

**PUBLISHED OPINION CASE SUMMARIES  
KENTUCKY COURT OF APPEALS  
JULY 2009**

**I. CIVIL PROCEDURE**

**A. *Delahanty v. Commonwealth***

[2008-CA-000580](#) 07/31/2009 2009 WL 2341518

Opinion by Judge Thompson; Judges Acree and Taylor concurred. The Court affirmed an order of the circuit court granting a writ prohibiting a district court judge from enforcing a verbal and written directive prohibiting the county attorney and his assistants from making objections to defense counsel's questions during preliminary hearings to establish probable cause to detain a defendant pending indictment. The Court first held that the circuit court had jurisdiction to consider the writ pursuant to controlling precedent, CR 81, SCR 1.040(6) and KRS 23A.080(2). The Court next held that KRS 23A.080(2) was constitutional and did not impermissibly amend Section 112 of the Kentucky Constitution. The Court then held that summons was not required to be issued to commence the original action and to confer personal jurisdiction over the judge. The Court then held that the threat of contempt was a sufficient legal interest to confer standing on the county attorney. The Court ultimately held that the writ was properly issued as the directive preventing county attorneys from advocating on behalf of the Commonwealth without being subject to the penalty of contempt resulted in an irreparable injury without an adequate remedy by appeal. The Court rejected the argument that objections were not sustainable during a preliminary hearing as objections on the basis of relevancy and competency were viable and sustainable. The blanket "standing" objection did not serve the purpose of preserving for appellate review the factual and legal foundations for objections. The Court finally rejected the argument that the directive was a "general policy" as opposed to a "rule" and that on that basis alone it was invalid because the district court lacked authority to promulgate it.

**B. *First Horizon Home Loan Corporation v. Barbanel***

[2008-CA-000083](#) 07/02/2009 2009 WL 1884397

Opinion by Judge Acree; Judge Nickell and Senior Judge Knopf concurred. The Court affirmed an order of the circuit court denying appellants' motion to set aside a default judgment. The Court held that the trial court did not abuse its discretion when it determined that appellants failed to demonstrate good cause, as required by CR 55.02 and set forth in CR 60.02, for their failure to answer appellee's complaint. Appellants' carelessness in their handling of the complaint, couched as good cause, was insufficient to explain why they failed to timely file their answers.

## II. CORPORATIONS

### A. *Daniels v. CDB Bell, LLC*

[2007-CA-001608](#) 07/17/2009 2009 WL 2059079

Opinion by Judge Clayton; Chief Judge Combs and Judge Caperton concurred. In an appeal and cross-appeal, the Court affirmed a trial court order granting a directed verdict in favor of appellants on appellees' claims for fraud and punitive damages and reversed a judgment imposing personal liability on investors in a corporation pursuant to a jury verdict finding that the corporate veil should be pierced. The Court first held that the trial court erred in submitting the question of whether the corporate veil should be pierced to the jury. The decision to pierce the corporate veil was an equitable one to be decided by the trial court and not a jury. The Court then held that appellees failed to show appellants exercised control or actively participated in harming appellees in order to support an "instrumentality theory" to justify pierce the corporate veil. The Court then held that appellees did not lack standing to pursue a default judgment because they adequately listed the judgment to allow the trustee in bankruptcy to decide not to pursue collection of the debt. The Court finally held that the trial court did not err in granting appellants' motion for directed verdict on the fraud claims when there was no evidence establishing that appellants had any knowledge of the questionable activities of the corporation's president in defrauding appellees.

## III. CRIMINAL LAW

### A. *Bhattacharya v. Commonwealth*

[2008-CA-000783](#) 07/31/2009 2009 WL 2341537

Opinion by Judge Moore; Judge Wine and Senior Judge Henry concurred. The Court affirmed an order of the circuit court affirming a district court judgment convicting appellant of operating a motor vehicle under the influence, first offense, and operating on a suspended license. Appellant entered a conditional guilty plea reserving the right to appeal the denial of his motion to suppress the results of his blood alcohol test. The Court ultimately held that the district court properly denied the motion to suppress. The Court first held that the arresting officer did not interfere with appellant's right to contact and communicate with an attorney, in violation of KRS 189A.105(3), by insisting on dialing the telephone numbers for the attorneys appellant wanted to call. The Court then held that the arresting officer did not interfere with appellant's right to use all available channels to contact an attorney by only providing him with a local telephone book to find an attorney or by keeping the telephone from appellant.

