

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
SEPTEMBER 2011**

I. CIVIL PROCEDURE

A. Bondurant v. St. Thomas Hospital

[2010-CA-000166](#) 9/9/11 2011 WL 3962597

Opinion by Judge Acree; Judges Caperton and Clayton concurred. The Court affirmed an order of the circuit court dismissing appellant's claims against the appellee Tennessee medical providers after she was prescribed an incorrect dosage of medication administered by a nursing home in Kentucky. The Court held that the circuit court did not err in dismissing the claims. In reaching that conclusion, the Court held that controlling law was clear that appellees' contacts, ordering care upon discharge, to be implemented upon admission to a Kentucky nursing home, were insufficient to invoke personal jurisdiction over the nonresident defendants in Kentucky. Further, the fact that appellees were aware that the services they performed in Tennessee would impact the patient's follow-up care was insufficient to exercise personal jurisdiction. Finally, the fact that it was inconvenient for appellant to file suit in Tennessee was not dispositive of the personal jurisdiction issue.

B. Butler v. Jordan

[2010-CA-000035](#) 9/30/11 2011 WL 4502066

Opinion by Senior Judge Lambert; Chief Judge Taylor and Judge Keller concurred. The Court affirmed an order of the circuit court dismissing appellant's action to set aside a deed on grounds of forgery. The Court held that the circuit court did not err in concluding that appellant's claim was precluded by prior litigation between the parties and was thus barred by *res judicata*. Appellant's counterclaim to set aside the subject deed in the first action, which was dismissed based upon the applicable statute of limitations, satisfied the "identity of parties" and "resolution on the merits" elements for claim preclusion. Further, the issue of the authenticity of the signature on the subject deed was clearly raised in the first action and resolved by dismissal. Moreover, *res judicata* applied since the issue of forgery was undoubtedly a point which properly belonged to the subject of the litigation between the parties in the first action since it was clearly within the scope of that case and its issues.

C. Summe v. Gronotte

[2010-CA-000055](#) 9/09/2011 2011 WL 3962517

Opinion by Judge Acree; Judges Dixon and Nickell concurred. The Court affirmed a trial order and judgment of the circuit court entered upon a jury finding in favor the appellee executor of an estate on her nuisance and trespass claims against appellant for constructing a berm encroaching on property included in an estate. The Court first held that the circuit court did not abuse its discretion in allowing appellee to testify regarding the value of the property.

Appellee was not testifying as an expert witness and the requirements set forth in *Commonwealth, Department of Highways v. Slusher*, 371 S.W.2d 851 (Ky. 1963) were met. The Court rejected appellant's argument that KRE 701 did not make Slusher obsolete and held that the lay opinion testimony satisfied both Slusher and the requirements of KRE 701. Reviewing the issues for manifest injustice, the Court next held that the jury's damage award was not contrary to the manifest weight of the evidence nor did appellee fail to present evidence of damages caused by the nuisance or trespass.

II. CONTRACTS

A. **Bradley v. Sammet**

[2010-CA-000770](#) 9/23/11 2011 WL 4421366

Opinion by Senior Judge Shake; Judges Stumbo and Thompson concurred. The Court reversed orders of the circuit court denying appellant's motion for a temporary injunction against appellee, denying a motion for reconsideration and granting appellee summary judgment in appellant's action against appellee for the alleged violation of a noncompetition agreement. The Court held that the circuit court erred in interpreting the noncompetition agreement without considering the intent of the parties as to the scope and enforcement of the agreement. Although the circuit court implied that the noncompetition agreement was unambiguous, it relied on extrinsic evidence. The disagreements as to the extrinsic evidence created factual issues and the construction of the contract was subject to resolution by the fact-finder.

