

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
FEBRUARY 2009**

I. ADMINISTRATIVE LAW

A. Transportation Cabinet, Commonwealth of Kentucky v. Caudill

[2007-CA-001864](#) 02/27/2009 2009 WL 484984

Opinion by Judge Thompson; Judge Stumbo concurred; Senior Judge Guidugli concurred in result only. The Court affirmed an order of the circuit court granting a motion by the Kentucky Personnel Board to dismiss a petition for review of a decision finding that the Cabinet failed to follow statutory provisions in hiring. The Court held that because the circuit court did not make findings of fact and the parties did not request findings on whether appellee waived service of process, the issue could not be reviewed on appeal. The Court then held that the Cabinet had waived the issue of whether the Board lacked standing to file a motion to dismiss the petition, as the issue was not raised in the circuit court. The Court then held that the Cabinet failed to effect service on the aggrieved employee, as counsel who was served did not waive or accept service on the employee's behalf. Further, because the circuit court did not making a finding as to whether the employee was served in good faith or was in receipt of actual notice, the Court of Appeals could not review the issue because it would require the Court to review factual matters de novo. The Court then held that while the failure to list the employee's address was not necessarily fatal to the petition under KRS 13B.140(1), the failure to serve him was. The Court finally held that the Board's failure to comply with KRS 13.140(3) by transmitting the administrative record to the circuit court was harmless error.

II. CIVIL PROCEDURE

A. Hines v. Carpenter

[2006-CA-002173](#) 02/07/2009 2009 WL 275837

Opinion by Judge Nickell; Chief Judge Combs and Senior Judge Graves concurred. The Court affirmed an order of the circuit court denying appellants' motion to compel appellee to pay them a lump sum for damages they allegedly incurred when appellee posted a supersedeas bond, which stayed collection of a summary judgment awarded to them for back child support. The Court held that, although appellants had been without the funds awarded them for far too long, § 115 of the Kentucky Constitution allowed appellee one matter-of-right appeal. Although, appellant had perfected more than one appeal in his effort to stall paying back child support, he appealed the supplemental summary judgment only once. Thus, pursuant to KRS 26A.300(1), the motion to compel the payment of damages was statutorily forbidden.

B. Jackson v. Beattyville Water Department

[2008-CA-000421](#) 02/20/2009 2009 WL 414302

Opinion by Judge Stumbo; Judges Clayton and Moore concurred. The Court reversed and remanded an order of the circuit court that remanded appellant's claim to district court. The Court held the trial court erred in transferring the action after finding that appellant failed to establish a prima facie case that her damages exceeded the jurisdictional amount set out in KRS Chapter 23A and 24A, based on defense counsel's erroneous statement that appellant had not filed a supplemental answer demonstrating the amount in controversy. The record established that the answer was timely filed and the complaint, coupled with appellant's answers to interrogatories, was sufficient to establish jurisdiction in the circuit court.

C. R.T. Vanderbilt Company, Inc. v. Franklin

[2007-CA-002103](#) 02/06/2009 2009 WL 276734

Opinion by Judge Thompson; Judge Stumbo and Senior Judge Guidugli concurred. The Court affirmed a judgment entered in favor of the appellee spouse and estate for the deceased's death caused by exposure to asbestos. The Court first held that the complaint was not untimely filed. It was well within reason for the jury to find that appellees exercised due diligence to discover that appellant was the source of the asbestos by launching a massive discovery effort to ascertain the identity of any unnamed tortfeasors. Only a post-death tissue analysis discovered the presence of talc, and appellant misrepresented that its talc contained asbestos - a fact which was exclusively within appellant's knowledge. The Court then held, although the sanctions imposed pursuant to CR 37.02 were harsh, the trial court did not abuse its discretion in imposing the sanctions for appellant's failure to comply with discovery orders. Appellant's non-compliance was willful, the requests were legitimately related to the subject matter of the litigation, appellant was repeatedly warned that sanctions would be imposed, the sanction was appropriate in light of the information withheld, and the trial court made detailed findings of fact sufficient to support the sanction imposed. The Court next held that, although an instruction to the jury reflecting the sanctions imposed was prejudicial and assumed an essential fact, as a result of the sanctions imposed the prejudice was unavoidable based on the sanctions. The Court also held that the trial court did not abuse its discretion by admitting expert testimony without a Daubert. The court was aware of the expert's proposed testimony, the basis for the claims against the defendants, the paper relied on by the expert, that the paper had been peer reviewed, that the expert testified in five prior cases, that the expert's opinions had been published in professional journals, and that tissue digestion study was an accepted methodology. The Court then held that documents drafted by a third-party defendant were highly relevant to the knowledge of the mining industry that talc contained asbestos and were admissible under the business records exception KRE 803(6). The Court also held that testimony of an industrial hygienist was properly admitted under KRE 602, as he testified to matters within his personal knowledge. The Court finally held that the trial court did not abuse its discretion in failing to reduce the statutory interest rate.

