

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

I. APPEALS

A. Willis v. Willis

[2011-CA-001519](#) 02/17/2012 2012 WL 512640

Opinion and order by Judge Keller; Judges Combs and VanMeter concurred. The Court dismissed an appeal for appellant's failure to timely tender the notice of appeal with a motion to proceed *in forma pauperis*. The Court held that the prison mailbox rule, RCr 12.04(5), did not apply to civil appeals. Therefore, appellant's appeal was untimely when the motion was filed and the notice tendered outside the 30-day time limit of CR 73.02(1)(a).

II. CIVIL PROCEDURE

A. Merck & Company, Inc. v. Ratliff

[2011-CA-000234](#) 02/10/2012 2012 WL 413522

Opinion by Judge Wine; Judges Acree and Clayton concurred. The Court reversed and remanded an order of the circuit court certifying a class for a class action lawsuit initiated by appellee. The Court held that class certification was inappropriate and therefore, the circuit court abused its discretion by entering a certification order. The claims of fraudulent misrepresentation, negligent misrepresentation and unjust enrichment required more individualized proof and thus, common questions did not predominate. The Court rejected appellant's argument that individualized proof would be minimal under a "fraud-on-the-market" approach.

III. CRIMINAL LAW

A. Blake v. Commonwealth

[2010-CA-000987](#) 02/10/2012 2012 WL 410019

Opinion by Chief Judge Taylor; Judges Lambert and Thompson concurred. The Court reversed and remanded a judgment of the circuit court entered upon appellant's conditional guilty plea to receiving stolen property over \$300. The Court held that the circuit court erred in denying appellant's motion to remand to district court or, in the alternative, to amend the indictment. Appellant consented to retroactive application of KRS 514.110 by filing a motion in circuit court requesting same and the amendment certainly operated to mitigate his punishment (increasing the value of property from \$300 to \$500 to constitute a Class D felony, with property valued under \$500 constituting a Class A misdemeanor) when the value of the property was approximately \$300.

B. Commonwealth v. Jones

[2010-CA-002324](#) 02/10/2012 2012 WL 424103

Opinion by Judge VanMeter; Judges Keller and Stumbo concurred. The Court affirmed an order of the circuit court granting appellee's motion to expunge the record of her voided felony conviction. The Court held that although the circuit

court's decision to expunge the conviction under CR 60.02(f) was incorrect, the effect of the voided conviction amounted to a dismissal of the charges pursuant to KRS 218A.275 and the voided conviction was properly expunged under the provisions of KRS 431.076, permitting expungement of charges dismissed with prejudice.

C. Moffitt v. Commonwealth

[2010-CA-001822](#) 02/03/2012 2012 WL 328243

Opinion by Judge Acree; Judge Wine and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court denying appellant's motion brought pursuant to CR 60.02 requesting removal from the Sex Offender Registry on the grounds that Kentucky's Sex Offender Registration Act (SORA) violated his procedural and substantive due process rights. The Court first held that appellant was not deprived of his procedural due process rights when he was not provided an opportunity to dispute his placement on the registry. Appellant received a meaningful opportunity to be heard during his trial and no additional process was due. The Court next held that SORA was not unconstitutionally over inclusive, even though the underlying kidnapping offense was not a sex crime nor did it require or involve a sexual act or component. The protection of children and the public was a legitimate state interest and a registration system for child kidnappers and abductors rationally furthered that interest. The Court finally held that SORA, and specifically KRS 17.510, was not unconstitutionally vague as applied to appellant. Collectively, KRS 17.510(6) and 17.500(3)(a) clearly set forth the precise crimes against minors which would subject an offender to SORA, including the registration requirements.