### B. *Breeden v. Commonwealth*

[2008-CA-000243](#) 07/17/2009 2009 WL 2059424

Opinion by Judge Stumbo; Judges Keller and VanMeter concurred. The Court affirmed an order of the circuit court denying appellant's motion for a hearing to determine if he was receiving proper psychiatric treatment in accordance with his plea of guilty but mentally ill. The Court held that while KRS 504.150 required

appellant to be provided with necessary psychiatric treatment, his motion for post-conviction relief was not proper. Rather, the appropriate remedy was a complaint for a writ of mandamus to the Department of Corrections to enforce the statute.

**C. *Pitcock v. Commonwealth***

[2007-CA-002014](#) 06/12/2009 2009 WL 2341428

Opinion by Senior Judge Knopf; Judges Dixon and Keller concurred. The Court affirmed a judgment of the circuit court sentencing appellant to two years of imprisonment for his conditional guilty plea to one count of unlawful possession of methamphetamine precursor, reserving the right to appeal the denial of his motion to suppress evidence. The Court ultimately held that the trial court properly denied the motion to suppress evidence discovered when detectives checked the pharmacy logs pursuant to KRS 218A.1446, which requires anyone purchasing products containing pseudoephedrine to show a government issued identification and to sign a store log. The Court first held that, given the prevalence and severity of methamphetamine production and its effect on both individuals and society, the statute prohibiting the purchase of more than nine grams of a product containing pseudoephedrine in a thirty-day period was neither constitutionally unreasonable nor arbitrary. The Court then held that appellant had no proprietary interest in the records of the pharmacy and therefore, his argument that the statute only served a law enforcement purpose was without merit. The Court finally held that the purchase of over-the-counter pharmaceuticals was not health information intended to remain protected and therefore, the trial court did not err in finding that appellant failed to show an expectation of privacy so as to confer standing to challenge the evidence submitted.

**D. *Washington v. Commonwealth***

[2007-CA-001404](#) 07/24/2009 2009 WL 2192171

Opinion by Judge Wine; Judges Nickell and Stumbo concurred. The Court reversed and remanded for a new trial appellant's conviction for robbery in the second degree and being a persistent felony offender in the first degree. The Court held that the trial court erred by allowing the Commonwealth to advance improper racial arguments at trial when the prosecutor used guesswork to arrive a racial population statistics in order to make the question of appellant's guilt or innocence one of "odds." The state interest was not compelling when the prosecutor could have easily relied on other evidence and the jurors were free to look at the pictures introduced to determine whether they thought the suspect was appellant. Attempting to sway the jury to convict appellant based upon "odds" rather than the reasonable doubt standard was unnecessary and improper. The Court also held that the testimony by a police officer that another officer made an identification was not improper hearsay when it was used to explain the subsequent actions of the police in response to defense counsel's arguments suggesting that local police did not undertake a legitimate investigation.

#### IV. EDUCATION

A. *Newport Independent School District v. Commonwealth*

[2008-CA-001615](#) 07/24/2009 2009 WL 2192773

Opinion by Senior Judge Harris; Judges Acree and Lambert concurred. The Court affirmed an order of the circuit court upholding the constitutionality of KRS 160.350 and dismissing appellants' declaratory judgment petition. The Court first held that the statute, which requires a superintendent of schools to establish residency in Kentucky after hire, imposed a constitutionally permissible residency requirement. The Court also held that the statute did not deny the superintendent equal protection of law as the rationale proffered by the Commonwealth, that a Kentucky resident would have a better comprehension of Kentucky's educational needs, was a rational basis for the residency requirement.

#### V. FAMILY LAW

A. *Fedders v. Vogt-Kilmer*

[2008-CA-000450](#) 07/31/2009 2009 WL 2341495

Opinion by Senior Judge Guidugli; Judges Stumbo and Thompson concurred. The Court vacated and remanded an order of the family court extending an original domestic violence order (DVO) for three years. The Court held that because the DVO had expired prior to the filing date of the motion to extend it, the family court did not have jurisdiction to extend it pursuant to KRS 403.270 but could only consider a new petition.

