

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
NOVEMBER 2008**

I. CONTRACTS

A. Lynn v. Digital Lifestyles, LLC

[2007-CA-002442](#) 11/14/2008 2008 WL 4889642

Opinion by Judge Lambert; Judge Nickell and Senior Judge Henry concurred. The Court affirmed a judgment of the circuit court denying appellant's motion for summary judgment and findings of fact and conclusion of law awarding damages to appellee on its claim for breach of contract for the installation of a home theater system. The Court first held that the case fell into the exception articulated in *Transportation Cabinet, Bureau of Highways, Com. of Ky. v. Leneave*, 751 S.W.2d 36 (Ky. App. 1988), allowing for the appeal of a denial of a motion for summary judgment because the facts were not in dispute, the question of whether the Court had jurisdiction was a matter of law, and there was a final judgment with an appeal taken. The Court then held that the trial court had personal jurisdiction over appellant even though he was an Indiana resident, the contract was signed in Indiana, and the work was to be performed in Indiana. Appellant came into Kentucky and sought out the on-going contract for goods and services, traveled into Kentucky to re-negotiate the contract, ultimately contracted with another Kentucky business, and caused direct consequence within the state by negotiating a contract for a large sum of money. The Court then held that appellee was not required to prove with certainty the costs of the equipment for the project because the equipment was ultimately not purchased because of the breach. Therefore, the trial court did not abuse its discretion by relying on testimony that the equipment costs amounted to half of the contract price and awarding damages based on that testimony. The Court finally held that there was no evidence that appellee suppressed or spoiled evidence.

II. CRIMINAL LAW

A. D.E. v. Commonwealth

[2007-CA-001882](#) 11/21/2008 2008 WL 4952104

Opinion by Judge Stumbo; Chief Judge Combs and Senior Judge Guidugli concurred. On discretionary review, the Court reversed appellant's conviction for criminal trespass. The Court held that appellant could not be convicted for criminal trespass for throwing rocks at a house when there was no evidence that she entered onto the land. While there were other charges the Commonwealth could bring, such as criminal mischief for which appellant was found guilty, KRS 511.080(1) requires that a person must enter onto the property to be found guilty of criminal trespass.

B. Kiser v. Commonwealth

[2008-CA-000200](#) 11/26/2008 2008 WL 4998947

Opinion by Judge VanMeter; Judges Moore and Taylor concurred. The Court reversed and remanded appellant's sentence and conviction for third-degree burglary. The Court held that a zoo, as a fenced-in area of land, did not constitute a building for purposes of the KRS 511.040(1), as defined by KRS 511.010(1).

C. Marshall v. Commonwealth

[2007-CA-002518](#) 11/07/2008 2008 WL 4822529 DR filed 12/09/2008

Opinion by Chief Judge Combs; Judge Stumbo and Senior Judge Guidugli concurred. The Court affirmed in part, vacated in part and remanded for a new trial, an order of the circuit court denying appellant's motion to suppress evidence obtained during a search of his person pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Court held that the search was unreasonable when officers pulled down appellant's pants and underwear after an officer detected an unknown object under his clothes that was not immediately identifiable by touch alone as crack cocaine. While the officers could have placed appellant under arrest after establishing that there was an outstanding warrant and then proceeded to conduct an intrusive search in a controlled environment, under the circumstances the search was unreasonable. The Court also held that the trial court did not err in failing to hold a competency hearing, as the record did not show any clear factual evidence to contradict appellant's own statements asserting his competency. As such, there was no evidence of any obvious implication of KRS 504.100.

D. Moore v. Commonwealth

[2007-CA-001787](#) 11/26/2008 2008 WL 4998687

Opinion by Judge Keller; Judge Wine and Senior Judge Lambert concurred. The Court reversed and remanded appellant's conviction for various drug possession charges stemming from a search conducted after the car in which appellant was a passenger was stopped at a roadblock. The Court held that the roadblock was conducted in an unconstitutional manner. The record showed no written policy regarding how citizens stopped were to be treated, there was in adequate evidence of any systematic scheme to prevent unconstrained discretion by the officers, the supervisor control of the roadblock did not restrict the KSP officers or confine the TVA officer who conducted the search. Further, appellant was not the driver of the vehicle which implied that the officer was looking for evidence of ordinary criminal activity rather than to prevent he immediate danger posed by impaired drivers.

