

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
DECEMBER 2008**

I. ADMINISTRATIVE LAW

- A. Commonwealth, Environmental and Public Protection Cabinet v. Sierra Club**
[2007-CA-001723](#) 9/19/08 2008 WL 5102143 DR filed 1/5/09
Opinion by Judge Clayton; Judges Moore and Taylor concurred. The Court reversed an order of the Franklin Circuit Court remanding a final order issued by the Secretary of the Environmental and Public Protection Cabinet issuing a permit to Thoroughbred Generating Company to operate a coal steam generating plant. The Court held that the trial court erred in finding that the Secretary applied an incorrect rule of law in making the determination that the analysis of the impairment to visibility, soils and vegetation was adequate. The Secretary's analysis was appropriate in applying the plain language of 401 KAR 51:017 §13 in determining that a cumulative analysis was not required. The Court next held that the trial court erred in finding that Thoroughbred was not in compliance with the Best Available Control Technology (BACT) regarding sulfur dioxide and nitrogen oxides emissions. The Secretary used present technology to determine that Thoroughbred met the level required by 401 KAR 51.001 § 1(25). The Court then held that the trial court erred in finding that the Secretary used an incorrect standard in finding that the permit would not violate National Ambient Air Quality Standards (NAAQS). There was no proof offered before the hearing officer that the sporadic use of a diesel-fired emergency generator could cause any additional impact on air quality. The Court finally held that the trial court erred in finding that the Cabinet's notice was not sufficient as having been made within the county in which the source was located. The notice achieved the purpose of 401 KAR 52:100 § 5(10) by allowing the areas affected by the emissions of the plant to participate and the Kentucky Clean Air Act regulations did not contain a specific requirement that Class I increment consumption be published.

II. CIVIL PROCEDURE

- A. Kentucky River Community Care, Inc. v. Stallard**
[2007-CA-002013](#) 12/19/08 2008 WL 5264331
Opinion by Chief Judge Combs; Judge Keller and Senior Judge Henry concurred. The Court vacated and remanded an order of the circuit court imposing a fine upon appellant of \$40,500 plus the costs of mediation and attorney fees for its failure to file a certification of authority that its insurer's representatives at mediation had the full authority to settle. The Court first held that the trial court had authority to require or to enforce the directives of the certification letter even though it exceeded the requirements of the Model Mediation Rules. The Court then held that, even if appellant should have assumed responsibility for the filing of the certification, the sanctions were imposed to punish for conduct already committed and was not

contingent upon the filing of a certificate of authority but rather as a reprisal for the failure to file it after the fact. The contempt, therefore, was criminal rather than civil and appellant was entitled to a jury trial to determine whether it was guilty of contempt.

B. Mary Breckinridge Healthcare, Inc. v. Eldridge

[2006-CA-001949](#) 12/31/08 2008 WL 5428213

Opinion by Judge Caperton; Chief Judge Combs and Judge Moore concurred. The Court affirmed a judgment of the circuit court in favor of an estate on its claim against a home health care provider for the wrongful death of a patient. The Court held that the trial court did not abuse its discretion by admitting expert testimony that relied solely upon the statements made by the deceased, as repeated to the emergency room doctor by the deceased's spouse, to form an opinion as to the cause of death. The statements by the spouse for the purposes of diagnosis and treatment were admissible under KRE 803(4) and *Miller v. Watts*, 436 S.W.2d 515 (Ky. 1969), as part of the medical record. The Court then held that the trial court erred in ruling that the statements were admissible under the state of mind exception provided for in KRE 803(3), as they could only be used to explain why the deceased went to the hospital, not for the purpose of proving that the statements were factually true. The Court next held that the trial court did not abuse its discretion in admitting the statements under the excited utterance exception of KRS 803(2), as the factual findings of the level of stress and excitement were not clearly erroneous based on the controverted evidence.

