

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
NOVEMBER 2009

I. APPEALS

A. Lawyers Mutual Insurance Company of Kentucky v. Stewart

[2009-CA-000114](#) 11/20/09 2009 WL 3878132

Opinion by Judge Wine; Judge Nickell and Senior Judge Harris concurred. The Court affirmed an order of the circuit court denying appellant's motion for enforcement of a supersedeas bond against the surety thereon. The Court held that when there has been an execution of judgment in disregard of a supersedeas bond, it would be unconscionable, unjust and inequitable to enforce it as against the surety.

II. ARBITRATION

A. FIA Card Services, N.A. v. Callahan

[2008-CA-000732](#) 11/13/09 2009 WL 3786143

Opinion by Judge Acree; Judges Taylor and Thompson concurred. The Court reversed and remanded an order of the circuit court denying appellant's petition and application to confirm and enforce an arbitration award against appellee. The Court held that the trial court erred in requiring appellant to provide independent proof of an agreement to arbitrate before confirming the arbitration award. The Court distinguished the holding in *Fischer v. MBNA America Bank, N.A.*, 248 S.W.3d 567 (Ky. App. 2007), on its facts. By the time appellant filed its petition, appellee's opportunity to challenge the award under KRS 417.160 or KRS 417.170 had passed. Under the circumstances, the circuit court lacked the discretion to do anything other than confirm the award.

III. CIVIL PROCEDURE

A. Lexington-Fayette Urban County Government v. LEXHL, LP

[2008-CA-002145](#) 11/13/09 2009 WL 3786630

Opinion by Judge Wine; Judges Stumbo and Thompson concurred. The Court affirmed a summary judgment entered in favor of the appellee newspaper on the appellant county government's declaratory judgment action seeking a declaration that the litigation exception to the Open Meetings Act allowed it to close council meetings in order to answer requests for information propounded by administrative agencies. The Court held that the trial court correctly concluded that the matter was moot because the underlying action was no longer pending before the agency. Given the unique and specific nature of the controversy, the county government did not show that a similarly-situated party would be subject to the same action again or even that the precise factual scenario could be duplicated so as to show the issue was

capable of repetition, yet evading review, in order to meet the exception to the mootness doctrine.

IV. CONTRACTS

A. **Waters v. City of Pioneer Village**

[2008-CA-000837](#) 11/20/09 2009 WL 3877596

Opinion by Judge Clayton; Judges Moore and VanMeter concurred. The Court affirmed an order of the circuit court granting a judgment to the appellee city on its claim against appellant for breach of an employment contract.

The Court first held that KRS 70.290, which allows a law enforcement agency to require a newly appointed officer to enter into an employment contract for no longer than three years from the date of graduation from the Criminal Justice Training Academy, did not prohibit the city from seeking repayment of the amounts owed under the contract. The statute did not provide the sole means of reimbursement to the City for expended training costs. While the statute placed a duty on an agency to pay the agency that paid for the training, it did not place a duty on the first agency to obtain the payment from the second.

The Court then held that because the City was entitled to be reimbursed under the employment contract, rather than under the statute, the amount recovered was properly calculated pursuant to the contract.

V. CORPORATIONS

A. **Inter-Tel, Inc. v. Linn Station Properties, LLC**

[2008-CA-002266](#) 11/20/09 2009 WL 3878099

Opinion by Senior Judge Henry; Judges Caperton and Dixon concurred. The Court affirmed an opinion and order of the circuit court granting a motion for summary judgment in favor of a property owner against a parent corporation of a corporation which was in turn the corporation parent of a defunct corporation against which a default judgment was obtained for the breach of a lease of an office building. The Court held that the circuit court correctly determined that the corporate veil could be pierced and that the parent and sub-parent corporations were liable for the default judgment. There were no disputed issues of material fact that the breaching corporation was undercapitalized; that its owners did not observe corporate formalities; that it had no employees, bank accounts or assets; that it did not pay its own bills; and that it was essentially maintained for the tax advantages it provided to its parent corporations.

