

PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS  
JUNE 1, 2012 to MAY 31, 2013

**I. ADMINISTRATIVE LAW**

A. Baptist Convalescent Center, Inc. v. Boonespring  
Transitional Care Center, LLC

2010CA001466 10/05/2012 2012 WL 4748166 DR Pending

Opinion by Judge Taylor; Judges Dixon and Lambert concurred. The Court of Appeals reversed an order of the circuit court reversing the Cabinet for Health and Family Services' denial of a certificate of need to appellee. The Court also reversed an order of the circuit court enjoining the Cabinet from enforcing its own regulation and ordering the Cabinet to withdraw a certificate of need that had previously been granted to appellant. The Court held that the circuit court is duty bound to adjudicate the validity of statutes and regulations when such legal issue is necessary to the disposition of a case. The Court also held that the validity of a regulation is a legal issue and review of such issue is not dependent upon the initial review by the circuit court. The Court then held that 900 KAR 6:075 plainly and directly conflicts with KRS 216B.095 and is therefore invalid. Specifically, the administrative rule, which governed the nonsubstantive review procedure related to applications to transfer or relocate existing certificate-of-need-approved nursing facility beds, was directly and materially inconsistent with the statutory provision that governed formal review of an application for a certificate of need. The Court further held that a health facility located in the county or contiguous county of another applicant facility qualifies as an "affected person" with standing to challenge the applicant facility's application for a certificate of need. The Court concluded that because the Cabinet's regulation was invalid, no justiciable issue existed for adjudication that would support the filing of a declaration of rights petition, so that action merited dismissal.

## **II. AGENCY**

A. Kindred Nursing Centers Ltd. Partnership v. Leffew

2011CA002067 04/19/2013 2013 WL 1688361 Released for  
Publication

Opinion by Chief Judge Acree; Judges Keller and Moore concurred. The Court of Appeals affirmed the denial of a motion to compel arbitration in a negligence action against appellant, a nursing home, after concluding that the arbitration agreement at issue was invalid. The Court first held that the Cabinet for Health and Family Services, a judicially appointed agent of a nursing home resident with limited authority to act on his behalf, could not ratify an arbitration agreement signed by the resident's son without authorization on behalf of the resident, who never regained competence prior to his death. The Court noted that only a principal is permitted to retroactively sanction the unauthorized actions of an agent. Because the resident, rather than the Cabinet, was the principal in whose name the agreement was signed, only the resident could subsequently ratify the action of his son. The Court next held that the circuit court properly declined to estop the son from disclaiming the arbitration agreement despite the son's alleged representations to nursing home administrators that he possessed the authority to execute it on behalf of his father. The "power of attorney" document relied upon by the nursing home was plainly limited in scope and did not confer upon the son the authority to enter into the arbitration agreement. The Court finally held that ordinary state law principles of contract, agency, and estoppel were not preempted by the Federal Arbitration Act (FAA) and could be used by the circuit court to assess the validity of the arbitration agreement.

## **III. APPEALS**

A. Carroll v. Wright

2012CA000787 04/05/2013 2013 WL 1365941 Rehearing Pending

Opinion by Judge Stumbo; Chief Judge Acree and Judge Combs concurred. The Court of Appeals reversed a trial verdict and judgment and remanded

for retrial on the issue of damages in this negligence action after holding that appellant was entitled to a directed verdict as to liability. Although the Court had held in a previous appeal in this action that appellant was not entitled to a directed verdict as to liability, the Court was not constrained by the "law of the case" doctrine to make the same holding in a subsequent appeal due to new evidence produced at the second trial that was directly relevant to causation and liability. Uncontroverted testimony indicated that appellee lost control of his tractor trailer, that it slid into oncoming traffic causing the accident and appellant's resulting injuries, and that in so doing appellee had violated statutory and common-law duties to stay in his lane and to safely operate his vehicle. This new evidence required a directed verdict as to liability in favor of appellant.

B. Craig v. Kulka

2011CA000036 09/21/2012 380 S.W.3d 546

Opinion and order by Judge Dixon; Judge Moore concurred; Judge Thompson dissented. The Court of Appeals dismissed an appeal of a circuit court order dismissing appellant's action against appellee to recover legal fees. After noting appellant's failure to provide a brief in substantial compliance with CR 76.12, the Court held that it possessed wide latitude to determine the proper remedy for a party's failure to follow the rules of appellate procedure and that dismissal of an appeal for failure to comply with CR 76.12 is within the Court's discretion. The Court then ordered that the appeal be dismissed.

C. Oakley v. Oakley

2011CA001410 12/21/2012 391 S.W.3d 377

Opinion by Judge Nickell; Judges Dixon concurred; Judge Maze concurred in result only and filed a separate opinion. The Court of Appeals entered an opinion and order dismissing the appeal due to a lack of jurisdiction on the basis that the notice of appeal was improperly filed from a verbal order made during an evidentiary hearing. The Court held that appellant instead should have appealed from a written order entered approximately one week after the hearing or amended his original notice of

appeal to include the written order. In addition, the Court struck the appellant's brief for failure to substantially comply with CR 76.12.

#### **IV. ARBITRATION**

A. GGNSC Stanford, LLC v. Rowe

2010CA002330 09/21/2012 388 S.W.3d 117

Opinion by Chief Judge Acree; Judges Caperton and VanMeter concurred. The Court of Appeals affirmed an order denying appellants' motion to dismiss the wrongful death action against them based on the existence of an arbitration agreement. The Court held that parents' custody over their mentally disabled child, absent guardianship, did not give them the authority to enter into an arbitration agreement on her behalf. The Court also held that entering into an arbitration agreement is not a healthcare decision and therefore may not be done by the parents of an incompetent person on behalf of that person. The Court further held that the person naming an attorney-in-fact must be the person for whom the attorney-in-fact is appointed and that the purported attorney-in-fact in this case had failed to take the procedural steps necessary to become guardian of that person and therefore lacked the authority to enter into an arbitration agreement on her behalf. The Court next held that the power-of-attorney document at issue was not executed by the proper party and was therefore incapable of transmitting the appearance of authority. The Court concluded that the parents could not be estopped from denying the validity of the arbitration agreement absent evidence that there was intent to mislead.

B. Swetnam Design Const., Inc. v. Saurer

2010CA002267 10/12/2012 382 S.W.3d 73

Opinion by Judge Caperton; Judges Dixon and Stumbo concurred. The Court of Appeals reversed and remanded a circuit court order confirming an arbitrator's modification of an original arbitration award. The Court held that an arbitrator or court may only modify an arbitration award pursuant to KRS 417.170 when there has been an evident miscalculation of figures; an evident

mistake in the description of a person, thing, or property; or if the arbitrators have awarded upon a matter not submitted and the award may be corrected without affecting the merits of the decision upon the issues submitted. The Court held that an arbitrator may not modify an award on grounds that the award has been "improperly determined" and that reconsideration of the evidence is not permitted.

## **V. ATTORNEY AND CLIENT**

### **A. Abbott v. Cunningham**

2010CA000147 05/25/2012 377 S.W.3d 565

Opinion by Judge Clayton; Judge Stumbo concurred; Judge Thompson concurred by separate opinion. The Court affirmed in part, reversed in part, and remanded interlocutory orders of the circuit court denying appellants' petition to recover judgment debts through the garnishment of assets held in the escrow/client trust accounts of the judgment debtors' attorneys. The circuit court granted the attorneys leave to apply the money held in those accounts as legal fees accrued by their clients and gave appellants a lien on any monies that were not used as legal fees. The Court first held that those attorneys who had already applied all of the funds they held as retainers as fees in their escrow accounts prior to service of garnishment had no remaining fees upon which an attachment could stand. The Court then held that a "flat fee" such as the ones accepted in the judgment debtors' criminal cases was earned immediately by the attorneys at the time of payment due to the inherent risk they had taken by accepting the fee and representation of the judgment debtors, regardless of the time and effort that could be involved. Therefore, the circuit court did not err in denying the petition to enforce garnishments. The Court further noted that the circuit court had correctly acknowledged that the nonrefundable fees must be "reasonable" and that such a determination could only be made after the judgment debtors' criminal cases had concluded.

### **B. Benton v. Boyd & Boyd, PLLC**

2010CA002058 07/06/2012 387 S.W.3d 341

Opinion by Judge Combs; Judge Moore and Senior

Judge Lambert concurred. The Court of Appeals affirmed an order granting summary judgment on appellant's claims for legal malpractice wherein appellant claimed damages for time she spent in jail when she was held in contempt for failing to pay a court-ordered amount to her ex-spouse. The Court first held that the circuit court did not prematurely grant summary judgment when the family court in the divorce action had thoroughly and precisely explained in detail why appellant was found to be in contempt and when appellant had failed to provide specific examples of what discovery could have been undertaken that would have affected the outcome. The Court next held that the circuit court did not err in finding that appellant was equitably estopped from asserting her negligence claims. The facts fell squarely within the definition of equitable estoppel when appellant: remained silent in the family court about the funds in her retirement account, which had been liquidated; was the only person who knew the true status of the account; remained notably silent when the account was discussed in court; presented no evidence to show that her attorney was aware of the true state of the account; and admitted to having signed two false affidavits. The Court finally held that appellant failed to establish the elements of legal malpractice and, therefore, the circuit court did not err in dismissing the legal malpractice action.

C. *Rose v. Winters, Yonker & Rousselle, P.S.C.*

2011CA000613 07/27/2012 391 S.W.3d 871

Opinion by Judge Keller; Chief Judge Acree and Judge Clayton concurred. The Court of Appeals affirmed an order dismissing appellants' complaint against their former attorneys. The complaint sought forfeiture of all attorneys' fees paid to the attorneys due to alleged violations of the Kentucky Supreme Court Rules of Professional Conduct concerning the illegal or unethical solicitation of clients. The circuit court concluded that it lacked jurisdiction to determine whether the attorneys had illegally or unethically solicited clients because the Kentucky Supreme Court has the sole authority to make such a determination. The Court held that while SCR 3.130(7.10) provides for a private cause of action to recover fees where a client has been illegally or unethically solicited, the rule presupposes that the appropriate disciplinary agency must first

determine whether the lawyer illegally or unethically solicited the client in violation of SCR 3.130(7.09). Only after a determination of unethical or illegal solicitation by the appropriate disciplinary agency has been made does the rule make provision for forfeiture of fees under SCR 3.130(7.10). Therefore, while the rule provides for a cause of action to recover fees, it does not provide a cause of action to determine whether a solicitation was illegal or unethical. Accordingly, dismissal was warranted.

## **VI. CIVIL PROCEDURE**

### **A. Allen v. Jones**

2011CA000576 07/06/2012 372 S.W.3d 441

Opinion by Judge Dixon; Judges Keller and Nickell concurred. The Court of Appeals affirmed an order dismissing appellant's claims against a Tennessee resident based on lack of personal jurisdiction. The Court held that the circuit court did not err in finding that it did not have personal jurisdiction under Kentucky's long-arm jurisdiction statute (KRS 454.210) over appellee, who had sold a truck to a driver who later injured appellant. Appellee fully complied with the requirements of Tennessee law in transferring the vehicle, did not transact business in Kentucky, did not contract to supply goods or services in Kentucky, and did not cause tortious injury by an act or omission in Kentucky. The Court further held that even if the transaction were governed by Kentucky law, the transfer of the title was properly completed and the driver's failure to title the truck in Kentucky did not impose liability upon appellee.

### **B. Edwards v. State Farm Mut. Auto. Ins. Co.**

2012CA000033 12/21/2012 389 S.W.3d 641

Opinion by Judge Lambert; Judges Combs and Nickell concurred. The Court of Appeals affirmed a judgment awarding a motorist's automobile insurer damages against the defendant driver for property damage caused to its insured's vehicle in an automobile accident. The Court held that the circuit court did not err in refusing to admit a settlement agreement signed by the insured, in which the insured released the defendant driver

from "any and all property damage" arising out of the accident, into evidence pursuant to CR 37.02. The agreement was executed 14 months prior to trial and appellant failed to plead release as an affirmative defense, failed to comply with a mandatory disclosure order, and offered no explanation whatsoever as to why she did not come forth with the release prior to the day of trial. The Court also upheld the award of damages against the contention that it was not based upon the fair market value of the vehicle. Appellant offered no evidence at trial of her opinion as to fair market value through the testimony of an expert or through documentary evidence, and she did not object to the testimony presented by the insurer. Moreover, because National Automobile Dealers Association (NADA) information was not available due to the newness of the car, the insurer's testimony as to how it valued the car and the amount of damages it paid its insured was adequate to determine fair market value.

C. Greer v. Hook

2010CA001767 09/14/2012 378 S.W.3d 316

Opinion by Judge Maze; Judges Clayton and Taylor concurred. The Court of Appeals affirmed an order dismissing appellants' personal injury suit for failure to properly supplement their answers to interrogatories regarding unliquidated damages. The Court held that CR 8.01(2) limits a plaintiff's recovery to the amount stated in his or her last interrogatory response. While a party may request to supplement his interrogatory answers, such a request is granted or denied at the discretion of the trial court, and the Court found no abuse of this discretion. The Court also rejected appellants' argument that appellee had waived strict compliance with the rule and instead held that the burden to supplement interrogatory information falls on the party seeking damages.

D. Hazel Enterprises, LLC v. Community Financial Services Bank

2011CA002060 07/27/2012 382 S.W.3d 65

Opinion by Judge Moore; Judges Dixon and Thompson concurred. The Court of Appeals affirmed an order denying appellant's motion to intervene in a foreclosure action for the purpose of protecting

its interest with respect to an amount it sought to collect in excess of the purchase price for a certificate of delinquency. The Court held that the circuit court did not abuse its discretion in denying the post-judgment motion to intervene as a matter of right. Appellant did not acquire any rights with respect to the certificate of delinquency until the final confirmation of sale and order of distribution had been entered. The Court further noted that appellant had previously been put on notice of the pending foreclosure action but had made no attempt to intervene until after the Master Commissioner sought to set aside the sale of the tax bill. Moreover, re-opening the litigation to account for appellant's late-acquired interests would have prejudiced the parties.

E. Hill v. State Farm Ins. Co.

2011CA001400 07/06/2012 390 S.W.3d 153

Opinion by Judge VanMeter; Judges Combs and Dixon concurred. The Court of Appeals reversed and remanded an order granting summary judgment in favor of the appellee insurer and dismissing appellant's claims against it as barred by the applicable two-year contractual limitations period provided in the insurance contract. The Court held that the circuit court erred as a matter of law in finding that appellant's complaint was filed outside the contractual limitations period when appellant had filed a motion to amend her original complaint to add the insurer as a defendant within the applicable two-year period. The filing of the timely motion for leave to amend and attachment of the amended complaint, while also providing notice to the defending party, was sufficient to timely commence the action against the insurer even though the motion to amend was not heard or granted until after the limitations period had expired.

F. Lexington Inv. Co. v. Willeroy

2010CA001027 03/01/2013 396 S.W.3d 309

Opinion by Judge Maze; Judges Keller and Moore concurred. An estate beneficiary brought an action against the estate's co-administrator, an attorney, for professional negligence, and against a broker and brokerage firm for unsuitable trading, failure to properly advise the co-administrator, and churning of the estate account. The circuit court

granted summary judgment in favor of the broker and brokerage firm, but denied their motion for sanctions and attorneys' fees under CR 11. On appeal, the Court of Appeals held that the personal representative of the estate was not a necessary party to the appeal by the broker and brokerage firm of the circuit court's denial of their motion for sanctions and attorney fees where, although the broker and brokerage firm had sought to hold estate funds in escrow to secure a potential award of attorneys' fees, the estate beneficiary and his counsel would be solely liable for any potential award. The Court then held that the circuit court did not abuse its discretion in denying the motion for CR 11 sanctions and attorneys' fees against the estate beneficiary and his counsel for allegedly failing to adequately investigate any potential claims against the broker and brokerage firm before initiating suit. Even though counsel for the estate beneficiary conceded that he did not know exactly what had transpired between the co-administrator of the estate and the broker, he had a reasonable basis to believe that either the co-administrator or the broker had engaged in wrongful conduct causing the estate losses. Moreover, given a looming statute of limitations deadline, and the co-administrator's reluctance to provide supporting documentation, the decision to bring claims against the broker and brokerage firm was not unreasonable. The Court further noted that a proposed tolling agreement signed by the broker and brokerage firm never became formally effective because not all of the potential defendants had signed it.

G. McPherson v. Felker

2009CA000901 02/15/2013 393 S.W.3d 40

Opinion by Judge Stumbo; Chief Judge Acree and Judge Nickell concurred. The Court of Appeals held that a signed summary judgment that was faxed to the circuit court clerk and entered on the docket must be considered a "signed" order under CR 58(1) for purposes of calculating the timeliness of a subsequent motion to alter, amend, or vacate. As long as the faxed order is regular on its face and there is no claim that the order was not intended to be entered or that it does not contain the signature of the judge, it should be presumed valid.

H. Northern Tool and Equipment, Inc. v. Durbin

2011CA000503 02/01/2013 392 S.W.3d 424

Opinion by Judge Thompson; Judges Combs and Maze concurred. On discretionary review from a circuit court judgment affirming the decision of the district court in a small claims action, the Court of Appeals held that the strict evidentiary standards contained in the Kentucky Products Liability Act are not applicable in a small claims action. If appellant desired to have its claim litigated in a forum where civil procedural rules are applicable, it could have sought removal to district court under KRS 24A.310.

I. Smith v. Flynn

2011CA002101 11/09/2012 390 S.W.3d 157

Opinion by Judge Combs; Judges Keller and Lambert concurred. The Court of Appeals held that the circuit court did not err in denying appellant's CR 60.02 motion to set aside a default judgment on the basis that appellant had been diagnosed with Alzheimer's disease and was therefore incompetent for service of process purposes. Because appellant admitted he has never been adjudicated incompetent, his alleged incompetence was not a valid defense for his failure to respond to the complaint as a matter of law. Furthermore, no meritorious defense was presented where appellant conceded liability two years prior to his diagnosis of dementia.

J. Stanley v. C&R Asphalt, LLC

2012CA001025 02/08/2013 396 S.W.3d 924

Opinion by Chief Judge Acree; Judge Caperton concurred and filed a separate opinion; Judge Thompson dissented and filed a separate opinion. The Court of Appeals dismissed the appeal for want of jurisdiction on the basis that a bare CR 59.05 motion which fails to state with particularity the grounds therefore is insufficient to toll the 30-day period for filing a notice of appeal.

K. Stoecklin v. River Metal Recycling, LLC

2011CA000951 06/15/2012 370 S.W.3d 527

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

## **VII. CONSUMER PROTECTION**

### **A. Collins v. Kentucky Lottery Corp.**

2011CA001073 10/12/2012 2012 WL 4839535 Released for Publication

Opinion by Judge Combs; Judges Clayton and Thompson concurred. The Court of Appeals affirmed a circuit court judgment that granted summary judgment to appellee and denied summary judgment to appellants. The Court held that the Uniform Commercial Code's definition of "goods" does not include intangible property, such as a chance to win money with a lottery ticket; that the purchase of a lottery ticket does not create an ongoing contractual relationship and therefore does not constitute a service; and that actions arising from transactions regarding the lottery do not fall within the purview of the Kentucky Consumer Protection Act. The Court held that appellants failed to establish a false representation when a variance in advertised possible prizes was de minimis in nature. The Court also held that negligent misrepresentation requires an affirmative false statement, not merely an omission. The Court further held that appellee was not unjustly enriched by the sale of \$20 lottery tickets that resulted in \$20 winnings when tickets were purchased with the understanding that they may yield zero benefit.

### **B. Marema v. First Federal Savings Bank of Elizabethtown, Inc.**

2011CA000995 10/12/2012 2012 WL 4839306 DR Pending

Opinion by Judge Dixon; Judges Moore and Thompson concurred. The Court of Appeals affirmed an order granting partial summary judgment to appellee mortgagee in its foreclosure action and a separate order finding that appellee had violated the Truth in Lending Act (TILA) and awarding statutory damages to appellants. The Court held that pursuant to 15 U.S.C.A. § 1635(f), appellants' right to rescind their loan transaction with appellee was extinguished three years from the date the promissory note was originally consummated. The time for rescinding was not extended by appellee extending the note's due date in an effort to help appellants make the required payments, or by the issuance of a second note solely for the purpose of covering the accrued interest on the primary note; the second loan was a separate transaction with a different loan number and interest rate. The Court further held that appellants had failed to show that they relied to their detriment on appellee's failure to provide TILA disclosure forms, and they were therefore barred from claiming actual damages. The Court also determined that an award of only part of appellants' attorneys' fees, when they had procured only limited success on their claims, was reasonable.

C. Roberts v. Lanigan Auto Sales

2010CA000950 01/04/2013 2013 WL 44020 DR Pending

Opinion by Judge VanMeter; Chief Judge Acree and Judge Caperton concurred. The Court of Appeals affirmed the dismissal of an action for fraud or for violation of the Kentucky Consumer Protection Act on the basis that a purchase contract which contained a "sold as is" clause transfers to the buyer the risk that the condition of the goods is not what the seller represents. By agreeing to purchase a vehicle "as is," the purchaser agreed to make his own assessment of the condition of the vehicle in spite of the seller's representations. Thus, the purchaser could not later claim that he relied on the seller's representations in agreeing to purchase the vehicle.

D. Sandoz Inc. v. Commonwealth ex rel. Conway

2010CA000626 10/12/2012 2012 WL 4838981 DR Pending

Opinion by Senior Judge Lambert; Judges Combs and

Moore concurred. The Court of Appeals reversed two separate circuit court judgments finding that appellant Sandoz had violated the Kentucky Medicaid Fraud Statute, the Kentucky Consumer Protection Act, and the False Advertising Statute and that appellant AstraZeneca had violated the Kentucky Medicaid Fraud Statute and the Kentucky Consumer Protection Act by inflating their average wholesale prices for Medicaid-eligible prescription drugs. The Court held that the Commonwealth had failed to establish causation of damages because it had been aware for decades that the prices were inflated and, therefore, it could not show that appellants' conduct was "a substantial factor" in causing it to over-reimburse pharmacies. The Court further concluded that basic equitable principles also prohibited the Commonwealth from recovering because its actions were in pari delicto with those of appellants.