B. **Estes v. McKinney**

[2010-CA-000576](#) 9/30/11 2011 WL 4502093

Opinion by Senior Judge Shake; Judges Moore and VanMeter concurred. The Court affirmed a summary judgment granted in favor of appellees on appellants' claims alleging appellees breached a merger agreement, breached a settlement agreement and breached its obligations under a promissory note. The Court held that the circuit court correctly applied the doctrine of accord and satisfaction. While, pursuant to KRS 355.3-311(3)(b), appellants could have rejected the instrument tendered in full satisfaction of the claim, their failure to repay the amount within 90 days, resulted in accord and satisfaction. The Court further held that because the claim had been discharged by accord and satisfaction prior to the summary judgment motion, any disputed issues that may have been deemed admitted by unanswered requests for admissions dissolved upon the occurrence of the accord and satisfaction.

III. CRIMINAL LAW

A. **Bishop v. Commonwealth**

[2010-CA-000706](#) 9/16/11 2011 WL 4107277

Opinion by Judge Lambert; Judges Dixon and VanMeter concurred. The Court affirmed a circuit court order denying appellant's motion for relief pursuant to RCr 11.42. The Court first held that the circuit court did not err in finding that trial counsel provided appellant with effective assistance. Because appellant

entered a guilty plea, he was precluded from raising any of the issues he raised on appeal. He was bound by the terms of his plea agreement with the Commonwealth, which included waiver of his right to appeal. Appellant was limited to contesting the validity of his guilty plea, which he did not argue in his brief.

B. Boyd v. Commonwealth

[2008-CA-001714](#) 9/23/11 2011 WL 4420794

Opinion by Judge VanMeter; Judge Nickell concurred; Senior Judge Lambert concurred in result only. The Court affirmed a judgment of the circuit court convicting appellant of criminal possession of a forged instrument in the first degree, possession of drug paraphernalia and of being a persistent felony offender in the second degree. The Court first held that, pursuant to RCr 10.26, there was no palpable error in the trial court's denial of appellant's motion to suppress counterfeit bills found in her purse when officers searched her vehicle after one of her passengers was arrested on an outstanding warrant. Although the search may have been unconstitutional under *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), application of the exclusionary rule would not deter deliberate and culpable police and practices and therefore, the search was authorized under *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), which was binding precedent at the time of the search. The Court next held that the trial court did not abuse its discretion by allowing an officer to testify about the way people sometimes purchase drugs on the street when the testimony was relevant to explain the circumstances that aroused the officer's suspicion that a drug transaction was taking place. The Court further held that even if the testimony should have been excluded, the error was harmless. The Court next held that there was no palpable error in admitting a detective's testimony that the counterfeit bills in appellant's possession could not have been glued together with a glue stick, as alleged by appellant, when the detective was qualified under KRE 702. Any lack of specialized training on the part of the detective concerning the glue went to the weight of his testimony, not his qualification as an expert or the competency of his testimony. The Court next held that the trial court did not err in denying appellant's motion for a directed verdict on two counts of criminal possession of a forged instrument when the circumstantial evidence was sufficient to support a finding that appellant intended to use the bills to make a drug purchase. The Court finally held that any error resulting from the trial court's omission of an intent element from the jury instructions on the charge of possession of drug paraphernalia was harmless when appellant's defense to the charge was to deny knowledge and ownership of the crack pipe found in her car and when she did not present a defense of lack of intent.

C. Commonwealth v. Gerald

[2010-CA-000015](#) 7/1/11 2011 WL 2582526 RH Denied and ordered pub. Opinion by Judge Stumbo; Judge Thompson concurred; Judge Caperton concurred by separate opinion. The Court reversed and remanded an order of

the circuit court granting a motion to suppress evidence found in the search of appellant's vehicle after he was arrested for possession of marijuana. The Court held that the circuit court erred in suppressing the evidence when it relied on *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), without considering the alternate evidentiary basis for the search of the passenger compartment and trunk of appellant's car. A police officer observed appellant rolling a marijuana cigarette while sitting in his vehicle, which led to a reasonable belief that evidence of criminal behavior might be found in the passenger compartment. When the search of the passenger compartment yielded both marijuana and cocaine, probable cause existed for the issuance of a search warrant for the vehicle and, therefore, pursuant to *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed. 572 (1982), a warrantless search of the vehicle's trunk was constitutional.

