

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
DECEMBER 2011**

I. CONTRACTS

A. The New Lexington Clinic, P.S.C. v. Cooper

[2010-CA-001128](#) 12/16/2011 2011 WL 6260442

Opinion by Judge Stumbo; Judge Clayton concurred; Judge Thompson concurred in result only. The Court reversed and remanded an order and judgment of the circuit court sustaining a summary judgment motion in favor of the appellee physicians and healthcare system on the appellant clinic's claim that the physicians, while serving as clinic board members, breached their fiduciary duties to the clinic by executing a plan to take their employment and support staff elsewhere and that the healthcare system defendants tortiously interfered with the clinic's employment contracts by facilitating and promoting the relocation. The Court first held that although the circuit court correctly determined that KRS 271B.8-300 supplanted the common-law claim of breach of fiduciary duty, appellant asserted a claim of breach of fiduciary duty in its complaint and therefore, summary judgment was premature. Aside from the heightened burden of proof, KRS 271B.8-300(5) tracked the common law very closely and did not evince the intent to abrogate the common-law claim entirely. Because appellant prosecuted a claim for monetary damages arising from the former directors' alleged breach of fiduciary duty, it fell within the express scope and purpose of the statute. While appellant's claim did not refer to KRS Chapter 271B specifically, the complaints fell well within the liberal policy related to notice pleadings. When viewed in a light most favorable to appellant and resolving all doubts in its favor, appellant prosecuted a claim for breach of fiduciary duty and genuine issues of material fact remained for adjudication.

II. CRIMINAL LAW

A. Commonwealth v. Castillo

[2010-CA-002019](#) 12/16/2011 2011 WL 6275995

Opinion by Judge Stumbo; Judges Keller and VanMeter concurred. The Court reversed and remanded orders of the circuit court dismissing an indictment with prejudice and expunging the assault charge against appellant after the Commonwealth chose not to pursue the case for 10 years. The Court first held that it was a violation of the separation of powers for the trial court to dismiss the case with prejudice absent consent by the Commonwealth. Further, the trial court was without jurisdiction to amend the order dismissing without prejudice, which was entered more than 10 years earlier. The Court then held that the trial court erred in expunging the charge when there were no factual findings that appellant's reasons for receiving an expungement outweighed the need of the Commonwealth to retain the records.

B. Dike v. Commonwealth

[2010-CA-001846](#) 12/02/2011 2011 WL 6003909

Opinion by Judge Moore; Judges Stumbo and Wine concurred. The Court reversed and remanded a judgment of the circuit court entered following appellant's conditional guilty plea to first-degree possession of methamphetamine, first offense; and possession of drug paraphernalia, first offense, wherein she reserved the right to appeal from an order denying a motion to suppress a statement made to the police and evidence found as a result of her statement. The Court held that the trial court erred in failing to suppress the statement, which was the product of a custodial interrogation, and the evidence found as a result of the statement. The Court held that the public safety exception to the Miranda warning requirement did not apply because the interrogation was not made in relation to any quantifiable public safety threat. Appellant was found by police in a bedroom in a private residence, she was immediately handcuffed, she was not read her Miranda rights, and the officer nevertheless asked her questions about the location of drug needles and the type and amount of drugs she had ingested.

C. Jackson v. Commonwealth

[2010-CA-000508](#) 12/16/2011 2011 WL 6260444

Opinion by Judge Lambert; Judges Caperton and Keller concurred. The Court reversed and remanded a final judgment of conviction for second-degree burglary for which appellant received a sentence of five years' imprisonment. The Court first held that the trial court did not err in denying appellant's motion for directed verdict as it was not unreasonable for a jury to find appellant guilty given the evidence that a window at the residence was open, jewelry was allegedly out of place, and appellant was observed coming out of the residence. The Court then held that the trial court did abuse its discretion and erred to appellant's substantial prejudice when it prevented appellant from testifying about a prior instance where he had wandered off to someone else's house following a seizure. The Commonwealth clearly opened the door when it asked appellant whether he had ever wandered off after a seizure and appellant's defense was that he suffered a seizure, became confused and wandered into the wrong house. The fact that he had suffered the same side-effect after a seizure on a previous occasion was both relevant and probative.

