

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
AUGUST 2012**

I. CIVIL PROCEDURE

A. Commonwealth, Cabinet for Health and Family Services v. Bell

[2011-CA-001482](#) 08/17/2012 2012 WL 3538472

Opinion by Judge Dixon; Judges Combs and VanMeter concurred. The Court reversed an order of the circuit court granting appellees' motion for attorney fees and for the production of appellant's records pertaining to particular Medicaid patients involved in its program. The Court first held that the trial court erred in ruling that appellees' motion for attorney fees was timely filed and that it retained jurisdiction to rule in the matter. Appellees' failure to file a timely CR 59.05 motion precluded the trial court from ruling on the later motion. The Court distinguished the holding in *Francis v. Crounse Corp.*, 98 S.W.3d 62 (Ky. App. 2002), noting that appellees' claim for fees was collateral to the merits of the case, the fees were not mandated by statute and the trial court did not specifically reserve the issue. The Court also held that even if the motion had been filed timely, the trial court was without the power to impose attorney fees on an agency of the Commonwealth. The Court finally held that the trial court was without authority to order disclosure of records relating to non-party Medicaid beneficiaries and the order was erroneous as it directly violated state and federal law.

II. CONSUMER PROTECTION

A. ABC, Inc. v. Commonwealth ex rel. Conway

[2011-CA-000631](#) 08/24/2012 2012 WL 3629487

Opinion by Judge Lambert; Judges Nickell and Taylor concurred. The Court affirmed in part, reversed in part, and remanded an order of the circuit court upholding the issuance of a subpoena and civil investigative demand (CID) by the Attorney General of Kentucky pursuant to Kentucky's Consumer Protection Act (KCPA), KRS 367.110 to KRS 367.300. The Court first held that the circuit court properly found that the Attorney General had the power to issue the CID when he suspected that appellant violated the KCPA in areas related to the withholding of financial aid, the loan default rate, job placement rate and transferability of credits. The Court next held that the circuit court did not abuse its discretion in considering materials attached to the AG's memorandum in support of the CID when the materials were clearly what the AG claimed they were. The Court next held that the AG could rely on national studies when such information contributed to his good faith belief that an investigation would be in the public interest. The Court next held that complaints, which were later resolved, could serve as a basis for issuance of a CID. The Court next held that the AG was not required to provide all of the records he obtained but only needed to include enough documentation to provide a sufficient basis for a reasonable belief that an investigation should be made. The Court finally held

that the trial court erred in not providing appellant the opportunity to contest the scope of the CID.

III. CONTRACTS

A. **Charles T. Creech, Inc. v. Brown**

[2011-CA-000629](#) 08/17/2012 2012 WL 3538351 Rehearing Pending
Opinion by Chief Judge Acree; Judges Moore and VanMeter concurred. The Court reversed and remanded an order of the circuit court granting summary judgment in favor of appellees on appellant's claims for breach of a noncompetition clause in an employment contract, improper interference with business operations, and fraud. The Court first held that the law of the case doctrine did not apply to an interlocutory order dissolving a temporary injunction, which was entered in the appeal. The Court then held that the trial court erred in granting summary judgment on the claim for breach of the noncompetition agreement when the evidence before the court was insufficiently developed to resolve all of the factors articulated in *Hammons v. Big Sandy Claims Serv., Inc.*, 567 S.W.2d 313 (Ky. App. 1978). The Court next held that the noncompetition agreement was supported by sufficient consideration when the employee continued his employment with appellant for more than two years after he signed the agreement and departed voluntarily. The Court finally held that whether appellant waived any or all of its rights under the agreement was a question of fact and therefore, the trial court improperly entered summary judgment on the basis of waiver.