D. Commonwealth v. Parker

[2010-CA-001215](#) 9/30/11

Opinion by Senior Judge Shake; Judge Lambert concurred; Judge Combs concurred by separate opinion in which Judge Lambert concurred. The Court reversed an order of the circuit court granting appellee's motion to suppress evidence discovered after he was arrested for driving on a suspended license. The Court first held that the appeal was timely filed. The running of the time for the Commonwealth to take its appeal from the order denying the motion to suppress was tolled by a timely-filed CR 59.05 motion. The Court then held that although the search was unconstitutional under *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the officer's good faith reliance on controlling law at the time made the search appropriate as articulated in *Davis v. United States*, 564 U.S. ___, 131 S.Ct. 2419, 180 L.Ed.2d (2011).

E. Martin v. Commonwealth

[2010-CA-000322](#) 9/16/11 2011 WL 4103031

Opinion by Judge Clayton; Judge Caperton concurred; Chief Judge Taylor dissented in part by separate opinion. The Court affirmed in part, reversed in part and remanded for a new trial. The Court first held that the trial court erred in failing to hold a hearing under *Faretta v. California*, 422 U.S. 806, 955 S.Ct. 2525, 45 L.Ed 2d 562 (1975), to insure that appellant voluntarily and intelligently waived his right to counsel, after appellant sent a letter to the trial court saying that he had fired his trial counsel, requested new counsel and proceeded to file numerous pro se motions, sometimes referring to himself as co-counsel. The Court then held that the trial court did not err in denying appellant's motion to dismiss on double jeopardy grounds after appellant's first trial ended with a mistrial, which was requested by defense counsel. It was not an abuse of discretion for the trial court to find that a mistrial was necessary and moreover, defense counsel requested the mistrial. The Court then held that it was not manifest injustice for the trial court to impose court costs when, although appellant had been found to be indigent, he was released on probation and would be able to work. The Court finally held that the trial court did not

abuse its discretion in revoking appellant's probation when appellant clearly violated a condition of probation by not completing drug court.

F. Simms v. Commonwealth

[2010-CA-000344](#) 9/16/11 2011 WL 4103036

Opinion by Judge Combs; Judges Caperton and Thompson concurred. The Court affirmed an order of the circuit court denying appellant's motion to withdraw his waiver of jury sentencing, which included a waiver of his right to appeal. The Court held that while the waiver form signed by appellant could have, and perhaps should have, stated that the right to appeal was guaranteed by the Kentucky Constitution, and while it would have been better practice for the trial court to conduct a colloquy in order to insure the voluntariness of appellant's plea, appellant was adequately informed when he agreed to the sentencing plea and therefore, the court did not err in denying the motion to withdraw the waiver. The Court also held that any error committed by the trial court in stating that appellant would not be able to appeal anything at all was harmless as appellant still possessed the right to appeal the limited issues that could not be waived.

G. Stinson v. Commonwealth

[2010-CA-001647](#) 9/9/11 2011 WL 3962647

Opinion by Judge Wine; Judge Acree and Senior Judge Lambert concurred. The Court affirmed a judgment of conviction entered pursuant to appellant's *Alford* plea to first-degree sexual abuse of his 17-year-old niece, wherein he reserved the right to appeal the constitutionality of KRS 510.110(1)(d) as vague and overbroad in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court first held that even if the statutory definitions of "position of authority" and "position of special trust" were potentially vague when applied to other situations, they clearly applied to appellant and therefore, the statute could not be considered unconstitutionally vague as applied to him. The Court next held that the statute was not overbroad for imposing criminal liability without requiring a jury to find appellant used his position of authority or special trust to impose sexual contact on the minor. Because the statute addressed the narrow issue of whether sexual contact occurred while the person occupied the position of authority or special trust, and not whether the person used the position of authority or special trust to obtain sexual contact, it did not needlessly prohibit or restrict constitutionally protected activities or invite enforcement in an arbitrary manner. The Court finally held that the trial court did not err by rejecting appellant's proposed jury instruction requiring the jury to find lack of consent as an element of the offense. The statute prohibited any person occupying a position of authority or special trust from engaging in sexual contact with minors in his or her care. Thus, any sexual contact between such persons was presumed to be non-consensual. Further, that presumption was not rebuttable.

