

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
FEBRUARY 1, 2020 to FEBRUARY 29, 2020

I. CHILD CUSTODY AND RESIDENCY

A. Santise v. Santise

[2019-CA-000192](#) 02/14/2020 2020 WL 741744

Opinion by Judge Maze; Judge Goodwine concurred; Judge Kramer dissented and filed a separate opinion.

Father appealed an order of the Jefferson Family Court refusing to relinquish its exclusive continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Pursuant to a settlement agreement incorporated into the parties' 2011 decree of dissolution, the parties were awarded joint custody of their two children and Father was designated primary residential custodian. The agreement permitted Father to move with the children to New Jersey, where they have continuously resided since shortly after the initial custody award. In his motion to relinquish jurisdiction, Father argued that the children's connections with New Jersey far outweighed their increasingly attenuated connection to Kentucky and asserted that New Jersey had already indicated that it would accept jurisdiction under the UCCJEA if invited. After discussing each of the KRS 403.834 factors, the family court concluded that given the totality of the circumstances, the enforcement nature of the proceedings before it, the court's familiarity with the family, and Father's ability to participate in the proceedings with minimal inconvenience, Kentucky remained the most convenient forum for the custody action. By a 2-1 vote, the Court of Appeals upheld the decision of the family court, perceiving no abuse of discretion in its refusal to cede jurisdiction based upon the length of time the case had been pending before it and its familiarity with the family dynamics and issues. The dissent concluded that because the family court order did not finally dispose of a claim, it was a purely interlocutory order requiring dismissal of the appeal. The majority addressed the finality issue, determining that, in view of the fact that New Jersey had entered an order assuming jurisdiction and had in fact disposed of matters in issue between the parties, it was inimical to both the letter and the spirit of the UCCJEA to deny appellate review of a claim that the statute had not been properly applied, especially where that denial would result

in duplication of litigation in two states.

II. CIVIL PROCEDURE

A. Cook v. Radtke

[2018-CA-000954](#) 02/21/2020 2020 WL 857064

Opinion by Judge Taylor; Judges Combs and Goodwine concurred.

Appellants challenged an opinion and order awarding \$467,911.82 in damages for default upon sundry promissory notes. The Court of Appeals reversed and remanded, holding that the circuit court erred by determining at trial that appellants were liable to certain appellees for default where their claims were not timely raised by the complaint as amended or during discovery pursuant to CR 8.01. The Court further held that the circuit court erred in allowing those appellees to amend the pleadings post-trial to assert the subject claims pursuant to CR 15.02. Under the facts presented, appellants were denied proper notice of the claims and the ability to adequately prepare a defense, including the opportunity to assert counterclaims.

III. CRIMINAL LAW

A. *Benton v. Commonwealth*

[2018-CA-001800](#) 02/21/2020 2020 WL 855489

Opinion by Judge Maze; Judges Acree and Combs concurred.

Appellant entered a conditional *Alford* plea to charges of first-degree trafficking in a controlled substance, possession of a firearm by a convicted felon, and being a PFO II. He reserved the right to appeal the denial of his motion to suppress evidence obtained by the police during a traffic stop. The motion to suppress was based on events occurring in February 2017, when a Lexington police officer observed a vehicle leave a city park after dark. The vehicle's lights were initially off, but the lights were turned on as it left the park. The officer ran the vehicle's registration plates and discovered that the owner had an active warrant. The officer also received a report that the vehicle was connected to a theft. Upon stopping the vehicle, the officer approached the driver. The officer testified that he smelled marijuana coming from the vehicle. The driver, appellant, initially gave an incorrect Social Security number. However, he then provided his correct information and the officer determined that he was not the subject of the warrant. But when the officer's backup arrived, the officer asked appellant and the passenger to exit the vehicle. Appellant became agitated at this request. A search of the vehicle revealed a digital scale and a loaded handgun. Following his arrest, a pat-down search of appellant uncovered a substantial amount of heroin packaged for sale. Appellant argued that the officer had no probable cause to believe that a traffic violation had occurred and no reasonable, articulable suspicion that criminal activity was afoot. He also asserted that the Commonwealth was required to produce the warrant which was the basis for the traffic stop. The Court of Appeals disagreed, concluding that the credible report of an active warrant for the vehicle's owner provided a reasonable, articulable suspicion for the stop. Furthermore, the circuit court was in the best position to evaluate the credibility of the officer's testimony about the warrant and the other circumstances surrounding the stop. In light of the totality of the circumstances, the Court agreed that the officer had a reasonable suspicion to stop appellant's vehicle. Thus, the circuit court properly denied appellant's motion to suppress evidence obtained during the subsequent searches.

