

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
SEPTEMBER 2009**

I. CIVIL PROCEDURE

A. Beach v. Caesars Riverboat Casino, LLC

[2008-CA-000402](#) 9/4/09 2009 WL 2834842 DR pending

Opinion by Judge Taylor; Judge Moore concurred; Judge VanMeter dissented. The Court reversed and remanded an order of the circuit court dismissing an action for lack of jurisdiction over appellees on appellant's complaint for personal injuries she received on appellees' riverboat casino located just across the Kentucky state line in Indiana. The Court held that the trial court erred by dismissing the complaint and concluding that the cause of action did not arise out of appellees' contacts in Kentucky. The Court took judicial notice, pursuant to KRE 201, of the adjudicated facts set out in *Ford v. RDI/Caesars Riverboat Casino, LLC*, 503 F.Supp. 2d 839 (W.D. Ky. 2007), and held that these facts, coupled with the unrefuted allegations in the complaint, provided the Court with a sufficient factual background to analyze appellees' contacts with Kentucky under the long-arm statute, KRS 454.210. While appellees' contacts with Kentucky did not "cause" the accident, the systematic and continuous nature of the contacts most clearly contributed to appellant's presence on the premises when she suffered her injuries.

B. Fields v. Womack

[2007-CA-001255](#) 9/11/09 2009 WL 2901196 Released for pub.

Opinion by Senior Judge Lambert; Judges Clayton and Thompson concurred. The court affirmed a judgment of the trial court approving a mediated settlement in a medical negligence action. The court first held that the trial court did not err in denying a motion to dismiss the underlying claim for untimeliness. After the claim was dismissed for improper venue and re-filed in the proper venue, the action was protected by the saving statute, KRS 413.270(1), when it was filed within the additional ninety-day period. The Court next held that the trial court did not err in approving the mediated settlement. The insurer had the authority to settle the claim under the terms of the insurance contract after it notified the insureds that their medical malpractice policy would not be renewed and the insureds failed to preserve their right to require the insurance company to refrain from any settlement they did not approve by purchasing ongoing insurance coverage. The court finally held that the trial court did not abuse its discretion by failing to award attorney fees to the complainants when it followed the general rule that parties in litigation are responsible for their own attorney fees.

C. Holly Creek Production Corp. v. Banks

[2008-CA-001851](#) 9/25/09 2009 WL 3047857 Rehearing pending

Opinion by Senior Judge Lambert; Judges Acree and VanMeter concurred. The Court affirmed in part and reversed in part a default judgment terminating an oil and gas lease and awarding compensatory and punitive damages. The Court first held that the trial court erred in allowing appellees to amend their complaint to include additional compensatory and punitive damages, pursuant to CR 15, at a CR 55.02 hearing on damages and other relief. The complaint filed by appellees, and upon which the default judgment was entered, was not sufficiently broad to support additional claims for nonpayment of royalties and punitive damages without additional process. The demand for accounting in the *ad damnum* clause was not sufficiently broad to support a judgment in compensatory damages for a term pre-dating any date identified in the complaint or a punitive damage judgment where there was no hint that punitive damages were sought or justified. However, the Court held that, applying the liberal pleading standards of CR 8.02, evidence presented at the CR 55.02 hearing was sufficient to justify the trial court's determination that the lease between the parties should be terminated.

D. LeBlanc v. Dorten

[2008-CA-001574](#) 9/18/09 2009 WL 2971760 DR pending
Opinion by Judge Lambert; Judge Acree and Senior Judge Harris concurred. The Court affirmed a jury verdict in appellee's favor on appellant's claims related to a motor vehicle accident. The Court first held that the trial court did not abuse its discretion in excluding witnesses and evidence submitted after a court-ordered deadline. The court's decision was directly related to appellant's failure to comply with the discovery deadlines and thus, the sanction clearly bore a direct relationship to the defect and was not unreasonable or capricious. Further, CR 37.02(2)(b) supported the court's sanction. The Court distinguished cases that did not involve the violation of a court order. The Court also held that appellant's answer to interrogatories was an insufficient disclosure of his witnesses. The Court next held that the trial court did not err in denying rebuttal evidence. Appellee presented no evidence at trial and therefore, there was nothing to rebut. The Court finally held that the trial court did not err in denying appellant's motion for a new trial. Appellant's avowal testimony, taken without an oath in the presence of a judge, was not uncontradicted evidence of perjury.