III. EMPLOYMENT

A. Wilson v. Kentucky Unemployment Insurance Commission

[2007-CA-002242](#) 11/21/2008 2008 WL 4889642

Opinion by Judge Stumbo; Judges Lambert and Thompson concurred. The Court reversed and remanded an order of the circuit court affirming a decision by the Kentucky Unemployment Insurance Commission to deny appellant benefits. The

Court first held that appellant failed to preserve the issue of setting aside the referee's and Commission's order when he failed to raise it during the administrative proceedings. The Court then held that the Commission erred by applying the wrong standard in denying benefits. The standard required by KRS 341.350(4) was that appellant make a "reasonable effort to obtain work," not that he be "actively seeking work." Because appellant was only temporarily without work, seeking employment through his union could be seen as reasonably seeking work even though it might not qualify as an active search.

IV. FAMILY LAW

A. **L.J.P. v. Cabinet for Health and Family Services**

[2007-CA-001783](#) 11/26/2008 2008 WL 4998635

Opinion by Judge Caperton; Judges Lambert and Thompson concurred. The Court reversed and remanded an order of the family court denying appellants' motion to intervene and their request for custody of a grandchild. The Court held that although the grandparents did not have a right to intervene in the termination proceedings under KRS 625.060, pursuant to CR 24.01, they could intervene as a matter of right in the custody determination made under KRS 625.100.

V. GOVERNMENT

A. **Jewish Hospital Healthcare Services, Inc. v. Louisville/Jefferson County Metro Government**

[2008-CA-000095](#) 11/14/2008 2008 WL 4889526

Opinion by Judge Lambert; Judge Nickell and Senior Judge Henry concurred. The Court affirmed in part and reversed and remanded in part orders of the circuit court dismissing, on sovereign immunity grounds, appellant's claims against Louisville/Jefferson County Metro Government seeking payment for the costs of medical care provided to indigent prisoners. The Court first held that because KRS 441.045(3) did not explicitly waive appellee's sovereign immunity, the trial court did not err in dismissing the claim on these grounds. Further, because sovereign immunity was not waived, the claims of unjust enrichment failed as a matter of law. The Court next held that appellee's refusal to reimburse appellant was not in violation of the takings clause of the Fifth Amendment. Appellee's actions were not intentional, as it entered into a contract with another hospital for the most economical provision of necessary medical care to inmates and it attempted to fulfill the contract except for the other hospital's decision to divert inmates to the appellant hospital. The Court next held that appellee's actions did not rise to the level of reverse condemnation because there was no real or even personal property at issue. The Court finally held that the trial court erred in dismissing appellant's motion for declaratory judgment on sovereign immunity grounds. The Court remanded for the trial court to address the very limited issue of whether appellee's entry into a Quality and Charity Care Trust fulfilled its constitutional obligation under KRS 441.045(3).

VI. JUVENILES

A. **Chipman v. Commonwealth**

[2007-CA-000690](#) 11/07/2008 2008 WL 4822236 DR filed 12/09/2008
Opinion by Judge Keller; Judge Wine and Senior Judge Lambert concurred. The Court affirmed a circuit court order sentencing appellant as a youthful offender after she entered a guilty plea to Robbery in the Second Degree. The Court first held that the circuit court did not act outside its subject matter jurisdiction when it sentenced appellant for Robbery in the Second Degree. Appellant was properly transferred to the circuit court pursuant to KRS 635.020(4) as there was probable cause to believe she committed a felony, that she used a firearm in the commission of the felony, and that she was at least fourteen years of age at the time. The Court then held that the fact that appellant's guilty plea equated to a conviction and based on the plain language of KRS 635.020(4), she was subject to the same penalties as an adult offender. Appellant's plea to a lesser offense did not exempt her from the sentencing provision of the statute. The Court finally held that *Canter v. Commonwealth*, 843 S.W.2d 330 (Ky. 1992), was distinguishable because the firearms provision in KRS 635.020(4) applied to appellant and therefore, she was not entitled to be sentenced in accordance with KRS 635.060.

