

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
AUGUST 1 to AUGUST 31, 2008**

I. ARBITRATION

A. Dutschke v. Jim Russell Realtors, Inc.

[2007-CA-001146](#) 08/01/2008 2008 WL 2942093 DR filed 09/03/2008
Opinion by Senior Judge Henry; Judge Keller concurred; Chief Judge Combs concurred by separate opinion. The Court affirmed an order of the circuit court denying appellants' motion to vacate an arbitration award and confirming the award related to a contract for purchase of a residence. The Court first held that the Kentucky Uniform Arbitration Act contained in KRS Chapter 417 was not unconstitutional under the jural rights doctrine. The doctrine was limited to application in the areas of negligence, personal injury and wrongful death. The Court then held that the Act did not deny appellants their right to a jury trial in violation of Section 7 of the Kentucky Constitution. Section 250 of the Constitution provided for a system of arbitration. Further, pursuant to the holding in *Louisville v. Peterbilt, Inc. v. Cox*, 132 S.W.3d 850 (Ky. 2004), arbitration was a proper forum in which to invoke a claim that an underlying contract was the product of fraud. The Court next held that the Act did not violate the separation of powers doctrine in Section 28 of the Kentucky Constitution, as Section 250 specifically vested the legislature with the power to establish an arbitration system. The Court also declined to conclude that, in order for a party to be bound by an arbitration clause, that acquiescence to the agreement must be proven under the same standards applicable to a defendant's waiver of a constitutional right in a criminal case. The Court finally held that the Act did not violate Section 2 of the Kentucky Constitution by failing to provide for meaningful judicial review of an arbitration decision. The level of judicial review provided was consistent with the underlying purposes of arbitration, the Act was authorized by Section 250, and the review process was sufficient to comply with Section 2.

II. CIVIL PROCEDURE

A. M.K.J. v. Bourbon County Board of Education

[2007-CA-000832](#) 08/29/2008 2008 WL 4133988 Reh filed 09/18/2008
Opinion by Senior Judge Buckingham; Judges Caperton and Stumbo concurred. The Court reversed and remanded an order of the circuit court order holding that it did not have jurisdiction to act on appellant's remaining claims after remand from the Court of Appeals. The Court first held that the circuit court's original order and the Court of Appeals 2004 opinion were not void for lack of subject matter jurisdiction, based on appellee's argument that appellant's appeal to the circuit court was untimely under KRS 13B.140(1). Even if the Board was an administrative agency as defined in the statute, the Board waived the 30-day requirement of KRS

13B.140 by not objecting until after both the circuit court and the Court of Appeals had decided the issues of the case. The Court then held that the circuit court erred in relying on *Pieck v. Carran*, 289 Ky. 110, 157 S.W.2d 744 (1941), in holding that its actions on remand were limited to remanding to the Board of Education to vacate its decision expelling appellant from school. The 2004 opinion made no mention of appellant's due process claims because it found that the decision to expel appellant was arbitrary. The opinion did not affirm any dismissal of the additional claims, leaving the implication that the claims were alive. The Court finally held that to the extent that the law of the case doctrine was applicable, the exception, to the rule articulated in *Gossett v. Commonwealth*, 441 S.W.2d 117 (Ky. 1969), should be applied. To the extent the prior opinion may have been deficient in failing to reverse the circuit court's dismissal of appellant's other claims, the exception was applicable.

III. CRIMINAL LAW

A. **Adams v. Commonwealth**

[2007-CA-002504](#) 08/22/2008 2008 WL 3876030 DR filed 09/23/2008
Opinion by Judge VanMeter; Judge Wine and Senior Judge Lambert concurred. The Court affirmed a judgment of the circuit court entered pursuant to appellant's conditional guilty plea to charges of driving under the influence (fourth offense) and driving on a license suspended for DUI (second offense). Appellant reserved the right to appeal the finding that the moped he was driving was a motor vehicle under KRS 189A.010(1). The Court first held that there was no support for appellant's argument that the legislature intended to apply any of the various other statutory definitions for motor vehicle to KRS 189A. The Court then held that the trial court did not err in finding that the moped was a motor vehicle under the common and approved usage of the term.

