

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
DECEMBER 2010**

I. ARBITRATION

- A. Kindred Nursing Centers Limited Partnership v. Sloan**
[2009-CA-001629](#) 12/3/10 2010 WL 4904955

Opinion by Judge Moore; Judge Thompson and Senior Judge Lambert concurred. The Court vacated and remanded an order of the circuit court denying appellant's motion to compel arbitration. The Court held that the trial court erred when it entered an order denying arbitration merely stating that the motion to compel arbitration was denied without any findings of fact or conclusions of law as required by CR 52.01.

II. CONTRACTS

- A. Winkler v. Germann**
[2009-CA-001684](#) 12/3/10 2010 WL 4904992

Opinion by Judge Acree; Judges VanMeter and Wine concurred. The Court reversed and remanded an order of the circuit court finding that appellant waived venue of an action brought by appellee related to a contract between the parties allowing appellant to use land for raising sod, hay and tobacco. The Court held that the case was effectively indistinguishable from *Cash v. E'Town Furniture*, 363 S.W.2d 102 (Ky. 1962) and under Cash the default judgment was void because appellant was not a resident of the county in which the action was brought, nor was he served with summons in that county, nor did he make defense to the action before the judgment was entered. The use of the word "may" in KRS 452.480 did not permit the filing of the complaint in the county of the plaintiff's residence nor was the venue provision in the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692a-1692o, applicable.

III. CRIMINAL LAW

- A. Harscher v. Commonwealth**
[2009-CA-000661](#) 5/21/10 2010 WL 2010848 Released for publication
- Opinion by Judge Keller; Acting Chief Judge VanMeter and Judge Combs concurred. The Court affirmed an order of the circuit court denying appellant's motion to expunge his record. The Court held that while a full pardon had the effect of removing all legal punishment for the offense and restoring one's civil rights, it did not erase the fact that the individual was convicted and therefore, appellant's pardon did not entitle him to expungement of his criminal record. The Court also held that appellant could not satisfy the requirements of KRS 431.076 for expungement because he had not been found guilty of the offense nor had the charges been dismissed with prejudice. The Court concluded that

the trial court correctly denied appellant's motion regardless of whether it applied KRS 431.076(1) or KRS 431.078.

B. Miller v. Commonwealth

[2009-CA-000296](#) 12/10/10 2010 WL 5018157

Opinion by Judge Thompson; Judge Moore and Senior Judge White concurred. The Court reversed and remanded an order of the circuit court extending appellant's probation beyond the maximum statutory two-year period for a misdemeanor conviction. The Court held when appellant failed to complete the required sex offender treatment program during the maximum two-year probationary period in KRS 533.020(4), the Court was not authorized under either KRS 532.045 or the holding in *Commonwealth v. Griffin*, 942 S.W.2d 289 (Ky. 1997), to unilaterally extend the period of probation. The Court was only authorized to revoke appellant's probation or to permit his probation to continue until expiration. The Court remanded for the trial court to determine whether appellant's probation should be revoked. Because the probation revocation proceedings were initiated prior to the expiration of the two-year probationary period, appellant was on notice and litigating his probation revocation and thus, the trial court still had jurisdiction pursuant to KRS 533.020(4).

C. Miller v. Commonwealth

[2009-CA-002027](#) 12/10/10 2010 WL 5018526

Opinion by Judge Lambert; Senior Judge Henry concurred; Chief Judge Taylor concurred in result only. The Court affirmed an order of the circuit court revoking appellant's probation after he entered a plea of guilty to a new charge of trafficking in marijuana. The Court held that the trial court did not abuse its discretion in revoking appellant's probation and the trial court's oral findings and reasons for revoking appellant's probation comported with due process.

D. Rustin v. Commonwealth

[2009-CA-002250](#) 12/29/10 2010 WL 5357004

Opinion by Judge Combs; Judge Dixon and Senior Judge Isaac concurred. The Court vacated and remanded an order of the circuit court denying appellant's motion to suppress evidence seized during a search conducted pursuant to a warrant. The Court held that the trial court erred in finding that the search warrant was supported by probable cause. The police reliance on the word of an anonymous tipster alone failed to provide the requisite probable cause. The underlying affidavit did not supply any facts indicating the reliability, experience or past history of dealing with the informant but merely referred to an anonymous telephone call from a confidential informant who had observed certain alleged activity. The affidavit did not provide information as to if or why the informant wished to remain anonymous, it did not state whether the informant's information resulted from involvement in the alleged activity, and the corroborating details were information that could easily be obtained by any member of the public. The Court also held that the good-faith exception did not apply as the officers' belief in the existence of probable cause was entirely unreasonable.