IV. CORPORATIONS

A. **Roberts v. Roberts**

[2010-CA-000653](#) 08/31/2012 2012 WL 3764719
Opinion by Judge Lambert; Judge Nickell concurred and Judge Caperton dissented. The Court affirmed a summary judgment and a subsequent denial of a motion under CR 60.02 on the appellant estate's claim seeking to stop the appellee corporation from collecting insurance proceeds from a policy it held on the deceased shareholder, based on a buy/sell contract which required any amount owed by the deceased stockholder to be deducted from the amount payable to the shareholder. The Court held that the circuit court did not prematurely enter summary judgment before appellants had an adequate opportunity to verify and validate the claims regarding the validity of the contract. The appellees established that appellants had adequate opportunity to complete discovery and failed to present any evidence that created a material issue of fact precluding summary judgment. The Court further held that the circuit court did not abuse its discretion in denying appellants' motion filed pursuant to CR 60.02(d) and (f). Subsequent transcripts from another case between the parties, which appellants claimed supported their motion, were not in the record. Without transcripts, the Court could not say the circuit court abused its discretion in denying the motion nor was there anything in the record to support the claim that depositions given in the instant case were false or fraudulent.

V. CRIMINAL LAW

A. **Bagby v. Commonwealth**

[2011-CA-000776](#) 08/17/2012 2012 WL 3538356

Opinion by Judge Combs; Judges Dixon and VanMeter concurred. The Court affirmed a judgment of the circuit court entered after appellant entered a conditional guilty plea, wherein he reserved the right to appeal an order denying a motion to suppress evidence related to drug charges. The Court held that the trial court did not err as a matter of law in finding that the exclusionary rule did not apply or in denying the motion to suppress evidence. The police detective was not duty-bound to arrest appellant as soon as he saw her driving without a valid operator's license but could wait to conduct further investigation. Therefore, the evidence was not obtained in violation of appellant's rights under the Fourth Amendment nor was it gathered as either the direct or the indirect result of any illegal police conduct.

B. **Commonwealth v. Terrell**

[2011-CA-000890](#) 08/03/2012 2012 WL 3137030

Opinion by Judge Combs; Judge Thompson and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court halting police questioning of appellee until he could consult with counsel. The Court held that the trial court did not err in entering the order. In doing so, the Court declined to distinguish the holding in *West v. Commonwealth*, 887 S.W.2d 338 (Ky. 1994), and concluded that the fact that appellee was represented by private counsel, as opposed to a public defender, was irrelevant and therefore, the circuit court properly relied on RCr 2.14.

C. **Crabtree v. Commonwealth**

[2011-CA-000452](#) 08/17/2012 2012 WL 3538316

Opinion by Judge Combs; Judges Dixon and VanMeter concurred. The Court affirmed appellant's conviction of multiple counts of possession of materials portraying a sexual performance by a minor. The Court held that the evidence was sufficient to prove appellant knowingly possessed the illegal images on his computer. Appellant's confession, along with the content and thumbcache images demonstrated that it was reasonable for a jury to believe that appellant sought out and either downloaded or viewed the illegal images and that he had control and possession of them. The Court rejected appellant's argument that merely viewing child pornography images before deleting them should not be deemed to constitute actual possession. The Court next held that the trial court did not err in failing to provide the jury with an instruction regarding temporary innocent possession in a case involving obvious and lurid filenames of videos that were downloaded, a clear confession, and numerous images remaining on appellant's computer after professionals began cleaning it. The Court then held that it was not error for the jury to consider whether appellant had knowingly possessed the images when the jury was provided with the statutory definitions of "knowingly" and "possession." The Court next held that the trial court did not err by not permitting appellant to admit testimony from a character witness

when the testimony did not shed any light on whether appellant committed the crimes of possessing child pornography. The Court finally held that because there were no individual errors, there could be no cumulative error.

D. Donovan v. Commonwealth

[2011-CA-000538](#) 08/24/2012 2012 WL 3628902

Opinion by Judge Caperton; Judges Combs and Nickell concurred. The Court reversed and remanded an order of restitution. The Court held that the trial court abused its discretion in entering the restitution order prior to the expiration of the time period set by the court for appellant to controvert the Commonwealth's evidence, thereby resulting in a violation of appellant's due process rights.