#### **VIII. CONTEMPT**

A. Stinson v. Stinson

2011CA001312 10/05/2012 381 S.W.3d 333

Opinion by Judge Lambert; Judges Caperton and VanMeter concurred. The Court of Appeals reversed an order of the family court holding appellant in contempt of an amended domestic violence order for violating the no-contact or communication provision. The Court held that a party may not be held in contempt for violating an order with which he was not served and of which he had no notice until the hearing on the violation.

#### **IX. CONTRACTS**

A. Spears v. Kentucky Ins. Agency, Inc.

2011CA000481 10/12/2012 2012 WL 4839015 DR Pending

Opinion by Judge VanMeter; Chief Judge Acree concurred and filed a separate opinion; Judge Moore dissented and filed a separate opinion. The Court of Appeals affirmed an order granting summary judgment in favor of appellees in a breach-of-contract action. The Court held that the letter of intent between the parties did not contain all the necessary terms for the formation

of a final and enforceable agreement because it had left open the terms regarding non-competition, arbitration, and exit agreements. Chief Judge Acree, in his concurring opinion, invited the Kentucky Supreme Court to determine whether preliminary agreements are enforceable. In dissent, Judge Moore opined that all of the material terms necessary for the formation of a final and enforceable agreement were present.

B. Thoro-Graph, Inc. v. Lauffer

2010CA000891 10/19/2012 2012 WL 5038254 DR Pending

Opinion by Senior Judge Lambert; Chief Judge Acree and Judge Stumbo concurred. The Court of Appeals affirmed an order of the circuit court awarding appellants \$25,000, under the theory of quantum meruit, for their consulting services in the purchase of a thoroughbred racehorse. The Court held that the circuit court properly applied the industry standard fee of 5% for appellants' assistance of appellee's purchase of the racehorse and that appellee's refusal to pay more than the industry standard did not evidence fraud. The Court also held that appellants were not entitled to an award of punitive damages or an award under the theory of disgorgement of profits, absent evidence that appellee was a wrongdoer. On cross-appeal, the Court held that a purported statute of frauds was inapplicable in the subject fee recovery situation and that even if the statute were applicable, it would not preclude recovery under the theory of quantum meruit.

**X. CORPORATIONS**

A. Howell Contractors, Inc. v. Berling

2010CA001755 11/02/2012 383 S.W.3d 465

Opinion by Judge VanMeter; Chief Judge Acree and Judge Moore concurred. The Court of Appeals affirmed an order of the circuit court denying summary judgment for appellant and granting partial summary judgment in favor of appellees. The Court held that the failure of a limited liability company to pay an entity debt did not rise to the level of fraud, illegality, or unlawfulness necessary to pierce the entity veil. The Court further held that in order to pierce a corporate

veil, a party must show the loss of corporate or entity separateness, as established by the analysis of eleven distinct factors, and the sanctioning of fraud or promoting of injustice.

B. Smith v. Bear, Inc.

2010CA001803 04/05/2013 2013 WL 1352148 DR Pending

Opinion by Judge Nickell; Judges Combs and Taylor concurred. The Court of Appeals affirmed in part, reversed in part, and remanded as to a summary judgment and award of damages in an action where a fuel provider filed suit against a corporate customer and its sole shareholder seeking payment for unpaid fuel charges and accrued interest. The Court affirmed summary judgment establishing personal liability for unpaid corporate debts against the sole shareholder of the corporation under the doctrine of constructive trust where the shareholder had received substantial corporate assets immediately prior to dissolution and after debts were accrued. However, the Court reversed and remanded the grant of summary judgment against the corporation on the basis that the corporation was purportedly represented below by the shareholder, a non-attorney, in contravention of established law. The Court also held that a jury trial was not required as the only triable issues were grounded in equity and the parties did not agree to a trial by jury. The Court concluded that the amount of damages awarded was appropriate and found no error in the circuit court's award of attorneys' fees under the circumstances.

C. Watkins v. Stock Yards Bank & Trust Co.

2011CA000228 06/29/2012 2012 WL 2470692 DR Pending

Opinion by Judge Keller; Judges Acree and Clayton concurred. The Court of Appeals affirmed an order dismissing appellant/cross-appellee's individual claims against a bank acting as the trustee of a family trust; an order granting appellees/cross-appellants' motion for summary judgment and dismissing appellant/cross-appellee's derivative claims; and an order denying appellees/cross-appellants' motions for attorneys' fees. The Court first held that the circuit court did not err in dismissing the derivative claims because appellant/cross-appellee did not have standing to pursue the claims pursuant to KRS 271B.7-400(1). Specifically, appellant/cross-appellee

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 circuit court did not err in dismissing appellant/cross-appellee's direct claims against a trustee when appellant/cross-appellee had 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 circuit court did not abuse its discretion in failing to award appellees/cross-appellants attorneys' fees.

## **XI. CORRECTIONS**

A. Meece v. Com., Dept. of Corrections

2011CA001231 01/11/2013 2013 WL 132638 DR Pending

Opinion by Judge VanMeter; Judges Nickell and Taylor concurred. The Court of Appeals held that the circuit court did not err in entering summary judgment in favor of the Department of Corrections on a death-row inmate's claim that he was denied access to the penitentiary Institutional Religious Center to observe the Sabbath on Friday evenings and Saturday mornings. The Court concluded that there was no violation of Kentucky Corrections Policies and Procedures or any deprivation of the inmate's rights under the Religious Land Use and Institutionalized Persons Act of 2000. Segregation of death-row inmates from the general population in a religious center was based upon security concerns. Further, the subject prison restrictions constituted a mere inconvenience to the inmate's desired approach to the practice of his religion and did not substantially inhibit his expression of religious beliefs.

B. Roberts v. Thompson

2011CA001950 12/07/2012 388 S.W.3d 519

Opinion by Judge VanMeter; Judges Combs and Dixon concurred. The Court of Appeals reversed and remanded an order dismissing appellant's petition for a declaration of rights seeking educational good time credit towards his sentence. The Court held that the Department of Corrections no longer has the discretion to award EGT credit for multiple diplomas under the subject circumstances but is

required to do so pursuant to the amended version of KRS 197.045(1).

C. Thrasher v. Commonwealth

2010CA001379 11/30/2012 386 S.W.3d 132

Opinion by Judge Taylor; Judges Nickell and VanMeter concurred. The Court of Appeals held that the circuit court was bound by KRS 454.415(4) to dismiss an inmate's declaration of rights action where there was absolutely no evidence that the inmate had exhausted his administrative remedies by following the procedures set out in Kentucky Department of Corrections Policy and Procedure (CPP) 17.4 to request a review or explanation of sentence calculation, including statutory good time credit.

**XII. CRIMINAL LAW**

A. Bagby v. Commonwealth

2011CA000776 08/17/2012 376 S.W.3d 620

Opinion by Judge Combs; Judges Dixon and VanMeter concurred. The Court of Appeals affirmed a judgment entered after appellant entered a conditional guilty plea wherein he reserved the right to appeal an order denying a motion to suppress evidence related to drug charges. The Court held that the circuit court did not err as a matter of law in finding that the exclusionary rule did not apply or in denying the motion to suppress. Specifically, the Court held that the investigating officer - who knew that appellant's driver's license had been suspended due to a DUI conviction - was not duty-bound to immediately arrest appellant as soon as he saw her driving without a license. Instead, he could wait to conduct further investigation before initiating an arrest. Citing to *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966) and *Phillips v. Commonwealth*, 473 S.W.2d 135 (Ky. App. 1971), the Court noted that there is no constitutional right to be arrested within a particular time frame. Law enforcement officials are entitled to conduct their investigations into criminal wrongdoing until such a time as the officers are satisfied in their professional discretion that halting the investigation is timely

and appropriate. Therefore, the evidence in question was not obtained in violation of appellant's rights under the Fourth Amendment nor was it gathered as either the direct or the indirect result of any illegal police conduct.

B. Bounds v. Commonwealth

2011CA000671 02/08/2013 2013 WL 462055 DR Pending

Opinion by Chief Judge Acree; Judges Nickell and Stumbo concurred. The Court of Appeals affirmed the denial of appellant's motion to suppress. The Court held that an officer's affidavit established probable cause to issue a search warrant for appellant's residence, person, and vehicle: (1) where the affidavit stated that the officer was a seven-year veteran of the police force; (2) because it is common knowledge among law enforcement and the courts that pseudoephedrine is a key ingredient in the manufacture of methamphetamine; and (3) the affidavit indicated that the officer discovered that appellant was purchasing and simultaneously asking others to purchase pseudoephedrine and, concomitantly, appellant purchased Coleman fuel, yellow ammonia, and ether, other items used in the manufacturing process. The fact that the affidavit did not affirmatively state the criminal activity occurred or was occurring on or at appellant's residence did not necessarily render the search warrant fatally flawed. The issuing court could reasonably assume that a person manufacturing drugs is doing so at his residence, and under the totality of the circumstances, the district court had a substantial basis for concluding that the factual recitations in the officer's affidavit established probable cause to issue a search warrant.

C. Brady v. Commonwealth

2011CA001639 03/08/2013 396 S.W.3d 315

Opinion by Judge Maze; Judges Stumbo and Thompson concurred. The Court of Appeals affirmed a judgment convicting appellant, following a guilty plea, of two counts of first-degree sexual abuse and sentencing him to five years' incarceration, five years' post-incarceration supervision pursuant to KRS 532.043, and a lifetime sex offender registration obligation. The Court held that the conduct giving rise to at least one count of

appellant's indictment occurred after the revised and enhanced sentencing provisions of KRS 532.043 took effect. Accordingly, the circuit court properly sentenced appellant under those provisions.

D. Bratcher v. Commonwealth

2009CA001084 11/02/2012 2012 WL 5370791 DR Pending

Opinion by Judge Nickell; Judges Keller and Stumbo concurred. The Court of Appeals affirmed the circuit court's denial of appellants' RCr 11.42 claims of ineffective assistance of counsel. The Court held that neither appellant was able to satisfy the Strickland standard of showing that counsel's performance was strategically unsound or unreasonable or that they were deprived of a fair trial with a reasonable result. The Court specifically held that trial counsel acted competently by discouraging a defendant called by the state as a witness against the codefendant from giving a version of events different from his taped statement to police. The Court also held that appellant was not deprived of effective assistance of counsel on the basis that he was the first capital client represented by his attorneys.

E. Buchanan v. Commonwealth

2011CA000639 09/21/2012 2012 WL 4208939 Released for Publication

Opinion by Judge Keller; Judges Taylor and VanMeter concurred. The Court of Appeals affirmed a judgment convicting appellant of multiple crimes. The Court held that the circuit court did not err when it permitted the jury to correct a mistake in its verdict because the mistake was one of form, not substance. Consequently, the alterations to the jury verdict did not result in a double jeopardy violation. The Court also held that because there was sufficient evidence to support both wanton first-degree assault and intentional first-degree assault, appellant was not denied a unanimous verdict by a combination jury instruction. The Court noted that appellant was on notice that it was within the Commonwealth's discretion to proceed under either or both theories of first-degree assault and he was therefore properly indicted. The Court further held that the circuit court did not abuse its discretion when it refused to grant a mistrial after administering a jury

admonition regarding inadmissible evidence of other crimes. The Court finally held that the evidence was sufficient to support a conviction of tampering with physical evidence.

F. Carter v. Commonwealth

2012CA000064 02/22/2013 2013 WL 645829 DR Pending

Opinion by Judge Combs; Judge Caperton concurred; Judge Dixon dissented. The Court of Appeals vacated and remanded an order revoking probation on the basis that the circuit court erred in failing to evaluate all criteria set forth in KRS 439.3106 and in relying solely on the element of failure to report. Appellant's failure to report, without more, could not serve as the basis for the revocation of probation. The General Assembly did not prioritize the element of reporting in the criteria to be considered; rather, it emphasized the necessity of analyzing the severity and risks of a person's crime before committing him to jail without probation.

G. Casey v. Commonwealth

2010CA002310 09/21/2012 2012 WL 4208921 DR Pending

Opinion by Judge VanMeter; Judges Moore and Stumbo concurred. The Court of Appeals affirmed a judgment convicting appellant of multiple crimes, including theft of a motor vehicle registration plate. The Court held that the evidence, namely that appellant had removed the license plate from a vehicle without that vehicle owner's permission, was sufficient to support a jury's conclusion that appellant intended to steal the license plate, despite evidence that the license plate was merely being used as a prop for a homemade temporary replacement plate.

H. Chames v. Commonwealth

2011CA000173 11/02/2012 2012 WL 5373913 DR Pending

Opinion by Judge VanMeter; Judges Moore and Stumbo concurred. In an opinion affirming in part, vacating in part, and remanding, the Court of Appeals held that the circuit court acted outside its jurisdiction in listing the conditions of appellant's conditional discharge in its judgment

and sentence. Under KRS 532.043(3)(a), the Department of Corrections, rather than the trial court, is tasked with setting the conditions of post-incarceration supervision. The Court held that the separation of powers doctrine precludes each of the three branches of government from encroaching upon the domain of the other two branches and, as a result, the circuit court acted without authority to do so when it listed conditions that could be imposed upon appellant's conditional discharge. The Court also held that it was error to impose restitution under KRS 532.033(3) and (4) without setting a certain, specified amount to be paid to the victim.

I. Commonwealth v. Armstrong

2011CA000931 02/22/2013 2013 WL 645979 DR Pending

Opinion by Chief Judge Acree; Judges Clayton and Keller concurred. In an appeal from the denial of the Commonwealth's petition for a writ of prohibition, the Court of Appeals upheld the conclusion of the circuit court that the district court properly suppressed evidence acquired following appellee's arrest for DUI. Under the totality of the circumstances, there was no probable cause to infer that appellee was operating or in physical control of his vehicle at the time of his arrest. The arresting officer testified that when he approached appellee's legally parked vehicle, he found appellee unresponsive and had to break the back window of the car to rouse him. Although the motor of the car was running, there was no evidence that appellee had moved or otherwise operated the vehicle while intoxicated.

J. Commonwealth v. Ballinger

2011CA001248 09/28/2012 2012 WL 4464564 DR Pending

Opinion by Judge Keller; Judges Clayton and Maze concurred. The Court of Appeals reversed an order granting appellee's motion to amend count one of his indictment from driving under the influence, fourth offense, to driving under the influence, second offense. The Court held that for the purposes of penalty enhancement, the determining factor as to whether conviction of a subsequent offense is proper is the existence of a credible record showing conviction of a prior offense. It is the timing of the convictions that control and

not the timing of the arrests. Thus, the Court held that even though appellee's convictions on his second and third offenses had not been entered at the time of his arrest on the fourth offense, where he pleaded guilty to the second and third charges prior to indictment on the fourth offense, the original indictment was proper.

K. Commonwealth v. Bedway

2011CA001235 10/26/2012 2012 WL 5274732 DR Pending

Opinion by Judge Dixon; Judges Caperton and Stumbo concurred. The Court of Appeals affirmed the circuit court's reversal of a district court order denying appellee's motion to suppress the results of a breathalyzer test. The Court held that appellee, who requested to call his daughter to get the phone number of an attorney who had previously done work for the family but was told that he could only call an attorney and not a third party, was deprived of his statutory right under KRS 189A.105(3) to attempt to contact and communicate with an attorney after being arrested for driving under the influence. Consequently, such deprivation mandated the exclusion of appellee's breathalyzer test. The Court further held that where a request under these circumstances was timely, the Commonwealth would not be negatively impacted and that there appeared to be no legislative intent that a suspect's right to contact an attorney was solely limited to an attorney that could be randomly located in a phone book or contacted on a collect-call phone.

L. Commonwealth v. Brooks

2011CA002075 12/07/2012 388 S.W.3d 131

Opinion by Judge Clayton; Judges Combs and Thompson concurred. The Court of Appeals held that the circuit court did not err in suppressing evidence found in appellee's purse where no evidence supported the Commonwealth's contention that a warrantless search of the purse was the product of concern for officer safety. The Court further held that a third party's consent to search the entire house did not extend to the purse, which was found in the house's basement, where no reason was offered for not asking the consent of the owner of the purse and the Commonwealth failed to show it would have been unable to secure a warrant to

search the purse. The Court noted that the purse's owner was in another room and supervised by police officers at the time of the search, and the officer who searched the purse testified that he was not concerned for his safety at the time of the search and that he was aware that the purse's owner had not been living in the house at the time of the prior shooting incident that had occurred there.

M. Commonwealth v. Burton

2011CA002139 03/15/2013 2013 WL 1003438 DR Pending

Opinion by Judge Caperton; Judges Combs and Dixon concurred. The Court of Appeals affirmed an order disallowing testimony by a physician and police officer in appellant's trial for second-degree manslaughter, second-degree assault, and operating a motor vehicle on a suspended license. The Court held that any error by the circuit court in determining that expert testimony from the physician, who was offered as a specialist in the field of toxicology, should be excluded because it was based upon inadmissible evidence was harmless. The Court noted that while experts are permitted to rely on information that is otherwise inadmissible, if the information is commonly relied on in their field, the subject matter of the expert opinion must still satisfy the test of relevancy, subject to the balancing of probativeness against prejudice as required by KRE 403. In this case, the physician's opinion was properly excluded per the circuit court's "gatekeeper role" because his opinion as presented to the circuit court was equivocal regarding the cause of appellant's behavior. The physician admitted that he could not establish when appellant had ingested illegal substances or whether he was impaired at the time of the accident. The Court further held that the circuit court's failure to hold an expert witness hearing on the admissibility of drug recognition testimony from a police officer was not an abuse of discretion where the officer did not personally observe appellant or subject him to drug-recognition testing, the drug-recognition examination was observation-intensive, and the reliability of the results was tied to the observer's training.

N. Commonwealth v. Davis

2012CA000933 05/10/2013 2013 WL 1919515 Released for

## Publication

Opinion by Judge Moore; Judge Nickell concurred; Judge Taylor dissented. The Court of Appeals reversed and remanded an order granting appellee's motion to expunge. The Court held that pursuant to KRS 431.076, if proceedings are pending against a person who has requested expungement of his/her record, the motion shall not be granted. The statute does not require the pending proceedings to be criminal in nature; therefore, the civil proceedings that were pending against appellee should have been sufficient to prevent expungement of his record, and the circuit court erred in granting appellee's motion to expunge. Additionally, KRS 431.078 was inapplicable to this case because that statute concerns expungement for people who have been convicted of misdemeanors or violations, whereas appellee was charged with, but not convicted of, a felony. Thus, the applicable statute was KRS 431.076, not KRS 431.078.

### O. Commonwealth v. Fowler

2011CA001581 09/21/2012 2012 WL 4210110 DR Denied

Opinion by Judge Moore; Judges Caperton and Lambert concurred. The Court of Appeals reversed and remanded an order granting appellee's motion to suppress. The Court held that KRS 189.380 requires a person to signal before conducting a lane change in his or her vehicle. Therefore, appellee's lane change without use of a turn signal gave a police officer probable cause necessary to conduct a stop.

### P. Commonwealth v. Robertson

2011CA002159 04/19/2013 2013 WL 1688357 Rehearing Pending

Opinion by Judge Maze; Judge Thompson concurred; Judge Stumbo concurred by separate opinion. The Court of Appeals affirmed an order overturning appellee's convictions due to ineffective assistance of counsel under RCr 11.42. The Court first held that comments by the prosecutor during closing argument violated appellee's right not to testify and that the failure of appellee's trial counsel to object to those comments constituted ineffective assistance. The Court next held that the presumption of prejudice established in *United States v. Cronin*, 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984), applied to counsel's

performance during appellee's juvenile transfer hearing given counsel's admission that he had failed to prepare whatsoever for the hearing or to challenge blatantly incorrect testimony given during it. The Court held that because of counsel's deficient performance, the transfer hearing's result was "presumptively unreliable" and invalid; moreover, this presumption could not be rebutted by a showing of harmless error. The Court further held that in such instances and where a defendant's current age prohibited his return to the juvenile system, the proper remedy, as a general rule, is the remand of the matter for a de novo review before the trial court regarding whether transfer was appropriate under Kentucky law and whether the court had jurisdiction over the case. However, the Court ultimately concluded that the "law of the case" doctrine prevented the trial court in this case from considering the appropriateness of the juvenile transfer because the Supreme Court had decided the question in an earlier appeal.

Q. Commonwealth v. Vibbert

2012CA000231 04/12/2013 397 S.W.3d 910

Opinion by Judge Dixon; Judge Caperton concurred; Judge Combs concurred in result by separate opinion. The Court of Appeals reversed and remanded an order dismissing an indictment against appellee for first-degree possession of a controlled substance. The Court held that KRS 218A.14151 must be interpreted as limiting deferred prosecution agreements for felonies under KRS 218A.1415 to the discretion of the Commonwealth's attorney and the circuit court. Thus, neither the county attorney nor the district court had authority to authorize a deferred prosecution agreement, and the Commonwealth was not bound by an agreement negotiated by the county attorney and approved by the district court.

R. Coomer v. Commonwealth

2011CA001512 05/03/2013 2013 WL 1844759 DR Pending

Opinion by Judge Thompson; Judges Clayton and Keller concurred. The Court of Appeals affirmed in part, reversed in part, and remanded an order revoking and forfeiting appellant's bail bond in the amount of \$50,000. The Court held that the

forfeiture of the entire \$50,000 was excessive and that the circuit court was without authority to direct payment of the forfeited bond to the county sheriff. The Court noted that the money forfeited did not belong to the appellant in question and was posted as bond by two other individuals. Those individuals did not participate in appellant's criminal activities after the bond was posted and there was no evidence that either could have prevented his conduct. The Court further noted that appellant appeared at all court dates and there was no evidence that there were costs incurred by the Commonwealth. Given these facts, and because appellant's arrest did not require substantial investigative resources and a delay in disposition of the underlying charges, forfeiture of the entire bond was excessive. The Court further held that KRS 30A.120 and KRS 431.100 control the disposition of forfeited bonds and require forfeited bond money to be paid to the Commonwealth rather than to a county sheriff.