IV. EMPLOYMENT

A. Hutchison v. Kentucky Unemployment Insurance Commission

2010-CA-000032 12/3/10 2010 WL 4905286

Opinion by Judge Acree; Senior Judges Henry and Isaac concurred. The Court affirmed an opinion of the circuit court affirming the administrative denial of unemployment benefits to a teacher who was terminated after pleading guilty to first-degree criminal trespass, two counts of fourth-degree assault, one count of third-degree terroristic threatening, second-degree stalking, and violation of a DVO. The Court held that the circuit court properly affirmed the determination that appellant was disqualified from receiving unemployment benefits because she was discharged for misconduct connected to her employment. Given the heightened standard of conduct reflected in KRS 161.790(1), paired with appellant's repeated failure to conform her behavior to the requirements of the law and the violent and threatening nature of her offenses, the conduct had a sufficient nexus to her employment and therefore, constituted conduct unbecoming a teacher. It was of no consequence that no student or faculty member actually knew of the conduct. The Court also held that the circuit court ruling that the evidence of appellant's conduct demonstrated a sufficient connection with her employment did not amount to burden shifting.

V. FAMILY LAW

A. Cabinet for Health and Family Services v. I.W., Jr.

2010-CA-000301 12/17/10 2010 WL 5128716

Opinion by Judge Lambert; Judge Stumbo and Senior Judge Shake concurred. The Court reversed and remanded an order of the family court denying a petition by the Cabinet for Health and Family Services to terminate the parental rights of the appellee father. The Court held that the trial court's findings were not supported by the evidence and were clearly erroneous when the uncontested testimony and evidence indicated that the termination of parental rights was in the child's best interest. Not only had the father never had a relationship with the child, the parent never came forward as the child's father or help to remove the child from an admittedly abusive home. Further, the father was not capable of handling the child's physical needs and was demonstrably incapable of meeting the child's extensive emotional needs.

B. N.H. v. Commonwealth, Cabinet for Health and Family Services

2010-CA-000955 12/29/10 2010 WL 5357230

Opinion by Judge Clayton; Judges Acree and Caperton concurred. The Court affirmed an order of the circuit court denying a motion filed pursuant to CR 60.02 wherein appellant argued that the circuit court lacked jurisdiction to enter a judgment of paternity and order of support after a DNA test confirmed that appellant was the biological father of a child. The Court held that the circuit court had jurisdiction over the question of paternity pursuant to KRS 406.011

when the facts established that the husband and wife in the action did not have marital relations for more than ten months prior to the birth of the child.

C. Pasley v. Pasley

[2009-CA-001857](#) 12/29/10 2010 WL 5356787

Opinion by Judge Lambert; Judge Moore and Senior Judge Isaac concurred. The Court reversed a domestic violence order entered by the family court following the filing of a petition for an emergency protective order filed by appellant's ex-wife. The Court held that the family court abused its discretion in entering the DVO when there were no allegations of physical abuse or physical injury, no allegations of threats of physical abuse in the petition for the EPO, and the record was devoid of any evidence that there was any domestic violence between the parties. Further, the record did not support appellee's allegation that appellant vandalized her house. Therefore, the record did not support the court's finding by a preponderance of the evidence that appellee was more likely than not a victim of domestic violence or that there was a likelihood that violence would again occur, as required by KRS 403.750.

D. Telek v. Daugherty

[2009-CA-001993](#) 12/17/10 2010 WL 5128651

Opinion by Judge Lambert; Judge Stumbo and Senior Judge Shake concurred. The Court reversed and remanded a domestic violence order granted to appellee. The court held that, pursuant to KRS 403.740(4), the family court lacked jurisdiction to hold a hearing or enter the DVO more than fourteen days after the emergency protective order was entered. The Court further held that appellant could not be equitably estopped from raising the jurisdictional defense, even though counsel's actions could be construed to be a waiver. The Court declined to address the issue of whether the family court judge was required to recuse because the issue was not raised below.

