

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

I. ADMINISTRATIVE LAW

A. Thomas v. Haney

[2010-CA-001026](#) 7/8/11 2011 WL 2693520

Opinion by Judge Moore; Judges Caperton and Stumbo concurred. The Court reversed and remanded a circuit court order dismissing appellant's petition for declaration of rights arising out of a prison disciplinary proceeding. The Court held that the circuit court erred in dismissing the petition because there was no evidence supporting the decision of the disciplinary review board as required by *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985). No evidentiary basis was provided to the trial court to support the prison officer's report and the adjustment committee's determination that a confidential informant was credible and that appellant assaulted another inmate. The information from the confidential informant(s) should have been filed under seal as part of the trial court record in order to provide a meaningful review because without the information, there was no evidence in the record supporting the credibility of the disciplinary charge against appellant. The Court was not permitted to rely on the unsupported conclusions written by the prison officer or the adjustment committee's review of the confidential informant(s) unknown to the courts.

II. CIVIL PROCEDURE

A. Statewide Environmental Services, Inc. v. Fifth Third Bank

[2009-CA-001143](#) 7/29/11 2011 WL 3207783

Opinion by Judge Acree; Judges Dixon and Keller concurred. The Court affirmed a default judgment entered against the corporate appellants and a summary judgment entered against the individual appellants as makers and guarantors on a single note in favor of the appellee bank. The Court first held the standard of review articulated in *Jeffrey v. Jeffrey*, 153 S.W.3d 849, 851 (Ky. App. 2004), was applicable on a default judgment when a party failed to move the circuit court to set it aside but instead appealed the default judgment directly. The Court was limited to determining whether the pleadings were sufficient to uphold the judgment and whether appellant was actually in default. The Court rejected the corporate appellants' argument that the standard of review in *PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, Inc.*, 139 S.W.3d 527 (Ky. App. 2003), was applicable. The Court then held that under *Jeffrey* the pleadings were sufficient to uphold the judgment when the pleadings stated all the elements of a cause of action for the collection of a note. The Court next held that the corporate appellants were actually in default, concluding that the corporations were not deprived of the opportunity to correct their deficient pleadings or to try to set aside the default judgments. Once the corporate appellants' deficient answers were stricken, the default judgment was properly entered under CR 55.01. The Court next held that the circuit court properly

entered summary judgment against the individual appellants when the individual appellants offered no opposition to the summary judgment motions and the allegations in the complaint averred a proper claim.

III. CONTRACTS

A. **Gill v. Washington Mutual Bank**

[2009-CA-001126](#) 7/1/11 2011 WL 2582506

Opinion by Judge Thompson; Judge Stumbo and Senior Judge Lambert concurred. The Court reversed and remanded a judgment of the circuit court overruling appellants' objections and exceptions to a master commissioner's report after concluding that appellants and the appellee bank did not reach an enforceable agreement for the assignment of a judgment, note and mortgage to appellants because there was no meeting of the minds. The Court held that, as a matter of law, the parties were bound by the stipulated oral agreement cited in the record. A third-party indemnification provision added to the written agreement was not a material term to be negotiated but rather, a provision that was not contemplated by the parties in their agreement.

