

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
APRIL 01, 2021 to APRIL 30, 2021**

I. BUSINESS ORGANIZATIONS

A. *KENNETH D. PARRISH DMD, PH.D., P.S.C., ET. AL. VS. ROBERT SCHROERING DMD, ET. AL.*

[2019-CA-0634](#), [2019-CA-0692](#) 04/16/2021 2021 WL 1431604

Opinion by CLAYTON, DENISE G.; GOODWINE, J. (CONCURS) AND KRAMER, J. (CONCURS)

This dispute concerns the buyout price to be paid to a retiring partner by the remaining partner for his share in a dental implant practice. The buyout provisions of their partnership agreement provided for the price to be based on the average of the closest two of three expert appraisals. When the appraisals were performed, the average of the two closest appraisals, which both used an asset approach to valuation, resulted in a negative value. The third appraisal, which used an income approach, valued the retiring partner's share of the practice at \$1.207 million. The retiring partner had already brought suit against the remaining partner, raising multiple claims including fraud, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, breach of contract, defamation, unjust enrichment and damage to property. He later sought to set aside the appraisals. The litigation culminated in a jury finding that the two closest appraisers arrived at their conclusions due to a demonstrable mistake of fact. The jury awarded the retiring partner \$767,000 and the trial court awarded him attorney's fees and costs. The remaining partner appealed on the grounds that the partnership agreement had set forth an unambiguous method for valuing the practice and the appraisals could not be set aside simply because of disagreement over their professional methodology. The retiring partner cross-appealed, arguing that the trial court erred in granting a directed verdict on his claims of breach of good faith and fair dealing and breach of fiduciary duty.

This Court addressed the proper standard for judicial review of a contractually-mandated appraisal. Relying on prior case law from Kentucky and other jurisdictions, as well as the principle of judicial deference to contractual agreements, the Court stated that such an appraisal cannot be set aside unless there is a showing of fraud, bad faith, arbitrariness, a demonstrable mistake of fact, a lack of understanding or completion of the contractually assigned task, or a combination of these factors. The Court held that in this case, there was insufficient evidence that the two closest appraisers committed a demonstrable mistake of fact that warranted setting aside their appraisals. Their asset-based approach was based on their professional judgment regarding the valuation of this type of dental practice, not on a misinterpretation of the partnership agreement or other material mistake. The Court also held that the retiring partner was not entitled to any further payments of a monthly share of the practice proceeds under the terms of the

agreement. As to the cross-appeal, the Court held that the trial court did not err in granting a directed verdict on the retiring partner's other claims. The final judgment was reversed, and the case was remanded for the trial court to average the appraisals in accordance with the agreement and to reconsider the award of attorney's fees and costs to the retiring partner.

II. CIVIL PROCEDURE

A. WILLIAM LANE ET. AL. VS. LAURA LEWIS MAZE ET. AL.

[2019-CA-1181](#) 04/16/2021 2021 WL 1431860

Opinion by GOODWINE, PAMELA R; KRAMER, J. (CONCURS) AND MAZE, J. (CONCURS)

Judge Laura Lewis Maze ("Judge Maze") was indicted on two counts of second-degree forgery and one count of tampering with public records. During the criminal proceedings, Judge Maze served subpoenas *duces tecum* on Appellants, all of whom were non-parties to the criminal action, demanding production of all Appellants' text messages from various dates. Appellants moved to quash the subpoenas, arguing that Judge Maze had not met the requirements for subpoenas *duces tecum* in a criminal case and that the subpoenas were overly broad. The Bath Circuit Court ordered the cell phone service providers to produce the subpoenaed text message records for *in camera* review. This appeal followed. The Court of Appeals vacated the order, holding that the subpoenas failed the four-part test articulated in *Commonwealth v. House*, 295 S.W.3d 825, 828 (Ky. 2009) and were "unreasonable" under Kentucky Rules of Criminal Procedure (RCr) 7.02(3). Judge Maze argued that an inspection of the Appellants' text messages were necessary because they would show motivation, bias, and a conspiracy to remove her from office. However, the Court held that because Judge Maze had presented no evidence to show the Appellants ever sent text messages to each other in furtherance of such a conspiracy, the subpoenas failed the "fishing expedition" test of *House*. Moreover, the Court held that the subpoenas failed the "relevancy" prong of *House*, because Judge Maze voluntarily retired from her position.