H. Tigue v. Commonwealth

[2009-CA-000080](#) 9/9/11 2011 WL 3962504 RH Pending

Opinion by Judge Wine; Judges Acree and Combs concurred. The Court reversed and remanded for a new trial an order of the circuit court denying appellant's RCr 11.42 motion finding that trial counsel provided effective representation and that appellant entered a knowing, voluntary and intelligent guilty plea. The Court held that appellant was denied counsel at a critical stage of the proceeding when his trial attorneys either refused or failed to make a motion to withdraw his plea after he requested they do so. In light of the importance of counsel's assistance in properly framing the issues and presenting those issues to the court, as well as developing any factual support and being knowledgeable about the requirement of a written motion and the elements considered by a trial court on a motion to withdraw a guilty plea, the Court held that the motion to withdraw appellant's guilty plea was a critical stage of the proceeding.

I. Vega v. Commonwealth

[2010-CA-001909](#) 9/30/11 2011 WL 4503135

Opinion by Judge Lambert; Judges Caperton and Keller concurred. On discretionary review, the Court affirmed an order of the circuit court upholding a district court order denying a motion to suppress evidence obtained as a result of appellant's arrest for carrying a concealed deadly weapon. The Court held that the circuit court did not err in upholding the district court's denial of the motion to suppress the evidence when the firearm was concealed, appellant's arrest was proper and the fruits of the search incident to appellant's arrest were not tainted. A toolbox was sitting on top of the firearm and the only reason the officer observed it was because the toolbox was not balanced and was angled up on one side. Appellant possessed the firearm that would have been visible only from a specific, solitary angle, and even then, only to individuals standing immediately adjacent to the passenger side window and peering carefully into the vehicle to identify the weapon.

J. Williams v. Commonwealth

[2010-CA-001603](#) 9/30/11 2011 WL 4505834

Opinion by Judge Wine; Chief Judge Taylor and Judge Caperton concurred. The Court affirmed an order of the circuit court denying appellant's motion filed pursuant to CR 60.02 to correct his sentence. The Court held that the trial court did not err in finding that appellant committed the offense of third-degree rape while "awaiting trial" on drug charges, for which he was give five years of diversion under a pretrial agreement, and ordering appellant's sentences to run concurrently. A subsequent offense committed during a period of pre-trial diversion may be considered committed while "awaiting trial" for the purposes of consecutive sentencing under KRS 532.060(3).

IV. EDUCATION

A. **Fell v. Jefferson County Board of Education**

[2010-CA-001830](#) 9/30/11 2011 WL 4502673

Opinion by Judge Thompson; Judge Caperton concurred by separate opinion; Judge Combs dissented by separate opinion. The Court reversed and remanded an order of the circuit court dismissing appellants' challenge to a student assignment plan, which was brought after appellants' children were assigned to schools other than that nearest their homes. The Court held that the trial court erred in construing the language of KRS 159.070 and in concluding that the term "enroll" meant to "register" and not to attend the school nearest a child's home. The Court ultimately held that involuntary assignment of a student to a school other than that nearest the student's home violated KRS 159.070.

V. EMPLOYMENT

A. **Drummond v. Todd County Board of Education**

[2009-CA-000356](#) 9/9/2011 2011 WL 3962509

Opinion by Judge Acree; Judges Caperton and Clayton concurred. The Court affirmed the administrative termination of appellant's employment after finding that he engaged in sexual contact with two students, constituting conduct unbecoming a teacher. The Court first held that the conclusions of the tribunal were supported by competent substantial evidence, which included the testimony of the two students who alleged appellant had inappropriate contact with them, the testimony of school administrators, and a third student's testimony supporting the conclusion that one of the other students had not recently fabricated her story. The Court next held that evidence of appellant's criminal acquittal was both irrelevant and potentially confusing to the tribunal and therefore, the hearing officer's exclusion of the evidence was proper. First, there were different standards of proof at the criminal trial than at the administrative hearing and second, the factual inquiries before the jury in the criminal trial differed from those presented to the tribunal. The Court next held that the hearing officer did not erroneously deny appellant's motion to enter his personnel file into the record, when the excluded documents were not relevant to the issue of sexual misconduct. The Court next held that the hearing officer did not improperly prevent appellant from asking one of the students whether DNA evidence was found on any of her clothing when it was not likely that the student was qualified to testify about scientific evidence. The Court next held that the hearing officer did not improperly limit the time to present evidence when appellant was permitted to conduct extensive cross-examination of the school board's witnesses and to call six witnesses of his own, allowing him to present his case and point out the flaws in the board's evidence. The Court next held that appellant failed to cite any authority in support of his argument that the hearing officer improperly denied his motion for a mistrial and therefore, the argument was waived. Even so, introduction of incompetent evidence did not warrant reversal of factual determinations based on competent substantial evidence. The Court next held that the hearing officer did not err in refusing to permit a witness for appellant to testify by telephone. Appellee did not agree to

