**PUBLISHED OPINIONS**

**KENTUCKY COURT OF APPEALS**
**OCTOBER 1, 2014 to OCTOBER 31, 2014**

## I. ADMINISTRATIVE LAW

### A. ***Kentucky State Police v. Conder***

2012-CA-001815 10/17/2014 447 S.W.3d 189

Opinion by Judge VanMeter; Judges J. Lambert and Moore concurred. In an action where a former facility security officer sought review of an order of the Kentucky State Police (KSP) Trial Board terminating his employment, the Court of Appeals held that the Trial Board did not act arbitrarily by conducting the termination hearing in accordance with the officer's reclassified employment status as a state police employee, rather than in accordance with his original employment status as a state merit employee. Even though the officer did not receive notice of reclassification prior to the incident giving rise to his termination, the statute reclassifying the officer's position was in place at the time the incident occurred and the officer received notice of reclassification prior to being notified of the charges leading to his termination. Therefore, the Trial Board did not act arbitrarily by pursuing administrative action against appellant pursuant to the statute governing his reclassified employment status since that statute effectively applied to his employment at the time of the incident and at the time of his termination.

## II. ARBITRATION

### A. ***Pikeville Medical Center, Inc. v. Bevins***

2013-CA-000917 10/24/2014 2014 WL 5420002 DR Pending

Opinion by Judge Caperton; Judges Combs and Dixon concurred. In a medical malpractice action where appellant sought to compel arbitration, the Court of Appeals affirmed the trial court's determination that Grover Bevins, the deceased husband of appellee Doris Bevins, did not have the capacity to enter into a complex arbitration agreement such as the one presented to him upon admission to the hospital, based upon his condition upon admission. The Court held that while Grover may have been oriented and focused enough to respond to the doctor's questions and to participate in the course of his medical treatment, he was not necessarily alert and oriented for the purposes of reviewing and signing a complex contract of the kind presented to him at the time it was presented. The records indicated that Grover was admitted on transfer for treatment of late stage kidney disease and that he was a very elderly, sick man at the time of admission.

## III. CHILD SUPPORT

### A. ***Shelton v. Shelton***

2014-CA-000259 10/17/2014 446 S.W.3d 663

Opinion by Judge J. Lambert; Judges Dixon and Taylor concurred. The Court of Appeals held that Father failed to establish a material change in circumstances that warranted modification of his child support obligation. In his mandatory disclosures, Father claimed he earned $72,000 per year. However, the gross receipts of the business owned by Father totaled $349,857, and the testimony of Father's CPA indicated that straight line depreciation would show Father, at a minimum, earned $100,353 per year. The Court further noted that Father failed to provide receipts to back up his claims, and there was little to no evidence to establish Father's ordinary business expenses.

## IV. CIVIL RIGHTS

### A. ***Gray v. Kenton County***

2013-CA-000145 10/17/2014 2014 WL 5304978 DR Pending

Opinion by Judge VanMeter; Chief Judge Acree and Judge Taylor concurred. On review from a circuit court's grant of summary judgment in favor of Kenton County concerning appellants' claims of sexual harassment, the Court of Appeals affirmed, holding that all three appellants failed to prove that their alleged harasser's conduct was severe and pervasive enough to create a hostile work environment actionable under the Kentucky Civil Rights Act (KCRA), KRS 344.040 *et seq*. When analyzed under a totality of the circumstances test, an alleged harasser's conduct is severe and pervasive enough to create a hostile work environment only when a reasonable person would find the environment to be hostile or abusive. Noting that the KCRA is not intended to make all offensive conduct actionable, the Court determined that the alleged harasser's conduct, while inappropriate, was not sufficiently severe or pervasive so as to create a hostile work environment. Two appellants also made separate *quid pro quo* harassment claims, on which the circuit court's grant of summary judgment was also affirmed due to the appellants' failure to provide evidence of a tangible employment detriment suffered as a result of their refusal to submit to the harasser's sexual advances. One appellant's transfer to another branch did not constitute an adverse employment action when neither her pay nor benefits were affected. The other appellant could not provide evidence of a causal relationship between her termination and the alleged harassment; moreover, Kenton County offered evidence of the appellant's poor work performance. Finally, the alleged harasser was not a supervisor to any of the appellants, and none of the appellants reported the inappropriate behavior to a supervisor, so Kenton County could not be held vicariously liable for the harasser's behavior.