D. Parker v. Commonwealth

[2010-CA-001371](#) 02/17/2012 2012 WL 512573

Opinion by Judge Lambert; Chief Judge Taylor concurred; Judge Thompson dissented. The Court reversed and remanded a judgment of the circuit court convicting appellant of first-degree robbery and second-degree fleeing and evading police and sentencing him to eleven-and-a-half years' imprisonment. The Court first held that appellee was precluded from arguing that appellant lacked standing when it failed to raise the issue before the trial court. The Court then held that because the victim was shown photographs of the suspected assailants and was told she was going to be asked to identify an individual who met the description provided, the trial court correctly found that the pre-identification procedures were unduly suggestive. However, the trial court abused its discretion in denying appellant's motion to suppress the victim's identification of appellant's co-defendant and in finding that the victim's identification was reliable when the Commonwealth failed to offer any testimony or evidence from the victim or anyone else addressing the factors the trial court relied upon in making that finding.

E. Phillips v. Commonwealth

[2010-CA-000969](#) 02/24/2012 2012 WL 592246

Opinion by Judge Lambert; Chief Judge Taylor and Judge Thompson concurred. The Court affirmed in part and vacated in part an order of the circuit court denying appellant's motion to dismiss the charges against him for failure to comply with sex offender registration and persistent felony offender in the first degree. The Court first held that appellant had no liberty interest in parole and therefore, he was not deprived of due process of law when his parole recommendation was rescinded prior to his release and he was required to attend a sex offender treatment program. The Court next held that the circuit court did not err in concluding that appellant had not served his time on the sex offenses prior to the 1998 and 2000 amendments to the Sexual Offender Registration Act. Pursuant to KRS 532.12(1)(b), appellant was still serving his sentence for rape and sodomy when the amendments went into effect. Further, since appellant was still incarcerated when the amendments went into effect, a sex offender risk assessment was not mandated and there were no due process or ex post facto violations in the denial of his parole and requirement to register as a sex offender. The Court also held that because appellant was an indigent defendant, the trial court erred in ordering appellant to pay court costs and a fine.

F. Wilson v. Commonwealth

[2010-CA-001399](#) 02/10/2012 2012 WL 411086

Opinion by Judge Moore; Judges Nickell and Thompson concurred. The Court affirmed a judgment of the circuit court convicting appellant of first degree Trafficking in a Controlled Substance; Possession of Drug Paraphernalia; third degree Trafficking in a Controlled Substance; Possession of Marijuana; Alcohol Intoxication in a Public Place; and of being a second-degree persistent felony offender. The Court first held that the circuit court did not err in denying appellant's motion for a directed verdict when the evidence was sufficient for a reasonable juror to find beyond a reasonable doubt that appellant was guilty of the two trafficking counts. The Court next held that the circuit court did not abuse its discretion in admitting expert testimony by a police detective about the "Florida Pain Train" whereby a "sponsor" paid Kentuckians to travel to Florida to get prescriptions. The testimony was specialized in character and outside the common knowledge and experience of most jurors. The Court next held that the circuit court did not abuse its discretion in refusing to instruct the jury on the defense of voluntary intoxication given appellant's actions and the lack of any evidence that he did not know what he was doing at the time of the incident. The Court finally held that the circuit court did not abuse its discretion in refusing to allow the defense to introduce appellant's records from the detention center regarding information appellant provided about his medical history because the prescription he told the officer at the jail about was not the same as the prescriptions he was accused of trafficking.

IV. FAMILY LAW

A. A.C. v. Cabinet for Health and Family Services

[2011-CA-000504](#) 02/24/2012 2012 WL 592850

Opinion by Judge Acree; Judges Caperton and VanMeter concurred. The Court affirmed an order of the family court terminating appellant's parental rights. The Court first held that the briefing procedures of *Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), extended to appeals from orders terminating parental rights. KRS 625.080(3) revealed the intent of the legislature to afford indigent parents the benefits of counsel during the entire course of the termination proceedings, including appeal. However, the right to counsel did not include the right to bring a frivolous appeal. Thus, *Anders* applied to appeals from orders terminating parental rights to which an indigent parent had court-appointed counsel who concluded the appeal lacked any meritorious issues which might support the appeal, and was, therefore, frivolous. The Court included a procedural blueprint to assist the bar in cases in which an *Anders* brief was warranted. The Court then independently reviewed the record and held that the appeal was, in fact, void of non-frivolous grounds for reversal.