VI. CRIMINAL LAW

A. **Hoppenjans v. Commonwealth**

[2008-CA-001388](#) 11/25/09 2009 WL 4060451

Opinion by Judge Wine; Judges Stumbo and Thompson concurred. The Court affirmed appellant's conviction for operating a motor vehicle under the influence of alcohol, first Offense (DUI). The Court held that although the testimony by the arresting officer that appellant refused to take a preliminary breath test (PBT) was in violation of KRS 189A.100(1), the trial court's admonishment to the jury was sufficient to cure the error. Therefore, appellant failed to show that the trial court abused its discretion by denying his motion for a mistrial.

B. Muncy v. Commonwealth

[2008-CA-001814](#) 11/20/09 2009 WL 3878086

Opinion by Judge VanMeter; Judge Nickell and Senior Judge Lambert concurred. The Court affirmed a final judgment of the circuit court sentencing appellant to ten years' imprisonment for two counts of first-degree trafficking in a controlled substance. The Court held that appellant was not denied due process of law when the trial court permitted a detective who testified for the Commonwealth to assist in replaying portions of recordings during jury deliberations. The Court declined to extend the principle in *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), to the instant case as there was no private communication between the detective and the jury; rather, the communication took place in open court and in the presence of the entire jury, appellant, and his counsel.

VII. EMPLOYMENT

A. Kentucky Retirement Systems v. Robb

[2009-CA-000437](#) 11/25/09 2009 WL 4060881

Opinion by Judge Dixon; Judges Clayton and Thompson concurred. The Court affirmed a decision of the circuit court reversing a decision of the Kentucky Retirement Systems denying an employee's application for disability retirement. The employee preschool bus driver was unable to renew her Commercial Driver's License because of mobility issues related to bilateral osteoarthritis of the knees. The Court held that, although the trial court may have exceeded the scope of its review, the evidence compelled a decision in the employee's favor. The Court concluded that obesity could not constitute a pre-existing condition to preclude retirement disability benefits when there was no evidence that the worker suffered osteoarthritis of the knees prior to her employment. Thus, the evidence compelled a finding that the employee did not suffer a pre-existing condition and that she was physically incapacitated from performing her job or a job of like duties.

B. Teco Mechanical Contractor, Inc.

[2008-CA-000305](#) 11/20/09 2009 WL 3877578

Opinion by Judge Keller; Judge Nickell and Senior Judge Lambert concurred. The Court affirmed in part, and vacated in part and remanded, a summary judgment upholding the constitutionality of portions of KRS Chapter 337 and assessing back wages and civil penalties against the appellant contractor.

The Court first held that although the trial court cited to the wrong review process, it reached the correct conclusion that the Act provided a process for aggrieved parties to be heard.

The Court then held that although the Act did not specifically provide for the filing of a direct action in circuit court by an aggrieved party, that right was inherent that aggrieved parties could file an original action in circuit court, not an appeal from an administrative adjudication. Therefore, from a due process standpoint, the Act was constitutional.

The Court next held that the Act did not improperly delegate judicial power to the Cabinet as the Cabinet was performing an administrative function when it issued citations or sought back wages for employees. Further, KRS 337.505(1) and KRS 337.520(3) did not leave the Cabinet with unfettered discretion regarding job classifications. Even so, because the Act provided for judicial review of the Cabinet's actions, even if the Cabinet were exercising judicial authority, there was a sufficient safeguard against abuse of discretion.

The Court next held that the trial court used the incorrect standard of review. Because appellant did not receive a full hearing at the Cabinet level, the court should have reviewed the matter *de novo*.

The Court next held that on remand the trial court must review *de novo* the Cabinet's use of the "work incident to a trade" method to classify employees to determine whether or not it was reasonable. Although, the Court rejected appellant's argument that the method ran afoul of statutes requiring certain tradesmen to be licensed because the legislature did not tie payment of various wage rates to licensing.

The Court finally held that the Cabinet's audit reports were generated with the intent to make a case against appellant and although they did not contain quotes, statements, or opinions of third parties, they were based on information obtained from employees. As such the audit forms amounted to inadmissible hearsay as to the employees who did not testify.

