PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
OCTOBER 2011

I. ATTORNEY AND CLIENT

A. Anderson v. Pete

2010-CA-000472 10/7/11 2011 WL 4633096

Opinion by Judge Wine; Chief Judge Taylor and Judge Moore concurred. The Court reversed and remanded a summary judgment in favor of the appellees on appellants' professional negligence claims springing from a prior action in which the appellee attorney filed suit on behalf of the appellants' father's estate for wrongful death. The Court first held that the trial court erred in granting summary judgment to appellees because there was a genuine issue of material fact as to whether the attorney was in privity with the minor children and whether he was representing the Estate and the children's mother personally, as well as next friend of the children. The Court then held that even if the attorney was found not to be in privity with the children, he still owed duties to the children as intended beneficiaries of the wrongful death action. Whether the attorney's performance was actually negligent or otherwise deficient was a matter that must first be considered by the trial court but the question survived summary judgment.

II. CIVIL PROCEDURE

A. Birchwood Conservancy v. United Brotherhood of Carpenters

2009-CA-001413 10/7/11 2011 WL 4632921 DR Pending

Opinion by Judge Acree; Judges Dixon and Nickell concurred. The Court affirmed in part, reversed in part and remanded an opinion and order of the circuit court dismissing the claims by an unincorporated association against the appellee union alleging the union breached a contract to construct and demolish barns. The Court first held that the circuit court did not lack subject matter jurisdiction, as it acquired jurisdiction when the complaint was filed and summons issued. The Court then held that the union irrevocably waived the defense of lack of subject matter jurisdiction because it never raised the defense in its pre-answer motion to dismiss the original complaint, in its answer to that complaint, or in a matter-of-course amendment to the answer. The Court finally held that the union also waived the lack-of-capacity defense. While the defense was not irrevocably waivable like the lack-of-personal-jurisdiction defense and the union could have asserted it for the first time in a response to a second amended complaint, its failure to do so was a waiver of the defense.

B. Catchen v. City of Park Hills

2010-CA-001069 9/30/11 WL Citation Not Available

Opinion by Chief Judge Taylor; Judges Caperton and Wine concurred. The Court affirmed in part, reversed in part and remanded an order of the circuit court dismissing appellant's complaint seeking to enjoin the appellee city from paying a promissory note and a declaration that the real estate transaction between the appellees was void. The Court first held that the circuit court properly dismissed

the complaint to the extent it sought to challenge the purchase of the property. Appellant did not have standing to challenge the official acts of the city regarding expenditures for the property because he did not allege an injury distinct from the general public. Appellant's reliance on KRS 92.340 to confer standing was misplaced because no officer, agent, employee or member of the legislative body was a party to the action. The Court then held that the trial court erred in finding that appellant did not have standing to challenge the imposition of the tax imposed by an ordinance, a portion of which was to be combined with funds from the general fund to pay the outstanding note indebtedness related to the purchase of the property.

C. Hammers v. Plunk

2010-CA-000279 10/21/11 2011 WL 5008045

Opinion by Judge Wine for the Court sitting *en banc*; all Judges concurred. The Court reversed and remanded orders of the circuit courts dismissing as time-barred under KRS 44.110, appellants' claims that individual employees of the Kentucky Department of Transportation were negligent in their maintenance of certain roadways. The Court held that the trial courts erred in dismissing the claims. KRS 44.110 was inapplicable because it applied only to causes arising within the Board of Claim against the Commonwealth or its immune agents or employees but not to actions originating in the circuit court against non-immune agents or employees of the Commonwealth. The Court overruled *Wagoner v. Bradley*, 294 S.W.3d 467 (Ky. App. 2009), to the extent that it purported to apply the one-year limitations period in KRS 44.110 to an action brought in circuit court. The Court further held that the claims raised by the estate for wrongful death and by the minor children for personal injury were covered under the two-year limitations period set forth in KRS 304.39-230(6), which began to run upon the date of the last basic or added reparation payment. The Court also held that the children's loss of consortium claim was subject to the one-year statute of limitations under KRS 413.140(1)(a) but that the limitations period was tolled due to the children's infancy, which also tolled their personal injury claims. The Court finally held that the trial court did not err in finding that the two-year limitations period in KRS 304.39-230 was equitably tolled to allow the estate's claims to proceed when the one-day-late filing was caused by the clerk of the court.

