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Inside This Issue:

JUDICIAL FOCUS SERIES

Circuit Judge David A. Tapp, 28th Judicial Circuit

We are pleased to announce that Judge David Tapp of the 28th Judicial Circuit (Pulaski, Lincoln, and Rockcastle counties) will be the next subject of Kentucky Appellate Survey Monthly's "Judicial Focus" series. An interview with Judge Tapp will be featured in the February 2017 edition of KAS Monthly, to be published in the first full week of March. Our interview with Judge Tapp follows the inaugural installment of the "Judicial Focus" series, which featured an interview with former Kentucky Supreme Court Justice Mary C. Noble of Lexington.

Judge Tapp has been a frequent presenter at judicial education conferences and lectures on a variety of issues. He has authored articles, columns and training materials on civil and criminal justice topics.

In 2011, Judge Tapp received the All Rise Award from the National Association of Drug Court Professionals for his work on funding issues for substance abuse treatment courts. He was also recognized in a U.S. Senate resolution for his substance abuse treatment efforts. He volunteers his time to serve as a Drug Court judge in his three-county judicial circuit.

Judge Tapp helped the Judicial Branch implement House Bill 463, which took effect in 2012 and set out the most concentrated overhaul of Kentucky's penal code in more than 30 years. The legislation is designed to curb the cost of incarceration without compromising public safety.

Judge Tapp is active in community organizations in his district.

A Circuit Court judge since 2005, Judge Tapp previously worked as a prosecutor, private attorney, organized crime investigator, pretrial officer and deputy sheriff. He received his juris doctor from the University of Louisville Louis D. Brandeis School of Law and his Master's of Science degree in Criminal Justice Administration from Chaminade University in Honolulu, Hawaii. He received a Bachelor of Arts degree from Morehead State University.

[Biography Credit: Kentucky Court of Justice.]

ADMINISTRATIVE LAW

KENTUCKY COURT OF APPEALS

Opinions Designated for Publication

South Central Kentucky Properties, Inc. v. Commonwealth of Kentucky, Department of Transportation et al., 2015-CA-001486-MR (Ky. App. Jan. 27, 2017) (to be published) (Franklin Circuit Court, Judge Thomas D. Wingate)

South Central Kentucky Properties, Inc., appealed from the Franklin Circuit court's order dismissing its action against the Commonwealth of Kentucky, Department of Energy and Environmental Cabinet, and granting summary judgment in favor of the Department of Transportation. South Central argued that the trial court erred in failing to conclude that the Department of Transportation violated provisions of the Kentucky Constitution by allowing a DOT contractor to dump waste material into a DOT easement, thus constituting a taking without just compensation, and the Energy and Environmental Cabinet violated Kentucky's administrative law by allowing the DOT to dump waste material and in failing to conduct a hearing or offer any substantive response.

The Court affirmed, holding and reasoning as follows:

(1) South Central failed to exhaust its administrative remedies as to the Energy and Environmental Cabinet. While South Central did contact an EEC field office regarding the demolition project and an EEC inspector responded that the disposal of demolition waste in an unpermitted sinkhole "could" result in violations, South Central filed no application, formal request, or plans with the EEC. Therefore, it undertook no formal administrative process to challenge the project, and there was no final agency action sufficient to trigger judicial review.

(2) The trial court correctly found that there were no genuine issues of material fact as to the claim against the Department of Transportation, as DOT possessed a drainage easement on the sinkhole and the contractor's act of dumping debris into the sinkhole was reasonably connected to the maintenance of that easement.

Judge Stumbo wrote for the panel. Judges Combs and Maze concurred.

COUNSEL: Laurence J. Zielke and Karen C. Jaracz for Appellant. Stewart C. Burch for Appellee Department of Transportation. Daniel C. Cleveland and John S. West for Energy and Environmental Cabinet.

Bartrum v. Kentucky Retirement Systems et al., 2016-CA-000094-MR (Ky. App. Jan. 20, 2017) (to be published) (Franklin Circuit Court, Judge Thomas D. Wingate)

Bartrum appealed the Franklin Circuit Court's decision affirming the final order of the Board of Trustees of the Kentucky Retirement Systems denying her application for disability retirement benefits.

Bartrum, a former employee of the Floyd County Board of Education where she worked as a family resources director, applied for disability retirement benefits on the basis of depression, obsessive compulsive disorder, fibromyalgia, chronic fatigue syndrome, and chronic pain. Bartrum claimed that was "unable to stay awake, unable to stay alert, unable to concentrate, unable to maintain focus[, and] unable to manage work-related stress." An independent psychological examination ordered by the agency's medical services board indicated "that the overwhelming evidence suggested that an exaggeration or complaints or malingering for secondary gain had to be considered." The hearing officer ultimately recommended denial of benefits, and the Board rendered a final order adopting this recommendation. The Franklin Circuit Court affirmed.

On appeal, Bartrum argued that the agency's decision was arbitrary and unsupported by substantial evidence. Specifically, Bartrum claimed that "the hearing officer and the agency erred by ignoring or dismissing the records and reports of all of her treating physicians and mental health specialists, which she contend[ed] clearly indicated that

ADMINISTRATIVE LAW

she was permanently incapacitated by mental illness and fibromyalgia." Bartrum argued that the independent psychological exam did not constitute substantial evidence.

The Court, in affirming, rejected Bartrum's argument as an impermissible attempt to shift her burden of proof:

> Throughout these proceedings, Bartrum bore the burden of producing evidence sufficient to prove her entitlement to disability benefits; she also bore the risk of non-persuasion for failure to do so. KRS 13B.090(7). Where the fact- finder denies relief to the party with the burden of production or persuasion, the issue on appeal is not whether the fact-finder's denial is supported by substantial evidence. Instead, the issue on appeal is whether the evidence in the claimant's favor is so compelling that no reasonable person could have failed to have been persuaded by it.
>
> The Franklin Circuit Court did not err by concluding that the evidence in Bartrum's favor was not so compelling that the Board of Trustees of the Kentucky Retirement Systems should have found in her favor as a matter of law. The Board of Trustees had the sole authority to determine the weight and credibility of Bartrum's evidence. *Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418 (Ky. 1985). Moreover, Kentucky Retirement Systems had no burden to produce evidence to rebut Bartrum's proof since a fact-finder may reject even uncontested evidence as unconvincing. *Kentucky Retirement Systems v. West*, 413 S.W.3d 578 (Ky. 2013). Nevertheless, the persuasive effect of the evidence submitted by Bartrum was undermined by the evidence submitted in the form of Dr. Ebben's report. The report was based upon objective evidence and suggested that Bartrum might be feigning or malingering her symptoms. In light of this evidence, the hearing officer's findings were reasonable and thus beyond our purview to alter.

Judge Combs wrote for the panel. Judges Dixon and Nickell concurred.

COUNSEL: Roy C. Gray and John H. Gray for appellant. Leigh A. Jordan Davis for Appellee.

Smith v. Teachers' Retirement System of Kentucky, 2015-CA-001224-MR (Ky. App. Jan. 13, 2017) (to be published)
(Franklin Circuit Court, Judge Phillip J. Shepherd)

Smith, an employee of the Kentucky Educational Development Corporation, appealed the Kentucky Teachers' Retirement Systems' determination that Smith's annual incentive pay was to be excluded from his annual compensation in determining his retirement benefits. The Franklin Circuit court affirmed this decision. On appeal, the issue was whether the trial court correctly applied KRS 161.220(10) in excluding Smith's incentive pay from his annual compensation for purposes of calculating his retirement benefits.

Smith argued that the legislature intended KRS 161.220(1) "to have the most beneficial effect, to be given the most beneficial construction, to grant members credit for total salary received for all services performed, and any ambiguity is to be construed to the benefit of the member." According to Smith, the Board and the trial court erred in their interpretation of the word "other" in the statute "by placing a restrictive interpretation such that it required salary or benefit adjustments to be available to 'all other' members, as opposed to 'some other' members." Under the latter interpretation, because some other KEDC employees received the annual incentive bonus, Smith would have been entitled to have his annual incentive benefits included in his annual compensation. Smith also argued that KTRS and the trial court erred in their assessment of the evidence and KTRS has adopted an arbitrary construction of the statute.

The Court affirmed, reasoning that, in 1992, the General Assembly "began to limit the definition of 'annual compen-

ADMINISTRATIVE LAW

sation.'" The statute "reflects a legislative decision to limit annual compensation which is available to compute retirement benefits." The public policy underlying this provision "is non-preferential treatment in the calculation of retirement benefits." Moreover, there was ample evidence that the agency has "consistently interpreted the statutory provisions to exclude from 'annual compensation' benefits or salary enhancements which were not provided to all members of a school districts. . . . [A]n agency's longstanding interpretation of statutes it is charged with administering is entitled to deference." Accordingly, there was no error in the Board's interpretation or application of KRS 161.220(1), and the trial corut did not err in affirming same.

Judge VanMeter wrote for the panel. Judges Combs and J. Lambert concurred.

COUNSEL: J. Follace Fields, II, for Appellant. Tamela A. Biggs for Appellee.

Finance & Administration Cabinet, The Kentucky Department of Revenue v. Sommer, 2015-CA-001128-MR (Ky. App. Jan. 13, 2017) (to be published) (Franklin Circuit Court, Judge Phillip J. Shepherd)

The Finance and Administration Cabinet appealed the Franklin Circuit Court's judgment overriding an opinion issued by the Office of the Attorney General and holding that the department of Revenue was required by the provisions of the Open Records At to produce for inspection suitably redacted copies of its final rulings in tax administration cases.

On appeal, the Department argued that the provisions of the Kentucky Taxpayers' Bill of Rights (specifically KRS 131.081 and KRs 131.190) exempt final rulings that are not appealed from public inspection.

The Court affirmed, holding:

> We agree with the circuit court that the Department of Revenue has taken an unreasonably and overly broad view of KRS 131.190(1)(a) and KRS 131.081(15) as to how those provisions relate to the nature of material sought by Sommer and Tax Analysts. As noted above, final rulings of the Department of Revenue must contain a general statement of the issues in controversy and the department's position with respect to them. KRS 131.110(3). Consequently, the substantive portions of final rulings contain a wealth of information relative to the implementation of our tax laws. This is the very material that Sommer and Tax Analysts have sought to inspect. They have not sought to inspect supporting statements filed by any taxpayer to initiate a protest of the tax assessment nor information provided by any taxpayer at a conference with the Department of Revenue. There is no doubt that such material would be protected by the provisions ensuring taxpayer privacy.
>
> The evidence presented to the trial court indicates that the Department of Revenue itself has used redacted copies of its final rulings to support its position in litigation concerning other taxpayers. The Department's use of its final rulings in this fashion clearly undermines and contradicts the position that it has taken throughout these proceedings.
>
> A number of these final rulings – suitably redacted by the Department of Revenue to protect taxpayer privacy – have been included in the record before us. Our review of these rulings indicates that they contain great bodies of information related to the reasoning and analysis of the Department of Revenue with respect to its task in administration of our tax laws. We are persuaded that that information can indeed be made available without jeopardizing the privacy interests of individual taxpayers protected by the provisions of KRS 131.190(1)(a) and KRS 131.081(15).

ADMINISTRATIVE LAW

> Based upon our review of these final rulings, we conclude that the circuit court did not err by construing the pertinent statutes to give maximum effect both to the privacy protections of taxpayers and to the public's interest in knowing how our tax laws are being administered.

Judge Combs wrote for the majority. Judge J. Lambert concurred. Judge VanMeter dissented.

COUNSEL: Katherine J. Fitzpatrick for Appellant. Jennifer Y. Barber for Appellee.

Opinions Not Designated for Publication

August Properties, LLC v. Kentucky Real Estate Commission et al., 2015-CA-001860-MR (Ky. App. Jan. 27, 2017) (not to be published) (Mercer Circuit Court, Judge Darren W. Peckler): Appellants appealed from the Mercer Circuit Court's granting the motion to dismiss filed by Appellees, including the Kentucky Real Estate Commission. On appeal, Appellants argued that the Commission erred in dismissing its complaint alleging that Appellees improperly used Appellants' photos, images, and a web site reference in their advertising in violation of the rules and regulations enforced by the Commission. The Court affirmed, reasoning that, under KRS 324.150, the disciplinary action the Commission imposes, if any, falls "squarely within the discretion of its members" Judge Stumbo wrote for the majority. Judge Combs concurred. Judge Thompson concurred in the result only. (Noel M. Botts for Appellant. Rhonda K. Richardson for Appellee Kentucky Real Estate Commission. Mark S. Fenzel and Julie G. Ray for Other Appellees.)

Grimes v. White, 2016-CA-000192-MR (Ky. App. Jan. 13, 2017) (not to be published) (Lyon Circuit Court, Judge Clarence A. Woodall III): Rodney Grimes appealed the Lyon Circuit Court's dismissal of his complaint seeking damages, injunctive relief, and a declaration that the policies of the Department of Corrections violate his federal and state rights. Specifically, Grimes argued that his disciplinary segregation violated the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment's prohibition against cruel and unusual punishment. The Court affirmed. Judge Clayton wrote for the panel. Judges Dixon and D. Lambert concurred. (Rodney Grimes, *Pro Se* Appellant. Stafford Easterling for Appellee.)

Major v. Louisville/Jefferson County Metro Government et al., 2015-CA-001572-MR (Ky. App. Jan. 13, 2017) (not to be published) (Jefferson Circuit Court, Judge Ann Bailey Smith): Major appealed the Jefferson Circuit Court's order affirming the Louisville Metro Merit Board's decision sustaining his layoff from the Louisville Air Pollution Control District. Major argued that his layoff was in violation of due process and an arbitrary act. The Court affirmed. Judge Stumbo wrote for the panel. Judges D. Lambert and Thompson concurred. (Philip C. Kimball for Appellant. Mark W. Dobbins and Sandra F. Keene for Appellee Louisville Metro Merit Board. Michael J. O'Connell and Walter A. Sholar for Appellees Louisville/Jefferson County Metro Government et al.)

Meredith v. Taylor et al., 2015-CA-001080-MR (Ky. App. Jan. 6, 2017) (not to be published) (Franklin Circuit Court, Judge Phillip J. Shepherd): Meredith, an inmate at Northpoint Training Center, appealed the Franklin Circuit Court's order dismissing his petition for a declaration of rights in which he argued that the restriction of his visitation rights following a prison disciplinary hearing violated his First and Fourteenth Amendment rights under the U.S. Constitution. The court affirmed, holding that Kentucky Corrections Policies and Procedures 16.1 does not create a liberty interest in visitation, CPP 16.1(K)(4) does not violate the right to freedom of association, and Meredith was not entitled to relief on the merits of his due process claim. Judge D. Lambert wrote for the panel. Chief Judge Kramer concurred, taking issue with Appellees' failure to file a brief in the appeal but instead direct the Court to trial court briefing. Judge Taylor concurred, echoing Chief Judge Kramer's concurring opinion. (Richard Meredith, *Pro Se* Appellant. No Appellee brief filed.)

Grayson Rural Electric Cooperative Corp. v. Kentucky Public Service Commission et al., 2015-CA-000805-MR (Ky. App. Jan. 6, 2017) (not to be published) (Franklin Circuit Court, Judge Thomas D. Wingate): Grayson Rural Electric

CIVIL PROCEDURE

KENTUCKY COURT OF APPEALS

Opinions Not Designated for Publication

Mitchell v. Leed HR, LLC et al., 2016-CA-000090-MR (Ky. App. Jan. 13, 2017) (not to be published) (Jefferson Circuit Court, Judge James M. Shake): Mitchell appealed the Jefferson Circuit Court's order entered in favor of Led HR, LLC, and Michael Schroering, vacating a foreign judgment based upon lack of *in personam* jurisdiction. On appeal, Mitchell argued that the trial court erred in failing to conclude that the judgment of the Idaho federal district court should be afforded full faith and credit under the provisions of the Uniform Enforcement of Foreign Judgments Act, KRS 426.950–.975. The Court, finding that consent to personal jurisdiction was properly established in the federal and state courts of Idaho, vacated and remanded. Judge Combs wrote for the panel. Judges Clayton and Maze concurred. (Timothy F. Mann for Appellant. Joshua T. Rose for Appellee.)

Grimes v. Grimes, 2016-CA-000261-ME (Ky. App. Jan. 6, 2017) (not to be published) (Jefferson Circuit Court, Judge Deborah DeWeese): Byron Grimes appealed the Jefferson Family court's denial of his motion to alter, amend, or vacate a portion of an order denying his motion to modify his temporary child support obligation. The Court dismissed the appeal as being from a non-final order. Judge Thompson wrote for the panel. Judges Acree and J. Lambert concurred. (Matthew D. Owen for Appellant. Pamela M. Workhoven for Appellee.)

Cayce et al. v. Sumner et al., 2015-CA-000040-MR & 2015-CA-000093-MR (cross-appeals) (Ky. App. Jan. 6, 2017) (not to be published) (Christian Circuit Court, Judge Andrew Self): Cayce appealed a pre-trial order granting a party peremptory strikes for the jury pool and a post-trial order denying her motion to vacate the judgment and for a new trial. Tracey Sumner brought a protective cross-appeal, arguing that the trial court erred in granting a directed verdict to Appellants and dismissing her tort claims. The cross-appeal need not be addressed if the trial court's judgment were affirmed. The case involved a will dispute. Cayce was named executrix of a will and began probate proceedings. Sumner filed a complaint contesting the will and alleging undue influence. Sumner further alleged various tort claims against Appellants. Another party intervened and alleged undue influence and lack of testamentary capacity, as well as various tort claims against Appellants. The trial court ultimately decided that two of the three parties challenging the will did not have antagonistic interests and were only entitled to three peremptory strikes under CR 47.03(1), but the third party had sufficient antagonistic interests to warrant receiving three peremptory strikes for her sole use. On appeal, Cayce challenged this decision and the trial court's denial of her motion to vacate the judgment despite the discovery of new evidence showing that the plaintiffs did not have antagonistic interests. The Court affirmed. Judge Stumbo wrote for the panel. Judges Clayton and VanMeter concurred. (Kenneth R. Haggard and Charles R. Haggard for Appellants. Daniel N. Thomas, James G. Adams, III, Robert L. Fears, and William G. Deatherage, Jr., for Appellees.)

