

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

I. ADMINISTRATIVE LAW

A. Harrison v. Park Hills Board of Adjustment

[2009-CA-001981](#) 1/07/11 2011 WL 43292

Opinion by Judge Lambert; Judge Stumbo and Senior Judge Shake concurred. The Court affirmed an order of the circuit court dismissing appellants' appeal from a zoning decision for lack of subject matter jurisdiction and an order denying a motion to alter, amend or vacate the judgment. The Court held that the circuit court did not err in dismissing the appeal and complaint for lack of subject matter jurisdiction when appellants failed to name two indispensable parties in their appeal to the circuit court. Pursuant to KRS 100.347(1), the applicants who initiated the proceedings were required to be named as parties to the appeal. The Court further held that the failure to strictly follow the statutory guidelines was fatal to appellants' appeal to the circuit court and that substantial compliance could not cure the jurisdictional defect.

II. ARBITRATION

A. Jacob v. Dripchak

[2008-CA-001157](#) 1/21/11 2011 WL 181295

Opinion by Chief Judge Taylor; Judges Combs and Nickell concurred. On remand from the Kentucky Supreme Court, the Court affirmed in part, reversed in part and remanded with directions, a judgment of the circuit court confirming an arbitration award in favor of appellee on claims related to an employment contract. The Court held that while KRS 417.050 excluded employment agreements from coverage under the Kentucky Arbitration Act, KRS Chapter 417, the statute did not prohibit, invalidate, or otherwise preclude the enforceability of arbitration clauses contained in employment contracts nor did it otherwise limit Kentucky courts from considering the same. The Court then held that the trial court erred in confirming the award based upon a 1997 employment agreement and the renewals thereof. The arbitrator lacked jurisdiction to consider the claims as they related to the earlier agreements when a 2003 agreement clearly and plainly superseded and terminated the earlier agreements, which did not contain an arbitration clause. The Court remanded for the circuit court to make a determination of damages, if any, that the employer might be entitled to under the 2003 employment agreement.

III. CONTRACTS

A. Javier Steel Corporation v. Central Bridge Company, LLC

[2009-CA-002124](#) 1/14/11 2011 WL 117657

Opinion by Judge Acree; Senior Judges Henry and Isaac concurred. The Court affirmed an order of the circuit court finding that the appellant steel subcontractor was unjustly enriched when the appellee bridge and road construction contractor overpaid for road works projects throughout the Commonwealth. The Court first held that the circuit court had the authority under CR 60.02 to set aside an order dismissing the case for failure to prosecute. The entry of the order was a clerical error and not the deliberate result of judicial reasoning and determination. The Court next held that the evidence of duplicate payments to third-party vendors, and to appellant for materials that the vendors, provided only once was sufficient to support the circuit court finding that appellant was overpaid, retained those funds and was unjustly enriched. The Court next held that the circuit court finding that appellant was overpaid did not result in an unlawful construction of the contracts. The Court finally held that the doctrine of unclean hands was not a bar to appellee's claim of unjust enrichment.

IV. CRIMINAL LAW

A. **Commonwealth v. Sanders**

[2009-CA-002398](#) 1/14/11 2011 WL 113144

Opinion by Judge Combs; Judges Clayton and Wine concurred. The Court affirmed an order of the circuit court granting appellee's motion to suppress evidence obtained after she was detained by a police officer. The Court held that the trial court correctly held that appellee was illegally detained. The case fell squarely under *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed. 357 (1979), in that the police did not have any reasonable suspicion that appellee was involved in criminal activity by her mere act of walking on the street. The fact that she was in a high crime area at night did not provide reasonable suspicion. Her nervousness as she walked alone in a bad neighborhood while a police car slowly drove past her more than once before stopping, the fact that she picked up her pace and the fact that she was seen walking on the street in conjunction with other passersby did not provide reasonable suspicion to allow for the detention.

