

**KENTUCKY COURT OF APPEALS  
PUBLISHED OPINIONS  
FEBRUARY 2011**

**I. APPEALS**

**A. Lanham v. Lanham**

[2009-CA-001025](#) 02/25/11 WL citation not available

Opinion by Judge Wine; Judges Clayton and Combs concurred. The Court affirmed an order of the circuit court holding appellant in contempt for failing to comply with the terms of a divorce decree and order entered by the court. The Court first held that a trial judge is not an indispensable party to an appeal from an order of contempt. The Court then held that the trial court did not abuse its discretion in its finding of civil contempt after appellant flagrantly disregarded court orders.

**II. ATTORNEY FEES**

**A. Clark v. Hectus & Strause PLLC**

[2010-CA-000008](#) 02/25/11 WL citation not available

Opinion by Senior Judge Lambert; Judges Clayton and Moore concurred. The Court reversed and remanded a summary judgment in favor of a lawyer and law firm on appellant's claim for reimbursement of all or part of a \$10,000 fee paid during representation of appellant in a criminal matter after he plead guilty in lieu of going to trial. The Court held that the written fee agreement between the parties for trial preparation and trial, consisting of letters between the parties, was ambiguous as to the question of whether appellant would be entitled to a partial reimbursement of the subject fee in the event that the case did not proceed to trial. In light of the ambiguous nature of the parties' fee agreement, there were genuine issues of material fact that could not properly be resolved via summary judgment. Because the parties did not create a fee contract that addressed the issue of who was entitled to what in the event that a trial did not take place, the question would have to be resolved by a finder of fact.

**III. CRIMINAL LAW**

**A. Matlock v. Commonwealth**

[2009-CA-000929](#) 02/18/11 2011 WL 556437

Opinion by Judge Acree; Judge Stumbo and Senior Judge Lambert concurred. The Court remanded a circuit court order denying appellant's motion to suppress without holding an evidentiary hearing. The Court held that the motion to suppress was timely made when it was made prior to cross-examination of the Commonwealth's first witness, when the seized items were first offered into evidence. The Court next held that RCr 9.78 mandates a trial court to hold an

evidentiary hearing outside of the presence of the jury. In this case material and substantial facts were in dispute, no tape of the interaction between appellant and the officer existed, and the officer's testimony regarding the search and seizure differed greatly from appellant's testimony at trial. Therefore, the failure to grant the hearing was not harmless error.

**B. Parker v. Commonwealth**

[2009-CA-001701](#) 02/04/11 2011 WL 336833

Opinion by Judge Clayton; Judge Thompson concurred in result only; Judge Nickell concurred by separate opinion. The Court affirmed an order of the circuit court finding that appellant was not entitled to reimbursement of restitution he paid in response to a restitution order which the Court of Appeals had previously directed the trial court to void. The Court held that the parole board had authority under KRS 532.032(4) to make restitution a condition of appellant's parole and therefore, he was not entitled to reimbursement.

**C. Reed v. Commonwealth**

[2010-CA-000266](#) 02/04/11 2011 WL 336988 DR Pending

Opinion by Judge Lambert; Senior Judge Isaac concurred; Judge Moore dissented by separate opinion. The Court affirmed in part and vacated in part a judgment of conviction and sentence, entered subsequent to a plea agreement, imposing a felony fine upon appellant in the amount of \$1,000.00. The Court held that because the trial court had previously found appellant to be indigent, pursuant to KRS 534.030 the imposition of the felony fine was in error. The Court also held that pursuant to *Simpson v. Commonwealth*, 889 S.W.2d 781 (Ky. 1994), the Court could simply vacate the portion of the judgment requiring the indigent defendant to pay the fine but was not required to overturn the plea agreement improperly imposing the felony fine.

