

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

**I. APPEALS**

**A. Matthews v. Viking Energy Holdings, LLC**

[2010-CA-000048](#) 4/8/2011 2011 WL 1327434

Opinion by Judge Acree; Caperton and Clayton concurred. In an opinion and order the Court dismissed an appeal taken more than 30 days after entry of a judgment quieting title to a buried gas pipeline easement in favor of appellee. The Court held that appellants' failure to state even one ground to support their CR 59.05 motion rendered the motion incomplete and therefore, invalid under CR 7.02(1). Their failure to supplement the motion within the 10-day limit rendered the motion untimely or dilatory, and therefore, the circuit court lacked jurisdiction to entertain it. Because the untimely motion did not effectuate the tolling provision of CR 73.02(1)(e), the notice of appeal, filed more than 30 days after the judgment, was untimely.

**II. ARBITRATION**

**A. Kindred Nursing Centers Limited Partnership v. Brown**

[2010-CA-000286](#) 4/1/2011 2011 WL 1196760

Opinion by Judge Caperton; Judges Combs and Keller concurred. The Court affirmed an order of the circuit court denying appellants' motion to dismiss or, in the alternative, to stay an action, pending arbitration. The action was brought by a guardian for injuries her incapacitated son received while a patient in appellants' nursing home. The alternative dispute resolution agreement at issue was signed by the mother before she was appointed legal guardian for her son. The Court first held that while Kentucky law generally favors the enforcement of arbitration agreements, appellants had the burden of establishing the existence of an arbitration agreement that conformed to statutory requirements. The Court then held that the guardian was not estopped from denying her authority to execute the agreement, which she signed before she became the legal guardian of her son. Regardless of the guardian's prior actions, once appointed guardian, her actions were guided by her fiduciary duties. Appellants could not reasonably rely upon the mother's signature alone without an explanation of her legal authority to bind her son. Further, the mother's assertions as to what she needed to make decisions for her son was of little legal import when appellants accepted the ill-advised legal effect of the assertions. The Court also held that the guardian was not estopped from avoiding the agreement under the Federal Arbitration Act because the authority of the mother to sign it was a valid ground to revoke or defend. The Court next held that the trial court did not err in finding the absence of either actual or apparent authority by the mother to act on behalf of her son. The Court finally held that that the guardian could not ratify the execution of the ADR agreement by her post-guardianship conduct. Ratification or adoption of a prior agreement entered into by the mother for the son required ratification or adoption by the son. Because the son was incapable of taking any action, he could not be found to have adopted or ratified the agreement.

### III. ATTORNEY AND CLIENT

#### A. **Poindexter v. Commonwealth**

[2010-CA-000811](#) 4/15/2011 2011 WL 1434875

Opinion by Judge Dixon; Judge Caperton and Senior Judge Lambert concurred. The court affirmed an order of the circuit court finding the appellant attorney in contempt of court for failing to comply with a court order requiring him to appear at an arraignment. The Court held that the trial court did not abuse its discretion in exercising its contempt powers when the evidence established that appellant knew he had a conflict with the arraignment date at the time he filed his entry of appearance. When the court rejected an agreed order rescheduling the arraignment date, appellant was on notice he had been ordered to appear at the arraignment. He did not attempt to contact the court to explain the circumstances; instead, he filed a notice of non-representation the day before the court appearance. He did not file a motion requesting permission from the court to withdraw and he failed to appear for the arraignment in contravention of the court's order. The 29th Judicial Circuit Rules of Procedure clearly contemplated that withdrawal required permission from the Court and SCR 3.130 required an attorney to continue representation when ordered by a court.