CONTRACT & COMMERCIAL LAW

KENTUCKY COURT OF APPEALS

Opinions Designated for Publication

Diversicare Leasing Corp. et al. v. Adams, 2015-CA-001061-MR (Ky. App. Jan. 6, 2017) (to be published) (Elliott Circuit Court, Judge Rebecca K. Phillips)

Diversicare appealed orders of the Elliott Circuit Court granting in part and denying in part its motion to compel arbitration in a complaint seeking damages for injuries Pearl Adams sustained and for her wrongful death while she was a resident at the Elliott Nursing & Rehabilitation Center. Multiple admission and readmission documents had been signed by either Adams or her daughter, Linda Elam, and each admission document contained an optional arbitration clause that had not been waived.

The daughter signed the Admission Agreement dated March 25, 2015, which contained the following clause:

> OPTIONAL ARBITRATION CLAUSE (If the parties to this Agreement do not wish to include the following arbitration provision, please indicate so by marking an "X" through this clause. Both parties shall also initial that "X" to signify their agreement to refuse arbitration.) Any controversy or claim arising out of or relating to the Agreement, or the breach thereof, shall be settled by arbitration in accordance with the provisions of the state code and judgement [sic] upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Adams was readmitted to the facility and signed a second admission agreement on July 18, 2005, that included the same optional arbitration agreement. Upon a subsequent readmission, Adams signed a third admission agreement on September 15, 2005, that contained the following language:

> OPTIONAL ARBITRATION (If either of the parties to this Admission Agreement do not wish to be bound by the Arbitration Agreement, which is being completed as an addendum to the Admission Agreement and is hereby incorporated by reference, please indicate so by marking and [sic] "X" through this clause. Both parties shall also initial that "X" to signify their agreement to decline optional arbitration."
>
> The facility and the resident or the resident's authorized representative recognize that future disagreements or disputes may arise and these parties both wish to agree now, in advance, to submit any disputes that may arise between the parties involving a matter or amount in controversy which is in excess of the sum of fifteen thousand dollars ($15,000) exclusive of interest, costs, and attorneys fees, which they can not [sic] otherwise resolve to binding arbitration instead of court litigation. The parties believe binding arbitration to be a speedy and economical alternative to what is generally a more protracted, more expensive, more public and more unpredictable means of resolving disputes. The parties hereto have entered into the attached arbitration agreement, which is hereby incorporated by reference.

Adams signed a readmission agreement on April 30, 2006, indicating that she would be readmitted to the facility pursuant to the terms set forth in the first admission agreement. Finally, Adams signed a readmission agreement on November 29, 2006, which referenced a prior admission/financial agreement dated November 29, 2006, and that Adams would be readmitted pursuant to the terms of that agreement.

Adams argued that a valid arbitration agreement did not exist because Diversicare did not attach the September 15,

CONTRACT & COMMERCIAL LAW

2005, arbitration agreement, Elam did not have authority to sign the first admission agreement, the arbitration agreement was unconscionable under Kentucky and federal law, the agreement lacked consideration, and the agreement was against public policy.

The trial court, in granting in part and denying in part Diversicare's motion, held that by signing the first readmission agreement, Adams ratified her daughter's execution of the first admission agreement, and the first readmission agreement stayed in effect until the second readmission agreement was signed. However, the trial court found as to the second readmission agreement that there was no admission agreement dated November 29, 2006, and it was "mere speculation" that this readmission agreement meant to incorporate the third admission agreement. Therefore, because the readmission agreements did not contain any arbitration clauses, any claims arising after November 29, 2006, were not encompassed by a binding arbitration clause. The parties agreed that the wrongful-death claim was not subject to the arbitration clause.

On appeal, Diversicare argued that the second readmission agreement should have been reformed to reflect the intent of the parties to incorporate an earlier admission agreement and that if the second readmission agreement was not an enforceable agreement, it could not replace a previous agreement. The Court affirmed, holding and reasoning as follows:

> [T]he circuit court properly declined Diversicare's request to reform Readmission Agreement 2 to incorporate an earlier admission agreement that contained an arbitration clause. It is purely speculative as to which document was meant to be incorporated into Readmission Agreement 2, be it one of the earlier admission agreements or an admission agreement dated November 29, 2006, which was never produced. Because Diversicare was unable to establish with any certainty which document was intended to be incorporated by reference in Readmission Agreement 2 and because the admission agreement did not otherwise contain an arbitration clause, we must hold that the circuit court did not err as a matter of law in declining to enforce an arbitration agreement purportedly referenced in an unspecified document.

As to Diversicare's second argument, the Court noted that "the circuit court did not reach any conclusion as to whether Readmission Agreement 2 bound the parties to any contractual terms, outside of whether an enforceable arbitration agreement existed, or whether the parties had been operating under an implied contract after November 29, 2006. The court merely held that there was not an arbitration agreement in writing that could be enforced from and after that date."

Judge J. Lambert wrote for the panel. Judges Acree and Thompson concurred.

COUNSEL: Michael F. Sutton and Sarah E. Tilley for Appellant. Corey T. Fannin and Robert E. Salyer for Appellee.

Hays v. Nationstar Mortgage LLC et al., 2015-CA-000121-MR (Ky. App. Jan. 6, 2017) (to be published) (Jefferson Circuit Court, Judge Brian C. Edwards)

Hays appealed an *in rem* judgment and order of sale rendered by the Jefferson Circuit Court, arguing that the trial court properly applied *Kentucky Legal Sys. Corp. v. Dunn*, 205 S.W.3d 235 (Ky. App. 2006), to determine that the lien of Nationstar Mortgage LLC was superior to a prior judgment lien filed by Hays. The trial court held that *Dunn* holds that "purchase money mortgages are superior to previously entered judgment liens against any property owned by mortgagor."

On appeal, Hays argued that the Jefferson Circuit Court erred in relying on *Dunn* instead of applying *Mortg. Elec. Registration Sys., Inc. v. Roberts*, 366 S.W.3d 405 (Ky. 2012). In *Roberts*, the Supreme Court of Kentucky held that "a

CONTRACT & COMMERCIAL LAW

prior interest in real property takes priority over a subsequent interest that was taken with notice, actual or constructive, of the prior interest." *Id.* at 407–08.

The Court acknowledged that "*Dunn* and *Roberts* appear to be at odds. *Dunn* states in clear and unambiguous terms that a vendor's purchase money mortgage is senior to all previous judgment liens (except tax liens), even when the vendor takes the mortgage with actual notice of prior judgment liens. Conversely, *Roberts* reaffirms the traditional race-notice rule that a prior interest in real property takes priority over a subsequent interest that was taken with notice, actual or constructive, of the prior interest." The Court ultimately held that *Roberts* overruled *Dunn* by implication. Accordingly, the Court reversed the Jefferson Circuit Court's judgment.

Judge Stumbo wrote for the panel. Judges D. Lambert and Thompson concurred.

COUNSEL: James P. McCrocklin for Appellant. Benjamin M. Rodriguez for Appellee.

Opinions Not Designated for Publication

LP Beattyville, LLC et al. v. Brown, 2015-CA-001982-MR (Ky. App. Jan. 27, 2017) (not to be published) (Lee Circuit Court, Judge Michael Dean): LP Beattyville appealed an order of the Lee Circuit Court denying a motion to compel arbitration in this nursing-home negligence and wrongful death case, arguing that the nursing-home resident's brother had actual or apparent authority to sign the arbitration agreement on the resident's behalf or, alternatively, it should have been allowed to conduct discovery on the issue. The Court affirmed, noting that LP Beattyville had produced no document demonstrating that the brother had authority to sign the agreement, the brother was not the resident's attorney in fact, and the brother's signature of the arbitration agreement as the resident's "legal representative" did not create apparent authority. Judge Thompson wrote for the majority. Judge Stumbo concurred. Judge Combs concurred in the result only. (Stephen M. Garcia and M. Brandon Faulkner for Appellant. Jacques G. Balette and Juliette B. Symons for Appellee.)

Wombles v. Preferred Automotive Sales, Inc., 2015-CA-001632-MR (Ky. App. Jan. 20, 2017) (not to be published) (Fayette Circuit Court, Judge Ernesto Scorsone): Wombles appealed the Fayette Circuit Court's judgment in favor of Preferred Automotive Sales, Inc., in which the trial court interpreted a legal services contract between the parties and orally found that Wombles had overcharged Preferred for legal services. The judgment also ordered Wombles to reimburse Preferred. On appeal, Wombles argued that there should have been a jury trial and the circuit court failed to make adequate factual findings regarding the amount of legal work he performed for Preferred and the legal effect of the engagement letter. The Court affirmed in part and reversed in part, holding that a bench trial was appropriate because Wombles never demanded a jury trial, but the trial court erred in failing to issue a written order under CR 52.01, which foreclosed meaningful appellate review. Judge D. Lambert wrote for the panel. Chief Judge Kramer and Judge Taylor concurred. (Bobby G. Wombles, *Pro Se* Appellant. Katherine K. Yunker for Appellee.)

Barren River Waterfront Development, Inc. et al. v. South Central Bank, Inc. et al., 2014-CA-002082-MR (Ky. App. Jan. 20, 2017) (not to be published) (Barren Circuit Court, Judge Phil Patton): Appellants appealed an order of the Barren Circuit Court granting summary judgment in favor of Appellee, holding that Appellee was entitled to certain insurance proceeds relating to certain property damage on the basis of the Bank's security interest in the property. The Court affirmed, holding that the applicable policy pertained only to the Bank's insurable interest and was in place solely to protect the Bank's interests; it did not cover Appellants' insurable interest. Judge Acree wrote for the panel. Judges J. Lambert and Taylor concurred. (B. Alan Simpson for Appellants. Charles E. English and David W. Anderson for Appellee South Central Bank, Inc. S. Frank Smith Jr. for Appellee Narrows Marina, LLC.)

Fuzailov et al. v. State Realty Corp. et al., 2014-CA-000454-MR & 2014-CA-000513-MR (Ky. App. Jan. 20, 2017) (not to be published) (Jefferson Circuit Court, Judge A.C. McKay Chauvin): The Parties cross-appealed a judgment of the Jefferson Circuit court entered upon a jury verdict in this case involving the purchase of an apartment building known as Kentucky Towers. Appellants sued Appellees, alleging that they were entitled to 50 percent of the profits

CONTRACT & COMMERCIAL LAW

from the sale of Kentucky Towers which Appellee failed to remit after the sale. Appellants further claimed breach of contract, fraud, breach of constructive trust, breach of fiduciary duty, and unjust enrichment. On appeal, Appellants claimed that the trial court erred in directing a verdict dismissing all the claims of Appellants other than one during trial and dismissing the claims of constructive trust, unjust enrichment, and for an accounting. Appellants further claimed that the trial court abused its discretion by removing the only African American juror from the jury after the jury viewed information indicating that Appellee had committed insurance fraud in the past. The Court affirmed, noting Appellants' failure to support their appeal of the dismissal of the claims with any legal arguments. Judge Taylor wrote for the panel. Judges Acree and Nickell concurred. (Paul Croushore for Appellants. Alan N. Linker, Christopher A. Bates, and Paul Hershberg for Appellees.)

Memorial Hospital, Inc. v. Morgan, 2015-CA-001596-MR (Ky. App. Jan. 13, 2017) (not to be published) (Clay Circuit Court, Judge Oscar G. House): Memorial Hospital, Inc., appealed from the Clay Circuit Court's entry of summary judgment in favor of McKinnley Morgan as to Morgan's attorney fee. Memorial submitted a check to Morgan and Morgan subsequently disbursed most of the check to his client, relying on the phrase "past due benefits" noted on the check stub to support his claim that Memorial had never tendered payment of the attorney fee. Memorial presented documentary evidence and affidavits indicating that the check included funds for both Morgan's attorney fee and past due benefits. The Court reversed and remanded. Judge Dixon wrote for the panel. Judges Nickell and VanMeter concurred. (Timothy J. Walker and Marcel Smith for Appellant. James R. Penington and Roy G. Collins for Appellee.)

Dattilo et al. v. Collins et al., 2015-CA-001152-MR (Ky. App. Jan. 13, 2017) (not to be published) (Christian Circuit Court, Judge John Atkins): The Dattilos appealed the Christian Circuit Court's order granting summary judgment in favor of the Collinses, arguing that the trial court erred in concluding that they were time barred from bringing their action alleging fraud under KRS 413.120(11) and erred in concluding that their breach of contract claim was without merit. The trial court concluded that the Dattilos' sale of the parcel to a third party divested them of any right to specific performance and injunctive relief and they failed to demonstrate any damages. The Court affirmed. Judge Stumbo wrote for the panel. Judges Clayton and VanMeter concurred. (Stephanie R. Mize for Appellant. David L. Cotthoff for Appellees.)

Kindred Nursing Centers Limited Partnership et al. v. Withers, 2014-CA-000065-MR (Ky. App. Jan. 13, 2017) (not to be published) (Hardin Circuit Court, Judge Ken M. Howard): Kidnred appealed the Hardin Circuit Court's order denying its motion to compel arbitration in this nursing-home negligent and wrongful death case in which the arbitration agreement was signed by the nursing-home resident's attorney in fact pursuant to a power of attorney document. The Court affirmed, citing *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016), to hold that a POA authorizing the attorney in fact "to make, execute and deliver deeds, releases, conveyances, and contract[s] of every nature in relation to both real and personal property, including stocks, bonds, contracts of indemnity and insurance," to "demand, sue for, collect, recover and receive all debts, monies, interest, and demands whatsoever now or due that may her[e]after be or become due to [the principal] (including the right to institute legal proceedings therefor)," and to act with "full power in and concerning the above premises and to do any and all acts as set forth above" as the principal could do if personally present, was insufficient to create authority to execute the optional arbitration agreement. Judge Thompson wrote for the panel. Judges Maze and VanMeter concurred. (Donald L. Miller, II, Jan G. Ahrens, and Kristin M. Lomond for Appellants. Chandrika Srinivasan and Kelly Bowles for Appellees.)

McCarthy et al. v. Estate of Nora L. Minning, 2013-CA-001943-MR (Ky. App. Jan. 13, 2016) (not to be published) (Grant Circuit Court, Judge Stephen L. Bates): The McCarthys appealed the Grant Circuit court's order finding that the McCarthys had breached the parties' agreed-upon settlement agreement, thereby entitling Appellee to enforce and collect upon the full judgment. The Court affirmed. Judge Acree wrote for the panel. Chief Judge Kramer and Judge Clayton concurred. (Ryan M. Beck for Appellant. Thomas R. Nienaber for Appellee.)

Kindred Nursing Centers Limited Partnership et al. v. Powell et al., 2013-CA-000885-MR (Ky. App. Jan. 13, 2017) (not to be published) (Marshall Circuit Court, Judge Dennis R. Foust): Kindred appealed the Marshall Circuit

CONTRACT & COMMERCIAL LAW

Court's order denying its motion to compel arbitration in this nursing-home negligence and wrongful death case in which the arbitration agreement was signed by the nursing-home resident's attorney in fact pursuant to a power of attorney document. The Court affirmed, citing *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016), to hold that a POA authorizing the attorney in fact to "make contracts, lease, sell or convey any real or personal property" and "to institute or defend suits concerning [the principal's] property or rights, and generally to do and perform for [the principal] and in [the principal's] name all that [the principal] might do if present," was insufficient to create authority to execute the optional arbitration agreement. Judge Thompson wrote for the panel. Judges Stumbo and VanMeter concurred. (Donald L. Miller II, Jan G. Ahrens, and Kristin M. Lomond for Appellants. Noah R. Friend for Appellees.)

Eitel et al. v. Duncan Commercial Real Estate LLC et al., 2015-CA-000506-MR (Ky. App. Jan. 6, 2017) (not to be published) (Jefferson Circuit Court, Judge Olu A. Stevens): Eitel appealed the Jefferson Circuit court's order dismissing her complaint against Appellees, in which she alleged claims of tortious interference with a contract and business relationship, fraud, unjust enrichment, and *quantum meruit*, arising from a real estate transaction. The claims went to arbitration, where a judgment was reached. The trial court entered an order confirming the award in accordance with KRS 417.170. The trial court dismissed the case upon confirming the award. On appeal, Eitel argued that her action in the trial court raised allegations not presented in the parties' arbitration and was therefore not barred by the arbitration award, Duncan was not entitled to an award of attorney fees for seeking confirmation of the arbitration award as it was not the prevailing party, and dismissal of her complaint deprived her of due process. The Court affirmed. Judge Nickell wrote for the majority. Judge Combs concurred. Judge Dixon concurred in the result only. (Jason Todd Hardin for Appellants. Christopher B. Rambicure for Appellees.)

CRIMINAL LAW & PROCEDURE

KENTUCKY COURT OF APPEALS

Opinions Designated for Publication

Lundy v. Commonwealth, 2015-CA-000451-MR (Ky. App. Jan. 27, 2017) (to be published) (Nelson Circuit Court, Judge Charles C. Simms III)

Lundy appealed his conviction of possession of marijuana and possession of drug paraphernalia and resulting sentence of twelve months' incarceration and a $5,000 fine. Lundy was shot at his home by his wife and fled the residence. Lundy's wife called 911 and reported the incident. Two officers arrived on the scene. At that time, Lundy's wife identified herself as the shooter and told an officer that the gun was on the kitchen table. An officer testified that he told Lundy's wife that he needed to enter the home to secure the weapon, to which the wife responded "fine." Lundy's wife denied that she consented to the officer's entry into the residence.