B. **Martin v. Pack's Inc.**

[2010-CA-001048](#) 7/29/11 2011 WL 3207947

Opinion by Judge Thompson; Judge VanMeter and Senior Judge Isaac concurred. The Court affirmed a summary judgment in favor of a commercial and residential construction company on its claim to collect an outstanding debt on a construction contract. The Court held that the trial court did not err in finding that the individual company owners' conduct following their company's dissolution created personal liability for paying the outstanding debt. Appellant's agreement to pay the final payment on the construction project constituted a new debt. Before the company was dissolved it contracted to construct a gas station and the company was solely liable to pay upon completion of the project. However, when the company was dissolved, appellant requested and obtained the construction company's waiver of its right to file a lien upon the property for the purpose of securing its right to collect the final payment on the project. The agreement became enforceable as a new contract and debt obligation of the individual owners. The Court also held that the grant of summary judgment was not premature. In the two and one-half years between appellant's answer and the summary judgment, appellant had ample opportunity to obtain discovery and failed to produce evidence of a genuine issue of material fact to preclude summary judgment. The Court also held that the record clearly demonstrated that the corporation was dissolved and thus, appellant could not be shielded from personal liability because his authority was limited by KRS 14A.7-020(3). The Court also held that appellant was not shielded from personal liability by KRS 271B.14-050 and 271B. 6-220(2). Appellant continued to reach agreements in the years following the company's dissolution and established a 10-year payment plan and produced no affirmative evidence as to how that conduct constituted winding up the business. The Court declined to consider appellant's argument that he could not be

individually liable in an amount in excess of his equity in the corporation at the time his ownership terminated because appellant failed to cite where he preserved the argument for review. The Court finally held that any error in the circuit clerk's failure to timely mail appellant's counsel a copy of the summary judgment, thus precluding appellant from filing a motion to reconsider pursuant to CR 59.05, was harmless when appellant failed to show what he would have presented to the trial court which could not have been previously presented.

IV. CRIMINAL LAW

A. **Hadaway v. Commonwealth**

[2009-CA-001625](#) 7/22/2011 2011 WL 2937233

Opinion by Judge VanMeter; Judges Dixon and Lambert concurred. On discretionary review, the Court affirmed an opinion of the circuit court affirming a district court judgment entered after a jury found appellant guilty of DUI and possession of an open alcohol container in a motor vehicle. The Court held that the testimony of the police officers constituted substantial evidence to support the district court's conclusion that an officer observed appellant in accordance with KAR 8: 030 when the officer remained in the room to observe appellant for 26 minutes prior to administering a breath alcohol test. The Court then held that while the circuit court erred in admitting the breathalyzer test results, absent introduction of the maintenance log, testimony that appellant was observed driving erratically, appellant's failure of the field sobriety tests and a passenger's remarks to the police that he and appellant had consumed alcohol supported the DUI conviction even without the breath alcohol test results. Therefore, the unpreserved error did not result in manifest injustice.

B. **Harris v. Commonwealth**

[2008-CA-001342](#) 7/22/11 2011 WL 2935053

Opinion by Judge Lambert; Judges Caperton and Keller concurred. On remand from the Supreme Court of Kentucky for further consideration in light of the decision in *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2011), the Court affirmed a circuit court order denying appellant's RCr 11.42 claims for ineffective assistance of trial counsel for the reasons stated in the initial opinion, holding that appellant's claims had already been presented in his direct appeal to the Kentucky Supreme Court. The Court then held that while the trial court could have held the RCr 11.42 motion in abeyance pending the outcome of the direct appeal, it was not ineffective assistance of counsel for appellate counsel not to petition the Kentucky Supreme Court to hold the direct appeal in abeyance pending a ruling by the trial court on appellant's motion for post-conviction relief filed pursuant to RCr 11.42.

C. **Henderson v. Commonwealth**

[2010-CA-001491](#) 7/15/11 2011 WL 2731857

Opinion by Judge Combs; Judge Lambert and Senior Judge Shake concurred. The Court affirmed an order of the circuit court denying appellant's motion for relief pursuant to CR 60.02 wherein he argued that the amendment of his PFO

indictment was a violation of RCr 6.16. The Court held that the circuit court did not err in denying relief and that the unpublished opinion in *Miller v. Commonwealth*, 2009 WL 160583 (Ky. Jan. 22, 2009), did not affect the Supreme Court's previous decision that the amendment to the indictment was not improper. There was not a facial violation of RCr 6.16 and appellant could not show that he was prejudiced by the amendment. The amendment to appellant's indictment was related to a status offense, it was made after the verdict was returned on the substantive offenses but before the jury returned a verdict on the PFO charge, and the amendment did not change the offense charged in any way.

