

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

I. ADMINISTRATIVE LAW

A. Commonwealth, Transportation Cabinet v. Handi-Van, Inc.

[2010-CA-001925](#) 01/20/2012 2012 WL 163005

Opinion by Judge Combs; Judge Nickell and Senior Judge Lambert concurred. The Court vacated and remanded an order of the circuit court dismissing for lack of jurisdiction the Transportation Cabinet's petition for declaratory rights wherein it argued that KRS 13B.030 allowed it to outsource an administrative hearing to the Division of Administrative Hearings at the Office of the Attorney General (OAG). The Court held that the trial court erroneously applied KRS 12.100. The statute was inapplicable because the matter did not involve a conflict between the OAG and the Cabinet but rather involved a conflict between KRS 281.640 and KRS 13B.030. While KRS 281.640 unequivocally provided that a hearing officer was required to be a full-time employee of the Cabinet, KRS 13B.030 expressly permitted a hearing officer from the OAG to preside over Cabinet hearings. Because KRS 13B.020, provided that KRS Chapter 13B superseded all other relevant statutes, unless exempted, and KRS 281.640 contained no such exemption, its provision must yield to KRS 13B.030.

II. CIVIL PROCEDURE

A. Bruner v. Discover Bank

[2011-CA-000197](#) 01/20/2012 2012 WL 163029

Opinion by Judge Moore; Judges Nickell and Thompson concurred. The Court vacated and remanded an order of the circuit court granting appellee's motion for summary judgment on its complaint alleging that appellant owed it a credit card debt. The Court first rejected appellee's argument that the appeal should be dismissed as untimely filed pursuant to CR 73.02(1)(a). The appeal was timely when it was filed within 30 days of the date the circuit court overruled a timely-filed CR 59.05 motion. The Court next rejected appellee's argument that the appeal should be dismissed pursuant to CR 73.03(1) for failure to identify the judgment from which the appeal was taken, when appellant only identified the order overruling the CR 59.05 motion. Appellant substantially complied with the rule, the judgment appealed was obvious to the Court and appellee could not demonstrate any substantial harm or prejudice. The Court then held that the trial court erred in granting summary judgment before appellee proved an assignment from the demonstrated owner of the debt for the purpose of collection or the demonstrated owner's specific authorization to its agent to collect the debt on its behalf. Appellee's assertion that it had standing to sue on behalf of Discover Bank, relying exclusively on its pleadings, was insufficient to establish standing as a real party in interest per CR 17.01.

B. Price v. Yellow Cab Co. of Louisville

[2010-CA-001894](#) 01/20/2012 2012 WL 162931

Opinion by Judge Lambert; Judges Clayton and Dixon concurred. The Court affirmed an opinion and order of the circuit court granting summary judgment to appellee and dismissing appellant's complaint alleging fraud, intentional infliction of emotional distress and conspiracy, based on misrepresentations appellee made in a prior personal injury lawsuit brought by appellant. The Court held that the circuit court properly granted summary judgment and dismissed the complaint on the basis of *res judicata*. Although the causes of action alleged in the second complaint were not actually pled in the first complaint, the subject matter of the second suit was raised in the prior suit and appellant was successful in obtaining a reversal of the dismissal of the first complaint based on the misrepresentations.

C. Windstream Kentucky West, LLC v. Kentucky Public Service Commission

[2009-CA-001973](#) 01/27/2012 2012 WL 246242

Opinion by Judge Combs; Judges Moore and Nickell concurred. In an opinion and order, the Court granted appellee's motion to dismiss appellants' appeal as moot. The Court held that because the Public Service Commission (PSC) closed its administrative action against the appellant communications company, wherein it was investigating whether the company was charging unreasonably high intrastate switched-access rates. The controversy was moot and no longer justiciable. The Court also held that the exception to the mootness doctrine did not apply. Although the disputed issue was capable of repetition, it most likely could not evade future review. However, the Court explained that appellant was entitled to vacatur, since the PSC by its own actions caused the case to become moot pending appeal. The PSC could not unilaterally seek to deprive the appellant of an opportunity for review while preserving for itself the benefit of the judgment.

