

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

I. CIVIL PROCEDURE

A. Commonwealth, Cabinet for Health and Family Services v. EPI Healthcare, LLC

[2010-CA-001333](#) 6/3/11 2011 WL 2162992

Opinion by Judge VanMeter; Judges Dixon and Keller concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of appellee on appellant's claim seeking reimbursement for Medicaid overpayments. The Court held that the trial court did not err by finding the present action to be barred by *res judicata*. In reaching its conclusion, the Court held that the language of the Supreme Court opinion in prior litigation did not implicitly reserve the present claims but merely narrowed its holding to the limited issue before it. The Court then held that the Cabinet was obligated to assert all claims it had related to the recoupment dispute in the previous administrative appeal wherein appellee disputed the amount of overpayments and argued that recoupment was barred by the statute of limitations.

B. Young v. U.S. Bank, Inc.

[2009-CA-001759](#) 6/3/11 2011 WL 2162539

Opinion by Judge Acree; Judge Stumbo and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court denying *sua sponte* relief from a foreclosure judgment and order of sale as not satisfying the requirements of CR 60.02. The Court first held that while the circuit court retained the authority to enforce the original judgment, it lost jurisdiction to modify either the order of sale or the order confirming the master commissioner's report 10 days after entry, absent a timely appeal. While the court also retained limited authority under CR 60.02, neither party filed a CR 60.02 motion, which was a necessary prerequisite to the grant of CR 60.02 relief. Therefore, the orders entered more than 10 days after the order confirming sale, other than an order enforcing the judgment, were void *ab initio*. The Court also held that the denial of appellants' motion to stay execution of a writ of possession was moot and the Court lacked jurisdiction to consider it because appellants no longer occupied the premises.

II. CONSTITUTIONAL LAW

A. Gingerich v. Commonwealth

[2008-CA-001493](#) 6/3/11 2011 WL 2162529

Opinion by Senior Judge Shake; Judges Stumbo and Thompson concurred. The Court affirmed an order of the circuit court affirming appellants' convictions for violating KRS 189.820, which required a slow-moving vehicle (SMV) emblem to be displayed on appellants' horse-drawn buggies. The Court ultimately held that the statute did not unconstitutionally interfere with appellants' ability to freely exercise their religion. In reaching that conclusion, the Court first held that KRS

189.820 was a neutral law of general applicability and therefore, did not invoke strict scrutiny analysis. The Commonwealth's objective of ensuring public safety through the most effective means possible overshadowed any encumbrances on religious practice. The Court rejected appellants' argument that a bicycle exemption created a showing of legislative belief that the SMV emblems did not promote roadway safety. The Court also rejected appellants' argument that the Commonwealth's goal of road safety with respect to slow-moving vehicles could be achieved through less restrictive means. The Court then held that the trial court did not err by not imposing upon the Commonwealth the burden of production to rebut appellants' claim of selective enforcement. Given the evidence presented to the trial court and the weight given the testimony by the trial court, appellants failed to establish a prima facie showing of discriminatory effect and discriminatory purpose.

III. CORPORATIONS

A. **Rednour Properties, LLC v. Spangler Roof Services, LLC**

[2009-CA-001159](#) 6/10/11 2011 WL 2535330

Opinion by Judge Lambert; Judge Stumbo concurred; Senior Judge Shake dissented in part by separate opinion. The Court affirmed an opinion and order of the circuit court awarding damages, interest and attorney fees on the appellee's claim that appellant failed to pay an outstanding balance due for to several change orders to a contract for work at an apartment complex. The Court first held that the trial court did not err in piercing the corporate veil to hold the sole member and agent of the appellant corporations personally liable. There was substantial evidence that the corporate entities were dummy corporations; the individual was the sole member and agent of several companies, at least one of which was a subsidiary of another; and the individual admitted setting up the LLCs for tax purposes. The Court next held that the circuit court did not err in finding that appellee had substantially performed the work under the contract. The Court rejected appellants' argument that they were not under an obligation to pay pursuant to the contract until appellee paid the material supplier when the contract only required appellee to furnish the materials used, which he did. The Court next held that the circuit court did not err in imposing late fees and interest on the amount of the judgment after it specifically found that appellants agreed to each change order and the record fully supported this finding. The Court finally held that appellee's attorney was a necessary party to the appeal for appellants to contest the award of attorney fees.