D. Jackson v. Commonwealth

[2010-CA-001450](#) 7/8/11 2011 WL 2899416

Opinion by Judge Lambert; Judge Combs and Senior Judge Shake concurred. The Court affirmed a judgment of the circuit court entered after a jury found appellant guilty of first-degree rape, first-degree wanton endangerment and illegal possession of drug paraphernalia and after appellant waived jury sentencing and agreed to a sentence of twelve-years' imprisonment. The Court first held that the trial court did not abuse its discretion by allowing hearsay testimony under the excited utterance exception to KRE 803(2). The victim's statements were given to the officer who testified immediately after the attack, the physical evidence supported the details she provided to police, the statements were given in close proximity to where the attack occurred, there was little or no time for the victim to fabricate the story, and the victim was clearly excited and upset when she gave her statement to the police. The Court next held that when appellant failed to move to suppress the victim's identification, the trial court was not required to hold an evidentiary hearing or enter any findings of fact thus, palpable error review under RCr 10.26 was precluded. The Court also held that the facts provided the police with probable cause to arrest appellant for possession of drug paraphernalia. Therefore, his arrest was not illegal, the victim's identification was not tainted and there was no possibility that the result of the trial would have been different. The Court finally held that the language of the jury instruction on the possession charge did not contain alternate theories of guilt. Further, because there was no evidence that appellant possessed any foil, the language included in the instruction was merely superfluous and any error was harmless.

E. Sands v. Commonwealth

[2009-CA-001824](#) 7/29/11 2011 WL 3207795

Opinion by Judge Wine; Judge Clayton concurred; Judge Combs concurred in part and dissented in part by separate opinion. The Court affirmed a judgment of the circuit court accepting appellant's *Alford* plea and denying appellant's motion to withdraw the guilty plea. The Court held that the trial court did not err in determining that appellant possessed the requisite competence to be prosecuted or to enter a plea. The record indicated that appellant was aware of the nature of the charges against him and that he was capable of providing

assistance to counsel. A psychiatrist detailed appellant's high intelligence scores, appellant's own writings to the court showing a sophistication of legal research and writing, the psychiatric evaluations emphasized that appellant was a malingerer with tendencies to be uncooperative by choice, and the court relied upon the professional evaluations rather than solely upon testimony from appellant or his attorney. The Court then held that the trial court did not err when it denied the motion to withdraw the guilty plea. The totality of the circumstances showed that the court and appellant had interacted over a four-year period, the court was familiar with appellant, the court relied heavily upon the classification of appellant as a malingerer, the court did not believe that appellant really needed the medication he claimed to be essential and the trial judge was in the best position to judge appellant's credibility.

F. Ward v. Commonwealth

[2010-CA-000732](#) 7/29/11 2011 WL 3209896

Opinion by Judge Lambert; Judges Dixon and VanMeter concurred. The Court affirmed a judgment of conviction and sentence entered subsequent to appellant's conditional guilty plea, reserving the right to appeal from an order denying a motion to suppress evidence. The Court held that the trial court did not err in denying the motion to suppress the drug evidence found in a warrantless search of appellant's car after he was stopped for a traffic violation. The thirty-three minutes that elapsed between the stop and arrest, with eight to ten of the minutes elapsing before the dog sniff began and another ten to fifteen elapsing before the dog alerted three times, was not an unreasonable delay and did not warrant suppression of the drugs discovered and seized.