S. Cozzolino v. Commonwealth

2011CA000656 06/22/2012 395 S.W.3d 485

Opinion by Judge Stumbo; Judge Combs and Senior Judge Lambert concurred. The Court of Appeals vacated a circuit court order that had reversed a directed verdict of the district court acquitting appellant of DUI. The directed verdict was entered in accordance with appellant's motion to dismiss after the district court suppressed evidence obtained in violation of *Miranda v. Arizona* and found that the odor of alcohol and appellant's red, glassy eyes were insufficient to prove DUI. The Court held that the Commonwealth could not appeal from a directed verdict of acquittal in these circumstances under the Double Jeopardy Clause of the United States and Kentucky Constitutions. The Court specifically held that the fact that the case was dismissed on appellant's motion did not support the circuit court's decision since the dismissal was related to a lack of evidence supporting appellant's factual guilt. Therefore, double jeopardy prevented appellant from being tried again for DUI.

T. Dehart v. Commonwealth

2011CA001592 02/22/2013 2013 WL 645950 DR Pending

Opinion by Judge Caperton; Judges Dixon and Taylor concurred. Upon review of appellant's plea colloquy, the Court of Appeals reversed and remanded an order denying his motion to withdraw his guilty plea. At the time appellant entered the plea, he asked specific questions concerning the applicable parole eligibility and requested that the circuit court clarify the issue only to receive erroneous and confusing information. Because the information appellant received during the colloquy from the circuit court and the Commonwealth was ambiguous, if not misleading, and because the record was clear that he had relied upon this information in pleading guilty, the Court held that the record established that appellant should have been permitted to withdraw his guilty plea on the basis that it was not knowingly, intelligently, or voluntarily entered.

U. Donovan v. Commonwealth

2011CA000538 08/24/2012 376 S.W.3d 628

Opinion by Judge Caperton; Judges Combs and Nickell concurred. The Court of Appeals reversed and remanded an order of restitution. The Court held that the circuit court abused its discretion in entering the restitution order prior to the expiration of the time period set by the court for appellant to controvert the Commonwealth's evidence regarding the restitution amount, thereby resulting in a violation of appellant's due process rights.

V. Douglas v. Commonwealth

2011CA000066 07/27/2012 374 S.W.3d 345

Opinion by Judge Moore; Judge Stumbo concurred; Judge VanMeter dissented by separate opinion. The Court of Appeals reversed and remanded a judgment convicting appellant of second-degree manslaughter and sentencing her to seven years' imprisonment. The Court held that the circuit court abused its discretion in allowing evidence of appellant's hydrocodone prescription history and that its disclosure resulted in the improper admission of irrelevant and prejudicial evidence of other crimes or bad acts. The act of getting multiple hydrocodone prescriptions was not strikingly similar to the charged offense of second-degree manslaughter and, therefore, it did not qualify for the "pattern of conduct" exception for admitting

evidence of prior bad acts. Additionally, it was not relevant and the danger of undue prejudice from its admission outweighed any probative value when appellant did not have hydrocodone in her bloodstream at the time of the motor vehicle accident resulting in the charges against her. Moreover, the probative value of the evidence, even if relevant, was substantially outweighed by the danger of undue prejudice. The insinuation that appellant was doctor shopping added to the undue prejudice. The Court further held that the error was not harmless because there was a reasonable probability that absent the error, appellant may have been convicted of the lesser-included offense of reckless homicide. The Court finally noted that appellant's Kentucky All-Schedule Prescription Electronic Reporting (KASPER) report should not have been disclosed to the Commonwealth or to the Commonwealth's expert since there was no court order authorizing the disclosure, and neither the prosecutor nor expert were authorized by statute to access the report.

W. Elders v. Commonwealth

2011CA000299 08/17/2012 395 S.W.3d 495

Opinion by Judge Keller; Chief Judge Acree and Judge Clayton concurred. The Court of Appeals affirmed an order denying appellant's motion to suppress evidence and a judgment convicting appellant of sodomy and/or rape in the third degree, one count of distribution of obscene matter to minors, and of being a persistent felony offender in the second degree. The Court first held that the circuit court did not err in denying the motion to suppress evidence because probable cause supported the issuance of the warrant to search appellant's home. The issuing judge could draw a reasonable inference that a video camera, videotapes, and erotic female clothing were kept at appellant's residence when the supporting affidavit provided that the victim told the police that appellant possibly took the video camera to his home. The Court further held that even if probable cause did not support the issuance of the warrant, the evidence would have been admissible pursuant to the good-faith exception to the exclusionary rule. The Court next held that the circuit court's statements explaining jury instructions were not coercive since the court did not make a statement regarding the propriety and importance of coming to an agreement. The court also did not otherwise err

in orally explaining the instructions.

X. Engles v. Commonwealth

2011CA000483 07/20/2012 373 S.W.3d 456

Opinion by Judge Combs; Judge Thompson and Senior Judge Lambert concurred. The Court of Appeals affirmed a judgment entered after appellant entered a conditional guilty plea to third-degree burglary and to being a persistent felony offender in the second degree wherein he reserved the right to appeal the denial of his motion to suppress evidence. The Court held that while the evidence did not conclusively prove that a gun found in a ladies' room in a nearby building was used by appellant during the subject burglary, it was not an abuse of discretion for the court to allow the gun to be admitted as evidence since it was found near enough both in time and in place to be relevant. The gun was found in a building that was across the street from the grocery store in which the burglary had occurred, and the building was accessible to the public. The police responded to the burglary immediately, and within minutes they found the gun in the same building in which they found appellant. Moreover, several witnesses testified that the gun appeared to be similar to the gun that they saw appellant brandish.

Y. Farmer v. Commonwealth

2011CA001412 10/19/2012 2012 WL 5042119 DR Pending

Opinion by Judge Dixon; Judges Caperton and Stumbo concurred. The Court of Appeals reversed and remanded an order denying appellant's motion for post-conviction relief from his burglary, assault, and persistent felony offender convictions. The Court held that trial counsel rendered ineffective assistance by failing to investigate whether appellant resided in the home he was charged with having burglarized and by advising appellant to plead guilty to burglary. The Court noted that if appellant could establish his status as a tenant-at-will and demonstrate that it was not legally terminated at the time of the incident, such would constitute a defense against the burglary charge.

Z. Gentry v. Commonwealth

2011CA000141 10/12/2012 2012 WL 4839012 DR Pending

Opinion by Chief Judge Acree; Judge VanMeter concurred; Judge Caperton concurred and filed a separate opinion. The Court of Appeals affirmed appellant's conviction of driving on a DUI-suspended license, third offense. The Court held that there is no expectation of privacy in a license plate affixed to the exterior of one's vehicle that would merit constitutional protection and that a police officer's running of appellant's license plate, therefore, did not constitute an illegal search. The Court also held that the running of license plate information without guiding policies and/or supervisor involvement did not amount to a constitutional violation. The Court further held that the officer had an articulable and reasonable suspicion to conduct a traffic stop when the vehicle's operator matched the description of the vehicle's owner, who had a suspended license.

AA. Given v. Commonwealth

2011CA002316 04/12/2013 2013 WL 1488996 DR

Opinion by Judge Clayton; Judges Keller and Thompson concurred. The Court of Appeals affirmed an order granting the Commonwealth's motion to correct appellant's sentence. Language in a judgment reflecting the amendment of a fourth-offense DUI to a third-offense DUI was held to be a clerical error under RCr 10.10 where the plea offer explicitly stated that appellant was pleading guilty to fourth-offense DUI; appellant signed the document and acknowledged that he understood its terms; appellant signed a written guilty plea stating his intention to plead to fourth-offense DUI; and appellant stated in open court that he was knowingly and voluntarily pleading guilty to fourth-offense DUI and third-offense driving on a DUI-suspended license as amended by agreement.

AB. Goins v. Commonwealth

2011CA000067 10/19/2012 2012 WL 5038488 DR Pending

Opinion by Judge Nickell; Chief Judge Acree and Judge Stumbo concurred. The Court of Appeals affirmed the circuit court's denial of appellant's

motion for post-conviction relief. The Court held that appellant was not entitled to retroactive application of a statutory amendment to KRS 218A.1415 that would result in a decreased penalty for his crimes. The Court further held that appellant had otherwise failed to establish ineffective assistance of both trial and appellate counsel.

AC. Grundy v. Commonwealth

2011CA001852 05/24/2013 2013 WL 2257699

Opinion by Judge Lambert; Judges Dixon and Taylor concurred. The Court of Appeals reversed and remanded a circuit court order that denied appellant's CR 60.02 motion to vacate an order revoking his probation and his CR 59.05 motion to alter, amend, or vacate. The Court held that pursuant to KRS 533.020(1) and *Conrad v. Evridge*, 315 S.W.3d 313 (Ky. 2010), the circuit court did not have jurisdiction to revoke appellant's probation and, therefore, the judgment revoking his probation was void. The Court further held that because a void judgment is a legal nullity and does not acquire validity with the passage of time, the fact that appellant's CR 60.02 motion was filed almost eight years after his probation was revoked did not preclude relief.

AD. Jarrell v. Commonwealth

2011CA001399 11/02/2012 384 S.W.3d 195

Opinion by Judge Moore; Chief Judge Acree concurred; Judge Thompson dissented and filed a separate opinion. The Court of Appeals affirmed an order revoking appellant's probation. The Court held that a lack of evidence in the record that appellant had received written notice of his probation conditions did not make revocation of his probation inappropriate when he had been orally informed of the conditions and was, therefore, on notice. The Court also held that an alleged failure to provide appellant with written notice of the basis for his probation revocation did not merit reversal where appellant was orally informed at a scheduling hearing for the revocation hearing of the basis for revocation, and where appellant appeared at the revocation hearing and was represented at that hearing by counsel, who cross-examined the Commonwealth's witness, appellant's probation officer. The Court also held

that appellant's signature on a form, admitting that he had used Oxycodone on the day of his sentencing, was sufficient to meet the preponderance-of-the-evidence standard needed to revoke his probation. The Court finally held that the circuit court did not abuse its discretion when it chose to revoke appellant's probation as opposed to imposing a lesser sanction for his probation violation. In his dissent, Judge Thompson opined that appellant could not have his probation revoked for a single use of Oxycodone minus a finding that the violation constituted a significant risk to prior victims or the community and that the probationer could not be managed in the community.

AE. Jones v. Commonwealth

2011CA001298 12/21/2012 2012 WL 6634144 DR

Opinion by Judge Stumbo; Chief Judge Acree concurred; Judge Nickell concurred and filed a separate opinion. The Court of Appeals affirmed the conclusion of the circuit court that under KRS 218A.14151(1)(a), the decision as to whether to allow a defendant into a deferred prosecution program is a matter within the sole discretion of the prosecution because the prosecutor must agree to allow the defendant into the program. If the Commonwealth denies a defendant entry into the program, it must then, pursuant to KRS 218A.14151(2), take a position on presumptive probation by stating on the record "substantial and compelling" reasons why the defendant cannot be safely supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety. However, the Commonwealth is not required to state on the record substantial and compelling reasons why it denied a defendant entry into the deferred prosecution program.

AF. Kaletch v. Commonwealth

2012CA000268 03/15/2013 396 S.W.3d 324

Opinion by Judge Moore; Judges Clayton and Lambert concurred. The Court of Appeals affirmed an order revoking appellant's probation. The Court held that the Double Jeopardy Clause does not apply to probation revocation proceedings because the threat of a negative result does not rise to the level of being "put in jeopardy" in the Constitutional sense.

In other words, a parole or probation hearing simply is not the equivalent of a criminal prosecution because a conviction could not flow from such a proceeding. The Court next held that KRS 439.3107, which requires the Department of Corrections to take action to develop regulations pertaining to graduated sanctions, did not require the circuit court to consider graduated sanctions before revoking appellant's probation. The Court finally held that the circuit court did not commit palpable error in revoking appellant's probation under KRS 439.3106.

AG. King v. Commonwealth

2010CA000394 09/28/2012 384 S.W.3d 193

Opinion by Judge Combs; Judges Caperton and Nickell concurred. The Court of Appeals affirmed appellant's convictions in three separate cases after concluding that his post-conviction motions were time-barred. The Court held that the latest appellant's claims could have accrued was when he received his enhanced federal sentence.

AH. Lemaster v. Commonwealth

2012CA000704 04/19/2013 2013 WL 1688206 Released for Publication

Opinion by Judge Combs; Judges Moore and Taylor concurred. The Court of Appeals dismissed an appeal in which appellant was challenging the revocation of his probation. The Court held that because appellant was a fugitive who had never reported to the Department of Probation and Parole for supervision, he was not entitled to call upon the Court's resources for determination of his claims. Therefore, dismissal was merited.

AI. Lewis v. Commonwealth

2012CA000244 04/19/2013 2013 WL 1688329 Released for Publication

Opinion by Judge Lambert; Judges Caperton and Maze concurred. The Court of Appeals affirmed a judgment finding appellant guilty of two counts of second-degree robbery and of being a first-degree persistent felony offender. Citing to KRS 515.030, the Court held that evidence that appellant engaged

in conduct implying the threat of physical force was sufficient to support his convictions even in the absence of an express threat. Appellant kept his hand in his pocket during the robbery and even went so far as to prop his concealed hand up on a counter, implying that his hand contained a gun which would be discharged if the victim failed to comply. The victim also testified that appellant's behavior gave the impression that he had a gun, and that the victim was in fear for his life.

AJ. Lucas v. Commonwealth

2011CA001020 09/21/2012 380 S.W.3d 554

Opinion by Judge VanMeter; Judges Keller and Taylor concurred. The Court of Appeals affirmed an order revoking appellant's probation. The Court held that appellant could not challenge the validity of a probation violation conviction by challenging the validity of the underlying conviction from which the probation originated.

AK. Maddix v. Commonwealth

2011CA001765 02/01/2013 2013 WL 375546 DR Pending

Opinion by Judge VanMeter; Judge Nickell concurred; Judge Taylor concurred in part and dissented in part and filed a separate opinion. The Court of Appeals affirmed an order voiding appellant's pretrial diversion and ordering him to pay restitution. The Court held that where the Commonwealth filed a motion to extend appellant's pretrial diversion during the three-year diversion period, the circuit court retained jurisdiction to rule on the motion even after the expiration of the diversion period. The Court also held that although the original pretrial diversion order failed to set an amount of restitution, that order was interlocutory and was extended by appellant's agreement. Because appellant participated in a civil proceeding that set restitution and had every opportunity to contest the amount owed, the Court concluded that he suffered no prejudice when the circuit court set the amount of restitution per the civil judgment.

AL. Mbaye v. Commonwealth

2009CA001134 10/12/2012 382 S.W.3d 69

Opinion by Judge Keller; Judges Lambert and Taylor concurred. On remand from the Kentucky Supreme Court, the Court, having previously affirmed an order revoking appellant's probation, now vacated and remanded the order. The Court held that pursuant to Commonwealth v. Marshall, 345 S.W.3d 822 (Ky. 2011), the circuit court was required to determine whether appellant's failure to find and/or maintain employment was done willfully. The Court concluded that the circuit court's findings were insufficient to support a probation revocation when they failed to address appellant's bona fide efforts to find and maintain employment and whether his inability to do so was through no fault of his own, when appellant was a foreign national and was prevented from working legally due to the loss of his passport.

AM. McElroy v. Commonwealth

2011CA000235 12/21/2012 389 S.W.3d 130

Opinion by Judge Lambert; Judges Caperton and VanMeter concurred. The Court of Appeals affirmed in part, vacated in part, and remanded as to a judgment convicting appellant of first-degree robbery. The Court held that appellant failed to demonstrate manifest injustice sufficient to overturn his conviction where his claims of evidentiary errors were unpreserved. The Court specifically held that no palpable error occurred in the Commonwealth's introduction of evidence concerning a witness's drug use and selling of drugs in order to bootstrap its theory that appellant's motive for commission of the robbery was to obtain drugs. The Court also held that an unpreserved error concerning appellant's references to his prior DUI offenses and a conviction for possession of Percocet in his videotaped statement to police did not rise to the level of palpable error. The Court then vacated an order imposing court costs and remanded for appropriate findings required by KRS 23A.205(2).

AN. McGorman v. Commonwealth

2010CA001971 11/16/2012 2012 WL 5626893 DR Pending

Opinion by Judge Clayton; Chief Judge Acree concurred; Judge Keller concurred in result only. The Court of Appeals reversed and remanded an order

denying appellant's motion for RCr 11.42 post-conviction relief. The Court held that the circuit court should have conducted an evidentiary hearing on appellant's claim that his trial counsel was ineffective for failing to convey the Commonwealth's 20-year plea offer to appellant - then a juvenile - or his parents. Appellant and his parents offered affidavits stating that they had not been approached with the offer, and trial counsel could not remember with certainty that he conveyed the offer to appellant, although he stated that he did convey it to the parents. The Court further held that trial counsel's failure to conduct an investigation, to have appellant's mental health status evaluated, and to talk to the prosecutor prior to appellant's surrender to police for interrogation (and a confession) clearly affected his ability to receive a fair trial. Allowing an interview with police under these circumstances constituted ineffective assistance of counsel. Therefore, because the interview with police permeated appellant's trial with unfairness, a new trial was merited.

AO. Meyer v. Commonwealth

2011CA001622 02/22/2013 393 S.W.3d 46

Opinion by Judge Moore; Chief Judge Acree concurred; Judge Keller concurred in result only. The Court of Appeals affirmed in part, reversed in part, and remanded a judgment convicting appellant of numerous charges following a mistrial. The Court held that the circuit court abused its discretion in declaring a mistrial as to all five counts of an indictment where the jury had informed the circuit court it was hung as to only two of the five counts. Since the jury returned a unanimous verdict as to the other three counts, there was no manifest necessity for a retrial on those counts and a partial jury verdict should have been accepted. Therefore, retrial on those counts was improper and appellant's retrial on count three, for which the first jury had found him "not guilty," placed him in double jeopardy. The Court further held that the introduction of evidence as to the counts upon which a guilty verdict had been reached in the first trial was improperly admitted in the second trial under KRE 404(b) as prior bad acts. The evidence was also inadmissible under KRE 401 and KRE 402 as irrelevant to the counts properly tried. It was also error to permit the Commonwealth to introduce evidence concerning a count upon which a

verdict of "not guilty" had been reached in the first trial.

AP. Moran v. Commonwealth

2010CA001493 04/26/2013 2013 WL 1776092 Released for Publication

Opinion by Judge Combs; Judges Nickell and Taylor concurred. On remand from the Supreme Court, the Court of Appeals affirmed a judgment convicting appellant of fourth-degree assault. Citing to *Graves v. Commonwealth*, 384 S.W.3d 144 (Ky. 2012), the Court held that any error in a jury instruction containing mixed states of mind was invited - and thereby waived - by defense counsel's affirmative agreement to such instruction, his active assistance in the composition of an answer to a jury question which informed the jury it was not required to specify which mens rea it had applied, and his statement that he would not argue a claim of non-unanimous verdict on appeal if the jury failed to specify the mens rea it had applied.

AQ. Padilla v. Commonwealth

2011CA000553 09/28/2012 381 S.W.3d 322

Opinion by Judge Thompson; Judges Dixon and Moore concurred. The Court of Appeals reversed and remanded a judgment denying post-conviction relief to appellant, a legal permanent resident facing deportation as a result of his conviction. The Court held that appellant demonstrated that had he been properly informed that his guilty plea resulted in mandatory deportation, he would have insisted on going to trial and that his decision would have been rational under the circumstances.

AR. Reilly v. Commonwealth

2011CA001608 04/19/2013 2013 WL 1688381 Rehearing Pending

Opinion by Judge Thompson; Judges Dixon and Moore concurred. The Court of Appeals affirmed the circuit court's denial of appellant's motion to enter the deferred prosecution program provided for in KRS 218A.14151. The Court held that trial courts lack authority under the statute to place a defendant in the deferred prosecution program without the prosecutor's consent. KRS 218A.

14151(1)(a) expressly states that the prosecutor must agree to deferred prosecution and, therefore, entry into the program is solely within the prosecutor's discretion. However, when deferred prosecution is denied, KRS 218A.14151(2) requires the prosecutor to take a position on probation and, if opposed, state substantial or compelling reasons on the record "why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety." The Court further held that trial courts are without authority to question the prosecutor's motives when it rejects a request to defer prosecution or to order probation without the prosecutor's agreement.

AS. Reynolds v. Commonwealth

2010CA002192 11/09/2012 393 S.W.3d 607

Opinion by Judge Caperton; Judge Lambert concurred; Judge Keller concurred in result only and filed a separate opinion. The Court of Appeals reversed, vacated, and remanded as to an order denying appellant's motion to suppress evidence seized during a "pat-down" search of his person and a subsequent judgment. The Court held that while a police officer was justified in conducting an evidentiary stop of appellant's vehicle, he was not justified in subsequently conducting a non-consensual "pat-down" search of appellant for weapons. The Court specifically held that "fidgeting" alone is insufficient to justify a Terry search for weapons and, thus, the circuit court erred in denying appellant's motion to suppress evidence obtained during the course of the search. The Court also reversed and remanded an imposition of court costs against appellant for a determination of whether: 1) appellant is a poor person as defined by KRS 453.190(2), and 2) whether appellant is unable to pay court costs now or in the foreseeable future.

AT. Shelton v. Commonwealth

2011CA000282 07/06/2012 372 S.W.3d 433

Opinion by Judge Keller; Judges Dixon and Nickell concurred. The Court of Appeals affirmed a judgment convicting appellant of first-degree assault. Reviewing for palpable error, the Court held that the circuit court did not err in

explaining language in the jury instructions regarding voluntary intoxication and wanton conduct by stating "it means that voluntary intoxication is not a defense to wanton conduct." There was nothing in the court's remarks to suggest that appellant's alleged psychosis was not a defense to wanton conduct and the jury was given a complete instruction on extreme emotional disturbance, which would have allowed the jury to find that appellant was acting under the effect of a psychosis.

AU. Southwood v. Commonwealth

2011CA001277 07/20/2012 372 S.W.3d 882

Opinion by Judge Clayton; Chief Judge Acree and Judge Dixon concurred. The Court of Appeals affirmed an order of the circuit court denying appellant's motion to alter, amend, or vacate an order revoking his probation. The Court held that the circuit court did not err in revoking appellant's probation when it had failed to make the specific finding that appellant could not be "appropriately managed in the community" pursuant to KRS 439.3106(1). The statutory language did not require the circuit court to make specific findings of fact, and the decision was consistent with the statute in that the court determined, based on pending charges against appellant, that there was no other sanction, short of revocation and incarceration, that would be appropriate.