E. Mullins v. Redford Township

[2008-CA-001818](#) 9/25/09 2009 WL 3048907
Opinion by Senior Judge Lambert; Judges Clayton and Thompson concurred. The Court reversed and remanded for further proceedings an order of the circuit court dismissing appellant's claims, under various theories of recovery, against two Michigan townships and police officers. Appellant claimed that police officers traveled to his home in Kentucky, arrested him, and forcibly transported him to Michigan where he was incarcerated for two weeks. The Court held that the dismissal under CR 41.02 for appellant's failure to comply with a scheduling order was improper without consideration of the factors enumerated in *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991), and findings that dismissal was warranted in light of those factors. The Court rejected appellees' argument that consideration of the factors could be presumed.

F. Wagoner v. Bradley

[2008-CA-001179](#) 9/4/09 2009 WL 2835122 Released for pub.
Opinion by Judge Lambert; Judge Stumbo and Senior Judge Henry concurred. The Court affirmed an order of the circuit court dismissing appellant's complaint related to a single-car accident in which she claimed that the appellees negligently erected a stop sign. The Court held that the trial court did not incorrectly apply the one-year statute of limitations in KRS 44.110(1) and that the Motor Vehicle Reparations Act (MVRA) did not extend the one-year statute of limitations. The Court further held that the same statute of limitations applied to the Commonwealth and its employees, regardless of whether the alleged negligence involved discretionary or ministerial acts.

II. CONTRACTS

A. Gray v. First State Financial, Inc.

[2008-CA-001034](#) 9/18/09 2009 WL 2971673 DR pending
Opinion by Judge VanMeter; Judges Lambert and Moore concurred. The Court affirmed a summary judgment in favor of appellees on appellant's claims for promissory estoppel, fraud, conversion, and trespass related to the conversion of a line of credit into an installment note. The Court held that the trial court properly found that there was no genuine issue of material fact as to whether the parties had an enforceable contract. Any alleged agreement to make a loan was too indefinite to be enforceable as the internal request to the loan committee not only lacked a closing date, the terms had not been conveyed to appellant and the loan was never approved by the necessary committee. Further, the alleged agreement was not enforceable pursuant to the statute of frauds, KRS 371.010. The Court also held that the trial court did not err in finding that no genuine issue of material fact existed as to whether appellant was entitled to relief on the ground of promissory estoppel. Appellant's allegation that she would have obtained financing with a different bank was not definite or of such substance to require relief. Further, because appellant was able to obtain and personally secure other credit lines, she failed to provide evidence of economic loss or other measurable injustice. The Court finally held that appellant's right to contribution from her ex-husband was wholly separate from her claim against appellees so that her claim of detriment in that regard did not support relief for promissory estoppel.

B. Metro Louisville/Jefferson County Government v. Abma

[2007-CA-001417](#) 9/4/09 2009 WL 2837355 Rehearing pending
Opinion by Judge Nickell; Judges Acree and Senior Judge Knopf concurred. The Court affirmed in part and vacated in part and remanded orders of the circuit court related to breach of contract claims by two groups of firefighters against the City of Louisville. The Court held that the trial court properly granted summary judgment to the firefighters after finding that the City breached its contract with the union. The Court first held that the firefighters could maintain a contract action separate from their wage and hour complaint. Although the wage and hour law filled any gaps in the Collective Bargaining Agreement (CBA), the City's

obligation to pay overtime was stated in the CBA negotiated between the City and the union. The Court then held that the trial court correctly found that the City had breached the CBA based on the CBA language, the intent of the parties under the CBA and well-settled caselaw. The Court next held that the judgment was not interlocutory. While the judgment reserved some issues for the taking of proof or later determination, it did specify the formula the City was to use in calculating the additional overtime pay. Further, by certifying the judgment as final on some but not all of the pending issues, the trial court enabled the City to perfect an appeal and to proceed in calculating damages. The Court also held that the firefighters could recover damages under both the contract and wage and law causes of action but that they could not recover twice for the same damage. The Court next held that the applicable statute of limitations was 15 years, as provided in KRS 413.090(2) for actions on written contract, not five years under KRS 413.12(2) for statutory violations, as the underlying cause of action was for breach of contract. The Court next held that although sovereign immunity could be asserted for the first time on appeal, the defense could not be asserted by the newly merged government to avoid a contractual obligation resulting from an agreement entered into by one of its predecessors.