The officers subsequently obtained a search warrant authorizing them to search the premises, described as a "[t]an metal building with attached garage and awning with red metal roof and out building" and seize "firearms and ammunition, firearm accessories, shell casings, projectiles, wine bottles and any blood evidence." Lundy argued that the officers' search of the residence exceeded the scope of the warrant. The trial court determined that Lundy's wife consented to entry into the residence for purposes of securing the weapon and that the warrant expressly permitted law enforcement to enter the premises, garage, and outbuilding. The trial court further found that "ammunition and shell casings were small items which could be placed in containers such as drawers, boxes and freezes." As such, the evidence found by the Nelson County's Sheriff's Department were admissible. The trial court did conclude that a task force's subsequent search of the premises without an additional search warrant was unconstitutional and all evidence discovered and seized by the task force was suppressed.

On appeal, Lundy argued that there was no consent to the search of a freezer and outbuilding located on his property, the searches of a locked freezer and an outbuilding were beyond the scope of the search warrant and the items seized were not in plain view, he was entitled to a directed verdict because the Commonwealth failed to prove the plant material seized from his residence met the definition of marijuana under KRS 218A.010(22) and he was entitled to a jury instruction defining hemp.

The Court affirmed, holding and reasoning as follows:

(1) This was not a warrantless search, so Lundy's argument regarding consent was irrelevant.

(2) The trial court properly denied Lundy's motion to suppress the marijuana found in the locked freezer and outbuilding, as the warrant specifically authorized officers to search for items that were small in size and that authorization included authority to "search anywhere those items might reasonably be found and unlock anything that might contain those items."

(3) Lundy was correct that, under federal and state law, "if the plants he possessed contained less than .3 percent THC, he possessed hemp and not marijuana." "While the level of THC distinguishes marijuana plants from hemp plants under federal and Kentucky law, that distinction is only relevant if [Lundy] could legally possess industrial hemp. Under Kentucky law, he could do so only if properly licensed and engaged in growing hemp or possessing hemp for industrial use. No such evidence was presented. If the facts were different and [Lundy] could legally possess industrial hemp plants or was in possession of a commercial hemp product containing THC, we would agree that the Commonwealth must establish the THC level in the plants or the product was more than .3 percent. That simply is not the case." Furthermore, "there was more than sufficient circumstantial evidence that the plant material was marijuana," including the discovery of plants found in an indoor grow operation in an outbuilding cellar, bud from marijuana plants found in a freezer, and a cloning solution found in the outbuilding.

CRIMINAL LAW & PROCEDURE

(4) Lundy was not entitled to a jury instruction defining industrial hemp because he was not a licensed grower nor could he otherwise possess industrial hemp.

Judge Thompson wrote for the panel. Judges Combs and VanMeter concurred.

COUNSEL: C. Thomas Hectus for Appellant. Andy Beshear and Bryan D. Morrow for Appellee.

Owens v. Commonwealth, 2014-CA-000779-MR (Ky. App. Jan. 27, 2017) (to be published) (Simpson Circuit Court, Judge Janet J. Crocker)

Owens appealed the Simpson Circuit Court's order denying his motion for DNA testing and his motions, amendments, and supplements for relief under RCr 11.42 and CR 60.02. Owens was convicted of first-degree wanton assault, tampering with physical evidence, and being a first-degree persistent felony offender and resulting thirty-year prison sentence.

On appeal, Owens argued that he was entitled to DNA testing of certain evidence because that testing would support his theory of alternative perpetrator. Specifically, Owens claimed that "finding DNA of another person on the brick would establish that someone else assaulted the victim and that the brick was the alternative perpetrator's weapon." Owens further argued that proof of the victim's blood on a white plastic chair bolstered his theory that the victim was assaulted by an alternative perpetrator while she sat in the chair.

The Court affirmed, rejecting this argument and holding that Owens did not satisfy the criteria of KRS 422.285:

> Generally speaking, the statute requires a trial court to determine the availability of relief under KRS 422.285 by assessing (1) the petition (and supplements and response), (2) the petitioner, and (3) the evidence, to confirm that each meets the requirements of the statute. Only after addressing these three preliminary steps, can the trial court reach step (4), the more substantive and ultimate question – is there a reasonable probability that the DNA evidence the petitioner seeks would have made a difference had it been available at or before trial?

Here, Owens' petition satisfied the requirements of the statute. Moreover, Owens' circumstances qualified him as a person intended by the legislature to benefit by the statute. However, the two items of evidence for which Owens sought DNA testing, a brick and a white plastic chair, did not qualify under the statute for testing. First, the brick was not "in the possession or control of the court or the Commonwealth." KRS 422.285(1)(a). this reason alone was sufficient to affirm the trial court's decision as to this item. As to the white plastic chair, Owens made no allegation that the blood evidence on the chair was that of anyone other than the victim. As such, "the evidence was not probative because it was not exculpatory, but merely corroborative of proof already available to the jury . . . – that the blood on the chair was that of the victim."

Likewise, Owens' request for funds to hire a blood-spatter expert under KRS 31.110(1)(b) came "far too late," almost five years after his trial and three years after his convictions were affirmed on appeal.

The Court rejected Owens' remaining arguments as having been already decided on direct appeal or untimely.

Judge Acree wrote for the panel. Judges J. Lambert and Taylor concurred.

COUNSEL: James Ricky Owens, *Pro Se* Appellant. Jack Conway and Leilani K. Martin for Appellee.

CRIMINAL LAW & PROCEDURE

O'Daniel v. Commonwealth, 2016-CA-000009-DG (Ky. App. Jan. 20, 2017) (to be published) (Lyon Circuit Court, Judge Clarence A. Woodall)

O'Daniel appealed the Lyon District Court's denial of his motion to suppress, his conviction of operating a motor vehicle with alcohol concentration of or above 0.08, and the Lyon Circuit Court's decision affirming his conviction on appeal. O'Daniel argued that the breathalyzer results should have been suppressed.

O'Daniel claimed that the trooper who stopped him violated KRS 189A.103(3)(a) because he did not "properly observe him at the 'location' in which the breath test was given for 20 minutes prior to administering the test." Here, the test was administered at the Caldwell County Jail. The trooper testified that he did not observe O'daniel for 20 minutes at the location where the breath test was given, but instead observed him during the ride from the Lyon County Jail to the Caldwell County Jail, which lasted more than 20 minutes.

The Court affirmed, holding that the trooper's observation of O'Daniel was sufficient. Citing to a previous unpublished decision, *Meadoes v. Commonwealth*, 2012 WL 410259 (Ky. App. 2012), the Court acknowledged that "it is not always practical to observe a defendant in the room in which the breath test is to be administered. In addition, the observation in this case satisfied the intent and purpose of the statute," which is to ensure "the defendant does not take anything orally or nasally which could interfere with the breath test."

O'Daniel also claimed that the breathalyzer results should be been suppressed because a deputy jailer, who was not certified to use the breathalyzer machine, turned it on. The Court found that this argument was without merit because KRS 189A.103(3)(b) provides that breath tests must be *given* by a police officer certified to use the machine; that requirement was satisfied here.

Finally, the Court rejected O'Daniel's argument that the trial court erred in failing to exclude evidence offered by the Commonwealth that had not been disclosed in pre-trial discovery. The trial court offered O'Daniel a continuance, which he declined, and also excluded some of the evidence at issue.

Judge Stumbo wrote for the panel. Judges Combs and Maze concurred.

COUNSEL: Donald E. Thomas for Appellant. Andy Beshear and Lee F. Wilson for Appellee.

Flaugher v. Commonwealth, 2015-CA-001637-MR (Ky. App. Jan. 13, 2017) (to be published) (Mason Circuit Court, Judge Jay Delaney)

Flaugher appealed the Mason Circuit Court's order revoking his probation, arguing that the trial court erred because it revoked his probation even though he was not notified of the conditions of his probation. Flaugher also argued that the trial court abused its discretion under KRS 439.3106 when it revoked his probation after he absconded from supervision.

The Commonwealth, in turn, argued that Flaugher's attorney stated during the shock probation hearing, which Flaugher did not attend, that she would inform Flaugher he needed to visit his probation officer in Kentucky after his release from Ohio. The Commonwealth acknowledged that the court did not mail the order granting shock probation directly to Flaugher, but emphasized that the order was mailed to Flaugher's attorney.

The Court vacated, holding and reasoning as follows:

> KRS 533.030(5) provides that "[w]hen a defendant is sentenced to probation or conditional discharge, he shall be given a written statement explicitly setting forth the conditions under which he is being released."

CRIMINAL LAW & PROCEDURE

. . . .

> [T]his Court has previously recognized that service upon a defendant's attorney, without corresponding personal service upon the defendant, is insufficient in some instances. . . . [Here,] because personal service upon the defendant of the conditions of his release is statutorily required, the service of the conditions upon Flaugher's defense counsel and not upon Flaugher himself was insufficient in this case. Therefore, the circuit court abused its discretion in revoking Flaugher's shock probation in this case because its decision to do so was unsupported by sound legal principles.

Chief Judge Kramer wrote for the panel. Judges Combs and Jones concurred.

COUNSEL: Brandon N. Jewell for Appellant. Andy Beshear and John P. Varo for Appellee.

Opinions Not Designated for Publication

Pilon v. Commonwealth, 2015-CA-001677-MR (Ky. App. Jan. 27, 2017) (not to be published) (Grant Circuit Court, Judge R. Leslie Knight): Pilon appealed a judgment sentencing him to serve a total of five years following his guilty plea to one count of unlawful distribution of methamphetamine precursor, one count of possession of a controlled substance in the first degree, and one count of possession of a firearm by a convicted felon. Pilon argued that the trial court abused its discretion in denying his motion to withdraw his guilty plea on a claim of ineffective assistance of counsel. The Court affirmed. Judge J. Lambert wrote for the panel. Judges Dixon and Stumbo concurred. (Karen S. Maurer for Appellant. Andy Beshear and David B. Abner for Appellee.)

Helton v. Commonwealth, 2015-CA-001620-MR (Ky. App. Jan. 27, 2017) (not to be published) (Harlan Circuit Court, Judge Kent Hendrickson): Helton appealed the Harlan Circuit Court's order revoking his probation, arguing that the trial court abused its discretion when it found that he was a risk to, and could not be managed in, the community. The Court affirmed, noting that before he was dismissed from the drug court program, Helton failed multiple drug screens and was sanctioned multiple times. It was, therefore, not unreasonable for the trial court to determine that Helton, who continued his drug use and tried to alter his drug screens, posed a risk to the community if allowed to continue probation. The Court affirmed. Judge Clayton wrote for the panel. Judges Dixon and D. Lambert concurred. (Robert C. Yang for Appellant Andy Beshear and J. Todd Henning for Appellee.)

Hicks v. Commonwealth, 2015-CA-001508-MR (Ky. App. Jan. 27, 2017) (not to be published) (Fayette Circuit Court, Judge Ernesto M. Scorsone): Hicks appealed his conviction of one count of knowingly abuse of an adult under KRS 209.990(2) and resulting seven-year prison sentence. On appeal, Hicks argued that he was entitled to a directed verdict because there was insufficient evidence that he ever committed sexual abuse against the victim. Hicks argued that Kentucky courts should adopt a test used in some federal circuits in civil cases requiring "substantial evidence" to support the nonmoving party's case in order to defeat a directed verdict motion. Hicks further argued that the sexual assault kits obtained from the victim and himself proved he never assaulted the victim because there were no findings of his or her DNA on the other person. The Court affirmed. Judge Clayton wrote for the majority. Judge Combs concurred. Judge Taylor concurred in the result only. (Kauren S. Maurer for Appellant. Andy Beshear and Jeffrey R. Prather for Appellee.)

Mason v. Commonwealth, 2014-CA-001340-MR & 2014-CA-001407-MR (Ky. App. Jan. 27, 2017) (not to be published) (Whitley Circuit Court, Judge Paul K. Winchester): Mason appealed the trial court's denial of immunity from prosecution pursuant to KRS 503.085(1) on the basis of self-protection and his motion to dismiss his indictment due to prosecutorial misconduct that he alleged occurred in the form of misadvice during the second presentation to the grand jury. The Court reversed and remanded, holding that the trial court denied the motion to dismiss the indictment and reasoning that "[m]ultiple, relevant areas of Kentucky's self-protection law were tortuously misconstrued until all of Mason's possible self-protection justifications were eliminated." Because the prosecutor "interjected pal-

CRIMINAL LAW & PROCEDURE

pably-erroneous legal advice into a grand jury proceeding on a critical legal issue, . . . he flagrantly abused his duty to provide accurate legal advice to the grand jury." Judge Clayton wrote for the panel. Judges Acree and J. Lambert concurred. (Ronald L. Bowling for Appellant. Andy Beshear and James D. Havey for Appellee.)

Steadman v. Commonwealth, 2015-CA-001172-DG (Ky. App. Jan. 20, 2017) (not to be published) (Hardin Circuit Court, Judge Kelly Mark Easton): Steadman sought discretionary review of his conviction in Hardin District Court of unauthorized practice of law. On appeal, Steadman challenged the constitutionality of KRS 524.130 as well as the sufficiency of evidence to support his conviction. Steadman also argued that the Commonwealth made improper remarks during closing arguments by using the word "scam" in reference to Steadman's behavior. The Court affirmed. Judge D. Lambert wrote for the panel. Judges jones and Maze concurred. (James W. Steadman, *Pro Se* Appellant. Andy Beshear and Mark Shouse for Appellee.)

Vance v. Commonwealth, 2015-CA-001156-MR (Ky. App. Jan. 20, 2017) (not to be published) (Montgomery Circuit Court, Judge William E. Lane): Vance appealed the Montgomery Circuit Court's revocation of his probation, arguing that the trial court abused its discretion in revoking his probation without making the required findings of KRS 439.3106. The Court reversed and remanded because Vance was in custody before the conclusion of the briefing process and the trial court failed to make the findings required by KRS 439.3106. Judge Stumbo wrote for the panel. Judges Combs and Maze concurred. (Brandon N. Jewell for Appellant. Andy Beshear and Jeffrey A. Cross for Appellee.)

Shelton v. Commonwealth, 2015-CA-000877-MR (Ky. App. Jan. 20, 2017) (not to be published) (Carroll Circuit Court, Judge Stephen L. Bates): Shelton appealed the final judgment and sentence of imprisonment entered by the Carroll Circuit Court following his guilty plea, conditioned on the right to appeal the trial court's denial of Shelton's suppression motion. The Court vacated and remanded, holding that the garage was searched based solely upon Shelton's wife's status as a parolee and Shelton did not consent to the search of the garage. The Court remanded to the trial court for additional proceedings regarding whether Shelton knew about his wife's parolee status and its effect on their residence in order to determine whether Shelton had a reasonable expectation of privacy in the garage he shared with his wife. Judge Jones wrote for the panel. Judges Clayton and Nickell concurred. (Robert C. Yang for Appellant. Andy Beshear for Appellee. Courtney J. Hightower for Appellee.)

Morehead v. Commonwealth, 2015-CA-000757-MR (Ky. App. Jan. 20, 2017) (not to be published) (Muhlenberg Circuit Court, Judge Brian Wiggins): Morehead appealed from the Muhlenberg Circuit Court's order denying his motion for relief under RCr 11.42. On appeal, Morehead claimed trial counsel was ineffective in failing to present evidence of an incriminating witness's intoxication to the court and failing to present evidence that an officer provided intentionally false or misleading in the search warrant affidavit. Morehead also argued that the trial court abused its discretion in denying his motion without an evidentiary hearing. The Court affirmed. Judge Jones wrote for the panel. Chief Judge Kramer and Judge Combs concurred. (Rickie Morehead, *Pro Se* Appellant. Andy Beshear and Kenneth W. Riggs for Appellee.)

Coleman v. Commonwealth, 2015-CA-000440-MR, ***Chestnut v. Commonwealth***, 2015-CA-000793-MR (Ky. App. Jan. 20, 2017) (not to be published) (Fayette Circuit Court, Judge Pamela R. Goodwine): Coleman and Chestnut appealed from conditional guilty pleas to facilitation of first-degree robbery, arguing that the trial court erred in denying their motions to suppress evidence seized following a warrantless entry and search of an apartment. The trial court held that Coleman and Chestnut failed to establish that they had standing to challenge the entry and search because they were, at most, occasional overnight guests. The Court affirmed. Judge Maze wrote for the panel. Judges Taylor and VanMeter concurred. (Erin Hoffman Yang for Appellant Coleman. Karen S. Maurer for Appellant Chestnut. Jack Conway and James Havey for Appellee.)

Pilch v. Commonwealth, 2015-CA-000386-MR (Ky. App. Jan. 20, 2017) (not to be published) (Fayette Circuit Court, Judge James D. Ishmael, Jr.): Pilch appealed his conviction of multiple sex crimes, arguing on appeal that the trial court made improper statements to the jury in the form of an *Allen* charge, he was absent during a critical stage of

CRIMINAL LAW & PROCEDURE

the trial in violation of RCr 8.28(1), the trial court erroneously imposed a fine despite his indigency, and the trial court erroneously imposed court costs under KRS 23A.205(2). The Court affirmed the conviction but vacated the imposed fine and remanded for a hearing to determine whether Pilch should be subject to court costs. Judge Stumbo wrote for the panel. Judges Combs and Maze concurred. (Gene Lewter for Appellant. Andy Beshear and James D. Havey for Appellee.)