D. Pollini v. Commonwealth

[2009-CA-000964](#) 12/22/2011 2011 WL 6412052

Opinion by Judge Lambert; Judges Combs and Keller concurred. On remand from the Supreme Court of Kentucky pursuant to *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2010), the Court vacated appellant's conviction and remanded the matter to the trial court. The Court first held that appellant did not abandon or waive his ineffective assistance of appellate counsel claim when his brief clearly presented the issue of ex parte contact between the judge and the jury. The Court also held that the trial court erred when it summarily denied appellant relief. Although appellant's co-defendant's conviction was reversed on other grounds, this did not render appellant's arguments moot. The Court then held that appellant received ineffective assistance of appellate counsel when his

counsel on direct appeal failed to present to the Kentucky Supreme Court the issue of the *ex parte* contact. The *ex parte* contact was reversible error when the judge's response to a jury question was erroneous and misleading at best and, at the very least, the judge was required to present the jury's request to counsel in appellant's presence.

E. Smith v. Commonwealth

[2010-CA-002237](#) 12/16/2011 2011 WL 6260371

Opinion by Judge Moore; Judge Wine concurred; Judge Stumbo dissented. The Court affirmed a circuit court order sentencing appellant to five years' imprisonment for possession of drug paraphernalia, second, after appellant failed to successfully complete a pretrial diversion program as part of a plea agreement with the Commonwealth. The Court held that appellant was not entitled to be sentenced under the lesser penalties imposed by KRS 218A.500(5), as amended during appellant's pretrial diversion, making the offense a Class A Misdemeanor subject to a term of imprisonment between ninety days and twelve months. KRS 532.020(2). Based upon ordinary contract principles, appellant was precluded from consenting to the imposition of a lesser penalty pursuant to KRS 446.110 after she entered into a valid plea agreement and received the benefit of her bargain by being afforded the opportunity to avoid the felony charge in its entirety had she complied with the conditions of her diversion.

F. Sprague v. Commonwealth

[2010-CA-001274](#) 12/16/2011 2011 WL 6275988

Opinion by Judge Stumbo; Judges Moore and Wine concurred. The Court affirmed a judgment of the circuit court entered subsequent to a jury verdict finding appellant guilty of five counts of First Degree Sexual Abuse. The Court first held that the phrase "with whom he or she comes into contact as a result of that position" in KRS 510.110 merely required proof that appellant came into contact with the victim as a result of his position of authority, but that the contact could, though did not have to be the initial contact or the sexual contact. The Court also held that the trial court did not err in refusing to address the jury's request for a clarification as to the meaning of this phrase in the statute. The statutory language was not ambiguous and the instructions mirrored the statutory language. The Court next held that the trial court did not erroneously give the jury five sexual abuse instructions, four of which were identical, without proper identifying characteristics. In viewing the record in its totality, the Commonwealth overcame the presumption of prejudice when appellant acknowledged the sexual contact on each of five occasions, it was uncontroverted that he held positions of authority at the victim's high school, and that he had contact with her at school, at his home and other places, and that the victim was under the age of 18 when the sexual contact occurred. The Court finally held that the trial court did not err in concluding that lack of consent was not an express element of KRS 510.110. The lack of consent provision of KRS 510.020(1) was subsumed by KRS 510.110 and it was implicit in KRS 510.110 that a minor under the age of 18 was incapable of consenting to sexual contact

with a person in a position of authority, even though that element was not expressly set out in KRS 510.110.