B. **Marshall v. Commonwealth**

[2007-CA-001320](#) 08/08/2008 2008 WL 3165791 Reh filed 08/20/2008
Opinion by Judge Taylor; Judge Moore concurred; Judge Clayton concurred in result only. The Court vacated and remanded an order of the circuit court revoking appellant's conditional discharge upon the offense of flagrant nonsupport. The Court first held that there was no legal authority requiring the circuit court to consider alternative forms of punishment when revoking probation or conditional discharge for failure to pay child support and that those cases involving revocation for failure to pay fines or restitution were inapplicable. However, the Court held that the circuit court abused its discretion by failing to make factual findings to support its decision to revoke appellant's conditional discharge.

C. **Morris v. Commonwealth**

[2007-CA-001571](#) 08/15/2008 2008 WL 3551102 DR filed 09/15/2008
Opinion by Judge Lambert; Chief Judge Combs and Judge Dixon concurred. The Court affirmed a judgment of the trial court entered subsequent to appellant's conditional guilty plea to trafficking in a controlled substance, first degree, reserving

the right to appeal the denial of a motion to suppress evidence. The evidence was discovered by police after they conducted an investigatory stop, ran a warrant check, found that appellant had a valid warrant out for his arrest, and arrested and searched appellant. The Court held that the trial court did not err in denying the motion to suppress evidence. The officers had reasonable suspicion to conduct an investigatory stop. The officers witnessed a known drug trafficker approach a stopped vehicle in the middle of the road in the dark hours of morning in a high crime area, the vehicle pulled away when they approached, they observed a group of individuals huddled behind a nearby conversion van, the individuals were approached by the drug trafficker, and the individuals dispersed in different directions at a brisk pace when the officers approached. Further, the warrant check was within the scope of the stop and the search was permissible as it was subsequent to a valid arrest. The Court then held that, even if the officers did not have a reasonable suspicion to stop appellant, pursuant to *Hardy v. Commonwealth*, 149 S.W.3d 433 (Ky. App. 2004) and *Birch v. Commonwealth*, 203 S.W.3d 156 (Ky. App. 2006), the existence of the valid warrant for appellant's arrest removed any taint caused by an unlawful detainment.

D. Niceley v. Commonwealth

[2007-CA-000576](#) 08/08/2008 2008 WL 3164279 DR filed 09/10/2008
Opinion by Judge VanMeter; Judge Thompson and Senior Judge Henry concurred. The Court affirmed a judgment of the circuit court sentencing appellant after a jury found him guilty of criminal attempt to commit the murder of his wife. The Court first held that the trial court did not err in the procedure it used to determine whether the victim, who had no memory of the time period from the night she was shot until several weeks later, was competent to testify. Further, the trial court did not abuse its discretion in finding that the victim was competent, as she was clearly competent to testify that she did not recall the events. The Court then held that the trial court did not err in limiting the testimony of a neuropsychiatrist to the victim's physical and neurological deficits and by not allowing him to testify as to whether she was credible, as that was a determination for the jury. The Court next held that the trial court did not err by failing to exclude a writing used to refresh the victim's memory. The Commonwealth did not offer the evidence as part of its case-in-chief and therefore, appellant was not entitled to notice under KRE 404(c). Further, the trial court sustained each of defense counsel's objections to the manner in which the writing was used to refresh the victim's memory. Even so, any error was harmless as appellant was given the opportunity to cross-examine the witness and the testimony lasted no more than 20 minutes during a month-long trial.

E. Veltrop v. Commonwealth

[2007-CA-000385](#) 08/01/2008 2008 WL 2940790 DR filed 08/22/2008
Opinion by Senior Judge Buckingham; Judge Moore concurred; Judge Wine concurred by separate opinion. On discretionary review, the Court affirmed an order of the circuit court affirming a judgment of the district court entered pursuant to appellant's conditional guilty plea to driving under the influence, first offense, in violation of KRS 189A.010. Appellant reserved the right to challenge the

constitutionality of KRS 189A.010(2), as violative of the separation of powers principle as an encroachment of the legislature on the power of the judicial branch to make rules for practice and procedure in the courts. The Court held that appellant lacked standing to challenge the constitutionality of the statute, which made the results of blood or breath tests inadmissible as evidence in a prosecution if the samples were obtained more than two hours after cessation of operation or physical control of a motor vehicle. Appellant's test result was obtained well within the two-hour limit set forth as an element of the offense in KRS 189A.101(1)(a) and therefore, she could not have suffered any injury or harm.