B. *Lawson v. Lawson*

[2008-CA-000824](#) 07/17/2009 2009 WL 2059450

Opinion by Judge Lambert; Judges Acree concurred; Senior Judge Harris concurred in result only by separate opinion. The Court affirmed an order of the circuit court denying a motion brought pursuant to CR 60.02(f) to set aside a portion of a divorce decree. The Court first held that the trial court did not abuse its discretion in finding that appellant failed to bring the motion within a reasonable time when it was brought eleven months after the decree, the case involved an expedited divorce and appellant immediately utilized the benefits conferred upon her under the agreement. The Court then held that the trial court did not abuse its discretion in ruling that appellant's claims of fraud, intimidation and mental incompetence were unsubstantiated when her actions indicated the opposite and her attorneys explained in writing to her the risks in accepting the agreement in lieu of conducting discovery into appellee's assets.

C. *Stipp v. St. Charles*

[2008-CA-000400](#) 07/02/2009 2009 WL 1884435

Opinion by Judge Acree; Judge Nickell and Senior Judge Knopf concurred. The Court affirmed orders of the family court denying a motion requesting a transfer on grounds of improper venue, distributing marital assets, awarding maintenance,

ordering continued health insurance coverage and allocating the parties' income tax refund in a dissolution of marriage action. The Court first held that the family court did not abuse its discretion in denying the motion to transfer. Appellee waived objection to improper venue by filing the petition and appellant's failure to assert the defense of improper venue or to timely file a motion pursuant to CR 12.01, constituted a waiver of his objection to venue. Further, appellant evidenced a waiver of any objection by choosing to proceed in the venue and availing himself of the court's time and judicial resources. The Court then held that the trial court did not abuse its discretion in distributing the marital assets, awarding maintenance to appellant after considering the factors set forth in KRS 403.200(2)(a)-(f), shortening the period appellee was required to pay appellant's health insurance premiums based on the length of COBRA coverage under appellee's plan, or in allocating a tax refund to pay for the parties' child's tuition and medical care for inpatient counseling and treatment.

## VI. PROPERTY

- A. *Johnson v. Environmental and Public Protection Cabinet*  
[2008-CA-000151](#) 05/15/2009 2009 WL 1348470 Released for publication  
Opinion by Judge Dixon; Judge Moore and Senior Judge Knopf concurred. The Court affirmed an order of the circuit court affirming a final order of the Environmental and Public Protection Cabinet granting a mine permit to a coal company authorizing both surface mining and underground mining. The Court held that the lease agreement from less than all co-owners of the property was sufficient to satisfy the statutory and regulatory requirements for the issuance of a surface mining permit. The Court also held that Kentucky does not make a distinction between surface and mineral interests when construing the mutual rights, duties and liabilities of cotenants. The Court rejected appellants' reliance on the Broad Form Deed Amendment, Ky.Const. §19(2), because the terms of the lease gave the coal company the right to mine coal, not an application of a broad form deed. The Court finally held that neither the trial court nor the Court of Appeals could review the issues of whether the actions of the cotenants and the coal company amounted to an ouster or that the strip mining proposed constituted waste as a matter of law. Pursuant to KRS 452.400(4), actions dealing with injury to real property must be brought in the county where the land was situated and were not within the jurisdiction of Cabinet or the circuit court reviewing the grant of a mine permit.

## VII. TORTS

- A. *D'Angelo v. Mussler*  
[2008-CA-001003](#) 05/29/2009 2009 WL 1491390  
Opinion by Judge Moore; Judge Dixon and Senior Judge Knopf concurred. The Court affirmed a summary judgment of the circuit court in favor of the appellee attorney on appellant's claim alleging wrongful use of civil proceedings. The Court held that the trial court properly found that appellee did not lack probable cause for

the basis of a medical malpractice claim against appellant, although it was later voluntarily dismissed with prejudice.