**IV. FAMILY LAW**

**A. Age v. Age**

[2009-CA-001982](#) 02/04/11 2011 WL 339196

Opinion by Judge Clayton; Judge Nickell concurred; Judge Thompson concurred by separate opinion. On appeal and cross-appeal, the Court affirmed orders of the circuit court denying appellant's motion under CR 60.02 to set aside a judgment of divorce, awarding maintenance to the cross-appellant, ordering the cross-appellant to pay additional fees to her original attorney, and denying the cross-appellant's motion for reimbursement of the attorney fees by appellant. The Court first held that while KRS 22A.020(3) does not allow appellate review of a dissolution decree, because appellant was asking for the marriage to be declared void, the decision was subject to appellate review. The Court then held that the trial court did not abuse its discretion in denying the motion to vacate the judgment of divorce because the motion was not timely filed within a year of the judgment and there was no evidence of civil fraud even though the Catholic Church determined under ecclesiastical law that the marriage was void. The

Court next held that the trial court did not err in awarding maintenance when the trial court's evaluation of the factors in KRS 403.200(2) was appropriate, the amount was not unreasonable and the duration was not arbitrary. The Court next held that although the notice of cross-appeal did not identify the order for reimbursement of attorney fees, because the objective was to decide cases on the merits; the cross-appellee made no objection; and no unfair prejudice resulted from consideration of the issue, the Court would decide the issue on its merits. The Court then held that the trial court did not abuse its discretion by not awarding the cross-appellant the attorney fees she incurred in defending against the motion to set aside the decree of dissolution. There was no indication that the court's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

**B. McGregor v. McGregor**

[2009-CA-000614](#) 02/18/11 2011WL556356

Opinion by Judge Wine; Judges Acree and Combs concurred. The Court affirmed findings of fact, conclusions of law and a judgment entered by the family court in an action dissolving the parties' marriage. The Court first held that the family court's finding that a shared-custody schedule best served the children's need for consistency and worked well for the parties was supported by substantial evidence and therefore, the court did not abuse its discretion in setting a shared-custody arrangement that allowed the parties to equally share parenting time on an alternating-week schedule. The Court next held that the family court did not err in imputing income to one spouse for purposes of determining child support and maintenance. In a case of first impression, the Court held that it was implicit in the language of KRS 403.200 that the court could impute income to a voluntarily unemployed or underemployed spouse to determine both the spouse's entitlement to maintenance and the amount and duration of maintenance. The Court next held that the family court was within its discretion to deviate from the child support guidelines based on the shared-parenting schedule. The Court also held that the family court did not clearly err or abuse its discretion in its discussion of the payment of the children's private school tuition in deviating from the guidelines. The Court next held that, based upon the income properly imputed to one spouse, the family court did not abuse its discretion by awarding maintenance based on this amount. Further, while the evidence may have supported an award for a shorter period in declining amounts, the evidence did not compel that result. The Court finally held that the family court did not inequitably assign debt to the parties.

**V. INSURANCE**

**A. Motorists Mutual Insurance Company v. Hartley**

[2010-CA-000202](#) 02/11/2011 2011 WL 474944

Opinion by Judge Thompson; Judge Moore and Senior Judge Lambert concurred. The Court reversed and remanded an opinion and order of the circuit court declaring that an "owned but not scheduled for coverage" exclusion

contained in a insurance policy issued by appellant to appellee was invalid and unenforceable. The Court first held that the exclusion was not ambiguous as it unequivocally stated that UIM coverage was not afforded for motor vehicles not covered under the policy and the motorcycle involved in the accident was not listed as an insured motor vehicle. The Court also held that the exclusion was not unenforceable on public policy grounds. In doing so, the Court distinguished the holdings in *Chaffin v. Kentucky Farm Bureau Ins. Companies*, 789 S.W.2d 754 (Ky. 1990), and *Hamilton Mut. Ins. Co. v. United States Fidelity & Guar. Co.*, 926 S.W.2d 466 (Ky. App. 1996). Unlike an owner of all other motor vehicles who must opt out of uninsured/underinsured coverage pursuant to KRS 304.20-020, motorcycle owners must affirmatively purchase all optional coverage. To afford UIM coverage to appellee, who did not pay premiums to appellant for coverage of his motorcycles and who expressly rejected such coverage, would be contrary to public policy because the insurance companies would ultimately raise premiums on all consumers to reflect the increased risk.