IV. EMPLOYMENT

A. *McBrearty v. Kentucky Community and Technical College System*

[2006-CA-002621](#) 08/22/2008 2008 WL 3875413 Rel for pub 10/02/2008
Opinion by Judge Caperton; Judges Lambert and Thompson concurred. The Court affirmed an order dismissing appellant's complaint alleging a number of claims including retaliation, invasion of privacy, disparate treatment, libel and slander, negligent supervision, wrongful termination of tenure-track employment, tortious interference with prospective employment, denial of due process, and intentional infliction of emotional distress. The Court first held that appellant's failure to name the individual defendants in their individual and official capacities in the Notice of Appeal was sufficient for dismissal of the appeal, in that any remand back to trial court could result in inconsistent obligations by appellee or the individual defendants. However, the Court went on to hold that the trial court did not err in dismissing the complaint. Addressing only the issues specifically raised in appellant's brief, the Court concluded that appellant failed to state a prima facie case of retaliation for reporting sexual harassment in that the first time she alleged sexual harassment was after the non-renewal of her contract. Also, because she was put on paid administrative leave with benefits until the expiration of her contract, she could not establish the contract was breached and therefore, could not establish that any adverse action had been taken. Further, appellant could not establish that she was retaliated against for exercising constitutionally protected speech by posting two cartoons outside of her office. Because the cartoons were defamatory, the speech was not protected. The Court next held that appellant failed to state a prima facie case of disparate treatment and that action taken with regard to two male professors was distinguishable on the facts. The Court finally held that the fact that the trial court denied a motion to dismiss in a different case was irrelevant to the instant case.

B. *Steilberg v. C2 Facility Solutions, LLC*

[2007-CA-001500](#) 08/01/2008 2008 WL 2941163 DR filed 09/03/2008
Opinion by Chief Judge Combs; Judge Keller and Senior Judge Henry concurred. The Court affirmed a summary judgment of the circuit court dismissing appellant's claims against appellees alleging violations of the Kentucky Civil Rights Act, KRS Chapter 344. The Court held that the charges of unlawful discrimination were not viable because appellant worked as an independent contractor rather than as an employee. The Court looked to the federal courts' construction of the term

employee and held that the Act's protection did not extend to independent contractors. The Court then concluded that that the record supported the finding that appellant was an independent contractor under the common law agency test. Appellant was not an expert in the regular business of the company, she billed the firm monthly for services rendered, she paid self-employment tax on her earnings, she did not receive benefits, she controlled her own work hours, she was not trained in the underlying business, and the business was not her sole area of concentration.

V. FAMILY LAW

A. **McCary v. Mitchell**

[2007-CA-000322](#) 08/01/2008 260 S.W.3d 362

Opinion by Judge Thompson; Chief Judge Combs and Judge Acree concurred. On discretionary review the Court affirmed an order of the circuit court affirming an order of the district court appointing the maternal aunt and uncle co-guardians and co-conservators of the estate of their minor niece after the child's father entered a guilty plea to complicity to murder the child's mother. The order was appealed by the child's paternal aunt and uncle. The Court held that the district court and the circuit court properly held as a matter of law that the paternal aunt and uncle could not be considered de facto custodians and therefore, had no superior right to the child, as KRS 403.270 had no application to guardianship proceedings under KRS 387.032. The Court then held that based on the record, the guardian *ad litem's* recommendation and the district court's observations, the district court did not err in appointing the maternal aunt and uncle.