B. **Leatherman v. Commonwealth**

[2008-CA-000849](#) 1/21/11 2011 WL 181251

Opinion by Judge Lambert; Chief Judge Taylor and Senior Judge Henry concurred. The Court affirmed a judgment of the circuit court following a jury trial convicting appellant of possession of a controlled substance (cocaine) (KRS 218A.1415), tampering with physical evidence (KRS 524.100), and operating a motor vehicle under the influence of alcohol or drugs (KRS 189.010). The Court first held that the trial court properly denied appellant's motion to suppress evidence. First, the deputy had sufficient grounds to stop appellant and investigate the situation. Based upon a 911 call, during which the caller described a woman driving a car displaying Washington State license plates who was committing criminal activity, and the undisputed fact that appellant pulled to the side of the road and stopped before the deputy activated his emergency

lights, there was no constitutional violation in the investigatory stop. Further, the fact that appellant exhibited glassy eyes, was acting nervous and fidgety, had a cup of beer and an opened but recorked bottle of wine in the vehicle gave the deputy grounds to further detain appellant to perform field sobriety tests to determine whether she was driving under the influence. Based on the field sobriety tests and the open containers of alcohol, the deputy was justified in performing a breathalyzer test. The discovery of a bottle of prescription medication and appellant's admission that she was on several medications, constituted sufficient grounds for continued detention. The Court next held that, pursuant to KRS 431.005(1)(e), the deputy had the requisite probable cause to arrest appellant without a warrant. The deputy's observations of appellant's glassy eyes and odd behavior, coupled with her admission that she was taking prescription medication that included a warning about driving, was sufficient to provide probable cause to arrest appellant for DUI. The Court next held that the trial court did not abuse its discretion in granting the Commonwealth's motion in limine prohibiting appellant from mentioning any statement or question appellant made to the deputy regarding her leaving her watch in the backseat of the cruiser where drugs were found. Further, even if the ruling was made in error, it was harmless in light of the strength of the other testimony. The Court also held that the prosecution's statements during closing argument referring to the watch as an "autograph" on the drugs did not rise to the level of palpable error. The Court finally held that the trial court did not err in denying appellant's motion for a directed verdict on the DUI charge when the evidence established that appellant admitted that she was taking three prescription medications, one of which contained a warning regarding driving while on the medication, and other testimony regarding appellant's behavior, the HGN test showing intoxication and appellant's admission to a witness several months after the incident that she was "whacked out."

C. Smith v. Commonwealth

[2008-CA-001340](#) 1/21/11 2011 WL 181299

Opinion by Chief Judge Taylor; Judges Clayton and Wine concurred. In two appeals, the Court affirmed a judgment of the circuit court upon a jury verdict finding the first appellant guilty of trafficking in a controlled substance in the first degree, possession of marijuana, and with being a persistent felony offender in the second degree. The Court affirmed in part, vacated in part, and remanded with directions a judgment upon a jury verdict finding the second appellant guilty of complicity to commit trafficking in a controlled substance in the first degree and with being a persistent felony offender in the second degree.

In both appeals, the Court held that appellants' constitutional challenge to KRS 29A.040, was unpreserved and could not be reviewed on appeal when they failed to notify the Attorney General of the constitutional challenge, as mandated by KRS 418.075 and CR 24.03.

In the first appeal, the Court held that the admission of objectionable testimony by two detectives constituted harmless error in light of the overwhelming evidence of appellant's guilt. The Court also held that the trial court did not err in instructing the jury on first-degree trafficking in a controlled substance when the evidence was sufficient for the jury to find that appellant engaged in the sale of cocaine.