Burkeen v. Commonwealth, 2014-CA-000987-MR (Ky. App. Jan. 20, 2017) (not to be published) (Marshall Circuit Court, Judge Dennis R. Foust): Burkeen appealed the Marshall Circuit Court's order revoking his probation and imposing his original ten-year prison sentence. The issue on appeal was whether the trial court complied with the due process requirements of *Bearden v. Georgia*, 461 U.S. 660 (1983), when considering alternatives to incarceration for flagrant non-support prior to revoking his probation. The Court affirmed. Judge Acree wrote for the panel. Judges J. Lambert and Taylor concurred. (Roy A. Durham for Appellant. Jack Conway and Bryan D. Morrow for Appellee.)

Pettis v. Commonwealth, 2014-CA-000697-MR, 2014-CA-000698-MR, and 2014-CA-000699-MR (Ky. App. Jan. 20, 2017) (not to be published) (Calloway Circuit Court, Judge Dennis R. Foust): Pettis appealed three orders of the Calloway Circuit Court revoking his probation. On appeal, Pettis argued that the circuit court abused its discretion in finding Pettis violated a condition of probation, in failing to articulate its findings as it related to the statutory criteria of KRS 439.3106, and in failing to consider graduated sanctions prior to revocation. The Court reversed and remanded, reasoning that the circuit court's order did not mention the factual premises for its findings under KRS 439.3106(1), but simply recited the language of the statute. Judge Acree wrote for the majority. Judge Taylor concurred in the result only. Judge J. Lambert dissented. (Robert C. Yang for Appellant. Jack Conway and Nate T. Kolb for Appellee.)

Smith v. Commonwealth, 2016-CA-000149-MR (Ky. App. Jan. 13, 2017) (not to be published) (Fayette Circuit Court, Judge Kimberly N. Bunnell): Smith appealed the Fayette Circuit Court's order denying his motion to vacate his sentence under CR 60.02. As a basis for relief, Smith claimed that his conviction violated the constitutional prohibition against double jeopardy. The Court affirmed, holding that Smith's arguments were without merits and Smith's motion was untimely given that it was filed more than seventeen years beyond the judgment and procedurally barred because the arguments could have or should have been raised on direct appeal. Judge Combs wrote for the panel. Judges Maze and Stumbo concurred. (Larry R. Smith, *Pro Se* Appellant. Andy Beshear and Todd D. Ferguson for Appellee.)

Myers v. Commonwealth, 2015-CA-001955-MR (Ky. App. Jan. 13, 2017) (not to be published) (Montgomery Circuit Court, Judge Beth Lewis Maze): Myer appealed the Montgomery Circuit Court's order denying his motion for relief under RCr 11.42. Myers argued that the trial court erred in denying his claim of ineffective assistance of counsel due to counsel's waiver of his right to a speedy trial pursuant to KRS 500.110. The Court affirmed. Judge Dixon wrote for the panel. Judges Nickell and VanMeter concurred. (Kieran J. Comer for Appellant. Andy Beshear and Gregory C. Fuchs for Appellee.)

Burton v. Commonwealth, 2015-CA-001742-MR (Ky. App. Jan. 13, 2017) (not to be published) (Fulton Circuit Court, Judge Timothy A. Langford): Burton appealed his conviction of one count of second-degree robbery and one count of being a persistent felony offender in the first degree and resulting prison sentence of ten years. The trial court also ordered Burton to pay $160 in court costs as well as $430 in restitution "subject to [a] hearing." The trial court further ordered Burton to pay jail fees to the Fulton County Detention Center amounting to $23 a day for the 301 days he was incarcerated prior to trial. The trial court deferred all payments until twelve months following Burton's release. On appeal, Burton argued that the trial court erred in denying him a directed verdict on all charges, in assigning court costs despite his representation to the court that he was "dead broke" and had no money, in assigning restitution as part of his sentence without his agreement or a hearing on the issue, and in ordering him to pay jail fees under KRS 441.265(1). The Court affirmed in part, vacated in part, and remanded, vacating the imposition of court costs and remanding for a hearing on the issue of restitution. Judge Maze wrote for the panel. Judges Taylor and Thompson concurred. (Robert C. Yang for Appellant. Andy Beshear and Bryan D. Morrow for Appellee.)

CRIMINAL LAW & PROCEDURE

Duncan v. Commonwealth, 2015-CA-001536-MR (Ky. App. Jan. 13, 2017) (not to be published) (Meade Circuit Court, Judge Bruce T. Butler): Duncan appealed his conviction of first-degree trafficking in a controlled substance, second offense and of being a first-degree persistent felony offender. On appeal, Duncan argued that the search of his person by a detective during a *Terry* stop and frisk violated his Fourth Amendment rights, the "plain feel" exception did not justify the detective's removal of drugs found in Duncan's pocket, he was denied a fair trial when a detective testified that Duncan was guilty of trafficking, he was denied a fair trial when the Commonwealth shifted the burden of proof during closing arguments by forcing him to prove the drugs were for personal use even though the Commonwealth had the burden to prove the elements of the crime, the Commonwealth failed to provide sufficient evidence of Duncan's prior trafficking offense, and he was subject to an illegal double enhancement by virtue of his PFO conviction. The Court affirmed in part, vacated in part, and remanded, affirming in all respects except the PFO conviction. Judge Stumbo wrote for the panel. Judges Clayton and Maze concurred. (Erin Hoffman Yang for Appellant. Andy Beshear and Susan R. Lenz for Appellee.)

Madison v. Commonwealth, 2015-CA-001466-MR (Ky. App. Jan. 13, 2017) (not to be published) (Fayette Circuit Court, Judge James D. Ishmael, Jr.): Madison appealed his conviction of trafficking in marijuana, greater than five pounds, first offense. On appeal, Madison argued that his due process rights were violated when the circuit court denied his motion for a directed verdict at the close of the Commonwealth's evidence. Madison claimed that the Commonwealth failed to prove that he possessed the marijuana at issue. The Court affirmed, holding that Madison's actions constituted exercising dominion and control over the package. Chief Judge Kramer wrote for the majority. Judge D. Lambert concurred. Judge Taylor concurred in the result only. (Gene Lewter for Appellant. Andy Beshear and Leilani K. M. Martin for Appellee.)

Williams v. Commonwealth, 2015-CA-001404-MR (Ky. App. Jan. 13, 2017) (not to be published) (Fulton Circuit Court, Judge Timothy A. Langford): Williams appealed the Fulton Circuit Court's order revoking his probation. On appeal, Williams argued that the trial court failed to consider the criteria of KRS 439.3106(1) prior to revoking his probation. The Court reversed and remanded. Chief Judge Kramer wrote for the panel. Judges Combs and Jones concurred. (Shannon Dupree for Appellant. Andy Beshear and M. Brandon Roberts for Appellee.)

Brock v. Commonwealth, 2015-CA-001310-MR (Ky. App. Jan. 13, 2017) (not to be published) (Bell Circuit Court, Judge Robert V. Costanzo): Brock appealed the Bell Circuit Court's order denying his motion to vacate his judgment and sentence pursuant to RCr 11.42. without an evidentiary hearing. Brock claimed that counsel rendered ineffective assistance by failing to advise him correctly regarding parole eligibility and, if he had been accurately informed that he would have to serve ten years of his sentence rather than six before becoming eligible for parole, he would have accepted the Commonwealth's plea offer. The Court vacated and remanded for an evidentiary hearing. Judge Combs wrote for the panel. Judges Dixon and Nickell concurred. (Heather Hodgson for Appellant. Andy Beshear and J. Hays Lawson for Appellee.)

Lewis v. Commonwealth, 2015-CA-001240-MR (Ky. App. Jan. 13, 2017) (not to be published) (Franklin Circuit Court, Judge Phillip J. Shepherd): Lewis appealed the Franklin Circuit Court's dismissal of his action against Kentucky State Police, in which he alleged that he was only required to register as a sex offender for ten years, not for his lifetime. The trial court dismissed the petition, holding that Lewis is required to register for his lifetime because he committed a sex crime against a minor and his duty to register is determined by the version of the Sex Offender Registration At, KRS 17.500–17.540, in effect at the time of his release from prison. The Court affirmed. Chief Judge Kramer wrote for the panel. Judges D. Lambert and Taylor concurred. (Bradley Fox for Appellant. Graham Gray and Heather C. Wagers for Appellee.)

Hughes v. Commonwealth, 2015-CA-001230-MR (Ky. App. Jan. 13, 2017) (not to be published) (Nelson Circuit Court, Judge David Seay): Hughes appealed his conviction for second-degree escape and resulting three-year prison sentence. Hughes argued on appeal that he was entitled to a directed verdict on the charge because he intended fully to return to custody at the Nelson County Detention Center after his furlough, but unintentionally consumed alcohol

CRIMINAL LAW & PROCEDURE

or drugs, preventing him from doing so. The Court affirmed. Judge J. Lambert wrote for the panel. Judges Acree and Thompson concurred. 9Emily H. Rhorer for Appellant. Andy Beshear and Courtney J. Hightower for Appellee.)

Warner v. Commonwealth, 2015-CA-001179-MR (Ky. App. Jan. 13, 2017) (not to be published) (Jefferson Circuit Court, Judge Charles L. Cunningham, Jr.): Warner appealed the Jefferson Circuit Court's order denying him post-conviction relief under RCr 11.42 on the basis that the motion was untimely under RCr 11.42(10), as it was filed three years and nine months after the judgment (the applicable limitations period was three years). Warner argued that his motion was timely under RCr 11.42(10(a) because he did not learn until November 2012, when he completed his prison sentence, that he would have to undergo post-incarceration supervision. The Court affirmed. Judge D. Lambert wrote for the panel. Judges Jones and Maze concurred. (Kieran J. Comer for Appellant. Andy Beshear and Ken W. Riggs for Appellee.)

Todd v. Commonwealth, 2015-CA-000681-MR (Ky. App. Jan. 13, 2017) (not to be published) (Jefferson Circuit Court, Judge Brian C. Edwards): Todd appealed the Jefferson Circuit Court's order denying his RCr 11.42 motion without an evidentiary hearing. On appeal, Todd argued that he was entitled to an evidentiary hearing on his claims that his attorney knowingly allowed Todd to falsely testify before the jury and his attorney rendered ineffective assistance in failing to investigate possible the facts, failing to effectively challenge and suppress all evidence seized in the case, failing to challenge the authenticity of the Commonwealth's evidence, in misadvising him regarding his potential maximum sentence and that he was "tricked" into pleading guilty. The Court affirmed. Chief Judge Kramer wrote for the panel. Judges D. Lambert and Taylor concurred. (Jamahill Todd, *Pro Se* Appellant. Andy Beshear and J. Todd Henning for Appellee.)

Burd v. Commonwealth, 2015-CA-000497-MR (Ky. App. Jan. 13, 2017) (not to be published) (Allen Circuit Court, Judge Janet J. Crocker): Burd appealed the Allen Circuit Court's order denying his RCr 11.42 motion for relief following an evidentiary hearing. On appeal, Burd argued that his trial counsel was ineffective in failing to request a lesser-included jury instruction with respect to the manufacturing methamphetamine charge. The Court affirmed. Judge J. Lambert wrote for the majority. Judge Thompson concurred. Judge Taylor concurred in the result only. (Homer Wayne Burd, *Pro Se* Appellant. Jack Conway and Gregory C. Fuchs for Appellee.)

Swan v. Commonwealth, 2014-CA-001760-MR (Ky. App. Jan. 13, 2017) (not to be published) (Henderson Circuit Court, Judge Karen L. Wilson): Swan appealed the Henderson Circuit Court's denial of his RCr 11.42 and 10.26 motions seeking to alter, amend, or vacate his conviction for complicity to first-degree robbery. On appeal, Swan argued that because his jury trial found that there was insufficient evidence to instruct the jury that he acted as principal under Robbery I, his later retrial as complicitor on that same count violated his protections against double jeopardy, and his attorney's advice to plead guilty to complicity constituted ineffective assistance of counsel. Swan further argued that trial counsel provided ineffective assistance in failing to disclose the sentences received by Swan's co-defendants, in failing to provide Swan a copy of the discovery prior to entering his guilty plea, and in misadvising Swan about the "facts and law" pertaining to his case. The Court, finding no error, affirmed. Judge J. Lambert wrote for the panel. Judges Dixon and Nickell concurred. (Maureen Sullivan for Appellant. Andy Beshear and Todd D. Ferguson for Appellee.)

Wright v. Commonwealth, 2015-CA-001265-MR (Ky. App. Jan. 6, 2017) (not to be published) (Pulaski Circuit Court, Judge David A. Tapp): Wright appealed the final judgment and sentence against him, arguing that because the Commonwealth was allowed to withdraw its recommendation of probation, he should have been permitted to withdraw his guilty plea prior to final sentencing. The Court affirmed. Judge Jones wrote for the panel. Judges Acree and VanMeter concurred. (Roy A. Durham for Appellant. Andy Beshear and John P. Varo for Appellee.)

Harris v. Commonwealth, 2015-CA-001046-MR (Ky. App. Jan. 6, 2017) (not to be published) (Kenton Circuit Court, Judge Gregory M. Bartlett): Harris appealed his conviction for shooting a convenience store owner, arguing that the Kenton Circuit Court erred in denying his motion for relief under RCr 11.42. Harris claimed that trial counsel was ineffective for failing to adequately investigate and present mitigating evidence during the sentencing phase of his

CRIMINAL LAW & PROCEDURE

trial and for failing to object to the composition of the jury pool. Harris also argued that he was entitled to an evidentiary hearing on his motion. The Court affirmed. Judge Thompson wrote for the panel. Judges Acree and J. Lambert concurred. (Heather Hodgson for Appellant. Andy Beshear and Perry T. Ryan for Appellee.)

Holt v. Commonwealth, 2015-CA-000985-MR (Ky. App. Jan. 6, 2017) (not to be published) (Union Circuit Court, Judge C. Rene Williams): Holt appealed the Union Circuit Court's order denying his motion to suppress evidence obtained against him as fruit of an unlawful search. Holt argued that an officer impermissibly invaded the curtilage of his apartment to observe the interior of Holt's bedroom from an unlawful vantage point in violation of his expectation of privacy. The officer testified that his vantage point was no more than three feet away from the sidewalk and that he could have seen through the angled blinds even from the sidewalk. Holt also argued that the mere presence of his gun did not justify the wireless search. The Court vacated and remanded, holding that the officers unlawfully violated the sanctity of Holt's home under the Fourth Amendment and that any exigency that arose thereafter was created by the actions of the officers. Judge Combs wrote for the panel. Judges Dixon and Nickell concurred. (Steven J. Buck for Appellant. Andy Beshear and James D. Havey for Appellee.)

Calhoun v. Commonwealth, 2015-CA-000847-Mr (Ky. App. Jan. 6, 2017) (not to be published) (Casey Circuit Court, Judge Judy D. Vance): Calhoun appealed his conviction of first-degree trafficking in a controlled substance, first offense, based on a trial that hinged heavily on the testimony of one witness, a confidential informant, who had apparent credibility issues. On appeal, Calhoun argued that the trial court erred and violated his Due Process rights when denying his directed verdict motion, in overruling his objection to a detective's testimony rehabilitating the confidential informant's credibility, in denying his motion for mistrial regarding an alleged separation-of-witnesses violation, in denying his motion for a mistrial after the Commonwealth invited the jury to ignore a recording, and in ordering the payment of restitution and court costs. The Court affirmed. Judge D. Lambert wrote for the panel. Chief Judge Kramer and Judge J. Lambert concurred. (Kathleen K. Schmidt and Roy D. Durham for Appellant. Andy Beshear and Bryan D. Morrow for Appellee.)

Tolar v. Commonwealth, 2015-CA-000833-MR (Ky. App. Jan. 6, 2017) (not to be published) (Campbell Circuit Court, Judge Julie Reinhardt Ward): Tolar appealed his conviction of four counts of theft by deception over $300 and resulting three-year prison sentence. After imposing judgment in conformity with the jury's verdict, the trial court ordered Tolar to pay $50,358.66 in restitution. Tolar's conviction arose from his going to a bank branch where, posing as his brother, he secretly acquired loans and a credit card on which he made small payments before defaulting. On appeal, Tolar argued he was entitled to a directed verdict because there was no evidence he intentionally decided the bank or intended to deprive the bank of funds, the trial court erred in failing to *sua sponte* admonish jurors to disregard the Commonwealth's suggestion he was guilty because he contacted an Ohio attorney, and the trial court failed to hold the adversarial hearing required by *Jones v. Commonwealth*, 382 S.W.3d 22 (Ky. 2011), in ordering restitution. The Court affirmed and remanded with instructions to the circuit court to identify the bank as the recipient of the restitution in its judgment, as required by KRS 532.032(1). The Court affirmed. Judge Nickell wrote for the panel. Judges Dixon and VanMeter concurred. (Steven J. Buck for Appellant. Andy Beshear and M. Brandon Roberts.)

Calloway v. Commonwealth, 2014-CA-002019-MR (Ky. App. Jan. 6, 2017) (not to be published) (Ohio Circuit Court, Judge Ronnie C. Dortch): Calloway appealed her convictions for facilitation of murder, complicity in tampering with physical evidence, and facilitation of retaliating against a participant in the legal process. On appeal, Calloway claimed that the proof introduced during the trial did not adequately support the jury verdicts. The Court affirmed in part, reversed in part, and remanded, holding: (1) the trial court correctly admitted a hearsay statement made close in time to the events concerned in the statement and improperly admitted another statement occurring twenty years after the events, but this error was harmless; (2) the trial court did not err in denying Calloway's motion for a directed verdict on the facilitation to murder charge, as direct evidence was not required to support the charge; (3) the trial court did not err in denying Calloway's motion for a directed verdict on the complicity to tampering with physical evidence charge; and (4) the trial court erred in denying Calloway's motion for a directed verdict as to the facilitation to retaliation against a participant in the legal process charge, as there was no proof of Calloway's knowledge of an intent on the part of the target's plan to alert the authorities, and absent this proof, the Common-

CRIMINAL LAW & PROCEDURE

wealth could not meet its burden of showing intent on the part of Calloway. Judge D. Lambert wrote for the panel. Judges Maze and VanMeter concurred. (Julia K. Pearson for Appellant. Jack Conway and David B. Abner for Appellee.)