B. Carrender v. Commonwealth

[2018-CA-001142](#) 02/21/2020 2020 WL 855689

Opinion by Judge Lambert; Judges Maze and K. Thompson concurred.

Appellant was charged with driving under the influence (DUI), first offense, and reckless driving after he was stopped at a Kentucky State Police roadblock in Wayne County, Kentucky. After appellant's motion to suppress evidence was denied, he entered a conditional guilty plea to DUI, and the charge of reckless driving was dismissed. He was sentenced to two days' incarceration (with credit for time served) and ordered to enter an alcohol treatment program. Appellant's conviction was affirmed on direct appeal to the circuit court, and he sought and was granted discretionary review. The Court of Appeals affirmed, holding that the "general law enforcement" purpose of the roadblock was bolstered by KSP's stated emphasis on enforcement of traffic laws, with special importance placed upon "occupant protection (seatbelt adherence), sobriety, insurance and registration violations." Therefore, it was in compliance with *Commonwealth v. Cox*, 491 S.W.3d 167 (Ky. 2015). Secondly, the Court held that the district court considered all factors enunciated in *Commonwealth v. Buchanon*, 122 S.W.3d 565 (Ky. 2003), and *Cox, supra*, before denying appellant's motion to suppress. Thus, the circuit court was correct in affirming the district court's denial of the motion.

C. *Compise v. Commonwealth*

[2018-CA-000452](#) 02/21/2020 2020 WL 855694

Opinion by Judge K. Thompson; Judge L. Thompson concurred; Judge Taylor concurred in result only.

Appellant challenged orders voiding her pretrial diversion and placing her on probation with a sanction. The Court of Appeals vacated and remanded, holding that the circuit court failed to make the required findings under KRS 439.3106 and relied in part upon an inadequate order of restitution. That order directed appellant to pay restitution of \$22,998.76 to the victim for stolen property; however, no terms were provided as to how restitution was to be paid. The Court concluded that the order failed to comply with the mandates of KRS 532.033 and that findings should have been made regarding appellant's financial situation, her ability to pay restitution, and what, if any, monthly payments she could afford. Given that the order of restitution was deficient, this was clear error and the circuit court must enter a corrected order on remand. When it did so, the circuit court must consider appellant's ability to pay restitution given her current financial situation.

D. Fogle v. Commonwealth

[2018-CA-001407](#) 02/21/2020 2020 WL 855495

Opinion by Judge Jones; Judges Kramer and Taylor concurred.

After a car chase in Kentucky, Ohio law enforcement authorities arrested appellant for driving under the influence. Following the arrest, he pleaded guilty. He was subsequently indicted in Kentucky for first-degree fleeing or evading police. Before his trial, the Commonwealth filed a notice of intent to introduce KRE 404(b) testimony of appellant's condition at the time of his arrest. Appellant filed a motion *in limine* to exclude any and all evidence by the Commonwealth aimed at establishing that he was "driving under the influence of alcohol or any other substance or combination of substances in violation of KRS 189A.010," which is necessary to prove fleeing and evading in the first-degree under KRS 520.095(1)(a)2. Appellant argued that because the Commonwealth did not charge and convict him of having violated KRS 189A.010 it was legally impossible for the Commonwealth to establish at trial that he was guilty of KRS 520.095(1)(a)2. The circuit court denied appellant's motion, reasoning that KRS 520.095(1)(a)2. only required the Commonwealth to prove a "violation" of KRS 189A.010 as opposed to obtaining an actual conviction thereof. The issue on appeal was whether the "violation" terminology requires an actual DUI conviction for purposes of KRS 520.095(1)(a)2. Looking to the plain language of the statute and the definitions of "violation" and "conviction," the Court of Appeals affirmed, holding that the violation is the act itself, which is distinct from the prosecution of having committed the act. If the General Assembly intended for a conviction or formal prosecution to be necessary, it could have used more precise terms. KRS 520.095(1)(a)2. requires factual proof that the defendant was in violation of KRS 189A.010 while fleeing or evading police; it does not require the Commonwealth to actually convict the defendant under KRS 189A.010.

E. *Hilton v. Commonwealth*

[2018-CA-001858](#) 02/07/2020 2020 WL 594080

Opinion by Judge Dixon; Judges Acree and Jones concurred.