IV. CRIMINAL LAW

A. **Bradford v. Commonwealth**

[2010-CA-001314](#) 6/24/11 2011 WL 2496270

Opinion by Judge Lambert; Senior Judge Shake concurred; Judge Keller concurred in result only. The Court reversed and remanded with directions a judgment of the circuit court entered pursuant to appellant's guilty plea to incest, reserving the right to appeal the circuit court ruling that KRS 530.020 applied to the step-grandparent/step-grandchild relationship. In a case of first impression,

the Court held that the legislature did not intend to extend the reach of the statute to the step-grandparent/step-grandchild relationship and therefore, the circuit court erred in not amending the charge to sodomy in the third degree.

B. *Burke v. Commonwealth*

[2010-CA-000655](#) 6/10/11 2011 WL 2548724

Opinion by Judge Clayton; Judge Nickell and Senior Judge Isaac concurred. The Court affirmed an order of the circuit court revoking appellant's probation. The Court held that the trial court did not abuse its discretion in revoking appellant's probation. There was no requirement for the court to advise appellant that he could waive his constitutional rights and appellant's due process rights were not violated.

C. *Ferguson v. Commonwealth*

[2010-CA-001031](#) 6/24/11 2011 WL 2496245

Opinion by Judge Caperton; Chief Judge Taylor and Judge Wine concurred. On discretionary review, the Court reversed and remanded an order of the circuit court affirming an order of the district court denying appellant's motion to suppress the results of a breathalyzer test due to an alleged violation of KRS 189A.105(3). The Court distinguished the holding in *Bhattacharya v. Commonwealth*, 292 S.W.3d 901 (Ky. App. 2009), and held that appellant's rights were violated when the police did not allow her to retrieve her attorney's phone number from her cell phone and did not furnish her with a telephone capable of connecting with the number to be dialed. The Court also held that the district court erred in finding that appellant had the opportunity to use her cell phone while in the police cruiser when she was not informed of her right under KRS 189A.105(3) until after she exited the cruiser, the police took her cell phone and she only had the cell phone outside the period immediately preceding the administration of the test. The Court finally held that because appellant's right to contact and communicate with her attorney was frustrated by state action, the district court erred in not suppressing the results of all tests conducted pursuant to KRS 189A.

D. *Mundy v. Commonwealth*

[2010-CA-000507](#) 6/17/11 2011 WL 2416733

Opinion by Judge Acree; Judges Lambert and Thompson concurred. The Court reversed and remanded an order of the circuit court denying a motion to suppress evidence, after which appellant entered a conditional guilty plea to first-degree possession of controlled substance. The Court first held that although the emergency aid exception to the Fourth Amendment's warrant requirement applied to automobiles, a warrantless search pursuant to the doctrine could only be upheld if the police entry into the vehicle was based on an objectively reasonable belief, given the information at the time of entry, that a person within the vehicle was in need of immediate aid. A person sleeping in a vehicle on a summer night, headlights off and legally parked did not justify a reasonable belief that appellant was in medical peril necessitating aid. Therefore, the officer's entry into

appellant's car was not objectively reasonable because the information available to the officer at the time of entry, viewed objectively, did not reasonably indicate that appellant was in immediate need of aid.

E. Ousley v. Commonwealth

[2010-CA-001579](#) 6/24/11 2011 WL 2496279

Opinion by Chief Judge Taylor; Judges Caperton and Wine concurred. The Court reversed and remanded a judgment of the circuit court entered subsequent to appellant's conditional guilty plea reserving the right to appeal the denial of his motion to suppress evidence seized as a result of warrantless searches of his trash toter. The Court held that considering the configuration of the homes in appellant's neighborhood and particularly appellant's home, appellant possessed a reasonable expectation of privacy in his trash toter where located on his property and that the warrantless searches by the police violated the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. Accordingly, the circuit court erred by denying the motion to suppress the evidence seized in the warrantless searches.

