

**PUBLISHED OPINIONS  
KENTUCKY COURT OF APPEALS  
FEBRUARY 2010**

**I. APPEALS**

**A. Gay v. Oldham**

[2007-CA-001086](#) 02/05/2010 2010 WL 391846 DR Pending  
Opinion by Judge Taylor; Judges Keller and VanMeter concurred. The Court dismissed an appeal from an order of the circuit court denying a motion to set aside a final order adjudging that the parties' settlement agreement provided for joint and several liability against appellants, as stated in a prior judgment. The Court held that because appellants failed to timely appeal the original judgment, as required by CR 73.02(1), the Court lacked jurisdiction to hear the appeal. All orders entered subsequent to the original judgment were null and void. The Court also held that there was nothing in the record referencing any several or individual allocation of liability in the original judgment that would require the imposition of joint and several liability as required under KRS 381.390.

**II. ATTORNEY AND CLIENT**

**A. Johnson v. Johnson, True & Guarnieri**

[2008-CA-000653](#) 02/05/2010 2010 WL 391847 Rehearing Pending  
Opinion by Judge Lambert; Senior Judge Harris concurred; Judge Taylor dissented by separate opinion. The Court vacated and remanded an order of the circuit court granting the appellee law firm's motion for fees and expenses related to the firm's representation of two brothers' opposition to a proposed plan to reallocate assets between three trust funds. The trial court granted the firm's motion for approximately \$2.8 million dollars in attorney fees - 10% of what it found was a \$28 million dollar savings to the fund, constituting a common fund, from which the allocation was sought. The Court held that the trial court abused its discretion in granting the award. The absence of a contingency fee arrangement between the firm and its clients was controlling and prohibited the firm from seeking 10% of the fund. The firm did not have a right to seek recovery in equity against the fund because it did not represent the broad interests of the fund and its efforts were simply incidental to the representation of the brothers. The fee agreement between the firm and its clients was both relevant and controlling as to the determination of the fees assessed against the common fund, unless the fee set forth in the fee agreement was otherwise determined to be unreasonable. The Court rejected the argument that KRS 412.070 created an exception to the requirements of SCR 3.130(1.5)(c) regarding the collection of contingency fees against the recoveries of the firm's own clients. Simply alerting the clients of its intention to seek a fee "well above the hourly rate" was not sufficient to satisfy the requirements of SCR 3.130(1.5)(c). The firm's sole remedy was in *quantum meruit*, which presumed the collection of a

non-contingency-based fee. The Court then held that the trial court did not err in utilizing KRS 412.070 to assess attorney fees against recoveries of the remaining unrepresented beneficiaries of the fund. The Court remanded for the trial court to reevaluate the reasonableness of the fees assessed against the recoveries of the remaining beneficiaries in light of the holding that it was an abuse of discretion to award a contingency fee.

### III. CIVIL PROCEDURE

#### A. **Burnham v. Radiology Group of Paducah, P.S.C.**

[2009-CA-000474](#) 02/19/2010 2010 WL 567923

Opinion by Judge Stumbo; Chief Judge Combs and Judge Clayton concurred. The Court reversed and remanded an order of the circuit court dismissing a medical malpractice claim for failure to revive the action after the death of the claimant. The Court first held that revival was mandatory and must be brought in the name of the personal representative of the estate. Since the deceased was the party in interest, CR 25.01, KRS 411.140 and KRS 395.278 applied upon her death. However, the Court then held that appellee waived its right to have the case dismissed by actively litigating the case for over three years. Further, appellee could show no prejudice because the deceased's spouse had been part of the case as guardian for the deceased prior to her death and had subjected himself to the trial court's jurisdiction by appearing on behalf of his spouse and her estate and there was almost no difference between his duties as guardian and as a personal representative of the estate.