III. CRIMINAL LAW

A. **Brown v. Commonwealth**

[2008-CA-001259](#) 9/18/09 2009 WL 2971687

Opinion by Judge Lambert; Judge Taylor and Senior Judge Henry concurred. The Court affirmed an order of the circuit court running appellant's twelve-month misdemeanor sentence consecutively with a three-year felony sentence imposed pursuant to KRS 5330.60(3). The Court held that where there is a conflict between KRS 532.110(1) and KRS 533.060(2) or where either statute could apply to direct sentencing, KRS 533.060 controls *Commonwealth v. Hunt*, 619 S.W.2d 733 (Ky. App. 1981) and *Handley v. Commonwealth*, 653 S.W.2d 165 (Ky. App. 1983). Because appellant committed at least one offense while she was on bond and awaiting trial for other offenses, KRS 533.060(3) controlled.

B. **Farmer v. Commonwealth**

[2008-CA-001339](#) 9/4/09 2009 WL 2856270 DR pending

Opinion by Judge Lambert; Judge Taylor and Senior Judge Henry concurred. The Court affirmed appellant's conviction by a jury of second-degree trafficking in a controlled substance (hydrocodone). The Court first held that the trial court did not err in failing to give a jury instruction on second-degree possession of a controlled substance when neither the Commonwealth nor appellant's theory of the case supported such an instruction. Because appellant admitted to both possession and transfer of the controlled substance a jury could not have believed that he merely possessed the controlled substance without trafficking in it in violation of KRS 218A.1413(1)(a). The Court rejected appellant's claim that his actions did not constitute a "transfer" under the statute. The Court next held that the trial court did not submit an erroneous second-degree trafficking instruction to the jury. The instruction exactly followed the model instruction and the direct

transfer of controlled substances was included in the meaning of “traffic” as set forth in KRS 218A.010(40). The Court then held that the trial court did not err in failing to submit a “missing evidence” instruction regarding a discrepancy on the crime lab report as to the number of pills delivered to the lab. The evidence suggested that a pill was not misplaced or lost but rather the discrepancy was caused by a recording error. The Court then held that in light of the fairly well understood meaning of the term “knowingly,” any error in failing to instruct on its definition as set forth in KRS Chapter 501 was harmless. The Court then held that the trial court did not err in sustaining the Commonwealth’s objection to the questioning of the police informant regarding previous criminal charges presumed dismissed upon the successful completion of a pretrial diversion program. Even if it were true that the trial court only assumed the charges were dismissed because no action to revoke the diversion status or to enter a judgment was ever taken, upon consideration of the totality of the evidence, any error was harmless. The Court then held that the trial court did not abuse its discretion in limiting appellant’s testimony on a portion of his defense. Although the admission of the testimony would have helped to explain why appellant took money from the informant and to impeach the informant, any elaboration on the testimony was not necessary and possibly prejudicial to the Commonwealth and further, did not affect appellant’s substantial rights. The Court finally held that the trial court did not err in overruling appellant’s motions for a directed verdict.

C. Filzek v. Commonwealth

[2008-CA-000536](#) 2/20/09 2009 WL 414462 Released for pub
Opinion by Senior Judge Graves; Judges Taylor and Lambert concurred. The Court affirmed a judgment of the circuit court entered subsequent to appellant’s conditional guilty plea to four counts of violating KRS 510.155, which prohibits the unlawful use of electronic means to induce a minor to engage in sexual or other prohibited activities. The Court first held that the peace officer provision of KRS 510.155 did not violate the First Amendment of the United States Constitution on its face or as applied when no actual child was involved in the communications between appellant and an undercover police detective posing as a fourteen-year-old girl. Offers to engage in illegal transaction are categorically excluded from First Amendment protection and KRS 510.155 merely prohibits the use of electronic means to engage in or solicit already otherwise prohibited activities. Further, it was not material that the child turned out to be a police officer, as it was appellant’s belief that he was soliciting an actual child. The Court then held that the multiple counts of the indictment did not violate the protection against double jeopardy. The singular use of the words “any” and “activity” in KRS 510.155(1) indicated that the Legislature intended prosecution for each incident involving electronic means to engage in the proscribed conduct. The facts did not demonstrate a course of conduct which culminated in a single proscribed activity but rather, each count of the indictment referred to temporally discrete incidents.