VI. INSURANCE

A. **Auto Owners Insurance Company v. Omni Indemnity Company**

[2007-CA-001165](#) 08/01/2008 2008 WL 2940809 DR filed 08/25/2008

Opinion by Senior Judge Henry; Chief Judge Combs and Judge Keller concurred. The Court affirmed an order of the circuit court finding that the appellant insurer of an automobile accident victim was not entitled to restitution from the appellee tortfeasor's insurer for advance money it paid to its insured in accordance with *Coots v. Allstate Insurance Company*, 853 S.W.2d 895 (Ky. 1993). The Court held that appellant, as the Underinsured Motorist carrier, bore the risk when it substituted payment of the settlement amount. When the tortfeasor filed for bankruptcy and appellant failed to protect its subrogation rights against him in the proceedings, it resulted in the tortfeasor's dismissal from the action without an adjudication of his liability, terminating in the functional equivalent of a zero verdict, resulting in a overpayment, for which appellant bore the risk.

VII. TAXATION

A. **Commonwealth, Jefferson County Property Valuation Administrator v. Cromwell Louisville Associates, L.P.**

[2007-CA-001128](#) 08/08/2008 2008 WL 3165649 DR filed 09/10/2008
Opinion by Chief Judge Combs; Judge Keller and Senior Judge Henry concurred. The Court reversed and remanded a judgment of the circuit court reversing a decision of the Kentucky Board of Tax Appeals that the appellee property owner had failed to comply with the provisions of KRS 133.120 and KRS 133.045 when he failed to file a challenge to a real property tax valuation in the same year that the property valuation occurred. The Court held that the only way to harmonize KRS 133.120(1) and (2) and KRS 133.045 was to limit the time to challenge a valuation to the same year the property valuation occurred. Therefore, appellee's failure to request a KRS 133.120(1) conference, protesting a property valuation in the year it occurred, prevented him from seeking a tax refund for overpayment under the provisions of KRS 134.590.

VIII. TORTS

A. **Brooks v. Grams, Inc.**

[2007-CA-001087](#) 08/08/2008 2008 WL 3165583 DR filed 09/08/2008
Opinion by Judge Wine; Judge Caperton concurred; Judge Keller concurred by separate opinion. The Court affirmed an order of the circuit court dismissing appellants' negligence claims against appellees for damages arising from an automobile accident. Appellants were injured in a collision with a vehicle driven by the husband of store employee after the employee asked him to run an errand for the store to purchase sausage. The Court held that, although the task performed was of a type which would have been performed by the store owner or someone working under his direct employ, an independent contractor would not have been hired to run the errand, the employee gave her husband money from the store to purchase the sausage, and purchasing sausage was part of the regular business of the store, these facts were not sufficient to impose liability under the doctrine of respondeat superior in the absence of any showing that the store exercised control over the husband or the instrumentality that cause appellants' injuries. The Court also noted that social and economic considerations to imposing vicarious liability upon a principal for the negligence of a volunteer were relevant, given the lack of evidence supporting a finding that appellees exercised any control over the husband.

B. **Cook v. Taylor**

[2007-CA-000122](#) 08/22/2008 2008 WL 3896694 DR filed 09/19/2008
Opinion by Judge Lambert; Judge Caperton and Judge Thompson concurred. The Court reversed and remanded an order of the circuit court dismissing appellants' claims against a paramedic and EMT who were dispatched by County Emergency Medical Services to treat a person who later suffered cardiac arrest and died. The Court held that the trial court erred in finding that the paramedic and the EMT were subject to the protection of KRS 411.148, the Good Samaritan Statute. Because

appellees provided care to the deceased in the normal course of their work and were called to the scene of the emergency while on duty, they had a duty to assist the deceased and therefore, were specifically exempted from the immunity granted by the statute. The Court also held that, because there were factual disputes that brought into question the validity of a release signed by the deceased's wife, the trial court properly refused to dismiss on the grounds of waiver.

C. Maysville Obstetric and Gynecological Associates, P.S.C. v. Lee

[2007-CA-001616](#) 08/29/2008 2008 WL 4140664

Opinion by Judge Lambert; Chief Judge Combs and Judge Dixon concurred. The Court affirmed in part and reversed and remanded in part a jury verdict rendered against an obstetric practice for negligence in the death of a newborn child related to an injury that occurred during the birth. The Court first held that despite conflicting evidence, the jury's verdict finding that the care by the obstetric practice was negligent was supported by substantial evidence. The Court then held that it was error for the jury to award no damages for the child's loss of earning capacity when there was no dispute that other than the blood loss leading to her death, the child was an otherwise normal and healthy child.