B. RHONDA MILLER VS. JAMES CODY ARMSTRONG

[2019-CA-1435](#) 04/09/2021 2021 WL 1324398

Opinion by ACREE, GLENN E.; MCNEILL, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

In Hardin Circuit Court, Appellant, Rhonda Miller, pursued status as a *de facto* custodian. The circuit court denied Miller's motion for *de facto* custodian status. Miller appealed. On appeal, Appellee, James Cody Armstrong, moved the Court to strike the Appellant's brief for failure to cite to the video tape record in compliance with the Kentucky Rules of Civil Procedure. Rather than attaching the video recording of the

proceedings below to the record on appeal, Miller appended a transcription of the video record drafted by her own stenographer. The Court of Appeals granted Armstrong's motion to strike Miller's brief and dismissed the appeal.

III. CRIMINAL LAW

A. **TERVANDA TOBIN VS. COMMONWEALTH OF KENTUCKY**

[2019-CA-0606](#) 04/23/2021 2021 WL 1583825

Opinion by JONES, ALLISON E.; CALDWELL, J. (CONCURS) AND KRAMER, J. (CONCURS)

Tervanda Tobin sought discretionary review of the Jefferson Circuit Court's opinion and order denying her motion to withdraw her guilty plea. Tobin was charged with failure to maintain insurance and was arraigned by the district court in a group colloquy setting. At the arraignment, the district court entered a plea of not guilty for Tobin. Later, Tobin appeared again in district court to enter a plea of guilty that she negotiated with the Commonwealth, which the district court accepted. On appeal, Tobin argued the district court erred by failing to ensure she knowingly and voluntarily waived her fundamental right to counsel. The Court of Appeals reversed and remanded the decision of the Jefferson Circuit Court, finding that there was no evidence in the record that Tobin knowingly and voluntarily waived her Sixth Amendment right to counsel at her arraignment, when she executed her guilty plea form, or when she entered her plea in open court.

B. **JAMES HENRY BERRY VS. COMMONWEALTH OF KENTUCKY**

[2020-CA-0767](#) 04/02/2021 2021 WL 1230187

Opinion by DIXON, DONNA L.; KRAMER, J. (CONCURS) AND MCNEILL, J. (CONCURS)

Appellant challenges denial of his fifth CR 60.02 motion seeking relief from 1987 convictions of murder and being a persistent felony offender in the first degree. Affirming, the Court held the claims were barred as successive. Further, having determined that Appellant filed repetitious and frivolous claims, the circuit court was instructed to deny any future requests by Appellant to proceed in forma pauperis on collateral attacks of this conviction.

C. **COMMONWEALTH OF KENTUCKY VS. JACOBI WILSON**

[2020-CA-1130](#) 04/30/2021 2021 WL 1704389

Opinion by GOODWINE, PAMELA R.; JONES, J. (CONCURS) AND KRAMER, J. (CONCURS)

The Commonwealth appeals from an order granting a motion to suppress evidence seized from a warrantless search and seizure of Jacobi Wilson. While on patrol, officers observed Wilson riding a bicycle on a public sidewalk in violation of a city ordinance and, after seizing him, discovered a firearm on his person. On appeal, the Commonwealth argues a warrant was not required to arrest Wilson under KRS 431.005(1)(d) because he fled or evaded the police, a misdemeanor under KRS 520.100(1)(a). In affirming the trial court order, the Court of Appeals concluded Wilson's violation of a city ordinance was not a crime under the Kentucky Penal Code. The Court further held the Commonwealth failed to prove Wilson fled or evaded the police because the officers knew only of Wilson's violation of the city ordinance when they pursued him and, on this basis, did not have an articulable reasonable suspicion that Wilson had committed a crime. The Court also declined to address the merits of the Commonwealth's argument regarding the trial court's findings of fact where the argument was devoid of citations to the record.