D. Phillips v. Commonwealth

[2008-CA-001817](#) 9/25/09 2009 WL 3047727

Opinion by Judge VanMeter; Chief Judge Combs and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court denying appellant's motion for an evidentiary hearing regarding the accuracy of statements made in a victim impact statement considered by the court during appellant's sentencing. The Court held that the trial court did not err by declining to afford appellant an opportunity to controvert the contents of the victim impact statement. The Court rejected appellant's argument that a defendant's opportunity to controvert the contents of a presentence investigation (PSI) report pursuant to KRS 532.050 applied to a victim impact statement submitted pursuant to KRS 421.520. The Court further held that, even if error, the error was harmless, as the trial court specifically indicated that it did not rely on the questioned statement but rather considered it in conjunction with the PSI report and sentenced appellant to the agreed-upon punishment.

E. Reed v. Commonwealth

[2008-CA-001563](#) 9/18/09 2009 WL 2971749 DR pending

Opinion by Judge Lambert; Chief Judge Combs and Judge VanMeter concurred. The Court affirmed appellant's conviction entered upon a jury verdict, for second-degree manslaughter arising from a motor accident. The Court first held that the trial court did not err in admitting certain evidence concerning appellant's medical treatment, as it was admissible under KRE 404(b)(1) to show that appellant's intoxication was voluntary, not the result of an accident in mixing the drugs and alcohol. The Court rejected appellant's claim that his medical treatment was too attenuated and remote in time when both physicians treated him within a month before the accident. The Court next held appellant's confrontation rights were not violated by the admission of a recording of an anonymous 9-1-1 call. Only the safety concerns expressed by the caller were admitted into evidence and the trial court properly ordered redaction of any testimonial statements expressed by the caller. The Court also held that the trial court did not abuse its discretion in finding that the danger of undue prejudice outweighed the probative value of the 9-1-1 call. The Court finally held that neither the wanton murder statute, KRS 507.020(1)(b), nor the second-degree manslaughter statute, KRS 507.040(1)(a), were void for vagueness. Although appellant's constitutional challenge focused on the definition of "wantonly," the "extreme indifference to human life" provision challenged in *Brown v. Commonwealth*, 975 S.W.2d 922 (Ky. 1998), and *Cook v. Commonwealth*, 129 S.W.3d 351 (Ky. 2004), was applicable.

F. Robbins v. Commonwealth

[2007-CA-002262](#) 9/4/09 2009 WL 2833520 DR pending

Opinion by Judge VanMeter; Judge Nickell and Senior Judge Graves concurred. The Court affirmed a judgment of the circuit court sentencing appellant to four years' imprisonment for illegal possession of a controlled substance pursuant to a conditional Alford plea. The Court also affirmed an order forfeiting currency found at the time appellant was arrested. The Court first held that the trial court did not err by failing to suppress the cocaine found appellant's vehicle. When appellant was arrested, he was a "recent occupant" of a vehicle, he was arrested on an outstanding bench warrant for drug trafficking charges, and he threw drugs

under his vehicle when confronted by the police. Under *Arizona v. Gant*, ---U.S.--, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the search of appellant's vehicle incident to his arrest was clearly justified. The Court next held that the trial court did not err in ordering forfeiture of the currency found at the time of his arrest. KRS 218A.410(1)(j) permitted the forfeiture when the Commonwealth satisfied its burden of making a prima facie case for forfeiture and appellant failed to offer evidence to rebut the presumption supporting forfeiture. The testimony established that appellant was a fugitive from justice on drug charges, he was not employed in any occupation from which taxes were being withheld, more than three grams of cocaine were found under his vehicle and more than three grams of cocaine were found in the driver's door. The Court next held that the trial court did not abuse its discretion in refusing to compel discovery regarding an unidentified expert witness in the field of narcotics. RCr 7.24(1)(b) did not compel disclosure in the absence of examinations, tests, or experiments made in connection with the case and there was no contention that the expert witness was a known witness, an exculpatory witness or a person who observed or participated in the crime. The Court further held that the trial court did not abuse its discretion by failing to conduct a Daubert hearing to assess the reliability of the proffered testimony by a law enforcement officer who was expected to opine on the drug trade based on his training and experience. The Court next held that the trial court did not err by refusing to compel disclosure of the identity of a confidential informant. The privilege of KRE 508(a) was applicable and the situation did not come within any of the exceptions to the rule when the informant was not a material witness and only provided general information to the officers prior to the date of arrest and was not present at the time of the arrest.