the telephonic testimony and therefore, allowing it would have violated KRS 13B.080(7). The Court finally held that, while appellant may have preferred to take certain testimony on avowal, the hearing officer did permit appellant to offer proof of the evidence, which was all he was entitled to under KRE 103(a)(2).

B. Travis v. Administrative Office of the Courts

[2010-CA-001165](#) 9/23/11 2011 WL 4422180

Opinion by Senior Judge Shake; Judges Keller and Lambert concurred. The Court affirmed an order of the circuit court dismissing, for lack of subject matter jurisdiction, appellant's wrongful termination action against the Administrative Office of the Courts. The Court held that the circuit court did not have the jurisdiction to review the termination of the former Family Court Administrator, a non-tenured employee. Pursuant to *Nance v. Kentucky Administrative Office of the Courts*, 336 S.W.3d 70 (Ky. 2011), the challenge to the Chief Justice's authority to terminate appellant's employment was required to be presented to the Supreme Court.

VI. FAMILY LAW

A. N.B. v. C.E.H., II

[2010-CA-002257](#) 9/9/11 2011 WL 4103602

Opinion by Judge Acree; Judge Wine concurred; Senior Judge Lambert concurred by separate opinion. The Court affirmed in part and vacated and remanded in part an order of the family court refusing to require the parties' minor child to undergo additional reconciliation counseling with appellant and permitting appellee to unilaterally decide to relocate the minor child to Texas, contrary to an order of joint custody and without appellant's agreement. The Court first held that the order from which the appeal was taken was final and appealable because it related specifically to the child's care and custody. The Court next held that the family court did not abuse its discretion in refusing to require the child to undergo additional counseling because the evidence supported the conclusion that reconciliation counseling would be unsuccessful. The Court then held that that the family court erred in allowing appellee to unilaterally relocate the child to Texas without resolving the issue according to the child's best interest. The Court finally held that appellee carried the burden of proving that the relocation was in the child's best interest.

B. Roberts v. Bedard

[2011-CA-000212](#) 9/16/11 2011 WL 4103910

Opinion by Judge Clayton; Judges Stumbo and Thompson concurred. The Court affirmed a family court order dismissing appellant's motion to modify a child support order originally entered in Florida. The Court held that the family court correctly found that it did not have subject-matter jurisdiction. Because appellant, the moving party, resided in Kentucky, she did not meet the requirements of the Uniform Interstate Family Support Act, KRS 407.5611 (UIFSA), and thus, could not move for modification of a foreign order in

Kentucky. Therefore, it was irrelevant whether the trial court had personal jurisdiction over appellee who was personally served in Kentucky. The Court also held that there was no contradiction between the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B (FFCCSOA), and the UIFSA and therefore, it was not necessary to determine whether the FFCCSOA preempted the subject-matter jurisdiction requirements of the UIFSA. The Court finally held that the family court did not abuse its discretion by allowing appellee to file a responsive motion to dismiss when it met the 24-hour deadline of the pertinent local family court rule.

