

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
JUNE 2012**

I. CIVIL PROCEDURE

A. Stoecklin v. River Metal Recycling, LLC

[2011-CA-000951](#) 06/15/2012 2012 WL 2160197

Opinion and order dismissing appeal by Judge Thompson; Chief Judge Taylor and Judge Keller concurred. The Court held that appellant could not appeal from an order granting his motion to voluntarily dismiss his claim with prejudice. The Court distinguished the holding in *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991). Despite appellant's insistence that he could not succeed on the merits of his appeal without a third expert witness, appellant did not show that this particular expert was so crucial that the trial court's exclusion of the testimony meant certain "death" for the claim.

B. The Family Trust Foundation of Kentucky, Inc. v. The Kentucky Horse Racing Commission

[2011-CA-000164](#) 06/15/2012 2012 WL 2160190

Opinion by Senior Judge Lambert; Judge Stumbo concurred; Judge Combs dissented by separate opinion. The Court vacated and remanded an order of the circuit court granting appellees' petition for declaration of rights and upholding regulations adopted by the Kentucky Horse Racing Commission authorizing "historic racing." The Court first held that it was acceptable for the circuit court to entertain and to adjudicate the petition for declaration of rights. The concern of the legitimacy of the regulations was both immediate and prominent, thus, satisfying the criteria required by *McConnell v. Commonwealth*, 655 S.W.2d 43 (Ky. App. 1983). Further, judicial review was proper under *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984). The Court then held that the parties had a right to develop proof and to present evidence to establish that the wagers made by patrons at electronic gaming machines did or did not meet the definition of pari-mutual wagering on a horse race. Thus, the circuit court abused its discretion in denying appellant's request for discovery, which was relevant and necessary to the court's determination.

II. CORPORATIONS

A. Watkins v. Stock Yards Bank & Trust

[2011-CA-000228](#) 06/29/2012 2012 WL 2470692

Opinion by Judge Keller; Judges Acree and Clayton concurred. The Court affirmed an order of the circuit court dismissing appellant's individual claims against a bank acting as the trustee of a family trust; an order granting appellees' motion for summary judgment and dismissing appellant's derivative claims; and an order denying appellees' motions for attorney fees. The Court first held that the trial court did not err in granting appellees' motion for summary judgment and dismissing the derivative claims because appellant did not have standing to pursue

the claims pursuant to KRS 217B.7-400(1). Appellant did not fairly and adequately represent the interests of the shareholders. His self-interest and lack of support from the other shareholders and trust beneficiaries deprived him of standing. The Court next held that the trial court did not err in dismissing appellant's direct claims against a trustee when appellant failed to demonstrate a specific injury to himself outside the diminution in the value of the corporate assets and his stock. The Court finally held that the trial court did not abuse its discretion in failing to award appellees attorney fees. Although appellant was unsuccessful, the facts gave him a reasonable basis to question appellees' actions.

III. CRIMINAL LAW

A. **Cozzolino v. Commonwealth**

[2011-CA-000656](#) 06/22/2012 2012 WL 2366272

Opinion by Judge Stumbo; Judge Combs and Senior Judge Lambert concurred. The Court vacated an order of the circuit court, which reversed a directed verdict of the district court acquitting appellant of DUI. The case was dismissed after the district court suppressed evidence obtained in violation of *Miranda*, found that the odor of alcohol and appellant's red, glassy eyes were insufficient to prove DUI, and granted appellant's motion for a directed verdict and found appellant not guilty. The Court held that the Commonwealth could not appeal from a directed verdict of acquittal under the Double Jeopardy Clause of the United States and Kentucky Constitutions. The fact that the case was dismissed on appellant's motion was not dispositive but rather, dispositive was the fact that the case was dismissed on issues related to guilt. Therefore, Double Jeopardy prevented appellant from being tried again for DUI.