VIII. FAMILY LAW

A. Atkisson v. Atkisson

[2008-CA-000376](#) 11/13/09 2009 WL 3805824

Opinion by Judge Wine; Judges Acree and Stumbo concurred. The Court affirmed in part, and reversed and remanded in part, a judgment and post-judgment orders of the circuit court in a dissolution action. The Court first held that the trial court did not err in declining to apply the formula set out in *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. App. 1981), to apportion the equity in the marital residence. Even if appellant was credited with amounts for specific marital contribution and appellee's withdrawal from a line-of-equity account, there was insufficient equity in

the resident to fully reimburse appellee for her non-marital contribution. Therefore, there was no marital equity to divide by the *Brandenburg* formula and the trial court properly awarded the entire equity amount to appellee.

The Court next held that the trial court properly awarded appellee the first amount of the proceeds from the sale of a timeshare after it accounted for the timeshare debt in its allocation of the equity in the residence.

The Court next held that the trial court did not err in denying appellant's request that temporary maintenance payments be credited against appellee's award of marital property. The temporary maintenance award was not excessive and the trial court imputed full-time income to appellee when determining and calculating the temporary maintenance award.

The Court next held that the trial court did not abuse its discretion in awarding attorney fees to appellee even though she received a substantial amount of liquid marital property when appellant retained a substantially higher earning capacity, received the residence and received most of the income-producing property.

The Court next held that the trial court did not err in ruling that appellee did not prematurely file writs of garnishment and a judgment lien. The compliance periods set out in the original judgment did not automatically re-commence upon entry of an order denying a CR 59.05 motion and the trial court's judgment remained in effect until modified, although enforcement of the judgment was stayed by operation of CR 62.01. As to the first obligation, the period for compliance had lapsed before appellee filed her garnishment writs. As to the other two compliance dates, appellant still had time to make the remaining payments, the time periods were not unreasonable, and appellant was required to seek an extension of time if he had legitimate problems complying with the deadlines.

The Court finally held that, although appellee was within her rights to file the writs, the trial court erred in concluding that appellant could have avoided the tax consequences of the garnishment and judgment lien on tax-deferred accounts. By upholding the garnishment writs, the trial court subjected appellant to a penalty which was far in excess of his breach and fundamentally altered the underlying allocation of marital assets. The Court remanded for the trial court to determine the amount of penalties and taxes incurred as a result of the garnishment and to appropriately allocate the amount between the parties.

B. Temple v. Temple

[2009-CA-000044](#) 11/13/09 2009 WL 3786862

Opinion by Judge Nickell; Judge Wine and Senior Judge Harris concurred. The Court affirmed an order of the circuit court finding that appellant waived her superior right to her son's custody and awarding custody of the child to appellant's mother. The Court held that appellant's testimony that she would give custody of the child to her father was the equivalent of an express waiver of her superior right

to custody and therefore, the trial court did not err in awarding custody to appellee, allowing appellant and her father to share visitation, and directing appellant to pay child support.

C. Williams v. Bittel

[2007-CA-002568](#) 11/25/09 2009 WL 4060081

Opinion by Senior Judge Harris; Judges Acree and Clayton concurred. The Court affirmed orders of the family court denying appellants'/cross-appellees' petition to modify custody, denying a motion to reconsider, and denying appellee's/cross-appellant's petition to modify custody and to stay a foreign judgment. The parties were granted joint custody after the family court found that they were de facto custodians of a child.

The Court first held that the out-of-state adoption of the child by appellants did not preempt the previously entered custody orders, which granted both parties joint custody of the child, designated appellants/cross-appellees as residential custodians, and granted liberal visitation to appellee/cross-appellant.

The Court next held that appellee/cross-appellant, who was granted joint custody rights because of his standing as a de facto custodian, was not required to continuously meet the de facto custodial requirements in order to maintain standing in the custody proceedings.

The Court finally held that the family court could properly condition its decision to defer to the foreign jurisdiction on the child's custody and visitation by providing that the prior orders regarding joint custodianship and visitation would not be affected.

IX. GARNISHMENT

A. Brooks v. Lexington-Fayette Urban County Housing Authority

[2008-CA-001677](#) 11/13/09 2009 WL 3786367

Opinion by Judge Nickell; Judges Keller and Moore concurred. The Court affirmed orders of the circuit court granting appellee's costs and expenses incurred in the successful bid to quash enforcement of a non-wage garnishment and denying appellant's request for attorney fees.