D. Morgan v. Appalachian Regional Healthcare, Inc.

2010-CA-000197 10/14/11 2011 WL 4861859

Opinion by Judge Wine; Judge Acree and Senior Judge Lambert concurred. The Court affirmed a judgment and order of the circuit court finding that appellant had breached a loan agreement and addendum with appellee and awarding appellee damages plus interest and attorneys' fees and costs The Court first held that no jurisdictional questions were raised by the trial court amending the summary judgment order to include the award of damages and attorneys' fees. The order granting summary judgment on the issue of liability was not a final judgment because it did not adjudicate the entirety of the claim. Moreover, it was not made

final under CR 54.02, even though it included the finality recitations of that rule. The Court next held that appellant was not entitled to reversal because he did not receive notice of the amended judgment order until after the ten-day period for challenging a final judgment under CR 59.05 had expired because appellant failed to show any reversible prejudice. Any objection to appellee's calculation of damages clearly could have and should have been presented to the circuit court before entry of the amended judgment and order. Moreover, the validity of the judgment was not affected by the failure of appellant to receive notice of entry of the judgment and order. Appellant was able to file a timely Notice of Appeal to challenge the amended judgment and order, CR 60.02 afforded him an avenue to seek relief on the ground asserted, and the record did not contain any notice of a substitution of counsel or a notice of change of address advising the circuit court and appellee that counsel wished to be served at another address. The Court finally held that the circuit court did not err in dismissing appellant's counterclaim for breach of contract, which was predicated on an assertion that appellee was required to pursue alternative dispute resolution. While the parties' employment agreement required disputes to be submitted to arbitration, the loan agreement, which was the subject of the breach of contract claim, did not contain an arbitration clause, the loan agreement was not expressly incorporated into the employment agreement, and by the language of the employment agreement, the loan agreement and addendum remained in effect according to their original terms.

III. CONSITUTIONAL LAW

A. Kentucky Office of Homeland Security v. Christerson

2009-CA-001650 10/28/11 2011 WL 5105253

Opinion by Judge VanMeter; Judge Wine concurred; Senior Judge Shake concurred in part and dissented in part by separate opinion. On appeal and cross-appeal, the Court affirmed in part, reversed in part and remanded an order of the circuit court finding that KRS 39A.285 and KRS 39G.010 violated the First and Fourteenth Amendments to the United States Constitution and Section 5 of the Kentucky Constitution and that the American Atheists lacked standing in the underlying action. The Court first held that the circuit court erred in finding that the challenged statutes violated the United States and Kentucky Constitutions. The Kentucky legislature made legislative findings in KRS 39A 285(3), which referenced the Commonwealth being protected by an "Almighty God" and required such findings to be publicized in Kentucky Office of Homeland Security training materials and posted at the State Emergency Center. KRS 39G.010(2)(a) required the executive director of the Kentucky Office of Homeland Security to publicize those findings. Because the legislative findings neither mandated exclusive reliance on Almighty God nor belief in a particular deity but rather, made reference to historic instances where American leaders prayed for Divine protection in trying times, the statute did not violate the Establishment Clause. Similarly, viewed against the historical background, the statutory references to God, like the other constitutional references to God, did not violate the prohibition of Section 5 of the Kentucky Constitution, or impinge on the freedom to believe

or disbelieve. The Court also held that the trial court did not err by finding that the America Atheists lacked standing to bring the action on behalf of its members. Because the association sought damages on behalf of its members, alleging its members suffered physical and emotional damages, without participation of the members, a court would have no way to determine the appropriateness of any award.