IV. FAMILY LAW

A. **THOMAS J. TUCKER VS. CINDY TUCKER AS ADMINISTRATRIX OF THE ESTATE OF JOHN KEVIN TUCKER, ET. AL.**

[2019-CA-1692](#) 04/16/2021 2021 WL 1432267

Opinion by JONES, ALLISON E.; ACREE, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

John and Patricia Tucker married in 1986. Thomas was born months later. John and Patricia separated in 1989. In 1991, Patricia sought assistance from the Wayne County Attorney with respect to child support to Thomas, who thereafter filed a support action against John. John was ordered to submit to DNA testing. The results conclusively determined John was not Thomas's father. The child support action was dismissed on grounds that John was not Thomas's father. In the judgment of marriage dissolution, there was a statement that said blood tests revealed that John was not Thomas's father. After the divorce, John remained active in Thomas's life, even during John's period of incarceration. Thomas believed John to be his biological father. Thomas did not learn the true facts until he reached majority, but before John passed. After John passed away, Thomas a complaint in Wayne Circuit Court alleging he was entitled to be treated as John's natural child for purposes of intestacy, or alternatively, an adoption by estoppel was created where John held himself out as Thomas's father. His complaint was dismissed on *res judicata* principles. If the issue of paternity is litigated and determined as an element of an action for support, the *res judicata* as to other legal rights which exist by virtue of paternity. *Ellis v. Ellis*, 752 S.W.2d 781, 782 (Ky. 1988). John's paternity was litigated as part of the paternity action and the circuit court expressly stated John was precluded from being Thomas's father. The right of adoption exists only by statute and there must be strict compliance. There was never a judgment of adoption in this case. Kentucky courts cannot recognize an adoption based on

conduct alone for purposes of inheritance where a statute specifically requires entry of a judgment of adoption. Moreover, Thomas learned of his paternity after he reached majority, while John was still alive. Both parties were aware that John was not Thomas's natural father, and John did not adopt Thomas and secure his inheritance rights. KRS 405.390. The Wayne Circuit Court is affirmed.

V. GOVERNMENTAL IMMUNITY

A. COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES VS. K. T., A CHILD, ET. AL.

[2020-CA-1336](#), [2020-CA-1342](#), [2020-CA-1343](#) 04/23/2021 2021 WL 1583814

Opinion by MAZE, IRV; CLAYTON, C.J. (CONCURS) AND DIXON, J. (CONCURS)

In June 2020, the Cabinet filed dependency/neglect/abuse (D/N/A) petitions against Mother after receiving a report that she left her three children unattended in a vehicle. The family court granted the petitions and placed the children in the Cabinet's temporary custody. The Cabinet placed the children with a paternal aunt. Shortly thereafter, the aunt notified the Cabinet that the children were with Father, and that Father and Mother had taken the children to Florida. The Cabinet notified Florida Child Protective Services but did not immediately notify the family court or the guardian ad litem (GAL) of the situation. At a status hearing the following week, the family court ordered the Cabinet to return the children to Kentucky within twenty-four hours. However, the Cabinet did not comply with the order for several more weeks. In the interim, the GAL filed new D/N/A petitions on behalf of the children against the Cabinet. The Bullitt County Attorney intervened to join the GAL's petitions. The Cabinet moved to dismiss the petitions based on the doctrine of governmental immunity. The family court denied the motion, concluding that the Cabinet was not immune from the filing of a D/N/A petition against it.

On interlocutory appeal, the Court of Appeals affirmed. The Court agreed that the Cabinet is shielded by governmental immunity. However, that immunity does not bar an action against the state or its agencies when the remedy sought does not involve the use of public funds. Furthermore, KRS 620.070 authorizes the filing of a D/N/A petition against "the parent or other person exercising custodial control or supervision"... Based on the definitions of the applicable terms in KRS 600.020, the Court held that the Cabinet is "an agency that has assumed the role and responsibility for care and custody of a child." Accordingly, the Court concluded that legislature has authorized the filing of a D/N/A petition against the Cabinet, and consequently, the Cabinet was not entitled to assert governmental immunity.

