

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
DECEMBER 2009**

I. CIVIL PROCEDURE

A. Wildcat Property Management, LLC v. Reuss

[2008-CA-002290](#) 12/11/2009 2009 WL 4723203

Opinion by Senior Judge Lambert; Chief Judge Combs and Judge Moore concurred. The Court reversed and remanded an order of the circuit court dismissing an action with prejudice. The Court first held that because both CR 77.02(2) and the local housekeeping rule only provided for dismissal without prejudice, the dismissal with prejudice was, of necessity, pursuant to CR 41.02. However, the circuit court failed to properly exercise its discretion by failing to make the required findings as to why the case was dismissed.

II. CONTRACTS

A. Barber Cabinet Company, Inc. v. Sparks

[2008-CA-001948](#) 12/04/2009 2009 WL 4406079

Opinion by Senior Judge Lambert; Chief Judge Combs and Judge Moore concurred. The Court reversed and remanded an order of the trial court finding that no contract was formed between a cabinetry company and a homeowner and dissolving the cabinet company's liens on the residential property. The Court first held that the trial court erred in not enforcing the contract between the cabinetry company and the homeowner when it unambiguously showed that the homeowner personally obligated himself to make payment in the event the contractor failed to make payment. The Court then held that under KRS 376.010(4), if payment from the homeowner to the contractor was identifiable as payment for the cabinetry, the homeowner was entitled to a dollar-for-dollar credit for such sums and the cabinetry company could have a lien only to the extent the homeowner failed to pay the contractor for the cabinetry.

B. Barnett v. Community Trust Bank, Inc.

[2009-CA-000164](#) 12/18/2009 2009 WL 4877691

Opinion by Judge Lambert; Senior Judge Harris concurred; Judge VanMeter dissented by separate opinion. The Court vacated and remanded a summary judgment entered by the circuit court dismissing appellant's claims of negligence, breach of contract and unjust enrichment filed against the appellee bank and appellant's brother's ex-wife. The claims arose after a bank employee changed the death beneficiary on a CD jointly owned by appellant and his brother without inquiring as to whether the brother wished to remove appellant as a joint owner and did not follow bank policy by cashing out the jointly-owned CD and opening a new individually-owned CD. The Court held that there was a genuine issue of material

fact as to whether the brother would have actually consented to or authorized the transaction in question if the bank employee had verified ownership of the CD and then properly discerned the brother's intent by adhering to bank policies. The bank's acknowledgment that it failed to follow its own policies and procedures, as well as the employee's testimony that he would have executed the transaction differently had he known about the joint ownership, supported the conclusion that the bank breached its duty of care. The Court then held that the record was sufficient to allow a jury to decide whether appellant's brother intended to completely divest him of any ownership or beneficial interest in the CD. The Court also held that if a jury should find in appellant's favor and then erroneously distributed the funds to his brother's ex-wife, then viable claims for breach of contract and unjust enrichment still existed.

III. FAMILY LAW

A. **Biggs v. Biggs**

[2008-CA-001219](#) 12/04/2009 2009 WL 4406061

Opinion by Chief Judge Combs; Judge Wine and Senior Judge Graves concurred. The Court vacated and remanded an order of the circuit court dismissing, for lack of jurisdiction, appellant's motion to modify custody. The Court held that the trial court erred by when it did not apply the factors mandated by KRS 403.834(2) before declining to exercise continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), 403.800, *et seq.* The Court further erred when it found that neither the child or appellant had significant connections with Kentucky when appellant remained a Kentucky resident, the child had lengthy visits in Kentucky, and the child's half-sister, grandparents, and other relatives resided in Kentucky.

B. **Cabinet for Health and Family Services v. J.T.G.**

[2009-CA-000211](#) 12/04/2009 2009 WL 4406123

Opinion by Judge Lambert; Judge Harris concurred by separate opinion; Judge VanMeter dissented by separate opinion. The Court vacated and remanded an order of the circuit court finding the Cabinet for Health and Family Services in contempt for failing to pay child care assistance costs to the uncle of a child who was given permanent custody of the child. The Court held that the trial court abused its discretion in enforcing an order entered by the family court that previously transferred the case. The transferring court lost jurisdiction once the matter was transferred and therefore, the order requiring the Cabinet to pay child care assistance costs was void *ab initio*. The Court also held that the application of the law of the case doctrine was an abuse of discretion, as the doctrine did not extend to trial court rulings. The Court remanded with instructions for the court to reconsider the Cabinet's CR 59.05 motion in light of the opinion, including but not limited to a consideration of KRS 610.010(12) and its applicability to the facts.