The Court first held that the trial court did not err in granting legal fees to appellee for amounts incurred in challenging the enforcement of the non-wage garnishment. Appellant's reliance on the law of the case doctrine was misplaced. The record and the earlier published opinions rendered in the matter did not hold that the Housing Authority was not a state agency and in light of precedent, the Housing Authority, created under KRS Chapter 80, enjoyed the status of a state agency. Therefore, the trial court correctly found that it was not subject to levy or execution by garnishment.

The Court then held that the trial court did not abuse its discretion in awarding the Housing Authority its reasonable attorney fees pursuant to CR 54.04 and KRS 411.080.

The Court finally held that the trial court did not err in denying appellant's request for additional attorney fees for her attempt to enforce the judgment through non-wage garnishment as CR 54.04 and KRS 344.450 only allowed for awarding attorney fees to the prevailing party.

B. Lifestyles of Jasper, Inc. v. Gremore

2008-CA-001396 11/06/09 2009 WL 3672881

Opinion by Judge VanMeter; Judges Keller and Stumbo concurred. On discretionary review, the Court reversed and remanded an order of the circuit court affirming a district court order upholding a garnishment challenge, ordering appellant to return amounts collected, and holding that a default judgment had been discharged when appellant filed a Form 1099-C, Cancellation of Debt, with the I.R.S. The Court held that Commonwealth ex rel. *Bates v. Hall*, 251 Ky. 280, 64 S.W.2d 585 (1933) was sufficiently broad to cover the instant situation in which the judgment creditor filed the form to comply with I.R.S. regulations and not in satisfaction of the debt. Therefore, the district court abused its discretion in holding that the judgment was discharged.

X. GOVERNMENT

A. Turbyfill v. Executive Branch Ethics Commission

2008-CA-001394 11/20/09 2009 WL 3878046

Opinion by Judge Wine; Judges Nickell and Thompson concurred. The Court affirmed an order of the circuit court denying appellant's petition for judicial review and declining to order dismissal of administrative proceedings opened by the Kentucky Executive Branch Ethics Commission (EBEC) for the purpose of sanctioning appellant. Although, appellant had been previously pardoned by the Governor, the EBEC filed "Allegations of Violations" in which it sought to fine appellant and publicly reprimand him for violating KRS 11A.020. The Court held that the allegation that appellant violated KRS 11A.020 was not criminal in nature and was collateral to the criminal proceedings for which he was pardoned. Therefore, the EBEC proceedings were not subject to the pardon.

The Court further held that the statutory scheme was not so punitive in purpose or effect so as to transform it into a criminal penalty. The Court rejected appellant's argument that the pardon could not preclude civil actions by private individuals but could preclude civil actions by a state agency seeking to enforce violations of state law. First, because the EBEC proceeding was a collateral civil action, the pardon could not preclude its action. Second, the language of the pardon itself did not purport to include EBEC administrative actions.

XI. PROPERTY

- A. **Arterburn v. First Community Bank**
[2008-CA-002018](#) 11/20/09 2009 WL 3878090
Opinion by Judge Clayton; Judge Acree and Senior Judge Harris concurred. The Court affirmed in part, and reversed and remanded in part, an order of the circuit court denying appellants' post-judgment motion to alter, amend or vacate orders of confirmation ordering payment to the master commissioner of fees and costs, appraiser's fees and newspaper advertisement costs.

The Court held that the trial court did not err in determining that five separate tracts were named for foreclosure, resulting in five withdrawn sales.

The Court next held that the fees for the withdrawn sales of four of the tracts were correctly calculated under The Administrative Procedures for the Court of Justice, Part IV, Section 6(2). However, the Court held that the language of the regulation prohibited the commissioner's fee on a withdrawn sale from exceeding \$2,500. Therefore, the Court limited the fees for the withdrawn sale of one of the tracts to that amount.