VII. SECURITIES

A. **Dolomite Energy, LLC v. Commonwealth, Office of Financial Institutions**

[2007-CA-001398](#) 09/05/2008 2008 WL 4092823
Opinion by Special Judge Rosenblum; Judges Nickell and Thompson concurred. The Court affirmed an order of the circuit court requiring appellants to comply with a subpoena *duces tecum* issued by the Commonwealth of Kentucky Office of Financial Institutions, Division of Securities. The subpoena was issued after the Commonwealth was notified by an investor that the appellant LLC, which sold interest in oil and gas explorations to investors, had violated the terms of a previous settlement agreement with the Commonwealth. The Court held that the Commonwealth did not exceed its investigatory powers by executing the subpoena. Under KRS 292.313(1-4), the Blue Sky laws were applicable whether or not the investor was a Kentucky resident. The Court further held that the trial court had sufficient evidence to perform its duty as a gatekeeper so as to determine that the investigatory subpoena was legitimate. The Court also held that appellant's argument that the subpoena violated the Commerce Clause was waived because it was not raised before the trial court, it was not raised in the prehearing statement, and notice was not provided to the Attorney General. The Court remanded with directions to vacate the order enforcing the subpoena as to an individual appellant not served with the subpoena and against whom the Commonwealth did not seek enforcement.

VIII. UTILITIES

A. **Kentucky Public Service Commission v. Commonwealth**

[2007-CA-001635](#) 11/07/2008 2008 WL 4822263 Reh filed 11/25/2008
Opinion by Judge Thompson; Judge Nickell and Retired Judge Rosenblum concurred. The Court affirmed in part and reversed in part a judgment of the circuit court related to the Public Service Commission's approval of a rate schedule, known as the Accelerated Main Replacement Program (AMRP) Rider, to recover costs associated with the replacement of aging gas mains. The Court first held that KRS 278.290(1) did not resolve the issue of whether the PSC had authority to approve the rider and that without specific statutory authority the PSC could not authorize the imposition of the surcharge for the main replacement program. The Court also held that the PSC's interpretation of KRS 278.183 was not entitled to deference, as the agency's governing statutes were clear and unambiguous and did not confer the authority. The Court then held that prior to the enactment of KRS 278.509 in 2005 the PSC lacked authority to approve the Rider. However, the Court then held that the intent of the legislature in enacting KRS 278.509 was to confer the authority to approve the AMRP Riders to provide for a time- and cost-effective procedure to recover costs. The Court next held that KRS 278.509 was constitutional and in compliance with Section 51 of the Kentucky Constitution. Although no other provision in the bill related to utility rates, there was no fraud or intent to deceive the public. Further, although KRS 278.509 and KRS 234.175 were unrelated, they both related to the general subject of gas delivery systems and appliances. The Court finally held that KRS 278.509 was not retroactive and therefore, the statute did not apply to the riders approved prior to its effective date although, the costs could be recovered through a general rate increase.

IX. WORKERS' COMPENSATION

A. **Comair, Inc. v. Helton**

[2007-CA-002332](#) 11/14/2008 2008 WL 4911195
Opinion by Judge Nickell; Judges Clayton and Taylor concurred. The Court affirmed an opinion of the Workers' Compensation Board reversing in part, vacating in part and remanding an opinion, order and award of benefits by the ALJ to a worker for a work-related knee injury. The Court held that the Board correctly concluded that appellant failed to prove that the worker's preexisting arthritic changes in both knees were active and impairment-ratable immediately prior to the work injury. The medical opinions relied on by the ALJ were silent on the issue and the other medical opinions clearly indicated that the degenerative changes were dormant and asymptomatic prior to the work injury. Therefore, the entirety of the worker's impairment due to the knee injury was compensable.