VI. LABOR LAW

A. **RIVER CITY FRATERNAL ORDER OF POLICE LODGE NO. 614, INC. VS. LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, ET. AL.**

[2020-CA-0266](#) 04/09/2021 2021 WL 1324371

Opinion by KRAMER, JOY A.; MAZE (CONCURS AND FILES SEPARATE OPINION) AND CALDWELL (DISSENTS)

The principal issue in this case is whether the Louisville Metro Police Department (“LMPD”) committed an unfair labor practice by requiring one of its employees to submit to an investigative interview from LMPD’s Professional Standards Unit (“PSU”). In January of 2017, an LMPD lieutenant submitted a “hostile working environment” complaint, purportedly on behalf of an LMPD sergeant. As part of its investigation, the PSU sought to interview another LMPD sergeant, who was a member of the River City Fraternal Order of Police, Lodge No. 614, Inc. (“FOP”). The FOP filed a “charge of unfair labor practice” with the Kentucky Labor Cabinet, arguing that LMPD’s requiring the sergeant to submit to the interview with the PSU required him to divulge information protected by the “union business” privilege. Both the Cabinet and the Jefferson Circuit Court held that LMPD did not commit an unfair labor practice. In affirming, the Court of Appeals held that the Kentucky Supreme Court has promulgated no rule recognizing a “union business” privilege in Kentucky, and the Court declined to infer such a privilege in this case. Moreover, the Court held that even if Kentucky did recognize a “union business” privilege, such a privilege belongs to an employee, not to a union or its representative. Judge Maze concurred and filed a separate opinion. Judge Caldwell dissented and filed a separate opinion.

VII. PROPERTY

A. **AUGUST PROPERTIES, LLC VS. COMMONWEALTH OF KENTUCKY, TRANSPORTATION CABINET**

[2019-CA-0298](#) 04/30/2021 2021 WL 1706711

Opinion by MAZE, IRV; ACREE, J. (CONCURS) AND COMBS, J. (CONCURS)

August Properties owns parcel of land upon which it operates an office and shopping plaza and a self-storage facility. August Properties filed a complaint against the Kentucky Transportation Cabinet, alleging: (1) a left-turn lane on a public road adjacent to the property backs up and restricts customers from entry to and exit from the property, (2) the Cabinet improperly installed a storm drain near the property, causing ponding of water and creating a danger to motorists and an impediment to customers of business on the property, and (3) an inverse condemnation claim against the Cabinet for placing improvements upon August Properties’ right-of-way for which it was never compensated. The Scott Circuit Court granted summary judgment in favor of Cabinet

on each claim, finding that the Cabinet did not have a duty to abate the occasional ponding of water that impedes access to the property, and that August Properties' inverse condemnation claim is precluded because it failed to identify a statute, regulation, or common law imposing a duty on the Cabinet to prevent traffic backup. August Properties appealed. The Court of Appeals affirmed the findings of the Scott Circuit Court.

**B. COMMONWEALTH OF KENTUCKY TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS VS. PTL WAREHOUSING, LLC, ET. AL.**

[2019-CA-0388](#) 04/02/2021 2021 WL 1229762

Opinion by THOMPSON, KELLY; ACREE, J. (CONCURS) AND LAMBERT, J. (CONCURS)

The Kentucky Transportation Cabinet ("Transportation Cabinet") filed a petition to condemn property owned by PTL Warehousing, LLC. In a jury trial for a determination of compensation owed to PTL Warehousing for the taking of its property, the Transportation Cabinet requested that the jury view the subject land, pursuant to Kentucky Revised Statutes (KRS) 416.620(1). The Logan Circuit Court denied the Transportation Cabinet's request, and the Transportation Cabinet appealed. The Court of Appeals reversed and remanded the decision of the Logan Circuit Court, holding that KRS 416.620(1) mandates that when a party requests that the jury be allowed to view the subject property in a condemnation, the trial court must grant the request, absent a common law exception. Further, the Court found that because none of the narrow grounds of exception to the statutory mandate applied here, reversal was required.

**C. JOEL D. HOUSE, ET AL VS. DEUTSCHE BANK NATIONAL TRUST AS
TRUSTEE FOR WAMU SERIES 2007-HE1 TRUST**

[2019-CA-1007](#) 04/16/2021 2021 WL 1432656

Opinion by TAYLOR, JEFF S.; CLAYTON, C.J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