## V. CRIMINAL LAW

### A. ***Logan v. Commonwealth***

2013-CA-000951 10/17/2014 446 S.W.3d 655

Opinion by Judge J. Lambert; Judges Caperton and Taylor concurred. The Court of Appeals affirmed the trial court's denial of appellant's RCr 11.42 motion alleging ineffective assistance of counsel. The Court held that trial counsel properly presented an alternative perpetrator theory to the jury. Moreover, finding that no improper contact between a juror and a prosecution witness occurred, the Court held that no ineffective assistance of counsel occurred from trial counsel's failure to present this matter to the trial court. The Court also held that trial counsel was not ineffective for allowing hearsay testimony to be admitted as no prejudice occurred, as determined by the Supreme Court of Kentucky on direct appeal. Finally, the Court held that trial counsel was not ineffective for failing to present other witness testimony to the jury.

**B.** ***Neal v. Commonwealth***

2013-CA-001628 10/31/2014 449 S.W.3d 370

Opinion by Judge J. Lambert; Judges Dixon and Taylor concurred. On discretionary review, the Court of Appeals affirmed the circuit court's opinion affirming the district court's judgment convicting appellant of driving without an operator's license and possession of drug paraphernalia. The judgment was entered pursuant to a guilty plea conditioned upon appellant's right to contest the denial of his motion to suppress evidence discovered in his vehicle by a police officer. First, the Court held that the officer's continued detention of appellant was proper under the totality of the circumstances. Appellant had walked away from his vehicle when the officer made contact with him, and the officer had enough of a reasonable suspicion that criminal activity was afoot to continue his detention of appellant and to direct appellant to accompany him back to appellant's vehicle. Appellant testified that he was attempting to distance himself from his vehicle because he did not have a valid operator's license; therefore, it logically followed that the officer would have needed to go to where the vehicle was parked in order to complete his inquiries into the ownership of the car and whether it could have been legally driven. Furthermore, the officer suspected that the vehicle had been used in recent robberies, and he needed to determine whether it was, in fact, the same car. Second, the Court held that a piece of torn plastic baggie found in plain view was sufficient evidence of criminal activity to conduct a warrantless search of the vehicle. The officer testified that the presence of the baggie was consistent with marijuana use, and he explained that a piece would be torn off when the baggie was tied once the marijuana was placed inside.

**C.** ***Scroggins v. Commonwealth***

2013-CA-000579 10/17/2014 446 S.W.3d 234

Opinion by Judge Clayton; Judge Jones concurred by separate opinion; Judge Dixon concurred by separate opinion and joined in the separate concurrence by Judge Jones. In a case where an out-of-state prisoner entered into a conditional guilty plea to manufacturing methamphetamine, the Court of Appeals held that the Commonwealth had violated Kentucky's version of the Interstate Agreement on Detainers (IAD) when it failed to dispose of the prisoner's criminal case prior to returning him to Indiana, where he was serving a two-year sentence. Applying *Alabama v. Bozeman*, 533 U.S. 146, 121 S.Ct. 2079, 150 L.Ed.2d 188 (2001), the Court noted that the language of the IAD is absolute and contains no de minimus exception to the "no return" requirement. Thus, this violation mandated dismissal with prejudice. In her concurring opinion, Judge Jones agreed that Bozeman and the IAD required reversal in the subject case, but she noted that the federal version of the act allowed federal courts the discretion to dismiss similar cases with or without prejudice - an option that is not currently available in Kentucky.

## VI. CUSTODY

### A. ***A.G. v. T.B.***

2013-CA-001685 10/17/2014 452 S.W.3d 141

Opinion by Judge VanMeter; Judges Caperton and Combs concurred. The Court of Appeals affirmed an order modifying parenting time to allow Father to serve as the primary residential parent in a post-divorce proceeding where Mother sought permission to relocate out of state and Father sought to modify parenting time. In holding that the circuit court did not abuse its discretion, the Court noted that the children were 13 and 11 years old; one child expressed a desire to remain in Kentucky with Father; the second child's wishes fluctuated; both children told their therapist that Mother pressured them to chose "her side"; and Mother's relationship with the children had been deteriorating. The Court also noted that the circuit court did not abuse its discretion by concluding that the evidence did not show that Father was a threat to the children's safety.

### B. ***Benton v. Sotingeanu***

2013-CA-001060 10/24/2014 450 S.W.3d 714

Opinion by Judge Thompson; Judges Combs and Stumbo concurred. Father, who had joint custody of the parties' child, moved for a court order requiring Mother to execute all forms necessary to enable Father to obtain a passport for the child. The circuit court granted the motion but imposed specific requirements before Father could travel internationally with the child; moreover, any such travel was required to either be agreed to by the parties or approved by the court. On appeal, the Court of Appeals affirmed. The Court first held that because the order did not modify the time Father spent with the child, it was not a modification of timesharing and, therefore, no written findings of fact were required. The Court then held that the circuit court properly applied the best interests of the child standard and that there was no abuse of discretion. Finally, the Court held that the circuit court's decision was consistent with federal law.