III. EMPLOYMENT

A. **Patton v. Pollard**

[2010-CA-001404](#) 12/02/2011 2011 WL 6003893

Opinion by Judge Wine; Judges Combs and Stumbo concurred. The Court affirmed in part and reversed in part a summary judgment dismissing appellant's claims against appellees for retaliation and wrongful termination, violation of her First Amendment rights to free speech, breach of contract, promissory estoppel and violation of applicable statutes after the school's foreign language offering was changed from French to Spanish, thus eliminating appellant's position as the French teacher. The Court first held that while appellant's claim for retaliation could not stand under the public policy exception to the at-will doctrine on state constitutional grounds, it could stand on statutory grounds under KRS 61.102. Because appellant sufficiently demonstrated the first three of the elements to establish a violation of KRS 61.102 (Kentucky's Whistleblower Act) and raised a genuine issue of material fact with respect to the fourth, the board of education was not entitled to judgment as a matter of law with respect to the state law claims for retaliation. However, the individually named board members and the site-based decision-making council (SBDMC) were entitled to summary judgment because KRS 61.101(2) did not impose individual civil liability. The Court next held that it could not reach the merits of appellant's federal claims of retaliation under the First Amendment, based on her speech in response to a letter of reprimand issued by the principal, because she failed to cite to 42 U.S.C. § 1983 in any of her pleadings. The Court next held that appellant failed to raise a genuine issue of material fact sufficient to withstand summary judgment on her claims for breach of contract and promissory estoppel, based on a letter from the superintendent of schools indicating a promise of future employment. The Court next held that the trial court misapplied the law in determining that the SBDMC members and the board members did not owe appellant any duty. While KRS 160.345 gave the SBDMC discretion to establish committees, once it exercised its discretion, it was required to adhere to the procedures and rules it voluntarily established and the rules and procedures for changing the curriculum were binding on the board and the parties dealing with it. The Court then held that the trial court correctly determined that the board of education was entitled to summary judgment on appellant's claims that KRS 160.345 and KRS 160.290 were violated in making the curriculum change as the board was immune from a suit for money damages. However, the individually named members of the SBDMC, the individual board members, the principal and the superintendent were only entitled to immunity if their actions were discretionary and taken in good faith. Because the enforcement of rules was ministerial, the trial court erred in finding that the individuals were immune from suit. The Court finally held that appellant raised a genuine issue of material fact as to whether KRS 160.345 and KRS 160.290 were violated in making the curriculum change. Therefore, the trial court erred

in granting summary judgment to the individuals with respect to the claim of statutory violation.

IV. FAMILY LAW

A. **A.M.W. v. Cabinet for Health and Family Services**

[2011-CA-001441](#) 12/09/2011 2011 WL 6111734

Opinion by Judge Keller; Judges Combs and VanMeter concurred. The Court dismissed the appeal from an order terminating appellant's parental rights. The Court held that the failure to join a necessary and indispensable party to the appeal by failing to serve the guardian *ad litem* for the child with the notice of appeal required the Court to dismiss the appeal.

B. **Crawford v. Crawford**

[2010-CA-001576](#) 12/16/2011 2011 WL 6275992

Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed in part, and reversed in part and remanded, an order of the circuit court confirming a report and supplemental report of a domestic relations commissioner (DRC). The Court first held that the circuit court erred in determining that the real property and a cabinet shop were non-marital assets and in awarding both to appellee as non-marital property when appellee failed to carry his burden to establish by clear and convincing evidence that the funds used to obtain them were non-marital assets. The Court also held that the circuit court did not abuse its discretion in denying appellant's request for reimbursement for medical or dental expenses when appellant failed to offer any documentary proof to support her assertion that the bills were for injuries sustained in an altercation with appellee.

C. **K.H. v. Cabinet for Health and Family Services**

[2011-CA-000896](#) 12/22/2011 2011 WL 6431128

Opinion by Judge Wine; Judges Acree and Clayton concurred. The Court reversed an order of the circuit court finding appellant's children to be neglected. The Court held that the trial court's finding of neglect was clearly erroneous when there was insufficient evidence to establish that appellant neglected the children in her refusal to sign an "Aftercare Plan." The Cabinet's substantiation of allegations of sexual abuse by the children's father against the children's cousin was not binding upon the court and had no preclusive effect in any subsequent proceeding. While appellant could not be heard to complain that the alleged victim's testimony was necessary to establish that the father posed a risk to his own children, the Cabinet was required to show that the father posed a risk of harm to his children and that appellant's failure to agree to the Aftercare Plan exposed the children to this risk. The Cabinet was further required to show that the risk of harm was more than a theoretical possibility but an actual and reasonable potential for harm before appellant could be subject to a finding of neglect based only on her refusal to comply with the Cabinet's recommendations.