FAMILY LAW

KENTUCKY COURT OF APPEALS

Opinions Designated for Publication

Keeton v. Keith, 2016-CA-000407-MR (Ky. App. Jan. 20, 2017) (to be published) (Meade Circuit Court, Judge Bruce T. Butler)

Gregory Keeton, father, appealed the Meade Circuit Court's order adopting a recommendation of the domestic relations commissioner that the parties' minor child be enrolled in the school district where Anna Keith, mother, resided. The trial court also, *sua sponte*, directed the mother to seek child support. On appeal, Gregory argued that the trial court erred in concluding that KRs 159.010 controlled the issue. The Court agreed and vacated and remanded:

> We are persuaded that the trial court erred in concluding that KRS 159.010 controls the issue. It merely directs placement of a child in a school **after** the parents have reached an agreement on the critical issue. We vacate and remand for a determination of school placement according to the child's best interests in compliance with the mandate of *Keifer v. Keifer*, 354 S.W.3d 123, 125–26 (Ky. 2011).

The Court also agreed that the trial court erred in issuing an order directing Anna to seek child support because an order directing her to seek child support, "which she did not request on her own," was "tantamount to modification of child support by a trial court, *sua sponte*." Trial courts have no authority to modify child support absent a written request for modification.

Judge Combs wrote for the panel. Judges Dixon and Nickell concurred.

COUNSEL: Linda M. Keeton for Appellant Ashley Duncan Gibbons for Appellee.

Jones v. Jones et al., 2015-CA-001284-ME & 2015-CA-001882-ME (Ky. App. Jan. 20, 2017) (to be published) (Rowan Circuit Court, Judge William Evans Lane)

Robert Jones appealed the Rowan Circuit Court's order awarding joint custody of the biological child of Robert Jones to Robert and his sister, Suszanne Jones, as well as an order directing Robert to pay child support to Suszanne and two orders directing him to pay a total of $3,000 in prospective attorney fees to Suszanne. The Court reversed and remanded, holding and reasoning as follows:

(1) The trial court erred in determining that Suszanne met the criteria of a *de facto* custodian under KRS 403.270. Kentucky courts have "repeatedly held that when a nonparent shares the parenting responsibilities with a natural parent, the nonparent cannot, as a matter of law, acquire *de facto* custodian status." The trial court "ignored this case law and tis own factual findings in concluding that Suszanne, a paid, but related, child care provider, met the criteria laid out in KRS 403.270. The trial court explicitly found that Robert, the boy's natural parent, had cared for the child and supported him financially." Accordingly, the trial court abused its discretion in holding Suszanne met the criteria to be a *de facto* custodian.

(2) Based on the above holding, the trial court's orders on child support and attorney fees were likewise invalid.

Judge D. Lambert wrote for the Court. Judges Jones and Taylor concurred.

COUNSEL: Paula Gay Richardson and Marsha Megan Hughes Richmond for Appellant. Earl Rogers III for Appellee Suszanne Jones.

FAMILY LAW

Opinions Not Designated for Publication

C.F.W. v. H.A.S. et al., 2016-CA-000182-Me & 2016-CA-000183-ME, and ***H.S. v. Cabinet for Health & Family Services et al.***, 2016-CA-000315-ME & 2016-CA-000316-MR (Ky. App. Jan. 27, 2017) (not to be published) (Jefferson Circuit Court, Judge Tara Hagerty): Father and Mother appealed the Jefferson Family Court's orders terminating their parental rights. Father challenged the family court's neglect finding, arguing that the finding was largely based on unsupported allegations of physical and sexual abuse. Father also argued that he had demonstrated the ability to provide essential parental care and necessities and there was a reasonable expectation of further improvement due to his advanced education, while Mother argued that the statutory best interest factors of KRS 625.090(3) weighed in her favor and did not support the family court's best interest finding. The Court affirmed. Judge Acree wrote for the panel. Judges J. Lambert and Thompson concurred. (Leonard W. Taylor for Appellant C.F.W. Paul J Mullins for Appellant H.S. Erika L. Saylor for Appellees.)

Sammet v. Sammet, 2015-CA-001350-MR (Ky. App. Jan. 27, 2017) (not to be published) (Oldham Circuit Court, Judge Timothy E. Feeley): Chuck Sammet appealed the family court's order requiring him to pay the cost of health insurance for his adult son pursuant to KRS 403.211(7)(c)3. On appeal, Chuck argued that the family court erred in misapplying the statute to require him to continue to pay for insurance and concluding the proof offered was sufficient to satisfy the statute where the court failed to make the necessary findings and mother did not provide proof that the son met the requirements of the statute. Alternatively, Chuck argued that even if he should have been required to maintain insurance on the son, these expenses should have been allocated between the parents based upon their income. The Court reversed and remanded for further proceedings to determine whether the son qualified for ongoing health insurance coverage. Judge Thompson wrote for the panel. Judges Combs and VanMeter concurred. (Paul V. Hibberd for Appellant. George R. Carter for Appellee.)

D.A.H. v. Cabinet for Health & Family Services et al., 2015-CA-000636-ME (Ky. App. Jan. 27, 2017) (not to be published) (Jefferson Circuit Court, Judge Hugh Smith Haynie): Father appealed the Jefferson Circuit Court's order terminating his parental rights to his minor child, arguing that the family court erred in terminating his parental rights because certain statutory findings were not supported by clear and convincing evidence. Specifically, Father argued that the family court's findings relating to parental fitness under KRS 625.090(2) were insufficient, there was insufficient evidence that he had abandoned the child for a period of not less than ninety days, and the family court's decision that termination was in the best interest of the child was not supported by clear and convincing evidence. Father claimed that the Cabinet was at fault for the lack of scheduled visits with the child. The Court affirmed. Judge Acree wrote for the majority. Chief Judge Kramer concurred. Judge D. Lambert concurred, arguing that the Cabinet moved "with unnecessary haste in pursuing termination." (Joy R. Colvin for Appellant. Erika Saylor for Appellee.)

Chimakurthy v. Innamuri, 2014-CA-000748-MR (Ky. App. Jan. 27, 2017) (not to be published) (Jefferson Circuit Court, Judge Hugh Smith Haynie): Appellant appealed the family court's decision declining to set aside the parties' marital settlement agreement as unconscionable. On appeal, Appellant argued that the family court erred in failing to find that she entered into the settlement agreement as a result of duress, fraud, and undue influence and the settlement agreement was unconscionable as to the division of marital assets and because it did not provide for maintenance or child support, but did provide for joint custody of the parties' child. The Court affirmed. Judge Acree wrote for the panel. Judges Nickell and Taylor concurred. (Allen McKee Dodd and Stefanie Stolz Potter for Appellant. William L. Hoge III and James K. Murphy for Appellee.)

Gilley v. Gilley, 2016-CA-000714-ME (Ky. App. Jan. 20, 2017) (not to be published) (Pike Circuit Court, Judge Larry E. Thompson): Candice Gilley appealed the Pike Circuit Court's order amending the custodian arrangement between her and her ex-spouse. The Court vacated and remanded, holding that additional findings of fact should have been made and, on remand, the trial court should consider the factors set forth in KRS 403.270(2) and (3) in its decision to modify the terms of the custody and visitation agreement. Judge J. Lambert wrote for the panel. Judges Acree and Clayton concurred. (Michael de Bourbon for Appellant. William S. Trivette for Appellee.)

FAMILY LAW

Stevens v. Bottom et al., 2016-CA-000665-ME (Ky. App. Jan. 20, 2017) (not to be published) (Green Circuit Court, Judge Allan Ray Bertram): Stevens appealed the Green Circuit Court's judgment denying her grandparent visitation rights with her grandchildren. On appeal, Stevens argued that the trial court erred in dismissing the guardian ad litem before culmination of the litigation and in concluding that the parents were acting in the child's best interest. The Court affirmed. Judge Clayton wrote for the panel. Judges Dixon and D. Lambert concurred. (Elmer J. George and Meredith Booth George for Appellant. Luke R. Lawless for Appellee.)

N.A.M. v. Cabinet for Health & Family Services et al., 2016-CA-000420-ME (Ky. App. Jan. 20, 2017) (not to be published) (Jefferson Circuit Court, Judge Tara Hagerty): Father appealed the Jefferson Family court's order terminating his parental rights to his daughter. The Court affirmed, noting that the Cabinet's evidence in support of termination was unrefuted and Father's testimony did "little more than promise to do better in the future." Judge J. Lambert wrote for the majority. Judge Thompson concurred. Judge Acree concurred in the result only. (Leonard W. Taylor for Appellant. Erika Saylor for Appellee.)

Robbins v. Meeker, 2016-CA-000302-ME (Ky. App. Jan. 20, 2017) (not to be published) (Fayette Circuit Court, Judge Traci Brislin): William Robbins appealed a domestic violence order entered against him in favor of Monique Meeker by the Fayette Circuit Court. On appeal, Robbins argued that the trial court abused its discretion in finding that domestic violence had occurred and that it might reoccur and erred in failing to issue written findings of fact. The Court reversed and remanded, holding that the trial court erred in finding that Robbins' alleged conduct in stalking Meeker because KRS 403.720(1), which adds stalking to the circumstances under which a DVO may be issued, applies prospectively, and there was no evidence of any physical aggression on the part of Robbins. Judge Maze wrote for the majority. Judge D. Lambert concurred. Judge Jones dissented. (Derrick L. Harris for Appellant. No brief filed for Appellee.)

A.R. et al. v. F.W. et al., 2015-CA-001829-ME (Ky. App. Jan. 20, 2017) (not to be published) (Jefferson Circuit Court, Judge Dolly W. Berry): Father appealed an order of the Jefferson Family Court registering a foreign support order for enforcement against him. Father argued on appeal that the Virginia order was invalid because the underlying civil action had been dismissed and the family court was without personal and subject-matter jurisdiction to proceed with the registration. The Court affirmed. Judge Nickell wrote for the panel. Judges J. Lambert and Taylor concurred. (A.R., *Pro Se* Appellant. No brief filed for Appellee. F.W. Michael J. O'Connell and Lily Patteson for Appellee Commonwealth of Kentucky, Cabinet for Health & Family Services.)

D.W. v. Commonwealth of Kentucky, Cabinet for Health & Family Services et al., 2015-CA-001523-ME (Ky. App. Jan. 20, 2017) (not to be published) (Jefferson Circuit Court, Judge Tara Hagerty): Father appealed the Jefferson Family Court's order finding under KRS 520.100(3) that he neglected his child. Father argued on appeal that he was the subject of vindictive prosecution, he was not properly served, the family court lacked subject-matter jurisdiction over the case, the family court abused its discretion in determining that he had neglected his son, there was insufficient evidence in the record to support a finding of neglect, he was denied the right to cross-examine witnesses when the trial court referred to let a social worker testify, he was denied his right to a speedy trial, and his counsel was ineffective because he failed to call a social worker and the mother as witnesses. The Court affirmed. Judge Acree wrote for the panel. Judges Clayton and J. Lambert concurred. (D.W., *Pro Se* Appellant. David A. Sexton for Appellee.)

Bailey v. Ehrler, 2015-CA-000959-ME (Ky. App. Jan. 20, 2017) (not to be published) (Jefferson Circuit Court, Judge Angela J. Johnson): Bailey appealed the domestic violence order entered by the Jefferson Family court entered against her on behalf of her former boyfriend, arguing that there was not sufficient evidence to issue the DVO against her because the parties presented conflicting accounts of their interactions. The Court affirmed, holding that it was within the family court's discretion to find Ehrler's testimony more credible. Ehrler testified that Bailey refused to vacate his property numerous times, continued to forcibly enter his home at night uninvited, and threatened him when he did manage to keep her out. Moreover, the physical confrontations between the parties "appeared to be escalating." Judge Acree wrote for the panel. Judges J. Lambert and Thompson concurred. (Eric E.

FAMILY LAW

Ashley for Appellant. David B. Mour for Appellee.)

Roberts v. Roberts, 2014-CA-000867-MR (Ky. App. Jan. 20, 2017) (not to be published) (Daviess Circuit Court, Judge Joseph W. Castlen): Larry Roberts appealed the circuit court's judgment classifying certain real property as marital property. On appeal, Larry argued that he had a $52,000 non-marital interest from the proceedings of the sale of the parties' property by virtue of his pre-marital interest in a part of the property. The Court affirmed. Judge Acree wrote for the panel. Judges J. Lambert and Taylor concurred. (Sean S. Land for Appellant. Candy Yarbray Englebert for Appellee.)

Stallion v. Stallion, 2015-CA-001735-ME (Ky. App. Jan. 13, 2017) (not to be published) (Pulaksi Circuit Court, Judge Marcus L. Vanover): Garrett Stallion appealed the Pulaski Circuit Court's decision that it lacked authority to modify the duration of a child support order originally entered by a Hawaii state court. Holding that Hawaii substantive law must be applied to Garrett's request to modify the duration of his child support obligation, and in any event Garrett was not entitled to terminate his obligation under the law of either state, the Court affirmed. Judge Jones wrote for the panel. Judges Maze and Thompson concurred. (Tommie L. Weatherly for Appellant. Heidi Schultz Powers for Appellee.)

Fullmer v. Commonwealth, 2015-CA-001269-MR (Ky. App. Jan. 13, 2017) (not to be published) (Kenton Circuit Court, Judge Christopher J. Mehling): Fulmer appealed the Kenton Circuit Court's finding of contempt for failure to pay child support and ordering him to serve forty hours of community service in lieu of five days' jail time with the remaining eighty-five day sentence conditionally discharged for a period of two years. On appeal, Fullmer argued that the trial court erred in its failure to apply the reduced support payment retroactively to the oldest child's emancipation and in imposing the civil contempt sentence. The Court affirmed. Judge J. Lambert wrote for the panel. Judges Combs and VanMeter concurred. (Thomas L. Rouse for Appellant. Howard L. Tankersley for Appellee.)

Howlett v. Howlett, 2014-CA-001505-MR (Ky. App. Jan. 13, 2017) (not to be published) (Bullitt Family Court, Judge Elise Givhan Spainhour): Chasity Howlett appealed the Bullitt Family Court's order finding her in contempt for failure to pay child support and sentencing her to 179 days in the Bullitt County Detention Center. The Court vacated and remanded, holding that the trial court failed to make any finding of fact regarding Chasity's ability to pay the purge amount. Without making this finding, the trial court impermissibly failed to determine whether Chasity possessed the ability to comply with the contempt order. Judge Taylor wrote for the panel. Judges J. Lambert and Thompson concurred. (Karen S. Maurer for Appellant. Anne W. McAffe for Appellee.)

Ahmed v. Abdella, 2015-CA-000819-MR (Ky. App. Jan. 6, 2017) (not to be published) (Jefferson Family court, Judge Angela Johnson): Hassan Ahmed appealed the Jefferson Family Court's amended order of dissolution of marriage classifying his IRA as marital property and dividing it equally between the parties. On appeal, Hassan argued that treating the total amount of the IRA as marital property was inequitable and he should have received the value of the IRA before their marriage and after their separation as non-marital property and, even if marital, the IRA should not have been divided equally because Araksen engaged in no homemaking duties during their separation, especially when she lived in other states and was outside the country. The Court affirmed. Judge Thompson wrote for the panel. Judges Combs and VanMeter concurred. (Michael R. Slaughter for Appellant. Beth Robinson for Appellee.)

Willis v. Willis, 2015-CA-000800-MR (Ky. App. Jan. 6, 2017) (not to be published) (Grayson Circuit Court, Judge Robert A. Miller): Randall Willis appealed the Grayson Circuit Court's opinion and order awarding Margaret Willis permanent maintenance and denying Randall recovery for damages allegedly done by Margaret to the marital residence. On appeal, Randall argued that the trial court erred in accepting the special domestic relations commissioner's recommendation to disallow recovery for the alleged damages to the marital residence and the commissioner was improperly appointed and had no authority to conduct the final hearing and the trial court abused its discretion in determining that Margaret was entitled to permanent maintenance because Margaret received sufficient property to provide for her reasonable needs, she was disabled and could not work, she was not in as physically poor health as he is, and she should be able to seek gainful employment. The Court affirmed. Judge Dixon wrote for the panel.

FAMILY LAW

Chief Judge Kramer and Judge Taylor concurred. (Phillip W. Smith for Appellant. Earlene Whitaker Wilson for Appellee.)

INSURANCE LAW

KENTUCKY COURT OF APPEALS

Opinion Not Designated for Publication

Shelter Mutual Insurance Co. v. Sheffield, 2015-CA-001355-MR (Ky. App. Jan. 27, 2017) (not to be published) (Franklin Circuit Court, Judge Phillip J. Shepherd): Shelter Mutual Insurance Company appealed several decisions of the Franklin Circuit court in an underinsured motorist claim involving two trials. On appeal, Shelter argued that the trial court should not have granted Sheffield's motion for a new trial following the first trial or, alternatively, its motion for a new trial following the second trial should have been granted. The Court affirmed, finding that the trial court properly ordered a new trial where the jury awarded damages for medical expenses but not for pain and suffering and properly denied a second new trial where Shelter argued that the jury was confused by the introduction of the UIM contract into evidence, the jury instructions for the second trial were different than the instructions at the first trial, and the introduction of a letter relating to PIP benefits was improper. The Court affirmed. Judge Clayton wrote for the panel. Judges Maze and Stumbo concurred. (James W. Taylor and Blake C. Nolan for Appellant. Charles W. Gorham for Appellee.)