In the second appeal, the Court held that the trial court was required to conduct a colloquy with the defendant to determine whether he properly waived his constitutional right to a twelve-person jury. The trial court erred by not doing so. The Court held that such error could be deemed harmless and the appellate court could look to the record for evidence to determine whether the waiver was knowingly, voluntarily and intelligently made. If no evidence was available, the appellate Court may remand to the trial court for an evidentiary hearing with the Commonwealth bearing the burden to prove the defendant's waiver was knowingly, voluntarily and intelligently made. If the Commonwealth failed in its burden, the defendant would be entitled to a new trial and if the Commonwealth succeeded, the trial court should reinstate the judgment of conviction. Reviewing the error for palpable error under RCr 10.26, because the record was silent as to whether appellant waived the right, the Court vacated the judgment and remanded to the trial court for an evidentiary hearing. The Court also held that the time period in which a defendant may waive his right to a twelve-person jury carried no constitutional import, as opposed to the waiver of the right to a jury trial, and therefore, the violation of KRS 29A.280(2) constituted harmless error under RCr 9.24. The Court also held that the trial court did not erroneously instruct the jury upon the charge of complicity to commit first-degree trafficking in a controlled substance, as the element of intent was adequately set forth in the instructions. The Court finally held that the trial court did not err by refusing to instruct the jury upon the offense of criminal facilitation, when the instruction was without any evidentiary foundation.

V. EMPLOYMENT

A. **Department of Revenue v. Wade**

[2008-CA-001822](#) 1/14/11 2011 WL 111881

Opinion by Judge Dixon; Judge Wine and Senior Judge Henry concurred. The Court affirmed an order of the circuit court affirming two opinions rendered by the Kentucky Personnel Board in favor of an employee of the Finance and Administration Cabinet. The Court first held that there was substantial evidence to support the Board's finding that the employee did not waive her right to a pre-termination hearing. Even if an attempt to postpone the hearing was improper, the Cabinet was without authority to dispense with the minimal requirement of a hearing. The Court next held that the Board correctly determined that, pursuant to KRS 18A.055(34), the Cabinet was without authority to unilaterally reinstate the employee (after which she was again terminated) during the appeal process without an order from the Board or a Court.

VI. FAMILY LAW

A. **Draper v. Commonwealth of Kentucky ex rel. Shannon C. Heacock**

[2010-CA-000112](#) 1/21/11 2011 WL 181355

Opinion by Judge Wine; Judges Thompson and VanMeter concurred. The Court reversed and remanded an order of the circuit court granting a mother's motion to set aside earlier orders of paternity, child support and joint custody, after finding that it lacked subject-matter jurisdiction to address the petition. The Court held that the mother waived any objection to the adjudged father's standing to assert paternity. While the trial court reasonably concluded that it was bound by the primary opinion of *J.N.R. v. O'Reilly*, 264 S.W.3d 587 (Ky. 2008), the result in *J.N.R.* must be applied on the narrowest possible grounds because it was a plurality opinion. The more recent analysis in *Harrison v. Leach*, 323 S.W.3d 702 (Ky. 2010), tended to undermine the reasoning of the plurality in *J.N.R.* KRS 406.011 set forth standing requirements for a third party to assert paternity of a child born during the lawful wedlock of a husband and wife. Unlike subject-matter jurisdiction, an objection to standing may be waived if not timely raised. Because the mother failed to object until well after the paternity judgment was entered, made affirmative representations acknowledging the biological father of the child, entered into agreed orders allowing for visitation with the child, and accepted child support under a temporary support order, and did not challenge the adjudged father's right to bring the action for nearly two years after he brought the paternity petition, she waived any objection to the father's standing to assert paternity.

B. **Hudson v. Hudson**

[2009-CA-002392](#) 1/14/11 2011 WL 113089

Opinion by Judge Acree; Senior Judge Henry concurred; Senior Judge Isaac dissented by separate opinion. The Court affirmed an order of the family court increasing the appellee father's child support obligation, deviating from the standard child support obligation because of a monthly Social Security payment to the child. Although appellant failed to request for review under CR 61.02, the Court reviewed the order for manifest injustice when appellant failed to comply with CR 76.12(4)(c)(v) by identifying where in the record the error was preserved. The Court held that the record did not make manifest that it was an injustice to increase the father's legal obligation deviating from the guidelines by deducting the monthly Social Security payment.