IV. CONTRACTS

A. Sohal Properties, LLC v. MOA Properties, LLC

2010-CA-001833 10/21/11 2011 WL 5008330

Opinion by Judge Combs; Judges Caperton and Thompson concurred. The Court affirmed in part, reversed in part and remanded a judgment of the circuit court determining that appellees were entitled to possession of the premises they leased to appellant, that appellees were entitled to keep the entirety of a substantial security deposit, and dissolving a notice of *lis pendens* filed by appellant. The Court first held that appellees were not precluded by the resolution of district court proceedings from denying appellant had acquired an equitable interest in the hotel property beyond the lease term because the district court lacked subject matter jurisdiction and therefore, there had not been an adjudication on the merits. The Court next then held that under the particular circumstances, the trial court erred in allowing appellees to keep the entirety of the $500,000.00 non-refundable security deposit. Because the amount was grossly disproportionate to any anticipated loss flowing from a breach of the parties' lease agreement it must be construed as an impermissible penalty or forfeiture rather than as valid liquidated damages. The Court also held that the trial court did not err by concluding that appellees were entitled to possession of the premises pursuant to the plain language of the lease agreement. The Court finally held that the trial court erred in dissolving the notice of *lis pendens*. Appellant had the right to maintain its notice of *lis pendens* throughout the pendency of the action, which remained pending while the appeal was being prosecuted.

V. CRIMINAL LAW

A. Arnett v. Commonwealth

2010-CA-001903 10/7/11 2011 WL 4634231

Opinion by Judge Lambert; Judges Caperton and Keller concurred. The Court affirmed appellant's conviction for first-degree sexual abuse entered pursuant to a guilty plea wherein appellant reserved the right to appeal whether first-degree sexual abuse was a probation-eligible charge. The Court held that the trial court did not abuse its discretion in finding that the minor victim was greatly affected by the crime and that probation would unduly depreciate the serious nature of the crime. The Court also held that the issue of whether probation was permissible because appellant was statutorily a violent offender under KRS 532 080, KRS 439.3401 or KRS 533.060, was moot because even if she was eligible, the trial court had already ruled it would not grant probation.

B. Cardwell v. Commonwealth

2009-CA-002401 10/14/11 2011 WL 4862418
Opinion and order by Judge Nickell; Judges Acree and Moore concurred. The Court dismissed as frivolous appellant's successive motion for post-conviction relief and directed the circuit court to deny all future requests for in *forma pauperis* status appellant might file to pursue subsequent collateral attacks on his conviction. The Court held that while appellant acting pro se was not subject to the same standards as litigants represented by counsel, his successive motions for post-conviction relief were prohibited and that the Court could bar prospective filings to prevent the deleterious effect of such filings on scarce judicial resources.

C. Commonwealth v. Smith

2010-CA-001703 10/28/11 2011 WL 5105466
Opinion by Judge Acree; Judges Moore and Nickell concurred. The Court reversed an order of the circuit court dismissing an indictment with prejudice. The Court held that the circuit court could not convert the dismissal of the criminal indictment without prejudice to a dismissal with prejudice nine years after entry of the original dismissal. The trial court lost jurisdiction over the order ten days after its entry. Appellant was required to either file a timely motion pursuant to CR 59.05 motion to alter, amend or vacate or to pursue an appeal in compliance with CR 73.02(1)(a), neither of which he did.

D. Hall v. Commonwealth

2010-CA-001878 10/21/11 2011 WL 5008333
Opinion by Judge Thompson; Judges Caperton and Combs concurred. The Court affirmed a judgment of the circuit court entered pursuant to a jury verdict finding appellant guilty of second-degree manslaughter and sentencing him to five years' imprisonment after he struck and killed his wife with a pontoon boat he was operating. The Court first held that the trial court did not err in excluding expert testimony offered for the purpose of proving that the police used a specific technique to interrogate appellant. The testimony had no relevance to appellant's guilt or innocence because the reliability of his statements to the police were not challenged. The Court next held that the trial court erroneously admitted testimony of a romantic relationship between appellant and a co-worker when the testimony did not tend to establish any connection between the relationship and the wife's death or provide a context for the events leading to the wife's death. However, the Court held that, based on the overwhelming evidence of appellant's reckless conduct, the error was harmless. The Court next held that the trial court did not err when it permitted witnesses to testify that appellant intentionally accelerated the boat toward his wife and struck her. KRE 701 permitted the lay witnesses to testify to the facts as they were observed. The Court finally held that the trial court did not err in finding that all written statements were made available to defense counsel pursuant to RCr 7.26.