III. CRIMINAL LAW

A. Jenkins v. Commonwealth

[2007-CA-001268](#) 12/19/08 2008 WL 5264290

Opinion by Judge Stumbo; Judges Lambert and Thompson concurred. The Court reversed, and remanded for a new trial, a final judgment and sentencing in which appellant received 12 years' imprisonment for the use of a minor in a sexual performance. The Court first held that appellant was not entitled to a directed verdict. The evidence that appellant put a dog toy down the underwear of the child, held the child down and watched the dog get the toy out, and that either the dog toy or the dog's mouth touched the genitals of the child comported with KRS 531.300(4)(b), which required physical contact with the genitals of a minor. The Court then held that while evidence about inappropriate touching; sexual comments made to the children; a trip to a strip club that resulted in a phone call to one of the children; and the placing of a sex toy in a child's room was relevant to establish intent and motive, testimony of sex toys in the house, general trips to strip clubs and marijuana use were impermissibly entered to establish bad character in violation of KRE 404(b). The Court next held that the trial court did not err in failing to give an instruction on attempted use of a minor in a sexual performance when appellant denied the alleged conduct and the only other evidence showed that the act was completed. The Court finally held that the trial court erred when it allowed more than one victim impact statement in violation of KRS 532.055. However, the issue

on retrial was moot as KRS 532.055 was amended to allow for multiple victims to give impact statements.

B. Payton v. Commonwealth

[2007-CA-001379](#) 12/5/08 2008 WL 5102130 DR filed 12/29/08

Opinion by Judge Caperton; Judge Lambert concurred; Judge Thompson dissented by separate opinion. The Court affirmed a judgment and sentence of the circuit court entered pursuant to appellant's conditional guilty plea to various drug charges, preserving the right to appeal the denial of a motion to suppress evidence found during the warrantless search of his residence. The Court held that the "knock and talk" procedure used to gain access to appellant's residence and the search conducted thereafter did not violate his rights under the Fourth Amendment to the U.S. Constitution and Section 10 of the Kentucky Constitution to be free from an unreasonable search and seizure. An employee for the Cabinet for Families and Children, accompanied by two police officers, arrived at appellant's home to investigate an anonymous call alleging methamphetamine existed and was being manufactured in appellant's home where two children resided. The Court held that it was objectively reasonable for the officer's to conclude that appellant's wife granted consent to search the residence when she responded to a request to look around and search the residence by throwing up her hands and saying, "Come on in." and simultaneously opening the door to accommodate entry. The Court further held that the consent given by appellant's wife was also sufficient to authorize a search even though appellant was present. There was no requirement that the police inform appellant that he had a right to refuse the search, and although he questioned the officers as to whether they had a search warrant and his response may not have risen to the level of actual consent, it did not rise to the level of an objection.

C. Peeler v. Commonwealth

[2007-CA-001483](#) 12/12/08 2008 WL 5191326

Opinion by Senior Judge Lambert; Judges Keller and Wine concurred. The Court vacated and remanded an order of the circuit court sentencing appellant to prison, without a separate sentencing hearing and a new pre-sentence investigation report, following his removal from a pretrial diversion program. The Court held that upon the failure of pretrial diversion, a subsequent sentencing proceeding was required by KRS 533.256(1) and (4).

IV. FAMILY LAW

A. Rankin v. Criswell

[2007-CA-002486](#) 12/31/08 2008 WL 5429320

Opinion by Judge Thompson; Judges Lambert and Stumbo concurred. The Court remanded for a hearing a DVO entered against appellant preventing him from having any contact with his former wife and their two minor children. The Court held that the trial court erred when it failed to conduct a full evidentiary hearing, as required by the domestic violence statute, but relied entirely on the contents of the petition containing inadmissible hearsay statements and records in dependency

cases, which were not evidence and to which appellant had no opportunity to examine or refute. The Court directed the trial court to question the petitioner under oath as to the allegations in the petition, to give appellant the opportunity respond, and to decide whether, under the preponderance of the evidence standard, domestic violence occurred and may occur again. The Court also held that the duration of the order did not depend upon the result of criminal proceedings and that acquittal on criminal charges arising from domestic violence did not preclude the effectiveness of a DVO.

V. INSURANCE

A. **Lawson v. American Bankers Life Assurance Co. of Florida**

[2007-CA-000033](#) 2/15/08 2008 WL 399558 Rel for pub 12/22/08
Opinion by Senior Judge Knopf; Judges Caperton and VanMeter concurred. The Court affirmed a summary judgment of the circuit court dismissing appellant's claim against appellee for failing to refund premiums for credit life insurance. The Court held that KRS 304.19-090(2) did not entitle appellant to a refund of the premium paid in advance. There was no premium refund due because when appellee assumed the risk of appellant's spouse's death, the premium paid for the assumption of the risk was earned. Since appellee paid the death claim and the policy did not state otherwise, it was not required to refund premiums for the remaining months of the policy. The Court also held that KRS 304.19-069 did not entitle appellant to a refund.