AV. Vaughn v. Commonwealth

2010CA001698 01/27/2012 371 S.W.3d 784

Opinion by Judge Dixon; Judges Lambert and Nickell concurred. The Court of Appeals vacated in part and remanded orders of the circuit court requiring the defendants to pay restitution to the Kentucky State Treasury for extradition expenses incurred by the Commonwealth. The Court held that the circuit court erred as a matter of law in applying the restitution statutes to appellants. The statutory scheme did not authorize a trial court to impose restitution for extradition expenses because the Commonwealth was not a victim who had suffered a loss as a result of the criminal acts committed by appellants. While KRS 440.090 allowed the government to seek compensation from the Treasury, it did not provide that the fugitive must then repay the Commonwealth for those expenditures.

AW. Virgil v. Commonwealth

2011CA001673 05/17/2013 2013 WL 2120339 Rehearing Pending

Opinion by Judge VanMeter; Chief Judge Acree and Judge Dixon concurred. The Court of Appeals reversed and remanded an order denying appellant's motion for post-conviction DNA analysis of evidence. At the time of appellant's motion, KRS 422.285 was only available for felons sentenced to death; appellant was sentenced to 70 years' imprisonment. However, KRS 422.285 was subsequently amended (2013 Ky. Acts Ch. 77) to include persons convicted of "a Class A felony, a Class B felony, or any offense designated a violent offense[.]" The Court held that since the amended statute was remedial, it could apply retroactively to appellant's motion. The Court further held that KRS 422.285 is enforceable by way of comity, despite infringement on the rule-making power of the courts, because it does not unreasonably interfere with the orderly function of the courts and promotes a strong public policy of the Commonwealth.

AX. Wills v. Commonwealth

2012CA000175 03/15/2013 396 S.W.3d 319

Opinion by Judge Lambert; Judges Dixon and Taylor concurred. The Court of Appeals vacated and remanded an order revoking appellant's probation. Citing to KRS 533.030(3), *Bearden v. Georgia*, 461 U. S. 660, 103 S. Ct. 2064, 76 L.Ed.2d 221 (1983), and *Clayborn v. Commonwealth*, 701 S.W.2d 413 (Ky. App. 1985), the Court held that the circuit court abused its discretion in revoking appellant's probation and requiring her to complete her prison sentence, where the court recognized that appellant was making a good faith effort to comply with her restitution payment schedule, yet failed to consider any alternative form of punishment. The Court further noted that the circuit court was required to make findings on the record as to why it was revoking probation under *Bearden* as well as to show that it considered alternatives other than imprisonment.

AY. Wilson v. Commonwealth

2011CA002157 12/07/2012 388 S.W.3d 127

Opinion by Judge Lambert; Judges Combs and Nickell concurred. The Court of Appeals vacated appellant's conviction and remanded the case for a new trial where the circuit court erred in refusing to grant a continuance based upon the Commonwealth's failure to produce a requested discovery document previously ordered to be produced. The Court held that denial of the continuance constituted an abuse of discretion when the Commonwealth delayed production of a police "pool" car log until moments before trial began, preventing development of a defense that prior occupants of the "pool" car had left drugs inside.

BA. Wright v. Commonwealth

2011CA000759 03/08/2013 2013 WL 845020 DR Pending

Opinion by Judge VanMeter; Judges Caperton and Lambert concurred. The Court of Appeals reversed and remanded a judgment convicting appellant of complicity to first-degree trafficking in a controlled substance and of being a second-degree persistent felony offender. The Court held that the circuit court abused its discretion when it allowed the jury to take the prosecutor's laptop into the deliberation room with them to listen to the audio recording of a drug transaction. On this ground alone, reversal was merited. The Court noted that giving jurors unrestricted and unmonitored access to a party's laptop, outside of the defendant's presence, is highly improper and the likelihood of prejudice very high. The Court then chose to address other issues that might arise on remand, concluding that the evidence was sufficient to support appellant's conviction for complicity to first-degree trafficking in a controlled substance; that, on retrial, a police officer was prohibited from interpreting the audiotape of the drug transaction for the jury or from improperly bolstering the credibility and testimony of an informant; and that the prosecutor's conduct during closing arguments was within the permissible bounds of advocacy.

BA. Wyatt v. Commonwealth

2011CA001446 11/30/2012 387 S.W.3d 350

Opinion by Judge Clayton; Judges Keller and Maze concurred. The Court of Appeals reversed the

revocation of appellant's conditional discharge where there was no evidence presented to the circuit court that actual notice of the conditions of probation, written or oral, had been given to appellant at the time of sentencing as required by KRS 533.030(5).

BB. Young v. Commonwealth

2011CA000956 05/03/2013 2013 WL 1850752 DR Pending

Opinion by Judge Stumbo; Judge Caperton concurred; Judge Dixon dissented. The Court of Appeals vacated appellants' convictions following their entry of conditional guilty pleas upon holding that their actions did not constitute the crime of theft by unlawful deception over \$10,000. Appellants were charged with knowingly and unlawfully engaging in a scheme to defraud by agreeing to place their unborn child for adoption with another family and receiving money from the family for the upkeep of the mother during her pregnancy, without disclosing that they had placed the child for adoption through a second agency to another couple. The Court held that to find that the money received by appellants was accepted as part of an agreement between the parties would be to recognize an illegal contract was entered into, which the Commonwealth stipulated was not the case. The Court further noted that the family knew that money had already exchanged hands between the agency and appellants when they provided them with support. Moreover, because the family was never guaranteed to be able to adopt appellants' child, there was no deception as to purpose of the funds. There is also no law or agreement that required appellants to inform the family of other adoptive parents they were considering and receiving money from. The Court finally noted that the family did not make the monetary gifts contingent on appellants not contacting other potential adoptive parents or adoption agencies. Given these agreed-upon facts, there could be no theft by deception or otherwise.

### **XIII. DAMAGES**

A. Crutcher v. Harrod Concrete and Stone Co.

2010CA001750 03/22/2013 2013 WL 1163945 Rehearing Pending

Opinion by Judge Nickell; Judges Combs and Moore

concurrent. A landowner filed suit for damages against a neighboring quarry owner and operator, alleging that the operator had encroached in its land and removed subsurface limestone. The circuit court entered judgment on a jury verdict for the landowner, but reduced the jury's award of punitive damages. On appeal, the Court of Appeals affirmed in part, reversed and vacated in part, and remanded. The Court first held that the evidence supported the jury's finding that the operator committed willful trespass, but it concluded that the measure of compensatory damages applied by the jury was improper. The Court held that the proper measure of compensatory damages for an intentional trespass from the removal of limestone as result of subsurface mining activity is the value of the limestone material at the time and place of its removal, without deducting the expense of severing it, rather than the difference in the fair market value of the land immediately before and after the encroachment. The Court next held that while an award of punitive damages was appropriate, the measure of punitive damages applied by the jury was improper. It was erroneous to award appellants the market value of the limestone as punitive damages because there was no direct correlation between punitive damages and appellants' loss, and because punitive damages cannot be transformed into compensatory damages without negating the specific purpose of the award. The Court then noted that an award of punitive damages at a rate of 25 times the award of compensatory damages could easily cross the line into the area of constitutional impropriety when it has been recognized that a ratio of just 4:1 might be close to the line.

#### **XIV. EDUCATION**

A. Sullivan University System, Inc. v. Commonwealth, Kentucky Board of Nursing

2011CA000853 08/24/2012 2012 WL 3629517 DR Pending

Opinion by Judge Stumbo; Judge Combs and Senior Judge Lambert concurred. The Court of Appeals reversed and remanded an order of the circuit court granting summary judgment in favor of appellee, the Kentucky Board of Nursing, on the appellant college's appeal from a Board order. The order in question changed the status of appellant's Applied Science Degree in Nursing Program to "probational." The Court held that the circuit court clearly

erred in granting summary judgment in favor of the Board because the Board had acted improperly in retroactively applying new administrative regulations. Therefore, the Board's retroactive enforcement of new regulations requiring appellant to have an 85% pass rate for first-time test takers of the NCLEX-RN examination was prohibited.

B. Webster County Board of Education v. Franklin

2012CA000811 02/08/2013 392 S.W.3d 431

Opinion by Judge Clayton; Judges Moore and Nickell concurred. The Court of Appeals affirmed a decision granting appellee's motion to dismiss a petition of the Board of Education. The petition contested the validity of a recall petition for an ad valorem property tax. The Court held that the Board violated Kentucky's Open Meetings Act when it authorized its attorney to pursue legal action to contest the adequacy of the recall petition in a closed meeting but did not vote to authorize the challenge in an open session and where two board members were in opposition to the decision at the closed session, thereby precluding a consensus. Moreover, because KRS 61.815(1)(c) prohibits the taking of final action in a closed session, the "litigation exception" within that provision is inapplicable to the final action of the Board authorizing litigation. The Court further held that the Board could not legitimize unauthorized conduct taken at an improperly closed session by subsequent ratification. The Court finally held that nunc pro tunc orders are not permitted for the purpose of correcting the failure to follow mandated actions like the ones required by the Open Meetings Act.

## **XV. EMPLOYMENT**

A. Caniff v. CSX Transportation, Inc.

2011CA000178 10/19/2012 2012 WL 5038812 DR Pending

Opinion by Judge Nickell; Judges Combs and Taylor concurred. The Court of Appeals held that the circuit court did not err in entering summary judgment on employee's action under the Federal Employer's Liability Act for personal injuries arising from his employment where he failed to present expert testimony regarding the applicable

standard of care and the railroad's breach of that duty. The Court held that a lay juror would not possess sufficient knowledge of the working conditions at a rail yard to independently determine whether the railroad put employee at an unreasonable risk of traumatic injury.

B. City of Bowling Green v. Helbig

2011CA001660 09/28/2012 2012 WL 4464608 Released for Publication

Opinion by Judge Combs; Judge Nickell and Senior Judge Lambert concurred. The Court of Appeals vacated and remanded an order granting a police officer's petition for declaration of rights following his city employer's failure to compensate him with overtime pay for annual leave. The Court first noted that a more specific statute is to be given preference over a general one. The Court then held that for purposes of KRS 95.495, forty hours' worth of time actually worked is a condition precedent for qualification for overtime pay. The Court accordingly held that a city ordinance prohibiting the inclusion of paid leave time when calculating hours actually worked for overtime pay purposes mirrored, rather than conflicted with, the language of KRS 95.495.

C. Cooke v. CSX Transportation, Inc.

2011CA000736 12/07/2012 2012 WL 6061717 DR Pending

Opinion by Judge Lambert; Judges Caperton and Moore concurred. The Court of Appeals affirmed the dismissal of a claim against a railroad for failing to provide a reasonably safe place to work under the Federal Employers' Liability Act (FELA). The Court held that a jury instruction on causation which included "in whole or part" language, without the additional modifying language "no matter how slight," was consistent with federal statutes and established case law, as well as Kentucky's preference for bare bones instructions. The Court also held that evidence of post-accident remedial measures was properly excluded under KRE 407 and that there was no error in excluding evidence that the railroad had changed the composition of its paint where there was no medical evidence to support the theory that oil-based paint had caused appellant's dizziness. The evidence was also irrelevant where the issue appellant was trying to

rebut had not been raised.

D. Hicks v. Kentucky Unemployment Ins. Com'n

2012CA000113 01/04/2013 390 S.W.3d 167

Opinion by Judge Stumbo; Judge Thompson concurred; Judge Maze dissented and filed a separate opinion. The Court of Appeals reversed and remanded a circuit court judgment affirming the denial of unemployment by the commission. The Court held that the claimant was not given the chance to meaningfully present his evidence to the commission referee because he was prohibited from collecting evidence to be used during his hearing. The Court specifically determined that it was an arbitrary denial of due process for the commission to refuse the claimant's request for an administrative subpoena and for a continuance of the hearing on the basis that the subpoena had not been issued.

E. Masonic Homes of Kentucky, Inc. v. Kentucky Unemployment Insurance Commission

2011CA001226 10/19/2012 382 S.W.3d 884

Opinion by Judge Clayton; Chief Judge Acree and Judge Keller concurred. The Court of Appeals ultimately affirmed a decision by the Kentucky Unemployment Insurance Commission finding that an unemployment compensation claimant's conduct in biting her own hand and causing herself injury was not misconduct disqualifying her from the receipt of benefits. The Court held that the Commission properly determined that the employee was discharged for reasons other than misconduct connected with the workplace where the referee determined that the employee suffered from a psychological condition that prevents her from appreciating the harm to herself of her conduct; that she coped with stress in an abnormal manner due to an anxiety disorder; that she harmed herself without meaning to and without knowing her actions were inappropriate for the workplace; and that she did not commit misconduct in connection with her work because she was unable to control her reaction to stress and anxiety. While the employee's actions would normally constitute misconduct, the Court upheld the determination that an exception should apply in the form of a mitigating circumstance due to a disease or mental condition that justified or explained the employee's admitted

misconduct.

F. Rogers v. Pennyrile Allied Community Services, Inc.

2012CA000204 12/14/2012 2012 WL 6214354 DR Pending

Opinion by Judge Nickell; Judge Dixon concurred; Judge Maze dissented and filed a separate opinion. The Court of Appeals held that summary judgment was improvidently granted on an employee's claim for a violation of KRS 61.101, et seq., the Kentucky Whistleblower Act. The employee claimed that she was terminated after confronting her supervisor about his trespass on her private property. The Court held that the circuit court incorrectly concluded that the protections of the Act contained within KRS 61.102 are triggered only with regard to information which "touches on a matter of public concern."

G. University of Louisville Athletic Ass'n, Inc. v. Banker

2011CA001436 02/01/2013 2013 WL 375496 DR Pending

Opinion by Judge Lambert; Judge Moore concurred; Judge Caperton dissented and filed a separate opinion. In reversing and remanding a jury award of damages in a retaliatory discharge case, the Court of Appeals held that where undisputed evidence showed that the decision not to renew employee's contract had been contemplated, if not decided, prior to her exercise of a protected activity, employee could not make a prima facie case of a causal connection between her discharge and her complaint to appellant's human resources department. Thus, the circuit court erred as a matter of law in refusing to grant appellant's motion for JNOV.

## **XVI. ENVIRONMENT**

A. Adams v. Sharp

2009CA002190 05/25/2012 2012 WL 1900146 DR Pending

Opinion by Judge Caperton; Judge Clayton concurred; Chief Judge Taylor concurred in result only. The Court of Appeals affirmed in part, reversed in part, and remanded as to a judgment regarding an order

of the Secretary of Energy and Environment Cabinet upholding the issuance of construction and Kentucky No-Discharge Operational Permits (KNDOP) for the construction and operation of hog barns, including land application of manure. The Court first held that farmers were not required to obtain Kentucky Pollution Discharge Elimination System (KPDES) operating permits regarding their proposed hog barns because their operations would not directly discharge into state waters. The Court then held that the substantial evidence standard of review, not the de novo standard of review, applied to its review of the Secretary's determination that: (1) the farmers, and not the owner of the hogs that the farmers were raising, were the individuals with primary responsibility for the day-to-day operations of the farms; and (2) the owner was therefore not required to sign the applications for the construction and No-Discharge permits as a co-permittee. Applying this standard of review, the Court concluded that substantial evidence supported this determination. The Court next held that the water-quality regulation governing the construction of sewage system facilities (401 KAR 5:005) does not require an individualized evaluation of each operation's potential for discharges of air pollutants. The Court finally held that the evidence supported the Cabinet's decision not to impose specific conditions for the control of discharges containing pathogens as a constituent of animal waste, and that the Cabinet acted within its discretion in determining the distances of setbacks that were designed to protect environmentally sensitive receptors and cultural features.

B. Com., Energy and Environment Cabinet v. Sharp

2009CA002283 05/25/2012 2012 WL 1889307 DR Pending

Opinion by Judge Caperton; Judge Clayton concurred; Judge Taylor concurred in result only. The Court of Appeals affirmed in part, reversed in part, and remanded as to a judgment regarding an order of the Secretary of Energy and Environment Cabinet upholding the issuance of construction and Kentucky No-Discharge Operational Permits (KNDOP) for the construction and operation of hog barns, including land application of manure. The Court first held that farmers were not required to obtain Kentucky Pollution Discharge Elimination System (KPDES) operating permits regarding their proposed hog barns because their operations would not directly discharge into state waters. The Court then held

that the substantial evidence standard of review, not the de novo standard of review, applied to its review of the Secretary's determination that: (1) the farmers, and not the owner of the hogs that the farmers were raising, were the individuals with primary responsibility for the day-to-day operations of the farms; and (2) the owner was therefore not required to sign the applications for the construction and No-Discharge permits as a co-permittee. Applying this standard of review, the Court concluded that substantial evidence supported this determination. The Court next held that the water-quality regulation governing the construction of sewage system facilities (401 KAR 5:005) does not require an individualized evaluation of each operation's potential for discharges of air pollutants. The Court finally held that the evidence supported the Cabinet's decision not to impose specific conditions for the control of discharges containing pathogens as a constituent of animal waste, and that the Cabinet acted within its discretion in determining the distances of setbacks that were designed to protect environmentally sensitive receptors and cultural features.

C. Mullins v. Ashland Oil, Inc.

2008CA000860 12/21/2012 389 S.W.3d 149

Opinion by Judge Lambert; Judges Combs and Keller concurred. The Court of Appeals affirmed the dismissal of one of several toxic tort claims filed as a result of Ashland Oil's drilling operations in the Martha Oil Field. Because of deficiencies in appellants' brief in terms of content and format, particularly with respect to preservation and citation to the record, as well as appellants' failure to properly list the issues argued in the brief in their prehearing statement, the Court only considered the argument that the circuit court erred in dismissing appellants' trespass claim for failure to file suit within the five-year statute of limitations set out in KRS 413.120(4) and found no error.

D. Ray v. Ashland Oil, Inc.

2008CA000840 12/21/2012 389 S.W.3d 140

Opinion by Judge Lambert; Judges Combs and Keller concurred. The Court of Appeals affirmed the dismissal of several toxic tort claims filed as a

result of Ashland Oil's drilling operations in the Martha Oil Field. Because of deficiencies in appellants' brief in terms of content and format, particularly with respect to preservation and citation to the record, several issues were reviewed solely for manifest error and none was found. Regarding dismissal of appellants' trespass claims, the Court cited to the parties' agreement that the five-year statute of limitations set out in KRS 413.120(4) applied and to this Court's previous ruling that the contamination in question did not constitute a continuing trespass. The Court further held that appellants' claims related to nuisance, negligence, ultra hazardous activities, and failure to warn should have been raised on prior appeal; therefore, the rulings of the circuit court on those matters represented the law of the case. The dismissal of appellants' water claims was affirmed on the basis that the issue was conclusively decided in a previous opinion.

## **XVII. FAMILY LAW**

A. B.L.M. v. A.M.

2011CA000333 09/28/2012 381 S.W.3d 319

Opinion by Judge Dixon; Judge VanMeter and Senior Judge Lambert concurred. The Court of Appeals vacated and remanded an order denying adoptive parents' motion to set aside a previous order requiring the adopted children to partake in post-adoptive visitation with their older biological siblings. The Court held that the family court was without statutory authority to order sibling visitation.

B. B.M.H. v. Com., Cabinet for Health and Family Services

2012CA000194 11/09/2012 385 S.W.3d 434

Opinion by Judge VanMeter; Chief Judge Acree and Judge Dixon concurred. The Court of Appeals held that the circuit court did not err in denying a motion to dismiss a judgment terminating appellant's parental rights to a minor child. Although appellant alleged that his inclusion as a party to the termination action was error because he was not the putative father of the child under KRS 625.065, and therefore not a necessary party,

the Court held that neither KRS 625.060 nor KRS 625.065 bars inclusion of a putative father who does not meet the criteria of KRS 625.065(1) as a party to the proceeding. Each statute simply states that a putative father who does meet the criteria is a necessary party. Moreover, appellant suffered no manifest injustice from a finding that he had no parental rights regarding the child.

C. Bailey v. Bailey

2012CA000508 05/10/2013 2013 WL 1919529 Released for Publication

Opinion by Judge Lambert; Judges Caperton and Maze concurred. The Court of Appeals affirmed orders of the circuit court and, distinguishing *Holman v. Holman*, 84 S.W.3d 903 (Ky. 2002), held that the circuit court properly characterized husband's pension benefits as marital property based on the fact that the benefits resorted to retirement benefits rather than disability benefits at age 62.

The Court further held that the circuit court did not abuse its discretion in denying husband attorneys' fees.

D. Ball v. Tatum

2011CA001716 07/20/2012 373 S.W.3d 458

Opinion by Judge Nickell; Judges Lambert and Taylor concurred. The Court of Appeals affirmed an order of the circuit court designating appellant's adoptive parents as de facto custodians of her special needs child. The Court first held that the circuit court did not err in designating appellees as de facto custodians. KRS 403.270 did not require proof appellees were the child's sole, only, or exclusive caregivers and financial supporters but only that they were the child's primary caregivers and primary financial supporters. The fact that appellant also cared for the child on occasion did not negate appellees' standing to petition for custody when, for all practical purposes, appellees had assumed the role of parents and stood in appellant's place. The Court then held that the circuit court did not err or abuse its discretion in finding that placing the child in the joint custody of the parties was in the child's best interest, when the court considered all the relevant factors in KRS 403.270 to decide the matter.

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

2010CA001056 06/15/2012 369 S.W.3d 722

Opinion by Senior Judge Lambert; Judges Clayton and Nickell concurred. On remand from the Kentucky Supreme Court, the Court of Appeals 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 circuit court properly considered appellant's ability to pay and implicitly concluded that appellant had not made sufficient bona fide attempts to make payments and had not shown that he was unable to make the required payments through no fault of his own. The Court also held that the circuit 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. The revocation proceeding did not amount to another civil contempt proceeding.