### C. ***Danaher v. Hopkins***

2013-CA-001689 10/24/2014 449 S.W.3d 765

Opinion by Judge VanMeter; Chief Judge Acree and Judge Maze concurred. In an action where a father filed a petition to register a foreign child custody order and the petition was denied, the Court of Appeals held that the evidence supported a finding that North Carolina was not the child's home state for the purpose of making an initial child custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The father admitted that he had not seen the child in North Carolina since April 2012, and the mother indicated that she had moved with the child to Kentucky in April 2012. Moreover, when the father filed his child custody complaint, the child had been residing in Kentucky for seven months. Thus, the evidence supported the finding that Kentucky was the child's home state.

## VII. EMPLOYMENT

### A. ***TECO Mechanical Contractor, Inc. v. Kentucky Labor Cabinet***

2013-CA-001601 10/17/2014 2014 WL 5305464 DR Pending

Opinion by Judge Combs; Judges Stumbo and Thompson concurred. The Court of Appeals affirmed an order finding that appellant had violated the prevailing wage law by misclassifying and underpaying seven employees. Appellant split the employees' work hours between a "skilled" and "unskilled" pay rate by using an arbitrary, predetermined formula. The employees testified that they were often paid at the general laborer rate when performing skilled work, and employees who testified about the completion of their time cards indicated that they were told to list a certain number of hours as skilled work and a certain number of hours as general labor regardless of the actual time spent performing each type of work. The Court further agreed that the decision to apply the "work-incident-to-trade" method of evaluating the employees' work hours for purposes of determining the amount of back wages to award was reasonable under the circumstances. The circuit court's award of prejudgment interest was also affirmed as a proper exercise of its discretion.

## VIII. FAMILY LAW

### A. ***Bouvette v. Bouvette***

2013-CA-000927 10/10/2014 2014 WL 5064477 DR Pending

Opinion by Judge Stumbo; Judges Clayton and Combs concurred. The Court of Appeals reversed and remanded an order of the Jefferson Circuit Court addressing the financial issues in a dissolution action. A trial regarding the financial matters was scheduled for February 27, 2013. On February 6, 2013, appellant moved for a continuance because she had not been able to retain counsel. That motion was denied. On February 20, 2013, appellant again moved for a continuance because she had been hospitalized for severe depression and was unable to attend the trial. She had also been unable to retain counsel. That motion was denied and the trial went forward. Consequently, no one was present at the trial to represent appellant's interests. On appeal, the Court of Appeals reversed the trial court's judgment as to the financial matters on grounds that appellant should have been granted a continuance. In reaching this decision, the Court discussed the continuance factors set forth in *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991).

### B. ***Waddle v. Waddle***

2014-CA-000576 10/17/2014 447 S.W.3d 653

Opinion by Judge Clayton; Chief Judge Acree and Judge Moore concurred. In an action where the custodial mother of a minor child appealed from an order granting visitation rights to the child's paternal grandparents, the Court of Appeals reversed and remanded, holding that the grandparents had the burden of overcoming a presumption that the mother acted in the child's best interests by objecting to the visitation petition. In reaching this decision, the Court noted that clear and convincing evidence of a loving relationship between a child and his grandparents is not enough to overcome the presumption that a parent's objection to grandparent visitation is in the child's best interests. Instead, the grandparents, to rebut this presumption, must provide clear and convincing evidence that visitation with them is in the child's best interest.

## IX. INSURANCE

### A. ***Hollaway v. Direct General Ins. Co. of Mississippi, Inc.***

2013-CA-000928 10/10/2014 2014 WL 5064649 DR Pending

Opinion by Judge Moore; Judges J. Lambert and Maze concurred. A third-party claimant brought a bad faith action against an insurer under the Kentucky Unfair Claims Settlement Practices Act (KUCSPA), alleging that the insurer failed to reasonably evaluate, investigate, and negotiate a settlement of her bodily injury claim following an automobile accident with its insured. The circuit court entered summary judgment in favor of the insurer, and the Court of Appeals affirmed. The Court held that under KRS 304.12-230, an insurer has tort liability for bad faith if, and only if, its liability for paying the claim in question was beyond dispute. Absent that, an insurer has a right to defend the case, without making any settlement offer at all, until appellate review is final. Here, appellant's assertion that appellee's liability for paying her claim was "beyond dispute" depended upon the fact that appellee had settled her property damage claim arising from the accident for $463.42 and had later settled her separate bodily injury claim for $22,500. However, the Court held that under Kentucky law, a settlement is not evidence of legal liability, nor does it qualify as an admission of fault. Aside from that, what remained was a situation in which appellee's legal liability for paying appellant anything at all remained an unresolved question. No evidence of record supported that the accident was responsible for causing appellant's alleged injuries, and, of equal importance, the record did not demonstrate beyond dispute that the insured caused the accident.