VI. JUVENILES

A. **K.F. v. Commonwealth**

[2008-CA-000478](#) 12/19/08 2008 WL 5264411
Opinion by Judge Stumbo; Judge Thompson and Senior Judge Guidugli concurred. The Court vacated and remanded an order committing a juvenile to the Cabinet for Families and Children after she was found in contempt for not following the orders of the court entered after she was adjudicated a status offender for being "beyond control of parent." The Court first held that the failure to give appellant proper notice of a probable cause and custody hearing required vacating appellant's commitment to the Cabinet. The Court further held that the trial court erred in denying appellant separate adjudication and disposition hearings as required by KRS 610.080, as only the juvenile, not the Commonwealth, could waive the separate hearings. The Court then held that the fact that the trial court did not make any written findings or state during the hearings what least restrictive alternatives to commitment had been tried, this alone did not require reversal, as the record established that the court had tried less restrictive alternatives, as required by KRS 600.020(35), and that commitment was the only option left. The Court finally held that a disposition made in light of the continuing out of control conduct, the entire record and all of the circumstances, did not amount to the use of commitment as a disposition for contempt.

VII. OPEN RECORDS

A. **Sinha v. University of Kentucky**

[2008-CA-000311](#) 12/19/08 2008 WL 5264388

Opinion by Judge Lambert; Judge Taylor and Senior Judge Graves concurred. The Court affirmed an order of the trial court denying attorney fees, costs and a per diem sum to appellant pursuant to KRS 61.882(5) for the appellee University's failure to provide her with her graduate medical school education records and documents under the Open Records Act. The Court held that the trial court's finding that the University improperly withheld the records but that its conduct was not willful was supported by substantial evidence. Therefore, the decision to deny the award of attorney fees and costs was not clearly erroneous.

VIII. PROPERTY

A. **Campbell County Fiscal Court v. Nash**

[2007-CA-000994](#) 12/12/08 2008 WL 5191239 Reh filed 1/7/09

Opinion by Judge VanMeter; Senior Judge Henry concurred; Judge Thompson concurred in part and dissented in part. The Court vacated and remanded orders of the circuit court declaring unconstitutional ordinances adopted by the county fiscal court giving the county director of planning and zoning the ability to make a threshold determination as to whether a proposed division of land was or was not a subdivision with the meaning of KRS 100.111(22), naming the county director of planning and zoning the "designated agent," and making the county municipal planning and zoning commission the "review board." The Court first held that the trial court erred in finding that the fiscal court lacked authority to enact the ordinances. Because the ordinances did not explicitly contravene the provisions of KRS Chapter 100, the fiscal court had the authority to enact the two ordinances at issue pursuant to KRS 67.083(3)(k). Further, whether the fiscal court was vested with the power to enact the ordinances initially, their subsequent adoption by the planning commission as part of its subdivision regulations rendered the issue moot. The Court next held that the trial court erred by holding that the ordinances were preempted by the agricultural supremacy clause set out in KRS 100.203(4). The Court distinguished *Grannis v. Schroder*, 978 S.W.2d 328 (Ky. App. 1997), on the basis that the ordinances addressed the division, platting and transfer of property, as opposed to the use to which the property was put and the ordinances did not restrict the agricultural uses to which appellees could subject their respective properties. The Court then held that the ordinances did not appear to violate Kentucky Constitution § 2, as a review mechanism was set in place. However, because appellees opted to dismiss their appeals before the planning commission, the issue was not ripe for review. The Court also held that the trial court erred by finding that the ordinances impermissibly vague, as they provided fair notice and a mechanism for review and the standards for enforcement were sufficiently clear to avoid arbitrary and discriminatory application. The Court finally held that the trial court erred in finding that the ordinances impermissibly interfered with the statutory duties of the county clerk and the PVA, including the clerk's duty to record lawful

deeds under KRS 382.110 and KRS 382.35 and the PVA's duty to maintain lists of all property additions to the property tax rolls for the county under KRS 132.015. KRS 100.277 authorized the planning commission to approve plats of subdivisions of land before plats could be recorded and instruments referring to unapproved plats or subdivisions were void.

