

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

**I. ARBITRATION**

**A. Medcom Contracting Services, Inc. v. Shepherdsville Christian Church Disciples of Christ, Inc.**

[2006-CA-002536](#) 06/26/2009 2009 WL 1811080

Opinion by Judge Taylor; Judges Caperton and Nickell concurred. The Court affirmed an order of the circuit court denying appellants' motions for summary judgment on counterclaims seeking confirmation of an arbitration award. The Court first held that the order was final and appealable because it did not merely deny the motions for summary judgment but also dismissed the counterclaims and thus, constituted adjudication on the merits of the counterclaims. The Court then held that the termination of the arbitration for nonpayment of fees did not constitute an arbitration award under KRS 417.120. Because no award was made by the arbitrator, appellee was not obligated to challenge the termination of the proceedings under KRS 417.160. Further, because appellee attempted to get reconsideration of the termination, it accrued no prejudice or *res judicata* effect legally sufficient to preclude it from filing the action seeking a judicial legal remedy.

**B. Valued Services of Kentucky, LLC v. Watkins**

[2008-CA-001204](#) 06/19/2009 2009 WL 1705696 DR Pending

Opinion by Senior Judge Buckingham; Judges Caperton and Stumbo concurred. The Court affirmed an order of the circuit court denying a motion to compel arbitration made by a check-cashing company and two of its employees on a false imprisonment action filed by appellee after an employee locked him in the business for over an hour when he told the employee he was unable to repay the loan on that day. The Court held that the arbitration provision was unconscionable because it encompassed an intentional tort with so little connection to the underlying agreement that it could not have been foreseen by appellee when he signed the agreement.

**II. CIVIL PROCEDURE**

**A. Harris v. Camp Taylor Fire Protection District**

[2008-CA-000460](#) 06/12/2009 2009 WL 1634885 DR Pending

Opinion by Judge VanMeter; Judge Nickell and Senior Judge Graves concurred. The Court affirmed an order of the circuit court finding that it lacked jurisdiction to award attorneys' fees in a whistleblower action under KRS 61.102, *et. seq.*. The Court held that the circuit court did not retain jurisdiction to award attorney's fees and costs on a motion filed more than thirty days after entry of the final judgment.

**B. Nolan v. Neely-Thoms**

[2008-CA-001046](#) 06/05/2009 2009 WL 1562959 Released for publication  
Opinion by Chief Judge Combs; Judge Thompson and Senior Judge Buckingham  
concurred. The Court affirmed an order of the circuit court dismissing with  
prejudice a personal injury action against appellee. The Court held that the trial  
court did not abuse its discretion by dismissing the complaint pursuant to CR  
41.02(1), as a result of appellant's pattern of dilatory pretrial practice producing  
numerous unreasonable delays resulting in a prejudicial burden for appellee. In light  
of appellant's refusal to assume control of the action, coupled with her pattern of  
totally ignoring orders of the trial court, the circuit court had no alternative other  
than dismissal.

**III. CRIMINAL LAW**

**A. Gamble v. Commonwealth**

[2008-CA-000015](#) 06/05/2009 2009 WL 1562881  
Opinion by Senior Judge Buckingham; Chief Judge Combs and Judge Acree  
concurred. The Court affirmed an order of the circuit court revoking appellant's  
conditional discharge of a five-year prison term for the criminal offense of flagrant  
nonsupport. The Court first held that money owed for past-due child support  
constituted "restitution" as defined by KRS 532.350(1)(a), and therefore, before  
probation or conditional discharge could be revoked based on a failure to pay, the  
requirements of *Bearden v. Georgia*, 461 U.S. 600, 103 S.Ct. 2064, 76 L.Ed.2d 221  
(1983), must be met. Thus, the trial court was required to determine appellant's  
reasons for failure to pay. However, Commonwealth was not required to prove the  
reasons appellant failed to make such payments and because appellant asserted a  
Fifth Amendment privilege against self-incrimination in the probation revocation  
hearing in response to questions concerning why he had not paid past-due child  
support, he effectively precluded the trial court from making the relevant inquiry.  
The Court then held that the trial court's findings of fact were sufficient to meet the  
minimal due process requirements applicable to a probation revocation hearing.  
Appellant was given notice of the single reason for the revocation hearing, was  
present to hear the evidence and the oral comments of the trial judge following the  
hearing, and understood that his probation was revoked due to his failure to pay  
child support. Therefore, the trial court did not abuse its discretion in revoking  
appellant's probation.

