

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
APRIL 2012**

I. CIVIL PROCEDURE

A. Bartley v. Culbertson

[2010-CA-001937](#) 04/20/2012 2012 WL 1365957

Opinion by Judge Combs; Chief Judge Taylor concurred; Judge Nickell dissented by separate opinion. The Court affirmed a summary judgment in favor of appellee in a declaratory judgment action wherein the appellee sought a determination that she was the biological child of and an heir at law to a deceased's estate through intestacy. The Court held that that the trial court did not err in granting summary judgment and in failing to find that the paternity claim was barred by *res judicata*. Intestacy was a significant new issue never before considered in prior actions, the issue of paternity had never ultimately been adjudicated in the prior actions, paternity in the context of intestacy had never ripened into a justiciable cause of action in the previous litigation, and the estate and other heirs had never been parties to any litigation. Thus, reliance on issue and claim preclusion was wholly misplaced, despite the similarity of the facts.

II. CONTRACTS

A. Snow Pallet, Inc. v. Monticello Banking Company

[2011-CA-000696](#) 04/20/2012 2012 WL 1370878

Opinion by Senior Judge Lambert; Judges Caperton and Thompson concurred. The Court affirmed a summary judgment dismissing appellants' claims for breach of fiduciary duty, interference with contractual relations and interference with prospective business advantage. Appellant alleged that the individual acting as both president of the appellee bank and as a member of the board for the county industrial development authority convinced the industrial authority to loan money set aside for appellant to another company at the same time appellant was attempting to secure funds for its business. The Court first held that the trial court did not err in finding that the bank did not breach a fiduciary duty to appellant, nor did it interfere with appellant's prospective contractual and business relationship with the industrial authority. The availability of low-interest loans to local business through the industrial authority was not confidential or secret information and there was no evidence of record that the loan appellant applied for years earlier was turned down at the bank president's insistence or that the money loaned to the other company five to six years later was from the same pool of money from which the earlier loan was slated to be drawn. The Court next held that the trial court did not err in finding that the bank did not tortiously interfere with contract. Appellant did not allege that a formal contract existed but only that there was an informal agreement. Therefore, the elements for tortious interference with contract were not met. The Court finally held that the trial court did not err in finding that the bank did not interfere with

prospective business advantage. Even assuming that applying for a loan created a valid business expectancy, there was no evidence that the bank president interfered with such expectancy or that such interference was improper.

III. CRIMINAL LAW

A. **Cawl v. Commonwealth**

[2010-CA-000358](#) 04/06/2012 2012 WL 1137876

Opinion by Judge Keller; Judges Stumbo and VanMeter concurred. The Court affirmed an order of the circuit court denying appellant's motion for post-conviction relief pursuant to RCr 11.42. The Court held that appellant failed to properly preserve the issue of whether the circuit court erred by failing to grant him an evidentiary hearing on the specific allegation that counsel was ineffective for incorrectly advising him about when he would be eligible for parole. Although the trial court found an evidentiary hearing was unwarranted, it did not specifically adjudicate the claims regarding trial counsel's alleged misrepresentation of parole eligibility and because appellant failed to file a motion pursuant to CR 52.02 for amended or additional findings of fact, the issue was not properly preserved for appellate review.

B. **Land v. Commonwealth**

[2010-CA-001840](#) 04/06/2012 2012 WL 1139320

Opinion by Judge Stumbo; Judges Dixon and Keller concurred. The Court affirmed appellant's conviction entered after appellant entered a conditional guilty plea to the offense of second-degree escape. The Court held that appellant's failure to report for an alternative sentence to be served on weekends constituted second-degree escape.

IV. EMPLOYMENT

A. **Plucinski v. Community Action Council**

[2010-CA-002056](#) 04/06/2012 2012 WL 1139319

Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed a judgment entered following the return of a jury verdict in favor of the appellee employer on appellant's claims for discrimination and retaliation. The Court first held that, as a matter of law, the circuit court properly granted summary judgment on appellant's disparate treatment claim. A supervisor's use of the words "cultural differences" in a meeting, which was a phrase open to interpretation, could not meet the definition of direct evidence to establish appellant's disparate treatment claim. The Court also held that appellant failed to establish a case of disparate treatment because she failed to prove all four elements set out in *Murray v. Eastern Kentucky University*, 328 S.W.3d 679 (Ky. App. 2009). The fact that appellant was the only Hispanic manager did not relieve her from establishing that similarly situated non-protected employees were treated more favorably. The Court also held that appellant's failure to offer testimony of another employee until well past the summary judgment state and failed to seek reconsideration of the order granting summary judgment, precluded her from arguing that the testimony entitled her to

prevail on the issue. The Court next held that appellant failed to adequately preserve the issue of whether the circuit court failed to properly instruct the jury on the retaliation claim. Appellant could not advocate a different proposed jury instruction on appeal other than the one she proffered at the trial court level.