E. Matthews v. Commonwealth

2010-CA-001157 10/14/11 2011 WL 4862427

Opinion by Judge Lambert; Judges Dixon and VanMeter concurred. The Court affirmed a final judgment of the circuit court convicting appellant of first-degree trafficking in a controlled substance (cocaine) and for being a first-degree persistent felony offender. The Court first held that a detective's discovery of a cell phone number on one of appellant's cell phones (after he was arrested on an active bench warrant and without a warrant) to check if it matched a number given to a confidential informant during a drug buy did not constitute a search for Fourth Amendment purposes. Therefore, the circuit court did not err in denying the motion to suppress that evidence. The Court next held that the circuit court did not abuse its discretion in denying appellant's pretrial motion to exclude evidence of other crimes or bad acts pursuant to KRE 404(b) by permitting introduction of a letter appellant passed to another inmate. The letter was properly admitted to show appellant was attempting to intimidate the confidential informant from testifying against him. The Court next held that the Commonwealth's closing argument did not result in manifest injustice. The Court next held that the Commonwealth did not fail to prove that appellant was 18 years old when he committed one of the prior felonies upon which the conviction was based, as the jury could reasonably conclude from the evidence that appellant had reached the age of 18 at the time he committed the prior felonies. The Court next held that there was no basis for the trial judge to recuse because the judge was the Commonwealth Attorney at the time of appellant's prior conviction. The prior conviction was not the matter in controversy and therefore, the judge's position at that time was immaterial. The Court finally held that because there was no error in any of the allegations raised in appellant's brief, there was no cumulative error.

F. Stevens v. Commonwealth

2010-CA-001913 10/14/11 2011 WL 4862436

Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed a judgment sentencing appellant to one year of imprisonment after he entered a conditional guilty plea to two counts of receiving stolen property over $300.00. The Court first held that because the Commonwealth did not file a cross-appeal the issue of whether the trial court erroneously granted a motion to suppress an initial motion to suppress evidence found in a warrantless search of appellant's property was not properly before the Court. The Court then held that the trial court did not err in denying a motion to suppress evidence found in a subsequent search of the property after appellant's wife gave an oral and written consent to search. The consent to search was voluntary and was obtained after significant time had passed after the illegal search and seizure. Thus, the evidence found was not fruit of the poisonous tree.

G. Taylor v. Commonwealth

2010-CA-000674 10/21/11 2011 WL 5008086

Opinion by Judge Stumbo; Judges Caperton and Moore concurred. The Court affirmed an order of the circuit court denying appellant's petition to declare him a victim of domestic violence under KRS 439.3402 and motion to reopen RCr 11.42 proceedings The Court held that the circuit court did not err in finding that

the KRS 439.3402 motion for relief should have been brought, if at all, either at sentencing, on direct appeal, or by way of appellant's previous motions for RCr 11.42 and CR 60.02 relief. Further, any argument relating to the application of KRS 439.3402 was moot because appellant had repeatedly violated the terms of his probation, resulting in revocation of his probation.

H. Valesquez v. Commonwealth

2009-CA-000147 10/28/11 2011 WL 5110268

Opinion by Judge Lambert; Judges Keller and Thompson concurred. On remand from the United States Supreme Court, the Court affirmed a judgment and sentence of probation wherein appellant entered a guilty plea, reserving his right to appeal the denial of a motion to suppress contraband discovered in his vehicle after a traffic stop and his arrest for driving on a suspended license. The Court held that in light of *Davis v. United States*, 564 U.S. ___, 131 S.Ct. 2419, 180 L.Ed. 285 (2011), because the officers conducted the search of appellant's vehicle in reasonable reliance on binding appellate precedent, the exclusionary rule did not apply and the evidence obtained in the search should not have been suppressed. Therefore, the trial court did not err as a matter of law in denying the motion to suppress the evidence obtained as a result of the warrantless search of appellant's vehicle.