### IV. CONTRACTS

#### A. **Big Sandy Regional Jail Authority v. Kenar Architectural & Engineering, Inc.**

[2009-CA-000167](#) 02/05/2010 2010 WL 392304

Opinion by Judge Lambert; Judges VanMeter and Senior Judge Harris concurred. The Court affirmed a summary judgment entered in favor of appellant on a breach of contract claim. The trial court found that appellee was entitled, as a matter of law, to the payment of fees for the design and development of architectural plans reflecting a proposed expansion of a detention facility. The Court first held that the trial court did not err in finding a valid enforceable contract between the parties. Appellant's official records and documentation evidenced a valid and enforceable contract and therefore, there was no violation of the principle mandating that a unit of government speaks only through its official documents. The Court also held that the trial court did not abuse its discretion in denying a motion to transfer venue. Either venue was proper under KRS 452.450 and appellant did not allege that it could not get a fair and impartial trial in order to justify a change of venue pursuant to KRS 452.010(2).

#### B. **Laurel Construction Company, Inc. v. Paintsville Utility Commission**

[2009-CA-000845](#) 02/19/2010 2010 WL 568934

Opinion by Judge Dixon; Chief Judge Combs and Senior Judge Buckingham concurred. The Court affirmed an order of the circuit court granting summary

judgment in favor of appellee on appellant's claim alleging that appellant's rejection of its bid to construct a new water tank violated KRS Chapter 45A, Kentucky's Model Procurement Code (KMPC), and section 2 of the Kentucky Constitution. The Court first held that the trial court properly found that KMPC did not apply to the case. The language contained in the grant agreement for the project did not require the appellee utility commission to proceed in accordance with the KMPC but only parenthetically referenced the commission's acts as being consistent with KRS Chapter 45A. Further, even if the commission contractually agreed to be bound by the KMPC, appellant was not a party to the grant agreement and therefore, lacked standing to assert a violation. The Court next held that the commission's actions did not violate Kentucky Constitution's Section 2. The commission's decision to reject appellant's low bid was not arbitrary but rather, was based upon multiple considerations, including the recommendations of the commission's manager and the consulting engineer.

## V. CRIMINAL LAW

### A. Bishop v. Commonwealth

[2008-CA-001966](#) 02/05/2010 2010 WL 392219 Rehearing Pending Opinion by Judge Caperton; Judges Acree and Thompson concurred. The Court reversed and remanded a final judgment and order of the circuit court entered following a jury trial. Appellant was convicted on a charge of first-degree assault and was sentenced to ten years. The Court first held that the trial court did not err in admitting 276 pages of medical records under KRE 803(6). The records were admissible as business records as exceptions to the hearsay rule as they contained the proper certification under KRS 422.300. However, the Court opined that whether the records were properly certified and whether an expert was necessary to explain the records to the jury were two different issues, holding that, pursuant to KRS 403, the probative value of the information contained in the records was substantially outweighed by the danger of undue prejudice, confusion of the issues, misleading of the jury, or by considerations of undue delay or needless presentation of cumulative evidence. The Court then held that the trial court erred in admitting the medical records in mass without the availability of any physician to explain the content.

### B. Butler v. Commonwealth

[2008-CA-001484](#) 02/05/2010 2010 WL 391857 Opinion by Judge Thompson; Judges Stumbo and Wine concurred. On discretionary review, the Court affirmed an order of the circuit court affirming a district court order revoking appellant's probation and ordering her to serve a 12-month sentence for possession of marijuana. The Court held that although appellant's banishment from the county in which she was convicted, as a condition of her probation, violated her constitutional right of free travel, appellant's failure to challenge the condition at the time it was imposed resulted in the survival of judgment of conviction. Therefore, the service of the 12-month sentence was not in violation of appellant's constitutional rights.

**C. Dorris v. Commonwealth**

[2008-CA-001351](#) 02/26/2010 2010 WL 668650

Opinion by Judge Wine; Judge Keller and Senior Judge Lambert concurred. The Court remanded an order of the circuit court denying appellant's motion for post-conviction relief under CR 60.02, wherein appellant claimed that the trial court erred by failing to conduct a competency hearing, after ordering a psychological evaluation, prior to accepting appellant's guilty plea. The Court held that based on the motion for psychiatric testing, the language of the order ordering the psychological evaluation, and appellant's statements during the plea colloquy, the trial court had some reason to believe that appellant may have been incompetent. Combined with the fact that the trial court recommended mental health counseling for appellant in its sentencing orders, its failure to hold a competency hearing was error.