III. CONTRACTS

A. Killian v. Tunacakes Properties, Inc.

[2010-CA-001396](#) 01/20/2012 2012 WL 162717

Opinion by Judge Keller; Judges Stumbo and VanMeter concurred. The Court reversed and remanded a judgment of the circuit court, based upon a jury verdict in favor of appellee on its claim to collect a consulting fee based on a promissory note and consulting agreement. The Court while the issue of whether the trial court erred in allowing a jury instruction on unjust enrichment was not properly preserved, the jury instruction for unjust enrichment resulted in a manifest injustice. Because unjust enrichment was an equitable doctrine, it was a question to be decided by the trial court, not the jury. The Court also held that unjust enrichment was not an available remedy to the corporate entities because any recovery to them must be under the express terms of the contract. The Court finally held that unjust enrichment, as used in this case, improperly imposed personal liability on appellant, thereby piercing the corporate veil. Appellant could not be held personally liable until the trial court determined that the

corporate veil could be pierced and absent such a finding the unjust enrichment instruction allowing the jury to hold appellant personally liable, resulted in a manifest injustice. If the trial court determined that the corporate veil could be pierced, appellant could be personally and contractually liable but the equitable remedy of unjust enrichment was not available.

B. Louisville Mall Associates, LP v. Wood Center Properties, LLC

[2010-CA-000933](#) 01/27/2012 2012 WL 246260

Opinion by Judge Acree; Judge Stumbo and Senior Judge Lambert concurred. The Court affirmed a summary declaratory judgment interpreting a letter of credit, affirmed an order denying appellants' motion filed pursuant to CR 60.02 and reversed and remanded an order granting appellee's motion for attorney fees. The Court first held that the circuit court did not err in determining the date the letter of credit expired independently from an amendment to the purchase and sale agreement between the parties. The Court next held that the circuit court did not err in concluding that appellee was entitled to draw on the letter of credit. The issuer was duty-bound to pay when appellee presented the documents specified in the letter of credit, not when it complied with the underlying agreement. If appellee improperly certified to the issuer that it complied with the underlying agreement, appellants were not precluded from bringing a breach of contract claim against appellee. The Court then held that the circuit court properly refused to grant appellants' motion seeking relief pursuant to CR 60.02. The issue raised in the motion was the proper subject of a CR 59.05 motion. Failure to timely file a CR 59.05 motion was a waiver of the arguments presented in the CR 60.02 motion. The Court finally held that the circuit court erred in awarding attorney fees to appellee. Because the circuit court confined its interpretation to the letter of credit, the attorney fees provision of the purchase and sale agreement did not provide a basis the award. As there was neither a contractual nor statutory authority for the award, nor any justifiable equitable grounds, the award was made in error.

IV. CRIMINAL LAW

A. Artis v. Commonwealth

[2010-CA-000437](#) 01/20/2012 2012 WL 162702

Opinion by Judge Wine; Judges Moore and Stumbo concurred. The Court affirmed a judgment of the circuit court entered after appellant entered a conditional guilty plea, reserving the right to appeal the denial of a motion to suppress evidence. The Court held that the trial court was correct as a matter of law in finding that although the search was illegal under the precedent set by *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed. 485 (2009), the "good faith" exception to the exclusionary rule was applicable. Pursuant to *Davis v. U.S.*, 131 S.Ct. 2419, 180 L.Ed. 2d 285 (2011), the "good faith" exception applied to the pre-Gant search incident to arrest. The Court rejected appellant's argument that the search was unconstitutional on state law grounds, as the Kentucky Constitution provided no greater protection than the Fourth Amendment to the federal constitution.

B. *Bowlin v. Commonwealth*

[2009-CA-001956](#) 01/06/2012 2012 WL 28676

Opinion by Judge Lambert; Judge Caperton concurred; Judge Keller concurred in result only. The Court denied a motion to dismiss the appeal as moot and vacated and remanded an order of the circuit court revoking appellant's conditional discharge and imposing a five-year sentence for appellant's conviction for flagrant nonsupport. The Court first held that even though appellant was released from prison on shock probation, he was still entitled to seek review of whether his conditional discharge was properly revoked. Even if the appeal were rendered moot by appellant's shock probation, the case fell squarely within the exception to the mootness doctrine. The Court then held that, based upon the holding in *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011), the trial court abused its discretion in revoking appellant's conditional discharge without making findings relative to the factors in *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

C. *Bucalo v. Commonwealth*

[2010-CA-000176](#) 01/27/2012 2012 WL 246245

Opinion by Senior Judge Lambert; Chief Judge Taylor and Judge Clayton concurred. The Court vacated and remanded a judgment of the circuit court entered on appellant's conditional guilty plea, reserving the right to appeal the denial of a motion to suppress evidence seized during a traffic stop. The Court held that because the police officers unreasonably prolonged the duration of the stop of appellant's vehicle by detaining her beyond the time needed to complete a citation for a traffic violation, the seizure was unconstitutional. The officers lacked reasonable suspicion to prolong the stop for purposes of conducting a drug dog sniff because there was insufficient evidence that appellant was engaged in drug-related activity. There was no evidence of anything suspicious about appellant's behavior when she was pulled over, no contraband or drug paraphernalia was seen in plain view in the vehicle and the only substantive evidence of criminal activity uncovered prior to the search was the drug paraphernalia found in the car of an individual who told police he was helping appellant move from one hotel to another.