VI. GOVERNMENT

A. Taylor v. Carter

[2009-CA-002004](#) 10/15/10 WestLaw Citation Not Available

Opinion by Judge Caperton; Senior Judge Lambert concurred; Judge Wine concurred in result only. The Court affirmed in part, and reversed in part and remanded, an order of the circuit court sustaining a motion for declaratory judgment filed by the appellee Mayor with respect to the appointment of the City Attorney, sustaining the Mayor's motion to void a tax reduction implemented by the appellant City Council members, and an order denying the Council's motion to alter, amend or vacate. The Court first held that the trial court properly concluded that the Council's action in reducing the property tax rate and creating a budget deficit was contrary to and in violation of KRS 91A.030 and Kentucky Constitution § 157(b) when, at the time the Council passed the tax decrease, it caused anticipated revenues to be less than anticipated expenditures. The Court next held that the trial court erred in concluding that the Council did not have the statutory authority to rescind its approval of the Mayor's appointment to City

Attorney. The Council made very clear that the approval of the appointment was conditional and unofficial and therefore, it was well within its authority to rescind the appointment at any time prior to the official appointment. The Court finally held that the trial court did not err by failing to *sua sponte* disqualify itself. First, the issue was waived when it was untimely raised in a CR 60.02 motion following the issuance of the court's decision. Second, the comments allegedly made by the trial court did not fit within the parameters of KRS 26A.015.

VII. JUVENILES

A. **B.H. v. Commonwealth**

[2010-CA-000259](#) 12/17/10 2010 WL 5128713

Opinion by Judge Moore; Judges Caperton and VanMeter concurred. The Court vacated and remanded an order of the family court finding that appellant violated KRS 630.020(3) and committing him to the Cabinet for Families and Children. The Court held that the family court did not have subject matter jurisdiction over the case because there was no evidence in the record to show that the Commonwealth complied with the provisions of KRS 630.050 before commencing judicial proceedings in family court. The Court then held that because no evidence was presented to show that the required assessment under KRS 159.140(1) was performed before the complaint was received by the Court Designated Worker, the family court did not have subject matter jurisdiction. The Court then held that it was palpable error for the family court to accept counsel's stipulation to the charge of habitual truancy without conducting the required colloquy or informing appellant of the constitutional rights he was purportedly waiving.

VIII. LICENSES

A. **Sangster v. Kentucky Board of Medical Licensure**

[2009-CA-002277](#) 10/29/10 2010 WL 5128665 Rehearing Pending

Opinion by Senior Judge Isaac; Judge Acree and Senior Judge Henry concurred. The Court affirmed an order of the circuit court authorizing the Kentucky Board of Medical Licensure (KBML) to utilize and disclose as evidence a Kentucky All Schedule Prescription Electronic Reporting (KASPER) report in a pending administrative action against appellant. The Court first held that the order was final and appealable because the claims regarding the disclosure of the KASPER reports under KRS 218A.202 were conclusively determined in the trial court order. The Court then held that KRS 218A.202(6)(a) did not preclude disclosure to more than one designated representative of the KBML and that to carry out its investigative purposes, the KBML must be able to disseminate the KASPER report between its investigators and consultants. The Court then held that KRS 218A.202 did not preclude the introduction of KASPER reports into evidence at an administrative hearing held by the KBML as long as the KBML obtained a court order, which it did. The Court finally held that the introduction of a KASPER report did not violate the best evidence rule because KRS

218A.202(8)(c) specifically authorized the use of a KASPER report as evidence at an administrative hearing.

IX. PREEMPTION

A. Kentucky Association of Fire Chiefs, Inc. v. Kentucky Board of Housing, Building, and Construction

[2009-CA-001476](#) 12/10/10 2010 WL 5018423

Opinion by Judge Wine; Judges Clayton and Dixon concurred. The Court affirmed an order of the circuit court declaring that the Kentucky Board of Housing, Buildings and Construction acted within its authority by adopting an interpretation of the Building and Residential Codes precluding enforcement of a local regulation of construction standards. The Court also affirmed an order of the circuit court dismissing declaratory claims as they related to fifteen other ordinances. The Court first held that the local governments were not indispensable parties because the matters at issue only concerned the authority of the Board to adopt regulations that superseded the local ordinances and the fire chiefs' obligation to enforce the local ordinances. The Court next held that the trial court properly dismissed the claims relating to the other fifteen ordinances. Any question concerning the validity of any other local ordinance was not before the trial court because the Board had not challenged enforcement of those ordinances and because the affected local governments were not parties to the action. The Court finally held that the Board acted within its authority by adopting an interpretation of the Building and Residential Codes preempting local fire safety ordinances relating to construction.