Appellant challenged an order denying his RCr 11.42 post-conviction motions. Appellant had been convicted of murder, first-degree assault, second-degree assault, operating a motor vehicle under the influence of alcohol which impairs driving ability, and being a persistent felony offender in the first degree following a fatal motor vehicle accident. The Court of Appeals affirmed, rejecting appellant's unsupported arguments that his trial and appellate counsel were ineffective for failing to timely disclose a defense expert. Appellant argued that the circuit court erred in denying his motion because: (1) trial counsel allowed the expert filing deadline to pass, resulting in the exclusion of critical evidence and depriving appellant of his right to a fair trial; and (2) appellate counsel failed to raise the issue of the exclusion of the defense expert's testimony, depriving appellant of his right to the effective assistance of appellate counsel. The Court noted that the defense expert did not take exception to the treating physician's opinion as to the victim's cause of death, nor did her testimony provide appellant with a legal defense to the murder charge; therefore, the exclusion of that evidence did not prejudice him. The fact that his expert was critical of treatment provided by medical personnel rendering aid to the victim following the collision did not exonerate appellant if her death was either foreseen or foreseeable by him as a reasonably probable result of his own unlawful act of operating a motor vehicle under the influence of alcohol. KRS 501.060(3)(b) clarifies that it is immaterial that the treatment provided by medical personnel following the collision possibly increased the probability of the inevitable consequence of the victim's death. The witness did not testify within a certain degree of medical probability that actions of medical personnel would or could have changed the inevitable outcome of the victim's death. The treating physician's testimony made it clear that the actions of prior medical personnel rendering aid to the victim were immaterial as there was no way to stop the bleeding sufficiently to save her life. Thus, any error of the circuit court in excluding the expert's testimony was harmless and not prejudicial to appellant. Without prejudice, appellant was unable to demonstrate that trial or appellate counsel was ineffective under the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

F. *Logsdon v. Commonwealth*

[2019-CA-000848](#) 02/21/2020 2020 WL 855486

Opinion by Judge L. Thompson; Chief Judge Clayton and Judge K. Thompson concurred.

The Court of Appeals reversed appellant's conviction for possession of a controlled substance and possession of drug paraphernalia. The Court examined KRS 218A.133(2), which exempts from prosecution for possession of a controlled substance or drug paraphernalia persons who have requested medical assistance, or one on whose behalf it has been requested. Here, a man named "Kyle" called 911 and indicated that appellant was having a drug overdose. Kyle refused to stay with appellant and left the scene. When medical personnel and police arrived, they found appellant with drugs and paraphernalia. The circuit court determined that KRS 218A.133(2) requires the person who called for medical assistance to remain with the overdosing person in order for the exemption to apply. In reversing, the Court of Appeals held that the plain language of the statute did not require Kyle to remain with appellant. The Court also acknowledged that this holding was contrary to the holding in *Allen v. Commonwealth*, No. 2017-CA-000389-MR, 2018 WL 4523207 (Ky. App. Sept. 21, 2018), which held the opposite.

G. Reed v. Commonwealth

[2018-CA-001574](#) 02/07/2020 2020 WL 594084

Opinion by Chief Judge Clayton; Judges Goodwine and L. Thompson concurred.

Police were able to track and arrest appellant, a robbery suspect, by “pinging” his cell phone. This process involved contacting his cell phone carrier, who used cell site location information (CSLI) to pinpoint and follow the location of his phone in real time. Appellant later sought to suppress evidence recovered in the ensuing stop, arguing that the use of real-time CSLI constituted a search for purposes of the Fourth Amendment and required the police to obtain a warrant. The Court of Appeals agreed, relying in part on the reasoning in *Carpenter v. United States*, -- U.S. --, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018), which held that a warrant is required to obtain historic CSLI data. Because a cell phone, which in the words of the United States Supreme Court has become almost a feature of human anatomy, enables the police to track individuals with great precision into areas where they would have a reasonable expectation of privacy, the acquisition of real-time CSLI constitutes a search for purposes of the Fourth Amendment. The Court of Appeals rejected the Commonwealth’s argument that the actions of the police were protected by the “good faith” exception to the warrant requirement because there was no clearly-established, binding precedent in Kentucky regarding the acquisition of real-time CSLI upon which the police could rely.

H. Roark v. Commonwealth

[2017-CA-001665](#) 02/07/2020 2020 WL 594129 DR Pending

Opinion by Judge K. Thompson; Chief Judge Clayton and Judge Combs concurred.