XII. TAXATION

- A. **Revenue Cabinet v. Ashworth Corporation**
[2007-CA-002549](#) 11/20/09 2009 WL 3877518
Opinion by Judge VanMeter; Judges Clayton and Nickell concurred. The Court affirmed in part and reversed in part and remanded an order of the circuit court reversing an order of the Kentucky Board of Tax Appeals holding that KRS 141.040 did not reach the distributive shares paid to the appellee/cross-appellant corporations by partnerships doing business in Kentucky because the corporations did not have a physical presence in Kentucky.

The Court first held that the circuit court did not err by finding that the corporations were subject to taxation pursuant to KRS 141.206(5). The plain language of the statute subjected the corporations to taxation and the words "are taxable," instead of "shall pay," were sufficient to impose tax liability.

The Court next held that KRS 141.206 was not void for vagueness as the legislative will expressed in the statute intelligibly expressed the policy that nonresident corporations, which are partners in a partnership doing business within and without Kentucky, are taxable on their proportionate share of distributive income passed through the partnership attributable to business done in Kentucky.

The Court next held that subjecting the corporations to tax under KRS 141.206(5) did not violate the Commerce Clause. The corporations owned up to a 99% limited and/or general partnership interest in, and received distributive shares of partnership income from the profits of, the partnership doing business in Kentucky, the partnership received protection and benefits from Kentucky, thereby enabling distribution of income to the corporations. This connection gave rise to a substantial

nexus with, and/or physical presence within, Kentucky. For the same reason, the Court held that subjecting the corporations to tax under the statute did not violate the Due Process Clause of the Fourteenth Amendment.

The Court next held that the circuit court erred in applying the three-factor formula found in KRS 141.120(8) to calculate the amount owed because KRS 141.206(5) contained the proper formula. The Court further held that the application of the formula in KRS 141.206(5) was constitutional and did not result in the taxation of extraterritorial values.

The Court next held that the circuit court erred by granting the corporations' motion seeking immediate payment of their refunds. Under KRS 131.340 a refund payment is not due until the matter is finally adjudged by either the Board or a court.

The Court next held that the amendment of a number of Bills did not render them unconstitutional. The Court held that since the Bills rationally furthered the legitimate governmental purpose of raising revenue, they satisfied the rational basis test and the retroactive period extending to outstanding claims as of the Bills' effective dates did not violate the due process clause. For the same reason, the Court held that the corporations' equal protection claim was without merit. Further, the application of the Bills did not constitute an unconstitutional taking because the adjustment of the interest rate on tax refunds was not such an exertion of the legislative taxing power so as to constitute a taking. The Court also held that the Bills did not contain more than one subject or insufficiently express the subject matter contained therein in violation of Ky. Const. § 51.

The Court next held that the Bills were not impermissible special legislation in violation of Ky. Const. § 59.

XIII. TORTS

A. **Bohl v. City of Cold Spring**

[2008-CA-002162](#) 11/13/09 2009 WL 3786633

Opinion by Senior Judge Lambert; Judges Nickell and VanMeter concurred. The Court affirmed a summary judgment in favor of the appellee city on appellant's claims for disability discrimination, retaliation, constructive discharge, intentional infliction of emotional distress (IIED), and disability harassment. The Court ultimately held that summary judgment was properly granted.

In reaching that conclusion the Court first held that the trial court correctly granted summary judgment on appellant's disability discrimination claim. Although appellant made a prima facie showing that he was "otherwise qualified" to perform his job when he produced evidence that he continued to perform his job to the satisfaction of the employer after he was diagnosed with multiple sclerosis (MS) and that he suffered an adverse employment action due to the disability when he was removed from his shift as detective, he failed to provide any proof that the city's

explanation that it had a legitimate business purpose in acting for the safety of appellant, other police officers and the community, in removing appellant from his shift was false.

The Court next held that summary judgment on the IIED claim was proper because the IIED claim was subsumed by the KRS Chapter 344 claims of disability discrimination, retaliation and disability harassment.

The Court next held that summary judgment was proper on the retaliation claim when appellant failed to overcome appellee's proof that it had a legitimate, non-discriminatory reason for its actions.

The Court next held that the trial court properly granted summary judgment on the disability harassment claim because the actions complained of did not create a pervasive abusive work atmosphere.

