

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
JUNE 2010**

I. CIVIL PROCEDURE

A. Steadman v. Gentry

[2009-CA-000332](#) 6/4/2010 2010 WL 2218639 Released for publication
Opinion by Judge Nickell; Judges Acree and Thompson concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of appellee. The Court held that the circuit court correctly determined that, pursuant to KRS 413.140, the statute of limitations expired on appellant's claim that appellee assaulted him while he was incarcerated. The Court distinguished the holding in *Nanny v. Smith*, 260 S.W.3d 815 (Ky. 2008). While appellant filed his amended complaint alleging the assault prior to the expiration of the limitations period, he did not instruct the circuit court clerk regarding the issuance of any additional summonses until after the limitations period had expired and nearly one year after the filing of the amended complaint. Further, *Nanny* involved the filing of an original, not an amended complaint, and there was not a provision for an amended complaint, similar to CR 4.01(1), requiring the clerk to issue a summons "forthwith."

B. Williams v. Oates

[2009-CA-001182](#) 6/18/2010 2010 WL 2428659 DR Pending
Opinion by Judge Lambert; Judge Caperton and Judge Nickell concurred. The Court vacated and remanded an order of the circuit court denying appellant's motions to file a supplemental complaint pursuant to CR 15.04. The Court held that the trial court erred in denying the motion for leave to file supplemental pleadings. As long as the pleadings sought only to invoke the trial court's jurisdiction to enforce an earlier judgment, and not to alter or amend the original complaint, the trial court was vested with jurisdiction to consider the pleadings. The Court also rejected the argument that appellant was barred from setting forth a claim for piercing the corporate veils in any subsequent execution proceedings because the claim was not pleaded in the original complaint. Since the debt had yet to be established, nor had the means of execution of the judgment, it would have been impossible for appellant to allege grounds to support any specific order of execution in his original complaint.

II. CRIMINAL LAW

A. Burchett v. Commonwealth

[2009-CA-000324](#) 6/4/2010 2010 WL 2218630 Released for publication

Opinion by Judge Keller; Acting Chief Judge VanMeter concurred; Judge Combs concurred by separate opinion. The Court affirmed a judgment and sentence of the trial court entered after a jury found appellant guilty of fleeing or evading police, first degree; wanton endangerment, first degree; and operating a motor vehicle under the influence. The Court held that the trial court erred when it permitted a deputy sheriff to testify that he received a number of complaints about a car driving recklessly. The statements were not relevant because the deputy's actions were not at issue. Appellant did not challenge the decision to attempt to stop her nor did she attempt to exclude the testimony regarding the chase that ensued. Therefore, the statements were impermissible hearsay as defined by KRE 801(c). However, the Court ultimately held that the error was harmless in light of the evidence as a whole. The complaints did not identify appellant or identify with specificity the car involved, the complaints related to actions appellant took before she fled from the deputy, they were not related to the charges against her, and there was more than sufficient evidence to support the jury verdicts.

B. Garcia v. Commonwealth

[2008-CA-001729](#) 6/25/2010 2010 WL 2539756

Opinion by Judge Keller; Judge Acree concurred by separate opinion; Judge Caperton dissented by separate opinion. The Court reversed and remanded an order of the circuit court denying appellants' motion to suppress evidence obtained during a vehicular stop. The Court held that the trial court erred in finding that there was sufficient indicia of reliability to justify the stop based on an anonymous call to 911. The Court distinguished the holding in *Commonwealth v. Kelly*, 180 S.W.3d 474 (Ky. 2005), and held that the tip at issue was not from an identifiable citizen informant because the officer did not have face-to-face contact with the tipster and the tipster did not provide any identifying information. Therefore, the case fit more in the category of *Collins v. Commonwealth*, 142 S.W.3d 113 (Ky. 2004), and *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), because the tip consisted of information readily available to a casual bystander and failed to provide any predictive information. Moreover, the officer did not independently observe any illegal activity or suspicious behavior to corroborate the tip prior to the stop.

III. EDUCATION

A. Carter v. Smith

[2007-CA-001853](#) 6/25/2010 2010 WL 2539752 DR Pending

Opinion by Judge Nickell; Senior Judge Lambert concurred; Judge VanMeter concurred in part and dissented in part by separate opinion. The Court affirmed an order of the circuit court voiding appellant's consulting contract due to an Open Meetings Act (OMA) violation and denying appellant's motion to alter, amend or vacate the order. The Court first held that the trial court correctly found that appellant was an independent contractor under a personal services contract (PSC), not an employee, and that the consulting contract was not a personnel matter that could be legally discussed by the school board in executive session. While the