### IV. ATTORNEY FEES

#### A. **Weinberg v. Gharai**

[2010-CA-001134](#) 4/15/2011 2011 WL 144186

Opinion by Judge Caperton; Chief Judge Taylor and Judge Wine concurred. The Court affirmed an opinion and order of the circuit court denying appellant's request for attorney fees and dismissing his attorney's lien in connection with his representation of appellee. The Court held that trial court did not err in denying the request for attorney fees. A settlement was reached in the underlying case after appellant attempted to renegotiate the contingency fee contract to prosecute an appeal and appellee hired new counsel to represent her on appeal. The contingency contract as drafted was clear that it did not provide for an additional retainer on appeal from a judgment and did not distinguish between a trial judgment or a summary judgment. Further, even if appellant's services under the contract were completed upon entry of the summary judgment, appellant knew or should have known that the attorney-client agreement provided that he only collected attorney fees if he settled or prevailed on the merits. Because no monies had been recovered when the lien for fees was filed, no contingency fees were owed. The Court also held that appellee did not waive her right to object to the attorney's lien when by not immediately objecting when the attorney's lien was filed because she timely filed a request for dismissal after appellant filed a motion for a hearing on the lien. The Court also held that appellee was not equitably estopped from objecting to the lien when a letter of agreement specifically provided that if the fee issue could not be settled, then either arbitration or a court order would be required to resolve it. The Court finally held that appellant was not entitled to a fee on the theory of *quantum meruit*. Appellant refused to honor the contract as it was written and insisted upon renegotiation of its terms.

Therefore, appellee had little choice but to retain new counsel to represent her on appeal.

## V. AUTOMOBILES

### A. **Hodgkiss-Warrick v. State Farm Mutual Automobile Insurance Company**

[2010-CA-000603](#) 4/8/2011 2011 WL 1327644

Opinion by Judge Caperton; Judges Thompson and Senior Judge Lambert concurred. The Court reversed and remanded a summary judgment in favor of the appellee automobile insurance company on appellant's claim seeking underinsured motorist coverage under both her policy and her husband's policy. The Court held that in light of the Kentucky Supreme Court's holdings in *Williams v. State Farm Mut. Auto. Ins. Co.*, 255 S.W.3d 913 (Ky. 2008), and *State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33 (Ky. 2004), public policy in Kentucky disfavored the application of the regular-use exclusion when the policy holder had no real control or ability to obtain greater liability coverage on the vehicle involved in the accident. As such, appellant was entitled to UIM coverage under her policy and the trial court erred in granting summary judgment to the insurer.

## VI. CONTRACTS

### A. **Davis v. Davis**

[2009-CA-002127](#) 4/01/2011 2011 WL 1196720

Opinion by Judge Lambert; Judges Nickell and Wine concurred. The Court affirmed a judgment of the circuit court in favor of the appellee business owners awarding them damages as well as several items of equipment from their blacktopping business. Appellees' claim sought damages from their son for taking business funds for his personal use, the son's failure to repay money advanced related to the purchase and construction of his home, and for interference with his parents' business. The son counter-claimed alleging he was a partner and/or had an ownership interest in the business and that he was entitled to a share of all revenue and income, as well as the equipment. The Court first held that the trial court did not err in awarding the appellees a judgment for the sums they paid for appellant's house and land. The Court extended the holding in *Rider v. Combs*, 256 S.W.2d 749 (Ky. 1953), to apply to cases involving real estate, and held that the trial court did not err in finding the existence of an implied contract requiring repayment of the amount appellees paid for appellant's real estate and for improvements to the real estate. The Court also held KRS 371.010(7) did not act to bar enforcement of the agreement when the parties would have contemplated performance of the contract within one year. Further KRS 371.010(8) or (9) did not bar enforcement because the agreement did not provide for the commission or compensation for the sale of real estate, nor did it provide for the establishment of a business enterprise. The Court also held that the trial court was not required to infer that the funds were intended as a gift from the parents to their son when the evidence established that the parents did not intend to make a gift and rebutted any presumption the funds were a gift. The Court next held that the trial court did not err in finding that appellant had no ownership interest in the parents' business or business equipment. While the father had discussed giving the company to the

son when he retired, the transfer never took place and there was no evidence to establish appellant was ever an owner or even a partial owner of the business, nor was there any record or legal title to establish appellant had any ownership interest in the equipment. The Court next held that the trial court did not err in awarding to appellees the amount appellant misappropriated from the business. While the record showed that appellant's personal expenses were generally paid with business funds, he was not an owner of the business, nor was he in a position to unilaterally keep payments, or portions thereof, made to the business. The Court finally held that the trial court did not err when it found that appellant tortiously interfered with business contracts and required him to repay the profit he received from the contracts. Even if he was not restricted by a covenant not to compete, he owed a duty of loyalty to appellees, which he breached when he used his knowledge of the business, as well as the business equipment and supplies to procure and complete contracts for his own separate company.