D. Watkins v. Fannin

[2008-CA-000170](#) 02/27/2009 2009 WL 485030

Opinion by Judge Acree; Judge VanMeter and Senior Judge Henry concurred. The Court dismissed an appeal from an order of the circuit court dismissing appellant's petition for declaration of rights. The Court held that because appellant failed to name an indispensable party, the Court was without jurisdiction to grant relief. Because appellant's petition sought an order to restore good time and expunge his prison record and only the Department of Corrections and the warden had the authority to do so, failure to name them in the Notice of Appeal was fatal.

III. CONTRACTS

A. Spot-A-Pot, Inc. v. State Resources Corporation

[2007-CA-002018](#) 02/13/2009 2009 WL 350646

Opinion by Judge Thompson; Judges Lambert and Stumbo concurred. The Court affirmed an order of the circuit court enforcing a settlement agreement resulting from a mediation related to financing for appellants' business operations. The Court held that the trial court did not err in granting appellee's motion to enforce a settlement agreement that appellee proposed. The bullet-point document generated at a mediation conference did not encompass the entire agreement of the parties and therefore, the trial court properly considered extrinsic evidence to discern the intent of the parties. The Court declined to address appellants' argument that the trial court failed to render sufficient findings of fact to support its order and judgment, as appellants failed to request specific findings pursuant to CR 52.04.

IV. CRIMINAL LAW

A. Combs v. Commonwealth

[2008-CA-000181](#) 02/06/2009 2009 WL 277074

Opinion by Senior Judge Guidugli; Judges Stumbo and Thompson concurred. The Court reversed and remanded a judgment of the circuit court entered subsequent to a jury verdict finding appellant guilty of trafficking in a controlled substance. The Court held that the trial court erred in submitting instructions permitting the jury to find appellant guilty as a principal after it allowed the Commonwealth to amend the indictment to charge appellant with complicity to trafficking in a controlled substance, first degree. Appellant was substantially prejudiced when the Commonwealth was permitted to pursue both charges after the evidence was closed, as appellant had no opportunity to defend herself against the original charge of trafficking.

B. Commonwealth v. Borders

[2007-CA-002435](#) 02/13/2009 2009 WL 350684 DR filed 2/24/2009

Opinion by Judge Caperton; Judge Thompson and Senior Judge Graves concurred. The Court reversed and remanded an order of the circuit court granting a motion to dismiss the charges against appellant on double jeopardy grounds. The Court held

that appellant had ample opportunity to either object to the trial court's decision to grant a mistrial in the first trial or to offer an acceptable alternative course of action. Therefore, he impliedly consented to the mistrial and his retrial was not barred on double jeopardy grounds. Further, appellant gave implied consent to the mistrial when he engaged in discussion with the trial court, both in and out of chambers, regarding potential witnesses for the next trial.