F. *Brumfield v. Stinson*

2011CA000837 03/30/2012 368 S.W.3d 116

Opinion by Judge Dixon; Judge VanMeter and Senior Judge Lambert concurred. The Court of Appeals 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 findings of fact did not support the family court's conclusion that appellees were de facto custodians as defined by KRS 403.270 because the findings only demonstrated that the parties had engaged in a kind of "co-parenting" arrangement. *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), had reiterated that this was insufficient to satisfy the de facto custodian standard. Because appellees did not meet this statutory standard, 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.

G. C.A.W. v. Cabinet for Health and Family Services,  
Com.

2012CA000875 02/01/2013 391 S.W.3d 400

Opinion by Judge Lambert; Judges Dixon and Taylor concurred. The Court of Appeals affirmed the termination of appellants' parental rights where the record contained substantial evidence to support the circuit court's findings of fact and conclusions of law under KRS 625.090. The Court noted that in addition to having abandoned the children for a period exceeding ninety days, appellants did not complete all required substance abuse orders and recommendations, individual counseling services, or parenting classes; did not fully cooperate with the Cabinet and maintain regular contact with the children or the social worker; and failed to provide any material support for the children.

H. C.H., N/K/A C.T. v. Cabinet for Health and Family  
Services

2012CA001268 03/29/2013 2013 WL 1919511 Released for  
Publication

Opinion by Judge Moore; Judges Nickell and Taylor concurred. The Court of Appeals affirmed a circuit court order terminating appellant's parental rights. The Court held that the evidence supported the circuit court's determination that termination of appellant's parental rights would be in the children's best interest. The Court relied upon testimony reflecting that appellant suffered from both mental and physical illness that could impair her ability to care for her children and that substantial effort was made to reunite appellant with her children over a period of years. These reunification services were only discontinued after a spanking incident that resulted in bruising and a criminal abuse conviction. The Court further noted that it was uncontested that appellant made every effort to comply with her case plan but nevertheless failed to provide a safe environment for the children when permitted to have unsupervised visitation. It was also uncontroverted that appellant failed to pay child support despite being able to obtain gainful employment. The Court also noted that appellant failed to show remorse or an appreciation of the

gravity of the spanking incident.

I. C.J.M. v. Cabinet for Health and Family Services

2012CA000590 12/21/2012 389 S.W.3d 155

Opinion by Judge Clayton; Judges Combs and Nickell concurred. The termination of appellants' parental rights was affirmed against their claims that they were given an insufficient amount of time to demonstrate their ability to parent their child since she was removed from their home shortly after her birth; that the Cabinet failed to prove by clear and convincing evidence that the child was neglected or abused; that the Cabinet failed to make reasonable efforts toward reunification; and that appellants were without the effective assistance of counsel during critical portions of the dependency action. The Court held that evidence that the child was born with marijuana in her system; that she was found sleeping on a couch, which is dangerous for an infant; that father was hostile and menacing to Cabinet workers; that appellants fired their appointed counsel during the dependency hearing, but reappointed counsel for the termination action; that father informed Cabinet workers that neither he nor mother was going to work the case plan until his federal civil rights litigation against the Cabinet workers was completed; that father was subsequently arrested for terroristic threatening against a Cabinet worker and her supervisor; and that a no-contact order had been issued and was still in place at the time of the termination proceeding all supported the circuit court's determination that termination was in the child's best interest. The Court further noted that despite being unrepresented during part of the dependency proceedings, which was a matter of their own choosing since they fired counsel, appellants were afforded assistance during all of the termination proceedings. Consequently, no manifest injustice occurred in the case.

J. Dickens v. Dickens

2012CA001222 05/24/2013 2013 WL 2257462

Opinion by Judge Caperton; Chief Judge Acree concurred and Judge Nickell concurred in result only. The Court of Appeals reversed and remanded the circuit court's denial of appellant's motion to modify child support and the subsequent denial of

his CR 59.05 motion to alter, amend, or vacate the prior order. The Court held that pursuant to KRS 403.213(3), the emancipation of a minor child entitles the payor of child support for multiple minor children to an automatic review of the child support obligation.

K. Ensor v. Ensor

2010CA001660 04/12/2013 2013 WL 1488999 Rehearing Pending

Opinion by Judge Nickell; Judges Moore and Thompson concurred. The Court of Appeals affirmed in part, reversed in part, and remanded a judgment concerning valuation and division of property, maintenance and the assessment of post-judgment interest in a dissolution action. The Court held that the circuit court erred in including a Grantor Retained Annuity Trust in the marital estate. Where there was no showing of a fraudulent or dissipative transfer, the creation and funding of an irrevocable estate planning trust removed the transferred assets from the marital estate and, therefore, wife did not retain an equitable interest in the trust assets.

L. Fortwengler v. Fortwengler

2011CA001833 12/21/2012 2012 WL 6632789 DR Pending

Opinion by Judge Lambert; Judges Combs and Nickell concurred. The Court of Appeals affirmed the conclusion of the circuit court that the proper action to be taken to collect a debt against one of the parties to a dissolution proceeding would be for the creditor (in this case either the husband or his father) to obtain a common law judgment or to attempt to collect the debt through a separate lawsuit. Furthermore, based upon this holding, the Court concluded that the circuit court did not err in denying husband's parents' motion to intervene in the dissolution action.

M. Goshorn v. Wilson

2011CA000574 07/06/2012 372 S.W.3d 436

Opinion by Judge VanMeter; Judges Combs and Dixon concurred. The Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings an order finding a prenuptial agreement

valid and enforceable; finding appellant to have vacated the marital residence, thus extinguishing any interest he may have had in his deceased wife's residence; and dismissing appellant's claims for fraud, misrepresentation, and wrongful eviction against the deceased wife's children. The Court first held that the circuit court did not err in finding that the prenuptial agreement was valid. The fact that appellant could have consulted with an attorney, but chose not to, did not render the agreement invalid. The Court next held that the circuit court erred by concluding that any interest appellant had in the marital residence had been extinguished. Appellant held a life estate in the marital residence which could only be terminated by a subsequent condition - his death or relocation from the home. Although appellant had purchased and moved into a condominium before his wife's death, this did not constitute relocation from the marital residence since his interest in the residence did not vest until the wife's will was probated. Appellant's initial attempt to renounce the wife's will and his subsequent assertion that he was entitled to a life estate in the marital residence sufficed as an expression of a desire to move back into the home.

N. Guenther v. Guenther

2011CA001165 09/14/2012 379 S.W.3d 796

Opinion by Judge Caperton; Judge Thompson concurred; Judge Keller concurred in result only in part, dissented in part, and filed a separate opinion. The Court of Appeals reversed and remanded the family court's entry of a domestic violence order. The Court held that KRS 403.740 does not impose a strict 14-day period after issuance of an emergency protective order during which a court must conduct a hearing or lose jurisdiction. The Court held that a family/circuit court can continue the hearing beyond fourteen days and retain its jurisdiction. Nonetheless, the Court held that entry of the DVO in this case was unsupported by sufficient evidence.

O. Hempel v. Hempel

2011CA000763 09/21/2012 380 S.W.3d 549

Opinion by Judge Combs; Judge Stumbo and Senior Judge Lambert concurred. The Court of Appeals

affirmed in part, vacated in part, and remanded a circuit court order that determined child custody and child support and divided marital property and debts in the dissolution action between the parties. The Court held that there was insufficient evidence to support the circuit court's finding that appellant had neglected to exercise the time-sharing opportunities previously awarded to him. The Court also held that there were insufficient factual findings to support the circuit court's decision to impute income to husband. The Court also directed the circuit court to make an equitable distribution of family photographs. The Court further held that there was no abuse of discretion in the circuit court's division of the marital estate. The Court finally held that although appellant had a right to inspect an account established for his minor child under the Uniform Gifts to Minors Act, he did not have an ongoing right to oversee the account.

P. J.D.C. v. Cabinet for Health and Family Services

2012CA000670 10/26/2012 383 S.W.3d 463

Opinion by Judge Lambert; Judges Caperton and VanMeter concurred. The Court of Appeals held that the circuit court erred as a matter of law in denying putative father an evidentiary hearing prior to entry of a paternity judgment. KRS 406.111 creates a "rebuttable presumption" of paternity when a genetic testing result of 99% shows a particular man to be the father of a child. However, this "rebuttable presumption" may be rebutted by a preponderance of the evidence. Putative father was therefore entitled to present evidence in an attempt to rebut the presumption of paternity.

Q. J.K. v. N.J.A.

2012CA000897 04/12/2013 397 S.W.3d 916

Opinion by Judge Nickell; Judges Moore and Taylor concurred. The Court of Appeals affirmed an order of contempt entered in a paternity action based upon mother's refusal to submit to genetic testing ordered on four separate occasions for both mother and child. The Court first held that the presumption of paternity set forth in KRS 406.011 did not deny the purported biological father the right to a finding of whether he was, or was not,

child's biological father. The Court then noted that the circuit court heard sufficient testimony concerning the putative father's claim upon which to make a determination as to standing and a request for genetic testing pursuant to KRS 406.081 and KRS 406.091(2). The Court further held that the evidence supported the circuit court's order of contempt since mother refused to submit to genetic testing.

R. Maxwell v. Maxwell

2012CA000224 10/19/2012 382 S.W.3d 892

Opinion by Judge Clayton; Judge Maze concurred; Judge Keller concurred in result only. The Court of Appeals held that the circuit court abused its discretion in awarding sole custody of children to father on the basis that mother's sexual orientation and relationship with another woman would be harmful to the children and possible misconduct. The Court held that being a member of a same-sex partnership alone does not meet the criteria for sexual misconduct and that it was a violation of mother's due process, equal protection, and fundamental right to parent her children to use only her sexual orientation as a determinative factor in a custody determination. The Court further noted that no factual findings were entered to support the conclusion that mother's action in this regard was harmful to children, either now or in the future.

S. McIntosh v. Landrum

2012CA000161 08/24/2012 377 S.W.3d 574

Opinion by Judge Stumbo; Judge Clayton concurred and Judge Lambert dissented by separate opinion. The Court of Appeals affirmed orders requiring appellant to pay, as part of his child support, amounts for respite care and work-related childcare, and awarding appellee attorneys' fees and court costs. The Court first held that the circuit court did not abuse its discretion in awarding appellee reimbursement for respite care. The circuit court specifically and adequately justified the extra expense by finding that when appellant missed his scheduled parenting time, appellee had to pay for extra childcare, which was not contemplated by the parties' separation agreement. The expenses would only occur if appellant did not exercise his

regular parenting time. The Court also held that the circuit court did not err when it awarded appellee work-related childcare expenses since there was sufficient evidence to prove appellee was incurring the expenses. Whether the costs were temporary was irrelevant as appellee only had to show, pursuant to KRS 403.211(6), that there was a change in circumstances requiring the payment of the expenses. The Court finally held that the circuit court did not abuse its discretion when it awarded appellee attorneys' fees due to the disparity of the parties' income.

T. Nosarzewski v. Nosarzewski

2011CA002148 08/10/2012 375 S.W.3d 820

Opinion by Judge Dixon; Judges Combs and VanMeter concurred. The Court of Appeals affirmed an order of the circuit court requiring appellant to reimburse appellee for the overpayment of child care expenses. The Court first held that the circuit court did not abuse its discretion in concluding that the doctrine of laches did not bar appellee's claim. The parties both testified that they did not understand how the expenses for child care factored into the calculation of child support, and appellee testified that the county attorney advised him that he was not eligible for a reduction in child support and he did not know he could seek reimbursement until he retained counsel years later. Citing *Olson v. Olson*, 108 S.W.3d 650 (Ky. App. 2003), the Court also held that the judgment could not be reversed on public policy grounds when appellee established that a substantial amount of the allocated child care expenses had not been incurred.

U. Palmer v. Burnett

2012CA000318 11/02/2012 384 S.W.3d 204

Opinion by Chief Judge Acree; Judges Dixon and VanMeter concurred. The Court of Appeals affirmed a circuit court order denying a maternal grandmother's request for visitation with her biological grandchild. The Court held that the maternal grandmother lacked standing to pursue visitation after having voluntarily terminated her parental rights to the child's mother. Accordingly, the Court concluded that the circuit court properly dismissed the action upon concluding that

the grandmother and her husband were not the child's grandparents for purposes of KRS 405.021, the grandparent visitation statute. The Court further held that termination of parental rights constitutes a permanent severance of the parent-child relationship, including the future right to a relationship with the child's children.

V. Rice v. Rice

2011CA002162 07/06/2012 372 S.W.3d 449

Opinion by Judge VanMeter; Judges Combs and Dixon concurred. The Court of Appeals affirmed an order denying appellant's motion to alter, amend, or vacate an order adopting a report of a domestic relations commissioner (DRC). The report designated appellee as the primary residential custodian of the couple's three minor children during the school year. The Court held that the circuit court did not err by refusing to grant appellant physical custody and in naming appellee custodian of the children during the school year. Merely because appellee would be working during part of the time the children were in his custody and they would be watched by their paternal grandparents did not mean that the circuit court granted the grandparents custody, nor did it improperly favor grandparents over biological parents. The Court also held that the DRC's findings that appellant's living situation was unstable and that designating appellee as the primary residential custodian was in the best interests of the children were not clearly erroneous when the DRC appeared to have considered all relevant factors in deciding what living situation would be best for the children.

W. S.S. v. Commonwealth, Cabinet for Health and Family Services

2011CA001790 07/06/2012 372 S.W.3d 445

Opinion by Senior Judge Lambert; Judges Combs and Stumbo concurred. The Court of Appeals affirmed an order of the family court finding that appellant's great-grandmother had standing to intervene as a de facto custodian under KRS 403.270. In so doing, the Court rejected the argument that the great-grandmother was not the primary provider of financial support for the child for any period of time merely because the sources of her income were

Social Security and Social Security Insurance and only her husband worked outside the home.

X. Samson v. Samson

2011CA002181 08/17/2012 377 S.W.3d 571

Opinion by Judge Clayton; Judges Lambert and Stumbo concurred. The Court of Appeals affirmed an order of the family court granting appellee leave to relocate with the parties' child. The Court first held that the family court did not err in considering a court-ordered evaluation by a social worker. The Court further held that the family court order was based on substantial evidence in the record that relocation was in the best interest of the child.

Y. Spreacker v. Vaughn

2011CA002011 11/30/2012 397 S.W.3d 419

Opinion by Judge Combs; Judge Nickell concurred; Judge Caperton dissented and filed a separate opinion. The Court of Appeals held that the circuit court did not err in determining the paternal great-aunt of a minor child to be the child's de facto custodian where ample evidence supported findings that the great-aunt provided primary financial support while the child's parents provided none. Although public assistance may have provided medical care for the child and the great-aunt received monies from Kinship Care that covered daycare costs, substantial evidence supported the finding that the great-aunt was the child's primary caregiver and financial supporter. The Court further held that the calculation of the statutory period for establishing a de facto custodian was not tolled by mother's response during the course of the subject proceedings where she admitted that she had not commenced any proceedings to regain custody of the child as required by KRS 403.270(1)(a).

Z. Telek v. Daugherty

2009CA001993 08/24/2012 376 S.W.3d 623

Opinion by Judge Lambert; Judges Combs and Stumbo concurred. The Court of Appeals reversed and remanded a domestic violence order granted to

appellee. The Court held that the family court erred in entering the DVO when appellee failed to establish by a preponderance of the evidence that an act of domestic violence had occurred, or may occur again, or that she was in fear of imminent domestic violence. Although appellant had touched and pushed past appellee in the past, this was not sufficient in light of Caudill v. Caudill, 318 S.W. 3d 112 (Ky. App. 2010). Further, appellant's failure to follow previous orders in a separate case and the family court's concern that appellant interpreted orders to his benefit were in no way tied to incidents of domestic violence and, therefore, could not form the basis for the entry of a DVO.

AA. Truman v. Lillard

2012CA000160 11/02/2012 2012 WL 5372121 DR Pending

Opinion by Judge Nickell; Judges Taylor and VanMeter concurred. The Court of Appeals held that the circuit court did not err in denying appellant's motion for joint custody, visitation, and to set child support in relation to the adopted child of her former same-sex partner. The Court held that under Kentucky's statutory scheme, a former same-sex partner of an adoptive parent could only attain standing to seek custody or visitation of the adopted child if the former partner qualified as a de facto custodian, if the adoptive parent had waived her superior right to custody, or if the adoptive parent was conclusively determined to be unfit. The Court determined that the adoptive parent in this case had not waived her superior right to custody and that appellant had demonstrated no legal basis that would entitle her to custody or visitation with the child.

AB. Tudor v. Tudor

2012CA000110 04/12/2013 2013 WL 1490582 Released for Publication

Opinion by Judge Caperton; Judge Lambert concurred; Judge Maze concurred by separate opinion. The Court of Appeals reversed and remanded an order denying appellant's request to modify his monthly maintenance obligation to appellee. The Court held that the circuit court improperly relied upon the income of appellant's new wife and expenses associated with his new children in determining

whether the court's previous maintenance award should be modified due to changed circumstances. Instead, the circuit court should have focused on whether the change in appellant's income was substantial and continuing such that the maintenance award became unconscionable.

AC. Wahlke v. Pierce

2012CA000022 02/08/2013 392 S.W.3d 426

Opinion by Judge Taylor; Judges Nickell and VanMeter concurred. The Court of Appeals reversed and remanded an order of the family court granting mother's motion to relocate to Texas with the child. The Court held that the previous relocation of both parents and the child to Ohio prior to the commencement of the visitation modification proceeding divested the family court of exclusive, continuing jurisdiction by operation of KRS 403.824(1)(b). Thus, the family court was without jurisdiction to rule on mother's motion to relocate with the parties' child.

AD. Williams v. Frymire

2011CA001568 08/31/2012 377 S.W.3d 579

Opinion by Judge Lambert; Judges Caperton and Nickell concurred. The Court of Appeals affirmed a judgment of the family court modifying custody of the parties' minor daughter from sole to joint and naming the father as the primary residential parent. The Court first held that the family court did not improperly exercise jurisdiction. Kentucky retained exclusive, continuing jurisdiction when both parties maintained significant connections with Kentucky, the child continued to visit with her father and her father's family members in Kentucky, and appellant continued to visit Kentucky. The Court next held that the family court considered all of the necessary factors set forth in KRS 403.834(2) in determining it was not an inconvenient forum and, therefore, did not abuse its discretion in retaining jurisdiction. The Court next held that the family court's decision to modify the parties' original custody decree to name the father as the primary residential parent was not against the weight of the evidence and, therefore, the family court did not abuse its discretion.

AE. Wolfe v. Wolfe

2012CA000578 02/15/2013 393 S.W.3d 42

Opinion by Judge Stumbo; Chief Judge Acree and Judge Combs concurred. The Court of Appeals held that the Kentucky Rules of Civil Procedure are applicable in domestic violence proceedings to the extent that they do not conflict with statutory procedures prescribed by the General Assembly. Therefore, mother was required to comply with the rules of discovery in obtaining child's medical records prior to a full hearing on a petition for a domestic violence order on behalf of child. The Court specifically held that domestic violence actions could be continued to accommodate discovery and that the time limits in those actions did not conflict with the rules of civil procedure. However, to the extent that there may appear to be a conflict, continuances and other procedural and statutory provisions allow for flexibility.

#### **XVIII GOVERNMENT**

A. City of Taylorsville v. Spencer County Fiscal Court

2011CA001096 06/01/2012 371 S.W.3d 790

Opinion by Senior Judge Lambert; Judges Combs and Stumbo concurred. The Court of Appeals 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 the petition met the requirements of the statute; and that the signatures supporting the petition were properly verified. The Court held that the wording of the petition did not precisely conform to the language of the authorizing statute and improperly limited the authority of the county CCG commission to consider all options under the statute. Because the petition did not strictly comply with the requirements of the statute, the circuit court erred in finding that it complied with the statute.

B. Snowden v. City of Wilmore

2010CA001585 01/11/2013 2013 WL 132543 DR Pending

Opinion by Judge Nickell; Judges Combs and Moore

concurrent. The Court of Appeals affirmed the dismissal of an action brought by a property owner against the city, its officers, and city attorney, alleging breach of contract and several torts arising out of the city's failure to adopt his proposed planned unit development (PUD) amendments. The Court first held that appellant was not entitled to recusal of the trial judge on grounds that the judge and city attorney had developed a close professional relationship over the years. The Court then held that letters authored by the city's mayor and city attorney regarding appellant's proposed PUD amendments did not bind the city to amend its PUD ordinance. Instead, the terms of any contract had to be agreed to by a majority of the city council before becoming the foundation of a written contract and ultimately had to be signed by the mayor to become effective. Here, there was no such writing and no other writing in which the city agreed to pass the PUD amendment. Moreover, while the city attorney may negotiate on behalf of a municipality, he lacks the authority to bind the city council.

## **XIX. HEALTH**

### A. Bullitt County Bd. of Health v. Bullitt County Fiscal Court

2011CA001798 12/07/2012 2012 WL 6062751 DR Pending

Opinion by Judge VanMeter; Judge Keller concurred; Judge Taylor dissented and filed a separate opinion. The Court of Appeals reversed a judgment that invalidated a board of health regulation which generally prohibited smoking in public places, places of employment, private clubs, and at some outdoor events in Bullitt County. The Court concluded that the legislature has clearly granted county boards of health the authority under KRS 212.230(1)(c) to promulgate regulations or ordinances involving public health. The Court also held that in *Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745 (Ky. 2004), the Supreme Court had previously resolved in the board's favor the issues of whether exposure to second-hand smoke is a health issue and whether adopted ordinances of the type in question were reasonable.

### B. Yeager v. Dickerson

Opinion by Judge Stumbo, Judges Nickell and Thompson concurred. The Court of Appeals affirmed in part, reversed in part, and vacated an order granting summary judgment and imposing Rule 11 sanctions in an action concerning the allegedly wrongful disclosure of medical records. During a hearing to determine guardianship of a minor child, attorney for father questioned mother concerning her medical history, particularly concerning her use of prescription drugs, utilizing medical records father had discovered in the marital residence after mother had abandoned it. The child's guardian ad litem testified that mother's use of prescription drugs negatively impacted her ability to act as a guardian for the child, who had recently been severely injured in a school bus accident. On the day following the hearing, mother died from an overdose of Oxycodone. Thereafter, appellant, on behalf of mother's estate, filed suit against appellee attorneys alleging a Health Insurance Portability and Accountability Act (HIPAA) violation. The Court held that KRS 446.070 does not create a right of action for HIPAA violations; that appellee attorneys were not "covered entities" to which HIPAA regulations and penalties apply because they are not medical providers or custodians entrusted with decedent's medical records; that the "judicial proceeding" privilege applied; and that the circuit court erred in imposing Rule 11 sanctions.