**B. Smith v. Bethlehem Sand & Gravel Company, LLC**

[2009-CA-000913](#) 4/22/2011 2011 WL 1515180

Opinion by Judge Moore; Chief Judge Taylor and Judge Wine concurred. The Court affirmed an order of the circuit court upholding a guaranty agreement and granting summary judgment to appellee on its action to collect the balance of a promissory note signed by the appellant president and chief executive officer on behalf of his company. The Court first held that the circuit court did not err when it upheld the validity of the guaranty agreement within the context of KRS 371.065. The guaranty agreement effectively referenced the instrument it guaranteed as required by the statute. There was no reason to subject the guaranty agreement to the requirement that it specify an effective termination date. The Court next held that the circuit court did not err in finding that appellant received consideration for the note when the guaranty agreement recited that it was designed to induce appellee to contract with appellant, it referenced the promissory note, and appellant signed both of the documents for exactly the same purpose. The Court then held that the circuit court correctly determined that appellee was not equitably estopped from enforcing the guaranty agreement when it chose not to participate in the company's bankruptcy proceedings. Under the clear terms of the guaranty, appellee had no duty to take action against the company in bankruptcy court or otherwise, nor could appellant rely on the proceedings to settle the outstanding claims. Further, appellant failed to show that he changed his position in reliance of an act or omission of appellee, which was a required element of equitable estoppel.

**VII. CRIMINAL LAW**

**A. Commonwealth v. Bushart**

[2010-CA-000290](#) 4/8/2011 2011 WL 1330366

Opinion by Judge Lambert; Judge Keller and Senior Judge Shake concurred. The Court reversed and remanded an order of the circuit court dismissing a reckless homicide indictment after finding that there was no probable cause to believe that appellee's shooting of the victim was not justified as self-defense. The Court held that the trial court committed palpable error when it considered an affidavit of the

defendant, serving to rebut the circumstantial evidence, when making its determination as to whether probable cause existed. Consideration of the affidavit, outside the police reports and interviews, resulted in a mini-trial, which was just the type of potential abuse prohibited by *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009).

**B. Commonwealth v. Garrison**

[2010-CA-000042](#) 4/15/2011 2011 WL 1434678

Opinion by Judge Nickell; Judge Clayton and Senior Judge Isaac concurred. The Court reversed and remanded an order granting appellee's motion to suppress evidence seized during his arrest and dismissing all charges against him. The Court first held that the authority to dismiss the criminal indictment rested solely with the Commonwealth and therefore, the trial court abused its discretion in unilaterally dismissing the charges. The Court then held that the trial court erred in granting the motion to suppress evidence seized after appellee's arrest. In reaching that conclusion, the Court held that under the totality of the circumstances, appellee was not under arrest at the moment he was placed in handcuffs during a dangerous felony stop to serve outstanding warrants on the passenger in the car appellee was driving. Appellee was seen leaving a residence known for illegal drug activity while accompanied by a wanted felon who was reputed to be armed and the police had a reasonable, articulable suspicion that criminal activity was afoot. Further, the slight intrusion was necessary for the safety of all parties as well as the general public, was reasonably related to the justification for the stop and was not unduly prolonged. The temporary detention was not tantamount to effectuating an arrest, even though appellee was placed in handcuffs. The Court also held that even if appellee's detention was unlawful, when the officers personally observed him operating the vehicle prior to the stop, observed him to be under the influence, and further investigation revealed he was impaired, they obtained the right to arrest him for DUI. Accompanying that right was the right to conduct a search incident to an arrest. The existence of probable cause to effectuate the arrest constituted an intervening circumstance that outweighed any possible misconduct or error on the part of the officers.