C. S.B. v. M.C.

[2009-CA-000966](#) 9/23/11 2011 WL 4407446

Opinion by Judge Lambert; Judges Clayton and Combs concurred. The Court reversed and remanded a family court order dismissing appellant's petitions to determine paternity and custody of a child born to appellee while she was married to someone other than appellant. The Court held that the family court erred in dismissing the petition. The fact that the husband and wife both judicially admitted that appellant was the child's father and the paternity testing confirmed that relationship, the husband and wife were estopped from arguing that the trial court did not have jurisdiction to establish paternity and custody because appellant did not allege in his initial petition that the husband and wife were separated when the child was conceived. The presumption of KRS 406.011 was rebutted. Therefore, the family court had jurisdiction to establish paternity and determine custody.

D. Walker v. Blair

[2010-CA-002228](#) 9/30/11 2011 WL 4502814

Opinion by Judge Caperton; Judges Combs and Thompson concurred. The Court affirmed an order of the family court granting grandparent visitation to appellee. The Court held that the trial court did not err when it denied appellant's motion to dismiss wherein she argued that appellee lacked standing to file an action for grandparent's visitations rights because she failed to assume the financial support of the child. At no time did appellee indicate that she was seeking noncustodial parental visitation as governed by KRS 405.021(3) but rather, sought grandparent visitation pursuant to KRS 405.021(1). The death of the father did not trigger the imposition of visitation and child support pursuant to KRS 405.021(3) but rather, the breadth of visitation sought by the grandparent. The Court next held that the trial court did not err in concluding that it was in the best interest of the child for the grandmother to have visitation. Speculation that the child would have contact with the grandmother's ex-husband was insufficient to prove trial court error.

VII. OCCUPATIONAL SAFETY

A. Department of Labor v. Hayes Drilling, Inc.

[2010-CA-000021](#) 9/2/11 2011 WL 3862203

Opinion by Judge Thompson; Judges Acree and Lambert concurred. The Court reversed an order of the circuit court reversing a decision and order of the Kentucky Occupational Review Commission affirming the issuance of a citation and imposition of penalties under the Kentucky Occupational Safety and Health Act (KOSHA), KRS 338.011 through 338.991, to a subcontractor after a worker was injured falling into a hole dug by appellant at a construction site. The Court held that the circuit court erred in reversing the decision. In reaching that conclusion, the Court first held that the citations were not invalid because the appellant was not afforded the opportunity to attend the opening conference or walk around inspection provided for in KRS 338.111 when appellant had permanently departed the work site when the compliance officer conducted her investigation and the primary contractor who was present and in control of the worksite was afforded the opportunity to attend. The Court next held that the citation was not invalid because the hazard was abated before the citation was issued when the citation acknowledged that the violation had been eliminated and appellant was informed that abatement was not the issue. The Court next held that appellant was responsible for the KOSHA violations under the multi-employer worksite doctrine when there was substantial evidence that it was the creating employer of the hazard. The Court then held that regardless of the contractual arrangement between appellant and the general contractor, appellant dug the hole at issue and provided a cover in violation of KOSHA standards. The Court finally held that the intentional removal of a plywood cover on the hole by the injured worker did not preclude the citation. Once the unsecured and unmarked plywood was placed as a cover over the hole greater than six feet deep, appellant violated KOSHA.

VIII. PROPERTY

A. Campbell v. Drescher

[2010-CA-000680](#) 9/16/11 2011 WL 4107015

Opinion by Judge Keller; Judges Thompson and Wine concurred. The Court reversed and remanded a summary judgment finding that the sellers of real property were entitled to proceeds from an avigation easement and a summary judgment in favor of the sellers' attorney on a legal malpractice claim for his failure to adequately secure their rights to the proceeds from the easement. The Court first held that the trial court erred in finding that the sellers were entitled to the proceeds from the easement. In reaching that conclusion the Court first held that the deed was not ambiguous and nothing in the deed or exhibits could be construed to act as a waiver by the buyer to proceeds from easements not yet in place. The Court then held that the equitable title theory had no application because the buyer paid the entire amount due and the sellers contemporaneously transferred the deed. The Court then rejected a plat theory, whereby the sellers argued that they dedicated the easements to public use when they granted easements to the United States. The easements were not open to public use and the transfer was not complete until after ownership of the property passed to the buyer. The Court then held that the United States did not obtain the easements until the deed of easement was executed and delivered, which was after the

buyer owned the property. The Court also held that the doctrine of unjust enrichment was inapplicable because there was an explicit contract performed according to its terms. The Court then held that the sellers could not rescind the contract based on a unilateral mistake regarding the disposition of the easement proceeds when, by the exercise of ordinary diligence, they could have specified that they were entitled to the proceeds from the easements. The Court finally held that the trial court erred in finding that the sellers' attorney represented them in a manner consistent with the standard of care applicable to attorneys. Whether the attorney committed legal malpractice by failing to secure the clients' rights to the proceeds from the easements was a question for the trier of fact.