V. EMPLOYMENT

A. Board of Trustees of the Kentucky Retirement Systems v. Haywood

[2010-CA-001204](#) 7/22/11 2011 WL 2935403

Opinion by Judge Keller; Judge Dixon concurred in result only; Judge VanMeter concurred in result only by separate opinion. The Court vacated, reversed and remanded an order of the circuit court reversing a Board of Trustees of the Kentucky Retirement System's finding that a worker did not qualify for disability retirement benefits. The Court first held that the circuit court erred in finding that the hearing officer's recommended order did not fully apprise appellee of her right to file exceptions because it did not warn appellee of the consequences for failure to file exceptions. The holding in *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004), was dispositive of the issue and the Court of Appeals was bound to follow it. The Court next held that the circuit court erred in finding that appellee was not required to file exceptions in order to preserve the issues because filing the exceptions would be an exercise in futility. The circuit court review was limited to the record and the circuit court could not use the Board's failure to produce evidence on the issue of futility that it was not obligated to produce. Because the record did not support the finding of futility, the finding must be vacated. The Court then held that because appellee failed to file the exceptions, the circuit court was precluded from addressing the issues

raised in the petition for review. The Court next held that the circuit court impermissibly shifted the burden of proof to the Board. Because appellee failed to meet her burden to prove her disability by a preponderance of the evidence, the Board was not required to put forth rebuttal evidence. The Court next held that the record did not support the circuit court's finding that the Board ignored evidence. The Court finally held that absent a valid constitutional challenge, removing the fact-finding authority from the Board, to avoid what the circuit court deemed an inherent conflict, was only within the purview of the legislature.

B. Kentucky Retirement Systems v. Lowe

[2010-CA-000835](#) 7/8/11 2011 WL 2693529

Opinion by Judge Wine; Judge VanMeter and Senior Judge Shake concurred. The Court affirmed an opinion and order of the circuit court overruling a decision of the Kentucky Retirement Systems Medical Review Board and directing disability retirement benefits be awarded to appellee. The Court held that the Board misconstrued applicable statutes and erred in its interpretation of the law when it concluded that appellee failed to present objective medical evidence to establish her disability. The opinions and conclusions of the treating physicians must be considered objective medical evidence for purposes of KRS 61.600 and the Board was not free to discount them merely because they were based in part upon the subjective complaints of a patient. Given the overwhelming evidence that appellee was disabled from her previous occupation, which was supported by the unanimous opinions of four treating physicians and one psychologist, the circuit court correctly overruled the decision of the Board.

C. West v. Kentucky Retirement Systems

[2009-CA-001176](#) 7/15/11 2011 WL 2731844

Opinion by Judge Wine; Judges Acree and Clayton concurred. The Court reversed and remanded an order of the circuit court affirming a denial of appellant's claim for disability retirement benefits by the Board of Trustees of the Kentucky Retirement Systems. The Court first held that the hearing officer erred in failing to consider the cumulative effect of appellant's various injuries and impairments. The Court next held that smoking could not be considered a pre-existing condition for the purposes of disability retirement in Kentucky. Therefore, the hearing officer erred in finding that appellant's tobacco use was a pre-existing condition to the ultimate diagnosis of COPD. The Court then held that KRS 61.600(3) required only that appellant come forward with some evidence that his condition did not predate his employment with the Commonwealth and that the Systems then bore the burden of going forward to rebut the evidence. Since the Systems offered no contrary medical evidence, the hearing officer erred by rejecting appellant's medical evidence.

VI. FAMILY LAW

A. **D.J.D. v. Cabinet for Health and Family Services**

[2010-CA-001184](#) 7/8/11 2011 WL 2693512

Opinion by Judge Thompson; Judge Stumbo and Senior Judge Shake concurred. The Court affirmed an order of the circuit court involuntarily terminating appellant's parental rights. The Court held that the family court was presented with substantial evidence to support the termination under KRS 625.090. Based on the record, the family court did not abuse its discretion by finding it was in the best interests of the child to terminate his mother's parental rights. Further, while the mother had not abused drugs for several months prior to the final hearing in the case, the family court was presented with sufficient facts that the mother had not provided for her child and had shown no ability to provide for the child in the near future.