**C. Fegley v. Commonwealth**

[2009-CA-001898](#) 4/1/2011 2011 WL 1196472

Opinion by Judge Dixon; Judge Moore and Senior Judge Isaac concurred. The Court affirmed in part, and reversed and remanded in part, an order of the circuit court denying appellant's motion for post-conviction relief pursuant to RCr 11.42. The Court first held that the trial court did not err in finding that appellant was not denied effective assistance of counsel when trial counsel failed to object to the trial court's preemptive finding that a BB gun was a deadly weapon. While trial counsel could have made an argument for reversal of existing law at the time of trial, counsel's failure to anticipate a later change in the law did not equate to ineffective representation. The Court next held that counsels' performance fell below the objective standard of reasonableness and was so prejudicial as to deprive appellant of a reasonable result when counsel failed to object to improper testimony offered by a probation and parole officer during the sentencing phase of

trial that appellant's maximum possible sentence was 120 years when, in fact, under KRS 532.110(1)(c), it was only 70 years. Both *Robinson v. Commonwealth*, 181 S.W.3d 30 (Ky. 2005) and *Lawson v. Commonwealth*, 85 S.W.3d 571 (Ky. 2002), dictated that appellant was entitled to a new sentencing phase. Had trial counsel objected to the testimony and/or closing argument by the prosecution asking the jury to fix a mid-point sentence, the jury would have likely reached a different sentencing verdict.

**D. Frazier v. Commonwealth**

[2009-CA-000561](#) 4/22/2011 2011 WL 1515173

Opinion by Judge VanMeter; Judge Dixon concurred; Senior Judge Lambert dissented by separate opinion. The Court affirmed in part, reversed in part and remanded a final judgment and sentence of imprisonment whereby appellant was adjudged guilty of various offenses. The Court first held that the trial court did not err in denying appellant's motion to suppress evidence of the search of appellant's person and vehicle, the resulting seizure from those searches and the fruits of the search and seizures. In reaching that conclusion the Court first held that given that appellant failed to signal while making a turn and a passenger tossed a bag of trash from the vehicle, the stop of appellant's vehicle was appropriate. The Court next held that, under the totality of the circumstances, specifically appellant's nervousness and failure to answer simple, unobtrusive questions, the request that appellant exit the vehicle was neither unreasonable nor outside the scope of the stop. Further, given appellant's nervousness, failure to cooperate, failure to look the officers in the eyes and verbal belligerence once outside the vehicle, the trial court did not err in determining that the police appropriately ordered appellant from his vehicle and subsequently frisked him. The Court next held that although appellant had been arrested and placed in the police cruiser after the officers found marijuana as a result of the frisk, the fact that he was arrested for possession of marijuana was sufficient to establish the reasonable belief that additional evidence of that offense would be found in the vehicle - either more marijuana, additional drugs or drug paraphernalia. The Court also held that the trial court's finding that appellant was competent to stand trial was supported by substantial evidence and was not clearly erroneous. The fact that appellant belittled the prosecution and jury, while making a spectacle of himself and the judicial process, was a reflection of his decision to represent himself, more than a reflection on his competency. The Court finally held appellant was entitled to a directed verdict on the littering charge. There was no evidence that the litter thrown from appellant's car by a passenger was destructive or injurious, a requirement of KRS 512.070(1)(a) to create third-party liability. Because the jury instruction did not include this language, it was improper and therefore, the conviction and sentence must be reversed.

**E. Ingram v. Commonwealth**

[2010-CA-000463](#) 4/8/2011 2011 WL 1327629

Opinion by Judge Moore; Judge Combs and Senior Judge Isaac concurred. The Court reversed an order of the circuit court denying appellant's motion for jail-time credit for the total number of days he was incarcerated for a separate twelve-

month sentence for a misdemeanor conviction. The Court held that the circuit court erred when it denied appellant's motion for jail-time credit. When the circuit court revoked appellant's probation for the felony and ordered appellant to serve the resulting two-year sentence "concurrently with any sentence," appellant was a confined prisoner serving the misdemeanor sentence. Therefore, pursuant to KRS 197.035(2), the starting date of appellant's two-year sentence was the same as the starting date of his twelve-month sentence.