**B. *Industrial Risk Insurers v. Giddings & Lewis, Inc.***

[2007-CA-002163](#) 07/02/2009 2009 WL 1884386 DR Pending  
Opinion by Judge Keller; Judges Clayton and Lambert concurred. The Court affirmed in part, reversed in part, and remanded a circuit court order granting summary judgment to appellees on appellants' tort claims related to damage to a lathe, material handling system and vertical machining centers manufactured by appellees. The Court held that the circuit court correctly determined that the Economic Loss Rule applies in Kentucky and that the destructive or calamitous exception to the Economic Loss Rule does not apply in Kentucky. The claims arising out of negligence and breach of warranty were contractual in nature and thus, were barred by the Economic Loss Rule. However, the claims arising out of negligent misrepresentation and fraud arose out of common law tort theories and did not fall within the rule. The Court then held that the trial court erred in concluding, as a matter of law, that the lathe, vertical machining centers and material handling system were one product and that, considering the evidence, this was a question of fact for a jury. The Court next held that, to the extent any service contract existed, any claims by appellants related to misrepresentation or fraud could be addressed in conformity with the holdings regarding the Economic Loss Rule. The Court finally held that appellants might be able to recover damages related to any other equipment or to its facility to the extent it could prove such damages.

**C. *Peters v. Wooten***

[2007-CA-001955](#) 07/17/2009 2009 WL 2059085  
Opinion by Judge Moore; Judge Acree and Senior Judge Knopf concurred. The Court affirmed a verdict and judgment for the defense after a jury trial in a personal injury case arising from an automobile accident. The Court first held that the trial court erred in ordering discovery of appellants' Social Security disability application. The Court then held that, although the error occurred, the trial court did not abuse its discretion in overruling appellant's objection to the evidence at trial when the records were used only to point out inconsistencies in appellant's prior testimony regarding his work history and did not reference appellant's attempt to collect benefits or disclose the name of the agency. The Court next adopted the "financial hardship" exception to the collateral source rule and held that the trial court did not abuse its discretion in allowing appellee's attorney to question appellant regarding collateral source benefits when appellant's wife opened the door by testifying that appellant did not seek medical treatment due to financial hardship. The Court also held that the probative value of not leaving the impression with the jury that appellant lacked monetary means to seek medical treatment outweighed any prejudice produced by the evidence. The Court next held that the trial court did not err in refusing to give a jury instruction allowing an award of damages resulting from the aggravation of a pre-existing injury when the court provided a broad instruction consistent with case law. The Court finally held that the trial court did not err in denying appellant's motion for a judgment notwithstanding the verdict as

appellant's testimony was subject to a credibility determination by the jury and there was nothing to suggest the verdict was palpably or flagrantly against the evidence such that it indicated the jury reached the verdict as a result of passion or prejudice.

## VIII. WILLS AND ESTATES

### A. *Fisher v. Gray*

[2008-CA-000171](#) 07/02/2009 2009 WL 1884425 DR Pending

Opinion by Judge Keller; Judge Wine concurred; Senior Judge Lambert dissented by separate opinion. The Court affirmed a summary judgment of the circuit court entered in favor of one of three sisters in an original action filed pursuant to KRS 394.240, asserting that their father's holographic will was a conditional will and that it was without effect because the condition did not occur. The Court held that the trial court did not err in relying upon extrinsic evidence or in concluding that the instrument was conditional and that the condition did not occur. Extrinsic evidence was admissible to prove the circumstances surrounding the execution of the will to construe the language that the will was "written in case of emergency," where the disposition of the estate was unnatural. The Court then held that the trial court did not err in finding that the father intended the will to be conditional upon his death due to an emergency during an upcoming surgical procedure. Therefore, the trial court did not err in when it found, as a matter of law, that the father died intestate when he died eight years later from lung cancer, allowing all three sisters to share equally in their father's estate.

## IX. WORKERS' COMPENSATION

### A. *Max & Erma's v. Lane*

[2009-CA-000528](#) 07/24/2009 2009 WL 2217530

Opinion by Judge Moore; Judge Nickell and Senior Judge Harris concurred. The Court affirmed an opinion of the Workers' Compensation Board reversing and remanding a decision of an ALJ denying an award of future medical treatment. The Court held that the Board did not err in reversing the ALJ's ruling that the worker was not eligible for an award of future medical benefits and correctly determined that KRS 342.020(1) obligated the employer to pay for any reasonable and necessary medical treatment for her permanent disability.