F. Prewitt v. Commonwealth

[2009-CA-002308](#) 6/3/11 2011 WL 2162548

Opinion by Judge Dixon; Judge Caperton and Senior Judge Lambert concurred. The Court affirmed a circuit court order denying appellant's motion to suppress evidence underlying her conditional plea of guilty to trafficking in marijuana greater than five pounds. The Court first held that under the totality of the circumstances, given the police officer's training and experience, the officer had a reasonable and articulable suspicion to detain a package during a scheduled parcel interdiction operation and that the detention to present the package to a drug dog was not unduly lengthy. Because the first package was properly detained and seized, the Court rejected the argument that the second package, which appellant attempted to retrieve, was tainted evidence. The Court then held that the affidavit supporting the warrant to search her package was sufficient to establish probable cause. Even after removing inaccuracies created by the officer's use of "cut and paste" from the first affidavit to create the affidavit to search appellant's package, the remaining information contained in the affidavit was more than sufficient to establish probable cause justifying the issuance of the warrant.

G. Stage v. Commonwealth

[2010-CA-000475](#) 6/17/11 2011 WL 2416731

Opinion by Judge Moore; Judge Lambert and Senior Judge Isaac concurred. In an opinion and order the Court dismissed appellant's appeal from an order finding appellant to be a high-risk sex offender, requiring him to register under the Kentucky Sex Offender Registration Act (SORA), KRS 17.510. The Court held that because the 1998 version of SORA was the version in effect when appellant was released from prison and initially registered, appellant had no judicially recognizable interest in the constitutionality of the 2006 version of the Act and thus, the Court was prohibited from issuing an advisory opinion on the question of

whether the statutory scheme was void as violating Section 51 of the Kentucky Constitution.

V. FAMILY LAW

A. Bennett v. Bennett

[2010-CA-001016](#) 6/10/11 2011 WL 2548791

Opinion by Judge Acree; Chief Judge Taylor concurred; Judge Combs concurred by separate opinion. The Court affirmed in part, reversed in part and remanded an order of the family court denying appellant's motion to modify his child support obligation and calculating an arrearage in favor of appellee. The Court first held that the family court erred in failing to afford the parties an opportunity to file written objections and have a hearing on the objections pursuant to CR 53.06. The Court next held that the family court abused its discretion by denying appellant's motion to reduce his child support with regard to installments of child support accruing after the filing of his motion to modify child support. The Court next held that the family court did not abuse its discretion in denying appellant's motion to modify child support with regard to installments that accrued prior to the date appellant filed the motion, absent evidence that the parties had an agreement to reduce child support upon the emancipation of each of their children. The Court finally held that KRS 403.213(3) did not establish an automatic modification to appellant's support obligation upon the emancipation of each child because the child support order did not set the obligation as a per-child amount but rather, a lump sum. Reconciling KRS 403.213(3) and KRS 403.213(1), the Court held that in such cases the obligor must return to court for the court to make a distinction between the child's emancipation and any other obligation that is part of the same decree or order.

B. Brooks v. Brooks

[2010-CA-001720](#) 6/24/11 2011 WL 2496282

Opinion by Judge VanMeter; Judge Dixon concurred; Judge Stumbo dissented by separate opinion. The Court affirmed an order of the circuit court in a dissolution action, which ordered appellant to pay child support, ordered appellee to pay maintenance to appellant and divided marital property. The Court first held that the trial court did not err by exempting appellee's Kentucky Teacher's Retirement Account from classification as marital property. Because appellant did not have a retirement account, the divisionary rule under KRS 401.190(4) was not triggered and under KRS 161.700, the retirement account was non-marital property and could not be treated as an economic circumstance for purposes of dividing marital property. The Court next held that the trial court's award of maintenance was not an abuse of discretion when it considered the factors set forth in KRS 403.200 to determine the amount and duration was sufficient for appellant to obtain a GED and job training. The Court finally held that the trial court did not abuse its discretion in considering the children's transportation needs in awarding a vehicle to appellee for the children to drive to school.

C. Corns v. Corns

[2010-CA-001911](#) 6/17/11 2011 WL 2416864

Opinion by Judge Nickell; Judge Thompson concurred; Senior Judge Shake dissented by separate opinion. The Court reversed and remanded an order of the family court modifying an award of joint custody to grant sole custody to the appellee. The Court held that the family court lacked subject matter jurisdiction to decide the issue of custody modification because appellant's pro se motion regarding the medical necessity for the child's tonsillectomy, which the trial court erroneously transformed into a hearing on custody modification, lacked the statutorily required affidavit or verification. Further, appellee's attempt to cure and join appellant's motion or consent to it was ineffectual because the motion was statutorily inadequate to raise the issue. Even if appellee's verified response could be considered a separate motion and statutorily sufficient to convey subject matter jurisdiction, technically there was no notice provided to appellant that the hearing on his motion was a hearing on custody modification.