VI. GOVERNMENT

A. Helbig v. City of Bowling Green, Kentucky

2011-CA-000077 9/2/11 WL Citation Not Available

Opinion by Judge Moore; Judge Dixon and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court dismissing appellant's claim that the appellee city demoted him in retaliation for making a disclosure protected by KRS 61.102, Kentucky's whistleblower statute. The Court held that appellant failed to establish a *prima facie* case for retaliation when the overtime policy he claimed violated KRS 95.495 was already public, KRS 95.495 was also publicly known, the public was presumed to know the law, and any alleged illegality with regard to the policy was readily redressable by means of a declaratory action.

VII. LICENSES

A. Beverage Warehouse, Inc. v. Commonwealth, Department of Alcoholic Beverage Control

2009-CA-002020 10/28/11 2011 WL 5105338

Opinion by Judge Thompson; Judge Keller and Senior Judge Shake concurred. The Court affirmed opinions and orders of the circuit court addressing a third party's right to a hearing before and after issuance of a liquor license. The Court first held that the designation of the Department of Alcoholic Beverage Control (ABC) was sufficient to confer subject matter jurisdiction to the circuit court. The statutory scheme conclusively established that the Alcoholic Control Board was not an administrative department separate from ABC and therefore, the failure to name the Board as a party was not fatal. The Court then held that the right to appeal to the ABC from a city administrator's approval of a liquor license was

expressly provided in the statutory language of KRS 241.200. Had the legislature intended to limit an appeal to an applicant or licensee, it could have used limiting language. Further, had the legislature intended to exclude the approval of a liquor license from the term "order" as used in the statute, it could have done so by including language similar to that contained in KRS 243.560. The Court also held that the ABC order dismissing the appeal was a final order because the case was finally disposed of as a matter of law in a formal adjudicatory proceeding; whether the "honest error" rule or equitable estoppel applied and whether the administrator acted in good faith were questions of fact to be decided by the ABC Board on remand; and *res judicata* did not preclude the relief sought.

B. Commonwealth, Cabinet for Health and Family Services v. Bluegrass Orthopaedics Surgical Division, LLC

2009-CA-001908 10/21/11 2011 WL 5008037

Opinion by Senior Judge Shake; Judges VanMeter and Wine concurred. The Court affirmed an order of the circuit court declaring that physician-owned ambulatory surgery centers (ASC) were exempt from the certificate of need requirements of KRS 216B. The Court also and reversed and remanded an order of the circuit court finding that an ASC was not exempt from KRS 216B regulation. The Court held that the ASCs at issue were distinguishable from the facilities in *Gilbert v. Commonwealth, Cabinet for Health and Family Services*, 291 S.W.3d 712 (Ky. App. 2008). The physician shareholders of both ASCs performed surgery on their own patients, the nature of the activity conducted included a more intimate doctor/patient relationship than that of a diagnostic testing facility or ASC owned by a third party and the doctor/patient relationship uniquely connected the ASCs to the medical offices. Because the ASCs were extensions of the physicians' office practices and their equipment did not exceed the maximum allowable, they were entitled to exemption from regulation.