G. *Robinson v. Commonwealth*

[2008-CA-000975](#) 9/25/09 2009 WL 3047594

Opinion by Judge Thompson; Judge Caperton and Senior Judge Graves concurred. The Court affirmed a judgment of the circuit court entered pursuant to a guilty plea reserving the right to appeal the denial of a motion to amend the indictment from a felony to a misdemeanor. The Court first held that in amending the sex offender registration statute, KRS 17.510(11), in 2006, the legislature intended to establish a uniform penalty for all sex offenders. Therefore, appellant was subject to the statutory penalty contained in the 2006 version of the statute, which made the penalty for failure to register a Class D felony. The Court also held that the ex post facto clauses of the U.S and Kentucky Constitutions did not prevent the application of the 2006 statute to appellant, as the 2006 statute did not have a real and direct effect on the punishment for appellant's past crimes but served only to affect the punishment for his commission of a future crime.

H. *Rollins v. Commonwealth*

[2008-CA-000074](#) 9/4/09 2009 WL 2834831 Released for pub.

Opinion by Judge Wine; Judge Moore and Senior Judge Henry concurred. The Court reversed an order of the circuit court setting restitution and an order overruling a motion to reconsider the order, entered after appellant had served out his sentence entered pursuant to a plea agreement that included language stating

that appellant had agreed to pay restitution. The Court held that the trial court lacked jurisdiction to order restitution when no verified petition was filed within the 90 days required by KRS 431.200, the only statute dealing with post-sentencing orders of restitution. The Court further held that RCr 10.10 was inapplicable as the failure to set the restitution amount in the final judgment was not a clerical error but rather was one of substance when the judge and the Commonwealth mistakenly believed that the court could order restitution without specifying an amount and that the amount could be supplemented at any point in the future.

I. Roskie v. Commonwealth

[2008-CA-001466](#) 9/25/09 2009 WL 3047638

Opinion by Senior Judge Harris; Chief Judge Combs and Judge Thompson concurred. The Court affirmed an order of the circuit court denying appellant's motion to dismiss his indictment pursuant to the Interstate Agreement on Detainers (IAD), KRS 440.450. The Court held that appellant waived his right to have final disposition of his case within 180 days by accepting a trial date that would occur after the time period lapsed.

J. Tucker v. Commonwealth

[2007-CA-001545](#) 9/25/09 2009 WL 3047488

Opinion by Senior Judge Harris; Chief Judge Combs and Judge Thompson concurred. The Court reversed and remanded with instructions to dismiss an indictment with prejudice and to list the case as "Dismissed-Diverted" pursuant to KRS 533.528. The Court held that because the Commonwealth failed to seek to have appellant's Class D Felony Pretrial Diversion voided, as required by KRS 533.256(1), before the expiration of the pretrial diversion period, the trial court lacked authority to revoke the pretrial diversion.

K. Zapp v. CSX Transportation, Inc.

[2008-CA-001362](#) 9/25/09 2009 WL 3047630 Rehearing pending

Opinion by Judge Taylor; Chief Judge Combs and Judge Nickell concurred. The Court reversed and remanded an order of the circuit court granting a motion for directed verdict for an employer on an employee's claim under the Federal Employers' Liability Act (FELA). The circuit court found that the claim was barred by the statute of limitations. The Court held that the circuit court erred by deeming the employee's testimony a judicial admission and by usurping the prerogative of the jury to decide a disputed issue of fact - when the statute of limitations was triggered. While the employee testified that his hand symptoms worsened while working in 1999, the circuit court erroneously inferred that the employee knew or should have known that the injury was caused by work duties in 1999.