X. PROPERTY

A. Carter v. Coalfield Lumber Company, Inc.

[2009-CA-000519](#) 12/3/10 2010 WL 4904674

Opinion by Judge Caperton; Judges Thompson and VanMeter concurred. The Court affirmed in part, reversed in part and remanded an order of the circuit court granting appellee's motion for judgment notwithstanding the verdict (JNOV) for appellants' failure to properly prove damages to their real estate. The Court first held that the trial court properly determined that two of the plaintiffs did not sustain their burden of proof concerning their claim for damages because they failed to provide evidence of the cost of repair to their property. However, the Court held that the trial court erred in granting the motion for JNOV to the other two plaintiffs. The testimony that the house was completely destroyed at a loss of \$10,000, the value of the house prior to the damage, was sufficient to sustain the plaintiffs' burden of proof concerning their claim for damages. In instances where property can only be determined to be a complete loss, i.e., where it cannot be repaired but instead must be replaced, that evidence of diminution in value alone is sufficient to overcome a motion for directed verdict as well as a motion for JNOV. The Court then held that the trial court did not err in restricting compensation for reasonable rental value of the property when the plaintiffs' failed to provide evidence of the rental value of the

property. The Court finally held that the trial court did not err in declining to issue jury instructions on the plaintiffs' claims for punitive damages when they failed to provide evidence of appellee's evil motive.

XI. TORTS

A. Gaines v. Diamond Pond Products, Inc.

[2009-CA-000848](#) 12/29/10 2010 WL 5343290

Opinion by Chief Judge Taylor; Judges Acree and Senior Judge Buckingham concurred. The Court affirmed an order of the circuit court granting a directed verdict in favor of appellee and dismissing appellants' negligence claim for injuries the minor appellant received while employed by appellee for an annual charitable activity. The Court held that the trial court properly granted the directed verdict. In reaching that conclusion, the Court first held that the trial court correctly concluded that appellee breached no duty of care owed to appellant as an employee. The uncontested facts demonstrated that appellee provided appellant with a reasonably safe place to work and any injury he suffered was caused by his violation of appellee's rules and occurred while he was engaged in activities outside the proper scope of his employment. The Court next held that even if appellant was an invitee, appellee did not breach its duty of care by failing to warn of a dangerous condition on its premises. While *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), modified the open and obvious doctrine, it did not abolish it. Appellant's injury was not a foreseeable harm that appellee could anticipate nor was it caused by a known or obvious condition and appellee had no duty to protect appellant from himself.

B. Johnson v. United Parcel Service, Inc.

[2009-CA-000404](#) 2/19/10 2010 WL 567375 Released for publication

Opinion by Judge Wine; Judges Moore and Nickell concurred. The Court affirmed an order of the circuit court finding that the appellee ex-employer had no duty to warn a future employer of an ex-employee's violent work history and dismissing an estate's claim pursuant to CR 12.02 for failure to state a claim for which relief could be granted. The Court held that no Kentucky law imposed a duty to warn the future employer. Kentucky does not recognize a universal duty of care; Kentucky does not recognize a duty to warn others that a crime may be committed by another; there was not a special relationship between the employer and ex-employee or future employers which would create a duty to warn, as contemplated by the Restatement (Second) of Torts §315; appellee did not undertake a duty to render services by providing a reference check; and there was no support in existing Kentucky law for a cause of action for negligent misrepresentation in the employee reference context.

C. Phillips v. Lexington-Fayette Urban County Government

[2009-CA-001613](#) 12/29/10 2010 WL 5481365

Opinion by Judge Lambert; Judge Stumbo and Senior Judge Shake concurred. The Court affirmed orders of the circuit court granting summary judgment in

favor of the Lexington-Fayette Urban County Government on appellant's claim for injuries she allegedly received during an encounter with Emergency Medical Services and dismissing an amended complaint against the individual medical technicians. The Court first held that even if LFUCG had purchased liability insurance, such a policy would not constitute a waiver of its sovereign immunity. The Court next held that LFUCG could not be held vicariously liable because vicarious liability was precluded by sovereign immunity. The Court next held that the doctrine of *respondeat superior* did not and could not work to waive sovereign immunity. The Court next held that the Good Samaritan Statute, KRS 411.148, had no application to emergency care or treatment given by a certified EMT or paramedic while on duty in the course and scope of employment and therefore, the statute was not a waiver of sovereign immunity. The Court finally held that the trial court did not err in dismissing the claims against the technicians as time-barred. The technicians did not receive actual notice within the statutory period and therefore, the amended complaint could not relate back under CR 15.03.