VIII. OPEN RECORDS

A. Cincinnati Enquirer v. City of Fort Thomas, Kentucky

2010-CA-001072 10/21/11 2011 WL 5008308

Opinion by Senior Judge Shake; Judge Lambert concurred; Judge Keller concurred in part and dissented in part by separate opinion. The Court affirmed in part, reversed in part and remanded an order of the circuit court finding that portions of the appellee city's investigative file in a murder investigation were exempt from the Open Records Act The Court first held that the circuit court properly concluded that the prosecution was not yet complete when the convicted person could challenge her sentence post-conviction. Therefore, any law enforcement records exempt under KRS 61.878(1)(h) were not yet subject to disclosure. However, the Court then held that the circuit court erred by applying the law enforcement exemption to all of the investigatory records without a showing of harm by the premature release of the records and that the City bore the burden of proof of the exemption, which it failed to meet. The Court next held that the trial court erred in finding that appellant's records request was vague as a matter of law, as there was no requirement that a records request be painstakingly

detailed, so long as the information sought was identifiable. Further, appellee never suggested that the request constituted an unreasonable burden. Thus, appellant should have prevailed in its action and the trial court abused its discretion in failing to make an award of costs, fees and/or sanctions. The Court finally held that the trial court did not err when it applied the privacy exemption to redacted portions of video recordings to protect the privacy interest of the children of the victim.

IX. PROPERTY

A. Guerin v. Fulkerson

2010-CA-000330 10/7/11 2011 WL 4633090

Opinion by Senior Judge Lambert; Chief Judge Taylor and Judge Stumbo concurred. The Court affirmed a summary judgment in appellee's favor on appellant's claim of unjust enrichment brought after appellee purchased property appellant claimed was subject to a *lis pendens* notice. The Court held that the trial court correctly found that the *lis pendens* notice did not cloud any title procured by appellee and that there was no evidence presented that could support appellant's contention that appellee had been unjustly enriched by his purchase of the property. First, appellant had nothing more than a general creditor's claim, her claim against appellee did not have a direct attachment to the real property itself, and the recording of the *lis pendens* was ineffective in terms of encumbering a sale of the property to appellee. Further, appellee failed to produce evidence supporting her claim that appellee was unjustly enriched by improvements made to the property or because he may have paid less than fair market value for items left on the property. In all respects, appellee appeared to be a bona fide purchaser for value who took clear title to the property.

B. O'Rourke v. Lexington Real Estate Company, LLC

2010-CA-000108 10/7/11 2011 WL 4633086

Opinion by Senior Judge Lambert; Judges Caperton and Combs concurred. The Court reversed and remanded a judgment of the circuit court awarding attorney fees to the appellee landlord. The Court held that while the lease agreement allowed for recovery for past due rent and property damage, the limited statutory exception in KRS 383.660(3), allowing for attorney fees for "willful" noncompliance, as that term is defined in KRS 383 545(17), was not applicable. Moreover, appellee failed to state any claim for attorney fees in the body of the complaint so as to give appellant notice, as required by CR 8.01, of any acts or omissions alleged against appellant that would authorize application of KRS 383.660(3).

X. TAXATION

A. Commonwealth, Finance and Administration Cabinet v. Saint Joseph Health System, Inc.

2010-CA-001086 10/7/11 2011 WL 4633108 Rehearing Pending

Opinion by Senior Judge Lambert; Judges Acree and Wine concurred. The Court reversed an opinion 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 trial court erred in finding otherwise.

XI. TORTS

A. Edwards v. Gruver

2008-CA-002348 10/14/11 2011 WL 4860431

Opinion by Judge Acree; Judge Clayton concurred; Judge Caperton concurred in part and dissented in part by separate opinion. On rehearing, the Court affirmed a judgment of the circuit court entered against appellant on appellee's claims for negligent selection, retention, and supervision of individuals to serve as recruiters for appellant's wholly-owned unincorporated association, the Imperial Klans of America. The claims were brought after appellee was assaulted at a county fair by the recruiters. The Court first held that it was not palpable error for the trial court to admit testimony that appellant asked the witness many years earlier to kill the attorney representing appellee. In the context of the whole record, the testimony was not so consequential as to justify a finding that its admission constituted palpable error. The Court next held that it was not palpable error for the trial court to admit evidence of the assailants' criminal histories. First, appellee was not required to give appellant notice of intent to present such evidence under KRE 404 because the rule only required such notice in a criminal case. Second, the evidence was offered under the exception to KRE 404(b) to establish that appellant knew of the violent nature of the individuals he selected as members and recruiters. Third, the probative value outweighed any prejudice. Finally, the jury apportionment of only twenty percent of the compensatory damages to appellant undermined appellant's argument that the jury verdict was based solely on passion or prejudice against him. The Court next held that the trial court properly denied appellant's motion for a directed verdict. In reaching that conclusion, the Court held that negligent selection was a cognizable claim in Kentucky and that an entity could be held liable when its failure to exercise ordinary care in selecting or retaining persons to conduct its activity created a foreseeable risk of harm to a third person. The Court then held that there was substantial evidence to support each element of appellee's claim for negligent selection