**B. Hamilton-Smith v. Commonwealth**

[2007-CA-002110](#) 04/03/2009 2009 WL 874780 Released for publication  
Opinion by Judge Clayton; Judges Acree and Keller concurred. The Court affirmed  
an order of the circuit court requiring appellant to register as a sex offender for a  
period of twenty years after he pled guilty to one count of possession of matter  
portraying a sexual performance by a minor, in violation of KRS 531.335. The  
Court held that because appellant committed a criminal offense against a victim who  
was a minor, which included any offense involving a minor or depiction s of a minor

as set forth in KRS Chapter 531, he was required to register pursuant to KRS 17.510.

**C. Lisle v. Commonwealth**

[2007-CA-002240](#) 06/26/2009 2009 WL 1811105

Opinion by Judge Wine; Chief Judge Combs and Senior Judge Buckingham concurred. The Court affirmed in part, and reversed and vacated in part, and remanded appellant's conviction for fourth-degree assault, third offense; violation of a domestic violence order; and persistent felony offender in the first degree. The Court first held that a prior conviction for family violence was an essential element of the felony assault offense under KRS 508.032. Because the Commonwealth's exhibits purporting to evidence prior judgments did not conform to the requirements of RCr 11.04, the Commonwealth failed to prove there was a prior conviction for assault of a family member or member of an unmarried couple. The error was necessarily palpable, allowing for review pursuant to RCr 10.26. While there would not be a retrial on remand, the Court instructed that it would be error for the trial judge to fail to instruct the jury that they could treat the fourth-degree assault, third offense, charge as either a misdemeanor or a felony pursuant to KRS 508.032. The Court declined to review other unpreserved errors and remanded for imposition of sentence on the fourth-degree assault and violation of a DVO charges.

**IV. EMPLOYMENT**

**A. Fitzgerald v. McFall**

[2007-CA-001403](#) 03/13/2009 2009 WL 637127 Rehearing pending

Opinion by Judge Dixon; Judge Nickell and Senior Judge Buckingham concurred. The Court affirmed a circuit court order vacating a hearing officer's order dismissing charges against a teacher, prior to a determination by a tribunal. The Court reversed an order denying the hearing officer's motion to dismiss him as a party to the action. The Court first held that the trial court did not err in determining that the hearing officer lacked the authority to grant a directed verdict. The authority of a hearing officer under KRS 161.790 differs substantially from other administrative proceedings wherein the hearing officer decides both issues of procedure and substance and therefore, the hearing officer exceeded his limited authority. Whether the school district presented sufficient evidence to warrant termination was within the sole determination of the tribunal. The Court then held that the trial court erred in denying the hearing officer's motion to dismiss him as a party. A hearing officer is not a party to an administrative proceeding under KRS 161.790 and does not fall within the definition of a party as defined by KRS 13B.010(3).

**B. Holbrook v. Kentucky Unemployment Insurance Commission**

[2007-CA-001738](#) 06/05/2009 2009 WL 1562855 Released for publication

Opinion by Judge Nickell; Chief Judge Combs concurred; Senior Judge Graves dissented by separate opinion. The Court affirmed an order of the circuit court affirming a decision of the Kentucky Unemployment Insurance Commission

denying appellant's request for benefits. The Court first held that the decision was supported by substantial evidence consisting of the employer's documentary evidence as well as a supervisor's testimony regarding appellant's poor work performance. The Court next held that the Commission did not misapply KRS 341.370, which permits the denial of benefits on the basis of misconduct. Appellant's actions did not represent mere inefficiency or unsatisfactory conduct but rather, represented a refusal to perform work as ordered over a lengthy period of time, and therefore, met the statutory definition of misconduct.