E. Elders v. Commonwealth

[2011-CA-000299](#) 08/17/2012 2012 WL 3538299

Opinion by Judge Keller; Chief Judge Acree and Judge Clayton concurred. The Court affirmed an order of the circuit court denying appellant's motion to suppress evidence and a judgment convicting appellant of sodomy and/or rape in the third degree, one count of distribution of obscene matter to minors and of being a persistent felony offender in the second degree. The Court first held that the trial court did not err in denying the motion to suppress evidence. Probable cause supported the issuance of the warrant to search appellant's home. The issuing judge could draw a reasonable inference that a video camera, videotapes and erotic female clothing were kept at appellant's residence when the affidavit provided that the victim told the police that appellant possibly took the video camera to his home. The Court further held that even if probable cause did not support the issuance of the warrant, the evidence would have been admissible pursuant to the good-faith exception to the exclusionary rule. The Court next held that the trial court's statements explaining jury instructions were not coercive and that the trial court did not err in orally explaining the instructions.

F. Lawson v. Commonwealth

[2011-CA-001297](#) 08/24/2012 2012 WL 3629004

Opinion by Judge Combs; Judges Caperton and Nickell concurred. The Court vacated and remanded an order of the circuit court rejecting appellant's collateral attack on a felony conviction. The Court held that appellant was clearly prejudiced by counsel's failure to object to the trial court's allotment of peremptory challenges. The under-allocation of peremptory challenges impaired appellant's ability to select his jury.

VI. EDUCATION

A. The Sullivan University System, Inc. v. Commonwealth, Kentucky Board of Nursing

[2011-CA-000853](#) 08/24/2012 2012 WL 3629517

Opinion by Judge Stumbo; Judge Combs and Senior Judge Lambert concurred. The Court reversed and remanded an order of the circuit court granting summary judgment in favor of appellee, the Kentucky Board of Nursing, on the appellant

college's appeal from a Board order changing appellant's Applied Science Degree in Nursing program's status to probational. The Court held that the circuit court clearly erred in granting summary judgment in favor of the Board. The Board's retroactive enforcement of new regulations requiring appellant to have an 85% pass rate for first-time test takers of the NLEX-RN examination was prohibited.

VII. FAMILY LAW

A. **Boggs v. Commonwealth, ex rel. Boggs**

[2010-CA-001401](#) 08/10/2012 2012 WL 3236060

Opinion by Judge Acree; Judges Caperton and VanMeter concurred. The Court vacated and remanded an order of the family court overruling appellant's motion to vacate a previous order of child support, which was entered on motion by the Commonwealth. The Court held that the family court order was void because the Commonwealth failed to properly intervene and therefore, it was not a party before the family court and had no power to file the motion which led to the order of child support.

B. **McIntosh v. Landrum**

[2012-CA-000161](#) 08/24/2012 2012 WL 3630347

Opinion by Judge Stumbo; Judge Clayton concurred and Judge Lambert dissented by separate opinion. The Court affirmed orders of the circuit court requiring appellant to pay as part of his child support, amounts for respite care and work-related childcare, and awarding appellee attorney fees and court costs. The Court first held that the trial court did not abuse its discretion in awarding appellee reimbursement for respite care. The trial court specifically and adequately justified the extra expense when appellant missed parenting times which caused appellee to pay for extra childcare and the expenses would only occur if appellant did not exercise his regular parenting time. The Court also held that the trial court did not err when it awarded appellee work-related childcare expenses. There was sufficient evidence to prove appellee was incurring the expenses. Whether the costs were temporary was irrelevant as appellee only had to show, pursuant to KRS 403.211(6), that there was a change in circumstances requiring the payment of the expenses. The Court finally held that the trial court did not abuse its discretion when it awarded appellee attorney fees due to the disparity of the parties' income.