D. Heltsley v. Frogge

[2009-CA-001867](#) 6/17/11 2011 WL 2416633

Opinion by Judge Acree; Judges Caperton and Clayton concurred. The Court affirmed orders of the circuit court finding that the appellee grandparents were not a child's *de facto* custodians and ordering the grandparent's to pay a portion of the father's attorney fees. The Court first held that the circuit court properly found that the grandparents did not satisfy the requirements of KRS 403.270(1) to establish *de facto* custodian status. The father's actions in the divorce proceedings were sufficient to suspend the running of time needed to confer appellees standing as *de facto* custodians. The Court also held that the circuit court did not abuse its discretion in awarding attorney fees to the father. It was not necessary for the court to conclude that the grandparents employed delay tactics but only to consider the financial resources of the parties, even discounting alleged inconsistencies in the invoice for services. The father's legal bill was well over the amount awarded, and the grandparents were not entitled to cross-examine the attorney regarding the billing statement.

E. Mills v. Abbott

[2009-CA-001114](#) 6/24/11 2011 WL 2508162

Opinion by Senior Judge Shake; Judges Lambert and Nickell concurred. The Court affirmed a summary judgment in favor of appellees on their suit to enforce a judgment lien against two parcels of property owned by the appellant attorney after a damage judgment for breach of fiduciary duty was entered against the attorney. The Court held that the trial court properly granted summary judgment to appellees. Because the judgment lien was entered prior to the marriage of the attorney and his wife, the wife's dower interest in the property was subject to the preexisting encumbrance.

VI. INSURANCE

A. Certain Underwriters at Lloyds's, London v. Abundance Coal, Inc.

[2009-CA-001283](#) 6/24/11 2011 WL 2496203

Opinion by Judge Acree; Judges Dixon and Keller concurred. The Court reversed in part, vacated in part and remanded an order of the circuit court granting the appellee coal company's motion to dismiss the appellant insurer's declaratory judgment action seeking a declaration that an insurance contract did not provide coverage on a claim that the coal company's operations had tortiously caused coal dust to enter real property. The Court first held that the circuit court erred in dismissing the action to the extent it rendered the insurer liable for punitive damages when the insurance contract specifically excluded such coverage. The Court then held that the trial court erred in dismissing the action after concluding that the tort claims should necessarily be covered by the policy. Applying the holding in *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679 (Ky. App. 1996), the Court held that the circuit court properly determined that the "Absolute Pollution" exclusion in the contract was ambiguous. However, the circuit court was not correct in concluding that the tort claims were covered. The Court remanded for additional proceedings to determine whether the alleged injuries suffered by the property owners were a result of pollution caused by the coal company and for which the exclusions would apply, or whether the dust and debris which allegedly entered the property did not constitute pollution as defined in the policy and for which the insurer would be liable.

B. The Medical Protective Company v. Wiles

[2010-CA-000262](#) 6/17/11 2011 WL 2420011

Opinion by Judge Lambert; Judge Stumbo and Senior Judge Shake concurred. The Court affirmed in part, reversed in part and remanded a multi-million dollar judgment of the circuit court in a third-party insurance bad faith claim brought pursuant to Kentucky's Unfair Claims Settlement Practices Act (UCSPA). The claim arose from appellant's handling of appellees' medical malpractice claim. The Court first held that the jury instructions on punitive damages were proper in that they required the jury to find that there was no reasonable basis for the insurer's action or inaction or that the insurer acted with reckless disregard for whether there was a basis for delaying payment of the claim. The Court then held that there was sufficient evidence to warrant the award of punitive damages. The twenty-seven-month delay between the injury and the initial settlement offer, where fault was clear, could not be considered mere delay and the insurer's focus on the financial appearance of the company established a questionable motive for the method of investigation and timing of the settlement. This was sufficient evidence to submit the issue of bad faith to the jury. The Court next held that appellant's failure to present the issue of an excessive punitive damage award to the trial court precluded review on appeal. The Court also held that the trial court did not abuse its discretion in permitting witnesses to characterize the settlement offer as low ball; the trial court did not abuse its discretion in excluding the testimony of the insurer's expert witnesses, none of whom had no claims handling or adjusting experience; the trial court did not abuse its discretion in permitting evidence of the insurer's national reserves to be introduced because the evidence was relevant to show a motivation for late reserving practices; and the trial court