B. Brosnan v. Brosnan

[2010-CA-000229](#) 02/03/2012 2012 WL 327857

Opinion by Judge Thompson; Judge Caperton concurred; Judge Combs concurred in result only. The Court affirmed a judgment of the family court, entered in a dissolution of marriage action, dividing the parties' marital property and debts and awarding maintenance. The Court first held that the family court abused its discretion when it permitted a social worker to testify that she diagnosed the wife with post traumatic stress disorder (PTSD). Because the social worker lacked training as psychologist or psychiatrist, her testimony was inadmissible. However, the Court held that the admission of the testimony was harmless, as there was substantial admissible evidence to support the award of maintenance. The Court next held that the family court did not abuse its discretion in setting the amount of maintenance after properly considering the husband's ability to pay while meeting his own reasonable needs and considering the factors set forth in KRS 403.200. The Court next held that the family court acted within its discretion when it declined to withhold dissolution of the marriage to permit the filing of a joint tax return and delay the husband's obligation to pay the wife much of her share of the marital property until after the marital residence was sold. Further, there was no abuse of discretion in either the division of property or debt. The Court finally held that because the wife was represented by counsel throughout the appeal, the question of whether attorney's fees could be advanced for appeal was moot. However, because the issue was capable of repetition, yet evading review, the Court held that attorney's fees for an appeal of a judgment in a dissolution of marriage proceeding was a collateral matter over which the family court retained jurisdiction after the filing of the notice of appeal and that the family had the authority to order fees prospectively pursuant to KRS 403.220.

C. Copas v. Copas

[2009-CA-000685](#) 02/03/2012 2012 WL 327853

Opinion by Judge Acree; Judges Moore and Nickell concurred. The Court affirmed in part, reversed in part and remanded orders of the family court modifying the division of the husband's military retire pay between the spouses. The Court first held that the family court did not abuse its discretion in reopening the property order pursuant to CR 60.02(f) to correct the misinterpretation by the Defense Finance and Accounting Service (DFAS) and to meet its specific requirements. The Court next held that the family court did not abuse its discretion in modifying the order to limit the wife's share to the portion of the military retire pay attributable to the marriage. The Court finally held that the family court erred by adding language requiring the DFAS to take the husband's disability pay into consideration in dividing the military retired pay.

D. Gaskill v. Robbins

[2010-CA-001814](#) 02/03/2012 2012 WL 335635

Opinion by Judge Lambert; Judges Dixon and VanMeter concurred. The Court affirmed a judgment of the family court valuing appellant's oral surgery practice and distributing cash to appellee in a dissolution proceeding. The Court first held that the family court did not abuse its discretion by failing to adopt the business valuation performed closest to the date of the decree when the decision to base the valuation on an earlier report was supported by ample evidence. The Court next held that the family court did not err in failing to award appellant post-judgment interest on the money she overpaid appellee in accordance with an original higher valuation of the practice, which was lowered on remand. Appellant's claim against the overpayment was an unliquidated debt and given the family court's well-documented reasoning, the family court did not abuse its discretion in denying the request for interest.

E. J.P. v. S.B.B.

[2011-CA-000516](#) 02/24/2012 2012 WL 592333

Opinion by Judge Combs; Judges Keller and Stumbo concurred. The Court vacated and remanded an order of the circuit court finding that appellant did not have standing to pursue a paternity action. Applying the more recent holding in *J.A.S. v. Bushelman*, 342 S.W.3d 850 (Ky. 2011), the Court held that appellee's admissions that she engaged in sexual intercourse with appellant one or two times per week for a number of years, including the one year preceding the birth of her child, and that she did not use birth control during the encounters, were sufficient to provide a reasonable basis for appellant's potential paternity, even though the marital relationship between appellee and her husband had not ceased during the ten-month period preceding the birth of the child.