B. **L.D. v. J.H.**

[2010-CA-000792](#) 7/1/11 2011 WL 2582557

Opinion by Judge Dixon; Judge Nickell and Senior Judge Shake concurred. The Court affirmed an order of the family court awarding permanent custody of appellant's son to the child's paternal grandparents. The Court first held that that mere compliance with a permanency plan did not equate to a legal proceeding under KRS 403.270. Further, substantial evidence supported the family court's finding that the paternal grandparents, with whom the child had been placed in dependency, neglect and abuse proceedings, provided a stable environment for the child. Therefore, they had standing to seek custody by virtue of KRS 620.027. The Court next held that appellees' cooperation with a permanency plan did not result in a waiver of their right to seek permanent custody of the child. The Court next held that the family court did not abuse its discretion in awarding permanent custody to appellees when it thoroughly analyzed all of the factors under both KRS 403.270(2) and KRS 620.023 in reaching its decision. The Court finally held that the family court did not err in refusing to permit the child to testify in chambers when the guardian *ad litem* was not properly served and appellant did not thereafter seek to have the child testify by deposition.

C. **Meekin v. Hurst**

[2010-CA-001641](#) 7/22/11 2011 WL 2935813

Opinion by Senior Judge Shake; Judges Dixon and Nickell concurred. The Court affirmed an order of the circuit court denying appellant's petition for primary residential custody of her daughter. The Court held that the trial court did not err in denying the request and disregarding a mediation agreement between the parties purporting to create a presumption that the child's wishes regarding her residence would constitute her best interests. The court could not abdicate the responsibility imposed by KRS 403.320(3) and the record contained ample evidence to support the court's findings and conclusions that the father was the most appropriate primary residential custodian.

VII. OCCUPATIONAL SAFETY

A. **David Gaines Roofing, LLC v. Kentucky Occupational Safety and Health Review Commission**

[2010-CA-001050](#) 7/1/11 2011 WL 2586285 DR Pending

Opinion by Judge Dixon; Judge Caperton and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court affirming an order of the Kentucky Occupational Safety and Health Review Commission affirming a citation to the appellant roofing company for a repeat/serious violation of a fall protection regulation and assessing a penalty. The Court held that the circuit court correctly affirmed the agency decision. The record contained substantial evidence to support the determination that appellant, with reasonable diligence, could have discovered its employees were not complying with the safety regulations.

VIII. PROPERTY

A. **City of Lebanon, Kentucky v. Goodin**

[2010-CA-000941](#) 7/15/11 2011 WL 2731853

Opinion by Chief Judge Taylor; Judges Acree and Combs concurred. The Court affirmed a summary judgment of the circuit court declaring invalid certain ordinances annexing unincorporated real property into a city. The Court held the circuit court properly granted summary judgment because the boundaries of the annexed property were not contiguous or adjacent to the boundaries of the city per KRS 81A.410(1)(a) and therefore, the annexation violated the statute.

B. **Tariq v. Worthington Glen Council of Co-Owners, Inc.**

[2010-CA-001610](#) 7/22/11 2011 WL 2935770

Opinion by Judge Combs; Judge Lambert and Senior Judge Shake concurred. The Court vacated and remanded an order of the circuit court finding that appellants violated provisions of condominium association's bylaws when they leased their condominium to a tenant. In a case of first impression, the Court held that because the amendment to the bylaws restricting leasing of condominiums was made without the proper percentage of owner approval, the association failed to state a cause of action against appellants. Therefore, the trial court's finding was clear error.

IX. TORTS

A. **Buckler v. Mathis**

[2010-CA-000828](#) 7/22/11 2011 WL 2937251

Opinion by Judge Lambert; Judge Keller and Senior Judge Shake concurred. The Court affirmed a judgment dismissing appellant's claim against appellee after a jury found that appellant had not met the \$1,000 statutory medical expense threshold required by KRS 304.39-060(2) on his claim for injuries he sustained in a motor vehicle accident. The Court first held that the trial court did not commit error in including in the jury instructions the threshold question of whether appellant's medical expenses were reasonably needed as a result of the motor vehicle accident. The Court also held that the instructions provided by the