board's acceptance of appellant's voluntary resignation as school superintendent during an executive session was proper, the board violated the OMA when it negotiated the consulting contract during the closed session. An independent contractor is not an employee under the OMA and a PSC for an independent contractor is not excepted from the requirement that negotiations occur in public view. The Court further held that appellant's resignation was voluntary and the PSC awarded to him became void upon the trial court's issuance of a restraining order preventing further payment under the PSC. The Court also held that the trial court properly denied compensation under a theory of quantum meruit. Appellant did not argue in his cross-claim that he was entitled to payment under the theory; he did not move for leave to amend his cross-claim under CR 15; his claim for compensation was based upon the written PSC and therefore, he could not seek relief based on an implied contract; and he received an unconscionable amount of money for the small amount of work he performed. On the cross-appeal, the Court held that the action taken by the board was voidable, not void from its inception, and therefore, the payments made prior to the entry of the trial court order enjoining the payment of future sums under the contract were not recoverable by the board.

IV. EMPLOYMENT

A. **Carrier v. Cabinet for Health and Family Services**

[2009-CA-000155](#) 6/18/2010 2010 WL 2428073 DR Pending

Opinion by Judge Wine; Acting Chief Judge VanMeter and Judge Acree concurred. The Court affirmed an order of the circuit court which affirmed a decision by the Kentucky Personnel Board dismissing appellant's claims against the Cabinet for Health and Family Services that he was involuntarily transferred and demoted from his merit position without just cause. Appellant retired after he was informed that a reorganization creating the Cabinet for Health and Family Services would result in a reclassification of his position. The Court held that the Cabinet acted within its statutory authority, that the Board afforded appellant all the procedural due process to which he was entitled and that the Cabinet presented substantial evidence to show just cause for its action. In reaching the conclusions, the Court first held that the Cabinet's failure to give written notice of the action was not made moot by appellant's resignation. Appellant was technically penalized within the meaning of KRS 18A.005(24) when his position was changed to a lower grade, even though his pay, duties and responsibilities remained the same. The Court next held that KRS 18A.110(7)(a) only governed modification of job classifications within existing governmental agencies. The merger and reorganization of the Cabinet were governed by KRS 12.028 and KRS 12.060(2). The Court next held that the administrative proceedings satisfied appellant's due process rights. Although the Cabinet could not identify the specific individual who made the decision to transfer appellant's position, appellant was permitted to call or cross-examine all of the individuals involved in the reorganization process. The Court finally held that there was substantial evidence supporting the Board's finding that the transfer was for just cause. While there was no question the reclassification amounted to an involuntary transfer and a penalization within the meaning of KRS 18A.005, the Cabinet met its

burden of showing that there was just cause for the reorganization and for the subsequent creation of a new staff assistant position in the Commissioner's office after appellant's retirement.

V. FAMILY LAW

- A. **J.R.A. v. G.D.A.**
[2009-CA-001709](#) 6/11/2010 2010 WL 2327220 Released for publication
Opinion by Judge Taylor; Judges Clayton and Thompson concurred. The Court reversed and remanded an order of the family court adjudicating appellant the legal father of a child after the family court concluded that appellant was equitably estopped from denying his paternity of the child. The Court held that the trial court erred by applying the doctrine of paternity by estoppel to the facts of this case. The Court distinguished the facts in *S.R.D. v. T.L.B.*, 14 S.W.3d 502 (Ky. App. 2005). First, the child was not born during the parties' marriage so there was not a presumption of paternity under KRS 406.011. Second, the child knew that appellant was not her biological father. Third, because the child knew and the parties both knew that appellant was not the child's natural father, appellant made no material representation to the child. The fact that appellant signed an affidavit of paternity pursuant to KRS 213.046 merely created a rebuttable presumption of paternity. Since both parties admitted that appellant was not the child's biological father and both acknowledged the affidavit was false, the presumption was clearly rebutted.

VI. GOVERNMENT

- A. **Kentucky Executive Branch Ethics Committee v. Atkinson**
[2009-CA-001145](#) 6/18/2010 2010 WL 2428654 Rehearing Pending
Opinion by Acting Chief Judge VanMeter; Judges Acree and Wine concurred. The Court reversed and remanded a summary judgment entered against the Kentucky Executive Branch Ethics Commission, enjoining it to dismiss the administrative charges against current and former property valuation administrators (PVAs) for alleged violations of the Executive Branch Code of Ethics. The Court held that the trial court erred in concluding that the Executive Branch Code of Ethics, as codified in KRS Chapter 11A, did not apply to the PVAs. The PVAs were "major management personnel in the executive branch of state government" and therefore, "public servants" as defined by KRS 11A.010(9).
- B. **Sheffield v. Graves**
[2009-CA-000338](#) 6/18/2010 2010 WL 2428082 Rehearing Pending
Opinion by Judge Wine; Judges Nickell and Stumbo concurred. The Court affirmed in one appeal, and reversed in a second appeal, judgments of two separate circuit courts in declaratory judgment actions brought by two county clerks asking the circuit courts to declare that they were entitled to retain all fees collected, with no control over those fees by the fiscal court. The Court held that the revised language of KRS 64.530(3) did not release the county clerks from the financial control of the fiscal courts. It simply meant that the revenue received by the county clerks may be