C. Crouch v. Commonwealth

[2008-CA-000314](#) 02/07/2009 2009 WL 277100

Opinion by Senior Judge Buckingham; Judge Wine concurred; Chief Judge Combs dissented by separate opinion. The Court affirmed a judgment of the circuit court entered subsequent to a jury verdict convicting appellant of identity theft, reckless driving, and being a first degree persistent felony offender and sentencing him to five years on the theft of identity charge, enhanced to 15 years due to his first-degree PFO status. After appellant was stopped for speeding, he gave a false name and Social Security number to the police. The Court held that the trial court did not err in denying appellant's pre-trial motion to have the indictment amended down from the felony charge of identity theft under KRS 514.160(1)(d) to giving a false name or address to a peace officer under KRS 523.110(1) because the trial court had no jurisdiction to amend the indictment except as authorized by RCr 6.16. Further, appellant's actions fit the plain language of the statute, as he admitted that he used the name and Social Security number as an alias to avoid detection. The statute did not require that there be a pecuniary benefit. The Court then held that the trial court did not err in denying appellant's request for a jury instruction that would have allowed the jury to find him guilty of giving a false name to a peace officer, as the evidence did not support the instruction. The Court declined to hold that the punishment was disproportionate to the crimes committed, as the sentence of 15 years was a result of appellant's PFO status. The Court also declined to apply the rule of lenity because there was no doubt or ambiguity as to the construction of the statute.

D. Johnson v. Commonwealth

[2007-CA-002517](#) 02/06/2009 2009 WL 276798

Opinion by Senior Judge Buckingham; Chief Judge Combs and Judge Wine concurred. The Court affirmed in part and reversed and remanded a judgment of the circuit court wherein appellant was convicted and sentenced to ten years in prison for drug offenses and for being a first-degree persistent felony offender. The Court held that the trial court erred by denying a motion to dismiss the PFO charge. In order for there to be a first-degree PFO prosecution based on convictions from a foreign jurisdiction, pursuant to KRS 532.080(3)(a), the sentences imposed for each conviction must be for one year or more or a sentence of death. Because one of appellant's Florida convictions resulted in a sentence of only 60 days and the other two resulted in "drug offender" probation for a period of time, the Commonwealth lacked proof that the convictions qualified for PFO prosecution. The Court then held that the trial court did not err in denying appellant's motion for a directed verdict on the charge of first-degree trafficking in a controlled substance (cocaine).

It was not necessary for the Commonwealth to prove a specific drug transaction but only possession with intent to sell. It was not clearly unreasonable for a jury to conclude appellant was guilty beyond a reasonable doubt based on the facts that the police acted on a tip that a person was selling cocaine at Keeneland Racetrack and was staying at a specific room at a hotel; that appellant was staying in the particular room at the hotel and a search uncovered a quantity of cocaine; that appellant admitted the cocaine was his; and that a large amount of cash was also found in the hotel, which was admittedly appellants. The Court finally held that the trial court did not err in ordering the forfeiture of cash seized when appellant failed to rebut by clear and convincing evidence the presumption of KRS 218A.410(j). The evidence indicated that the cash was found in close proximity to the cocaine and consisted primarily of denominations that represented the sale of specific amounts of crack cocaine, thus establishing the rebuttable presumption that the cash was forfeitable.

E. Taylor v. Commonwealth

[2007-CA-002351](#) 02/20/2009 2009 WL 414003

Opinion by Judge Wine; Chief Judge Combs and Senior Judge Buckingham concurred. The Court affirmed a judgment convicting appellant of promoting contraband in the first degree pursuant to KRS 520.050. The Court first held that appellant stated no basis to suppress the marijuana found on his person after he was taken to jail subsequent to his arrest. The police officers' questions to appellant did not establish that the evidence was obtained in violation of his constitutional rights but rather, went to the issue of whether the evidence was sufficient to support a jury's finding that he knowingly introduced contraband into a detention facility. The Court then held that appellant's suppression motion did not preserve the issue at it related to the sufficiency of the evidence on a motion for directed verdict when appellant only argued in his motion for directed verdict that the Commonwealth failed to prove that marijuana was dangerous contraband. However, the Court held that even had the issue been adequately preserved, the Commonwealth proved both a voluntary act and a culpable mental state by proving that appellant knew that he had contraband on his person and, with that knowledge, took it into the facility. The Court rejected the argument that this interpretation violated appellant's right against self-incrimination.