B. **Lemons v. Commonwealth**

[2010-CA-001942](#) 06/22/2012 2012 WL 2360131

Opinion by Senior Judge Lambert; Judge Caperton concurred; Judge Thompson dissented by separate opinion. The Court reversed and remanded a judgment of the circuit court entered upon appellant's *Alford* plea to charges of second-degree manslaughter and second-degree assault, reserving his right to appeal from the trial court's denial of his motion to dismiss pursuant to KRS 503.085. The Court held that the trial court erred in applying KRS 503.085 and in not dismissing the indictment. In reaching that conclusion, the Court first held that appellant's motion invoking immunity from prosecution based on a claim of self-defense or defense of others was timely filed when it was filed a reasonable time prior to trial. The Court then held that the Commonwealth bore the burden to establish probable cause that appellant's use of force was unlawful and its failure to do so required dismissal of the indictment. Although appellant's behavior and statements after the fight which resulted in the victim's death were suspicious, they were not sufficient to meet the burden of showing probable cause without other circumstantial and physical evidence.

C. **Senseman v. Commonwealth**

[2011-CA-000354](#) 06/08/2012 2012 WL 2053357

Opinion by Judge Combs; Senior Judge Lambert concurred; Judge Moore dissented in part by separate opinion. The Court affirmed in part, reversed in part and remanded appellant's conviction of manslaughter and criminal abuse for the death of his infant daughter. The Court first held that under the totality of the circumstances, the trial court clearly erred in denying appellant's motion to suppress his statement in violation of the requirement that a *Miranda* warning be given. The facts indicated that appellant was "in custody" and was undergoing interrogation when he gave his statement; the purpose of the questioning was admittedly to elicit a confession; the detective testified that appellant was a suspect in the death and that appellant was going to remain in custody once the detective obtained the statement he wanted; the place of questioning was hostile, intimidating and coercive; appellant was not informed that he was free to leave and twice was told to "stay put" when the detective left the room; appellant was in a vulnerable state of mind after returning from arranging the funeral for his daughter; and the detective deceived appellant into thinking that the science proved that the child died from an injury received while in appellant's care. The Court also held that the error was not harmless because appellant's incriminating statement was the only evidence to inculcate him or to support his conviction. The Court finally held that the trial court did not abuse its discretion in denying appellant's motion for separate trials on the murder and criminal abuse charges and that joinder of the offenses did not prejudice appellant.

IV. FAMILY LAW

A. **Batton v. Commonwealth ex rel. Noble**

[2010-CA-001056](#) 06/15/2012 2012 WL 2160122

Opinion by Senior Judge Lambert; Judges Clayton and Nickell concurred. On remand from the Kentucky Supreme Court, the Court affirmed an order of the circuit court revoking appellant's conditional discharge because of his failure to pay child support. The Court held that the findings of the circuit court complied with the holding in *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011), because they demonstrated that the trial court properly considered appellant's ability to pay and implicitly concluded that appellant had not made sufficient bona fide attempts to make payments and not shown that he was unable to make the required payments through no fault of his own. The Court also held that the trial court did not erroneously deny appellant's request to set an attainable purge amount to avoid incarceration. The request for a purge amount should have been presented following the finding of contempt, not following the revocation of his conditional discharge, which then could have been addressed in an appeal from the order and sentence of contempt. The revocation proceeding did not amount to another civil contempt proceedings.

B. **Kidd v. Combs**

[2009-CA-002260](#) 06/15/2012 2012 WL 2160120

Opinion by Judge Lambert; Judges Thompson and VanMeter concurred. The Court affirmed a judgment of the circuit court awarding joint custody to appellant and his daughter's maternal great-grandparents. The Court held appellees were

not required to petition the court for status as *de facto* custodians nor were they required to be original parties to the action. Pursuant to KRS 403.280(4), the court had the statutory authority to add them as parties once it found they met the requirements to be *de facto* custodians. The Court next held that the circuit court properly found appellees to be *de facto* custodians. There was no dispute that appellees raised the child for four and one-half years of her life, they were her primary caregivers and financial supporters for the requisite period of time and they provided food, clothes, toys and the only real home the child knew in her first five years. Although the parties agreed that the arrangement was temporary at the outset, the parents allowed the child to remain with appellees. The Court also rejected appellant's arguments that a six-week period when the child was with appellant broke the period of time required to qualify as a *de facto* custodian when there was no evidence that appellees intended to abandon their support while the child visited with appellant for the short period of time.