## X. OPEN RECORDS

### A. ***University Medical Center, Inc. v. American Civil Liberties Union of Kentucky, Inc.***

2013-CA-000446 10/03/2014 2014 WL 5369340 DR Pending

Opinion by Judge Nickell; Judges Clayton and Combs concurred. At issue was the question of whether University Medical Center, Inc. (UMC) - the operator of the University of Louisville Hospital and related facilities - is a public agency within the scope of Kentucky's Open Records Act. The Court of Appeals held that UMC did not constitute a public agency under KRS 61.870(1)(j) because it was not "established, created, and controlled by a public agency[.]" However, the Court agreed with the circuit court that UMC was a public agency as defined by KRS 61.870(1)(i) because UofL, itself a public agency, appoints a majority of UMC's board of directors. Consequently, the Court affirmed the circuit court's decision that UMC was a public agency subject to the Open Records Act, but the Court remanded the matter for a determination of whether the requested records were otherwise statutorily exempt from disclosure.

## XI. ORIGINAL ACTIONS

### A. ***Kentucky Board of Medical Licensure v. Chaney***

2014-CA-001338 10/31/2014 2014 WL 5488174 N/A Filed in S. Ct.

Opinion and Order by Judge Nickell; Judges Combs and Maze concurred. After the Board of Medical Licensure issued an emergency order suspending a physician's license upon the filing of a felony indictment against the physician, the physician filed a petition for declaratory judgment and motions for a restraining order, temporary injunction, and permanent injunction against the Board. The circuit court issued a temporary injunction on the grounds that 201 KAR 9:240 Section 3(4) violated the 14th Amendment of the United States Constitution, Section 2 of the Kentucky Constitution, and KRS 311.592(2). The Board subsequently filed a motion for interlocutory relief. The Court of Appeals granted the motion. In so doing, the Court first noted that the exhaustion of administrative remedies is not required when a party challenges the constitutionality of a statute or regulation as void upon its face. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 472 (Ky. 2004). Such a requirement would be an exercise in futility because administrative agencies are not authorized to pass upon constitutional questions. The Court then held, however, that the circuit court abused its discretion by declaring 201 KAR 9:240 Section 3(4) unconstitutional upon a motion for temporary injunction. The constitutionality of the regulation is the ultimate issue presented by the physician's petition for declaratory judgment. By declaring the regulation unconstitutional and requiring the Board to conduct a hearing in accordance with its opinion, the circuit court essentially adjudicated the ultimate rights of the parties. Such adjudication exceeded the scope of a motion for temporary injunction. *Oscar Ewing, Inc. v. Melton*, 309 S.W.2d 760 (Ky. 1958); *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky.App. 1978). It is not the function of a motion for temporary injunction to settle a dispute on the merits.

## XII. STATUTE/RULE INTERPRETATION

### A. ***Kentucky Executive Branch Ethics Commission v. Wooten***

2013-CA-000524 10/03/2014 2014 WL 5368891 DR Pending

Opinion by Judge Stumbo; Judges Combs and Thompson concurred. The Court of Appeals affirmed two orders of the Franklin Circuit Court holding that KRS 11A.020(1)(c) does not bar Property Valuation Administrators (PVAs) from hiring or promoting family members. The Kentucky Executive Ethics Commission charged five PVAs with violation of KRS 11A.020(1)(c), which states that no public servant shall use "his official position or office to obtain financial gain for himself or any members of the public servant's family[.]" The Commission then imposed various penalties on the PVAs. The circuit court concluded that KRS 11A.020(1)(c) could not bar the hiring or promotion of family members because this did not amount to financial gain. The Court of Appeals held that this conclusion was not erroneous and was supported by the language of the statute. In contrast to the statute at issue, other legislative action barring nepotism was clear and unambiguous; moreover, the legislature had previously declined to adopt an amendment which would have expressly barred the practice pursuant to the statute at issue.