V. EMPLOYMENT

A. Adams v. Lexington-Fayette Urban County Government

[2007-CA-000066](#) 02/13/2009 2009 WL 350600

Opinion by Judge Thompson; Judge VanMeter and Senior Judge Henry concurred. The Court affirmed a judgment entered pursuant to a jury verdict in favor of appellees on appellant's claim for racial discrimination and retaliatory discharge. The Court held: 1) The trial court order severing appellant's case from that of his co-plaintiffs was proper under CR 42.02, as it was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles when it was issued almost three years before a jury was impaneled and there was sufficient time for appellant to prepare his case. 2) The appeal as it related to the co-plaintiffs must be dismissed

because their litigation remained in the trial court for disposition. 3) The trial court did not err in excluding portions of a report created as a result of a fact-finding investigation. While the report fell within the public records hearsay exception, the third-party statements contained therein constituted inadmissible double hearsay. 4) The trial court did not err in excluding appellee's answer and motion for partial dismissal filed in the wrongful termination case filed by appellant's supervisor. First, the unverified answer and motion were defenses to the wrongful termination allegation and could not be deemed judicial admissions that appellee vicariously, through a supervisor, engaged in discriminatory employment practices. Second, the statements contained in the documents were not so contrary to appellee's interests that they fell under the purview of KRE 804(b)(3). Third, the trial court did not abuse its discretion in ruling the documents were cumulative in nature. Fourth, the trial court did not abuse its discretion in excluding the documents for impeachment purposes when they were prepared and signed by counsel, not the witness. 5) The trial court did not err by denying appellant's motion for a directed verdict, as the evidence was sufficient for a jury to reasonably find that the supervisor engaged in unequal employment practices but that race was not the motivating factor and that appellant was not subjected to retaliation. 6) The jury instructions were not inadequate or defective. a) The instruction requiring the jury to find that appellant suffered a materially adverse change was permissible. b) The instructions did not require that appellant prove his race was the sole factor for any materially adverse change. c) The fill-in-the-blank instruction forms requiring the jury to state what materially adverse actions were taken were not impermissible. d) The trial court was not required to give a vicarious liability instruction. e) The trial court did not err by including extraneous language in an instruction as there was no indication that the jury was misled. f) The instructions did not improperly constrict what was illegal conduct. g) The trial court was not required to give a missing evidence instruction as there was no evidence that appellee intentionally destroyed evidence favorable to appellant. h) The trial court was not required to instruct that disparate treatment was legally equivalent to discrimination. 7) The doctrine of *res adjudicata* was not applicable to the issues of whether the trial court erroneously denied a request for appellee to produce a report purportedly authored by its counsel, denied a request to call counsel as a witness, and refused to disqualify appellee's counsel. 8) Any records or reports related to the investigation of the claim constituted work product and any possible hardship to appellant was rectified by a trial court order requiring appellee to provide a list of the individuals interviewed during the investigation. 9) Appellant was not prejudiced by the trial court's refusal to permit appellant to call appellee's counsel as a witness or to disqualify counsel as there was no evidence that counsel had any specialized or personal knowledge that could not be gained from other sources.

VI. FAMILY LAW

A. **Hearld v. Hearld**

[2008-CA-000601](#) 02/13/2009 2009 WL 350713

Opinion by Judge Thompson; Judge Stumbo and Senior Judge Guidugli concurred. The Court vacated and remanded an order awarding custody of three minor children to the mother. The Court held that the family court lacked jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA). The prerequisite for the court to invoke jurisdiction under KRS 403.822 was not met, as Kentucky was not the home state of the children for six months prior to the commencement of the custody proceedings and moreover, there was no evidence to suggest that the children's home state of North Carolina had declined to exercise jurisdiction. Further, the court did not have emergency jurisdiction under KRS 403.828(1), as the custodial parent's pending deployment to Iraq and refusal to disclose the location of the children did not constitute mistreatment or abuse so as to invoke the court's subject matter jurisdiction.