**B. Stamper v. Hyden**

[2009-CA-002033](#) 02/18/11 2011 WL 557796

Opinion by Judge Dixon; Judges Clayton and Wine concurred. The Court vacated and remanded a judgment entered upon a jury verdict in favor of the appellee insurance company on appellant's claims for recovery under her uninsured motorist benefits pursuant to her automobile insurance policy for damages resulting from the intentional criminal conduct of her former boyfriend. In a case of first impression, the Court held that in order to achieve the protective purpose of KRS 304.20-020, on a claim for UM benefits, the term "accident" must be interpreted from the perspective of the insured-victim, not the uninsured motorist-tortfeasor. Therefore, the incident was an accident within the meaning of appellant's UM policy and the trial court erred by instructing the jury to determine whether damages were the result of an accident. The Court also held that the error was not harmless because the instructions potentially confused or misled the jury by limiting appellant's recovery to damages that were caused by an accident.

**VI. JUVENILES**

**A. J.L. v. Commonwealth**

[2010-CA-001090](#) 02/11/11 2011 WL 475002

Opinion by Judge Nickell; Judges Keller and Stumbo concurred. The Court reversed and remanded orders finding the appellant minor siblings to be habitual truants and imposing restrictions on their movements and school absences until graduation or until they reached the age of 21, whichever occurred first. The Court held that the juveniles' admissions to the charged offenses must be set aside when the trial court failed to ensure the entry of the admissions was knowingly, intelligently and voluntarily made and that the juveniles knew the constitutional rights they were giving up by entering the admissions.

## VII. PROPERTY

### A. **W.M. Specialty Mortgage, LLC v. Community Trust Bank, Inc.**

[2009-CA-002091](#) 02/18/11 2011 WL 558655

Opinion by Chief Judge Taylor; Judge Keller and Senior Judge Lambert concurred. The Court affirmed a summary judgment of the circuit court adjudicating the priority liens upon a tract of real property. The Court held that the circuit court properly granted summary judgment to the appellee bank, holding that its lien claim was prior and superior to that of appellant. Pursuant to the plain terms of KRS 382.280, appellee's lien, which was recorded first in time, had priority over appellant's lien on the same property. The Court further held that appellant's argument that the doctrine of equitable subrogation should apply was without merit. There was no agreement between the borrowers and the appellee bank that the prior recorded lien would be subordinate to the later in time recorded lien. Additionally, the equities of the case did not favor application of the doctrine when the record revealed that in conjunction with a commercial loan, appellee obtained as additional collateral, a mortgage lien on the borrowers' residential property; thereafter appellant obtained and recorded a mortgage lien on the same residential real property after refinancing the borrowers' indebtedness on the property; through an error of the title examiner, appellant was unaware of appellee's prior lien; and the borrowers defaulted on the commercial loan.

## VIII. TORTS

### A. **Cunningham v. Abbott**

[2007-CA-001971](#) 02/04/11 2011WL336459 Rehearing pending

Opinion by Judge Nickell; Judges Stumbo and Wine concurred. The Court affirmed in part, vacated in part, reversed in part, and remanded orders entered in actions related to the mediated settlement of claims against the manufacturer of Fen-Phen. The actions were brought to retrieve what the plaintiffs claimed were misallocated monies and to receive damages for breaches of professional duty. On direct appeal the Court first held that the plaintiffs' filing of an independent action was not an impermissible collateral attack on valid orders entered in the products liability action against the drug manufacturer. The plaintiffs had no opportunity to learn of the handling of the settlement in the products liability action; the independent action was not the result of a modification or vacation of the orders in the products liability action; the failure of the attorneys to disclose settlement details, the amount of attorney fees, and information regarding the creation of a *cy pres* trust allowed for an inference that the plaintiffs were lulled, gulled, or seduced into inactivity during the products liability action; and CR 60.03 offered equitable relief by means of an independent action. The Court next held that the trial court erred in awarding partial summary judgment to the plaintiffs as an affidavit of a practicing attorney and expert in mass litigation raised genuine issues of material fact as to whether the entire settlement, minus