C. Miller v. Norris

[2011-CA-001285](#) 06/22/2012 2012 WL 2366276

Opinion by Judge Stumbo; Judge Combs and Senior Judge Lambert concurred. The Court affirmed a summary judgment of the family court dismissing appellant's action seeking grandparent visitation. The Court first held that the family court properly treated appellees' motion to dismiss under CR 12.02 as a CR 56.03 motion for summary judgment. The Court then held that the family court did not err in finding that the doctrine of equitable estoppel did not bar appellees from asserting the defense that appellant failed to comply with KRS Chapter 405 by pursuing visitation during the time her daughter had parental rights to the children. Appellant was aware of both the necessity to seek grandparent visitation and the means of doing so but failed to timely do so. Therefore, the family court correctly found that there were no genuine issues of material fact and that appellees were entitled to judgment as a matter of law.

D. Stinson v. Brumfield

[2011-CA-000837](#) 03/30/2012 2012 WL 1057968 Released for Publication

Opinion by Judge Dixon; Judge VanMeter and Senior Judge Lambert concurred. The Court reversed and remanded an order of the family court designating appellees as the *de facto* custodians of appellant's minor child and awarding joint custody to the parties. The Court held that the family court erred in interpreting the requirements of KRS 403.270 in finding that there was clear and convincing evidence that appellees were *de facto* custodians. The findings of fact established that the parties had engaged in a kind of "co-parenting" arrangement but that appellees did not literally stand in the place of appellant. Because appellees did not meet the statutory standard of *de facto* custodians, they were required to show by clear and convincing evidence that appellant was an unfit custodian or that she had waived her superior right to custody. The Court remanded for the family court to consider the petition under that standard.

V. GOVERNMENT

A. **City of Taylorsville v. Spencer County Fiscal Court**

[2011-CA-001096](#) 06/01/2012 2012 WL 1957412

Opinion by Senior Judge Lambert; Judges Combs and Stumbo concurred. The Court reversed orders of the circuit court finding that a petition for a voter referendum on a Charter County Government, pursuant to KRS 67.830, was valid; that it met the requirements of the statute; and that the signatures supporting it were properly verified. The Court held that the wording of the petition did not precisely conform to the language of the statute and thus improperly limited the authority of the commission to consider all options under the statute. Because the petition did not strictly comply with the requirements of the statute, the trial court erred in finding that it complied with the statute.

VI. JUVENILES

A. **K.N. v. Commonwealth**

[2011-CA-000159](#) 06/08/2012 2012 WL 2051964

Opinion by Judge Combs; Judges Keller and Stumbo concurred. The Court affirmed an order of the circuit court granting the Commonwealth's petition for a writ of mandamus wherein it sought to compel the district court to apply the mandatory transfer statute and transfer the case to circuit court. The Court first held that a writ was appropriate because the Commonwealth did not have an adequate remedy by appeal. The denial of the motion to transfer did not dispose of the ultimate issue of appellant's guilt and there was no finality within the meaning of CR 54.02(1). Therefore, the Commonwealth's only remedy was to petition for a writ of mandamus. The Court next held that the circuit court correctly distinguished between the two transfer statutes and determined that the district court was not at liberty to proceed under KRS 640.010. The circuit court properly proceeded under KRS 635.020(4), the statute mandating transfer of a juvenile at least 14 years of age charged with a felony in which a firearm was used. The fact that appellant did not personally handle the gun during the course of events was not dispositive when the trial court had ample reason to believe there was probable cause that appellant was a participant in the crime.