C. **Pinkhasov v. Petocz**

[2008-CA-002420](#) 1/28/11 2011 WL 250559

Opinion by Judge Nickell; Judges Moore and Wine concurred. The Court reversed and remanded orders of the family court holding that appellant and appellee had entered into a legally valid *de facto* marriage. The Court first held that the purely religious marriage ceremony, solemnized pursuant to the tenets of the Jewish religious faith but without prior issuance of a civil marriage license as

required by Kentucky statutory law, did not create a legally valid civil marriage under the laws of the Commonwealth of Kentucky. In reaching that conclusion, the Court, construing the unambiguous language in KRS 402.080, held that the General Assembly intended two essential requisites of a legally valid civil marriage - obtaining a marriage license and solemnization of the intent to be married - and that strict compliance was necessary to establish a legally valid and binding civil marriage. The Court then held that the term “*de facto* marriage” was synonymous with common-law marriage and that there was no legally valid civil marriage established between the parties simply because of their religious expressions, public representations and living arrangements. Kentucky’s refusal to recognize common-law marriage could not be circumvented by simply appending to the relationship the alternative legal appellation of “*de facto* marriage.”

VII. INSURANCE

A. **One Beacon Insurance Company v. KIGA**

[2010-CA-000220](#) 1/28/11 2011 WL 262995

Opinion by Judge Lambert; Judge Moore and Senior Judge Isaac concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of Kentucky Insurance Guaranty Association (KIGA), on the appellant insurer’s petition to enforce an order requiring KIGA to pay one-half of the medical bills paid on behalf of an injured worker. In a case of first impression, the Court held that the circuit court properly granted judgment as a matter of law. Appellant was not a claimant nor was the subrogation claim a “covered claim” under KRS 304.36-050. By the clear language of the statute, appellant was not an insured making a first-party claim or a person seeking a liability claim. Further, its claim for subrogation of paid medical benefits was specifically prohibited in the statute.

VIII. JUVENILES

A. **J.K.B. v. Commonwealth**

[2010-CA-001062](#) 1/28/11 2011 WL 255584

Opinion by Judge Stumbo; Judges Keller and Nickell concurred. The Court reversed and remanded an order of the family court imposing certain educational requirements upon the appellant juvenile until he reached the age of 21, after the court found him to be a habitual truant and beyond the control of his parent. The Court held that, pursuant to KRS § 610.010(2) and KRS § 610.120(3), the family court lost jurisdiction over the child when he reached the age of 18 and that the education requirements must terminate at that time.

IX. PROPERTY

A. **Eversole v. McCurley**

[2009-CA-001923](#) 1/21/11 2011 WL 181348

Opinion by Judge Lambert; Judges Moore and Nickell concurred. The Court affirmed a partial summary judgment finding that no partnership existed between family members in a dispute over property. The Court held the trial court properly determined that the partnership, if it existed at all, was dissolved at the will of one or more partners and that dissolution was appropriate under KRS 362.305(1)(f). Therefore, even if appellants were able to produce evidence at trial that a partnership existed, it would be impossible for them to produce evidence at trial warranting a judgment in their favor, given the applicable rules for dissolving a partnership.

B. Grafton v. Shields Mini Markets, Inc.

[2009-CA-001862](#) 1/14/11 2011 WL 112833 Rehearing Pending
Opinion by Senior Judge Lambert; Judges Caperton and Wine concurred. In a case of first impression, the Court reversed and remanded a summary judgment in favor of appellee on its property-damage claim against appellants. The Court concluded that the circuit court erred by granting summary judgment to appellee, holding that a non-fraudulent property-damage settlement or recovery by a mortgagor from a third-party tortfeasor bars a subsequent recovery by a mortgagee against that same tortfeasor for that same act of property damage. Furthermore, when a mortgagor receives the recovery or settlement proceeds, they must be held in trust for the mortgagee to the extent of any outstanding debt.