This is a residential foreclosure action concerning the enforcement of a promissory note where the original has been lost. In 2006, Joel D. House executed a promissory note in favor of Washington Mutual Bank ("Washington Mutual"), secured by a mortgage on real property owned he and his wife, Monica House (the "Houses"). In December of 2007 and May of 2008, respectively, Deutsche Bank National Trust ("Deutsche Bank") obtained from Washington Mutual the promissory note by transfer and the mortgage by assignment, but Washington Mutual, as agent for Deutsche Bank, retained possession of the promissory note. In October of 2008, Chase Bank acquired all loans and loan commitments from Washington Mutual. Later, Deutsche Bank filed a foreclosure action, claiming that the Houses had defaulted on the promissory note by failing to make the required monthly payments. The Houses responded by claiming that Deutsche Bank

could not enforce the promissory note because it had not produced the original note. Further, the Houses contended that Chase Bank held the originally promissory note and was solely entitled to enforce it. Deutsche Bank filed a motion for summary judgment and an order of sale, admitting that the original promissory note was lost, but claiming that it was entitled to enforce the note under Kentucky Revised Statutes (KRS) 355.3-309. The matter was referred to the master commissioner, who recommended that the motion, and order of sale be denied because Deutsche Bank failed to satisfy KRS 355.3-309 which sets forth the requirements to enforce a lost promissory note. The circuit court denied Deutsche Bank's motion, and Deutsche Bank subsequently filed another motion for summary judgment and order of sale. The master commissioner ultimately recommended that Deutsche Bank's motion for summary judgment and order of sale be granted. The Jefferson Circuit Court granted summary judgment in favor of Deutsche Bank and the Houses appealed. The Court of Appeals affirmed.

D. STUART WAYNE WRIGHT VS. FRANK L. MILLER

[2020-CA-0152](#) 04/02/2021 2021 WL 1230183

Opinion by CLAYTON, DENISE G.; GOODWINE, J. (CONCURS) AND KRAMER, J. (CONCURS)

This case involves the ownership of a manufactured home located on real property owned by Appellant, Stuart Wayne Wright. Appellee, Frank L. Miller, had title to the manufactured home, but Wright claimed the manufactured home was affixed to his real property and, thus, he owned it. Wright brought an action to quiet title to the manufactured home. After answering discovery, Miller moved for summary judgment, arguing the manufactured home remained personal property until converted into real property using the statutory procedure set forth in Kentucky Revised Statutes (KRS) 186A.297. The circuit court granted summary judgment to Miller, holding that Wright had not produced any evidence that the previous owner of the manufactured home executed and filed an affidavit of conversion to real estate with the county clerk as set forth in KRS 186A.297(1). Therefore, the manufactured home remained personal property owned by Miller, which did not transfer to Wright when he purchased the real property. On appeal, the Court of Appeals affirmed. The Court explained that simply because a manufactured home is located on real property does not mean the manufactured home is a permanent fixture or part of that real property. Unless the statutory procedure set forth in KRS 186A.297 is followed, the manufactured home remains personal property. Further, the manufactured home did not lose its character as personal property and become subject to the previous owner's mortgage of the real property because an active certificate of title existed for the home, which had not been surrendered. The Court also noted that, in Wright's purchase contract for the real property, he acknowledged that title to the manufactured home was not included. Because Miller established no genuine issue of material fact existed, the circuit court did not err in granting summary judgment.

In addition, the Court rejected Wright's argument that the circuit court did not provide him a full opportunity to conduct discovery because Wright never requested supplemental discovery, file a motion to compel, or move for additional time for discovery. Finally, the Court rejected Wright's argument that the circuit court erred by not considering the "unclean hands doctrine." The Court held that, while Miller may have obtained title to the manufactured home for a nominal sum and in a time frame that seemed unfair or questionable to Wright, the circuit court was within its discretion not to invoke the equitable defense of the "unclean hands doctrine." The circuit court's ruling was based on statutory and case law precedent, and law trumps equity.

VIII. STANDING

A. ANGELIKA KASEY, ET. AL. VS. ANDREW BESHEAR GOVERNOR, ET. AL.

[2018-CA-1643](#) 04/09/2021 2021 WL 1324395

Opinion by CALDWELL, JACQUELINE M.; DIXON, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

Appellants appealed the opinion and order of the Franklin Circuit Court dismissing their complaint against the Governor and the Commissioner of Agriculture for failure to monitor or enforce compliance with animal shelter statutes. In affirming, the Court of Appeals held that the Appellants failed to meet each of the three requirements for constitutional standing set forth by the United States Supreme Court in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).