V. LICENSES

A. Kentucky Board of Licensure for Professional Engineers and Land Surveyors v. Curd

[2010-CA-000693](#) 02/17/2012 2012 WL 512403

Opinion by Judge Caperton; Judge Wine concurred; Chief Judge Taylor concurred in result only. The Court affirmed in part, reversed in part and remanded an opinion and order of the circuit court finding that KRS 322.180(2) and (12) and KAR 18:142 Sections 2, 3 and 9 were unconstitutionally vague as applied to the appellee/cross-appellant, a licensed land surveyor who testified as an expert witness in a quiet title action and was later disciplined by the Kentucky Board of Licensure for Professional Engineers and Land Surveyors. The Court held that but for 201 KAR 18:142 Section 3, the circuit court correctly found that the provisions were unconstitutionally vague as applied to appellee's testimony. The Court also held that the Board had the authority to institute disciplinary action against appellee.

VI. MINES AND MINERALS

A. Laurel Mountain Resources, LLC v. Commonwealth, Energy and Environment Cabinet

[2010-CA-001860](#) 02/17/2012 2012 WL 512580

Opinion by Senior Judge Lambert; Chief Judge Taylor and Judge Clayton concurred. The Court reversed and remanded an order of the circuit court affirming an order of the Secretary of the Commonwealth of Kentucky, Energy and Environment Cabinet, denying a "Lands Unsuitable for Mining" petition but nonetheless imposing numerous restrictive conditions on all future surface coal mining in the petition area. The Court held that 405 KAR 24.030 Section 8(3) was contrary to Kentucky law and more stringent than the Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 United States Code (U.S.C.) § 1201, et seq. While 30 U.S.C. § 1272(b) gave the Secretary the authority to condition mineral leasing or mineral entries in a manner so as to limit surface coal mining operations, it unambiguously restricted the authority to instances in which a designation of unsuitability for all or certain types of surface mining was actually made. Because appellees' unsuitability petition was explicitly denied, 405 KAR 24.030 Section 8(3) ran afoul of the limitation and therefore was null, void and unenforceable.

VII. PROPERTY

A. Berghaus v. U.S.Bank

[2010-CA-002050](#) 02/10/2012 2012 WL 412977

Opinion by Judge Combs; Judge Nickell and Senior Judge Lambert concurred. The Court affirmed in part, vacated in part and remanded an order of the circuit court dismissing appellant's counterclaim in a foreclosure action initiated by the appellee bank. The Court held that the circuit court correctly granted summary judgment in favor of the bank on appellant's counterclaims. Appellant's claim for money damages, costs and attorney fees was time-barred as it made outside the one-year limitations period in the Truth in Lending Act, 15 U.S.C. § 1640(e). The bank could not be found liable for fraud as there was no indication that it was directly involved with the initial mortgage transaction or that it acquired the note in any manner inconsistent with the exercise of good faith and due diligence. The bank could bear no liability for any alleged discrepancy between

what was in the disclosure statement and a good-faith estimate by the subprime mortgage lender, as the bank was not required to undertake an investigation of facts beyond what the law required of assignees. The Court then held that the circuit court erred by refusing to allow sufficient discovery before judgment was entered and by relying solely upon a deficient affidavit offered by the bank with respect to appellant's breach. While it could be inferred by the affidavit that the affiant had undertaken a review of appellant's account, copies of the records to which she referred in the affidavit were neither attached nor served with the affidavit as required by CR 56.06. That, coupled with the circuit court's denial of an opportunity for full and complete discovery, made summary judgment with the respect to the breach prematurely entered.