IX. WORKERS' COMPENSATION

A. Commonwealth, Uninsured Employers' Fund v. Gussler

[2008-CA-000482](#) 08/08/2008 2008 WL 3247264 Motion to file petition

Opinion by Judge Caperton; Judge VanMeter and Senior Judge Guidugli concurred. The Court affirmed an opinion of the Workers' Compensation Board reversing and remanding an opinion and order of the ALJ ruling that an injured worker was exempt from contractor status under KRS 342.610(2) and that his injury was excluded from coverage as an agricultural exemption under KRS 342.0011(18), KRS 342.630(1), and KRS 342.650(5). The Court first held that that the legislature deliberately omitted logging from the definition of agriculture in KRS 342.0011(18). The Court then held that the Board's decision was supported by substantial evidence in the record that the work performed was logging. The logging was not connected to the day-to-day operations of the farm itself but was entirely distinct and separate from any farming activity, the timber was removed to be sold for profit, the checks made payable to the worker noted that they were for logging, and the employer had a federal tax ID number solely in conjunction with the logging permits.

B. Kentucky Employers Safety Assoc. v. Lexington Diagnostic Center

[2007-CA-002360](#) 08/29/2008 2008 WL 4133945 NOA to S.Ct.- Unpub

Opinion by Judge Thompson; Chief Judge Combs and Judge Acree concurred. The Court affirmed an opinion and order of the Workers' Compensation Board affirming an opinion and order of the ALJ holding appellant responsible for a worker's reasonable and necessary medical treatment, including blood-borne pathogen protocol for ongoing assessment. The Court held that a worker's contact with blood and other body fluids alone was sufficient to constitute a physical injury for the purpose of the Workers' Compensation Act and consequently, the employer was

liable for medical expenses incurred as a result of medical testing and laboratory work performed. Merely because the worker could not offer proof of a permanent impairment as a result of his contact with a patient's blood, did not preclude an award of medical benefits.

C. Pike County Board. of Education v. Mills

[2008-CA-000149](#) 08/01/2008 260 S.W.3d 366

Opinion by Judge Thompson; Judge Keller and Senior Judge Graves concurred.

The Court affirmed a decision of the Workers' Compensation Board affirming an award of permanent partial disability and medical benefits by the ALJ. The Court held that the Board and the ALJ correctly found that a high school color guard instructor was an employee of the Board of Education on the date of his injury, even though the notification from the superintendent that he had been hired was not received until later. KRS 342.640, which specifically deals with the definition of an employee within the context of the Workers' Compensation Act preempted the more general language of KRS 160.380, which vests exclusive authority in the superintendent to appoint or promote individuals. The Court also held that, because the Board of Education did not file a petition for reconsideration requesting further findings, review was limited to whether the ALJ's conclusion that the instructor was a seasonal employee was unreasonable. Based on the instructor's testimony that he was hired to work only from the summer to fall season, the finding was not unreasonable.

X. ZONING

A. Legrand v. Ewbank

[2007-CA-001770](#) 08/29/2008 2008 WL 4133946

Opinion by Judge Thompson; Judge VanMeter and Senior Judge Henry concurred.

The Court affirmed an order of the circuit court affirming a ruling by the county Board of Adjustments that a sand company had nonconforming-use rights to conduct sand and gravel mining operations on all lands it owned that were under permit at the time the county adopted comprehensive planning and zoning provisions. The Court held that the Board did not err when it included property not actively mined at the time the zoning ordinance was enacted as a nonconforming-use exception to the ordinance's scope. While a mere unexpressed intent to mine the property was insufficient, there was substantial evidence to support a finding that the entire acreage was demonstrably dedicated to the nonconforming use. Consistent with KRS 100.253, the Board appropriately defined the scope of the preexisting nonconforming use encompassed within the mining permit on the date the ordinance was enacted.