IV. EMPLOYMENT

A. Colorama, Inc. v. Johnson

[2008-CA-000443](#) 9/4/09 2009 WL 2834950 Released for pub.
Opinion by Judge Caperton; Judges Thompson and Wine concurred. The court affirmed a judgment entered subsequent to a jury verdict finding that the employer retaliated or discriminated against a worker for filing a workers' compensation claim. The Court first held that the worker met his burden to establish a prima facie case of discrimination. Filing the workers' compensation claim was an activity expressly protected under KRS 342.197, the employer knew that he had done so, the jury's factual finding that the worker was terminated was not clearly erroneous, and the worker presented sufficient evidence for the jury to believe he was terminated in retaliation for seeking workers' compensation benefits. The Court distinguished the case from *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195 (Ky. 2001), because the worker in the instant case was released to return to work without restriction, he said he wanted to try to perform the work and he may have been able to assume a light duty position. While the evidence might have been conflicting, it was for the jury to weigh the evidence and reach a conclusion. Therefore, the Court did not err in denying the employer's motion for a directed verdict. The Court finally held that the award of attorney fees and costs were authorized by KRS 342.197(3) and the trial court did not abuse its discretion in making the award. Even so, the employer's failure to name the worker's attorney as a party to the appeal ultimately precluded review of the issue.

B. Woods v. Western Kentucky University

[2008-CA-001825](#) 9/11/09 2009 WL 2901520 DR pending
Opinion by Judge VanMeter; Judges Keller and Stumbo concurred. The Court affirmed a directed verdict in favor of Western Kentucky University on appellant's claim that the change in the qualifications for a director's position for which she applied was racially motivated in violation of the Kentucky Civil Rights Act (KCRA). The Court held that under the burden-shifting approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 702, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Kentucky Ctr. For the Arts v. Handley*, 827 S.W.2d 697 (Ky. App. 1991), appellant was unable to meet the burden of establishing a prima facie case of discrimination. She was objectively unqualified for the position since she did not possess a doctorate degree or faculty experience at the time she applied. Even so, the University offered legitimate, nondiscriminatory reasons for changing the qualifications. Appellant's own opinions about her work qualifications did not sufficiently cast doubt on the reasons proffered by the University.

V. FAMILY LAW

A. Daunhauer v. Daunhauer

[2008-CA-000378](#) 9/4/09 2009 WL 2834838 Released for pub.
Opinion by Judge Acree; Judge Nickell and Senior Judge Knopf concurred. The Court reversed an order of the family court denying a motion to terminate appellant's maintenance obligation created by an order dissolving the parties' marriage. The Court held that appellee's ability to meet her financial needs with her own resources constituted a change in the parties' circumstances so

substantial and continuing as to render the continuation of the obligation unconscionable.

VI. PROPERTY

A. **Eagle Cliff Resort, LLC v. KHBBJB, LLC**

[2008-CA-000676](#) 9/4/09 2009 WL 2835020 Released for pub. Opinion by Judge Acree; Judge Dixon and Senior Judge Graves concurred. The Court affirmed an order of the circuit court confirming a judicial sale of commercial property following foreclosure by the mortgage holder. The Court held that the trial court did not err by failing to protect appellant's right of redemption under KRS 426.530(1). The trial court conducted a hearing to determine whether the appraisal was irregular, fraudulent or so erroneous as to be unconscionable. The trial court's order set out, and the record substantiated, that the appraisal was sufficient to protect redemption rights. Despite the large gap between the appraisals by the court-appointed appraisers and the appraisal privately obtained, appellant failed to demonstrate any abuse of discretion by the circuit court.

B. **Little v. Hall**

[2008-CA-001702](#) 9/25/09 2009 WL 304764 Opinion by Judge VanMeter; Chief Judge Combs and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court granting permanent injunctive relief barring appellants from obstructing a road across their property. The Court held that after remand from the Court of Appeals, the trial court did not err in finding that appellees used the road under a claim of right and acquired a prescriptive easement across the property. Appellants offered no affirmative evidence to meet their burden of proving that appellees used the road by permission rather than under a claim of right and appellees satisfied the "very slight evidence" standard by producing evidence that they continued using the road in a manner consistent with a belief that they were entitled to do so indefinitely.