**D. Howard v. Commonwealth**

[2008-CA-002075](#) 02/19/2010 2010 WL 567299

Opinion by Judge Lambert; Senior Judge Knopf concurred; Judge Thompson concurred in result only. The Court affirmed a judgment of conviction for sexual abuse in the first degree and resisting arrest, for which appellant received an aggregate sentence of ten years' imprisonment. The Court first held that the trial court did not abuse its discretion in finding that the child victim was competent to testify after conducting an adequate competency hearing whereby the child demonstrated a moral obligation to tell the truth and was able to recall most of the events surrounding the sexual abuse. The child's inconsistent statements were a question of credibility for the jury. The Court next held that the trial court did not abuse its discretion in admitting statements identifying appellant as the perpetrator, which were made by the child to a nurse at the hospital where she was treated. The statements were admissible as statements for the purpose of medical treatment. The Court next held that the trial court did not err in denying appellant's motion for a directed verdict as it was not clearly unreasonable for the jury to find him guilty. The Court next held that the trial court did not abuse its discretion in preventing appellant from introducing evidence that the child had been exposed to pornography and sex toys. The evidence was properly excluded under the Rape Shield Law as set forth in KRE 412. The Court next held that the trial court did not abuse its discretion in excluding the child's counseling records. The records were properly excluded as privileged under KRE 506. The Court next held that the trial court did not err in prohibiting the introduction of testimony by the *guardian ad litem* for the child. The statements were protected by the attorney-client privilege and the introduction of the statements in a family court proceeding did not amount to a waiver of the privilege. The Court finally held that appellant's allegations of prosecutorial misconduct did not entitle him to a new trial. Although a comment by the prosecutor was improper, it was harmless error. The other comments made by the prosecutor were not improper and therefore, did not constitute prosecutorial misconduct.

**E. Jones v. Commonwealth**

[2008-CA-001517](#) 02/05/2010 2010 WL 391862 DR Pending

Opinion by Judge Thompson; Senior Judge Harris concurred; Chief Judge Combs concurred in part and dissented in part by separate opinion. The Court reversed and remanded an order of the circuit court revoking appellant's probation. The Court held that the trial court erred by failing to inform appellant that his testimony at his probation revocation hearing could not be used against him at his subsequent criminal trial arising from the same facts. Consistent with holding in *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), and the Kentucky Constitution, the probationer's testimony at a probation revocation hearing could not be used substantively against him at a subsequent criminal proceeding. While the court was not required to continue the revocation proceedings until the criminal proceedings concluded, the trial court was required to inform the probationer that, if he chose to testify at the probation revocation hearing, the testimony could not be used against him in a subsequent criminal trial on the underlying offense, although the testimony might be admissible for the purpose of impeachment or rebuttal in an appropriate instance.

**F. Lawton v. Commonwealth**

[2008-CA-000692](#) 02/26/2010 2010 WL 668630

Opinion by Judge Nickell; Judges Stumbo and Wine concurred. The Court affirmed a final judgment and enhanced sentence of imprisonment entered subsequent to a jury verdict finding appellant guilty of escape in the second degree and of being a persistent felony offender in the second degree. The Court first held that the trial court properly denied appellant's motion for a directed verdict. Under the holding in *Stroud v. Commonwealth*, 922 S.W.2d 382 (Ky. 1996), and based on the totality of the evidence, second-degree escape was the appropriate charge when appellant severed his monitoring device and left the confines of his mother's home. Appellant remained in custody of the county detention center even though he was not physically confined within the detention center while on home incarceration. The Court rejected appellant's argument that he was "released" from custody to be placed in the home incarceration program. The Court also held that the trial court did not abuse its discretion by declining to instruct the jurors on third-degree escape when there was no testimony from which jurors could reasonably conclude that appellant was restrained by a public servant or any entity other than the detention center. The Court finally held that the second-degree escape instruction did not misstate the law and that there was no requirement that the Commonwealth prove that appellant escaped from a detention facility while he was charged with or convicted of a felony.