D. Rossi v. CSX Transportation, Inc.

[2009-CA-001234](#) 12/17/10 2010 WL 5128637

Opinion by Judge Nickell; Judges Moore and Lambert concurred. The Court affirmed an entry of judgment in appellee's favor following a jury trial on appellant's claims under the Federal Employer's Liability Act (FELA) for work-related cumulative trauma resulting in bilateral carpal tunnel syndrome and trigger finger in two fingers. The Court first held that the trial court did not err in precluding appellant's expert biomedical engineer from testifying regarding the cause of appellant's injuries. Although the expert was clearly qualified to testify as to the risk factors, he was not a medical doctor and did not physically examine or test appellant. Further, there was no discernible harm as appellant's treating physician testified to the cause of appellant's injuries. The Court next held that the trial court did not abuse its discretion in prohibiting appellant from cross-examining appellee's former senior safety officer using a document with which the witness was unfamiliar. The proffered letter was unsigned, undated and wholly unauthenticated; appellant did not produce testimony or evidence of authentication as required under KRE 901, nor did he show the letter was self-authenticating; the relevance of the letter was suspect; the letter was not produced in discovery; the letter constituted inadmissible hearsay; and the public records exception set forth in KRE 803(8) did not apply because no indication of the trustworthiness of the document was produced. Further, even if the letter could have been used for impeachment purposes, appellant could not thwart the purposes of the evidentiary rules by simply labeling an otherwise inadmissible piece of evidence as impeachment evidence. The Court next held that the trial court correctly refused to give a proffered instruction that the Federal Railroad Administration requires reporting of all musculoskeletal injures under certain circumstances when there was no evidence or testimony adduced regarding the existence or substance of the regulation referred to in the instruction. The Court finally held that the trial court did not abuse its discretion in precluding appellant

from offering rebuttal testimony of a witness who was not identified on appellant's witness list and whose testimony was not responsive to any surprise evidence presented by appellee when the issue of whether appellee discouraged employee injury reporting was injected into the case by appellant.

XII. WORKERS' COMPENSATION

A. **Peabody Painting Waterproofing, Inc. v. Kentucky Employers' Mutual Insurance Company**

2008-CA-001914 12/29/10 2010 WL 5343284

Opinion by Judge Thompson; Chief Judge Taylor and Judge Clayton concurred. The Court affirmed an order of the circuit court granting an insurer's motion for summary judgment on an employer's claims that the insurer wrongfully denied coverage for a worker injured in Louisiana, for bad faith, for violation of the Kentucky Consumer Protection Act and the Unfair Claims Settlement Practices Act and for violation of KRS 304.12-235. The Court also affirmed an order of the circuit court denying the insurance agent's cross-claim for indemnification. The Court held that the trial court correctly granted the motions for summary judgment in favor of the insurer. The terms of the policy unambiguously covered only workplaces in Kentucky. Further, the extraterritorial coverage provisions as set forth in KRS 342.670 did not provide coverage because the worker's employment was not principally localized in Kentucky nor was he working under a contract of hire made in Kentucky. The worker received his work orders from Florida, had no interaction with the Kentucky office, was a Florida resident, and the majority of his work assignments were in Florida. Therefore, his employment was not principally located in Kentucky. Other than a routine check of his driver's license by the Kentucky office, no one from the Kentucky office participated in the worker's hiring, the worker completed the application in Florida and the offer and acceptance of employment occurred in Florida. The Court also held that the insurer was not estopped from denying coverage. The insurance agent was informed that the policy did not offer out-of-state coverage, the policy unambiguously stated the same limitation, and the employer knew it lacked coverage when the Florida Division of Workers' Claims issued a stop work order for the company upon finding that the policy did not cover Florida employees. The Court finally held that because the insurer could not be liable to the employer under any theory alleged in the complaint, the cross-claim for indemnification must fail.

B. **Steinrock v. Cook**

2010-CA-001136 12/10/10 2010 WL 5113217

Opinion by Judge Lambert; Judges Moore and Nickell concurred. The Court affirmed an order of the Workers' Compensation Board reversing an opinion of an Administrative Law Judge holding that a worker was an independent contractor and not an employee of the appellant roofing company. The Court held that the Board did not overlook or misconstrue controlling law or so flagrantly err in evaluating the evidence so as to cause gross injustice, nor did the Board substitute its judgment for that of the ALJ. Instead, the Board

reviewed the ALJ's application of the controlling law to the facts and determined that the ALJ's ruling was in error, concluding that the ALJ failed to recognize the phrase "distinct occupation" as a legal term of art and in doing so, erred in applying the factors set forth in *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965), and refined in *Chambers v. Wooten's IGA Foodliner*, 436 S.W.2d 265 (Ky. 1969).