B. **R.M. v. R.B.**

[2008-CA-001099](#) 02/27/2009 2009 WL 485089

Opinion by Judge Taylor; Judge Lambert and Senior Judge Graves concurred. The Court affirmed an order of the circuit court denying appellants' motion to terminate the appellee biological father's parental rights. The Court first held that while the circuit court erred in conducting an evidentiary hearing and permitting appellants to present their case under KRS Chapter 625, because the substantial provisions of KRS 625.090(2) pertaining to involuntary termination were identical to those in KRS 199.502(1) for adoption proceedings, it was not necessary to reverse because the proper result was reached. The Court also held that the Report from the Cabinet required by KRS 199.510 was essential to support appellants' claims that adoption was in the best interest of the child and that without the Report the circuit court could not grant the adoption as a matter of law.

VII. INSURANCE

A. **Auto-Owners Insurance Company v. Goode**

[2008-CA-000350](#) 02/13/2009 2009 WL 367216

Opinion by Judge Keller; Chief Judge Combs and Senior Judge Henry concurred. The Court affirmed a jury verdict in favor of appellee on her claim for coverage under her mother's underinsured motorist coverage, which exempted from coverage a relative who owned an automobile. The Court first held that the definition of "automobile" in the policy was ambiguous. The Court then held that the holding in *Lewis v. American Family Ins. Group*, 555 S.W.2d 579 (Ky. 1977) was applicable and therefore, the trial court did not err in defining "automobile" as one that had not been retired from service for an indefinite time into the future. The Court next held that the jury instruction regarding the operability of appellee's car was not erroneous, as counsel had ample opportunity to flesh out the legal nuances regarding the extent of damage to appellee's car, the cost to repair it and whether appellee

intended to repair it. The Court finally held that the trial court did not err in denying the insurer's motion for a directed verdict. Appellee's evidence that the automobile did not have a steering column, needed brake repairs, had bald tires and had not been driven for several months was sufficient for a jury to reasonably conclude that the repairs necessary to make the car roadworthy and/or operable were not minor in nature.

B. State Farm Mutual Automobile Insurance Company v. Slusher

[2008-CA-000169](#) 02/27/2009 2009 WL 485027

Opinion by Judge Wine; Judge Caperton concurred; Judge Taylor dissented by separate opinion. The Court affirmed a judgment of the circuit court finding that the estate of an employee was entitled to receive uninsured motorist benefits under a policy issued to the deceased on his personal automobile. In a case of first impression, the Court held that the co-employee's immunity from liability under the Workers' Compensation Act, KRS 342.690(1), did not preclude the estate from recovering uninsured motorist's benefits from the policy. Because the policy language "legally entitled to recover" was ambiguous, the Court applied the "essential facts" approach. Because the parties stipulated that the co-employee's negligence caused the accident and that the damages exceeded the workers' compensation benefits and were at least the policy limits for UM or UIM benefits, recovery was appropriate. Further, because the clear intent of the UIM statute was to allow an insured to purchase additional coverage so as to be fully compensated, it was of no consequence that the tortfeasor was unable to respond in damages.

VIII. STATUTE/RULE INTERPRETATION

A. Louisville/Jefferson County Metro Government v. Metro Louisville Hospitality Coalition, Inc.

[2008-CA-000377](#) 02/13/2009 2009 WL 350694 Reconsid 02/20/2009

Opinion by Judge Moore; Judges Taylor and VanMeter concurred. The Court reversed an opinion and order of the circuit court striking as unconstitutional Louisville's Smoke Free Law, after it found that a provision exempting Churchill Downs was unconstitutional. The Court first held that a justiciable controversy existed, even though the exemption was deleted when the Law was amended and reenacted, because appellees sought relief beyond the exemption and because there were pending actionable citations under the Ordinance. The Court then held that the circuit court erred in relying on legislative history in the absence of an ambiguity in the law. The Court further held that the circuit court erred in relying on *Burrow v. Kapfhammer*, 284 Ky. 753, 145 S.W.2d 1067 (1940), in reaching its conclusion that the exemption invalidated the entire ordinance. The Court ultimately concluded that even in light of the invalid exemption, the severability clause substantively comported with KRS 446.090 and the law could remain in force because it could still fully serve the purpose of promoting public health.