LABOR & EMPLOYMENT LAW

KENTUCKY COURT OF APPEALS

Opinion Designated for Publication

Tucker v. Bluegrass Regional Mental Health Mental Retardation Board d/b/a Bluegrass.org, 2015-CA-001229-MR (Ky. App. Jan. 20, 2017) (to be published) (Fayette Circuit Court, Judge Thomas L. Clark)

Tucker appealed the Fayette Circuit Court's order granting summary judgment to Bluegrass Regional Mental Health Mental Retardation Board ("Bluegrass"), on her claims of gender discrimination under KRS 344.040 of the Kentucky Civil Rights Act and retaliation under KRS 344.280.

Tucker's counsel was permitted to withdraw from the case based on disagreements with Tucker regarding how to proceed with the case. The trial court allowed Tucker thirty days to retain new counsel or proceed *pro se*. Tucker notified the Court nine days later of her intent to proceed on her own while continuing to try to find counsel. After the thirty days had expired, Bluegrass filed a motion for summary judgment, noticing the motion to be heard two weeks later. Tucker did not respond to the motion or appear at the hearing. The trial court granted the motion. Four days later, Tucker filed a motion to amend her complaint to include any aliases of the defendant and requested that the trial court grant her more time to find another attorney.

Ten days later, Tucker filed an objection to the summary judgment, requesting reconsideration and ninety days to find an attorney. At the hearing on the motion, Tucker notified the trial court that Bluegrass had been served with the motion that morning. The trial court denied the motion on the basis of insufficient notice Tucker refiled the motion. Bluegrass filed a response. The trial court denied the motion to reconsider as untimely.

The Court affirmed, holding and reasoning as follows:

(1) "Tucker did not establish a *prima facie* case of gender discrimination because she failed to show that she was subjected to an adverse employment action. Although she claimed that she was paid less than her male colleagues, Bluegrass provided data, which Tucker was unable to refute, to show that this was not the case. Thus, as a matter of law, summary judgment was appropriate on her claim of discrimination."

(2) As to her retaliation claim, Tucker failed to offer evidence of the fourth element of a *prima facie* claim: namely, that there was a causal connection between the protected activity (filing the EEOC complaint) and the termination. Bluegrass received notice in August 2013 that Tucker had filed an EEOC charge. Its proceedings against Tucker regarding the allegedly inappropriate filing of an improper 202A petition commenced eight months later. "Without any additional evidence of retaliatory conduct, there [was] an insufficient temporal relationship to meet the standard for showing causation."

Judge J. Lambert wrote for the panel. Judges Nickell and Taylor concurred.

COUNSEL: Angela Tucker, *Pro Se* Appellant. Leslie Patterson Vose, Erin C. Sammons, and Gregory A. Jackson for Appellee.

Opinions Not Designated for Publication

Fisk v. Toyota Motor Manufacturing Kentucky, Inc., 2014-CA-001262-MR (Ky. App. Jan. 20, 2017) (not to be published) (Scott Circuit Court, Judge Paul F. Isaacs): Fisk appealed two orders of the Scott Circuit court dismissing several of his claims in his action against Toyota Motor Manufacturing Kentucky, Inc., and Life Insurance of North America, in which he sought damages relating to the cessation of his short-term disability benefits and his allegedly forced retirement. On appeal, Fisk argued that the trial court erred in holding that his breach of fiduciary duty claim

LABOR & EMPLOYMENT LAW

against Toyota was barred by the Claim Consulting Agreement because Toyota was acting as an insurer under Kentucky law when it provided disability insurance to him, in concluding that certain claims were precluded by his settlement agreement in a related federal action, and in holding that his claim for civil conspiracy for wrongful termination was bared by the one-year statute of limitations under KRS 413.140(1)(c). The Court affirmed. Judge J. Lambert wrote for the panel. Judges Combs and VanMeter concurred. (Louis C. Schneider for Appellant. Craig P. Siegenthaler and Katherine A. Garbarino for Appellee.)

PROPERTY LAW

KENTUCKY COURT OF APPEALS

Opinions Designated for Publication

Hazel Enterprises, LLC v. Ray, 2015-CA-000628-MR (Ky. App. Jan. 13, 2017) (to be published) (Warren Circuit Court, Judge John R. Grise)

Hazel Enterprises, LLC, appealed the Warren Circuit Court's order denying a motion to reconsider a prior holding that Scott Ray was not obligated to pay post-judgment interest following a final judgment and order of sale of his real property. Hazel argued that the trial court erred as a matter of law, as KRS 360.040 mandated Ray's liability for post-judgment interest.

The Court affirmed, holding that KRS 360.040 "expressly permits a trial court to impose an interest rate of less than twelve percent—or even no interest at all—on a claim on unliquidated damages." The Court likewise held that the "facts and equities before the trial court bring the trial court's decision to award no post-judgment interest within the range of permissible decisions":

> Ray tendered full and unconditional payment in almost immediate compliance with the trial court's order of July 18, 2013. Hazel refused payment, asserting then as it does now that additional fees owed to the Master Commissioner, the number and amount of which could not have been known to Ray at that time, prevented it from accepting Ray's payment. While Hazel may have been within its rights to reject Ray's payment, we must agree with the trial court that Hazel's decision to do so, in the hope of recovering additional, unspecified expenses, reasonably placed its claim for post-judgment interest at risk. Certainly, equity demands that Hazel should not benefit from a fifteen-month delay for which it was solely responsible after rejecting Ray's attempt at full compliance and nevertheless deciding it would not appeal the Final Judgment and Order of Sale.

Judge Maze wrote for the panel. Judges Jones and Nickell concurred.

COUNSEL: Alan Pritchard for Appellant. No brief filed for Appelele.

Victory Community Bank v. Socol, 2015-CA-000005-MR (Ky. App. Jan. 13, 2017) (to be published) (Kenton Circuit Court, Judge Patricia M. Summe)

Victory Community Bank appealed the Kenton Circuit Court's determination of the date on which Victory reasonably should have discovered that Socol, a real estate appraiser, allegedly overvalued some real property securing a loan made by the bank. Under KRS 413.140(3), a civil action against a real estate appraiser must be brought within one year from "the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured."

The trial court held that, but for a tolling agreement between the parties, the statutory limitations period would have expired on December 1, 2011, one year after the date of default. The tolling agreement extended the limitations period to February 28, 2012. The complaint was filed three days later, and the trial court determined that this prevented the action from proceeding.

The Court affirmed, finding that while the trial court erred in its determination of the reasonable discovery date, Victory nevertheless failed to bring its action against Socol within the applicable limitations period. The Court disagreed with the trial court that default by the borrower, standing alone, should have necessarily put the bank on no-

PROPERTY LAW

tice, and instead that the statute of limitations began to run no later than February 3, 2011, the date of Victory's detailed inquiry about problems with the original appraisal. Therefore, the action was time barred.

Judge VanMeter wrote for the panel. Judges Combs and J. Lambert concurred.

COUNSEL: Scott R. Thomas and Justin Whittaker for Appellant. Kent W. Seifried for Appellee.

Opinions Not Designated for Publication

Bryson et al. v. The Alma D. Roberts Revocable Living Trust, 2015-CA-001710-MR (Ky. App. Jan. 13, 2017) (not to be published) (Wayne Circuit Court, Judge Vernon Miniard, Jr.): The Brysons appealed the Wayne Circuit Court's Order resolving a boundary dispute and accepting the opinion of Appellee's surveyor as to the boundary of certain real property in Wayne County and awarding Appellee treble damages after finding the Brysons intentionally harvested timber from property they did not own. The Court affirmed. Judge D. Lambert wrote for the panel. Judges Jones and Maze concurred. (James M. Frazer for Appellants. John T. Mandt for Appellee.)

Victory Community Bank v. Kenkel et al., 2015-CA-001657-MR (Ky. App. Jan. 13, 2017) (not to be published) (Kenton Circuit Court, Judge Gregory M. Bartlett): Victory Community Bank appealed a decision of the Kenton Circuit court permitting Kenkel to reopen foreclosure proceedings in order to add the bank, which was a judgment lienholder, as a defendant. The Court vacated and remanded, nothing that Victory's judgment liens were of record in Kenton County before the filing of a *lis pendens* notice in the county clerk's office and were readily discoverable before judgment was entered. Accordingly, the trial court erred in granting Kenkel's motion for extraordinary relief. Judge Combs wrote for the panel. Judges Stumbo and Thompson concurred. (Justin Whitaker for Appellant. Glenn E. Algie for Appellee.)

Stalker et al. v. Means et al., 2015-CA-001072-MR (Ky. App. Jan. 13, 2017) (not to be published) (Christian Circuit Court, Judge Andrew Self): Appellants appealed the Christian Circuit court's order determining the boundary line of two parcels of property based on the testimony of one party's surveyor. Appellants claimed that Appellees' survey was inaccurate because he failed to follow the established boundary hierarchy as established by case law. The Court affirmed. Judge VanMeter wrote for the panel. Judges Clayton and Stumbo concurred. (Harold M. Johns and Lora L Robey for Appellants. Stephen E. Underwood for Appellees.)

Stevens v. Peyton, 2015-CA-000761-MR (Ky. App. Jan. 13, 2017) (not to be published) (Hopkins Circuit Court, Judge James C. Brantley): Stevens appealed the Hopkins Circuit Court's order denying his petition to quiet title on a claimed parcel of property. On appeal, Stevens argued that the trial court erroneously quieted title in favor of Peyton under KRS 411.120, erred in failing to grant Stevens a jury trial on whether Peyton was estopped to deny Stevens' title, and in granting summary judgment to Peyton on the measure of damages to the timber. Stevens relied largely upon PVA records, his quitclaim deed from Island Creek Coal, and alleged deficiencies in Peyton's title and testimony of the surveyors. The Court affirmed, agreeing with the trial court that Stevens failed to satisfy his burden. Judge VanMeter wrote for the panel. Judges Clayton and Stumbo concurred. (William C. Prow for Apellant. William R. Thomas for Appellee.)

McClure et al. v. Bank of Jamestown et al., 2015-CA-000678-MR (Ky. App. Jan. 6, 2017) (not to be published) (Russell Circuit Court, Judge Vernon Miniard, Jr.): Appellants appealed from the Russell Circuit Court's order granting summary judgment in favor of Bank of Jamestown and ordering the sale of property for which the Bank held the note and mortgage. On appeal, Appellants argued that there was a genuine issue of material fact, the trial court should have applied the doctrine of equitable subrogation to reorder priority of the liens because they were innocent third-party purchasers and the Bank a "sophisticated lending institution" that had, at the least, constructive knowledge of Appellants' interest in the property, the trial court failed to address Appellants' claims for equitable relief based upon the Bank's actual knowledge and course of conduct, and the trial court failed to address the effect of a purchase of part of the property at the master commissioner's sale on an easement that existed for the entire de-

PROPERTY LAW

velopment. The Court affirmed. Judge Dixon wrote for the panel. Judges Nickell and VanMeter concurred. (Dawn Lynne McCauley for Appellant. Mark H. Flener and M. Gail Wilson for Appellee.)

Sullivan et al. v. McCown et al., 2015-CA-000981-MR (Ky. App. Jan. 6, 2017) (not to be published) (Pike Circuit Court, Special Judge Thomas M. Smith): The Sullivans appealed the Pike Circuit Court's entry of summary judgment dismissing their claims against the heirs of the Estate of Nickitie Flanary. The Sullivans argued on appeal that the trial court erred in finding that the Flanary heirs were not bound by the terms of a settlement agreement with a third party concerning title to property allegedly covered by a coal lease. The Court affirmed, holding that the Flanary heirs were not bound by the settlement, nor did the Sullivans sufficiently allege any liability to them out of the settlement. Judge Maze wrote for the panel. Judges Jones and Nickell concurred. (William H.B. Rich for Appellants. Lawrence R. Webster for Appellee Betty McCown. Billy R. Shelton for Appellees.)

TORT LAW

KENTUCKY COURT OF APPEALS

Opinions Designated for Publication

Louisville/Jefferson County Metro Government, 2015-CA-001238-MR (Ky. App. Jan. 27, 2017) (to be published) (Jefferson Circuit court, Judge Olu Stevens)

Louisville/Jefferson County Metro Government appealed the Jefferson Circuit Court's order denying its motion for declaratory judgment and granting declaratory judgment in favor of Appellees, John Lewis and the Estate of Don W. Braden. The Court vacated and remanded, holding that the trial court erred in its exclusive reliance upon Lewis's compliance with Louisville Metro Police Department Standard Operating Procedures and, at the time of the accident, Lewis was not operating within the scope of his employment for purposes of triggering Louisville Metro's statutory obligation to defend and indemnify him under Claims Against Local Government Act ("CALGA"). The Court reasoned as follows:

(1) "Immediately prior to the accident in this case, Officer Lewis was off- duty; he had run two personal errands, had his children in the vehicle with him, and was on his way home; he was not responding to a call for assistance; he did not have his lights and sirens activated; and his vehicle was unmarked. Officer Lewis was performing no realizable police action at the time of the accident. LMPD did not even benefit from the presumed crime deterrence that typically accompanies the visibility of a marked police vehicle. Applying these facts to the appropriate legal analysis, we must conclude that Officer Lewis was *not* 'acting in furtherance of the municipality's business and incident to the performance of his duties.'" While "[t]here is little question that LMPD derives some benefit from having its officers in or near their departmental vehicles, where they can monitor the radio and be ready to respond to calls for assistance, even while 'off the clock.' The Estate would have us conclude, almost exclusively from this single fact, that officers participating in the take-home car program are always acting within the scope of their employment and that municipalities are therefore liable for all actions taken by their officers, at all times, no matter how personal in nature the conduct and no matter how miniscule the benefit to the municipality. This cannot be the case, and it is not the law."

(2) Louisville Metro did not admit that Lewis was acting within the scope of his employment at the time of the accident by providing a defense for Lewis at the outset of the civil suit. "We refuse to hold that a local government's good-faith effort to comply with CALGA can compromise its own interests or prospects in such a way. A chilling effect would result from such a holding, causing local governments to hesitate or outright refuse to offer a defense for employees if there was any doubt whatsoever that the employee's conduct fell within the scope of his employment. This would place municipal employees in greater individual legal and financial peril, not less. Such an approach is therefore in direct conflict with the spirit and intent of CALGA."

Judge Maze wrote for the panel. Judges Clayton and Combs concurred.

Counsel: Edward H. Bartenstein, Patricia C. Le Meur, and William B. Oberson for Appellant. Jamie K. Neal, Kevin C. Burke, Alison Messex, and Don Meade for Appellees.

Jacobi v. Holbert, 2015-CA-001929-MR (Ky. App. Jan. 20, 2017) (to be published) (Hardin Circuit Court, Special Judge Ronnie C. Dortch)

Jacobi appealed the Hardin Circuit Court's order dismissing his complaint for professional negligence against F. Larry Holbert, an attorney with the Department of Public Advocacy who represented Jacobi in criminal proceedings instituted against him in Hardin County.

In his action against Holbert, Jacobi claimed that Holbert "failed to exercise the degree of care and skill expected of a

TORT LAW

reasonably competent attorney while representing him, contending that Holbert had failed to properly advise him with respect to probation and parole eligibility standards." Specifically, Jacobi claimed that "as a result of the misadvice or nonadvice, he had been incarcerated for years longer than he had expected when he opted to plead guilty." The trial court determined that Holbert as entitled to qualified official immunity from suit.

The Court affirmed, holding that Holbert, "as an employee of the DPA, is entitled to invoke immunity against Jacobi's claims. The DPA is an agency of state government, and its attorneys are employees of the Commonwealth." Holbert argued that "any analysis that concludes that Holbert was acting as a public employee necessarily renders him an agent of the prosecution – thus placing Holbert in a position of conflict with the interests of his client." The Court likewise rejected this argument:

> The Commonwealth has a profound and overriding interest in promoting justice. This ideal can be accomplished only where an indigent accused of a crime is provided independent legal counsel. It is the duty of the Commonwealth to insure that the Sixth Amendment guarantee of access to adequate counsel be upheld -- just as surely as it is the duty of the Commonwealth to prosecute wrongdoing. The dual roles and duties create no conflict -- inherent, implied or actual. The trial court did not err by concluding that Holbert is entitled to qualified official immunity from suit.

Judge Combs wrote for the panel. Judges Dixon and Nickell concurred.

COUNSEL: Hans G. Poppe for Appellant. Robert K. Bond for Appellee.

Grego v. Jenkins et al., 2015-CA-001142-MR (Ky. App. Jan. 13, 2017) (to be published) (Jefferson Circuit Court, Judge James M. Shake)

Grego appealed the Jefferson Circuit Court's entry of summary judgment in favor of Appellees. The trial court ruled that release forms signed by Grego's mother prior to departing for a church mission camp precluded her personal injury claim. Grego argued that the release forms were not enforceable because neither form expressly released Woodland Baptist Church for its own negligent conduct during Grego's participation in the camp, were broadly written, and the purported releases were buried in provisions unrelated to pre-injury releases, but instead related to medical treatment.

Applying the Supreme Court of Kentucky's ruling in *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005), the Court reversed and remanded:

> The releases do not mention "negligence" and do not explicitly release Woodland Baptist Church from liability for personal injuries caused by its own conduct. Furthermore, the releases could reasonably be construed to only release Woodland Baptist Church from vicarious liability in connection with any medical treatment rather than for its own conduct. Such a construction is particularly reasonable where, as here, the language relied upon by Woodland Baptist Church is included within the medical permission form and "buried" in small print within that provision. Finally, there is no specificity in the releases regarding the type of harm contemplated by the releases, and, in fact, they are broadly written to purport to cover all claims, past and future, from whatever source or of whatever nature.

Judge Thompson wrote for the panel. Judges Combs and VanMeter concurred.

COUNSEL: M. Catherine Halloran and William D. Nefzger for Appellant. Deborah L. Harrod for Appellees.