**G. Miller v. Commonwealth**

[2008-CA-001443](#) 02/12/2010 2010 WL 476013

Opinion by Senior Judge Lambert; Judges Nickell and VanMeter concurred. The Court affirmed a judgment of the circuit court entered subsequent to appellant's conditional guilty plea to possession of a controlled substance in the first degree and to being a persistent felony offender in the second degree. Appellant reserved his

right to appeal the denial of his motion to suppress evidence. The Court first held that the trial court's finding that appellant did or said something to prompt the police officer to pull up appellant's pants, revealing crack cocaine, was supported by substantial evidence even in light of appellant's and the officer's differing version of the events. The Court also held that the officer's justification for handcuffing appellant, which created the necessity of appellant requesting assistance with his pants, was sufficient to authorize a reasonable means to prevent flight when there was evidence that appellant's passenger was agitated, the encounter was between a single police officer and two citizens on a busy highway after a traffic accident, the presence of marijuana was suspected and a vehicle search was intended. Therefore, the manner of detention, although intrusive, was not unreasonable and did not constitute a seizure or arrest under the Fourth Amendment.

**H. Richards v. Commonwealth**

[2008-CA-001019](#) 02/26/2010 2010 WL 668637

Opinion by Judge Nickell; Judges VanMeter and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court denying appellant's motion for custody credit. The Court held that the trial court properly determined that until appellant completed his shorter Florida sentence, the amount of credit for time served to which he was entitled could not be calculated for the Kentucky sentence, which was ordered to run concurrent to the Florida sentence. Furthermore, because appellant was already serving the Florida sentence while in Kentucky to resolve the Kentucky charge, he received credit from Florida authorities for his time in Kentucky toward service of the Florida sentence. Awarding him the number of days he requested would constitute a double award for which there was no legal authority.

**I. Valesquez v. Commonwealth**

[2009-CA-000147](#) 02/19/2010 2010 WL 567325

Opinion by Judge Lambert; Judge Thompson and Senior Judge Knopf concurred. The Court vacated and remanded a judgment of conviction entered subsequent to a conditional guilty plea wherein appellant reserved the right to appeal the denial of a motion to suppress evidence found in his vehicle after he was arrested for driving on a suspended license. The Court held that appellant's Fourth Amendment rights were violated as a matter of law, under the holding in *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed. 485 (2009), when the police officers searched his vehicle without first obtaining a warrant to do so while appellant was secured in the back of a police vehicle. The Court also held that the good faith exception to the exclusionary rule could not preserve the admissibility of the evidence as the exception was limited to warrants invalidated for lack of probable cause, not for searches conducted pursuant to settled law at the time of the search.

**VI. EMPLOYMENT**

**A. Highlands Hospital Corporation v. Preece**

[2008-CA-000371](#) 02/19/2010 2010 WL 569745

Opinion by Judge Thompson; Judge Clayton and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court granting partial summary judgment to appellant for claims of intentional infliction of emotional distress. The Court also affirmed a judgment entered subsequent to a jury verdict finding that the employer interfered with the employee's exercise of her rights under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2615 (FMLA) and that it acted in bad faith pursuant to 29 U.S.C. § 2617(a)(1). The jury awarded the employee lost wages and the court doubled the award based on the finding of bad faith and awarded the employee front pay. The Court first held that the employer's failure to inform the employee of the method selected for calculating FMLA leave was the same as if no selection had been made although, the breach of the obligations did not result in strict liability. The Court next held that the trial court did not abuse its discretion in admitting the testimony of another employee who had personal knowledge of the employer's procedures and practices regarding the FMLA, as the testimony was relevant to establish that the employer acted in bad faith. The Court next held that the trial court did not err in refusing to grant a directed verdict for the employer when there was sufficient evidence that the employer failed not only to inform the employee of the method used to calculate her leave but failed to keep accurate records so that the used leave could be determined. It was a jury question as to whether the employer interfered with the employee's rights. The Court also held that there was sufficient evidence to support the finding that the employee was prejudiced by the violations. The Court next held that trial court did not abuse its discretion in awarding liquidated damages and prejudgment interest under 29 U.S.C. § 2617(a)(1) when the evidence was sufficient for the jury to find that the employer acted in bad faith and that its violation was not based on objectively reasonable grounds. The Court also held that the trial court did not abuse its discretion in awarding front pay as a viable equitable remedy. Although reinstatement was the preferable remedy, because neither party sought reinstatement, it was not feasible. Further, the one-year front pay was directly related to the employee's wages and benefits. The Court next held that the trial court did not err in denying the employer's request for an additional instruction. The Court finally held that the trial court properly dismissed the employee's claim for intentional infliction of emotional distress on the basis that the claim was preempted by the FMLA.