did not err in allowing the introduction of a surveillance tape of the injured appellee in order to question why the insurer failed to review the surveillance after learning it was not helpful to the defense, while at the same time contending that appellee was exaggerating her symptoms. The Court then held that the trial court erred as a matter of law when it determined that appellees were entitled to an award of attorney fees and statutory interest pursuant to KRS 304.12-235. The plain and unambiguous language of the statute limited its application to named insureds and healthcare providers, not third-party claimants. The Court finally held that the trial court did not abuse its discretion in denying the insurer's motion to lower the interest rate on the post-judgment interest or in ordering the interest to run from the entry an earlier judgment and order when a second order merely reconsidered and corrected the earlier order.

VII. PROPERTY

A. **Bowles v. Hopkins County Coal, LLC**

[2009-CA-001209](#) 6/24/11 2011 WL 2508163

Opinion by Senior Judge Shake; Judges Dixon and Nickell concurred. The Court affirmed an opinion, judgment and order of the circuit court in a declaration of rights action brought by successors in interest to surface and other mineral rights. The Court held that the trial court correctly found that the owner of the coal beds had the right to capture coal bed methane (CBM) while it was still located in the coal beds and appellants had the right to capture it once the mining process was complete.

B. **Golden Oak Mining Company v. Lucas**

[2008-CA-002148](#) 6/17/11 2011 WL 2416600

Opinion by Judge Acree; Judges Dixon and Lambert concurred. The Court reversed a judgment of the circuit court entered after a jury trial on appellees' claims that their water supply was adversely impacted by appellant's underground mining activities. The Court held that the trial court erred by denying appellant's motion for summary judgment on statute of limitations grounds. The statute of limitations in KRS 413.120 was applicable to both appellees' statutory and common law claims and appellees knew they had been injured and also that their injury may have been caused by appellant's conduct more than five years before appellees filed their civil suit. The Court also held the discovery rule in *Wiesman v. Alliant Hospitals, Inc.*, 37 S.W.3d 709 (Ky. 2000) was inapplicable in a property damage action; appellees could not rest upon their rights until a governmental agency substantiated their suspicions that appellant's conduct caused their injury; the accrual of the action was unaffected by a Cabinet investigation; that statutory and equitable estoppel were inapplicable to the facts; and that the nuisance and trespass were not continuing or temporary but were permanent and had ended when the limitations period began to run.

VIII. PUBLIC HEALTH

A. **King v. Butler Rest Home, Inc.**

[2010-CA-001467](#) 6/17/11 2011 WL 2416752

Opinion by Judge VanMeter; Judge Dixon concurred; Judge Keller concurred in result only. The Court affirmed an opinion and order of the circuit court affirming an order of the Cabinet for Health and Family Services, which held the actions of a nursing home discharging appellant from its long-term care facility to be in compliance with federal and state law. The Court first held that 900 KAR 2:050 § 2, which deals with transfer and discharge rights from long-term care facilities, defined by KRS 216.510(1), and the applicable portion of the Centers for Medicare and Medicaid Services State Operations Manual revealed no requirement that an appeal be heard regarding a denial of Medicaid benefits prior to the discharge of a patient for nonpayment. Appellant filed two applications for Medicaid benefits, both which were denied, and subsequently did not pay for her care. Therefore, the ALJ did not err by finding the nursing home could discharge her for nonpayment. The Court next held that the ALJ did not err by finding that the nursing home notified of appellant of her discharge and transfer from the facility by sending notice to her daughter. Based on the plain language of the financial agreement, the daughter was listed as the person to whom all correspondence and billing statements should be mailed. The Court finally held the nursing home did not fail to comply with 900 KAR 2:050 § 2 by failing to provide sufficient preparation and orientation on discharge from the facility.

B. Professional Home Health Care Agency, Inc. v. Commonwealth, Cabinet for Health and Family Services

[2009-CA-001846](#) 6/10/11 2011 WL 2548630

Opinion by Judge Wine; Judge VanMeter and Senior Judge Shake concurred. The Court vacated and remanded an opinion and order of the circuit court remanding a Certificate of Need (CON) application for an additional hearing. The Court held that the circuit court erred in limiting the scope of remand to the need numbers in existence at the time of the hearing approving the application for a CON. The Court held that to restrict the numbers on remand to the incorrect numbers utilized at the hearing would not effectuate justice. In addition, the language of the applicable regulations required the use of the latest numbers available at the time of a decision. Moreover, the State Health Plan required the use of the latest numbers available at the time of a decision.