C. **Southside Real Estate Developers, Inc. v. Pike County Fiscal Court**

[2008-CA-001534](#) 9/4/09 2009 WL 2835138 Released for pub. Opinion by Judge VanMeter; Judges Lambert and Moore concurred. The Court affirmed an order of the circuit court finding that a county fiscal court's failure to comply with the requirements of KRS 67.0802 in its decision to exchange property conveyed to it from the federal government, after completion of a flood control project prevented appellant from maintaining an action to compel conveyance of the property from the fiscal court. The Court first held that the trial court properly concluded that the decision to exchange the property did not comply with statute, which required either a transfer to another governmental agency or a public sale by auction or sealed bid. The Court then held that the requirements of the statute were not preempted by federal law so that the only requirement for transfer of the property would be the approval of the federal government. The Energy and Water Development Appropriation Act, under

which the flood control project was initiated, did not manifest Congressional intent to preempt state requirements on the transfer of real estate owned by counties; no express preemption existed; and compliance with both federal and state requirements concerning the transfer of real property was not physically impossible.

VII. TORTS

A. **Boland-Maloney Lumber Company, Inc. v. Burnett**

[2008-CA-000059](#) 9/11/09 2009 WL 2901206 DR pending
Opinion by Judge Wine; Judges Acree and Stumbo concurred. The Court affirmed on direct appeal and reversed on cross-appeal a judgment of the circuit court entered subsequent to a jury verdict in favor of the injured person in a negligence action involving an injury occurring on a staircase. The Court first held that the trial court did not abuse its discretion in allowing the matter to proceed to the jury absent expert testimony on the defendant's duty. The uniformity of stair risers on a stairway is an abundantly apparent standard, even among laypersons, so that anyone could interpret the exceptional foreseeability of risk. The Court then held that the trial court did not err in refusing to allow any apportionment of fault to a subcontractor. The right to apportionment did not extend to the subcontractor that had been determined not to be liable as a matter of law. The Court then held that the trial court had the inherent authority to enforce its orders and therefore, did not err in refusing to grant a motion to allow expert testimony when the defendant failed to disclose the experts after an order was entered that no additional discovery would be allowed. The Court then held that the trial court did not abuse its discretion in allowing testimony from an economic expert concerning the injured person's earning capacity. Although the testimony was not based on actual earnings at the time of injury, nothing precluded testimony on the impairment to earn money or the use of a "proxy" to do so, where current earnings were not indicative of earning power. The Court then held that the trial court did not err in allowing testimony in violation of an order that the plaintiff's witnesses could not testify that the stairs violated the Kentucky Building Code. The defendant waived the issue when it failed to object to the testimony at trial, defendant's counsel brought up the reference to the Kentucky Building Code, and the testimony was not in violation of the order. The Court then held that the defendant's failure to specifically object to the final written instructions precluded review but even so, although the present case was not a premises liability case, the use of the term "unreasonably dangerous" was often found instructed in cases other than products liability when dealing with an ordinary care standard so that the trial court did not abuse its discretion in including the instruction. The Court finally held that the trial court erred in excluding evidence related to plaintiff's claim for future prescription medication expenses. Although there was no expert testimony as to the amount of medication required or the likely cost of the medication over the remainder of the plaintiff's lifetime, the plaintiff entered the yearly cost of the prescription drugs by avowal and the doctors testified that the plaintiff suffered from a seizure disorder which would likely require him to take medication for the remainder of his life. The

Court reversed and remanded for a determination on the sole issue of future prescription medication expenses.

B. Fuel Transport, Inc. v. Gibson

[2008-CA-000969](#) 9/25/09 2009 WL 3047578 Rehearing pending
Opinion by Judge Clayton; Judge Thompson and Senior Judge Lambert concurred. The Court affirmed in part and reversed in part a judgment of the circuit court entered subsequent to a jury verdict in favor of an estate in a wrongful death case awarding compensatory and punitive damages. The Court first held that the trial court did not abuse its discretion in denying a motion for a new trial based on a claim of juror misconduct. During *voir dire*, appellants failed to ask a proper question to elicit a response they complained was prejudicially omitted by the juror. Further, the juror did not sign the verdict form awarding compensatory damages. The Court next held that, although appellant failed to exercise reasonable care in failing to fix the coal truck that caused the accident, the failure did not rise to the level of wanton or reckless disregard for others so as to prove the gross negligence necessary for an award of punitive damages. Therefore, the trial court erred in overruling appellant's motion for a directed verdict on the issues of punitive damages. The Court next held that the trial court properly admitted an affidavit regarding the ownership of the coal truck and the employment of the driver, as it affected the credibility of a key witness. The Court next held that appellants waived the right to challenge the award for pain and suffering when they failed to object to the \$2 million limit on possible recovery. Even so, the award was supported by evidence that the deceased had intervals of consciousness until her death. The court then held that appellants' failure to object to jury instruction until immediately prior to the reading of the instructions to the jury, and failure to request an instruction limitation for "conscious" pain and suffering, waived the issue. The Court finally held that the trial court properly denied appellants' requests for change of venue.