Appellant was one of multiple people charged with manufacturing methamphetamine because they were all present in the trailer where the manufacturing was taking place. One of the co-defendants pled guilty to all indicted charges and, during the entry of his plea, he repeatedly testified that he had acted alone. At appellant's trial, although there was testimony about the manufacture of methamphetamine and the presence of drugs, paraphernalia, and the hidden location of a "one-step" lab, this testimony did not tie appellant to these things beyond his mere presence in the trailer. Appellant attempted to introduce into evidence a certified recording of the co-defendant's plea hearing - specifically his statement that he had acted alone, as it supported appellant's alternate perpetrator theory. The circuit court denied the motion, determining that it was not established that the co-defendant was truly unavailable as there was no court order compelling him to be in court as a witness and no evidence that a subpoena was served upon him. The court also rejected the other grounds for admission, explaining that while there was no issue that the DVD of the plea hearing was a valid record, it did not fit neatly into KRE 803(6) or (8). Appellant was ultimately found guilty of manufacturing methamphetamine, possession of a controlled substance, tampering with physical evidence, and possession of drug paraphernalia. The Court of Appeals reversed and remanded, holding that the hearsay rules for using prior testimony of an unavailable witness, when such is the only evidence besides the defendant's testimony to support the defendant's defense, must be interpreted in light of the Due Process Clause to allow use by a defendant when an effort was made to obtain the witness's attendance. The Court concluded that the circuit court erred in finding that appellant could not establish that the co-defendant was unavailable without establishing that there was a court order compelling him to appear as a witness. The Court noted that KRS 804(a)(5) contains no such requirement and that while there was no written proof in the record that a subpoena was served on the co-defendant, defense counsel represented several times that he had subpoenaed the co-defendant and did not understand why he was not present in court unless he wished to assert a privilege. The Court further held that the prior testimony from the co-defendant's plea hearing could not be excluded on the basis that the prosecution did not have a reason to cross-examine the co-defendant; the prosecution is charged with seeing that justice is done, and it should have appropriately questioned the co-defendant to discover who committed the crimes charged considering that several defendants

were charged with the exact same crimes because no one admitted responsibility. KRE 804(b)(1).

I. Sanders v. Commonwealth

[2019-CA-000445](#) 02/07/2020 2020 WL 594078

Opinion by Judge Jones; Judges Kramer and Taylor concurred.

Appellant appealed from an order denying his motion for jail-time credit. After appellant was arrested, he signed a pretrial services supervised release order imposing various conditions of release, including “home incarceration with exception of work.” The form did not check the boxes for curfew, call-in to pretrial services, or electronic monitoring. Appellant was never monitored by an electronic device while he awaited trial. Prior to sentencing, appellant filed a motion for jail-time credit for the period he was confined to his home prior to trial based on his confinement and the fact that his supervised release form described his confinement as “home incarceration.” The circuit court denied appellant’s motion for credit on the basis that he was not electronically monitored during his pretrial release. The Court of Appeals affirmed the circuit court’s failure to order jail-time credit because that court lacked the authority to do so. KRS 532.120(3) used to give trial courts the authority to credit sentences in their judgments. However, following amendments to the statute in 2011, that authority now rests with the Department of Corrections. Pursuant to *Caraway v. Commonwealth*, 459 S.W.3d 849 (Ky. 2015), the role of the trial court with respect to the statute is appellate in nature. The defendant must first pursue administrative remedies with Corrections before the matter may be addressed by a court. Here, the circuit court was not authorized or required to make a determination of credit for time served in custody before sentencing. While not reviewing the merits of appellant’s appeal, the Court also pointed out that “home incarceration” is a precise term that requires use of an electronic monitoring device. Without the use of such a device, a trial court should not describe the pretrial release as “home confinement” or “home restriction.”

J. Starks v. Commonwealth

[2019-CA-000518](#) 02/14/2020 2020 WL 740282

Opinion by Judge Kramer; Judge Dixon and Special Judge Buckingham concurred.