**F. Jackson v. Commonwealth**

[2009-CA-001611](#) 4/29/2011 2011 WL 1598719

Opinion by Judge Keller; Judges Caperton and Combs concurred. The Court affirmed a judgment convicting a father of first-degree sexual abuse of his daughter and a judgment convicting the child's mother of tampering with a witness. The Court first held that the trial court did not err when it denied the father's motion for a directed verdict of acquittal. The child's testimony and the testimony by a nurse were more than a scintilla of evidence and supported the trial court's determination that it was not unreasonable for a jury to find guilt. The Court next held that the trial court did not abuse its discretion in joining the father's and mother's trials. The evidence relevant to the tampering charge included the child's testimony at the adjudication hearing wherein she stated what her father did was an "accident" and that her mother told her it was an accident. It also included the child's testimony at trial wherein she stated that what her father did was not an accident. Because this evidence would have been admissible in both parents' trials had they been separated, the father could not show prejudice in joinder. The Court next held that pursuant to KRE 802, the trial court erred in admitting hearsay statements the child made to a nurse, identifying the father as the perpetrator, because they were not necessary to treat or diagnose the child. However, in light of the child's testimony, combined with all the other evidence presented, the error was harmless. The Court next held that the trial court did not err in failing to direct a verdict for the mother. Based on the child's testimony, it was not unreasonable for a jury to conclude that the mother knowingly made a false statement to the child. The Court next held that the testimony of a social worker and the children's foster mother about facts that occurred after the adjudication hearing were inadmissible under KRE 402 because it was irrelevant. However, the evidence was harmless in light of the other evidence. The Court also held that other testimony offered by the social worker and foster mother was irrelevant and the probative value was substantially outweighed by its prejudicial effect. However, because there was not a substantial possibility that the result of the trial would have been different, the unpreserved errors did not rise to the level of palpable error under RCr 10.26. The Court finally held that while under the law at the time appellants properly preserved the issue by making a motion to strike jurors for cause, the trial court did not abuse its discretion in refusing to remove three jurors - a juror whose granddaughter was sexually abused, a juror who attended church with the child, and a juror who worked with a peripheral witness - when they unequivocally stated they could fairly and impartially decide the case.

## VIII. EMPLOYMENT

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

[2010-CA-000292](#) 4/1/2011 2011 WL 1196779

Opinion by Judge Caperton; Judge Combs and Senior Judge Lambert concurred. The Court affirmed a summary judgment in favor of appellees on appellant's claim alleging hostile work environment, sexual harassment, constructive discharge and intentional infliction of emotional distress. The claim was brought after appellant resigned her employment with the Kentucky State Police and after her complaint was dismissed by the Kentucky Commission on Human Rights. The Court first held that the trial court properly concluded that appellees were entitled to summary judgment based on the doctrine of election of remedies. Appellant sought relief for the alleged violation of her civil rights from the KCHR and obtained a final determination, which she did not contest. Pursuant to KRS 344.270, the subsequent litigation in circuit court was barred. The Court also held that the trial court properly concluded that appellant failed to establish claims for sexual harassment, hostile work environment or IIED. Appellant's treatment was not severe or pervasive enough to satisfy the standards articulated in *Ammerman v. Board of Educ. of Nicholas County*, 30 S.W.3d 793 (Ky. 2000), to establish a claim for sexual harassment and hostile work environment. Further, the conduct did not rise to the level of outrageous conduct required by *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky. App. 2001), to establish a claim for IIED.