C. **Nosarzewski v. Nosarzewski**

[2011-CA-002148](#) 08/10/2012 2012 WL 3240813

Opinion by Judge Dixon; Judges Combs and VanMeter concurred. The Court affirmed an order of the circuit court requiring appellant to reimburse appellee for the overpayment of child care expenses. The Court held that the trial court did not abuse its discretion in concluding that the doctrine of laches did not bar appellee's claim when the parties both testified that they did not understand how the expenses for child care factored into the calculation of child support and appellee testified that the county attorney advised him that he was not eligible

for a reduction in child support and he did not know he could seek reimbursement until he retained counsel many years later. Citing *Olson v. Olson*, 108 S.W.3d 650 (Ky. App. 2003), the Court also held that the judgment could not be reversed on public policy grounds when appellee established that a substantial amount of the allocated child care expenses had not been incurred.

D. Samson v. Samson

[2011-CA-002181](#) 08/17/2012 2012 WL 3538479

Opinion by Judge Clayton; Judges Lambert and Stumbo concurred. The Court affirmed an order of the family court granting appellee leave to relocate with the parties' child. The Court first held that the family court did not err in considering a court-ordered evaluation by a social worker. The Court further held that the trial court order was based on substantial evidence in the record that relocation was in the best interest of the child.

E. Telek v. Daugherty

[2009-CA-001993](#) 08/24/2012 2012 WL 3628883

Opinion by Judge Lambert; Judge Stumbo and Senior Judge Shake concurred. The Court reversed and remanded a domestic violence order granted to appellee. The court held that the family court erred in entering the DVO when appellee failed to establish by a preponderance of the evidence that an act of domestic violence occurred, or may occur again, or that she was in fear of imminent domestic violence. Although appellant had touched and pushed past appellee in the past, this was not sufficient in light of *Caudill v. Caudill*, 318 S.W.3d 112 (Ky. App. 2010). Further, appellant's failure to follow previous orders in a separate case and the family court's concern that appellant interpreted orders to his benefit, were in no way tied to incidents of domestic violence and therefore, could not form the basis for the entry of a DVO.

F. Williams v. Frymire

[2011-CA-001568](#) 08/31/2012 2012 WL 3762437

Opinion by Judge Lambert; Judges Caperton and Nickell concurred. The Court affirmed a judgment of the family court modifying custody of the parties' minor daughter from sole to joint and naming the father as the primary residential parent. The Court first held that the family court did not improperly exercise jurisdiction. Kentucky retained exclusive, continuing jurisdiction when both parties maintained significant connections with Kentucky, the child continued to visit with her father and her father's family members in Kentucky and appellant continued to visit Kentucky. The Court next held that the family court considered all of the necessary factors set forth in KRS 403.834(2) in determining it was not an inconvenient forum and therefore, did not abuse its discretion in retaining jurisdiction. The Court next held that the family court's decision to modify the parties' original custody decree to name the father as the residential parent was not against the weight of the evidence and therefore, the family court did not abuse its discretion.

VIII. PROPERTY

A. **Ball v. Oldham County Planning and Zoning Commission**

[2010-CA-000284](#) 08/03/2012 2012 WL 3136659

Opinion by Senior Judge Lambert; Chief Judge Acree and Judge Stumbo concurred. The Court affirmed an order of the circuit court affirming a decision of a county board of adjustments to grant a road frontage variance with respect to property owned by a trust. The Court first held that the board made adequate findings of fact in support of its decision to grant the requested variance. While the findings were not extensive or numerous, they were not so sparse or “bare bones” to be considered insufficient. While more specific findings would have been preferable as to some of the findings required by KRS 100.243, in light of the undisputed testimony at the hearing, they were sufficient. The Court then held that the board’s findings were supported by substantial evidence. In reaching that conclusion, the Court distinguished the holdings in *Bourbon County Bd. of Adjustment v. Currans*, 873 S.W.2d 836 (Ky. App. 1994), and *Moore v. City of Lexington*, 309 Ky. 671, 218 S.W.2d 7 (1948), and held that the board did not err in concluding that the trust’s efforts to subdivide and to sell all or part of the property qualified as a reasonable use of the land that the denial of the variance would deprive the trust of that use.