B. Rehm v. Ford Motor Company

2009-CA-001868 10/7/11 2011 WL 4632924

Opinion by Judge Combs; Judge Thompson concurred by separate opinion; Judge Caperton concurred in part and dissented in part by separate opinion. On appeal and cross-appeal, the Court affirmed a judgment of the circuit court following a jury verdict in favor of Ford Motor Company on appellants' premises liability

claims brought after an elevator mechanic was diagnosed with malignant mesothelioma. The Court first held that based on the lengthy passage of time, involving some thirty years, the trial court did not abuse its discretion in admitting newspaper articles under the ancient-documents exception to the hearsay rule. The Court next held that the trial court did not err in admitting the testimony of an occupational epidemiologist who offered a theory that the worker had developed mesothelioma as a result of household exposure to his own father's work clothes. The witness was qualified as an expert in asbestos-related diseases and was sufficiently qualified to review the literature pertaining to high risk for asbestos-related disease in elevator mechanics and while the evidence for the home-exposure theory was weak, it was the sole province of the jury to evaluate the conflict clearly demonstrated and highlighted by the effective cross-examination. The Court also held that appellants were not prejudiced by a fleeting reference by the expert witness to the worker's exposure from other locations, as the jury had been made aware of the other locations from other testimony presented in appellants' case-in-chief. The Court next held that the trial court improperly dismissed the loss of consortium claims by the workers' wife and children because the injury occurred when the mesothelioma became manifest, not upon mere exposure, which was after the marriage and the children were born. However, the error was moot because it was derivative upon a finding of damages rejected by the jury. On the cross-appeal, the Court held that the trial court did not err in denying Ford's motion for summary judgment based on the issue of up-the-ladder immunity as the issue had already been determined by the Supreme Court and thus, was the binding law of the case. The Court also held that the trial court did not err in admitting internal memoranda listing other employees who had died as a result of mesothelioma. The documents were relevant to prove that Ford had notice of the risks of working with asbestos, not as proof that the worker's mesothelioma was caused by asbestos at the location where he worked. Further, Ford did not offer proof that the evidence was unduly prejudicial.

C. Schulze v. Hinton

2010-CA-000121 10/28/11 2011 WL 5105382

Opinion by Judge Lambert; Judges Caperton and Keller concurred. In an appeal and cross-appeal, the Court affirmed several orders of the circuit court in a personal injury suit wherein appellant sought damages for injuries she sustained in a motor vehicle accident. The Court first held that the trial court properly denied appellant's motion for a new trial. In so concluding, the Court first held that the jury's decision not to award damages for pain and suffering was supported by the record. The jury had a sufficient basis upon which to find that appellant's complaints were not causally related to the accident but were related to a pre-existing back problem. The Court next held that while appellant's six-minute delay in objecting to a comment made in closing argument did not make the objection untimely or the issue unpreserved, the admonition given by the trial court, requested by appellant, cured any alleged error. On the cross-appeal, the Court first held that when the trial court entered conflicting orders awarding costs, the more specific order awarding costs to appellant was the one that should be

followed. The Court then held that while appellant did not receive the amount of damages she requested, she was nonetheless awarded a portion of what she claimed and therefore, she was properly considered the "prevailing party" for purposes of awarding costs. Therefore, the trial court did not commit any error or abuse its discretion in awarding the costs she requested.