IX. TAXATION

A. **Finance and Administration Cabinet v. Rohm and Haas Company**

[2008-CA-000022](#) 02/06/2009 2009 WL 277054

Opinion by Judge Acree; Judges Clayton and Keller concurred. The Court affirmed an order of the circuit court which overturned an order from the Board of Tax Appeals upholding the denial of tax refunds claimed by appellees under KRS 139.480(3) for sales and use tax imposed on energy costs. The Court held that, as a matter of law, each of appellees' three business operations was separate and distinct from the others for purposes of the statute. The Court distinguished the holding in *Schenley Distillers, Inc. v. Commonwealth, ex rel. Luckett*, 467 S.W.2d 598 (Ky. 1971) from the holding in *Revenue Cabinet, Com. of Ky. v. James B. Beam Distilling Co.*, 798 S.W.2d 134 (Ky. 1990), and held that *Beam* was applicable and that the distinction between the various stages of the process of converting crude methyl methacrylate into Plexiglas and emulsions was not at odds with the "integrated plant concept" embraced in *Schenley*. The Court finally held that appellees did not fail to include the cost of raw materials in the costs of production in the downstream operations, as the costs were factored in the accounting by the upstream operation.

X. TORTS

A. **Davis v. Johnson**

[2007-CA-002394](#) 02/20/2009 2009 WL 414008

Opinion by Senior Judge Buckingham; Judges Dixon and Nickell concurred. The Court reversed a judgment of the circuit court that reversed a judgment of the district court finding that appellee could not recover a share of damages under Kentucky's wrongful death statute. The Court held that a decedent's stepchild who was not legally adopted could not recover a share of the damages under KRS 441.130.

B. **Davis v. Scott**

[2007-CA-002279](#) 02/13/2009 2009 WL 367219

Opinion by Judge Dixon; Judges Caperton and VanMeter concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of appellees and dismissing appellants' claim for legal malpractice. The Court held that the trial court did not err in dismissing the claim. Appellants' assignment of the proceeds from the legal malpractice action as settlement in federal litigation, conditioned upon appellant pursuing a legal malpractice claim against his attorney, constituted an impermissible assignment of a legal malpractice claim, which was void as against public policy. The Court further held that the cause of action could not be maintained apart from the assignment as, under the express terms of the settlement agreement in the federal litigation, appellant could not be the real party in interest.

XI. WILLS AND ESTATES

A. Hammons v. Hammons

[2007-CA-002312](#) 02/13/2009 2009 WL 350663

Opinion by Judge Lambert; Judge Taylor and Senior Judge Graves concurred. The Court affirmed a summary judgment, declaration of rights and order quieting title in favor of the widow of appellants' deceased father. The Court held that the trial court did not err in finding that appellants only possessed a contingent, rather than a vested remainder in their father's property. The explicit provisions in the will required that appellants or one of their heirs survive appellee to inherit the property remaining from her life estate and therefore, their interest by definition was contingent. The Court also held that the trial court did not err in finding that appellants were not entitled to any right of inspection or an accounting of the property.

XII. WORKERS' COMPENSATION

A. Morrison v. The Home Depot

[2007-CA-002457](#) 02/13/2009 2009 WL 367212

Opinion by Judge Nickell; Judges Clayton and Taylor concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming an opinion of the ALJ, after remand from the Kentucky Supreme Court, finding that a university evaluator was affiliated with the University of Louisville School of Medicine. The Court held that the ALJ's finding was supported by substantial evidence that the doctor met the requirements of KRS 342.315 to serve as a university evaluator. The evidence showed that the doctor was a non-tenured professor of orthopedic surgery and had performed the university evaluation at the request of the medical school and that his status as an independent contractor with a medical assessment clinic did not negate those facts.