V. PROPERTY

A. **Hoard v. Ocwen Loan Servicing, LLC**

[2010-CA-001823](#) 12/09/2011 2011 WL 6110938

Opinion by Judge Moore; Judges Nickell and Thompson concurred. The Court vacated and remanded a judgment of foreclosure in favor of appellee. The Court held that the trial court could not properly enter a default judgment against appellant when appellant filed an answer to the complaint which was not in any way deficient. The Court then held that appellee's motion for a default judgment could not be converted into a motion for summary judgment and the trial court erred by entering summary judgment *sua sponte* where the legal issues had not been submitted for a determination.

VI. TORTS

A. **Messerly v. Nissan North America, Inc.**

[2010-CA-000717](#) 12/02/2011 2011 WL 6004318

Opinion by Judge Caperton; Judge Wine concurred; Chief Judge Taylor dissented by separate opinion. The Court reversed and remanded a summary judgment of the circuit court dismissing appellants' complaint, brought after their son sustained fatal injuries when his mother backed over him in the driveway, alleging that their automobile was defective and negligently designed because it was not equipped with a rearview camera or back-up sensors. The Court held that the trial court erred by granting summary judgment because the question of the risk of a backover injury in the automobile was a question for the jury.

B. **True v. Fath Bluegrass Manor Apartment**

[2010-CA-001784](#) 12/22/2011 2011 WL 6412093

Opinion by Judge Thompson; Judges Clayton and Stumbo concurred. The Court affirmed a summary judgment dismissing appellant's claims against his landlord for injuries he sustained when he fell from his apartment balcony. The Court held that the circuit court properly granted summary judgment because the landlord could not be held liable for appellant's injuries caused by an open and obvious hazard that appellant was aware of prior to his fall. Recovery for appellant's claim for negligent repair could only be permitted if a repair resulted in an increased danger that was unknown to the tenant or if the repair gave the deceptive appearance of safety. However, the undisputed facts were to the contrary. The Court also held that the exceptional circumstances described in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), did not apply. Further, because the common law precluded recovery, the disputed facts were immaterial and therefore, did not preclude summary judgment.

VII. UTILITIES

A. **West Kentucky Rural Electric Cooperative Corporation v. City of Bardwell, Kentucky**

[2010-CA-001140](#) 12/16/2011 2011 WL 6275976

Opinion by Judge Wine; Judges Moore and Stumbo concurred. The Court affirmed a summary judgment of the circuit court resolving a utility service dispute in favor of the appellee city. The Court held that the circuit court correctly found that the county fiscal court was the consumer, both before annexation and after annexation of the property where a new courthouse was constructed, and the municipal electric utility had the dominant right to furnish electricity to the new courthouse. The determination of whether a particular entity or individual was a “consumer” under KRS 96.538 was a question best left to the trial court, as the finder of fact, on a case-by-case basis. The Court then held that because the county both paid for the services and used the services, the park at issue was an extension of the county itself, the new courthouse built on the annexed property was both owned and operated by the county, and the electrical services provided to it were paid by the county, both were arms of the county. Because the rural electric cooperative had no consumers in the area prior to annexation, and because the county fiscal court could not be considered a new consumer, the rural cooperative had no superior right to provide electricity to the new courthouse. The Court then held that the trial court did not err by viewing three tracts as one annexed property.

VIII. WORKERS' COMPENSATION

A. Gogel v. Hancock

[2011-CA-001143](#) 12/22/2011 2011 WL 6757421

Opinion by Judge Keller; Judges Acree and Combs concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming a decision by the ALJ to dismiss appellant's claim after finding that appellant, an exercise rider for the appellee horse trainer, was an independent contractor, not an employee. The Court first held that the ALJ and the Board did not misapply the factors in *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965) and *Chambers v. Wooten's IGA Foodliner*, 436 S.W.2d 265 (Ky. 1969). While there was some evidence supporting a finding that appellant was an employee, the evidence did not compel such a finding. The Court rejected appellant's public policy argument, that the law should be changed from its current focus on control to a focus on the nature of the work performed, on the basis that the argument was one for the legislature, not the Court.