## IX. FAMILY LAW

### A. **Abdur-Rahman v. Peterson**

[2010-CA-001366](#) 4/29/2011 2011 WL 1598761

Opinion by Judge Caperton; Judge Combs concurred; Judge Keller concurred in part and dissented in part. The Court reversed and remanded a trial court order amending a domestic violence order to include the parties' minor child. The Court first held that the trial court did not abuse its discretion when it refused to hear the testimony of appellant's instructor at Batterer's Intervention. The testimony of appellant's attendance and conduct in class was irrelevant to his conduct out of class. The Court then held that the trial court did abuse its discretion in refusing to hear testimony from appellant's partner which would have been instrumental in appellant's attempt to establish the time of the injuries to the child to support his contention that the child returned from appellee's mother's house with the injuries. The Court further held that this error was not harmless. The Court then held that the trial court did not abuse its discretion in refusing to allow testimony regarding appellee's prior mental health history given the length of time that had passed and because there were no allegations of mental health issues concerning appellee's unfitness to parent after the birth of the child. The Court finally held that any error regarding the medical findings of burns to the child was harmless. While it was true that the trial court could not determine the degree of burns without medical proof, the ruling focused on appellant's lack of concern for the origin of the burns and his failure to seek medical treatment for what appeared to be severe burns.

**B. Foster v. Fortner**

[2010-CA-001010](#) 4/1/2011 2011 WL 1196885

Opinion by Judge Lambert; Judges Nickell and Wine concurred. The Court reversed a judgment of the circuit court registering a foreign order for child support arrearage against appellant and holding a prior judgment modifying child support entered in Kentucky to be void as a matter of law. The Court held that because the petition to register the foreign child support order/divorce decree was not filed until years after the Kentucky order modifying child support, the Kentucky court was free to modify the order, assuming it had jurisdiction otherwise to do so. The Court then held that pursuant to KRS 23A.110, the Kentucky court had subject matter jurisdiction over the matter and because appellee was served while she was in Kentucky, personal jurisdiction was established. The Court then held that appellee waived particular case jurisdiction by not challenging the order or contesting particular case jurisdiction at the time the motion to modify child support was filed. The Court finally held that appellant was impermissibly deprived of his property without due process of law when the arrearage the foreign court was asking Kentucky to enforce had not been reduced to any judgment found in the record.

**C. McMullin v. McMullin**

[2010-CA-000843](#) 4/22/2011 2011 WL 1515608

Opinion by Judge Wine; Judges Clayton and Combs concurred. The Court affirmed a post-dissolution qualified domestic relations order (QDRO), dividing appellant's pension benefits with his ex-wife. The Court first held the provision of the parties' settlement agreement dealing with the pension benefit was ambiguous as it was susceptible to more than one interpretation because the provision did not include whether the benefit was to be calculated from the date of the divorce decree or when the pension became payable. Therefore, it was necessary for the Court to determine the intent of the parties at the time of the divorce decree. The Court then held that because appellant intentionally introduced the ambiguity into the contract in order to secure appellee's assent, the provision could not be construed in his favor. Therefore, the trial court did not err in construing the contract as requiring the calculation to be made from the time of appellant's retirement. The Court finally held that while the trial court erred in applying the implied covenant of good faith and fair dealing when there was no allegation that appellant breached the contract, it was of little consequence because the provision was correctly construed against appellant on other grounds.

**X. PROPERTY**

**A. Waldrige v. Homeservices of Kentucky, Inc.**

[2010-CA-000264](#) 4/29/2011 2011 WL 1598738

Opinion by Judge Thompson; Senior Judge Lambert concurred; Judge Moore dissented by separate opinion. The Court reversed and remanded a summary judgment in favor of a real estate brokerage firm and its agent on appellants' claims that the firm and agent failed to disclose material conditions relating to the sale of residential property and breach of fiduciary duties allegedly owed to the appellants as buyers of the property. The Court first held that the claim was not

barred by the doctrine of *res judicata* arising from a prior administrative proceeding before the Kentucky Real Estate Commission (KREC). Because there was no litigation that would comport with due process of law at the KREC level, the order had no preclusive effect. The Court then held that while the firm and agent did not have a duty to inspect the property for defects, nor could they be held liable for negligent omissions or misrepresentations, as the seller's real estate agent, they owed a duty to the buyer to not commit fraud by either misrepresenting a material fact or failing to disclose a material fact of which they had actual knowledge and of which the buyers were unaware. The firm's agents had been involved in the sale of the property and may have had actual knowledge of the serious flooding, which caused damage to the home. Further, the sellers knew the house had flooded but failed to disclose the extent of the flooding and damage in the disclosure statement, which raised a question of fact as to whether the firm or agent knew the disclosure was false. Therefore, the trial court erred in granting summary judgment.