IX. PUBLIC HEALTH

A. Fleming County Hospital District v. Fleming Regional Medical Imaging, PLLC

[2009-CA-001275](#) 9/30/11 2011 WL 4501980

Opinion by Judge Keller; Judges Caperton and Lambert concurred. The Court affirmed an order of the circuit court finding that the appellee medical MRI entity was exempt from the certificate of need requirements in KRS 216B. The Court first held that the circuit court correctly found that the appellant hospital and association bore the burden of proof. Once a requester received a favorable advisory opinion from the Cabinet for Health and Family Services, the affected party seeking to challenge the opinion bore the burden of proof. The Court then held that the MRI entity met the private physician office exemption under *Gilbert v. Commonwealth*, 291 S.W.3d 712 (Ky. App. 2008). Although there was discussion of expanding the ownership, no such expansion had taken place.

X. TORTS

A. Buda v. Schuler

[2010-CA-001087](#) 9/23/11 2011 WL 4408448

Opinion by Senior Judge Shake; Judges Keller and Lambert concurred. The Court affirmed a summary judgment in favor of appellee on his claim for damages for injuries he sustained during an altercation with appellant. The Court first held that the trial court did not err by finding an absence of a genuine factual dispute as to liability based on the uncontroverted evidence that appellant caused serious physical injury to appellee and in light of appellant's statements on the record taking responsibility for severe injuries inflicted on appellee. The Court next held that the trial court did not err in awarding compensation to appellee for his lost income and lost profits even though he received his base salary during the time he was unable to work. The salary received was a fraction of what his income would have been to his for-profit corporation and concomitantly to him, when his labor was the sole source of income for his business. Further, appellee's testimony was substantial evidence to prove lost profits and appellee's claim advised appellant that he intended to seek damages in the amount of \$95,000 in lost profits to his business. The Court then held that the record contained significant evidence indicating that appellant viciously

attacked appellee and severely beat him with an object. This conduct constituted an egregious display of total disregard for the safety of others to support the trial court's award of punitive damages. The Court finally held that the trial court did not err in awarding appellee the full amount of medical bills even though his healthcare providers accepted less payment than the full amount billed.

B. Smith v. Bargo

[2010-CA-000241](#) 9/30/11 2011 WL 4502074

Opinion by Senior Judge Lambert; Judges Caperton and Thompson concurred. The Court reversed and remanded a judgment entered upon a jury verdict assigning to appellant a portion of the liability arising from a motor vehicle accident after the trial court granted appellant a directed verdict. The Court held that the trial court erred in presenting the question of appellant's liability to the jury after it granted appellant's unopposed motion for a directed verdict as it pertained to the claims against him. While it was appropriate for the jury to determine appellant's portion of fault incident to its determination of the comparative fault of the other parties, it was error for the trial court to adjudge liability for that fault after appellant had already been dismissed from the case.

C. South Woodford Water District v. Byrd

[2009-CA-000854](#) 9/23/11 2011 WL 4420835

Opinion by Judge Acree; Chief Judge Taylor concurred; Judge Combs dissented by separate opinion. The Court reversed an order of the circuit court denying appellant's motion to dismiss appellee's claim that the appellant water district failed to terminate water service to his property upon his request, resulting in damage to his property. The Court first held that it had jurisdiction to review the interlocutory order under the collateral order doctrine. The Court next held that it did not have jurisdiction under the collateral order doctrine or any other jurisprudence to review appellant's defense under the Claims Against Local Governments Act, KRS 65.200-65.2006. As a statutory defense to liability only, as with any other liability defense, the denial could be vindicated following a final judgment. The Court then held that the water district was entitled to governmental immunity and therefore, instructed the circuit court to dismiss the claim. Because appellant did not name as a defendant any government official, the discretionary/ministerial function analysis was irrelevant and the circuit court erred in considering whether the alleged conduct constituted a ministerial or a discretionary act. Appellant was a state agency engaged in the governmental function of providing water and therefore, was entitled to governmental immunity from a claim of damages resulting from an employee's failure to terminate water service.