VII. PROPERTY

A. **McAlpin v. Bailey**

[2010-CA-001123](#) 06/01/2012 2012 WL 1957301

Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed in part, reversed in part and remanded a circuit court judgment finding that appellees acquired title to a disputed strip of property under the doctrine of champerty and awarding compensatory damages to the trespassing parties for the value of an encroaching fence. The Court first held that the trial court erred in finding that appellees/cross-appellants were entitled to the property based on the doctrine of champerty. Although they possessed the strip of land when an earlier transfer was made, the doctrine of champerty merely invalidated the transfer and would have allowed them to purchase the property. The Court held that because the appellees/cross-appellants did not adversely possess the

strip of land for fifteen years, the trial court correctly held that they were not entitled to title by adverse possession. The Court also held that the trial court properly denied appellees/cross-appellants request for punitive damages. The Court finally held that the trial court correctly determined that appellees/cross-appellants were entitled to compensatory damages for appellants'/cross-appellees' removal of the encroaching fence. The three or four days that elapsed between the written notice of intent to remove the fence and the actual removal and damage to the fence did not amount to advanced written notice of intent or give adequate opportunity for removal of the fence and therefore, appellants'/cross-appellees' actions were not reasonable.

B. Milam v. Viking Energy Holdings, LLC

[2011-CA-001060](#) 06/22/2012 2012 WL 2360500

Opinion by Judge Lambert; Judges Acree and Combs concurred. The Court affirmed an interlocutory judgment of the circuit court granting appellee's petition for condemnation and enforcing the terms of a pipeline easement on appellants' property. The Court first held that the circuit court properly ruled that appellee had the power to condemn the pipeline easement. Despite the regulatory treatment of different types of pipelines, the differences did not extend to KRS 278.502. Further, appellee was a common carrier and engaged in public services and therefore, was not excluded from the application of the statute. The Court next held that appellee engaged in good faith negotiations with appellants prior to filing the condemnation petition. The circuit court properly allowed appellee to amend its complaint to conform to the evidence presented concerning the results of a corporate reorganization and the original company conducting the negotiations was synonymous with the company operating the pipeline. Further, written correspondence established that good faith negotiations were undertaken. The Court next held that the circuit court correctly found that KRS 278.502 did not require the private company to obtain an appraisal. The Court finally held that the circuit court properly found that the property was adequately described for purposes of the condemnation petition.

VIII. TAXATION

A. Virgin Mobile USA, L.P. v. Commonwealth of Kentucky

[2010-CA-001185](#) 06/29/2012 2012 WL 2470136

Opinion by Judge Caperton; Judges Lambert and Nickell concurred. The Court affirmed in part, reversed in part and remanded a judgment of the circuit court that applied a tax to appellant's prepaid wireless business. The Court first held that the circuit court did not err in applying the Commercial Mobile Radio Service Act tax for wireless 911 services to appellant for periods prior to a 2006 statutory amendment extending the tax to prepaid wireless services. While the statute's suggested method of collection was contrary to the business model of a prepaid provider, this did not exempt prepaid providers from what was a general duty to collect the service fee. Further, the 2006 amendment only changed the method by which collection was to occur, not the general obligation of providers to pay the fees. The Court next held that the circuit court abused its discretion in requiring

appellant to pay appellee's attorney fees. Although KRS 65.7635(5) authorized an award of attorney fees, appellant's good faith obviated penalization via an award of attorney fees. The Court finally held that the circuit court did not err in finding that appellee was not entitled to prejudgment interest. In limiting the definition of tax to those taxes administered by the Department of Revenue for purposes of Chapter 131, the governing statute excluded other taxes, including those administered by the Board. Alternatively, appellant's good faith reliance upon an independent national tax and business law information service, as well as its own accountants and tax advisors, was reason to deny an award of prejudgment interest.