## **XI. TAXATION**

### **A. City of Bowling Green, Kentucky v. Hotels.com, L.P.**

[2010-CA-000825](#) 4/29/2011 2011 WL 1600505

Opinion by Judge Clayton; Judges Combs and Keller concurred. The Court affirmed an order of the circuit court dismissing the appellant city's case on its claim that several online travel companies were required, under KRS 91A.390(1), to pay a tax on accommodations for hotel rooms located in the city. The Court held that the enabling statute allowing counties within the Commonwealth to impose a transient room tax did not include online travel companies in the definition of those who have to pay transient taxes.

## **XII. TORTS**

### **A. Aesthetics in Jewelry, Inc. v. Estate of Robinson S. Brown, Jr.**

[2009-CA-002056](#) 4/8/2011 2011 WL 1327411

Opinion by Judge Caperton; Judges Combs and Keller concurred. The Court affirmed an order of the circuit court denying a motion for directed verdict in favor of an estate arising out of the sale of jewelry by appellants to the deceased. The Court also affirmed an order of the circuit court denying appellants' motion for attorney fees under the Kentucky Consumer Protection Act, KRS 367.220. The Court first held that the trial court did not err in denying the estate's motion for a directed verdict. There was no evidence that prior to the purchase of the jewelry, appellant intentionally or negligently made material representations to the deceased as to the value of the property. While there was evidence that appellant believed he could sell the jewelry to someone else for the amount paid and that he believed the MSRP to be \$1 million, and that he advised the deceased of these opinions, ultimately the figures were opinions that did not amount to material misrepresentations, which the estate was required to prove in bringing its claims. The Court then held that the trial court did not abuse its discretion in denying the motion for attorney fees. While the attorney fee-shifting provisions in KRS 367.220 gave the court the authority to award attorney fees to a prevailing defendant, the trial court considered the facts and evidence and made a

conclusion, well within its discretion, that the claim brought by the estate was not frivolous and was advanced in good faith and therefore, attorney fees were not warranted.

**B. Goodin v. White**

[2009-CA-002261](#) 4/15/2011 2011 WL 1434670

Opinion by Senior Judge Shake; Judges Lambert and Stumbo concurred. The Court affirmed a judgment of the circuit court entered upon a jury verdict in favor of a patient on her claims that her doctor was negligent and deviated from the standard of care in his treatment of her condition. The Court first held that the trial court did not err in denying the motion to admit a settlement agreement between the patient and the doctor's insurer as an unfair *Mary Carter* agreement that created bias. The insurer's continued presence at trial was not only because of the settlement agreement but also because the doctor never moved to dismiss his third-party action against the insurer. The record did not indicate that the patient or any of her witnesses changed their testimonies or made inconsistent statements after the settlement agreement was executed. Because the jury had been informed that the patient and insurer had settled, the jury was well aware of the position of the adversarial, as well as the non-adversarial parties. The Court next held that the patient and insurer did not receive additional preemptory strikes beyond those allowed by CR 47.03(1). The record indicated that although the patient and the insurer had discussed possible settlement, the settlement was not reduced to writing until jury selection was complete. Moreover, the parties' interests were not aligned, nor were they co-parties, and the doctor's indemnity claim proceeded against the insurer.