fees and expenses was to be split between the settling claimants; whether the settling complainants were fairly and adequately compensated; whether the *cy pres* trust was funded with money that should have been distributed to the settling claimants or was funded with excess funds for which the plaintiffs' consent to its ultimate use was not required; and whether the attorneys were obligated to indemnify the manufacturer for additional claimants who might come forward after settlement had been dispersed. The Court next held that the order denying the defendants' motion for summary judgment was interlocutory. The Court next held that an attorney did not have standing to appeal on behalf of the *cy pres* trust, which was a separate corporate entity that did not appeal the adverse ruling seizing its assets and placing them in a constructive trust. The Court finally held that the trial court did not abuse its discretion in denying the plaintiffs' motion to transfer venue from the Boone Circuit Court to Fayette Circuit Court. There was no statutory provision allowing for the bifurcated proceedings requested by the plaintiffs, seeking only that the trial be moved. Further, plaintiffs' active prosecution of the matter for nearly two years before complaining regarding venue operated as a bar to the request.

**B. Engle v. Baptist Healthcare System, Inc.**

[2009-CA-002170](#) 02/25/11 WL citation not available

Opinion by Judge Moore; Judge Dixon and Senior Judge Isaac concurred. The Court reversed and remanded on direct appeal and affirmed on cross-appeal a defense verdict in a medical negligence action regarding care and treatment provided to a patient. The Court first held that the trial court erred in admitting an investigative report from the Department for Community Based Services (DCBS) resulting from an investigation of the executor's allegations concerning the care and treatment. The report was hearsay and in light of *Jordan v. Commonwealth*, 74 S.W.3d 263 (Ky. 2002), KRE 803(8) did not exempt it from the rule against hearsay. The report, entered into evidence without the safeguards described by *Jordan*, did nothing more than put before the jury another social worker's improperly admitted written belief that a preponderance of the evidence did not support a finding that the health care provider deprived the deceased of services necessary to maintain her health and welfare. The erroneous introduction of this evidence prejudiced the executor's substantial rights and mandated reversal and a new trial. On the cross-appeal, the Court held that the trial court did not err in its decision to grant the executor leave to amend his answers to interrogatories to seek punitive damages after the close of evidence but prior to submission of the matter to the jury. Because a new trial was warranted, there was no authority to prohibit the executor from moving to supplement his answers during the course of retrial.

**C. McAlpin v. Davis Construction, Inc.**

[2009-CA-002154](#) 02/11/11 2011 WL 480761

Opinion by Judge VanMeter; Judge Lambert and Senior Judge Shake concurred. The Court affirmed an order and judgment of the circuit court dismissing with prejudice appellant's negligence claim against the appellee construction

company following a unanimous jury verdict in favor of the company. Appellant filed suit against appellee for the negligent maintenance and operation of its dump truck with which she was involved in a collision. The Court first held that the trial court did not err by instructing the jury that the driver's duties were subject to a sudden emergency qualification. The driver testified he was traveling at a lawful speed and that he applied his brakes immediately upon seeing appellant enter his path and appellee submitted evidence that the driver reacted typically. Therefore, a reasonable jury could deduce that the driver did not create the emergency and had little to no time for deliberation of alternative courses of action. The Court next held that the trial court did not err by denying appellant's motion for a directed verdict as the evidence was sufficient to support a finding that the driver acted as a reasonably prudent driver when appellant failed to yield to his right-of-way. The Court finally held that the trial court did not err by failing to instruct the jury according to the Code of Federal Regulations when the instructions given stated that the driver was under the duty to exercise ordinary care to avoid collision with other persons or vehicles using the highway and the detail concerning the duties to maintain the vehicle in a safe condition could have been fleshed out during appellant's closing statements.