B. **Citifinancial, Inc. v. Bratton**

[2011-CA-001152](#) 08/31/2012 2012 WL 3762432

The Court reversed and remanded a judgment of the circuit court in favor of property owners in a lien release suit. The Court held that because the General Assembly used the word “shall” in conjunction with the notice requirements of KRS 382.365, appellees were required to comply with all elements of the notice requirements before they could seek a penalty pursuant to the statute. The notice was not delivered by certified mail, nor delivered in person, and it was not sent to an officer at appellant’s principal place of business, or its registered process agent. Appellees’ failure to comply with the notice requirement was fatal to their claim.

C. **Littleton v. Plybon**

[2011-CA-002114](#) 08/24/2012 2012 WL 3629026

Opinion by Judge Moore; Chief Judge Acree and Judge Thompson concurred. The Court affirmed an order of the circuit court dismissing appellants’ complaint seeking to set aside the sale of property on the basis that a deed failed as a matter of law to create a joint tenancy with right of survivorship but rather the deed created a tenancy in common so that appellants were entitled to a portion of the subject property. The Court held that the trial court did not err in finding that a direct conveyance was sufficient to create a joint tenancy. The unities of time, title and interest could have been achieved with the use of a straw man acting as an intermediary title holder, a more circuitous route to give effect to the parties’ intent that the grantor also be one of the grantees. Thus, there was no reason not to enforce the intention of the deed to create a joint tenancy where it was achieved directly rather than indirectly.

IX. TAXATION

A. **Meadows Health Systems East, Inc. v. The Louisville/Jefferson County Metro Revenue Commission**

[2009-CA-001839](#) 8/03/2012 2012 WL 3138023

Opinion by Senior Judge Lambert; Judges Acree and Stumbo concurred. The Court affirmed an order of the circuit court denying appellants' motion for summary judgment in a declaratory judgment action. The circuit court rejected the appellants' claims against the appellee revenue commission wherein they sought refunds of portions of occupational license fees allocable to the sale of business assets as "net profits". The Court held that the circuit court correctly determined that capital gains from the sale of appellants' businesses were subject to the local occupational license fee. The gains were properly subject to the license fee and the regulations did not run afoul of the Kentucky Constitution or KRS 91.200.

X. TORTS

A. **Bates v. Curtis**

[2010-CA-000285](#) 08/17/2012 2012 WL 3538271

Opinion by Judge Taylor; Chief Judge Acree and Judge Combs concurred. The Court reversed, and remanded with instructions, a judgment entered upon a jury verdict in favor of appellees on their claim for malicious prosecution. The Court held that because there were numerous trial errors, the trial court erred in denying appellant's motion for a directed verdict. The trial court made a substantial and continuing error by submitting the case to the jury as being one for malicious prosecution, as opposed to one for wrongful use of civil proceedings. The trial court erred by submitting the issue of probable cause to the jury thus, impermissibly delegating the court's mandatory duty. The trial court also erred by not directing a verdict in appellant's favor when appellant's proof that he relied on counsel's advice in filing a civil action against appellees was unrefuted.

B. **Carruthers v. Edwards**

[2011-CA-001612](#) 08/10/2012 2012 WL 3236604

Opinion by Chief Judge Acree; Judges Clayton and Stumbo concurred. The Court affirmed an order of the circuit court granting appellees' motion to dismiss appellant's complaint for injuries she received when she was struck in the parking lot of a bar on premises owned by appellees and leased to the bar. The Court held that the trial court properly dismissed the complaint. In reaching that conclusion, the Court first held that appellant's complaint did not state a valid claim under the Dram Shop Act, KRS 413.241. Liability could not be imposed upon the lessors who simply held title to the property on which the properly licensed lessee engaged in the regulated sale of intoxicating liquors. The Court then held that appellant failed to state a common law claim against appellees when there was no allegation that, at the inception of the lease, appellees expressly authorized the bar to over-serve patrons or an unreasonably great

likelihood that the bar would do so. The Court finally held that, independent of appellees status as lessors, any claim of negligence against them would not survive a motion pursuant to CR 12.02(f).