D. *Johnson v. Commonwealth*

[2010-CA-000607](#) 01/20/2012 2012 WL 162704

Opinion by Judge Caperton; Chief Judge Taylor and Judge Clayton concurred. The Court reversed and remanded an order of the circuit court denying appellant's motion to dismiss the indictments against him, after which he entered a conditional guilty plea to various drug charges. The Court held that the trial court erred in denying the motion after finding that KRS 218A.240(1) provided the Attorney General's office with the authority to investigate. The Attorney General's power and authority to investigate and prosecute cases was defined by KRS 15.200. Because no one authorized by statute invited the Attorney General to participate in the investigation, the Attorney General and the UNITE officers

were without authority to initiate the investigation, which ultimately led to appellant's grand jury indictment.

E. Kerr v. Commonwealth

[2011-CA-000351](#) 01/27/2012 2012 WL 246454

Opinion by Judge Lambert; Judges Clayton and Dixon concurred. The Court affirmed a judgment of the circuit court entered subsequent to a jury verdict finding appellant guilty of second-degree robbery. The Court first held that the trial court did not commit any error in its explanatory comments prior to the start of the trial. Reviewing for palpable error, based on the holding in *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010), the Court next held that the jury instructions and the robbery instruction did not prevent the jury from reaching a unanimous verdict. The Court finally held that the trial court did not abuse its discretion in striking a juror for cause and in finding that the juror might lean toward the defense because, as a neighbor of defense counsel, there was a sufficient closeness or proximity between the two.

F. Lukjan v. Commonwealth

[2010-CA-001509](#) 01/13/2012 2012 WL 95556

Opinion by Judge Acree; Judge VanMeter concurred; Chief Judge Taylor concurred in result only. The Court reversed and remanded a judgment of the circuit court entered after a jury found appellant guilty of arson, burning personal property to defraud an insurer and committing a fraudulent insurance act over \$300. The Court held that the trial court improperly excused, on the basis of KRS 329A.015, appellant's witness presented as an expert on fire scene investigations. The statute did not prohibit a witness not licensed as a private investigator from providing testimony on the cause and/or origin of a fire. The Court further held that the error was not harmless when the result was that appellant's defense then had no expert opinion rebutting the evidence that arson was indeed the cause of the fire. The Court next held that the trial court improperly admitted the opinion testimony of three of the Commonwealth's expert witnesses without conducting a *Daubert* hearing or reviewing an adequate record to determine whether the expert testimony was reliable. The Court further held that the error was not harmless because without the testimony there was little direct evidence that the fire was the result of arson. The Court next held that admission of financial documents found in the trash outside appellant's business was proper. The fact that the documents were found in a trash can near a public walkway was supported by substantial evidence and the trial court correctly concluded that appellant had no expectation of privacy in the documents. The Court finally held that the trial court properly excluded a lightning-strike report on the basis that there was no foundation for its admission under the business records exception when there was no certification that the recordings were made by a person. The certification represented that the data was detected and recorded by sensors and therefore, the data was more akin to scientific, technical or specialized information, the admissibility of which was governed by KRE 702.

G. Raines v. Commonwealth

[2010-CA-001059](#) 01/27/2012 2012 WL 246637

Opinion by Judge Clayton; Judges Dixon and Lambert concurred. The court affirmed a judgment of the circuit court entered on appellant's conditional guilty plea to seven counts of incest, wherein he reserved the right to appeal whether the incest statute, as enacted in 2006, was applicable to the sexual contact between appellant and his adult step-daughter. The Court held that since the plain meaning of KRS 530.020, at the time appellant committed the acts for which he was indicted, did not include the victim's age as an element of the crime of incest, the primary element for incest was the relationship of the parties.