**B. McKissic v. Commonwealth, Transportation Cabinet**

[2007-CA-002471](#) 02/19/2010 2010 WL 566675

Opinion by Judge VanMeter; Judge Nickell and Senior Judge Lambert concurred. The Court affirmed a circuit court order dismissing an employee's claim for damages under KRS Chapter 344 and reversed and remanded a circuit court order vacating a Personnel Board decision dismissing the employee's appeal based on a hearing officer's finding that the employee failed to show that race or age was considered when he was not selected for promotion. The Court first held that the trial court properly found that the KRS Chapter 344 civil rights claim for damages was barred by the employee's election of remedies. The employee's EEOC charge was dismissed after an investigation and his separate administrative appeal to the Personnel Board was dismissed after the completion of a two-day evidentiary

hearing. He could not then also pursue judicial relief on the same grounds of race and age discrimination. The Court then held that the trial court erred by failing to apply the correct standard of review in vacating the Personnel Board's decision. The employee satisfied his initial burden of establishing a prima facie case of discrimination based on age and race by showing he was qualified for promotion to two available positions that were awarded to younger Caucasian applicants. However, the employer produced evidence to show that a legitimate, nondiscriminatory reason existed for its action in that the employee was the only candidate with a record of past disciplinary action. Absent a showing by a preponderance of the evidence that the stated reasons were pretextual, the employee was not entitled to relief.

## VII. FAMILY LAW

### A. **Buddenberg v. Buddenberg**

[2009-CA-000274](#) 02/05/2010 2010 WL 392306

Opinion by Judge Wine; Judge Nickell and Senior Judge Harris concurred. The Court affirmed in part and vacated in part a Domestic Violence Order prohibiting appellant from any contact with his wife and their three children. The Court also vacated an order holding appellant in criminal contempt for violation of a prior Emergency Protective Order. The Court first held that, while the wife had legitimate concerns about appellant's conduct toward juvenile girls, his behavior did not meet the standard in KRS 403.720(1) for granting a DVO with respect to the children. Any long-term risk appellant may pose to his own children were better addressed as part of the custody proceedings in the dissolution action. However, the Court declined to disturb the custody and visitation orders entered in the proceedings in light of the specification that the custody order was subject to modification by a court of competent jurisdiction. The Court next held that once the court made the finding that appellant's conduct toward the wife amounted to an act of domestic violence or abuse, pursuant to KRS 403.750(2) it had the discretion to set the length at the full three-year period, even though the evidence might have supported a shorter duration. The Court finally held that the trial court abused its discretion in holding appellant in contempt for violating the EPO absent specific findings supporting its conclusion that appellant intentionally violated the no-contact provision of the EPO and absent definitive evidence that appellant had been served with the EPO before he attempted to call his children.

### B. **Campbell v. Campbell**

[2006-CA-001803](#) 02/05/2010 2010 WL 391841

Opinion by Judge Taylor; Judges Acree and Thompson concurred. The Court reversed and remanded with directions findings of fact, conclusions of law and judgment, styled as a judgment of the family court but prepared by an arbitrator, in a dissolution of marriage action wherein the parties agreed to the arbitration procedure. The Court held that the family court erred by "confirming" the arbitration award and by converting it to a judgment. Under the Kentucky Constitution and applicable law, the findings of fact, conclusions of law and

judgment were neither enforceable nor legally valid. Under the local rule and under CR 52.01, the family court was required to conduct a hearing or trial upon the pending dissolution action and to make independent findings of fact and conclusions of law. The Court also held that, as this was a case of first impression, the opinion was limited to the cases currently before the Court and had prospective application only as to any pending or future arbitration proceedings in family court.