## V. FAMILY LAW

### A. **Holland v. Holland**

[2008-CA-002115](#) 06/19/2009 2009 WL 1705744

Opinion by Judge Nickell; Chief Judge Combs and Judge Taylor concurred. The Court affirmed an order of the circuit court denying appellant's request to modify child support as of the date the matter was heard by the trial court, rather than the date on which the trial court's order was entered. The Court held that KRS 403.213(1) required a written motion for modification before a change in child support and therefore, the trial court did not abuse its discretion in declining to make the child support modification retroactive to the date of a change in custody when no written motion seeking a modification was filed.

### B. **Howard v. Howard**

[2008-CA-001059](#) 06/12/2009 2009 WL 1635137 DR Pending

Opinion by Senior Judge Lambert; Judges Clayton and Thompson concurred. The Court affirmed an order of the trial court denying a motion to modify a prior child support order and holding appellant in contempt for failure to comply with a provision of a divorce decree requiring him to pay toward a deficiency judgment arising from the repossession of an automobile. The Court first held that appellant failed to meet the requirements of KRS 403.213 to put forth the necessary evidence required to establish a material change in circumstances requiring modification of the child support obligation. The Court next held that 11 U.S.C. § 523(a)(15) was applicable to deny discharge in bankruptcy of the automobile debt agreed to by the parties and imposed by the court's final decree. Thus, the trial court did not err in resolving this issue. The Court finally held that the trial court did not abuse its discretion in awarding attorney's fees based on its resolution of the other issues.

### C. **Kessler v. Switzer**

[2008-CA-002083](#) 06/05/2009 2009 WL 1562837

Opinion by Judge Lambert; Judge Keller concurred; Judge Caperton dissented by separate opinion. The Court affirmed an order of the circuit court extending a domestic violence order. The Court first held that appellant's due process rights were not violated by the trial court's failure to hold a hearing requiring appellee to testify and subjecting her to cross-examination before extending the DVO. KRS 403.750(2) does not require proof of additional acts of violence and therefore, a hearing is not required before an extension of a DVO is ordered. The Court then

held that because appellant failed to notify the Attorney General during the pendency of the case before the trial court, as required by KRS 418.075, his constitutional challenge to the statute was not preserved for review. The Court finally held that the trial court properly determined the facts and circumstances established a continuing need for extending the DVO. The trial court was familiar with the details of the case, it considered dismissed criminal charges against appellant, appellee's affidavit, appellee's request for a one-year extension, the circumstances surrounding the original issuance of the DVO, and the effectiveness of the DVO in preventing violence between the parties thus, fully satisfying the purpose of Kentucky's Domestic Violence and Abuse policy.

## VI. TORTS

### A. **Bailey v. MCM Business Services, Inc.**

[2007-CA-001619](#) 06/05/2009 2009 WL 1562848 Rehearing Pending Opinion by Judge Lambert; Judge Taylor and Senior Judge Graves concurred. The Court affirmed a judgment of the circuit court entered pursuant to a jury verdict in favor of appellees on appellant's claims related to an automobile accident. The Court first held that the issue of whether it was error to instruct the jury on the doctrine of sudden emergency was properly preserved by the trial court's renewal of appellant's motion for directed verdict at the close of all the evidence and by appellant's motion for JNOV following the jury verdict. The Court then followed the holding in *Regenstrief v. Phelps*, 142 S.W.3d 1 (Ky. 2004), and held that the trial court did not err in instructing the jury on the sudden emergency doctrine based on testimony that the driver tried to brake but could not, that there were no skid marks indicating the brakes activated, and that the driver swerved into another lane, which was indicative of encountering a sudden emergency. The Court finally held that the trial court did not err in excluding the report of a doctor who examined appellant and died several days later as there was no hearsay exception applicable to the report.