trial court were in line with binding precedent as set forth in *Bolin v. Grider*, 580 S.W.2d 490 (Ky. 1979). The Court next held that the trial court did not err by attempting to educate the jury as to what it should do in relation to completing the instructions and verdict forms depending on what findings it made. The Court next held that the trial court correctly determined that appellee's objections to a doctor's deposition testimony were timely filed by operation of CR 6.01. The Court then held that trial court did not abuse its discretion in striking portions of the doctor's testimony, after which the court excluded appellant's claim for future medical expenses from the trial. The doctor qualified his opinion on the permanency of appellant's claimed injuries to the performance of a current physical examination, which never occurred, even after the trial court permitted appellant to take additional testimony from the doctor regarding permanency.

B. Faller v. Endicott-Mayflower, LLC

[2008-CA-001506](#) 7/1/11 2011 WL 2582339 DR Filed

Opinion by Judge Nickell; Chief Judge Taylor and Judge Combs concurred. On remand from the Kentucky Supreme Court to consider the matter under *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), the Court again affirmed a summary judgment in favor of appellees on appellant's claims related to injuries she sustained when she fell while leaving a restaurant. The Court distinguished the facts in *McIntosh* and held that appellant was not foreseeably distracted nor did a third party push her into danger. Therefore, the trial court's award of summary judgment was proper. Unlike *McIntosh*, appellant tripped over the threshold marked with yellow- and black-striped caution tape while leaving a restaurant following a leisurely holiday meal. She admitted being familiar with the threshold, having traversed it on prior occasions, and admitted she would not have fallen had she been looking in the direction she was walking.

X. WILLS AND ESTATES

A. Hoskins v. Beatty

[2010-CA-000677](#) 7/1/11 2011 WL 2582554

Opinion by Judge VanMeter; Judges Dixon and Stumbo concurred. The Court affirmed in part and reversed and remanded in part a judgment of the circuit court finding that the appellee estate and heirs could recover certain property, as well as accrued interest and earnings from the property, they claimed passed to them upon the life tenant's death. The Court first held that the trial court correctly concluded that the heirs were entitled to the property and while the life tenant had the unlimited power to use and consume the estate property during her lifetime, she could not make a testamentary disposition of the remaining property to appellant. The Court then held that the trial court erred in concluding that the heirs were entitled to the cash dividends and interest earned during the time of the life estate. Absent a limitation imposed by the grantor, the life tenant was entitled to the income or benefits accrued during the life estate. The Court remanded to the circuit court to make further factual findings to

determine the amount of property or principal remaining in the estate at the time of the life tenant's death.

B. Smith v. Smith

[2010-CA-000823](#) 7/1/11 2011 WL 2585925 Rehearing Pending
Opinion by Judge VanMeter; Judges Dixon and Stumbo concurred. The Court reversed an order of the circuit court finding that the execution of a purported will substantially complied with KRS 394. 049. The Court held that the document, which was not wholly in the handwriting of the testator, could not be admitted to probate when two persons actually observed the testator subscribing the document but only one subscribed her name to the document as a witness.

XI. WORKERS' COMPENSATION

A. Audi of Lexington v. Elam

[2010-CA-002038](#) 7/8/11 2011 WL 2693503
Opinion by Judge Combs; Judges Thompson and VanMeter concurred. The Court affirmed an opinion of the Workers' Compensation Board directing an ALJ to enter an order awarding benefits consistent with a permanent, partial disability rating substantially higher than the rating originally assigned by the ALJ. The Court held that the Board did not overlook or misconstrue controlling statutes or precedent in concluding that the ALJ's calculation was erroneous. The Board properly determined that the worker should have been awarded permanent, partial disability benefits based on the higher impairment rating after subtracting the worker's pre-existing, active impairment rating from his overall impairment rating. The ALJ was not at liberty to assume a doctor's analysis that the portion of the worker's permanent impairment rating attributable to his pre-existing impairment progressed at a rate commensurate with that portion of his impairment attributable to the work-related injury when there was no medical testimony to support the assumption.