V. PROPERTY

A. **Carrier v. Kirchheimer**

[2009-CA-002163](#) 04/13/2012 2012 WL 1232940

Opinion by Chief Judge Taylor; Judge Stumbo and Senior Judge Lambert concurred. The Court reversed and remanded a judgment of the circuit court adjudicating under KRS 418.040 a petition for declaration of rights involving real property. The Court held that the trial court erred in determining that the road at issue was a private road for the sole use and benefit of the lot owners in a subdivision and that the road was not a public roadway. The road was dedicated by estoppel to public use through the recording of the subdivision plat and through the selling of lots by reference to the plat. This displayed an objective intent, notwithstanding the subjective intent of the original developers, to dedicate the road to public use and the offer was consummated by the selling of lots in which the deeds referenced the plat. The Court then held that the circuit court erred in finding that a one-foot strip of land was restricted in use and that the appellants could not grant lot owners permission to cross it. There was no written or recorded instrument evidencing a restriction on the use of the one-foot strip of land in the record. The only evidence of the existence or terms of such a restriction was oral testimony which was only enforceable between the original contracting parties. Therefore, any purported restriction was unenforceable against the appellants as no such restriction was recorded in the property's chain of title.

B. **Lewis v. Manning**

[2010-CA-002162](#) 04/20/2012 2012 WL 1365960

Opinion by Senior Judge Lambert; Judge Thompson concurred; Judge Caperton dissented by separate opinion. The Court reversed and remanded a judgment of the circuit court entered following a bench trial finding in favor of appellees in appellant's action seeking to void or reform a deed of conveyance on the grounds that the subject property contained fewer acres than represented in the deed. Citing *Harrison v. Talbot*, 2 Dana 258, 32 Ky. 258 (1834), the Court held that in light of the astounding discrepancy between the acreage set forth in the deed and the actual acreage, the trial court was required to formulate an equitable remedy in the nature of a price reduction or rescission of the subject transaction.

VI. TORTS

A. **Gill v. Burress**

[2011-CA-000332](#) 04/13/2012 2012 WL 1231967

Opinion by Judge Moore; Judges Acree and VanMeter concurred. The Court affirmed in part, reversed in part and remanded a summary judgment in favor of

the appellee physician on appellant's claim that the physician negligently failed to detect a mass in appellant's breast for a period of approximately 18 months. The Court first held that the trial court erred in granting summary judgment on appellant's claim for mental anguish, emotional distress, and a loss of ability to enjoy life due to an increased fear of cancer recurrence or death. While it might be difficult for appellant to attribute any specific part of her existing mental anguish that was specifically related to her five to twenty-five percent increased likelihood of having cancer again, as opposed to what her mental anguish would have been if she had been timely diagnosed, this difficulty did not preclude her from presenting her case to the finder of fact. The Court next held that the trial court erred in granting summary judgment on appellant's claim for compensatory damages arising as a result of chemotherapy treatment and the surgical removal of her ovaries. Testimony was capable of supporting a finding that it was more probable than not that a mammogram would have detected appellant's tumor a year and a half prior to her actual diagnosis, that appellant would have received less treatment and chemotherapy would have been unnecessary if the tumor had been discovered earlier. The Court then held that the trial court did not err in determining that any future medical treatment related to a potential recurrence of cancer was non-compensable when appellant was cancer-free and it was at least seventy percent likely that she would suffer no recurrence and therefore, would not require future medical treatment. The Court finally held that the trial court did not err in finding that appellant's five to twenty-five percent decreased chance of remaining cancer free was non-compensable. Kentucky was among the minority of jurisdictions that did not consider a decreased chance for long-term survival or lost chance for recovery or a better medical result as a compensable injury.

B. Golden v. Paintsville City Utilities

[2011-CA-000929](#) 04/06/2012 2012 WL 1139318

Opinion by Judge Lambert; Judges Thompson and VanMeter concurred. The Court affirmed a summary judgment in favor of appellee on appellant's claim for injuries he received after his vehicle was struck by a vehicle owned by appellee. The Court held that the circuit court did not err in granting summary judgment when the record clearly established that appellee's employee did not breach his duty to exercise ordinary care under the circumstances. The employee was operating the vehicle within his lane of travel and was otherwise proceeding with all due care until the time another vehicle suddenly turned from its lane into the employee's lane and directly into his path and that the force of the impact on the employee's vehicle was what caused the subsequent collision with appellant's vehicle.