H. Saylor v. Commonwealth

[2010-CA-001705](#) 01/06/2012 2012 WL 28695

Opinion by Judge Lambert; Chief Judge Taylor and Judge Thompson concurred. The Court affirmed an order of the circuit court denying appellant's motion filed pursuant to RCr 11.42. The Court first held that the trial court's finding that additional character evidence would not have likely changed the jury's verdict was not clearly erroneous. The Court next held that the trial court properly denied, without an evidentiary hearing, appellant's claim that trial counsel was ineffective for failing to submit an EED defense to the jury. Based on an incomplete record, the Court assumed that the record supported the trial court's conclusion that an EED instruction was submitted. The Court next held that because appellant failed to present proof at the evidentiary hearing to support his claims that trial counsel was ineffective for failing to seek an intoxication instruction and for failing to prepare and present medical and scientific evidence regarding the victim's time of death, appellant waived the arguments on appeal. The Court next held that appellant's argument that he received ineffective assistance of counsel when trial counsel failed to object to the trial court's decision to withhold a ruling on appellant's motion for a directed verdict at trial was meritless. The Court finally held that the trial court did not err in denying appellant's claim of prosecutorial misconduct during jury deliberations without an evidentiary hearing. Absent some corroborating evidence that misconduct occurred, such an allegation could be refuted on the face of the record and did not warrant an evidentiary hearing.

I. Schweikert v. Commonwealth

[2010-CA-001936](#) 01/27/2012 2012 WL 246640

Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed an order of the circuit court denying appellant's motion for RCr 11.42 relief. The Court held that the trial court properly denied relief without an evidentiary and in finding that appellant's claims were refuted by the record. In reaching that conclusion, the Court first held that counsel was not ineffective for failing to seek suppression of a statement appellant made during a custodial interrogation when the record established that appellant waived his right to remain silent. The Court next held that trial counsel was not ineffective for failing to notify appellant of a plea offer from the Commonwealth when the

record established that no offer was made by the Commonwealth through the first day of trial and the only evidence offered merely established appellant's offer of a plea that would be acceptable to him, which was rejected by the Commonwealth. The Court next held that trial counsel was not ineffective for failing to object or request corrective action regarding introduction of testimony about a drug purchase and drugs found in appellant's residence when the record showed that appellant continually raised the drug issue on his own. The Court next held that counsel was not ineffective for failing to object to statements made during closing argument when on direct appeal the Supreme Court found no error in the closing argument. The Court finally held that trial counsel was not ineffective in failing to investigate or subpoena telephone records to impeach the victim's testimony when appellant failed to establish that counsel's actions were deficient or that he was prejudiced as a result.

J. West v. Commonwealth

[2010-CA-001477](#) 01/20/2012 2012 WL 162763

Opinion by Judge Clayton; Judges Stumbo and Thompson concurred. The Court vacated and remanded a judgment entered upon appellant's conditional guilty plea to one count of first-degree possession of a controlled substance, first offense. The Court held that the trial court erred in denying appellant's motion to suppress evidence discovered during a routine traffic stop. Appellant's Fourth Amendment rights were violated when the police officer asked appellant to step from his car, after ascertaining that there were no warrants or other problems relating to appellant or his passengers. The subsequent detention based on the officer's curiosity about a passengers' unusual attire, the fact that the passenger did most of the talking and lied about where they were coming from, did not give rise to a reasonable and articulable suspicion of criminal activity to justify asking appellant to step out of the vehicle.

V. EMPLOYMENT

A. Beavers v. City of Berea

[2010-CA-001522](#) 01/06/2012 2012 WL 28690

Opinion by Judge Wine; Chief Judge Taylor concurred; Judge Caperton dissented by separate opinion. The Court affirmed an order of the circuit court granting summary judgment against appellant on his claims of wrongful discharge and due process violations following his termination as a police officer. The Court held that because appellant's termination resulted from an internal police investigation without a citizen complaint, the provisions of KRS 15.520 did not apply.

B. Jackson v. JB Hunt Transport, Inc.

[2010-CA-001487](#) 01/13/2012 2012 WL 95553

Opinion by Judge Acree; Judges Moore and Nickell concurred. The Court affirmed a summary judgment in favor of the appellee employer on the appellant employee's claims alleging that his termination violated the employer's substance use/abuse policy and its voluntary assistance program. The Court first

held that the circuit court properly concluded that 49 C.F.R. § 382.121 did not create a private right of action under either state or federal law and therefore, any claims of wrongful discharge, breach of contract and promissory estoppel based on the regulation must fail. The Court next held that the circuit court did not err in granting summary judgment on appellant's claims. Appellant was discharged for failure to comply with the substance use/abuse policy and voluntary assistance program, including the expectations of a treatment facility; the documents appellant claimed constituted an employment contract expressly disclaimed such a relationship and therefore, appellant should have expected that his employment was at-will and terminable at any time for any reason; and appellant did not detrimentally rely on promises from the employer to give rise to a promissory estoppel claim and even if the voluntary assistance program could give rise to such a claim, appellant's self-reporting was not the cause for his termination but rather, it was a positive drug test after the time he began his participation in the program. Because appellant had no employment security to begin with, his position relative to the employer did not change by his self-reporting his drug use.