## **XX. IMMUNITY**

### A. Coleman v. Smith

2011CA001276 09/21/2012 2012 WL 4210031 DR Pending

Opinion by Chief Judge Acree; Judge Clayton and Senior Judge Lambert concurred. The Court of Appeals reversed and remanded an order denying appellant's motion for summary judgment on grounds of immunity. The Court held that a detention center policy governing admittance of unconscious or intoxicated individuals was in part ministerial and in part discretionary for purposes of a qualified official immunity analysis. The Court specifically held that appellant, a shift supervisor, engaged in a discretionary act when he concluded that an intoxicated inmate was not

suffering from a drug overdose and therefore allowed her to be admitted. However, the Court held that it was unclear whether immunity should apply because there was a genuine issue of material fact as to whether appellant's discretionary act was performed in good faith. The Court further held that there were genuine issues of material fact regarding the application of detention center policies to both men and women and whether there was a non-arbitrary reason for differing treatment for male and female prisoners.

B. Coppage Construction Co., Inc. v. Sanitation District No. 1

2011CA000121 01/25/2013 2013 WL 276019 DR Pending

Opinion by Judge Lambert; Judges Dixon and Taylor concurred. The Court of Appeals affirmed the dismissal of appellant's contract, statutory, and tort claims against the appellee sanitation district on the basis of sovereign immunity. The sanitation district, which was created under KRS Chapter 220, was held entitled to the defense of sovereign immunity on appellant's tort claims because its parent counties are immune and because it performs functions integral to state government. The district was held entitled to sovereign immunity on appellant's contract claims because there was no valid written contract between the parties.

C. Edmonson County v. French

2011CA000963 02/08/2013 394 S.W.3d 410

Opinion by Judge Lambert; Judges Dixon and Taylor concurred. The Court of Appeals reversed and remanded the circuit court's determination that the county, fiscal court, elected fiscal court members, and the county judge-executive were not entitled to the defense of sovereign immunity on appellee's claim that the accumulation of ice on courthouse steps, allegedly due to deficient guttering and drainage, caused her to fall and suffer injuries. The Court held that the county and fiscal court, as well as the individual fiscal court members and the judge-executive in their official capacities, were entitled to immunity. Moreover, because the complaint did not specify whether appellee was alleging claims against the judge-executive and fiscal court members in their official or

individual capacities and referred to them only in the context of their official capacities, the Court construed the complaint to allege a claim against the judge-executive and the fiscal court members in their official capacities only. Therefore, dismissal of appellee's claim was merited.

D. Hurt v. Parker

2011CA002257 01/04/2013 2013 WL 50261 DR Pending

Opinion by Judge Combs; Judges Lambert and Nickell concurred. The Court of Appeals affirmed an order denying a school principal's motion for summary judgment as to negligence claims filed against him in his individual capacity. The Court held that a principal's responsibility for maintaining a school parking lot was ministerial in nature. Therefore, the circuit court did not err in concluding that the principal was not entitled to qualified official immunity in his individual capacity, and his motion for summary judgment on that basis was properly denied.

E. Jenkins Independent Schools v. Doe

2011CA001965 09/28/2012 379 S.W.3d 808

Opinion by Judge Combs; Judges Caperton and Nickell concurred. The Court of Appeals vacated in part and remanded a circuit court order finding that appellants, an independent school district and individual school personnel, did not have immunity in a lawsuit brought by parents on behalf of their child. The Court held that a municipal school board is entitled to governmental immunity the same as a county school board. The Court also held that a school board's possession of liability insurance does not serve as a waiver of immunity. As to the individual appellants, the Court held that if a complaint does not specify that a defendant is being sued in his official capacity, then he is only being sued as an individual for purposes of a qualified official immunity analysis. The Court then held that the failure of a teacher to supervise a student in the face of known and recognized behavior is not a discretionary function and therefore deprives the teacher of the defense of qualified official immunity to a claim of negligent supervision.

F. Knott County Fiscal Court v. Amburgey

2011CA000782 02/01/2013 2013 WL 375484 Rehearing Pending

Opinion by Judge Caperton; Judges Combs and Nickell concurred. The Court of Appeals reversed and remanded as to the circuit court's denial of the fiscal court's motion for summary judgment in a negligence action. The Court held that the fiscal court did not waive sovereign immunity under KRS 67.180 where appellee's injuries did not arise from the actual use of a county vehicle but instead resulted from a vehicular accident not involving a county-owned vehicle due to alleged negligence for failure to remove mud and debris from the roadway and the failure to warn of the hazardous condition.

G. Roach v. Hedges

2011CA001856 02/15/2013 2013 WL 562877 DR Pending

Opinion by Judge Clayton; Judges Combs and Thompson concurred. The Court of Appeals affirmed a summary judgment determining that principals, a school plant operator, and a school maintenance worker were immune from suit under the Kentucky Recreational Use Statute (KRS 411.190(3)-(4)) for injuries allegedly sustained due to negligence in the maintenance of a school playground. The Court held that by adopting a broad definition of "owner" to include those "in control of the premises," the legislature demonstrated the intent to eliminate negligence liability, under the circumstances set forth in the statute, by removing the duty of care from individuals who have sufficient control to render them liable absent the statute's application.

H. Sanitation District No. 1 v. McCord Plaintiffs

2011CA000819 01/25/2013 2013 WL 275602 DR Pending

Opinion by Judge Taylor; Judges Keller and Thompson concurred. The Court of Appeals affirmed in part, reversed in part, and remanded as to an order denying the sanitation district's motion to dismiss an action brought by homeowners. The action alleged negligence, nuisance, trespass, and inverse condemnation stemming from the overflow of raw sewage into the homeowners' residences. The Court held that the sanitation district was entitled to the defense of sovereign immunity as to the homeowners' negligence claims on the basis that it

is an arm of its parent counties and carries out integral functions of state government. However, the Court held that the district was not entitled to sovereign immunity on the homeowners' claims for inverse condemnation, nuisance, and trespass.

I. Wales v. Pullen

2011CA002109 12/21/2012 390 S.W.3d 160

Opinion by Judge Lambert; Judges Combs and Nickell concurred. The Court of Appeals affirmed in part, reversed in part, and remanded in a negligence action brought by an injured motorcyclist against the director of the city department of public works and the county engineer alleging that the failure to remove downed trees from the road caused his accident. The Court held that the county engineer's duty to have downed trees removed from the roadway was ministerial, rather than discretionary, and that the fact that he was not aware of his statutory duties concerning the removal of trees did not constitute an adequate defense for a public official or employee seeking the protection of sovereign immunity. The Court then held that the public works director was entitled to qualified official immunity because his duties were discretionary in nature and because appellant failed to prove that the director's actions with respect to the removal of trees after a massive windstorm were objectively unreasonable.

**XXI. INSURANCE**

A. Cole v. Fagin

2012CA000797 04/19/2013 2013 WL 1694758 DR Pending

Opinion by Judge Moore; Judges Nickell and Taylor concurred. The Court of Appeals reversed the circuit court's entry of summary judgment on statute of limitations grounds in an automobile negligence action. The Court held that an automobile insurer was required under the Motor Vehicle Reparations Act (MVRA) to utilize the insured's basic reparations benefits (BRB) coverage prior to medical payments (MedPay) coverage to pay the insured's accrued medical expenses. Because of this, the MVRA's two-year limitations period started to run only when the last BRB disbursement was made to the insured, even though the insurer

had characterized its reimbursements to the insured as MedPay and the insured did not object to its characterization. Thus, how the reimbursements were "labeled" by the parties was ultimately irrelevant. In reaching its decision, the Court noted that there was no dispute that all accrued medical expenses could have been paid via BRB coverage. The Court further noted that allowing an insurer to apply medical expenses toward MedPay coverage, when those expenses could also have been applied toward BRB coverage, would be fundamentally at odds with the concept of "no-fault" in Kentucky.

B. *Martindale v. First Nat. Ins. Co. of America*

2011CA001747 12/21/2012 2012 WL 6632774 DR Pending

Opinion by Judge Nickell; Judge VanMeter concurred; Judge Taylor concurred in result only. The Court of Appeals affirmed the dismissal of appellants from a bad faith claim they filed after a jury verdict in an automobile accident case. Citing the doctrine of judicial estoppel, the circuit court based appellants' dismissal from the bad faith claim upon their concealment in a subsequent bankruptcy proceeding of the personal injury lawsuit and resulting jury award. Furthermore, even if the bad faith claim had been allowed to proceed, the Court concluded that appellants could not have prevailed at trial where, at most, appellants demonstrated only a disparity between the jury's award and the insurance company's offers. That factor alone is insufficient to establish a bad faith claim.

C. *Medlin v. Progressive Direct Ins. Co.*

2011CA002258 04/05/2013 2013 WL 1365912 DR Pending

Opinion by Judge Stumbo; Judges Keller and Thompson concurred. The Court of Appeals affirmed an order denying appellant's motion for declaratory relief. The Court held that the circuit court correctly concluded that the Motor Vehicle Reparations Act (MVRA) only requires insurance obligors to either pay medical expenses directly to medical providers or to reimburse the insured for actual accrued economic losses. Because appellant had not personally paid any medical bills, he had not incurred any economic losses and was not entitled to be directly reimbursed. The Court further noted that appellant had been offered three options for

collecting his PIP benefits: payment to appellant's chiropractor directly; reimbursement for out-of-pocket expenses; and payment by check in an amount equal to his medical bills and with the check including his name and the name of his medical provider. The first two options are included in the Motor Vehicle Reparations Act, and the third option was pursuant to an agreement between the parties. Having declined all three options, appellant was not entitled to the declaratory relief he sought in circuit court.

D. Pryor v. Colony Insurance

2012CA000227 02/01/2013 2013 WL 386880 DR Pending

Opinion by Judge Clayton; Judges Combs and Nickell concurred. The Court of Appeals held that language in a commercial general liability policy precluding coverage for liability arising out of injuries to employees, as well as language in an endorsement broadening the exclusion by barring coverage to anyone performing duties related to the conduct of the insured's business, supported entry of summary judgment on claims related to the death of a person hauling timber for the insured. The Court further held that even if the circuit court had construed the decedent to have been acting as an independent contractor at the time of his death, that status falls within the scope of the endorsement precluding coverage for performing duties related to the conduct of the insured's business. The Court also held that a third party cannot make a claim under Kentucky's Unfair Claims Settlement Practices Act for the purpose of establishing coverage.

E. Sparks v. Trustguard Ins. Co.

2011CA001119 12/14/2012 389 S.W.3d 121

Opinion by Judge Moore; Chief Judge Acree and Judge Thompson concurred. The long-time companion of a named insured who did not meet the definition of "family member" under the insured's automobile insurance policy nonetheless sought underinsured motorist (UIM) benefits under the policy on the basis that she, not the insured, had always been owner of the car insured. The Court of Appeals rejected this contention and held that UIM coverage was personal to the named insured and is not connected to any particular vehicle. Thus,

appellant could not use her own insurable interest in the car as a tool to impute herself into the subject UIM policy as a "de facto insured." The Court also rejected appellant's arguments of estoppel, reasonable expectations, illusory coverage, and public policy as a basis for avoiding summary judgment.

F. Stull v. Steffen

2011CA000229 07/27/2012 374 S.W.3d 355

Opinion by Judge Keller; Judges Taylor and Thompson concurred. The Court of Appeals affirmed a summary judgment in favor of appellees on appellant's claim for injuries she received in an automobile accident. The Court held that the circuit court did not err in finding that the claim was filed outside the statute of limitations set forth in KRS 304.39-230(6), which requires a claim to be filed within two years of the last personal injury protection (PIP) benefit payment. The Court agreed with appellant that only payment of PIP benefits could extend the statute of limitations and all PIP benefits had to be paid before the insurer could disburse medical payment (MedPay) benefits. However, the Court concluded that the insurer's failure to exhaust PIP benefits before beginning the disbursement of MedPay benefits did not convert all subsequent disbursements of MedPay benefits into PIP benefits. Instead, it only converted the portion of MedPay benefits necessary to reach the \$10,000 PIP benefit limit. The Court summarized its holding as follows: "Every dollar that could be designated as either PIP or MedPay will be deemed to be PIP until such time as PIP is exhausted. Every dollar thereafter will be deemed to be MedPay." Therefore, the two-year statute of limitations began to run on the date the PIP benefits were deemed to have been exhausted.

## XXII. JURISDICTION

A. Com., Uninsured Employers' Fund v. County of Hardin Planning & Development Com'n

2011CA001553 11/09/2012 390 S.W.3d 840

Opinion by Judge Dixon; Judges Moore and Thompson concurred. The Court of Appeals affirmed a judgment in an action brought by a county

challenging an Uninsured Employer's Fund (UEF) workers' compensation lien and a developer's counterclaim against UEF for damages for slander of title and inverse condemnation. The circuit court found the lien invalid, dismissed the slander-of-title counterclaim on the basis of sovereign immunity, and, following trial, entered judgment in favor of the developer. The Court first held that the circuit court had jurisdiction to consider the challenge to the lien under KRS 342.770 - and that the matter was not within the exclusive jurisdiction of the Workers' Compensation Board - where the court was being asked to determine the validity of the lien after a determination that the developer was not a workers' compensation claimant's employer, rather than any benefits or employment issues, and the subject property was in the court's circuit. The Court also held that UEF was not entitled to dismissal as to the inverse condemnation claim due to a failure to exhaust administrative remedies where there was no specific remedy available in the administrative system. Therefore, the developer's claim for inverse taking was properly lodged in circuit court. The Court also held that UEF's continuation of the lien after a determination that the developer was not an employer unconstitutionally encumbered property and therefore constituted a compensable taking.

B. Moctar v. Yellow Cab of Louisville, LLC

2010CA002155 09/21/2012 2012 WL 4208910 DR Pending

Opinion by Judge Stumbo; Judge Combs and Senior Judge Lambert concurred. The Court of Appeals affirmed an order dismissing appellant's negligence action against appellees and granting default judgment against a third party. The Court held that an improperly-brought interlocutory appeal does not divest the circuit court of its jurisdiction during the time between the filing of the appeal and the appeal's dismissal. Therefore, the circuit court's order was not a nullity.

C. Norton v. Perry

2009CA002343 01/11/2013 2013 WL 310159 DR Pending

Opinion by Judge Caperton; Chief Judge Acree and Senior Judge Lambert concurred. The Court of Appeals reversed and remanded an order that

dismissed appellants' action stemming from the unwelcome nomination of their property to the National Register of Historic Places and denied appellees' motion to dismiss the appeal for lack of jurisdiction. The Court first held that the circuit court had concurrent jurisdiction to hear federal questions. The Court also held that if appellants were requesting that their property be removed from the National Register, they must first exhaust all administrative procedures. However, if appellants sought to have a court determine if procedural irregularities occurred in the nomination process, then exhaustion of administrative remedies would not be required. The Court then held that an individual appellee's actions were sufficient to establish personal jurisdiction under Kentucky's long-arm statute, KRS 454.210. The Court also determined that appellants were entitled to adequate discovery as to their claim of unconstitutional taking of their property. The Court further held that appellees' process of determining the number of property owners and number of objections needed to halt the nomination of the property was fundamentally flawed and therefore violated appellants' due process rights. The Court finally held that the circuit court erred when it dismissed appellants' common law claims without first conducting discovery.

D. Shafizadeh v. Shafizadeh

2010CA000758 12/14/2012 2012 WL 6213707 Rehearing Pending

Opinion by Chief Judge Acree; Judges Clayton and Keller concurred. The Court of Appeals held that a family court order dividing marital property entered while a disqualification petition filed pursuant to KRS 26A.020 was pending before the Chief Justice was not void for lack of jurisdiction but was merely voidable. Enforcement of such order was effectively suspended until the Chief Justice decided the disqualification issue, and when the petition was denied, any particular case jurisdictional defect regarding the order was thereby cured. While the Court also upheld an award of maintenance to allow wife time to obtain gainful employment, it reversed as to the open-ended nature of the award and remanded for the family court to specify a fixed duration.

E. Soileau v. Bowman

Opinion by Judge VanMeter; Judges Nickell and Taylor concurred. The Court of Appeals reversed and remanded an order denying appellant's motion to set aside prior orders and judgments in his dissolution action with appellee. The Court held that a circuit court has no discretion in setting aside a void judgment, regardless of the passage of time between the entry of judgment and movant's motion to set aside. The Court held that constructive service, absent an appearance by the party, is insufficient to subject nonresidents to personal jurisdiction. The Court further held that appellant did not subject himself to personal judgment by making child support payments that did not conform to the circuit court's support order and were not made at that court's directive.

### **XXIII JUVENILES**

A. K.N. v. Commonwealth

Opinion by Judge Combs; Judges Keller and Stumbo concurred. The Court of Appeals 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 (KRS 635.020(4)) 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 district court's denial of the motion to transfer did not dispose of the ultimate issue of appellant's guilt. Therefore, there was no finality within the meaning of CR 54.02(1), and 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 potentially-applicable transfer statutes and determined that the district court was not at liberty to proceed under KRS 640.010. Instead, the circuit court properly proceeded under KRS 635.020(4), which mandates 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 there was probable cause that appellant was a participant in the crime.

B. M.A.M. v. Commonwealth

2012CA000989 04/12/2013 2013 WL 1488509

Opinion by Judge Moore; Judge Nickell and Judge Taylor concurred. The Court of Appeals reversed and remanded family court orders finding that appellant violated a Juvenile Status Offender Order (JSOO), that he was in contempt for doing so, that the least restrictive means was not a necessary requirement for disposition of contempt findings, and that the proper disposition for appellant's contempt was his commitment to the Cabinet for Health and Family Services. The Court held that the juvenile's guilty plea was invalid because the family court failed to conduct a proper colloquy under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), to determine whether the juvenile's stipulation to the charges in the JSOO was voluntarily, intelligently, and knowingly entered. Moreover, the JSOO was not a valid court order because it was based solely upon allegations and not upon any actual findings made by the family court. The Court further held that the juvenile should not have been placed in the Cabinet's custody for his contempt of court because the contempt finding was based upon the juvenile's violation of the JSOO, an invalid court order.

C. S.B. v. Commonwealth

2012CA000868 04/05/2013 396 S.W.3d 928

Opinion by Judge Stumbo; Judges Keller and Thompson concurred. The Court of Appeals vacated a judgment finding appellant to be a habitual truant. The Court held that the circuit court lacked subject matter jurisdiction to make the truancy determination where there was no evidence of compliance with the statutory assessment requirements of KRS 159.140 and where there was no evidence of the child's failure to participate that would excuse the lack of proof.

#### **XXIV. LANDLORD/TENANT**

A. Warren v. Winkle

2012CA000366 05/24/2013 2013 WL 2257641

Opinion by Judge Thompson; Judges Maze and Stumbo concurred. The Court of Appeals reversed and remanded the circuit court's entry of summary judgment in favor of the landlords in a tenant's personal injury action. The action was initiated as a result of injuries the tenant allegedly sustained when the ceiling in an apartment she rented from the landlords collapsed. The Court held that while a landlord is generally not liable for injuries to the tenant or her property because of defects in the leased premises in the absence of a contract or warranty as to the condition or repair thereof, because the landlords retained exclusive supervision and control of the roof and the area between it and the tenant's apartment unit, they could be liable for injuries to the tenant caused when the ceiling collapsed in her apartment. However, the Court emphasized that the duty is not absolute and the landlords must have had actual or constructive knowledge of a defective and dangerous condition.

## **XXV. LICENSES**

A. Doyle v. Kentucky Bd. of Medical Licensure

2011CA001915 04/05/2013 2013 WL 1352046 DR Pending

Opinion by Judge Keller; Judges Stumbo and Thompson concurred. The Court of Appeals affirmed the denial of appellant's CR 60.02 motion. Appellant sought relief from the voluntary dismissal of his petition for judicial review of a Board order suspending and indefinitely restricting his license. The Court upheld the circuit court's determination that appellant voluntarily chose to enter into an agreement with the Board in which he "surrendered the opportunity to argue" underlying issues about the validity of the Board's previous suspension and revocation orders, thereby rendering moot any issues regarding the sufficiency of the evidence supporting those orders. The Court also noted that no sufficient evidence of fraud or coercion was offered which would have required the granting of CR 60.02 relief.

B. O'Shea's-Baxter, LLC, D/B/A Flanagan's Ale House v. Com., Alcoholic Beverage Control Bd.

2011CA001583 01/04/2013 2013 WL 45315 DR Pending

Opinion by Judge VanMeter; Judges Nickell and Taylor concurred. The Court of Appeals reversed and remanded the circuit court's entry of summary judgment in favor of the Alcoholic Beverage Control Board (ABC) and the Louisville/Jefferson County Metro Government. ABC upheld the county's denial of a restaurant's application for a retail liquor by drink license on the basis that another license was within 700 feet. The Court held KRS 241.075(2) unconstitutional as local or special legislation in violation of Sections 59 and 60 of the Kentucky Constitution. The Court found no reasonable basis for presuming that the circumstances associated with a concentration of liquor licenses in a "combination business and residential area" in Louisville are different than in the "downtown business area" of Louisville or in other cities not designated as cities of the first class.

#### **XXVI. MECHANICS' LIENS**

A. PBI Bank, Inc. v. Schnabel Foundation Co.

2011CA001135 01/25/2013 392 S.W.3d 421

Opinion by Judge Thompson; Judges Clayton and Combs concurred. The Court of Appeals affirmed a summary judgment entered in favor of a contractor as to the enforceability of a mechanics' lien. The Court held that an initial mechanics' lien statement, which was signed by contractor's attorney and included a "prepared by statement" listing the attorney and his name and address, was sufficient to comply with the mechanics' lien statute (KRS 382.335) even though the attorney did not separately sign the "prepared by statement" section on the lien statement. The statute did not require that the preparer of the statement sign it in a specific form or location, but only required that the preparer execute his signature by "affixing a facsimile of his signature on the instrument." The Court then held that as a result of the county clerk's rejection of this initial lien statement, the doctrine of equitable tolling applied and an untimely-filed second lien statement related back to the timely, but improperly rejected, first lien statement.