C. Gossett v. Crockett

[2010-CA-002079](#) 04/20/2012 2012 WL 1365958

Opinion by Judge Combs; Chief Judge Taylor concurred; Judge Nickell dissented by separate opinion. The Court affirmed an order of the circuit court denying appellants' motion for a new trial. The Court held that the improper

statement by appellee's counsel in closing argument regarding the prospect of financial ruin for appellee was cured by the strong admonition to each jury member that consideration of either party's financial condition was not permitted. The Court further held that the trial court did not err in refusing to allow the jury to be informed of appellee's insurance policy when appellants could not show that any prejudice resulted from the decision.

D. Williams v. Cline

[2011-CA-000444](#) 04/20/2012 2012 WL 1365964

Opinion by Senior Judge Lambert; Judges Caperton and Thompson concurred. The Court affirmed in part, reversed and part and remanded an order of the circuit court dismissing appellant's claims against a police detective and a county attorney for malicious prosecution, abuse of process and negligence. Appellant claimed that appellees coerced her into signing a stipulation of probable cause to get her case dismissed without prejudice and then later used that stipulation to avoid liability. The Court first held that the trial court did not err in dismissing the claim for abuse of process. While there was a genuine issue of material fact as to whether the county attorney requested a probable cause stipulation for improper reasons, because the county attorney had already commenced prosecution at the time he requested the stipulation, he was not acting outside of his authority as a prosecutor and therefore, he was immune from suit on the claim. The Court next held that because the dismissal required a stipulation of probable cause, the trial court erred when it failed to make specific findings of fact that the agreement was voluntary, that there was no evidence of prosecutorial misconduct and that public policy interests would not be affected, before allowing the agreement to preclude suit for malicious prosecution. While appellees' actions taken subsequent to formal prosecution were cloaked with absolute immunity, their actions while investigating only entitled them to qualified immunity. The Court finally held that the trial court erred in granting summary judgment on appellant's negligence claim when there was a genuine issue of material fact as to whether appellees acted in good faith in misidentifying appellant as the offender during the investigation and prior to prosecution but nevertheless initiated the prosecution.

VII. UCC

A. Dean v. Commonwealth Bank & Trust Company

[2010-CA-002152](#) 04/06/2012 2012 WL 1137907

Opinion by Judge Acree; Chief Judge Taylor and Judge VanMeter concurred. The Court affirmed a summary judgment in favor of the appellee bank on appellant's claims alleging violation of the Uniform Commercial Code, specifically KRS 355.4-405 and 355.4-406; aiding and abetting fraud and illegal activity and breach of ordinary care; common law negligence; and breach of contract and breach of duty of good faith and fair dealing. The Court held KRS 355.4-406, and not a statute of limitations, prohibited pursuit of the claims. In light of the uncontroverted facts and the legislative intent, appellant should have reasonably discovered unauthorized transactions on its account and its failure to

timely examine its bank statements, combined with the failure to timely notify the bank, resulted in an absolute prohibition to the claims which were more than a year old.

VIII. WORKERS' COMPENSATION

A. **Dallas National Insurance Company v. Board**

[2011-CA-001645](#) 04/13/2012 2012 WL 1253277

Opinion by Judge Thompson; Judges Moore and Nickell concurred. The Court affirmed an opinion and order of the Workers' Compensation Board affirming a decision of an Administrative Law Judge awarding permanent total disability benefits to a worker and assessing sanctions pursuant to KRS 342.310. The Court first held that the ALJ correctly determined that at the time of the work-related injury, the trucking company employer was a subcontractor and obtained workers' compensation insurance for the worker with the appellant insurer through its contract with the trucking company for which the driver was hauling tobacco to North Carolina. The contract and related evidence presented demonstrated an agreement to provide workers' compensation for the employer's drivers and the premiums were deducted from payments due to the employer. The Court also held that Kentucky had jurisdiction over the claim. While the contract between the trucking companies contained a choice of law provision, the provision did not relate to a workers' compensation injury. While North Carolina may have been an appropriate forum because the accident occurred there, North Carolina did not have exclusive jurisdiction. The Court next held that the finding that the worker was permanently and totally disabled was supported by substantial evidence. The Court finally held that the ALJ did not err in assessing sanctions, pursuant to KRS 342.310(1), against the insurer for not paying temporary total disability benefits when it did not pay income benefits and did not appear in the action to assert any defense to payment until after the opinion and award.