**D. Smith v. Martin**

[2009-CA-002226](#) 02/04/11 2011 WL 336850

Opinion by Chief Judge Taylor; Judge Stumbo and Senior Judge Shake concurred. The Court affirmed in part, vacated in part and remanded a summary judgment dismissing appellant's defamation claims against appellee. The Court first held that the statements directed to appellant at a city council meeting by the mayor presiding at the meeting were entitled to an absolute privilege under KRS 83A.060(15). As such, the circuit court properly rendered summary judgment dismissing the defamation claim based upon those statements. The Court then held that KRS 411.060 provided a qualified privilege for the publication of a report recounting the events at the city council meeting. However, whether the report was fair and accurate or was maliciously made was not addressed by the trial court. Therefore, the Court remanded to the trial court for a determination of whether the qualified privilege operated as a defense to the defamation claim.

**IX. WILLS AND ESTATES**

**A. Jarvis v. National City**

[2009-CA-002258](#) 02/04/11 2011 WL 336865 DR pending

Opinion by Judge Nickell; Judge Clayton concurred; Judge Thompson dissented by separate opinion. The Court affirmed an award of summary judgment to appellees in a declaratory judgment action wherein appellees sought a declaration that the repeal of KRS 386.180, eliminating limits on the compensation charged by testamentary trustees, was effective with respect to trusts which predated the repealed statute. The Court adopted the summary judgment of the trial court, declaring that for serving as trustees of testamentary

trusts, the trustees could charge a reasonable fee, generally commensurate with the fee that would be charged for similar non-testamentary trusts, and in the limited instances of testamentary trusts that are or have been subject to a termination fee, the testamentary trustees' determination of reasonable fees may also take into consideration the fees charged or deferred, prior to the repeal of KRS 386.180, so that the total fee they receive during the administration of a trust was reasonable.

**B. Maratty v. Pruitt**

[2009-CA-000695](#) 02/11/11 2011 WL 474802

Opinion by Judge VanMeter; Chief Judge Taylor concurred; Judge Stumbo dissented. The Court affirmed a summary judgment of the circuit court in favor of the administratrix of an estate on the heirs' action under KRS 62.070 for recovery on a fiduciary's bond. The Court held that the three elements of claim preclusion subpart of *res judicata* were present - identity of the parties, identity of the cause of action, and an action resolved on the merits. The Court rejected the heirs' argument that claims involving breach of fiduciary duties were reserved solely to the circuit court. KRS 24A.120 gave the district court jurisdiction over the settlements and accounts of fiduciaries, even those that might be contested. Because the administratrix filed a proposed settlement, KRS 395.617 provided the heirs with the remedy of instituting an adversary proceeding in circuit court, pursuant to KRS 24A.120(2), following the district court judgment or of cross-appealing after the administratrix appealed. The Court also held that the claim on the bond was precluded by the heirs' participation in the district court settlement. By approving the settlement, the district court made the implicit determination that the administratrix had faithfully discharged her duties.

**C. McGowan v. Bogle**

[2010-CA-000118](#) 02/04/11 2011 WL 336932

Opinion by Judge Thompson; Judge Caperton and Senior Judge Isaac concurred. In a will construction dispute, the Court affirmed a judgment of the circuit court finding that the anti-lapse statutes were not applicable because the will unambiguously expressed the intention that the beneficiaries survive the testator in order to inherit under the will. The Court held that, pursuant to the reasoning in *Slattery v. Kelsch*, 734 S.W.2d 813 (Ky. App. 1987), the use of the language conditioning the gifts on the survival of the beneficiaries at the time of the testator's death was sufficient to defeat the application of the anti-lapse statutes. A different result was not compelled by KRS 394.410(3) and the facts in *Blevins v. Moran*, 12 S.W.3d 698 (Ky. App. 2000), were distinguishable. Because the will expressly and unambiguously stated the testator's intention, the circuit court was not required to admit extrinsic evidence regarding appellants' relationship to the testator.