TORT LAW

Cales et al. v. Baptist Healthcare System, Inc., 2015-CA-001103-MR (Ky. App. Jan. 13, 2017) (to be published) (Fayette Circuit Court, Judge Pamela R. Goodwine)

Joyce and Jack Cales, appealed the Fayette Circuit Court's decision granting Baptist Healthcare's motion to dismiss on the basis that their product-liability claims were preempted by federal law. The lawsuit related to the off-label use of a bone morphogenetic protein combined with a Peek Capstone surgical fusion cage. The Fayette Circuit court held that, even if not preempted, the claims were precluded by Kentucky's "middleman" statute set forth in the Kentucky Product Liability Act. The trial court likewise held that Baptist had no duty to inform Joyce of the FDA regulatory status of a medical device used in her surgery.

The Court affirmed in part, reversed in part, and remanded:

(1) The trial court correctly concluded that the products liability claims were preempted by the federal Medical Device Amendments of 1976 ("MDA"). In rejecting Appellants' argument that their claim was against the healthcare provider, not the manufacturer, the Court emphasized that the "only logical reading" of the statute is that preemption does not depend on how the device is used. Rather, the statute specifically states "it preempts any requirement applicable to the device." Moreover, Appellants "mistakenly confuse the 'use' of a product with its 'design.'" The allegations in the complaint relate not to the design or delivery of the device, but its use by Baptist Healthcare.

(2) The medial negligence claims were not preempted by federal law. While "a healthcare provider is free to use medical devices off-label and such uses are not inherently unreasonable or dangerous, the physician is held to the common law medical practice standards." The Court disagreed with the trial court that Baptist did not owe a duty to Joyce. The "off-label use of a medical device and the need to inform a patient of that use is a question of fact." As the "reasonable individual" standard set forth in the implied consent statute, KRS 304.40-320, makes clear, the "materiality of the off-label use of a medical device or product is to be decided by the jury."

Judge Thompson wrote for the panel. Chief Judge Kramer concurred. Judge Nickell concurred by separate opinion.

COUNSEL: Gregory J. Bubalo, Kenneth L. Sales, Leslie M. Cronen, Gary C. Johnson, and Rhonda J. Blackburn for Appellants. Patricia C. Le Meur, Susan D. Phillips, and M. David Thompson for Appellee.

McCuiston v. Butler et al., 2015-CA-001061-MR (Ky. App. Jan. 6, 2017) (to be published) (Henderson Circuit Court, Judge Karen Lynn Wilson)

Jean McCuiston, administratrix of the estate of Joyce McCuiston, appealed the Henderson Circuit Court's order granting summary judgment in favor of William Butler and the City of Henderson, in this wrongful death case.

Joyce had called 911 to report a non-active theft. Butler was the 911 operator who answered the call. Joyce never requested medical assistance or reported any type of medical emergency. Joyce instructed Butler that when the responder arrived, she would "holler" and say "come in, the door's open." Joyce never gave her name. Butler never relayed this information to the responding officer. When the deputy arrived at the residence, she was not completely certain it was the correct residence because it was not numbered. The deputy knocked on the door and there was no answer. The deputy spoke with a neighbor, who informed her that Joyce owned the property but no one lived there all of the time. The neighbor also told the deputy that Joyce was a severe alcoholic, and "if she was awake, she was drunk" The neighbor further added that if Joyce had called 911, it was likely from a pay phone somewhere.

The deputy called the phone number given in the 911 call but the call was unanswered. The deputy then knocked on the back door of the residence very loudly, but got no response. The deputy contacted Butler and told him that no one answered the address and she had been advised by a neighbor that no one lived there. Butler relied on this information, and after several attempts to determine the caller's name and location, assumed he had misheard the address. Butler never told the deputy about Joyce's instructions at the end of the original 911 call. Three days later,

TORT LAW

Joyce was found dead at the residence.

The Henderson Police Chief recommended that Butler's employment be terminated. Butler appealed this determination to the Henderson Civil Service Commission. The Commission, after hearing evidence, found that Butler had violated several regulations, but recommended suspension without pay for six months instead of termination. Joyce's cause of death was later revealed to be natural causes brought about by a history of uncontrolled hypertension and chronic alcoholism.

The Estate filed a wrongful-death suit against Butler and the City of Henderson, arguing that Butler had no duty towards Joyce and his actions did not cause her death. Butler and Henderson also argued that even if Butler's actions were a substantial factor in causing her death, Butler was entitled to official immunity for his actions. The trial court granted the motion for summary judgment, and the Estate appealed.

On appeal, the Estate argued that the trial court abused its discretion in failing to acknowledge certain judicial admissions made by Henderson's outside counsel during the Commission hearing, equitable estoppel prohibited Henderson from denying liability, the trial court erred in not allowing the deposition of Henderson's outside counsel, and the trial court erred in concluding that Butler was entitled to qualified official immunity. Butler and Henderson, in turn, argued that the Estate failed to challenge the trial court's conclusion that the Estate had not established medical causation, the trial court properly held that Henderson's counsel's arguments at the Commission hearing did not constitute judicial admissions, equitable estoppel had no application in this case, and the trial court correctly decided that Butler was entitled to qualify official immunity.

The Court affirmed, holding that the public duty doctrine did not operate to establish a "special relationship" between Butler and Joyce. Here, Butler did nothing beyond his public job responsibilities that would create a "special relationship" with Joyce. Here, the Estate did not establish that Butler, outside his role as a 911 dispatcher, created a connection with Joyce and "repeatedly fostered the continuation of that relationship." Rather, Butler "performed his regular duties, took the call, and sent help in a non-emergency situation. Butler never created a 'special relationship' with [Joyce] where her death was uniquely foreseeable based on the connection with the 911 dispatcher." Based on this holding, the Court declined to address the remaining issues raised on appeal.

Judge Clayton wrote for the panel. Judges Stumbo and VanMeter concurred.

COUNSEL: Stephen M. Arnett for Appellant. Michael S. Maloney and Justin M. Schaefer for Appellees.

McCoy v. Family Dollar Store of Kentucky, Ltd. et al., 2015-CA-000926-MR (Ky. App. Jan. 6, 2017) (to be published)
(Martin Circuit Court, Judge John David Preston)

McCoy appealed the Martin Circuit Court's entry of summary judgment dismissing her premises liability case against Family Dollar Store and its landlord. McCoy sued for damages for injuries she sustained when she tripped on a wheel stop and fell in the parking lot of the Family Dollar store in Inez, Kentucky. McCoy claimed that Family Dollar had breached its duty to maintain the walkway surfaces in a safe manner and therefore caused her to be injured.

The trial court held and reasoned as follows:

> The Court's first duty, however, is to determine the duty owed to the business invitee. In the case at bar, the wheel stop was in its intended location, and was not damaged or defective in anyway [sic]. The Court takes judicial notice that there are wheel stops located at innumerable businesses throughout the Commonwealth of Kentucky. The Plaintiff in this case was not distracted by any emergency situation nor was she distracted by a conversation with any other person, nor was she faced

TORT LAW

> with a situation where the wheel stop was partially hidden or concealed. As the Court noted in *Shelton*, an open and obvious danger may not create an unreasonable risk and gave examples of a small pothole in a parking lot, steep stairs leading to a business, or a simple curb. Bearing all these factors in mind, the Court concludes as a matter of law that the wheel stop did not constitute an unreasonably dangerous condition so as to require the owner to eliminate or warn of it. Since there was no unreasonably dangerous condition, no further duty was imposed upon the Defendants, and they are entitled to summary judgment as a matter of law.

The Court affirmed, holding and reasoning as follows:

(1) The trial court did not err in failing to consider plaintiff's expert's testimony regarding standard practice for safe walking purposes, as the expert's report was not entered into the record and McCoy failed to seek additional time to obtain the expert's testimony or to file an affidavit or his report into the record. Accordingly, the opinion was not before either the circuit court or the Court of Appeals for review.

(2) The trial court correctly held that Family Dollar and its landlord did not breach their duty of care by the presence of the wheel stop in the parking lot. "The wheel stop was not defective or damaged, and it did not create an unreasonably dangerous condition necessitating the need to warn any invitees about, or correct, the condition. There was no evidence in the record that wheel stops were unreasonably dangerous, and McCoy failed to place into evidence any testimony, an affidavit, or even a report establishing this assertion."

Judge J. Lambert wrote for the panel. Judges Acree and Thompson concurred.

COUNSEL: Kyle R. Salyer for Appellant. Kimberly Van Der Heiden for Appellee Family Dollar Store of Kentucky. Jeffrey A. Taylor and Kyle W. Ray for Appellee R&J Development Co.

Turner et al. v. Ritchie et al., 2015-CA-000869-MR (Ky. App. Jan. 6, 2017) (to be published) (Breathitt Circuit Court, Judge Frank Allen Fletcher)

Arch Turner, David Napier, Michael Bowling, and Reggie Hamilton, officials of the Breathitt County school system, appealed the Breathitt Circuit Court's order denying their request for qualified official immunity in their individual capacities.

The lawsuit arose from an inappropriate sexual relationship between a student and a teacher. Ritchie, as next friend of the minor victim, filed a complaint in Breathitt Circuit Court, alleging claims of negligence, negligent hiring, training, supervision, and retention, violation of a special relationship, violation of the Restatement (Second) of Torts Section3 14A, negligent and intentional infliction of emotional distress, violation of Sections 1 – 3 of the Kentucky constitution, and breach of contract. Plaintiff demanded damages for past, present, and future mental and physical pain and suffering and embarrassment, consequential damages, a permanent impairment of her ability to earn money, medical and counseling costs, punitive damages, and attorney's fees, costs, and expenses.

In moving for summary judgment, the defendants argued that there were no prior allegations of sexual abuse of students by the teacher that would have placed any of them on notice. The defendants also argued that their actions in relation to the teacher's conduct was discretionary. The trial court denied the motion. On appeal, Appellants challenged the trial court's ruling on immunity and also raised a number of other arguments. The Court determined that only the immunity issue was properly before it, as the other arguments were not yet ripe for appeal.

The Court reversed and remanded, applying *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014), holding that Appellants "acts, or inactions, in this case were discretionary because they constituted a more general duty to supervise the students rather than a specific duty, such as being assigned to supervise the loading or unloading of the bus, the lunch-

TORT LAW

room, or the hallways." Further, these actions, or inactions, were done in good faith and within the scope of Appellants' authority. Accordingly, they were entitled to immunity in their individual capacities.

Judge J. Lambert wrote for the panel. Judges Acree and Thompson concurred.

COUNSEL: Jonathan C. Shaw for Appellants. J. Dale Gordon and Mary Lauren Melton for Appellees.

Opinions Not Designated for Publication

Fields et al. v. Baker, 2015-CA-001673-MR (Ky. App. Jan. 27, 2017) (not to be published) (Laurel Circuit Court, Judge Gregory A. Lay): Two grounds crew workers of the Laurel County Board of Education appealed the Laurel Circuit Court's determination that they were not entitled to qualified official immunity in this suit alleging that they failed to remove ice from a student parking lot. The Court reversed and remanded, agreeing with the trial court that the two workers' duties were ministerial, but that it was not within the scope of their duties to apply salt to the high school parking lot or remove ice from the lot. Judge Clayton wrote for the panel. Judges Acree and J. Lambert concurred. (Larry G. Bryson for Appellants. Liddell Vaughn for Appellee.)

Carney v. Galt et al., 2014-CA-001124-MR (Ky. App. Jan. 27, 2017) (modified Feb. 3, 2017) (not to be published) (Jefferson Circuit Court, Judge Angela McCormick Bisig): Carney appealed the Jefferson Circuit Court's order granting Galt and Nord's respective motions for summary judgment regarding Carney's premises liability and negligence claims. Carney was injured when he ran onto Defendants' property to retrieve a basketball. As Carney grabbed for the ball, he tripped on posts and 2x4s that were part of a fence construction and landed on a concrete driveway. At the time of the accident, Carney was a guest on property next door to the property owned by the defendants' home. The trial court concluded that Nord was the landlord and owner of the residence being leased to Galt and was not liable to Carney. The Court affirmed this conclusion, holding that upon surrendering complete control of the premises to Galt, Nord's duty as a landlord was to warn Galt of known latent defects at the time that Galt leased the premises. The trial court also concluded that Carney was a trespasser on Galt's property to on Galt's property and, further, the fence was an open and obvious condition. The Court reversed on this basis, holding that the open and obvious nature of the fence did not preclude liability, and Carney's status as a trespasser or licensee was a disputed fact that must be resolved by the trier of fact. Judge Taylor wrote for the panel. Judge Nickell concurred. Judge Acree concurred in a lengthy separate opinion, criticizing the Supreme Court's recent departure from traditional open-and-obvious jurisprudence. (Stephen W. Long and Dan Rudloff for Appellant. Michael S. Maloney and Blake V. Edwards for Appellee Rusty Galt. A. Campbell Ewen and William P. Carrell II for Appellee Julita Nord.)

Richardson v. Queen, 2015-CA-001585-MR (Ky. App. Jan. 20, 2017) (not to be published) (Jessamine Circuit Court, Judge C. Hunter Daugherty): Richardson appealed the Jessamine Circuit Court's order denying her motion for summary judgment on the basis of qualified governmental/official immunity. Richardson was sued after a child fell and his head on the gym floor while she was serving as a substitute teacher. The Court affirmed, holding that the trial court correctly denied immunity because "a teacher's duty to supervise students is ministerial, as it requires enforcement of known rules." Judge VanMeter wrote for the majority. Judge Jones concurred. Judge Acree concurred in the result only. (Suzanne Cassidy for Appellant. Cory Ann Finn for Appellee.)

Hughes v. Martin et al., 2015-CA-000968-MR (Ky. App. Jan. 20, 2017) (not to be published) (Kenton Circuit Court, Judge Gregory M. Bartlett): Hughes appealed the Kenton Circuit Court's judgment upon a jury verdict in favor of Martin and her liability carrier, GEICO Indemnity Company. The case arose from a car accident. On appeal, Hughes argued that he was prejudiced by errors and misconduct by Martin's counsel during trial, including improper comments or references to inadmissible evidence, and he was therefore entitled to a mistrial; Martin's counsel engaged in "frivolous and abusive" motion practice; Martin's counsel engaged in improper and harassing cross-examination; Hughes was entitled to direct verdict on liability; and the trial court erred in denying his post-trial motion for an evidentiary hearing based on alleged juror misconduct because of a prior relationship between Martin's counsel and

TORT LAW

a juror. Judge Maze wrote for the panel. Judges J. Lambert and Taylor concurred. The Court affirmed. (Jerry M. Miniard for Appellant. Robert B. Cetrulo for Appellees.)

Ries et al. v. Oliphant et al., 2011-CA-000100-MR (Ky. App. Jan. 20, 2017) (not to be published) (Jefferson Circuit Court, Judge Barry Willett): The Court considered whether the trial court committed reversible error in limiting the testimony of the plaintiffs' expert, who would have rebutted a defense expert's testimony concerning his mathematical formula timing the infant child party's in utero bleed. The Court reversed and remanded, holding that a defendant's failure to "seasonably disclose the new mathematical formula and timing opinions" of its expert undermined the plaintiffs' ability to prepare their case for trial. The trial court erred in refusing to allow plaintiffs' expert to rebut the defense expert's revised opinion on the basis that the expert disclosure deadline had passed. Judge Taylor wrote for the majority. Judge Stumbo concurred. Judge Clayton dissented. (Ann B. Oldfather and R. Sean Deskins for Appellants. Gerald R. Toner for Appellees.)

Yonts et al. v. Bux, 2016-CA-000017-MR (Ky. App. Jan. 13, 2017) (not to be published) (Boyle Circuit Court, Judge Darren W. Peckler): Yonts appealed the trial verdict and judgment of the Boyle Circuit Court reflecting a jury verdict in favor of Dr. Anjum Bux on Yonts's medical negligence claim. The jury determined that Dr. Bux did not fail to exercise a degree of care and skill expected of a reasonably competent physicial specializing in pain management. On appeal, Yonts argued that the trial court erred in failing to instruct the jury in terms of traditional negligence language by failing to include the duty of "prudence" rather than "competence" in the instructions. The Court affirmed. Judge Stumbo wrote for the panel. Judges Clayton and Maze concurred. (Charles C. Adams, Jr., for Appellants. Clayton L. Robinson and Jonathan D. Weber for Appellee.)

Nelson County Board of Education et al. v. Newton et al., 2015-CA-001292-MR (Ky. App. Jan. 13, 2017) (not to be published) (Nelson Circuit Court, Judge Charles C. Simms): Appellants, childcare providers and instructional assistants, the childcare coordinator for the Nelson County Board of Education, and director of a childcare facility operated by the Nelson County Board of Education appealed the Nelson Circuit Court's denial of summary judgment on the grounds that they were not entitled to qualified official immunity from negligence claims. The Court affirmed in part, vacated in part, and remanded, holding that the duties of childcare providers were not discretionary in nature, those Appellants were not entitled to qualified official immunity as a matter of law, but the director and childcare coordinator were entitled to qualified official immunity. Judge Combs wrote for the panel. Judges Clayton and Maze concurred. (Mark S. Fenzel for Appellant. John D. Hubbard for Appellee.)