VI. PROPERTY

A. Henninger v. Brewster

[2010-CA-001110](#) 01/13/2012 2012 WL 95431

Opinion by Judge Acree; Judges Clayton and Wine concurred. The Court affirmed a summary judgment in favor of appellee on appellants' declaratory judgment action, filed pursuant to KRS 418.040, seeking a declaration that they were the legal owners of a portion of property upon which appellee's mobile home was located. The Court held that the circuit court did not err in finding that a deed conveying property to appellants was void as champertous under KRS 372.070(1), to the extent of a portion of the property adversely possessed by appellee. In so concluding, the Court held that appellee's uncontradicted affidavit provided sufficient evidence that her possession of the part of the lot in question was hostile and that she did not have permission to place the mobile home on that portion of the lot and that she did so under a claim of right, believing she owned the property. The Court also held that appellants had an adequate amount of time to produce evidence contradicting or refuting the affidavit. The Court also held that the property owner's knowledge that a third party was adversely holding possession of property, standing alone, did not negate the "hostile" element. The Court finally held that appellee's mistaken belief as to the property line did not prevent her claim from being adverse.

VII. TORTS

A. Nichols v. Hazelip

[2010-CA-002168](#) 01/13/2012 2012 WL 95569

Opinion by Judge VanMeter; Judges Keller and Stumbo concurred. The Court affirmed a judgment entered after a jury rendered a verdict in favor of appellees, finding that appellant was the initial aggressor in an altercation on a golf course. The Court first held that the trial court did not err by denying appellant's motion

for a directed verdict on appellee's counterclaim for assault. Physical contact was not required to recover for fright or other mental suffering caused by an assault and if the jury believed the evidence warranted it, damages based on appellee's mental suffering were appropriate under the circumstances. The Court next held that trial court did not err by denying appellant's motion for a directed verdict and submitting appellee's assault claim to the jury. While there was conflicting evidence, evidence was presented to support a finding that appellant was the initial aggressor. The Court next held that the trial court did not err by denying appellant's motion for JNOV or for a new trial wherein he argued that the jury's award was excessive. Based on the evidence, the trial court correctly found that the award was not influenced by passion or prejudice. The Court next held that the trial court did not err in denying appellant's motion for a new trial based on the questioning of a defense witness about appellant's insurance coverage and questioning appellant regarding prior psychiatric care, when appellant failed to address how either question resulted in prejudice so as to affect his substantial rights. The Court next held that the trial court did not abuse its discretion in granting both appellees four peremptory strikes under CR 47.03. The trial court properly considered the relevant factors in determining that appellees maintained antagonistic interests. The Court finally held that the trial court did not err in granting appellees' motion to exclude damages related to appellant's shoulder injury. Based on the evidence before it, the jury unanimously found appellant to be the aggressor and therefore, not entitled to any recovery. Thus, there was no likelihood that the jury would have awarded appellant damages and any error in this regard was harmless.

B. *Rogers v. Integrity Healthcare Services, Inc.*

[2010-CA-001876](#) 01/27/2012 2012 WL 246639

Opinion by Judge Lambert; Judges Caperton and Keller concurred. The Court affirmed a summary judgment in favor of appellee on appellant's medical malpractice claims. The Court held that the circuit court did not err in granting appellee's motion for summary judgment or in denying appellant's motion to set it aside. The Court first held that appellant waived the issue of whether the circuit court correctly relied upon prior caselaw in concluding that affidavits, which contradicted appellant's answers to interrogatories, could not be submitted for the purpose of attempting to create a genuine issue of material fact, when appellant failed to raise the argument before the trial court. The Court next held that appellant also waived any argument that his interrogatory answers were not entirely inconsistent with the subject affidavit. Moreover, the argument lacked merit. The Court next held that that appellant had ample time to produce expert witnesses to support his cause of action and to sustain his burden of proof. Because he failed to do so, appellee was entitled to summary judgment as a matter of law. The Court finally held that the circuit court did not abuse its discretion in denying the motion to set aside the summary judgment when the motion did nothing more than reassert the same arguments made in challenging the motion for summary judgment. Although the circuit court cited to CR 60.02, rather than to CR 59.05, its decision was otherwise sound.