C. Greer v. Arroz

[2009-CA-001586](#) 1/21/11 2011 WL 181335
Opinion by Judge Thompson; Judges Caperton and VanMeter concurred. The Court reversed and remanded an order of the circuit court finding that appellant wrongfully exercised control over personal property owned by appellees, which was left on real property appellant purchased at a master commissioner sale. The Court held that, unless otherwise ordered by the court with jurisdiction over the real property, an order confirming a judicial sale was final and conclusive as to the rights of the parties with notice of the sale, including any personal property located on the property. In reaching that conclusion, the Court first held that the facts were conclusive that appellees abandoned any claim to the personal property that remained on the premises at the time of the confirmation of the judicial sale. The Court also held that even though the doctrine of abandonment precluded the claim for conversion, the application of laches was also appropriate when appellees delayed in seeking the return of their personal property and when the delay was unreasonable in view of the notices of the pending sale and available judicial remedies.

X. TORTS

A. Akins v. The News Enterprise

[2009-CA-002188](#) 1/28/2011 2011 WL 255447

Opinion by Judge Thompson; Judges VanMeter and Wine concurred. The Court affirmed an order of the circuit court dismissing appellant's complaint for libel against a newspaper. The Court held that the newspaper did not commit the tort of libel by publishing an article using the term "carjacking" in describing appellant's criminal case. Although appellant was not charged with carjacking, the article merely conveyed that appellant's rape and kidnapping charges arose from a carjacking. Further, under KRS 411.060, a publication containing an accurate description of a judicial proceeding, regardless of the falsity or defamatory character of its contents, is absolutely privileged unless it was made for the sole purpose of causing harm. In this case, the article was written to inform the public and necessarily described the alleged conduct giving rise to the indictment. The trial court properly found that the complaint was devoid of any allegation of maliciousness and that appellant did not request an explanation or contradiction concerning the article. Therefore, the dismissal of the complaint was proper under KRS 411.060.

B. Booth v. CSX Transportation, Inc.

[2009-CA-002103](#) 1/28/11 2011 WL 255408

Opinion by Senior Judge Isaac; Judge Acree and Senior Judge Henry concurred. The Court reversed and remanded an order of the circuit court granting summary judgment to appellee on appellant's claims for injuries to his knees while employed as a railroad carman for appellee. The Court first held that a regulation promulgated under the Federal Railway Safety Act, 49 U.S.C. § 20101, et seq. (FRSA) may preclude a claim under the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. (FELA). However, the Court concluded that in this case, because 49 C.F.R. § 213.103, the regulation at issue, did not address what constituted safe walking conditions in its rail yards, appellant's FELA claim was not precluded and the trial court erred in concluding it was. The Court also held that although deposition testimony by a person who assisted in reviewing and revising the federal regulations under the FRSA might be useful in clarifying the regulations, the Court was bound by the plain language of the regulation, which did not cover walkway safety.

C. Edwards v. Gruver

[2008-CA-002348](#) 1/14/11 2011 WL 111969 Rehearing Pending

Opinion by Senior Judge Buckingham; Judge Caperton concurred in part and dissented in part by separate opinion; Judge Clayton concurred in part and dissented in part by separate opinion. The Court reversed and remanded a judgment of the circuit court entered against appellant and in favor of appellee on appellee's claims for negligent or reckless hiring, retention, or supervision of three men who assaulted him. The jury returned a \$2.5 million verdict in favor of appellee for which appellant was responsible for over \$1 million. The Court first held that there was not a special relationship between appellant, the head of the Imperial Klans of America (IKA), an unincorporated association, and its members so as to create in the association head an affirmative duty of supervision and control over the activities of the members. Although appellant

was the head of the association and the assailants were members and the members were encouraged to recruit new members, appellant did not have any ability to control their activities. Thus, the trial court erred in not granting a directed verdict in appellant's favor. However, because appellant did not move the trial court for judgment notwithstanding the verdict, the court reversed for a new trial, rather than for the entry of judgment. The Court also held that testimony that 10 years earlier appellant had encouraged the witness to kill Morris Dees, who was appellee's attorney, was admissible for the purpose of rebutting appellant's contention that he did not encourage IKA members to engage in violent or illegal activities. The Court finally held that the trial court did not err in allowing testimony concerning the past criminal records of the assailants when the cause of action was for the negligent or reckless hiring, retention, or supervision of the assailants and the evidence was used to show the violent propensities of the assailants and appellant's knowledge of those propensities.