Appellant was convicted of five felony counts, including two counts of escape, on June 6, 2016. His sentence was probated for five years. Following a hearing in February 2019, the circuit court revoked his probation and ordered his sentence to run consecutively to felony convictions from Indiana due to the escape convictions. He appealed both the probation revocation and the order running his sentence consecutively to the Indiana convictions. The Court of Appeals affirmed the circuit court's decision to revoke appellant's probation, but vacated the portion of the order running his sentence consecutively to the Indiana convictions. The plain language of KRS 532.110(3) mandates that a sentence imposed for escape must run consecutively to any other sentence a defendant is required to serve. Appellant's sentence was imposed in June 2016 - not when his probation was revoked in February 2019. At the time appellant's sentence was imposed, the Indiana convictions that were the subject of the appeal did not exist.

IV. EMPLOYMENT

A. *Croghan v. Norton Healthcare, Inc.*

[2018-CA-001351](#) 02/14/2020 2020 WL 742031

Opinion by Judge Maze; Judge Combs concurred; Judge Acree concurred in result only and filed a separate opinion.

Appellant challenged a summary judgment dismissing its employment-discrimination claims against Norton Healthcare, Inc. and individual defendants. The circuit court found that the Estate's claims brought under the Kentucky Civil Rights Act (KCRA) were time-barred based on a contractual six-month limitation period for bringing claims arising from the employment. While the appeal was pending, the legislature amended KRS 336.700 to contain language that would bar enforcement of the contractual provision. The Court of Appeals concluded that the amendment was applicable to this action and agreed with appellant that a six-month period was not a sufficient time to conduct a reasonable investigation and to file a KCRA action in good faith. Therefore, the Court held that the provision was not enforceable with respect to appellant's KCRA claims and that the circuit court erred by dismissing the complaint as untimely. Hence, the Court reversed and remanded for additional proceedings on the merits of the claims. In his concurring opinion, Judge Acree opined that the majority opinion should have focused solely on KRS 336.700's applicability to the case.

B. Kentucky Authority for Educational Television v. Estate of Wise

[2018-CA-000793](#) 02/07/2020 2020 WL 594127 Rehearing Pending

Opinion by Chief Judge Clayton; Judges Goodwine and L. Thompson concurred.

In response to state budget cuts, the Kentucky Authority for Educational Television (KET) terminated the employment of several non-classified employees, including appellee, who thereafter filed an appeal with the Kentucky Personnel Board. The Board ruled in appellee's favor on his claim of age discrimination. KET appealed to the Franklin Circuit Court, arguing that the Personnel Board lacked jurisdiction over the case and claiming that it had sole authority over the dismissal of non-classified employees like appellee under KRS 18A.115(1)(f). The circuit court affirmed the Board's order, holding that the Board had jurisdiction and that its decision was supported by substantial evidence. The Court of Appeals affirmed the circuit court, relying on KRS 18A.095(14)(a), which provides that any executive branch employee who believes he has been discriminated against may appeal to the Board, and KRS 344.025, which provides that no provision of KRS Chapter 18A may be construed to prevent state employees, classified or non-classified, from bringing discrimination claims before the Board. The Court noted that unlike university employees or the Kentucky State Police, KET employees are not provided by statute with a dedicated personnel board. The Court also held that sufficient direct and circumstantial evidence, in the form of the testimony of KET supervisors and co-workers, supported the finding of age discrimination.

V. INSURANCE

A. *Davis v. Progressive Direct Insurance Company*

[2019-CA-000850](#) 02/28/2020 2020 WL 962360

Opinion by Judge Kramer; Judge Dixon and Special Judge Buckingham concurred.

In a direct appeal from the circuit court's grant of summary judgment to appellee, the Court of Appeals affirmed. While riding her motorcycle in Barren County, Kentucky, appellant collided with a horse-drawn buggy. She thereafter sought uninsured motorist coverage under her policy with appellee. Appellant presented two arguments on appeal: (1) the circuit court erroneously concluded that a horse-drawn buggy did not qualify as a "motor vehicle" under the Motor Vehicle Reparations Act (MVRA), KRS 304.39-010 *et seq.*; and (2) the circuit court erroneously concluded that the horse-drawn buggy did not qualify as a "motor vehicle" as defined by the language of her insurance policy with appellee. The Court of Appeals upheld the grant of summary judgment. First, the MVRA defines a "motor vehicle" as one which is "propelled by other than muscular power." KRS 304.39-020(7). Second, a horse-drawn buggy does not qualify as a motor vehicle for purposes of uninsured motorist coverage, consistent with the previous Court of Appeals' opinion in *Rosenbaum v. Safeco Ins. Co. of America*, 432 S.W.2d 45 (Ky. 1968), and in conformity with the principle that terms used in insurance contracts should be afforded their ordinary and usual meaning.