**C. O'Bannon v. Allen**

[2010-CA-000695](#) 4/1/2011 2011 WL 1196852

Opinion by Judge Keller; Judges Clayton and Senior Judge Isaac concurred. The Court affirmed a trial court order dismissing appellants' wrongful death action against a doctor. The Court held that the trial court correctly determined that the county in which a patient died after overdosing on medication was not the proper venue for the claim but rather, the proper venue was the county where the patient sought treatment. The patient's death was not the injury referred to in KRS 452.160(1). The statute describes venue as being where the injury was done, not where the damage was suffered. Further, pursuant to KRS 411.130, the entitlement to bring an action for wrongful death arises from the negligence or wrongful act of another inflicted on the decedent, not on the negligence or wrongful act inflicted on the estate or survivors of the decedent. The doctor's duty arose when the patient sought treatment and any breach of that duty occurred in the county where the patient sought treatment. Therefore, the injury was "done" in that county.

**D. Wilkerson v. Williams**

[2010-CA-000088](#) 2/18/2011 2011 WL 559218 Ord. Pub. by S.Ct.

Opinion by Senior Judge Isaac; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed an order of the circuit court denying appellants' motion for a

new trial on their claims that appellee had committed assault and negligent assault against appellant at a party hosted by appellee's father. The Court first held that appellants' designation of the order for a new trial as that from which the appeal was taken, as opposed to the final judgment dismissing the appeal, was harmless error. The Court then held that the trial court's exclusion of testimony that appellee was drinking moonshine at the party, finding that the testimony was more prejudicial than probative, was fully in accord with KRE 403. The Court next held that the trial court did not err in denying the motion for a new trial on the basis that the jury failed to follow the instructions. There was no indication that the jury agreed to be bound by a quotient verdict and appellants' speculation of what occurred in jury deliberations did not establish that the jury did not follow the instructions. The Court finally held that the trial court did not err in dismissing the father as a defendant. The Court declined to adopt social host liability to impose a duty on the father.

### **XIII. WORKERS' COMPENSATION**

#### **A. Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano**

[2010-CA-000663](#) 4/29/2011 2011 WL 1648262

Opinion by Senior Judge Lambert; Judges Clayton and Combs concurred. The Court affirmed a decision of the Workers' Compensation Board affirming an ALJ's determination that a worker sustained compensable work-related injuries in an automobile accident during the course of his employment with a horse farm. The Court first held that the ALJ and Board correctly relied on the "dual purpose" doctrine in support of their conclusion that the worker's injuries were compensable. The trip in question clearly qualified as a business trip because the employer acknowledged that if this worker had not traveled to New York, the employer would have sent another employee in a horse van to watch the horses during the trip. Even if the worker had already made arrangements to go to New York well before requesting or being offered the ride by appellant, the employer asked the worker to travel in the horse van with the farm's horses to care for them on their way to New York and paid him for his efforts. Further, the worker showed the farm's horses at the sale in New York, thereby conveying an obvious economic benefit to the employer. The Court also held that the ALJ and the Board correctly relied on the "positional risk" rule and the "traveling employee" exception to the "going and coming" rule to determine that the workers' injuries arose out of were in the course of employment. Even though the worker stayed in New York and worked for the sales, he was injured while traveling back to resume his work at the horse farm in Kentucky. Therefore, even if the work for the sales could be considered a personal errand and a deviation for personal purposes, the deviation would not embody an intent to abandon the work-connected travel home. When the deviation was terminated and travel home was resumed, the coverage resumed.

#### **B. UPS Airlines v. West**

[2010-CA-001433](#) 4/22/2011 2011 WL 1549289

Opinion by Judge Wine; Judge VanMeter and Senior Judge Shake concurred. The Court affirmed an order of the Workers' Compensation Board reversing an

opinion and award of the ALJ granting the employer a credit, representing an offset against the amount of temporary total disability (TTD) benefits, after finding that a “Loss of License” benefit plan was exclusively employer-funded. The Court held that the Board correctly found that the benefit, which under its terms entitled a pilot, who had been off work and unable to use his FAA certificate to fly for a period of six months, a percentage of pay for up to twenty-four months, was employer funded. In a case of first impression, the Court held that benefits received pursuant to a collective bargaining agreement were not exclusively employer-funded under the terms of KRS 342.730(6). Therefore, the employer was not entitled to an offset against the TTD benefits.