C. Martin v. Elkins

[2011-CA-000862](#) 08/31/2012 2012 WL 3762419

Opinion by Senior Judge Lambert; Judges Combs and Stumbo concurred. The Court affirmed a summary judgment of the circuit court finding that appellee breached no duty under Kentucky law by allowing his son to host a party at his residence where alcohol was consumed by teenagers. The Court held that, as an adult landowner who was aware that minors were imbibing on his property, appellee had a special relationship with those minors and the scope of foreseeability was expanded. However, because the tortious conduct was an assault which occurred at another location due to an automobile fender bender, it was beyond the scope of reasonable foreseeability by appellee. Therefore, the circuit court did not err in granting summary judgment to appellee.

D. Stathers v. Garrard County Board of Education

[2010-CA-002212](#) 08/31/2012 2012 WL 3762035

Opinion by Chief Judge Acree; Judges Moore and VanMeter concurred. The Court affirmed in part, reversed and remanded an order granting summary judgment in favor of the appellee board of education, construction companies, and drilling and blasting companies on appellants' claim that blasting during the construction of a new high school caused damage to their homes. The Court first held that appellants showed a genuine issue of material fact as to causation to maintain their strict liability claim and survive summary judgment. There was no requirement that a plaintiff in a blasting case produce any expert testimony to establish causation. The homeowners' depositions provided evidence concerning the condition of the houses prior to blasting, gave graphic descriptions of the blasting and the corresponding vibrations and effects, and gave descriptions of significant changes to their homes after the blasting. Therefore, a fact-finder could reasonably conclude that blasting caused the damage to appellants' homes. The Court next held that the board of education was not entitled to governmental immunity merely because it was engaged in a government function. If appellants were able to successfully prove that their homes were damaged or destroyed as a direct result of the construction of the new high school, the board may be liable in damages under section 13 of the Kentucky Constitution for a taking.

E. Walker v. Love

[2010-CA-002150](#) 08/17/2012 2012 WL 3538280

Opinion by Judge Stumbo; Senior Judge Lambert concurred; Judge Moore dissented by separate opinion. The Court reversed and remanded orders of the circuit court granting summary judgment to appellees on appellants' medical malpractice claims. The Court held that the trial court erred in granting summary judgment. Appellants' failure to name a medical expert witness did

not constitute failure of proof that justified the grant of summary judgment. There was no specific expert disclosure deadline and summary judgment was granted two months before the pretrial conference. Further, there was sufficient medical evidence to create a legitimate dispute about the need for an expert witness.

XI. WILLS AND ESTATES

A. Young v. Richardson

[2010-CA-002209](#) 08/03/2012 2012 WL 3136770 Rehearing Pending
Opinion by Judge VanMeter; Chief Judge Acree and Judge Moore concurred. The Court affirmed an order vacating an earlier-entered partial summary judgment order in an action concerning the propriety of a transfer of assets from two inter vivos trusts established by appellant's parents. The Court held that the trial court did not abuse its discretion in vacating the earlier judgment, pursuant to CR 60.02(f) and CR 60.03, after finding that the partial summary judgment did not result in a just outcome and that the decision to vacate would not prejudice either party. The trial court found it probable that when the parties filed their competing motions for summary judgment, they had possession of documents which purportedly established the legal authority to transfer the trust assets at issue and that it was extraordinarily unusual that none of the parties or their attorneys produced these documents for the court's consideration at that time.

XII. WORKERS' COMPENSATION

A. Rock Drilling, Inc. v. Howell

[2012-CA-000490](#) 08/24/2012 2012 WL 3642476
Opinion by Judge Caperton; Judges Combs and Nickell concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming an opinion of the ALJ finding that the statutory three multiplier under KRS 342.730(1)(c) could be awarded on reopening and finding that the impairment agreed upon at the time of the original settlement could not be considered as the impairment on reopening. Because the reopening was not solely for the application of the three multiplier but was largely because of a claim for increased impairment following a second surgery, the ALJ's decision to award the three multiplier was supported by substantial evidence. The Court next held that the ALJ properly exercised his discretion in finding a 1% disability rating most credible, rather than a compromised and agreed-upon 6% disability rating from the original settlement, when there was not a 6% impairment rating assessed by a medical expert.