**C. Kerr v. Osborne**

[2009-CA-000351](#) 02/26/2010 2010 WL 668743

Opinion by Judge Nickell; Judge Wine concurred; Senior Judge Harris concurred by separate opinion. The Court vacated and remanded an order of the circuit court denying appellant's motion to vacate an agreed order giving custody of the parties' baby to appellee and granting appellant supervised weekend visitation with the child. The Court held that the trial court acted arbitrarily in finding that four months was an unreasonable time for appellant to move to set aside the agreed order. Additionally, the trial court misread CR 60.02 as imposing a one-year absolute cutoff for the filing of motion to vacate. The Court finally held that the trial court abused its discretion in awarding custody without receiving substantial evidence in support of its decision. KRS 403.270(2) required that an award of custody must be made following a determination of the best interests of the child.

**D. S.B.B. v. J.W.B.**

[2009-CA-001033](#) 02/05/2010 2010 WL 392346

Opinion by Judge Nickell; Judge Thompson and Senior Judge Graves concurred. The Court reversed and remanded an order of the circuit court denying a petition brought by a child's stepfather to involuntarily terminate the parental rights of the biological father. The Court held that the paying of court-ordered child support, without more, was insufficient to overcome the great weight of the evidence presented supporting termination of parental rights. Although payment of child support was a significant factor in determining whether the father abandoned the child, the father clearly evinced his intent to abandon the child, as the trial court impliedly found. The Court remanded for the circuit court to determine whether sporadic payment of support outweighed other importance considerations and whether it was sufficient to negate a finding of abandonment under KRS 199.502(1)(a), (e), and (g).

## VIII. INSURANCE

**A. Baldwin v. Doe**

[2009-CA-000721](#) 02/05/2010 2010 WL 392343

Opinion by Judge Caperton; Judge Stumbo and Senior Judge Knopf concurred. The Court reversed and remanded an order of the circuit court granting summary judgment to an insurer on appellant's claim for a back injury he suffered after stopping to remove a tarp that flew from a flatbed truck onto his vehicle. The Court held that the impact set forth by the facts was sufficient to satisfy the physical

contact required by the “strike” provision in appellant’s uninsured motorist coverage.

## **IX. PROPERTY**

### **A. Clark v. Board of Regents of Western Kentucky University**

[2008-CA-000599](#) 02/12/2010 2010 WL 476007

Opinion by Judge VanMeter; Judge Lambert and Senior Judge Henry concurred. The Court affirmed an order of the circuit court upholding the power of a university board to condemn appellants’ property, pursuant to the Eminent Domain Act of Kentucky, KRS 416.540 et seq., for the purpose of constructing an educational facility. The Court held that the university had the authority to condemn the property through the sovereign power of eminent domain and appellants failed to meet their burden of establishing the lack of necessity or public use. Therefore, the Court concluded that the factual findings made by the circuit court were supported by substantial evidence and the court did not err in concluding that the university did not act arbitrarily or in excess of its authority in seeking condemnation.

## **X. TORTS**

### **A. Helton v. Tri-County Cycles Barbourville, LLC**

[2009-CA-000049](#) 02/19/2010 2010 WL 567319

Opinion by Senior Judge Buckingham; Chief Judge Combs and Judge Dixon concurred. The Court affirmed summary judgments granted by the circuit court in favor of a cycle dealership, car dealership and the majority shareholder/officer of the dealership on appellant’s claim related to injuries he sustained in an all-terrain vehicle accident. Appellant was injured while riding as a passenger on the ATV. The Court held that the trial court properly granted summary judgments, pursuant to KRS 342.690(1), on the basis of workers’ compensation immunity. The Court first held that the issuance of appellant’s license for both businesses established his joint employment status as both an employee of the car dealership and the cycle dealership. The Court then held that while appellant’s employer may have been recklessly and negligently operating the ATV at the time of the accident, his actions were within the scope of his employment, thereby affording him immunity under KRS 342.690(1). The Court finally held that although the car dealership did not produce a certification of coverage from the Department of Workers’ Claims or an affidavit from the insurer, it produced a copy of its workers’ compensation insurance policy establishing coverage and, coupled with appellant’s workers’ compensation award, was sufficient to invoke the exclusive remedy immunity under KRS 342.690(1).