Hurst v. Caldwell et al., 2015-CA-000786-MR (Ky. App. Jan. 13, 2017) (not to be published) (Mercer Circuit Court, Judge Robert G. Johnson): Hurst appealed the Mercer Circuit Court's order denying his motion to vacate an order granting summary judgment in favor of the City of Burgin and its police chief on his state-court negligence claims and federal claims for deprivation of constitutional rights under the color of state law under 42 U.S.C. § 1983. The basis of the claim was that the police chief's dispatch message contained false information and was transmitted negligently, leading another officer to pursue and shoot him. The Court affirmed, finding that the police chief owed Hurst no duty because there was no special relationship between Hurst and the police chief or City. The Court further declined to apply the state-created danger theory adopted by the Sixth Circuit, holding that the doctrine was inapplicable under this case. Judge VanMeter wrote for the panel. Judges Combs and J. Lambert concurred. (Andrew Horne for Appellant. Erica K. Mack for Appellees James Caldwell and City of Burgin. Christina L. Vessels, Barry M. Miller, and Casey C. Stansbury for Appellees Jason Eldridge and City of Harrodsburg.)

Russell v. Gundelly et al., 2014-CA-001756-MR (Ky. App. Jan. 13, 2017) (not to be published) (Fayette Circuit Court, Judge Thomas L. Clark): Russell appealed the Fayette Circuit Court's order granting summary judgment to Appellees on the basis that his claims of an alleged misdiagnosis of HIV were time barred under KRS 413.140. The Court affirmed. Judge J. Lambert wrote for the panel. Judges Combs and VanMeter concurred. (Kevan Morgan for Appellant. Donald P. Moloney, II, Andrew DeSimone, Jamie W. Dittert, William E. Thro, and Margaret M. Pisacano for Appellees.)

TORT LAW

Rabe v. Frohn, 2015-CA-001353-MR (Ky. App. Jan. 6, 2017) (not to be published) (Boone Circuit court, Judge Richard A. Brueggemann): Rabe appealed the Boone Circuit Court's order holding that his complaint against Frohn relating to faulty roofing work was barred by the applicable statute of limitations under KRS 413.246(1). On appeal, Rabe argued that when Frohn returned to fix the roof it constituted a second home inspection, thereby restarting the limitations period. The Court rejected this argument and affirmed. Judge Stumbo wrote for the panel. Judges Clayton and Maze concurred. (Thomas R. Nienaber for Appellant. R. Kim Vocke for Appellee.)

Hall v. Harreld et al., 2015-CA-001291-MR (Ky. App. Jan. 6, 2017) (not to be published) (Jefferson Circuit Court, Judge Mary M. Shaw): Hall appealed the Jefferson Circuit Court's order granting summary judgment in favor of Dr. Kevin Harreld and his physician group. The trial court entered summary judgment after finding that Hall had failed to offer expert testimony to support her negligence action. The Court affirmed. Judge D. Lambert wrote for the panel. Judges Jones and Maze concurred. (Katherine Hall, *Pro Se* Appellant. Clay M. Stevens and Kristen H. Fowler for Appellees.)

WILLS & ESTATES

KENTUCKY COURT OF APPEALS

Opinions Not Designated for Publication

Pike et al. v. Pike et al., 2015-CA-001118-MR (Ky. App. Jan. 20, 2017) (not to be published) (Meade Circuit Court, Judge Bruce T. Butler): Appellants appealed the circuit court's entry of summary judgment in favor of Appellees upon concluding that the entirety of the timber sales proceeds were, pursuant to agreement, required to be divided equally among seven children or their estates. The Court affirmed. Chief Judge Kramer wrote for the panel. Judges Dixon and Taylor concurred. (Jerry M. Coleman for Appellants. Kenton R. Smith for Appellees.)

Hansford et al. v. Stephens, 2015-CA-001724-MR (Ky. App. Jan. 13, 2017) (not to be published) (McCreary Circuit Court, Judge Paul K. Winchester): Appellants appealed a judgment following a trial in which the jury found that a purported will was not the will of the decedent. On appeal, Appellants argued that the trial court erred in holding a jury trial despite the lack of a jury trial demand, the trial court erred in admitting a voice recording into evidence, the trial court erred in admitting certain testimony, and the jury verdict should have been reversed due to juror misconduct. The Court affirmed. Judge VanMeter wrote for the panel. Judges Dixon and Nickell concurred. (Jessica A. Burke for Appellants. Andrew K. Long for Appellee.)

Wright v. Cornish et al., 2015-CA-001301-MR (Ky. App. Jan. 6, 2017) (not to be published) (Anderson Circuit Court, Judge Charles R. Hickman): In this will contest case, Wright, the deceased's biological sister, appealed the Anderson Circuit Court's order granting summary judgment in favor of Appellees, the deceased's former step-children (whose mother divorced the deceased five years earlier), upon determining that the estate passed to Appellees as contingent beneficiaries under a will executed by the deceased before he and Appellees' mother were divorced. Upon finding an ambiguity in the will, the Court vacated and remanded. Judge Combs wrote for the majority. Judge J. Lambert concurred. Judge VanMeter dissented. (William E. Johnson and William S. Middleton for Appellant. Bobbi Jo Lewis for Appellee.)

WORKERS' COMPENSATION

KENTUCKY COURT OF APPEALS

Opinions Not Designated for Publication

Uninsured Employers' Fund v. Burton et al., 2016-CA-000969-WC (Ky. App. Jan. 20, 2017) (not to be published) (Workers' Compensation Board): The Uninsured Employers' Fund appealed the Board's opinion reversing the ALJ's determination that Appellees were engaged in a joint venture and that they were, therefore, jointly and severally liable for the payment of workers' compensation benefits. The Court affirmed. Judge Combs wrote for the panel. Judges Stumbo and Thompson concurred. (Dennis M. Stutsman for Appellant. Jackson Watts for Appellee Charles Burton. W. Barry Lewis for Appellee O'Neill Dishon. Ronald J. Pohl for Appellee Tin Manufacturing.)

Anderson v. Rhino Energy, LLC et al., 2016-CA-000892-WC (Ky. App. Jan. 20, 2017) (not to be published) (Workers' Compensation Board): Anderson appealed the Workers' Compensation Board's order denying his claim for workers' compensation benefits for cumulative injury. On appeal, Anderson argued that the ALJ erred in finding that his medical expert's testimony was less credible than those of the employer based on objective findings or the failure to review the actual films of Anderson's imaging studies, the ALJ erred in concluding he had no cumulative trauma injury because he continued to work continuously until he was laid off, and he was not required to express object to the admissibility of expert opinions as to whether objective findings are required to find impairment or to expressly designate noncompliance as a contested issue in order to preserve these issues for appeal. The Court affirmed. Judge VanMeter wrote for the panel. Judges Acree and Jones concurred. (Sherry Brashear for Appellant. J. Gergory Allen and Terri Smith Walters for Appellee.)

Hopkins County Coal, LLC v. Morse et al., 2015-CA-001405-WC (Ky. App. Jan. 13, 2017) (not to be published) (Workers' Compensation Board): Hopkins County Coal appealed the ALJ's ruling awarding permanent total disability benefits to Morse relating to his hearing loss. On appeal, Hopkins County Coal argued that the Workers' Compensation Board erred in affirming the ALJ's conclusion that the issue of the hearing loss claim had been properly preserved for the ALJ's review and in affirming the ruling because the record lacked substantial evidence to support the finding. Judge D. Lambert wrote for the panel. Judges Maze and VanMeter concurred. (Brandy B. Hassman for Appellant. James (Chip) Adams II for Appellee.)

Plumley v. Kroger, Inc., 2016-WC-001031-WC (Ky. App. Jan. 13, 2017) (not to be published) (Workers' Compensation Board): Plumley appealed the Workers Compensation Board's decision affirming in part and reversing in part the ALJ's decision awarding him permanent partial disability benefits. On appeal, Plumley argued that the ALJ's decision was supported by substantial evidence as it related to the whole person impairment rating and, as an apparent issue of first impression, that multiple injuries to the same body part should be treated as a single cumulative trauma injury for the purpose of calculating the amount of the award under KRS 342.730(b). The Court affirmed. Judge D. Lambert wrote for the panel. Judges Jones and Taylor concurred. (Diana Beard Cowden for Appellant. Ronald J. Pohl and Brandon L. Rosen for Appellee.)

Ford Motor Company v. Turner et al., 2016-CA-001008-WC (Ky. App. Jan. 13, 2017) (not to be published) (Workers' Compensation Board): Ford Motor Company appealed the Workers' Compensation Board's decision affirming the ALJ's determination that Turner, who claimed to have suffered repetitive upper extremity injuries while employed with Ford, suffered a work-related injury, was entitled to temporary total disability benefits while on light duty, and had a 7% impairment. The Court affirmed in part, reversed in part, and remanded, remanding for consideration of the award of TTD benefits in light of *Trane Commercial Sys. v. Tipton*, 481 S.W.3d 800, 807 (Ky. 2016), regarding the propriety of TTD benefits while a worker is on light duty. Judge Combs wrote for the panel. Judges Stumbo and Thompson concurred. (George T. T. Kitchen, III, for Appellant. Ched Jennings for Appellee.)

James River Coal Service Co. v. Fields et al., 2016-CA-000643-WC (Ky. App. Jan. 13, 2017) (not to be published) (Workers' Compensation Board): James River Coal Service Co. appealed the ALJ and Workers' Compensation

WORKERS' COMPENSATION

Board's decision failing to give preclusive effect to a 1994 settlement agreement entered into by Jennings Fields and Ikerd & Bandy Coal Company for Fields' one-time retraining incentive benefit ("RIB") claim as a bar to his current claim. Under KRS 342.732(1)(a), workers diagnosed with certain low levels of occupational pneumoconiosis with little to no pulmonary impairment are entitled to a one-time RIB. The Court vacated and remanded because Fields previously received an RIB award in 1994. Judge VanMeter wrote for the panel. Judges Clayton and Stumbo concurred. (Morgan J. Fitzhugh for Appellant. McKinnley Morgan for Appellee.)

Kay Trucking v. Miller et al., 2016-CA-000088-WC (Ky. App. Jan. 13, 2017) (not to be published) (Workers' Compensation Board): Kay Trucking appealed the ALJ's opinion and order awarding workers' compensation benefits to Tom Miller relating to three injuries Miller allegedly sustained over the course of his employment, which the ALJ concluded rendered Miller permanently and totally disabled. The Workers' Compensation Board affirmed the ALJ. On appeal, Kay Trucking argued that the ALJ erroneously based Miller's award upon an independent medical evaluation that did not constitute substantial evidence. Alternatively, Kay Trucking argued that Miller was not entitled to benefits because he failed to give timely notice of his injuries. The Court affirmed. Chief Judge Kramer wrote for the panel. Judges Dixon and Taylor concurred. (David D. Black and Vanessa Rogers for Apepllant. No brief filed for Appellee.)

United Parcel Service v. Helms et al., 2015-CA-001728-WC (Ky. App. Jan. 13, 2017) (not to be published) (Workers' Compensation Board): United Parcel Service appealed the decision of the Workers' Compensation Board affirming the ALJ's amended opinion and order on remand and on reconsideration. On appeal, Ups argued that as a matter of law Carla Helms was not entitled to an award of temporary total disability benefits from the time she returned to work on August 15, 2012. The Court reversed. Judge J. Lambert wrote for the panel. Judges Taylor and Thompson concurred. (Christopher G. Newell and Kenneth J. Dietz for Appellant. James D. Howes for Appellee.)

ORAL ARGUMENT CALENDAR—FEBRUARY 2017

SUPREME COURT OF KENTUCKY

Thursday, February 9, 2017

9:00 AM

University of Kentucky et al. v. Carpenter et al., 2015-SC-000384-DG (Fayette Circuit Court, Judge Pamela Goodwine): 1) Whether the circuit court properly ordered separate trials for each of the female police officers; 2) whether the female police officers presented sufficient evidence of discrimination and retaliation to survive summary judgment or a directed verdict; and 3) whether the female police officers' supervisors are subject to individual liability under the Kentucky Whistleblower Act. The Court granted discretionary review on April 27, 2016. (Barbara A. Kriz and William Thro for Appellants. Robert L. Abell for Appellees).

10:00 AM

Talley v. Paisley, 2016-SC-000092-DG (Fayette Circuit Court, Judge Pamela Goodwine): The division of proceeds of sale of realty owned by an unmarried cohabiting couple in a joint tenancy with right of survivorship. The Court granted discretionary review on August 17, 2016. (Anita M. Britton and Amy C. Johnson for Appellant. Thomas W. Miller, Elizabeth C. Woodford, and Anna L. Dominick for Appellee).

11:00 AM

Jefferson, D.O. et al. v. Eggemeyer, 2015-SC-000625-DG (McCracken Circuit Court, Judge Craig Z. Clymer): 1) Whether the Court of Appeals erred in setting aside the trial court's denial of the motion for a new trial, claiming that the lower court abused its discretion due to a misunderstanding of the facts underlying the motion; 2) whether a party who requests and receives admonitions, but does not object to the form of the admonition nor asks for a mistrial, has preserved for appeal a challenge to the events which brought about the admonition; and 3) whether the trial court erred in levying sanctions against the defendant physician for conduct allegedly unrelated to the initial acts for which the trial court found him in contempt, arising out of the mistrial of the first trial. The Court granted discretionary review on March 9, 2016. (E. Frederick Straub Jr. and James R. Coltharp Jr. for Appellant. Hans G. Poppe Jr. and Warner T. Wheat for Appellee).

Friday, February 10, 2017

9:00 AM

Bd. of Trustees of Kentucky School Bds. Insur. Trust v. Pope, Jr., Deputy Rehabilitator of Kentucky School Bds. Insur. Trust Workers' Compensation Self-Insur. Fund et al., 2015-SC-000664-TG (Franklin Circuit Court, Judge Thomas D. Wingate): Whether the organization is entitled to a claim of governmental immunity regarding tort claims. The Court granted discretionary review on February 18, 2016. (Douglas L. McSwain, William C. Robertson, III, Sharon L. Gold, and Courtney R. Samford for Appellant. Perry M. Bentley, Todd S. Page, Paul C. Harnice, Justin D. Clark, Sarah J. Bishop, Barry L. Dunn, and Emily Warf for Appellee).

10:00 AM

Utility Management Group, LLC v. Pike Cty. Fiscal Court, 2015-SC-000680-DG (Pike Circuit Court, Judge John D. Caudill): Whether a private for-profit entity contracting for operational and management services with a public entity is a "public agency" for purposes of the Kentucky Open Records Act. The Court granted discretionary review on June 8, 2016. (Kevin C. Burke and Jamie K. Neal for Appellant. John D. Hays, David S. Kaplan, and Casey L. Hinkle for Appellee).

ORAL ARGUMENT CALENDAR—FEBRUARY 2017

11:00 AM

Collins et al. v. Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, 2015-SC-000675-DG (Letcher Circuit Court, Judge Samuel T. Wright III): Issues involve the scope of duty owed by the Transportation Cabinet Bureau of Highways in enforcing regulation regarding length and width of motor vehicles on a "non-designated" highway. The Court granted discretionary review on June 8, 2016. (Darrell Hall for Appellant. Bridget L. Dunaway and John Carter for Appellee).

KENTUCKY COURT OF APPEALS

Monday, February 13, 2017

Court of Appeals Courtroom, Frankfort

3:30 PM

Morgan v. Fischer, 2015-CA-001573-MR (Jefferson Circuit Court, Judge Mitchell Perry): Whether the trial court erred in holding that the Louisville Mayor had qualified immunity in suit for defamation. (Thomas McAdams III for Appellant. I. Frockt and J. Landrum Sr. for Appellee).

Tuesday, February 14, 2017

Court of Appeals Courtroom, Frankfort

9:00 AM

Cabot Turfway Ridge Defendants v. U.S. Bank National Assoc., as Trustee, Successor-in-, 2015-CA-001199-MR (Boone Circuit Court, James R. Schrand): Whether the trial court erred when it granted summary judgment and order of sale in favor of Appellees. (Brian Eviston and Christopher Katers for Appellant. Gregory Cross, Heather Foley, Denise McClelland, Michael Nitardy, and Griffin Sumner for Appellee).

9:45 AM

August Properties, LLC v. City of Burgin, 2012-CA-001570-MR (Mercer Circuit Court, Judge Darren W. Peckler): Whether the subject ordinance at issue is invalid as enacted and as applied to the Appellant. And, whether the trial court erred in not finding the subject ordinance to be arbitrary, unreasonable, and unenforceable and granting summary judgment in favor of Appellee. (Noel Botts for Appellant. Wanda Dry and J. Hensley for Appellee).

1:30 PM

Southwest Clark Neighborhood Assoc., Inc. v. Branham, 2015-CA-001654-MR (Clark Circuit Court, Judge William G. Clouse): Whether the rezoning action of the Clark County Fiscal Court was proper. (Thomas Fitzgerald, W. Graddy IV, Dorothy Rush, and Randal Strobo for Appellant. Thomas Nienaber, Brian Thomas, Henry Rosenthal Jr., and John Rompf Jr. for Appellees).

2:15 PM

Powers v. Keeneland Assoc., Inc., 2015-CA-001868-MR (Fayette Circuit Court, Judge Pamela R. Goodwine): Whether Appellant was an independent contractor or an employee of Appellee. (Joseph Rosenbaum and Jason Thompson for Appellant. Richard Griffith and Elizabeth Muyskens for Appellee).

ORAL ARGUMENT CALENDAR—FEBRUARY 2017

Wednesday, February 22, 2017

Kentucky Wesleyan College – Rogers Hall, Owensboro

10:30 AM

Robertson v. Westerfield National Insur. Co., 2016-CA-000477-MR (Metcalfe Circuit Court, John T. Alexander): Whether the circuit court erred by rendering summary judgment dismissing appellant's action for injuries suffered after being struck by an ATV. (Kurt Maier and Jon Roby for Appellant. Perry Adanick for Appellee).

1:30 PM

Dunavent v. Bradley, 2014-CA-001483-MR (Fayette Circuit Court, Pamela R. Goodwine): Whether the circuit court properly imposed a constructive trust upon certain real property. (Wesley Gersh and James Troutman for Appellant. Wayne Cook, Norbert Arrington, Richard Foley, and Jonathan Kurtz for Appellee).

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