The Court finally held that the trial court properly granted summary judgment on the claim for constructive discharge because the conditions complained of were not intolerable and did not compel appellant's resignation.

B. *Childers v. Geile*

2008-CA-002114 11/06/09 2009 WL 3672891

Opinion by Judge Stumbo; Judge Lambert and Senior Judge Henry concurred. The Court affirmed a summary judgment in favor of appellees on appellants' claim for the tort of outrage related to emergency treatment appellant received, after which she miscarried.

The Court held that the trial court did not err in granting summary judgment. In doing so, the Court held that the holdings in *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295 (Ky. App. 1993), and *Banks v. Fritsch*, 39 S.W.3d 474 (Ky. App. 2001), were not inconsistent with the holding in *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984). The cases collectively recognized the application of the tort of outrage in Kentucky to facts where the conduct was intended only to cause extreme emotional distress in the victim, and where those facts would not otherwise sustain a cause of action for a traditional tort like negligence, assault or battery.

The Court further held that appellants failed to demonstrate that the facts only supported a wrongful death claim, without emotional distress as an element of damages, and not an action alleging one of the traditional torts such as negligence.

C. *Faller v. Endicott-Mayflower, LLC*

2008-CA-001506 11/20/09 2009 WL 3878062

Opinion by Judge Nickell; Chief Judge Combs and Judge Taylor concurred. The Court affirmed a summary judgment in favor of appellees on appellant's claims related to injuries she sustained when she fell while leaving a restaurant. The Court ultimately held that the trial court properly granted summary judgment because

appellant could not prove that any act or omission by any of the appellees substantially caused her to fall.

In reaching that conclusion, the Court first held that statements in appellant's deposition were judicial admissions that the condition of the threshold of the restaurant was known to her.

The Court next held that appellees had no reason to expect appellant would fall at the threshold after her numerous visits without incident and that, based on her admitted knowledge of the condition, she assumed the risk of crossing the threshold and appellees had no duty to warn her of the condition of the threshold.

The Court next held that because no duty was owed and no duty was breached, appellant's claim that the trial court misapplied the doctrine of contributory negligence was without merit.

The Court next held that summary judgment was appropriate on appellant's claim that the premises violated the Kentucky Building Code. Appellees' testimony created a presumption of non-deficiency under KRS 198B.135 and because the building was completed in 1926 and the threshold was unchanged from the time the restaurant was opened in 1992 until the time of appellant's fall, compliance with the current code provisions was not mandatory.

The Court finally held that summary judgment was not premature when appellant had nearly three years to complete discovery, significant discovery had occurred, and no additional discovery was sought after a notice of submission for final adjudication was filed.

D. Hawkins v. Miller

[2008-CA-001224](#) 11/06/09 2009 WL 3672873

Opinion by Judge Acree; Judges Taylor and Thompson concurred. The Court affirmed a judgment of the circuit court dismissing appellant's defamation action against his former supervisors and managers at his former place of employment. The Court reviewed the claims for manifest injustice after striking appellant's briefs for failure to conform to CR 76.12(4). The Court then held that dismissal was appropriate. The trial court properly found that appellees had a qualified privilege because the statements complained of were made in response to appellant's claim for unemployment benefits and his complaint with the Equal Employment Opportunity Commission (EEOC), which were quasi-judicial settings.

E. McDonald's Corporation v. Ogborn

[2008-CA-000024](#) 11/20/09 2009 WL 3877533

Opinion by Judge Acree; Judges Taylor and Thompson concurred. The Court affirmed in part, and reversed in part, a judgment of the circuit court awarding both compensatory and punitive damages. The claims arose when a hoax caller, identifying himself as a police officer, successfully convinced restaurant managers,

employees, and third parties to conduct a strip search and sexual assault of an employee the caller said had stolen a wallet or purse at the restaurant. The employee filed claims against the restaurant for sexual harassment, false imprisonment, premises liability, and negligence. The assistant manager on duty the night of the events, who was later fired, filed a cross-claim against the restaurant for intentional infliction of emotional disturbance (IIED).