IX. TORTS

A. Calhoun v. Provence

[2010-CA-001282](#) 06/22/2012 2012 WL 2360933

Opinion by Judge Stumbo; Judges Combs and Keller concurred. The Court affirmed a judgment of the circuit court reflecting a jury verdict in favor of appellant on her claim to recover damages arising from an automobile accident. On the direct appeal, the Court first held the trial court did not abuse its discretion in bifurcating the proceedings. The court's finding that separate proceedings would be more efficient was alone sufficient to support the determination that bifurcation was warranted. Although an earlier decision on bifurcation would have been preferable, it was not an abuse of the wide discretion of the trial court. The Court next held that the trial court did not err in denying appellants' motion for a directed verdict and a new trial on the issue of causation. Given the totality of the evidence, there was sufficient evidence for a jury to reasonably conclude that appellant's injury resulted from something other than the motor vehicle accident or for no discernable reason at all. The Court then held that the trial court did not err in prohibiting the introduction of the other driver's criminal charging documents and related testimony because they had no probative value. On the cross-appeal, the Court held that the trial court did not err in designating cross-appellant as the primary insured at the time of the accident. In reaching that conclusion, the Court first held that the cross-appellant had a statutory duty to require the purchaser to provide proof of insurance before delivering possession of the vehicle. Prior transactions between the parties were irrelevant and did not relieve cross-appellant from its statutory duty.

B. Lawrence v. George

[2011-CA-000275](#) 06/29/2012 2012 WL 2470985

Opinion by Judge VanMeter; Judge Dixon and Senior Judge Lambert concurred. The Court affirmed a summary judgment in favor of the appellee parole officer on two estates' wrongful death actions wherein the estates claimed that the parole officer's failure to fulfill his statutory duties resulted in the death of two children. The Court held that the officer properly exercised his discretionary duties in supervising the parolee who killed the children and thus was entitled to qualified official immunity. Therefore, the trial court did not err in granting summary judgment in favor of the officer.

C. Litsey v. Allen

[2010-CA-001777](#) 06/01/2012 2012 WL 1959562

Opinion by Senior Judge Lambert; Judges Dixon and VanMeter concurred. The Court affirmed a summary judgment dismissing appellant's claims for malpractice and intentional infliction of emotional distress as barred by the one-year statute of limitations in KRS 413.140(1)(e). The Court first held that the trial court correctly determined that appellant's claims were not tolled following her last visit to the doctor. The "continuous course of treatment" doctrine did not apply when appellant did not allege that she was relying upon the doctor to correct the consequences of poor treatment but only that she continued to have her prescription for Xanax renewed. The Court then held that the trial court correctly determined and that appellant's claim for intentional infliction of emotional distress was governed by the specific one-year statute of limitation, KRS 413.140(1)(e), governing claims against medical providers. The Court finally held that appellant did not preserve her claim that the doctor should be estopped from relying on the statute of limitation when she failed to present the argument to the trial court.

D. Smith v. Grubb

[2011-CA-000223](#) 06/15/2012 2012 WL 2160192

Opinion by Judge Thompson; Judges Lambert and VanMeter concurred. The Court reversed and remanded a judgment of the circuit court awarding appellants damages for past medical expenses, pain and suffering and loss of consortium for injuries the appellant wife received when she fell in the appellee store's parking lot. The Court first held that the trial court erred as a matter of law in finding that the store manager was individually liable for the injuries. Liability against the manager was precluded because she did not have sufficient control or supervision of the premises. The Court next held that the trial court erred in denying the store's motion for a directed verdict based on the open and obvious doctrine. The condition in the parking lot was open and obvious and the limited exception in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), did not apply when there was no evidence that the store knew or should have known that an invitee on its premises would blindly walk through its parking lot oblivious to common imperfections.