IX. TORTS

A. Bailey v. GRW Engineers, Inc.

[2009-CA-002140](#) 6/24/11 2011 WL 2496216

Opinion by Judge Dixon; Judges Acree and Keller concurred. The Court reversed and remanded an order dismissing appellant's claims for defamation, libel and tortious interference with business relations. The Court held that the trial court erred in dismissing the action after finding that appellee was entitled to absolute immunity for statements it made in a letter to a city mayor related to appellant's qualifications and references as low bidder on a city project. The Court held that the legislative immunity afforded by caselaw and statute was not only limited to actual members of a legislative body but also only to statements made while acting within the scope of the duties imposed upon them by statute. Appellee was

not a member of the city council and had no duties imposed upon it by statute, therefore it was not entitled to legislative immunity. The Court also rejected appellee's argument that the statements were comparable to statements made by witnesses in judicial proceedings entitling it to judicial immunity.

B. Dennis v. Fulkerson

[2009-CA-001367](#) 6/24/11 2011 WL 2496204

Opinion by Judge Wine; Judge VanMeter concurred; Judge Thompson concurred in part and dissented in part. On direct appeal, the Court affirmed an order of the circuit court denying appellant's motion for a new trial in his medical negligence case and on cross-appeal, reversed and remanded the circuit court's denial of the cross-appellant's CR 59.05 motion to alter, amend or vacate the judgment. The Court first held that the jury award, which awarded past medical expenses but nothing for pain and suffering and lost wages after an emergency room doctor misdiagnosed appellant's appendicitis, was adequate. While the jury could have reached a different conclusion, its conclusion with respect to pain and suffering and lost wages was nonetheless supported by evidence that appellant's appendix may have perforated 12 to 24 hours before he ever presented to the emergency room and that even if he had not been misdiagnosed, the more invasive surgery may have been necessary. Further, the jury was free to return a \$0 award for lost wages when appellant was unemployed at the time of the medical negligence. On the doctor's cross-appeal, the Court held that the trial court erred when it failed to reduce the amount of judgment to the extent that the bill was written off by the hospital.

C. LaMarre v. Fort Mitchell Country Club

[2010-CA-000813](#) 6/24/11 2011 WL 2496242

Opinion by Senior Judge Shake; Judges Lambert and Stumbo concurred. The Court reversed an order of the circuit court granting summary judgment to the appellee country club on appellants' claims that the club had acted negligently by illegally serving alcohol to the driver of a golf cart, resulting in permanent injury to a passenger. The Court held that the circuit court erred in granting summary judgment to the club based on KRS 413.241, the Dram Shop Act. The club's distribution of package alcohol in direct violation of its special private club license under KRS 243.270, which only permitted the distribution of retail alcoholic drinks, excepted the club from the protections of the Dram Shop Act. The Court also held that even if the Club had not acted in direct contravention of its license, summary judgment was still inappropriate because there were genuine issues of material fact as to whether the club employees knew or should have known that the driver was intoxicated when they continued to serve him alcohol.

D. Lucas v. Gateway Community Services Organization, Inc.

[2010-CA-001033](#) 6/24/11 2011 WL 2508193

Opinion by Judge Lambert; Judges Nickell and Wine concurred. The Court affirmed a summary judgment entered in favor of appellees on appellant's claim for damages for negligent maintenance and construction of a parking lot and

failure to maintain premises in a safe and hazard-free condition after she was injured in a fall. The Court held that, based on appellant's own testimony, summary judgment was proper and the circuit court properly found that there were no disputed issues of material fact concerning the open and obvious condition of the parking lot. The Court then held that *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), did not apply to alter the result because appellant's own testimony showed that she was not distracted so as to make her injury foreseeable.

E. *Shelton v. Kentucky Easter Seals Society, Inc.*

[2009-CA-000945](#) 6/24/11 WL Citation Not Yet Available

Opinion by Judge Wine; Judges Acree and VanMeter concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of appellee on appellant's claims for injuries she received when her foot became entangled in wires at her husband's hospital bedside. The Court held that the recent opinion of *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), did not abrogate the open and obvious doctrine in Kentucky and that the activities and circumstances surrounding McIntosh were distinguishable because there was no evidence that appellant was distracted, or made to forget the hazard, as she approached her husband's bed to kiss him goodbye. Further, the evidence did not show that appellant was forced to encounter the hazard merely because she was unable to approach the bed on the other side because of the bed's proximity to the wall.