B. Kentucky Farm Bureau Mutual Insurance Company v. Brewer

[2018-CA-000736](#) 02/21/2020 2020 WL 857073

Opinion by Judge K. Thompson; Judges Jones and Kramer concurred.

Kentucky Farm Bureau Mutual Insurance Company appealed from an order denying its motion for declaratory judgment. The circuit court ruled that Kentucky Farm Bureau was estopped from denying insurance coverage on a claim by appellee against William Walters. The Court of Appeals reversed and remanded, concluding that the circuit court erred. Kentucky Farm Bureau defended Walters after giving him timely notice that it was defending under a reservation of rights. The Court held that the circuit court erroneously concluded that the mere passage of time between the reservation of rights and the filing of a declaratory judgment action was sufficient to preclude Kentucky Farm Bureau from asserting a no-coverage defense. The circuit court did not address whether Kentucky Farm Bureau had misrepresented to Walters that it was no longer defending under a reservation of rights or whether Walters had been prejudiced by Kentucky Farm Bureau's failure to earlier assert a no-coverage defense. Thus, the case required remand for further findings.

VI. WORKERS' COMPENSATION

A. Maysey v. Express Services, Inc.

[2018-CA-001121](#) 02/21/2020 2020 WL 856439

Opinion by Judge K. Thompson; Chief Judge Clayton and Judge Combs concurred.

Appellant challenged the decision of the Workers' Compensation Board affirming the Administrative Law Judge's (ALJ's) decision not to grant him a 30% enhancement of benefits for a safety violation pursuant to KRS 342.165(1) against Express Services, Inc., a temporary help service agency. The agency placed appellant at Magna-Tech Manufacturing, LLC, where his left arm was amputated above the elbow by a centrifuge machine. At issue was whether Express Services could be liable for the statutory penalty for the safety violations of Magna-Tech, the host employer. The Court of Appeals reluctantly affirmed. KRS 342.615(5) sets forth that a temporary help service shall be deemed the employer of a temporary worker; it does not permit a temporary employee to be viewed as being the client's employee. Thus, in the absence of evidence that the agency had knowledge of, approved of, or acquiesced in the host employer's actions, Express Services could not be liable for the penalty. The Court noted that given the nature of the relationship between a temporary help service and the host employer and that the host employer controls the day-to-day-operations of the workplace, that is a highly unlikely situation. The Court concluded by urging the General Assembly and Supreme Court to address the issue.

VII. ZONING

A. *Hengehold v. City of Florence*

[2018-CA-000991](#) 02/07/2020 2020 WL 594090

Opinion by Judge Maze; Judges Acree and Combs concurred.

The City of Florence issued a notice of violation against the Hengeholds, asserting that their keeping of chickens violated the applicable zoning regulations. Following a hearing, the City's Code Enforcement Board upheld the notice of violation. The Hengeholds challenged that decision by way of an original action in district court pursuant to KRS 65.8831(1). Following a *de novo* review of the record, the district court upheld the notice of violation, and the circuit court affirmed that holding on appeal. The Court of Appeals accepted the Hengeholds' petition for discretionary review and the City's cross-petition. The Court first held that the Code Enforcement Board was not an indispensable party at the action's inception. Unlike most administrative appeals, an action challenging a code enforcement board is treated as an original action, not a statutory appeal. Furthermore, the statute does not list the Board as a party who must be named to the action. The Court then reversed the lower courts' holdings upholding the notice of violation. Examining the specific language of the Boone County Zoning Regulations, specifically the principally permitted uses in the Hengeholds' district as compared to those of other districts, the Court concluded that commercial farms for poultry production were not permitted in the Hengeholds' district. However, the permitted uses did not clearly prohibit the Hengeholds' mere possession of chickens for non-commercial purposes. Moreover, the "accessory uses" language of the regulations permitted the "keeping of pets and animals" within the Hengeholds' district. The Court held that this language was broad enough to cover the Hengeholds' activities. The City also argued that its later amendment to the regulations, which permitted "chicken coops" in other districts but not in the Hengeholds' district, should be read as excluding both the chickens and the structures used by the chickens. However, since the Hengeholds kept the chickens prior to the amendment, the Court held that they would be entitled to a non-conforming use even if such a reading were warranted. The Court also disagreed with the City's assertion that any structure used by chickens should be automatically considered as a "coop" and noted that, even if the structures were considered coops, the Hengeholds would be entitled to retain them if they were in existence prior to the amendment of the regulation.