XI. WILLS AND ESTATES

A. Kincaid v. Kincaid

[2009-CA-002202](#) 9/2/11 2011 WL 3862153 DR Pending

Opinion by Judge Thompson; Judges Acree and Lambert concurred. The Court affirmed in part, reversed in part and remanded a summary judgment denying

advisory committee members' claims for compensation from funds remaining in a trust and a subsequent order denying a bank's request to supplement its executor and trustee fee to compensate the advisory committee members for past service. The Court also ordered all records in the appeal unsealed. In the opinion and order unsealing the records, the Court held that the procedure for sealing records, articulated in *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658 (Ky. 1983), must be followed and that the parties' agreement to seal a court record without a hearing and appropriate findings could not be the basis for denying public access. In the opinion affirming in part, reversing in part and remanding, the Court held that the circuit court erred as a matter of law in denying the bank's request for a supplemental fee for past services rendered by the advisory committee members. The bank, as executor of the estate, was entitled to pay reasonable compensation to the advisory committee for its advice and administration of the estate pursuant to KRS 395.150 and KRS 39.195(18). Consistent with the statutory provisions, the will expressly permitted the executor to employ advisors. Because the bank was entitled to supplement its executor fee to compensate the advisory committee members, the appeal from the summary judgment denying the advisory committee members' request for compensation was moot.

XII. WORKERS' COMPENSATION

A. Greg's Construction v. Keeton

[2011-CA-000761](#) 9/16/11 2011 WL 4347203

Opinion by Judge Moore; Judges Dixon and Thompson concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming an opinion, order and award of an ALJ holding the appellant construction company exclusively liable, per KRS 342.7305(4), for paying benefits and medical expenses for a worker's claim of permanent partial hearing loss. The Court held that the Board did not overlook or misconstrue controlling law or commit an error in assessing the evidence so flagrant as to cause gross injustice and that the decision was supported by substantial evidence. The fact that the worker's hearing impairment was causally related to exposure to hazardous levels of workplace-related noise was uncontested as was the fact that appellant was the worker's last employer. The worker was only required to present substantial evidence demonstrating that he was exposed to hazardous levels of noise during his employment with appellant, which he did. Therefore, pursuant to the unambiguous language of KRS 342.7305(4), appellant was exclusively liable for the worker's benefits and the ALJ correctly declined to apportion the benefits between appellant and the worker's former employers.

B. Uninsured Employers' Fund v. Stanford

[2010-CA-002288](#) 9/30/11 WL Citation Not Yet Available

Opinion by Senior Judge Shake; Judges Dixon and Nickell concurred. The Court affirmed an opinion of the Workers' Compensation Board, which affirmed in part, reversed in part and remanded an opinion, award and order of the ALJ adjudicating a benefits claim by a worker after he fell from a zip line and

suffered permanent injury. The worker was part of a federally-funded program, which placed him in a summer work program. The Court first held that the issue of reimbursement to the prevailing party was preserved for determination by the ALJ and therefore, the Board could properly order reimbursement. The issue of reimbursement was a sub-issue of any liability presented to either the ALJ or the Board and once the Board held that liability had been reallocated to a party other than that designated by the ALJ, reimbursement was inevitable and proper. The Court also held that the Board properly dismissed issues presented by the employer as untimely taken after the worker filed a second motion for reconsideration seeking the same relief sought in an original motion for reconsideration. The Court finally held that the worker was not entitled to sanctions against the employer for filing a frivolous appeal when the claims were not so lacking in merit that they were brought in bad faith and the issue of the timeliness of the appeal to the Board was an issue of first impression and one which had a direct effect on the employer.