VIII. WILLS AND ESTATES

A. Combs v. Mullins

[2008-CA-000776](#) 9/18/09 2009 WL 2971636 DR pending
Opinion by Judge Moore; Judge Lambert concurred; Judge VanMeter dissented by separate opinion. The Court affirmed an order of the circuit court dismissing appellant's claim for an interest in property filed over thirty years after his father's death. Appellant argued that *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1977) (*Pendleton II*), holding KRS 391.090 (prohibiting an illegitimate child from inheriting from his father) unconstitutional, did not have a retroactive effect on the devolution of a title and that establishing a firm date for the application of retroactivity resulted in a violation of his federal equal protection rights and unjustifiably stripped him of his right to inherit from his father. The Court held that it was bound by the holding in *Turner v. v. Perry County Coal Corp.*, 242 S.W.3d 658 (Ky. App. 2007), and *Pendleton II*, as the Court had considered whether to overrule *Turner* but the majority had refused to do so. Therefore, because the father died intestate in 1975, before the *Pendleton II* decision was

rendered, title to the property properly passed to the legitimate children on that date and appellant did not inherit an interest in the property. Thus, the trial court properly dismissed the complaint.

B. Rice v. Steele

[2008-CA-000308](#) 9/18/09 2009 WL 2971596

Opinion by Judge Lambert; Judge Acree and Senior Judge Harris concurred. The Court dismissed appellant's appeal from an order dismissing her claims against her mother's estate and vacated in part and remanded a partial summary judgment in favor of appellant on her claim for restitution for her mother's funeral expenses. The Court granted appellee's motion to dismiss the appeal for appellant's failure to join her siblings. The siblings were named defendants in the court below. Therefore, in their individual capacities, they were indispensable and naming the estate alone was fatal. The Court then held that the trial court erred in granting partial summary judgment to appellant on the claim of restitution for funeral expenses when the motion for summary judgment failed to name and serve the siblings.

IX. WORKERS' COMPENSATION

A. Bell v. Consol of Kentucky, Inc.

[2009-CA-000673](#) 9/4/09 2009 WL 2830950 Released for pub.

Opinion by Senior Judge Harris; Judges Moore and Nickell concurred. The Court affirmed a decision by the Workers' Compensation Board affirming a decision of the ALJ to reduce benefit payments by 50%, pursuant to KRS 342.730(3), after the worker died in an accident. In a case of first impression, the Court held that KRS 342.730(3) applies to settlement agreements. The Court further held that KRS 342.265(4) and KRS 342.125 were not applicable, as the issue was how remaining benefits of an award were to be distributed to a widow after the employee's death from a non-work related injury. The Court rejected the argument that the application of KRS 342.730(3) was contrary to public policy.

B. Sullivan v. Wolf Creek Collieries

[2009-CA-000385](#) 9/11/09 2009 WL 2901561 Released for pub.

Opinion by Senior Judge Harris; Judges Moore and Nickell concurred. The Court affirmed a decision of the Workers' Compensation Board finding that an employer was equitably estopped from contesting a worker's treatment for depression but that the employer was only estopped from denying compensability to the date of the ALJ's decision. The worker was treated by a physician who did not accept Kentucky workers' compensation patients and with whom the worker entered into an arrangement whereby the worker paid for his treatment out of pocket and was then reimbursed by the employer. The Court held that it was undisputed that the balance billing arrangement violated KRS 342.020(1) and KRS 342.035(2) and once the employer filed the medical fee dispute, the worker was on notice that the fees were being challenged and he could no longer rely upon past representations or omissions on the employer's part.