B. *Stevenson v. Bank of America, BAC Home Loans L.P.*

[2010-CA-002215](#) 10/07/2011 2011 WL 4633978

Opinion by Judge Nickell; Judges Caperton and Wine concurred. The Court affirmed a summary judgment in favor of appellee in a mortgage foreclosure action. The Court held that appellee was the real party in interest under CR 17.01 and therefore, had standing to bring the foreclosure action. The assignment of mortgage was not the document which transferred enforcement rights on the note to appellee and the date of its execution was immaterial. When the note was endorsed in blank, it became a bearer instrument and no assignment was necessarily required to transfer the right to collect and enforce the note. Mere possession of the original note was sufficient. Because appellee was lawfully in possession of the original note, it was entitled to enforce the obligations secured thereby and was the real party in interest in the litigation below.

VIII. TORTS

A. *Frost v. Dickerson*

[2010-CA-000537](#) 02/24/2012 2012 WL 592193

Opinion by Judge Nickell; Judge Combs and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court dismissing appellants' action for damages and loss of consortium in a personal injury case stemming from an automobile accident. The Court held that the "discovery rule" did not toll the limitations period for bringing a tort action under Kentucky's Motor Vehicle Repairs Act (MVRA), KRS 304.39-230.

B. *Ryan v. Fast Lane, Inc.*

[2011-CA-000300](#) 02/10/2012 2012 WL 413684

Opinion by Judge Keller; Judges Combs and Stumbo concurred. The Court affirmed a summary judgment in favor of appellee on appellant's claim that she was injured while pumping gas at appellee's establishment and that her injury was due to a latent defect in the gasoline pump. The Court held that the trial court did not err in granting summary judgment and that it correctly determined that *res ipsa loquitur* did not apply. Appellant was operating the pump at the time of the injury and therefore, it was not under the exclusive control of

appellee. Further, there was no evidence that appellee was negligent, as appellant submitted no evidence that the pump was defective. Appellant's conclusory allegations and subjective beliefs that the accident would not have happened but for appellee's negligence were not enough to survive summary judgment.

IX. WILLS AND ESTATES

A. Commonwealth Bank & Trust Company v. Young

[2010-CA-000593](#) 02/24/2012 2012 WL 592196

Opinion by Judge Thompson; Judges Moore and Nickell concurred. The Court affirmed an order of the circuit court declaring that the appellee trust beneficiaries did not violate a no-contest clause of a trust document executed by their mother. The Court first held that the trial court did not abuse its discretion when it certified the order as final and appealable. The no-contest clause was significant to the other pending claims because if the children forfeited their interest in the trust, they would have not standing to allege that the trusts' assets were improperly distributed. Further, because the question of forfeiture under the no-contest clause was distinctly different from the remaining claims of breach of fiduciary duty, mismanagement of the trusts and distributions contrary to the trust, the trial court did not abuse its discretion in certifying the order as final and appealable. The Court then held that the trial court correctly found that the children did not forfeit their interest in their mother's trusts by asserting their claims. While the trust document contained an enforceable no-contest clause, the children's complaint sought a construction of the trust document, not an invalidation of any of its terms.

X. WORKERS' COMPENSATION

A. Hardin Memorial Hospital v. Hornback

[2011-CA-001707](#) 02/24/2012 WL Citation Not Available

Opinion by Judge Thompson; Judge Caperton and Senior Judge Lambert concurred. The Court reversed and remanded an opinion and order of the Workers' Compensation Board affirming an ALJ's award of permanent total disability benefits to a worker and an enhanced benefit pursuant to KRS 342.165(1) for injuries the worker suffered when she fell down an elevator shaft while working at the appellant hospital. The Court held that substantial evidence did not support the ALJ's finding that the employer intentionally violated its general duty to provide a safe workplace. The one-time malfunctioning of an elevator was an unanticipated event responded to by employees without direction from the employer, the instruction given by the elevator company was not a safety policy, and although removal from the malfunctioning elevator was a plausible event, it was not a hazard associated with hospital employment. Thus, the factors in *Lexington-Fayette Urban County Government v. Offutt*, 11 S.W.3d 598 (Ky. App. 2000), were not met to establish KRS 338.031(1)(a) was violated.