## **XI. WILLS AND ESTATES**

### **A. Benjamin v. JP Morgan Chase Bank, N.A.**

[2009-CA-000417](#) 02/26/2010 2010 WL 668744

Opinion by Judge Lambert; Judges Acree and Keller concurred. The Court affirmed a judgment of the circuit court in favor of several charities, holding that certain funds held in a testamentary trust established for the benefit of the charities should be distributed to the charities pro rata although the deceased never changed the terms of her will to account for a large inheritance. The Court held that it was impossible to interpret the language of the residuary clause as intending to confer a benefit upon remote heirs when there was no mention of the heirs anywhere in the will. The Court then held that there was no evidence to support the heirs' notion that the trust created in the will was an incomplete trust or was somehow ineffective to convey the residuary into the trust. The Court then held that the will did not evidence a specific intent to limit amounts given to the charities with the remainder passing to her heirs at law. The language of the entire will, giving each part its natural and legitimate meaning, established that it was not the testator's intent to die intestate as to any part of her property, including her residuary estate. The Court finally held that the cy pres doctrine also supported the judgment in favor of the charities. The testator clearly manifested a general charitable intent. Although Kentucky courts had never applied the cy pres doctrine to distribute excess trust funds, the testator's charitable purpose could not legitimately be questioned. Thus, the presumption against intestacy and the public policy favoring charitable contributions militated in favor of effecting the testator's wishes and designating the funds for the benefit of the charities pro rata.

## **XII. WORKERS' COMPENSATION**

### **A. American Greetings Corporation v. Bunch**

[2009-CA-001750](#) 02/26/2010 2010 WL 682342

Opinion by Judge Lambert; Judge Thompson and Senior Judge Knopf concurred. The Court affirmed a decision of the Workers' Compensation Board reversing a finding of the ALJ that a workers' claim was not compensable and dismissing her claim. The Court held that the Board correctly determined that participation in a charity event during the worker's unpaid lunch break was, as a matter of law, within the course and scope of her employment. In reaching that conclusion, the Court held that an unpaid lunch break was included within the term "working hours" to meet the test articulated in *Smart v. Georgetown Community Hospital*, 170 S.W.3d 370 (Ky. 2005). The Court then held that the charity event at which the worker injured her knee was a "regular incident" of her employment. Not only did the employer have actual knowledge of the event, it sponsored and hosted the activity and actively encouraged employees to participate. The Court rejected the employer's argument that an event must be held more than once a year in order to be considered a regular incident. The facts, considered in their entirety were sufficient to regularize the conduct and stamp it part and parcel of the employment.

### **B. Wal-Mart Stores, Inc. v. Wells**

[2009-CA-001682](#) 02/19/2010 2010 WL 566176 Rehearing Pending

Opinion by Judge Stumbo; Chief Judge Combs and Judge Clayton concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming an ALJ

opinion and award of workers' compensation benefits to an injured employee after he pursued a civil suit against two third-party tortfeasors who were responsible for his injuries. The Court first held that KRS 342.700(1) did not prohibit the worker from collecting from the civil suit and the workers' compensation claim. The ALJ correctly found the amount of the civil damages duplicating workers' compensation benefits were amenable to a claim of subrogation by the employer and correctly deducted the worker's attorneys' fees and expenses from the subrogation amount. The Court also held that the employer's argument that, as part of the tort settlement, the worker waived his right to bring a workers' compensation claim was without merit when the settlement set out the exact requirements of KRS 342.700(1).