#### **XXVII MINES AND MINERALS**

A. Black Fire Coal Co., LLC v. Com., Energy and Environment Cabinet

2011CA001774 12/07/2012 393 S.W.3d 36

Opinion by Judge Clayton; Judges Maze and Taylor concurred. The Court of Appeals affirmed a decision upholding an order of the Energy and Environment Cabinet regarding the forfeiture of surface mining reclamation bonds. The Court first held that a bank that issued a letter of credit to secure surface mining reclamation bonds that were the subject of a permit to conduct mining operations was not a surety to whom the Cabinet was required to give notice of bond forfeiture due to the permit holder's multiple violations. The Court then held that forfeiture of the bonds was authorized due to the permit holder's failure to take corrective action - even if the holder was not permitted access to the property to take such action - where the holder could have obtained an easement by necessity to address the violations pursuant to KRS 350.280 but failed to do so.

**XXVII NEGLIGENCE**

A. Bridgefield Casualty Insurance Company, Inc. v. Yamaha Motor Manufacturing Corporation of America

2011CA000684 10/26/2012 385 S.W.3d 430

Opinion by Judge VanMeter; Judges Lambert and Thompson concurred. The Court of Appeals held that the circuit court did not err in granting summary judgment on a workers' compensation insurer's claim against an ATV manufacturer for statutory and common law subrogation based on product liability theories of negligent design, negligent manufacturing, and breach of express and implied warranties. The claim arose from the manufacturer's distribution of an allegedly defective Rhino that caused injuries to a claimant insured for which the insurer had paid compensation benefits. The Court held that because the insurer's rights were strictly derivative of claims its insured could pursue, the circuit court properly applied the same one-year statute of limitations as would be applicable in a direct action by the insured against the manufacturer. Neither the discovery rule nor the equitable estoppel doctrine operated to toll the statute of

limitations because the insured's injuries and the Rhino's potential role in causing the accident were immediately evident from the accident itself. Dismissal of the insurer's breach of warranty claims was affirmed on the basis that there was no privity of contract or "buyer-seller relationship" between the insurer and manufacturer.

B. Brock v. Louisville Metro Housing Authority

2011CA002244 12/14/2012 2012 WL 6214303 DR Pending

Opinion by Judge Combs; Judge Nickell concurred; Judge Lambert concurred in result only. A pedestrian walking a dog was injured when the dog pulled her onto the grass adjacent to a sidewalk and she stepped in a hole hidden by grass and leaves. The circuit court granted summary judgment to the Metro Housing Authority as to the pedestrian's subsequent negligence action on the basis that she was a trespasser to whom the Housing Authority owed no duty of care. The Court held that habitual trespassers are afforded the status of gratuitous licensees if the landowner could have known about the habitual use of the property in the exercise of ordinary care and failed to object. Consequently, the Court vacated summary judgment as premature where issues of fact existed about whether the Housing Authority should have been on notice about the habitual use of the property by the public and whether it acted negligently in not covering a deep, leaf-obstructed hole close to a public street.

C. Collins v. Appalachian Research and Defense Fund of Kentucky, Inc.

2011CA001680 12/07/2012 2012 WL 6061749 DR Pending

Opinion by Judge Dixon; Judges Maze and Nickell concurred. In a negligence action stemming from an automobile accident, the Court of Appeals affirmed the circuit court's determination that appellee was entitled to summary judgment on appellants' claim that it was vicariously liable for their injuries under the doctrine of respondeat superior. The Court held that where appellants offered no proof other than their own beliefs as to whether the defendant driver was acting within the scope of her employment at the time of the accident, no genuine issue of material fact was created to rebut appellee's proof to the contrary. Further, a

defendant's general schedule is not determinative of what she was doing on the morning of the accident so as to bring her activities within the scope of her employment. The Court noted that the driver unequivocally testified that she was conducting personal errands on the morning of the accident, none of which benefited her employer in any regard.

D. Estate of Moloney v. Becker

2011CA001773 04/19/2013 2013 WL 1688378 Released for Publication

Opinion by Judge VanMeter; Judges Nickell and Taylor concurred. The Court of Appeals affirmed a judgment that resulted in the dismissal of an estate's negligence action against a financial planner for damages that resulted from an allegedly defective qualified personal residence trust (QPRT) set up by the planner. The Court first held that whether the financial planner violated his common-law standard of care or the statutorily-imposed standard of care found in the unauthorized practice of law statute (KRS 524.130) when he set up the QPRT was immaterial to the issue of whether substantial evidence supported the jury's finding that the planner's negligence was not a substantial factor in causing an injury to the estate. The Court also concluded that the question of whether the planner's negligence in setting up the QPRT was a substantial factor in causing the estate's injuries was ultimately a matter for the jury. The Court finally held that the circuit court did not abuse its discretion by allowing the planner to testify regarding his previous work for the decedent.

E. Jackson v. Ghayoumi

2011CA002017 12/14/2012 2012 WL 6214169 DR Pending

Opinion by Judge Lambert; Judges Combs and Nickell concurred. The Court of Appeals held that the circuit court did not err in excluding expert testimony to support the claim in a malpractice action that a chiropractor's use of an electrical stimulation treatment modality caused appellant to spontaneously miscarry her pregnancy. The excluded expert testified in his deposition that he had no knowledge whatsoever regarding the delivery of electrical stimulation to the human body or the

machines at issue, and he disclaimed any knowledge of how electrical stimulation delivered to appellant's neck caused her alleged injuries. The Court found no error in the circuit court's conclusion, after conducting a Daubert hearing, that the expert's testimony was speculative and unreliable because it could not be scientifically tested or verified.

F. Miller v. Fraser

2011CA000884 12/07/2012 2012 WL 6061720 DR Pending

Opinion by Judge Caperton; Judges Lambert and Nickell concurred. The Court of Appeals reversed a verdict for a physician in a medical malpractice action on the basis that the circuit court erred in ruling that appellant could not present his claim for failure to obtain informed consent prior to administration of therapeutic medication. The Court concluded that the informed consent statute (KRS 304.40-320) is not limited to surgical procedures and thus appellant should have been permitted to present his claim of negligence for lack of informed consent. The Court further held that for purposes of determining the physician's duty of care in the administration of ketorolac, a non-steroidal anti-inflammatory drug (NSAID) to treat abdominal pain, kidney failure was foreseeable, since the manufacturer's warning accompanying the medication disclosed known reversible renal dysfunction.

G. Potter v. Boland

2011CA001336 12/07/2012 2012 WL 6061730 DR Pending

Opinion by Judge Thompson; Judge Clayton concurred; Judge Combs dissented and filed a separate opinion. The Court of Appeals affirmed the dismissal of appellants' loss of parental consortium claims as having been filed outside the applicable statute of limitations. The Court held that because it is an independent action and not specifically a part of a wrongful death claim, a parent's claim for loss of consortium under KRS 411.135 remains regardless of whether the child's personal representative asserts a wrongful death claim or whether a personal representative is appointed. Thus, as previously settled by the Supreme Court, KRS 413.140 is the only limitation period set forth by the General Assembly for loss of consortium and the circuit

court properly applied it in this case. Because it was painfully obvious that appellants knew they had been harmed when their child died, they had a duty to exercise reasonable diligence to discover whether they had been injured by a physician's malpractice. Thus, in order to defeat the application of the one-year statute of limitations set forth in KRS 413.140, appellants were required to submit affirmative evidence that they could not discover with reasonable diligence that they had been injured by the physician.

H. Rice v. Vanderespt

2011CA002152 12/21/2012 389 S.W.3d 645

Opinion by Judge Combs; Judges Lambert and Nickell concurred. A police officer shot while responding to a dispatcher's call concerning a report of domestic violence sued the landlords of her assailant for negligence based upon their decision to rent their property to "violent and/or disruptive tenants." The Court of Appeals affirmed the circuit court's entry of summary judgment for the landlords on the basis that they were protected from liability by the public policy considerations of the Firefighter's Rule. The Court rejected the officer's argument that the landlords' failure to evict the menacing tenant created an undue risk of injury beyond what is inevitably involved in a response to a call for help in a domestic violence situation.

I. Ries v. Oliphant

2011CA000100 12/21/2012 2012 WL 6632511 DR Pending

Opinion by Judge Taylor; Judge Stumbo concurred; Judge Clayton concurred in result only. In a medical malpractice action, the Court of Appeals held that the circuit court erred in permitting expert testimony regarding a mathematical formula that purported to time fetal blood loss. The expert who offered the testimony admitted to having done no independent research in the area and to having no knowledge of any scientific study or other objective source directly setting forth his "mathematical model and equilibration theory" concerning a fetus in utero. The Court concluded that without an underlying objective basis in the record to support the expert's assumption that the equilibration rate of a human fetus in utero is

identical to that of a human adult or child, it is virtually impossible to assess the reliability of that assumption or the reliability of his mathematical formula. Because the timing of the fetus's blood loss was a critical factual issue for the jury to resolve, the persuasive effect of the expert's testimony in stating that he could accurately time the blood loss within a 15-minute window required reversal for a new trial.

## **XXIX. OPEN RECORDS**

A. Com., Cabinet for Health and Family Services v. Lexington H-L Services, Inc.

2010CA002194 10/19/2012 382 S.W.3d 875

Opinion by Senior Judge Lambert; Chief Judge Acree and Judge Moore concurred. The Court of Appeals affirmed a judgment of the circuit court finding that appellant had willfully withheld requested records from appellees, in violation of the Kentucky Open Records Act (KORA), and awarding attorneys' fees. The Court held that in order to recover attorneys' fees for an open records violation, the plaintiff must show that an agency's violation of the act was done in bad faith. The Court held that appellant's reliance on an overall policy of nondisclosure when failing to disclose requested records constituted a willful violation of KORA and an award of attorneys' fees was therefore warranted.

B. Taylor v. Barlow

2011CA001779 09/14/2012 378 S.W.3d 322

Opinion by Judge Maze; Judges Clayton and Taylor concurred. The Court of Appeals reversed and remanded the circuit court's dismissal of appellant's lawsuit requesting records from appellee and seeking damages for appellee's failure to provide said records in conformity with a decision of the Attorney General. The Court held that appellant had standing to sue under the Kentucky Open Records Act, notwithstanding the fact that the records he sought pertained to a third party. The Court held that appellant was not engaged in the unauthorized practice of law and was instead acting as a pro se litigant, as evidenced by his actions and pleadings.

**XXX. PROPERTY**

A. Ball v. Oldham County Planning and Zoning  
Commission

2010CA000284 08/03/2012 375 S.W.3d 79

Opinion by Senior Judge Lambert; Chief Judge Acree and Judge Stumbo concurred. The Court of Appeals affirmed an order of the circuit court affirming a decision of a county board of adjustments to grant a road frontage variance with respect to property owned by a trust. The Court first held that the board made adequate findings of fact in support of its decision to grant the requested variance. While the findings were not extensive or numerous, they were not so sparse or "bare bones" as to be considered insufficient. While more specific findings would have been preferable as to some of the findings required by KRS 100.243, in light of the undisputed testimony at the hearing, they were sufficient. The Court then held that the board's findings were supported by substantial evidence. In reaching that conclusion, the Court distinguished the holdings in Bourbon County Bd. of Adjustment v. Currans, 873 S.W.2d 836 (Ky. App. 1994) and Moore v. City of Lexington, 309 Ky. 671, 218 S.W.2d 7 (1948), and held that the board did not err in concluding that the trust's efforts to subdivide and to sell all or part of the property qualified as a reasonable use of the land for variance purposes. The Court further held that the mere fact that a variance would circumvent a zoning regulation is not enough to merit its denial. Instead, the question is whether the granting of the variance would allow for "an unreasonable circumvention of the requirements of the zoning regulations." KRS 100.243(1).

B. Croushore v. BAC Home Loans Servicing, L.P.

2010CA001866 10/05/2012 381 S.W.3d 331

Opinion by Judge Lambert; Judges Nickell and Taylor concurred. The Court of Appeals affirmed a summary judgment in favor of appellee, a mortgage assignee, in its foreclosure action against appellants. The Court held that appellee had been successful in showing that it was in lawful possession of the note on appellants' property and that the

consideration paid by appellee to obtain the note was irrelevant to whether appellee had standing to foreclose.

C. Littleton v. Plybon

2011CA002114 08/24/2012 395 S.W.3d 505

Opinion by Judge Moore; Chief Judge Acree and Judge Thompson concurred. The Court of Appeals affirmed an order dismissing appellants' complaint, which sought to set aside the sale of property on the basis that a deed failed as a matter of law to create a joint tenancy with right of survivorship but instead created a tenancy in common so that appellants were entitled to a portion of the subject property. The Court held that the circuit court did not err in finding that a direct conveyance was sufficient to create a joint tenancy. The Court specifically rejected appellants' argument that the direct conveyance was insufficient to create a joint tenancy because the requisite unities of time, title, and interest were lacking. In so doing, the Court noted that appellants did not contest that these unities could have been achieved with the use of a straw man acting as an intermediary title holder, a more circuitous route to give effect to the clear intent that the grantor also be one of the grantees. Because appellants were only seeking to enforce common-law technicalities, there was no reason not to honor the intention of the deed to create a joint tenancy where it was achieved directly rather than indirectly.

D. Mays v. Porter

2011CA000362 04/19/2013 2013 WL 1688480 Released for Publication

Opinion by Judge Moore. Chief Judge Acree and Judge Thompson concurred. The Court of Appeals affirmed a judgment finding that a transfer of real property to appellants was the result of undue influence. Substantial evidence demonstrated that appellee did not wish to execute the deed of conveyance and would not have done so absent her husband's insistence. The attorney that prepared the deed indicated that appellee attempted to ask questions regarding the deed, but that her husband did not permit her to do so prior to executing the deed. Additionally, there was evidence to show

that husband had previously exerted physical force over appellee and that she refrained from going against his wishes because she feared for her safety. The Court also held that the circuit court did not err by allowing appellee to amend her counterclaim post-trial.

E. McAlpin v. Bailey

2010CA001123 06/01/2012 376 S.W.3d 613

Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court of Appeals affirmed in part, reversed in part, and remanded a circuit court judgment finding that appellees/cross-appellants 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 circuit 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 then held that because appellees/cross-appellants did not adversely possess the strip of land for fifteen years, the circuit court correctly determined that they were not entitled to title by adverse possession. The Court also held that the circuit court properly denied appellees/cross-appellants' request for punitive damages. The Court finally held that the circuit court correctly determined that appellees/cross-appellants were entitled to compensatory damages for appellants/cross-appellees' removal of an 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.

F. Milam v. Viking Energy Holdings, LLC

2011CA001060 06/22/2012 370 S.W.3d 530

Opinion by Judge Lambert; Judges Acree and Combs concurred. The Court of Appeals affirmed an

interlocutory judgment 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 engaged in public services and, therefore, was not excluded from the application of the statute. The Court next held that appellee's attempts at good faith negotiations with appellants before instituting condemnation proceedings were conducted in conformity with the applicable statutes, even though the negotiations were instituted by one entity, and completed by another, where the two entities had merged after a corporate reorganization, making them synonymous. In so holding, the Court found no error in the circuit court's decision to permit appellee to amend its complaint to conform to the evidence presented concerning the results of the corporate reorganization. The Court finally held that the circuit court correctly found that KRS 278.502 did not require appellee to obtain an appraisal and that the subject property was adequately described for purposes of the condemnation petition.

G. Payne v. Rutledge

2011CA000953 02/08/2013 391 S.W.3d 875

Opinion by Chief Judge Acree; Judges Moore and Thompson concurred. In a dispute over a shared driveway, the Court of Appeals affirmed the entry of summary judgment on one property owner's claim that the other property owners had breached an agreement concerning maintenance of the driveway easement, requiring termination of the easement and damages. The Court upheld the circuit court's conclusion that one property owner could not unilaterally decide to pave the driveway, which had always been merely dirt or gravel, and then require the other property owners to contribute one-half of the expenses. There was no error in the circuit court's findings that paving the driveway with concrete constituted an "improvement" rather than a "rebuilding" or "repair" and was therefore beyond the subject matter of the easement and maintenance agreement; that it was necessary to obtain the consent of the adjoining property owners prior to requiring them to defray the cost of paving; and that no basis had been established for rescinding

the easement maintenance agreement.

H. PSP North, LLC v. Attyboys, LLC

2011CA001994 01/18/2013 391 S.W.3d 396

Opinion by Judge Nickell; Judges Taylor and VanMeter concurred. The Court of Appeals affirmed a summary judgment which found that appellee possessed an irrevocable license to use a ramp that extended from its property onto appellant's property. The Court held that a successor-in-interest with knowledge of an irrevocable license granted by the previous owner prior to the successor's purchase of the property is barred by equitable principles from revoking the license.

I. Slone v. Calhoun

2011CA000571 11/30/2012 386 S.W.3d 745

Opinion by Judge Taylor; Judge Nickell concurred; Judge Combs dissented and filed a separate opinion. The Court of Appeals reversed the circuit court's dismissal of a complaint for damages under a land contract on the basis that a forfeiture provision in the contract precluded any claims advanced by appellant. The Court held that, based upon the circuit court's legal ruling that the parties had entered into an installment land contract, *Sebastian v. Floyd*, 585 S.W.2d 381 (Ky. 1979) and its progeny compelled a holding that forfeiture of the buyer's payments upon default was invalid and unenforceable in Kentucky. Not only did the buyer in this case have an equitable ownership in the subject property to the extent of the monthly payments she made thereon, but she also had redemption rights under KRS 426.530. The Court further held that despite the fact that appellant did not raise the argument in her prehearing statement, the circuit court's error in failing to apply the proper law regarding installment land contracts resulted in palpable error and manifest injustice warranting appellate review.

J. U.S. Nat. Bank Ass'n v. American General Home Equity, Inc.

2010CA002081 10/05/2012 387 S.W.3d 345

Opinion by Senior Judge Lambert; Judges Caperton and Thompson concurred. The Court of Appeals reversed and remanded a summary judgment entered in favor of appellee, a mortgagee who was a successful bidder at a tax sale. The circuit court concluded that appellee was entitled to a credit for the full amount of its judgment against the purchase price of the property, with the remaining balance to be apportioned among senior lienholders. The Court held, however, that a mortgagee was entitled to use its judgment lien as a credit against its bid on foreclosed property, but only for the net amount it would be entitled to receive from the proceeds of the commissioner's sale. In this case, since appellee's judgment lien was inferior to appellants' superior tax liens, the net amount due appellee could only be determined after sales proceeds were distributed to appellants.

K. Vick v. Elliot

2012CA000364 05/17/2013 2013 WL 2120301 Rehearing Pending

Opinion by Judge VanMeter; Chief Judge Acree and Judge Taylor concurred. In a dispute over a parcel of property between two adjoining landowners, the Court of Appeals affirmed the circuit court's finding of title by way of adverse possession. Although mere recreational use of a disputed parcel will not prove actual possession of the parcel for purposes of establishing a claim of adverse possession, when recreational use is coupled with the construction of a fence enclosing the property for the statutory period of fifteen years, a claim of adverse possession may stand. Testimony indicated that a fence enclosing the disputed property was erected as early as the 1940s. The Court held that the fence provided notice that appellees and their predecessors in interest held the property to be their own and thus constituted actual possession.

L. Villas at Woodson Bend Condominium Ass'n, Inc. v. South Fork Development, Inc.

2010CA000578 12/07/2012 387 S.W.3d 352

Opinion by Judge Nickell; Judges Lambert and VanMeter concurred. The Court of Appeals affirmed the circuit court's determination that appellee, a condominium developer, retained the right to pursue

future development activities within a condominium project beyond a four-year marketing interval set forth in the master deed. Under the terms of a "consent to amendment" provision imposed on each condominium unit purchaser, any amendments to the deed for the limited purpose of bringing additional units into the condominium regime and altering the interests in the common elements were done with the unanimous consent of the unit owners. The Court also found no indication that, in drafting the master deed, appellee intended to, or inferred it would, complete all construction activities within a four-year period.

M. Woodlawn Springs Homeowners Ass'n, Inc. v. Your Community Bank, Inc.

2012CA000439 12/21/2012 2012 WL 6633145 DR Pending

Opinion by Judge Combs; Judges Lambert and Nickell concurred. The Court of Appeals vacated and remanded a summary judgment entered in favor of a bank, which was the owner of 51 subdivision lots, in a declaratory judgment action brought by the bank against the subdivision's homeowners' association. The lots had been conveyed to the bank by the estate of the subdivision's previous owners and developers in lieu of foreclosure. The bank sought a declaration that it was exempt from homeowners' association fees and sought release of a lien held by the homeowners' association on the subject property. The bank maintained that when the lots were transferred to it, it became entitled to the developers' exemption from homeowners fees set out in the development's declaration of covenants. The Court held that the declaration of covenants concerning the development made clear that the exemption of association fees for the developers expired with the original owners/developers. Since the homeowners' association now functionally stood in the shoes of the developers with respect to carrying out the duties and burdens enumerated in the declaration, the association was therefore entitled to collect fees from all property owners - including the bank. The Court noted that the bank's argument to the contrary would ultimately result in the absurdity of all 51 properties in development being exempt from the fee as having been originally owned by the developers.

A. Eriksen v. Gruner & Simms, PLLC

2012CA000563 05/17/2013 2013 WL 2120295

Opinion by Chief Judge Acree; Judges Dixon and Thompson concurred. The Court of Appeals affirmed the circuit court and held that when a patient expressly asks his healthcare provider to provide his first free copy of medical records to an agent of the patient, KRS 422.317(1) requires that the copy be provided to the agent free of charge. However, the healthcare provider may seek reimbursement for any charges incurred in mailing, faxing, scanning, or otherwise transmitting the free copies to the patient's agent. The Court further held that KRS 422.317 did not violate the Kentucky or United States Constitutions.