F. *The Estate of Judith Burton v. The Trover Clinic Foundation, Inc.*

[2009-CA-001595](#) 6/10/11 2011 WL 6816338

Opinion by Judge Caperton; Judge Clayton concurred; Judge Acree concurred by separate opinion. The Court affirmed in part and reversed and remanded in part a judgment entered pursuant to a jury verdict finding in favor of a medical clinic and doctor on the appellant estate's claims that the doctor misread CT scans and as a result the deceased's lung cancer went undiagnosed. The Court first recognized the tort of negligent credentialing and set out the elements of the tort. On the direct appeal, the Court then held that, pursuant to CR 42.02, the trial court did not abuse its discretion in bifurcating the proceedings for medical negligence from those for negligent credentialing. The procedure did not violate KRS 411.186. The estate was free to pursue punitive damages and introduce evidence to support said damages in the first and second phase of the trial. Further, while the estate should have been permitted to conduct a full and complete *voir dire* concerning both phases of the trial, any error was harmless because the jury did not find appellees to be negligent during the first phase of the trial and the second phase had not yet been conducted. The Court next held that the trial court did not abuse its discretion in excluding peer review reports and minutes seeking to establish the doctor's habit of reading radiological films at a dangerously fast pace when the reports and minutes were not verbatim, the meetings were not recorded and the statements contained in the minutes could not be attributed to any particular person. The Court next held that the trial court did not abuse its

discretion in determining that members of the peer review committee were not qualified to express expert opinions because their opinions would be based on radiological practices and standards, the very expertise of which they had no independent knowledge. The Court next held that because the estate failed to revive a fraud claim against the doctor, the argument presented related to the fraud claim was not preserved for the Court's review. The Court next held that the trial court committed prejudicial error by depriving the estate of the right to cross-examine the doctor regarding the suspension of his medical license. Although post-treatment of the deceased, the suspension was not a collateral matter when it was close in time to the deceased's misread CT scans and relevant to the doctor's qualifications as an expert witness. The Court finally held that the trial court did not improperly prohibit the estate from cross-examining a witness who made a statement to the peer review committee when a hearing revealed that the peer review secretary could not attribute the statement directly to the witness. On the cross-appeal the Court first held that the trial court did not err in admitting habit evidence in the form of testimony regarding the doctor's workload and speed of film interpretation. The testimony of two physicians and four employees, along with the doctor's own testimony, was sufficient to establish a habit of the doctor and any question as to the timeliness of the evidence bore on the weight, not to its admissibility. Further, the witnesses had sufficient personal knowledge. The Court then held that the trial court did not abuse its discretion in denying a motion for a change of venue, given the information presented to the trial court concerning pretrial publicity.

X. WILLS AND ESTATES

A. Humphrey v. Blackford

[2009-CA-001733](#) 6/24/11 2011 WL 2496214

Opinion by Senior Judge Shake; Judges Nickell and VanMeter concurred. The Court affirmed a summary judgment entered by the circuit court in favor of appellees on their petition for a declaration of rights and to quiet title to real property. The Court first held that the circuit court properly granted summary judgment to appellees because the appellant spouse of the deceased spouse relinquished any dower interest to which she may have been entitled when she executed a deed of conveyance for the property to be held in trust, in exchange for which she received a life estate. The Court also held that there were no genuine issues of material fact as to whether appellant intended to relinquish her dower interest when the terms of the deed of conveyance established her intent to convey her interest in exchange for the life estate.

XI. ZONING

A. Hudman v. Terry

[2009-CA-001510](#) 6/24/11 2011 WL 2496212

Opinion by Judge Acree; Judge Nickell and Senior Judge Shake. The Court affirmed an order of the circuit court reversing a board of zoning and adjustment decision to grant a conditional use permit. In the direct appeal, the Court held that based upon the correct application of the zoning ordinances to the uncontested

facts, the circuit court correctly determined that the proposed use of an outbuilding as a machine and welding shop did not constitute an agricultural home occupation. In the cross-appeal, the Court held that the circuit court properly rejected the contention that the property constituted two separate tracts when the deed evinced the parties' intent to consolidate two tracts to create a single plot of land.