used only to fulfill the statutory duties of the clerks and for no other purpose. Had the legislature intended to effect a dramatic alteration in the traditional role of the fiscal courts in setting legislative and fiscal policy, it would have revised the other subsections of the statute and the provisions of KRS 64.152(1) to reflect such intent.

VII. INSURANCE

A. **Owners Insurance Company v. Utley**

[2009-CA-001471](#) 6/18/2010 2010 WL 2428730 DR Pending

Opinion by Judge Lambert; Judges Caperton and Nickell concurred. The Court affirmed an order of the circuit court denying an insurer's motion for declaratory judgment that it was not obligated under its policy to defend or indemnify appellee with regard to an attack in which appellee injured a man while defending himself. The Court held that the trial court did not err in finding that appellee did not subjectively intend to injure the man who attacked and threatened to kill him and harm his wife and therefore, that the exclusion in appellee's homeowner's policy for "bodily injury or property damage reasonably expected or intended by the insured" did not apply. The Court further held that the doctrine of inferred intent was not applicable to the facts of the case. There was no evidence that appellee intended to injure the man but only that he was acting in self defense to protect himself and others.

VIII. JUVENILES

A. **A.C. v. Commonwealth**

[2009-CA-000714](#) 6/4/2010 2010 WL 2218655 Released for publication

Opinion by Judge Moore; Judge Caperton and Senior Judge Buckingham concurred. The Court denied a motion to dismiss the appeal and vacated and remanded an order of the family court finding the appellant juvenile in contempt of court and ordering her to be detained until placed in a home by the Cabinet for Health and Family Services, Department for Community Based Services, for no more than 30 days. In denying appellee's motion to dismiss the appeal as moot, the Court held that the case met the exception to the mootness doctrine. Although appellant's probation period had long since passed, she was still being subjected to review and the family court was proceeding under the erroneous assumption that it retained jurisdiction over the status offense and that the period of probation had not expired. The Court then held that the doctrine of invited error did not apply to the case. Appellant did not knowingly and voluntarily waive any of her rights, she did not benefit from any errors made by the family court, and the errors occurred through not fault of appellant's. Reviewing the issues on appeal under RCr 10.26, the Court held that it was palpable error for the family court to hold appellant in contempt. The court had no jurisdiction to hold appellant in contempt once the status offense action expired pursuant to the terms of her probation. The Court rejected appellee's argument that, pursuant to KRS 620.025, when a separate DNA action was filed nine months after the family court entered the order in the status offense case, the DNA petition acted to suspend all proceedings in the status offense case.

IX. PROPERTY

A. **Collins v. Lewis**

[2008-CA-001832](#) 6/4/2010 2010 WL 2218572 Released for publication
Opinion by Judge Acree; Judges Caperton and Thompson concurred. The Court affirmed an order for sale of real property after the circuit court found that the value of the property would be materially impaired if divided. The Court held that the factual findings were not clearly erroneous. In the action brought under KRS 389A.030, while appellants bore the burden of going forward by putting forth some proof of divisibility and appellees first presented their evidence that the property was indivisible, because both parties were given the opportunity to present their evidence, any error was harmless.

X. TAXATION

A. **Trillium Industries, Inc. v. Kentucky Unemployment Insurance Commission**

[2009-CA-000535](#) 4/30/2010 2010 WL 1728926 Ord. Pub. 6/25/2010
Opinion by Judge Keller; Chief Judge Combs and Judge Wine concurred. The Court affirmed a decision of the Kentucky Unemployment Insurance Commission finding appellant to be a successor employer and finding that it was liable for approximately \$495,000 in unpaid unemployment taxes pursuant to KRS 341.070(7). The Court held that the Commission's findings were supported by substantial evidence and that it correctly applied the law to the facts. It was undisputed that negotiations took place between the companies, which brought a transfer to appellant. Further, there was substantial evidence that two of the five requirements of 787 KAR 1:300 § 1(2) were met in that the company acquired was a going concern and appellant continued to operate the business as the same type of business at the same location.

The following Workers' Compensation cases were appealed to the Kentucky Supreme Court and therefore, are no longer published. The Supreme Court case number is included for your information.

Pella corporation v. Bernstein, 2010-SC-000448

Martinez v. Peabody Coal Company, 2010-SC-000438.