#### **XXXII TAXATION**

A. Com., Finance and Admin. Cabinet, Dept. of Revenue  
v. Commonwealth Agri-Energy, LLC

2011CA000512 11/16/2012 2012 WL 5628180 DR Pending

Opinion by Judge VanMeter; Chief Judge Acree and Judge Moore concurred. The Court of Appeals affirmed a decision of the Board of Tax Appeals directing the Department of Revenue to consider an ethanol producer's application for an ethanol tax credit to be timely filed. The Court held that the Department's failure to extend the deadline for filing an application for the tax credit was arbitrary and capricious where the official reporting form to apply for the credit was not available until the day it was due, the form was not officially published until after the application was due, and the producer's application was filed three days after the form was officially published. The Court also held that to demand the application be filed on the same day the form was officially provided was unreasonable.

B. Com., Finance and Administration Cabinet, Dept. of  
Revenue v. Saint Joseph Health System, Inc.

2010CA001086 01/18/2013 2013 WL 190441 Released for  
Publication

Opinion by Senior Judge Lambert; Judges Acree and Wine concurred. The Court of Appeals reversed an opinion and order of the circuit court finding that the provider of natural gas to a hospital was not liable for the utility tax authorized by KRS 160.593 and KRS 160.613 and that the hospital was required to reimburse the provider because the hospital was not exempt from what it found was an excise tax. In a case of first impression, the Court held that, consistent with KRS 160.6131(4) and (5), which focused on the act of furnishing utility services rather than whether the provider was a regulated utility, because the provider furnished natural gas to the hospital, the provider was subject to imposition of the utility tax and the circuit court erred in finding otherwise.

C. Dayton Power and Light Co. v. Department of Revenue, Finance and Admin. Cabinet, Com.

2011CA001438 11/02/2012 2012 WL 5372109 DR Pending

Opinion by Judge Combs; Judge Dixon concurred; Judge VanMeter dissented and filed a separate opinion. The Court of Appeals affirmed the circuit court's reversal of an order of the Board of Tax Appeals providing that the Department of Revenue could not change its valuation of property that was owned by an electric utility company. The Court held that the circuit court correctly determined that a utility company's franchise should be taxed separately under KRS 132.020(1)(r), changing the utility's state tax obligation and making it subject to local taxes. KRS 132.208 exempts intangible personal property from state and local taxes except that which is assessed under Chapter 136. The Court held that this statutory exemption must be narrowly construed, compelling the conclusion that the franchise of a public service company is not subject to the exemption and was not entitled to be spread over and among other types of assets. The Court also held that the utility could not avail itself of the doctrine of contemporary construction because contemporaneous construction cannot be invoked to memorialize or to ratify a mistake of an agency and would disserve sound public policy interests if such recourse were attempted. In dissent, Judge VanMeter opined that the doctrine of contemporaneous construction should apply.

D. Meadows Health Systems East, Inc. v. Louisville/Jefferson  
County Metro Revenue Commission

2009CA001839 8/03/2012 375 S.W.3d 71

Opinion by Senior Judge Lambert; Chief Judge Acree and Judge Stumbo concurred. The Court of Appeals affirmed an order of the circuit court denying appellants' motion for summary judgment in a declaratory judgment action. Appellants contended that the appellee revenue commission violated Kentucky constitutional and statutory law by imposing an occupational license fee on capital gains from the sale of appellants' business assets. The Court held that the local regulations being challenged were valid because neither Section 181 of the Kentucky Constitution nor KRS 91.200 expressly prohibited capital gains of any sort - including those obtained via the sale of a business - from being considered "net profits" subject to an occupational license fee. The Court noted that the failure of KRS 91.200 to specifically define what constitutes "net profits" or indicate what income, if any, might be exempt from the provision's reach demonstrated the General Assembly's intent to delegate broad latitude to local governments in determining what constitutes such. The Court further held that the extraordinary or unusual nature of the business transaction or activity carried no significance in determining the applicability of the fee as long as it generated net profits for the business entity. Thus, the fact that appellants had sold off nearly all of their business assets did not remove the gains made from the transactions from the realm of net profits.

E. Tax Ease Lien Investments 1, LLC v. Hinkle

2011CA000652 10/19/2012 2012 WL 5040549 DR Pending

Opinion by Judge Thompson; Judge Combs and Senior Judge Lambert concurred. The Court of Appeals affirmed in part, reversed in part, and remanded where a third-party purchaser of certificates of delinquency regarding real property for which property taxes had not been paid brought actions to enforce its rights to collect the amount due. The circuit court awarded attorneys' fees in an amount that was less than the purchaser requested and denied the purchaser's request that the sale proceeds be distributed pro rata to all parties with valid tax liens. The Court held that the circuit court did not abuse its discretion in

determining the reasonableness of litigation fees requested by the purchaser, but it was error not to order a pro rata distribution of the sale proceeds. The Court held that it is the role of the circuit court to follow the language of KRS 134.452(3)(c) in order to provide a third-party purchaser of a certificate of delinquency with a feasible means to recover and protect its tax lien and to safeguard the public against possible abuses of the judicial process by not allowing excessive attorneys' fees and costs to be imposed upon economically burdened citizens. The priority given liens resulting from unpaid ad valorem taxes in KRS 134.420(3) may be exercised by third-party purchasers of certificates of delinquency and a pro rata distribution of the proceeds of any judicial sale is required.

## XXXII TORTS

### A. Calhoun v. Provence

2010CA001282 06/22/2012 395 S.W.3d 476

Opinion by Judge Stumbo; Judges Combs and Keller concurred. The Court of Appeals affirmed a judgment of the circuit court reflecting a jury verdict in favor of appellant/cross-appellee wife on her claim to recover damages arising from an automobile accident. On the direct appeal, the Court first held that the circuit court did not abuse its discretion in bifurcating the proceedings. The circuit court's finding that separate proceedings would be more efficient was alone sufficient to support the determination that bifurcation was warranted. The Court further noted that although an earlier decision on bifurcation would have been preferable, the lack of such did not constitute an abuse of discretion. The Court next held that the circuit court did not err in denying appellants/cross-appellees' 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/cross-appellee's injury resulted from something other than the motor vehicle accident or for no discernable reason at all. The Court then held that the circuit 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 circuit court did not err in designating

appellee/cross-appellant Legend Suzuki as the primary insured at the time of the accident pursuant to *Gainsco Companies v. Gentry*, 191 S.W.3d 633 (Ky. 2006) and KRS 186A.220(5). In reaching that conclusion, the Court held that appellee/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 appellee/cross-appellant from its statutory duty.

B. Carruthers v. Edwards

2011CA001612 08/10/2012 395 S.W.3d 488

Opinion by Chief Judge Acree; Judges Clayton and Stumbo concurred. The Court of Appeals affirmed an order granting appellees' motion to dismiss appellant's complaint for injuries she received when she was struck in the parking lot of a bar on premises owned by appellees and leased to the bar. The Court held that the circuit court properly dismissed the complaint. In reaching that conclusion, the Court first held that appellant's complaint did not state a valid claim under the Dram Shop Act, KRS 413.241. Liability under the act could not be imposed upon the lessors, who simply held title to the property on which the properly-licensed lessee engaged in the regulated sale of intoxicating liquors. The Court then held that appellant failed to state a common-law claim against appellees when there was no allegation that, at the inception of the lease, appellees expressly authorized the bar to over-serve patrons or that there was an "unreasonably great likelihood" that the bar would do so. The Court finally held that, independent of appellees' status as lessors, any claim of negligence against them would not survive a motion pursuant to CR 12.02(f).

C. Gibson v. Raycom TV Broadcasting, Inc.

2011CA001347 11/02/2012 2012 WL 5372104 DR Pending

Opinion by Judge Clayton; Judges Combs and Thompson concurred. The Court of Appeals held that summary judgment was properly granted on a contractor's defamation claim against a television station where statements made during a broadcast were substantially accurate; no malice on the part of the station or the homeowner who contacted the

station was proven; information regarding unsatisfactory workmanship was legitimate; and because the station is a media defendant, a constitutional free speech issue was implicated. The Court further held that whether the statements in question were defamatory per se was immaterial to the entry of summary judgment where the statements were true or substantially true.

D. Litsey v. Allen

2010CA001777 06/01/2012 371 S.W.3d 786

Opinion by Senior Judge Lambert; Judges Dixon and VanMeter concurred. The Court of Appeals 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 circuit 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 failed to allege that she was relying upon the doctor to correct the consequences of poor treatment and instead only continued to have her prescription for Xanax renewed. The Court then held that the circuit court correctly determined that appellant's claim for intentional infliction of emotional distress was governed by KRS 413.140(1)(e), which applies to 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 circuit court.

E. Peoples Bank of Northern Kentucky, Inc. v. Crowe Horwath

2010CA001709 07/13/2012 390 S.W.3d 830

Opinion by Judge Thompson; Judges Clayton and Stumbo concurred. The Court of Appeals affirmed a judgment entered following a jury verdict in favor of appellee Crowe Horwath, LLP on appellants' claims for professional negligence and breach of fiduciary duty in performing its auditing duties. The Court first held that the circuit court properly instructed the jury that criminal wrongdoers caused the appellant bank's losses. Regardless of whether liability could be

apportioned, the instruction was not confusing or misleading and the evidence supported the instruction, which informed the jury that the criminal wrongdoers breached their duties owed to the bank and that their breaches caused the losses to the bank. The Court next held that the circuit court properly instructed the jury that the bank's agents caused losses to the bank in connection with check conversions. The instruction was not confusing or misleading and the evidence regarding the converted check scheme was presented to prove that the converted checks were the cause of the bank's undercapitalization and ultimate closing. The Court next held that the circuit court did not abuse its discretion in admitting expert testimony describing the duties of bank directors and, specifically, appellants' directors. The nature and scope of the duties owed a financial institution by its directors was a matter beyond the experience of the average juror. The Court finally held that any error by the circuit court in directing a verdict in the individual auditor's favor was harmless when the jury was not informed that the individual was dismissed from the action and was otherwise properly instructed that the firm was accountable for the conduct of its CPAs, including the individual auditor.

F. Pezzarossi v. Nutt

2011CA000990 12/07/2012 392 S.W.3d 417

Opinion by Judge Lambert; Judges Combs and Nickell concurred. The Court of Appeals reversed and remanded a judgment and order denying lender's request for jury instructions on punitive damages and a new trial in a fraudulent misrepresentation action. The Court held that lender, who presented clear and convincing evidence that borrower's attorney acted toward lender with fraud in representing to lender that a loan would be repaid from proceeds of borrower's personal injury settlement, was not required to also prove that the attorney acted with malice in order to recover punitive damages under KRS 411.184.

G. Smith v. Grubb

2011CA000223 06/15/2012 2012 WL 2160192 DR Pending

Opinion by Judge Thompson; Judges Lambert and

VanMeter concurred. The Court of Appeals 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 circuit 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 circuit 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.

H. *Stathers v. Garrard County Board of Education*

2010CA002212 08/31/2012 2012 WL 3762035 DR Pending

Opinion by Chief Judge Acree; Judges Moore and VanMeter concurred. The Court affirmed in part, reversed in part, and remanded an order granting summary judgment in favor of the appellee/cross-appellant board of education, construction companies, and drilling and blasting companies on appellants/cross-appellees' claim that blasting during the construction of a new high school caused damage to their homes. As to the direct appeal, the Court held that appellants/cross-appellees showed a genuine issue of material fact as to causation to maintain their strict liability blasting claim and to survive summary judgment. The Court particularly held that there was no requirement that a plaintiff in a blasting case produce any expert testimony to establish causation. The homeowners' depositions provided evidence concerning the condition of the houses prior to blasting, gave graphic descriptions of the blasting and the corresponding vibrations and effects, and gave descriptions of significant changes to their homes after the blasting. Therefore, a fact-finder could reasonably conclude that blasting caused the damage to the homes. As to the cross-appeal, the Court held that the board of education was not entitled to governmental

immunity merely because it was engaged in a government function. If appellants/cross-appellees were able to successfully prove that their homes were damaged or destroyed as a direct result of the construction of the new high school, the board may be liable in damages under sections 13 and/or 242 of the Kentucky Constitution.

#### **XXXIV TRUSTS**

A. Vander Boegh v. Bank of Oklahoma, N.A.

2011CA000921 02/08/2013 394 S.W.3d 917

Opinion by Judge Moore; Judge Stumbo concurred; Judge Thompson concurred in result only. The Court of Appeals upheld the circuit court's decision in a trustee's action filed pursuant to KRS 386.675. The trustee petitioned for instructions regarding how to fulfill its fiduciary obligations to beneficiaries concerning a mining quarry lease and royalty payments from the lease. The Court held that the circuit court properly applied the "prudent investor" standard to the evidence presented and did not err in concluding that it was in the best interests of all beneficiaries to keep the lease in force despite an alleged royalty shortfall. There was no evidence of certainty that another lessee capable of operating the quarry could be found, and many beneficiaries depended on royalties from the lease and would suffer financial hardship during the lengthy period of time that would be required to terminate the lease and to find another operator. The Court also concluded that evidence concerning an alleged breach by the operator was speculative. The Court further held that an alleged mining permit violation could not form the basis for a breach of the lease agreement in the absence of a final order, by the entity authorized to make that determination, that a permit violation existed. The Court further noted that contrary to appellants' argument, nothing in the circuit court's order prohibited the trustee from exercising its discretion to terminate the lease if lessee commits a default in the future.

#### **XXXV. WILLS AND ESTATES**

A. Blackwell v. Blackwell

Opinion by Chief Judge Acree; Judges Caperton and VanMeter concurred. The Court of Appeals affirmed in part, reversed in part, and remanded an order of the circuit court that affirmed a judgment and order of the district court dismissing appellant's claims against her ex-husband's estate. The Court first held that the circuit court properly affirmed the portion of the district court order finding that a letter of notice of disallowance was adequate as contemplated by KRS 396.055(1) when it clearly and unequivocally disputed, rejected, and disallowed appellant's claim for unpaid maintenance. The Court further held that the notice of disallowance substantially complied with the statute - even though it had not been sent by the estate's personal representative - when it was sent by an agent acting on the personal representative's behalf. The Court then held that the circuit court erred in affirming that portion of the district court order finding that appellant's claim was barred for appellant's failure to file a timely enforcement action against the personal representative. The notice of disallowance did not comply, substantially or otherwise, with KRS 396.055(1) when it clearly failed to include any language warning appellant that an action against the personal representative must be commenced not later than 60 days after the mailing of the notice. However, the failure did not render the disallowance letter void. Instead, appellant was no longer bound to bring the enforcement action within the 60-day limitations period but only within a reasonable time, which she did when she filed it within the six-month period for presenting claims to the estate as set forth in KRS 396.011.

B. Rose v. Ackerson

Opinion by Senior Judge Lambert; Chief Judge Acree and Judge Stumbo concurred. The Court of Appeals affirmed an order of the circuit court awarding the proceeds of an annuity to appellees on behalf of an estate. The Court first held that the circuit court did not abuse its discretion when it determined that appellees' complaint was sufficient to state a cause of action when it plainly alleged that appellant was asserting a claim for the annuity proceeds, which she had acknowledged were to be used for the debts of the estate. The Court

next held that the circuit court did not abuse its discretion when it determined that appellant would be unjustly enriched if she were to retain the annuity funds. Appellees' failure to assert the existence of unjust enrichment did not preclude the circuit court from making the legal conclusion that appellant would be unjustly enriched after finding that appellant had acquired the annuity proceeds by fraudulent inducement. The Court next held that the circuit court did not err in finding clear and convincing evidence that appellant had agreed to use the annuity funds to pay the estate's debts and that her failure to do so would render it unconscionable for her to retain the funds. The Court next held that the circuit court did not err when it found the existence of an agreement between appellant and the deceased that the annuity would be used to pay the debts of the estate. This did not alter the terms of the policy but, rather, limited the actions of appellant after receipt of the funds. The Court finally held that appellant failed to preserve her defense of "unclean hands" when she untimely and inadequately raised the defense for the first time in a post-trial motion.

#### **XXXVI WORKERS' COMPENSATION**

A. GSI Commerce v. Thompson

2012CA000510 09/28/2012 2012 WL 4491136 Released for Publication

Opinion by Judge Combs; Judges Caperton and Nickell concurred. The Court of Appeals affirmed an opinion of the Workers' Compensation Board affirming an Administrative Law Judge's award of benefits to appellee. The Court held that the ALJ was not required to disregard a physician's opinion when the employer argued that the opinion was the product of an incomplete and inaccurate medical history. The Court noted that the ALJ had broad discretion when determining the weight to be given to the physician's opinion. The Court further held that the question of whether appellee's injury fit within the diagnostic criteria set out in the American Medical Association's Guides was a medical question reserved to medical experts.

B. Jones v. Dougherty

2010CA001985 12/14/2012 2012 WL 6213723 DR Pending

Opinion by Judge Keller; Judges Clayton and Maze concurred. The Court of Appeals held that absent evidence of aggression or hostility in an assistant principal's act of taking a snake to a teacher's office to show it to her, the assistant principal's actions occurred within the scope of her employment where there was no evidence she knew that the teacher had a fear of snakes or that she pushed or thrust the snake toward the teacher. Thus, the Court affirmed the entry of summary judgment on the teacher's claim that the assistant principal's "willful and unprovoked physical aggression" overcame the exclusive remedy provisions of the Workers' Compensation Act. The Court concluded that the circuit court correctly determined that appellant failed to provide evidence that the assistant principal's action in showing the snake to her constituted willful and unprovoked aggression.

C. Justice v. Kimber Volunteer Fire Dept.

2012CA000417 09/14/2012 379 S.W.3d 804

Opinion by Judge Clayton; Judges Maze and Taylor concurred. The Court of Appeals affirmed a decision of the Workers' Compensation Board affirming an Administrative Law Judge's determination that appellant was not entitled to disability income benefits because he had no regular employment from which an average weekly wage could be determined. The Court held, pursuant to KRS 342.140, that volunteer personnel who are not engaged in regular employment cannot receive disability income benefits.

D. Pro Services, Inc. v. Wilson ex rel. Estate of Wilson

2010CA001322 01/04/2013 391 S.W.3d 382

Opinion by Judge Nickell; Judges Clayton and VanMeter concurred. The Court of Appeals affirmed in part, reversed in part, and remanded a decision by the Workers' Compensation Board regarding a claim for permanent total disability (PTD) benefits. The Court held that the Board properly reversed and remanded the award of the Administrative Law Judge (ALJ) for additional findings concerning the calculation of claimant's average weekly wage based upon his concurrent employment where the evidence

on this issue had been presented to the ALJ but was not mentioned in the opinion and award. The Court further held that where the ALJ's analysis on an issue is incomplete and insufficient to afford proper review, the Board did not substitute its judgment for the fact-finder in remanding for further findings. The Court held that the Board did err, however, in asserting that it "is common knowledge full-time [employment] is a 40 hour work week," as the Act does not define the number of hours that must be worked to be considered "full-time" employment.

E. Reichwein v. Jackson Purchase Energy Corp.

2011CA001339 09/21/2012 397 S.W.3d 413

Opinion by Judge Thompson; Judges Dixon and Moore concurred. The Court of Appeals affirmed a summary judgment in favor of appellee, on the basis of up-the-ladder immunity, in appellant's action for loss of parental consortium. The Court first held that the deceased's fatal injury in Kentucky constituted sufficient contact to apply Kentucky law. The Court then held that because appellee had secured payment of workers' compensation coverage and the deceased, who worked for another electrical cooperative that was providing assistance to appellee in maintaining its power systems, was injured while performing work that was a regular and recurrent part of appellee's business, appellee was entitled to up-the-ladder immunity.

F. Twin Resources, LLC v. Workman

2012CA001504 02/22/2013 394 S.W.3d 417

Opinion by Judge Moore; Judges Keller and Lambert concurred. The Court of Appeals affirmed the sua sponte determination of the Workers' Compensation Board that the Chief Administrative Law Judge (CALJ) acted in excess of his statutory and regulatory authority in resolving a post-award medical fee dispute. The Court held that it is within the province of the Board to determine a question of law, such as whether an ALJ's opinion is in conformity with Chapter 342, and therefore the Board had the authority to raise the question of whether the CALJ acted without or in excess of his statutory or regulatory powers on its own motion. After the CALJ determined that the motion to reopen the medical fee dispute was supported by

a prima facie showing, the Board correctly concluded that under 803 KAR 25:012 § 1(6)(c), the CALJ's only option was to assign the motion for further proof time and an adjudication on the merits and that he could not assign the medical fee dispute to himself or otherwise retain jurisdiction.

#### **XXXVI ZONING**

A. Masonic Homes of Kentucky, Inc. v. Louisville  
Metro Planning Commission

2011CA002041 02/08/2013 2013 WL 462345 DR Pending

Opinion by Judge Dixon; Chief Judge Acree and Judge VanMeter concurred. The circuit court upheld a decision of the Louisville Metro Planning Commission to approve an application to build a cellular communications tower on adjacent property. The Court of Appeals affirmed. The Court held that because KRS 100.987 specifically vests the planning commission with subject-matter jurisdiction to regulate the placing of cellular towers within metropolitan Louisville, the question of whether a particular party was able to pursue an application under that statute is a question of standing, not jurisdiction. Thus, appellant's failure to object to the applicant's standing at the administrative level constituted a waiver of the issue and precluded appellant from raising it for the first time before the circuit court.

B. Yocum v. Legislative Body of City of Fort Thomas

2011CA002191 02/01/2013 2013 WL 375574 DR Pending

Opinion by Judge Clayton; Judge Combs and Nickell concurred. The Court of Appeals affirmed an order denying appellant's zoning appeal and granting partial summary judgment on the issue of the constitutionality of KRS 100.212 and an identical city zoning ordinance. The Court upheld the 14-day notice provision of KRS 100.212 and the ordinance against a claim that they are unconstitutional in failing to afford interested persons a meaningful opportunity to be heard. The Court noted that appellant had appeared before the planning commission and presented evidence and did not ask for additional time to prepare. Further, there is no requirement that appellant be allowed to present

evidence before the city council, which is authorized to follow the commission's recommendation without a hearing. Because appellant was afforded a meaningful opportunity to be heard before the planning commission, he could not establish that the statute and ordinance are violative of his right to due process.