The Court first held that the Workers' Compensation Act, KRS 342.590(1), did not preclude the employee's pursuit of common law causes of action when the employer failed to prove it complied with KRS 342.341(1) by showing *prima facie* evidence of workers' compensation coverage. Further, there was no manifest injustice in the trial court's ruling that the employee was not acting in the scope and course of her employment during the events.

The Court next held that the Kentucky Civil Rights Act (KCRA) did not preempt the employee's claims. The common law claims, unlike those based on discriminatory practices, stood independently and were not subsumed by the KCRA.

The Court next held that the KCRA claim did not fail as a matter of law. The jury's finding of no negligence on the part of the assistant managers did not insulate the restaurant from liability for the intentional acts of its employees.

The Court next held that the evidence supported the employee's claim for false imprisonment when she did not sign a release, was deprived of her clothing, she repeatedly objected to the search and seizure of her body, she was threatened with further police involvement, she was under the impression the door was locked and she had a constant guard between herself and the door.

The Court next held that the employee's premises liability claim did not fail as a matter of law as the restaurant could be held liable for the foreseeable tortious acts committed against the employee by its own employees, by a third-party and by the caller.

The Court next held that the employee's negligence claim did not fail as a matter of law. But for the restaurant's failure to satisfy its duty to supervise or train its employees regarding the risk of which it was aware, the employee would not have been injured.

The Court next held that the criminal actions of the assistant manager's fiancé did not prevent the imposition of liability on the restaurant when the criminal activity was a foreseeable danger, resulting from the decision not to warn, train or supervise managers and owners that the hoax calls were an ongoing problem.

The Court next held that the evidence supported the award of punitive damages under KRS 411.184(3). The instruction properly limited the jury's consideration of the evidence to that contemplated by the statute and it was a question of fact for the

jury as to whether the restaurant could have anticipated the conduct in response to the hoax.

The Court next held that the assistant manager properly pleaded a cause of action for IIED. After noting that the restaurant failed to preserve the issue, the Court held that although the assistant manager did not specifically enumerate the four elements of the cause of action, she adequately gave notice of her claim with ample reference to each element.

The Court next held that the trial court properly denied a directed verdict on the IIED claim. The jury's verdict was not so flagrantly against the weight of the evidence so as to indicate passion or prejudice when there was sufficient evidence to support the allegation that the restaurant failed to warn, resulting in severe emotional distress.

The Court next held that the trial court properly apportioned liability to the restaurant. Although the verdict forms did not comply with KRS 411.182(1), by allowing apportionment to a non-settling party, the language in the instructions was proper and the trial court corrected any potential error in its judgment. The Court further held that this reasoning applied equally to the compensatory and punitive damages awarded.

The Court finally held that the punitive damages awarded to the employee were not unconstitutionally excessive but that the punitive damages awarded to the manager were constitutionally excessive and ordered them reduced.

F. Moore v. Saint Joseph Healthcare, Inc.

2008-CA-002340 11/06/09 2009 WL 3672900

Opinion by Judge Stumbo; Judges Thompson and Wine concurred. The Court affirmed a summary judgment entered in favor of the appellee hospital on appellant's claim that the hospital was negligent in failing to obtain informed consent before administering a thrombin injection. The Court held that the trial court properly granted summary judgment after finding that appellant's written consent to an ultrasound compression encompassed his consent to the injection. Further, this finding comported with KRS 304.40-320(2).

XIV. WORKERS' COMPENSATION

A. Journey Operating, LLC v. Zurich American Insurance Company

2009-CA-000279 11/06/09 2009 WL 3673007

Opinion by Senior Judge Lambert; Judges Clayton and Thompson concurred. The Court reversed an opinion and order of the Workers' Compensation Board reversing a decision by the Chief Administrative Law Judge reopening a final decision and finding that an insurer was estopped from terminating benefits. The Court held that KRS 342.125 provided authority for reopening to protect the verity of the administrative proceeding. The Court distinguished the holding in *Custard Ins.*

Adjusters, Inc. v. Aldridge, 57 S.W.3d 284 (Ky. 2001), as this was not simply an attempt to enforce the prior judgment but was necessary to determine whether the insurer had committed constructive fraud in the original proceeding.