C. **Day v. Day**

[2008-CA-000133](#) 12/11/2009 2009 WL 4722579

Opinion by Senior Judge Harris; Judges Lambert and VanMeter concurred. The Court affirmed an order of the trial court in a dissolution of marriage action determining that appellant's entire workers' compensation settlement was marital property and awarding appellee one-half of the settlement and setting appellant's child support obligation. The Court held that the trial court did not abuse its discretion in determining that the entire workers' compensation settlement was a marital asset and dividing it equally between the parties after it considered the factors required by KRS 403.190.

D. Leach v. Harrison

[2009-CA-000622](#) 12/11/2009 2009 WL 4723245

Opinion by Judge Wine; Judge Nickell and Senior Judge Harris concurred. The Court vacated and remanded an order of the circuit court granting permanent sole custody of appellant's minor children to the children's maternal grandparents. The Court held that the trial court lacked jurisdiction because the maternal grandparents lacked standing as non-parents who were not *de facto* custodians. Kentucky's child custody statutes did not grant subject-matter jurisdiction to courts to determine the custody rights of a non-parent who had not been found to be a *de facto* custodian or to provide non-parents standing to bring such actions.

E. Walsh-Stender v. Walsh

[2009-CA-000117](#) 12/30/2009 2009 WL 5125019

Opinion by Senior Judge Harris; Judges Lambert and VanMeter concurred. The Court vacated family court orders entered related to a motion to modify custody. The Court held that the family court lacked jurisdiction to consider the matter. Because appellant still lived in Tennessee, the state having original jurisdiction over the matter, and the child regularly visited her there, Tennessee retained exclusive, continuing jurisdiction over all custody matters. The family court erroneously relied upon KRS 403.822 to confer jurisdiction, as the statute only applied to initial custody determinations. Further, KRS 403.826 prohibited the Kentucky court from entertaining a custody motion without an order from Tennessee relinquishing its jurisdiction over the proceedings.

IV. TORTS

A. Kelley v. Poore

[2008-CA-002409](#) 12/18/2009 2009 WL 4877707

Opinion by Chief Judge Combs; Judge Moore and Senior Judge Lambert concurred. The Court affirmed a jury verdict and judgment dismissing appellant's personal injury claim, which was filed following a collision between appellee's fishing boat and a personal watercraft operated by appellant. The Court first held that the trial court did not err by refusing to grant a directed verdict against appellee based on his failure to keep a proper lookout when the evidence allowed the jury to reasonably find that appellee consistently maintained a proper lookout but that appellant failed to keep a proper lookout, failed to yield the right-of-way, and approached appellee's vessel so suddenly that he did not have sufficient time to react before the collision.

The Court next held that the trial court did not err by failing to instruct the jury on the federal rules of the waterway as they related to an overtaking vessel's intention to overtake. There was no testimony that the fishing boat was overtaking or intended to overtake the personal watercraft and therefore, it was not unreasonable for the court to reject complex and technical proposed instructions defining appellee's duties as to overtaking the personal watercraft in favor of an instruction adequately explaining appellee's general duty. The Court finally held that the trial court did not err by denying a motion *in limine* to exclude evidence indicating that appellant was an inexperienced boater along with evidence to suggest that appellee was a practiced one. The challenged evidence concerned the nature and quality of the parties' experience, not evidence of their character excludable pursuant to KRE 404(a).

B. Murray v. Eastern Kentucky University

[2008-CA-000561](#) 12/11/2009 2009 WL 4722760

Opinion by Judge Acree; Judge Lambert and Senior Judge Harris concurred. The Court affirmed a summary judgment of the circuit court dismissing appellant's claims of gender and disability discrimination against a Kentucky university. The Court first declined to analyze the claim under mixed-motive summary judgment analysis when appellant presented her discrimination claims to the trial court as single-motive claims. The Court then held that the trial court properly granted summary judgment because appellant failed to present sufficient evidence to establish she was qualified for the position she sought and failed to present evidence of similarly situated, non-protected employees who were treated more favorably. The Court also held that the circuit court's requirement that appellant find similarly situated employees among the faculty of a limited pool of approximately 100 faculty members in the university's College of Health Sciences was not unreasonable.

V. WILLS AND ESTATES

A. Mackey v. Hinson

[2008-CA-002328](#) 12/04/2009 2009 WL 4406090 DR Pending

Opinion by Judge Lambert; Judge Taylor and Senior Judge Henry concurred. The Court affirmed a summary judgment finding a will to be unambiguous and distributing undesignated residuum to four charities. The Court held that the trial court properly found that the will was unambiguous in its direction that all undesignated portions of the estate should be distributed pursuant to the residuary clause therein. Any miscalculation or omission which resulted in a portion of the estate going undesignated did not result in intestacy as to the undesignated portion. Rather, the contingency was expressly and manifestly set forth in the residuary clause.