling company, Blue Skies. Eventually, Blue Skies filed suit against Millers Florida. After the parties failed to settle, a jury awarded Blue Skies upwards of $1.5 million. During that action, Brewer created Millers Kentucky, LLC, which is a totally separate entity to Millers Florida, LLC. Millers Kentucky subsequently filed for bankruptcy even though it does not own the property at issue and was not a party to the action. The bankruptcy court entered an order which directed Millers Kentucky and Millers Florida to consolidate their assets for the purposes of the bankruptcy and to file the correct documents with the Secretary of State to completely merge the two LLCs. Millers Kentucky and Millers Florida failed to submit any merger forms to the Secretary of State. The bankruptcy court also conducted a mediation on December 18, 2020, in which Millers Kentucky reached a global settlement ("Settlement Agreement") with its creditors, including Blue Skies.

On December 20, 2021, Millers Kentucky filed suit against Morgan & Pottinger, James McCrocklin, and Mosely & Townes ("Attorneys") for malpractice, as they were the attorneys who represented Millers Florida during various stages of the Blue Skies action. On March 16, 2022, Millers Florida and Brewer filed separate complaints against the Attorneys; Millers Florida alleged the same claims Millers Kentucky did in 2021, and Brewer alleged emotional distress, depreciation of his membership in Millers Florida, and expenses incurred in collateral litigation. The trial court consolidated the 2021 and 2022 actions and entered its Opinion and Order on October 14, 2022.

The four issues on appeal were: (1) whether Millers Kentucky had standing, (2) whether the bankruptcy court's order merged Millers Kentucky and Millers Florida, (3) whether the trial court erred in holding that Millers Florida had no standing to bring its 2022 action due to its attempt to assign its malpractice claim, (4) whether the trial court erred in determining Brewer had no standing to recover damages for his membership value loss, and (5) whether the trial court erred in not dismissing the actions filed in 2022 by Millers Florida and Brewer because the actions were time-barred.

This Court first determined that Millers Kentucky was not a real party in interest pursuant to Kentucky Rule of Civil Procedure ("CR") 17.01, because Millers Florida was the true client to the Attorneys in the Blue Skies lawsuit. The Blue Skies lawsuit began in 2015, a year before Millers Kentucky was created, and it was never joined in the lawsuit after creation. Second, the bankruptcy court's decision to consolidate the assets of Millers Kentucky and Millers Florida did not effectively merge the two entities. The consolidation was just for the bankruptcy, and, further, substantive consolidation in bankruptcy is an equitable measure, is punitive in nature, and cannot be used offensively. Lastly, the claims brought by Millers Florida and Brewer were barred by a one-year statute of limitation. While the trial court did err in determining that Millers Florida lacked standing because it attempted to assign its legal malpractice claim, because assignment is prohibited, Millers Florida's claims were nevertheless time-barred, as well as Brewer's claims. The statute of limitations in a legal malpractice action start running when damages become "fixed and speculative," which occurred here when the Settlement Agreement with Blue Skies was reached in December 18, 2020, resolving the Blue Skies lawsuit.

V. TORTS

A. ***BOSTON v. COMMONWEALTH HEALTH CORPORATION, INC., 2023-CA-0583-MR (Ky. App. 2024)***

2023-CA-0583-MR 3/01/2024 2024 WL 1335987
Opinion by CALDWELL, JUDGE; CETRULO, J. (CONCURS) AND JONES, J. (CONCURS)

Boston tripped and fell outside of a hospital owned and operated by Appellees. Boston suffered injuries which were treated at the hospital. A complaint was then filed, alleging that the Appellees owned, occupied, and maintained the hospital; thus, they had a duty to regularly inspect the property for defects and correct them. Boston alleged in his complaint that the Appellees breached that duty. However, Boston did not file a certificate of merit (or a declaration or affidavit stating that the certificate was not required). Appellees argued stated that Boston's failure to file a certificate of merit deprived the circuit court of subject matter jurisdiction. The circuit court agreed and granted Appellee's motion to dismiss. This Court reversed and remanded the circuit court's judgment. This case revolves around the interpretation of KRS 411.167. The statute states that "any action identified in KRS 413.140(1)(e) requires a certificate of merit to be filed." KRS 413.140(1)(e) provides: "The following actions shall be commenced within one (1) year after the cause of action accrued:…An action against a physician, surgeon, dentist, or hospital licensed pursuant to KRS Chapter 216, for negligence or malpractice." The circuit court determined that "negligence" as used in KRS 413.140(1)(e) meant any type of negligence (including premise liability negligence). However, this Court determined that negligence as used in KRS 413.140(1)(e) was to mean medical malpractice negligence. There is a difference between medical malpractice claims and premises liability negligence claims; and, the circuit court's interpretation would be at odds with KRS 411.167(5), which provides that a certificate of merit is not immediately required if there has been a request by the claimant for records of the claimant's medical treatment by the defendants and those documents have not been produced. Furthermore, the title of the legislation from which KRS 411.167 is derived from is "AN ACT relating to medical malpractice." There is a legal difference between medical malpractice and premises liability negligence. Therefore, this Court reversed and remanded.

B. ***DEBORHA LLOYD v. NORTON HOSPITALS, INC. D/B/A/ NORTION's WOMEN'S AND CHILDREN'S HOSPITAL; CHRISTOPHER DALE HENLEY, M.D., DARREN CAIN, M.D.; DIAGNOSTIC X-RAY PHYSICIANS, PSC (DXP); AND SHELIA SLONE KCSA, 2023-CA-0748-MR (Ky. App. 2024)***

2023-CA-0748-MR 4/19/2024 2024 WL 1685440
Opinion by CETRULO, JUDGE; GOODWINE, J. (CONCURS) AND JONES, J. (CONCURS)

This is an appeal from summary judgments granted in favor of three defendants in a medical malpractice action. The injured party underwent surgery for a knee replacement in 2019 and after surgery, a suture needle was missing. The radiologists did not observe the needle on x-ray, and the surgical technician was unable to locate it. The surgical team elected not to reopen the patient's knee to look for the missing needle. Weeks later, it was confirmed that the needle had remained in the patient's

body and needed to be removed, requiring a further surgery. The matter was litigated against several entities, and the trial court ultimately granted summary judgment to Norton Hospital, the Radiologists and the surgical technician, for various reasons.

On appeal, we reversed the summary judgment in favor of the Radiologists as it was based upon plaintiff's expert testimony being from an orthopedic surgeon, rather than a radiologist. The trial court erred in finding that plaintiff could not proceed against the Radiologists without testimony from an expert of the same specialty. We also reversed a summary judgment in favor of the surgical technician. The plaintiff did not produce expert testimony as to her negligence. However, this case presented the classic example for application of the *res ipsa loquitor* doctrine, which allows a jury to infer negligence from the mere fact of the retained foreign object which caused the need for the subsequent surgery. Thus, summary judgment as to that defendant was premature. The summary judgment in favor of Norton was affirmed.