IX. TORTS

A. **Thomas v. St. Joseph Healthcare, Inc.**

[2007-CA-001192](#) 12/5/08 2008 WL 5102119 DR filed 1/5/09
Opinion by Judge Wine; Judge Clayton concurred; Judge Dixon concurred in result only. The Court affirmed in all respects, except for the award of punitive damages, a judgment of the circuit court on an estate's claim against a hospital for negligence and under the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. The Court first held that claims under EMTALA and for medical negligence were not mutually exclusive and therefore, the Estate's claim asserting a medical negligence claim did not automatically preclude it from bringing a claim under EMTALA. The Court then held that the Estate presented sufficient evidence to support a claim under EMTALA and that the duty to stabilize a patient under EMTALA did not require that the hospital have actual knowledge of a specific condition but that the duty arose upon the hospital's determination that the deceased was manifesting symptoms of sufficient severity as to constitute an emergency medical condition. The Court then held that, based upon the evidence and testimony of the Estate's expert witnesses, the jury could conclude that the Hospital released the deceased even though the doctors knew his condition was not stable and was likely to deteriorate. The Court also held that the jury instruction on the EMTALA claim was substantially correct and not materially misleading as it implicitly required the jury to find that the hospital's physicians had knowledge of the deceased's emergency medical condition. The Court next held that the trial court properly submitted the negligence claim to the jury, as the testimony of the Estate's nursing expert and medical expert was sufficient to show that any negligence by the Hospital was a substantial factor in causing injury to the deceased. The Court then held that the trial court did not err by denying the hospital's motion *in limine* to preclude any award of unliquidated damages, as prohibited by *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999). Under the circumstances, while the Estate failed to specify the amount of its claim for unliquidated damages prior to the first trial, after that trial ended in a mistrial, the trial court could reasonably find that the Estate seasonably identified its claim for such damages with respect to the second trial. The Court next held that the hospital was not entitled to a new trial based upon a series of issues involving the conduct of the trial, as overall, the hospital was not deprived a fair trial, did not show how it was prejudiced by any of the claimed errors, and/or failed to properly object at trial. These alleged errors included the denial of motions to strike jurors for cause; the denial of a motion to exclude deposition testimony based upon erroneous information that a settlement with the treating physicians contained a term preventing their experts from testifying for the hospital; the admission of inconsistent testimony of an expert witness; the

introduction of an expert's deposition testimony regarding nursing care; the reference to a social worker's note suggesting that the police should be called if the deceased continued to return to the hospital; the statement by counsel that jurors should use their own knowledge, life experiences and values in the deliberation process; counsel's references to the deceased's past and family relationships to evoke sympathy; the holiday scheduling of the trial; and the hospital's opportunity to cross-examine or impeach several fact witnesses. The Court also held that the jury's questions about the distinctions between negligence and EMTALA claims did not show that it was confused or misled by the instructions. Further, the verdicts were not inconsistent, even though only nine jurors found the Hospital to be negligence but ten agreed with the verdict apportioning fault and assessing punitive damages. The Court then held that the issue of whether the trial court erred in denying the hospital's motion to compel production of the settlement agreement with the physicians was unpreserved, as the hospital did not object to the order sealing the settlement agreement and did not request more specific findings addressing any allegedly improper provisions in the agreement. The Court next held that, while the issue of whether the hospital ratified the grossly negligent conduct of its employees was a question of fact for the jury pursuant to KRS 411.184(3), the trial court erred by failing to provide such a ratification instruction and by failing to instruct the jury that the Estate was required to prove its right to punitive damages by clear and convincing evidence. Because the Court reversed for a new trial on punitive damages, it addressed the issue of the amount of the punitive damage award and held that given the enormous disparity between the compensatory and punitive damages, the award was excessive. The Court noted the KRS 411.186(2) set out the standards for a jury to consider in awarding punitive damages and that separate instructions may be appropriate for each of the applicable factors.

X. ZONING

A. Kentucky Public Service Commission v. Shadoan

[2007-CA-000697](#) 12/31/08 2008 WL 5428218

Opinion by Chief Judge Combs; Judge Caperton concurred by separate opinion; Judge Moore concurred in part and dissented in part by separate opinion. The Court affirmed an opinion and order of the circuit court vacating an order of the Kentucky Public Service Commission. The trial court concluded that appellees' local planning commission lacked jurisdiction to consider the proposed construction of a cellular tower on land adjacent to their property. The Court first held that appellees' failure to file a separate and specific designation of record as contemplated by the provisions of KRS 278.420 did not divest the circuit court of jurisdiction when the appellees attached as an appendix to their complaint and petition a copy of the PSC's order and the circuit court readily accepted the filing and determined that a copy of the order was the only document necessary to resolve the issues raised in the complaint. The Court then held that the trial court did not err in concluding that the provisions of KRS 278.650 required the PSC to exercise jurisdiction where the local planning body had formally declined to do so by not adopting specific zoning regulations pursuant to the provisions of KRS 100.987.