

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

I. CIVIL PROCEDURE

A. Cline v. Spectrum Care Academy, Inc.

[2008-CA-002329](#) 02/2010 2010 WL 2629417

Opinion by Judge Nickell; Judge Stumbo and Senior Judge White concurred. The Court reversed, and remanded for further proceedings, orders sealing the record in two consolidated cases related to a wrongful death claim. The Court held that trial court erroneously placed the burden on the appellant estate to prove that sealing the record was improper, refused to allow counsel for the estate to be heard, and made no findings of fact before granting appellee's request to seal the record.

II. CONTRACTS

A. Five Star Lodging, Inc. v. George Construction, LLC

[2009-CA-000990](#) 30/2010 2010 WL 2976524

Opinion by Judge Thompson; Judges Moore and Senior Judge Henry concurred. The Court affirmed an order of the circuit court dismissing an insurance company as a party and granting summary judgment to the surety on a performance and payment bond, procured on behalf of a construction company and in favor of appellant as obligee, for the construction of a hotel. The Court first held that the trial court properly dismissed the insurance company which acted as the construction company's agent to procure the bond. There was no dispute that it did not bond the project and if there was any ambiguity, it was clarified by a letter expressly stating which company bonded the project. The Court then held that any action against either insurer on the bond as surety was time barred by the two-year time limitation contained in the bond. There was no material issue of fact regarding the date of completion of the hotel. Although appellant was dissatisfied with the work performed, the hotel was nevertheless completed when the certificate of occupancy and the architect's certificate of substantial completion were issued. As a third-party beneficiary of the contract, appellant was bound to the terms of the bond agreement by accepting the bond by its execution of the contract with the construction company. Appellant could not impute the default judgment entered against the construction company to the insurers who were not parties to the proceedings and had no opportunity to defend the action. The Court rejected appellant's arguments under the doctrines of "law of the case," "equitable estoppel," and "*res judicata*."

III. CRIMINAL LAW

A. **Meyers v. Commonwealth**

[2009-CA-000376](#) 23/2010 2010 WL 2867812

Opinion by Judge VanMeter; Judges Combs and Keller concurred. The Court affirmed a judgment of the circuit court sentencing appellant to eighteen years' imprisonment for possession of a firearm by a convicted felon and for being a second-degree persistent felony offender. The charges were severed for trial from charges for sexual abuse and tampering with physical evidence for which appellant entered a guilty plea. The Court held that the trial court did not abuse its discretion in admitting the testimony of appellant's wife in violation of KRE 504. The charges of wrongful conduct by appellant against his wife, coupled with his wife's firsthand knowledge of his possession of the handgun, called into question the need to shield the wife's testimony from the court under the marital privilege. Further, even though appellant admitted to possessing the handgun, his wife's testimony concerning the facts and circumstances of appellant's possession of the handgun was relevant for purpose of establishing the wife's credibility as a witness and denying her the right to testify would amount to an unjustifiable expansion of the marital privilege.

B. **Pollini v. Commonwealth**

[2009-CA-000964](#) 16/2010 2010 WL 2788167

Opinion by Judge Lambert; Judges Combs and Keller concurred. The Court affirmed an order of the circuit court denying appellant's post-conviction motion for a new trial under RCr 11.42. The Court first held that appellant failed to establish actual prejudice resulting from his trial attorneys' failure to object to insertion of the word "unlawful" into the KRS 503.050(1) self-defense jury instruction. The Court next held that there was sufficient evidence to support an initial aggressor instruction pursuant to KRS 503.050. Appellant's intentional return to the active crime scene for the purpose of retrieving his toolbox after arming himself with a loaded semi-automatic pistol because he expected to have another encounter with a neighbor of the victim was sufficient for the jury to conclude that appellant "started an encounter" with the victim. The fact that appellant attempted to flee once he saw the victim was not dispositive because by the time he attempted to flee, the encounter had already begun. Further, because the jury was instructed upon the two exceptions to the initial aggressor limitation, it freely considered and rejected the withdrawal defense. The Court next held that appellant failed to demonstrate any kind of deficient performance on the part of trial counsel for failure to raise the issue of the trial court's ex parte contact with the jury when counsel was not notified of the violation until after the verdicts were rendered, and even if there was deficient performance on the part of trial counsel in not discovering the violation, appellant failed to establish how he was prejudiced when nothing substantive was transmitted to the jury outside his presence. The Court next held that the record conclusively refuted appellant's argument regarding trial counsel's ignorance about juvenile charges consolidated with the murder and first-degree burglary charges when both appellant and trial counsel expressly refused a continuance offered by the trial court

and asserted they were ready to proceed with the trial. The Court rejected appellant's argument that counsel was deficient for failing to move to separate the juvenile offenses from the non-juvenile offenses pursuant to RCr 9.16. Counsel did object to consolidation prior to trial and even if he hadn't, joinder was proper. The Court next held that trial counsel's performance was not deficient for failure to introduce evidence showing the presence of drugs in the victim's urine when counsel opposed the motion by the Commonwealth to bar the evidence. The Court next held that trial counsel's failure to introduce medical records indicating appellant suffered from post-traumatic stress disorder to support an "extreme emotional disturbance" defense, while likely error, was not substantial enough to warrant post-conviction relief. The Court then held that the trial court did not err by denying an evidentiary hearing when appellant failed to set forth any factual issues that were not conclusively resolved by an examination of the record. The Court finally held that the record conclusively demonstrated that it was legitimate trial strategy for trial counsel to not present evidence regarding gunshot residue from the victim, to not retain a ballistics expert, and to not cross-examine a witness in order to elicit exculpatory testimony.

C. Roach v. Commonwealth

[2008-CA-001961](#) 09/2010 2010 WL 2696275

Opinion by Judge Acree; Judges Caperton and Keller concurred. The Court affirmed an order of the circuit court denying appellant's motion to vacate his sentence and conviction pursuant to RCr 11.42 and motion for an evidentiary hearing. The Court first held that the circuit court correctly ruled that it was barred from considering issues raised in a supplemental motion, filed after the three-year statute of limitation expired, to the extent the issues were not raised in the original motion. The Court then held that the trial court correctly ruled that an evidentiary hearing was not necessary. The record affirmatively demonstrated that appellant's plea was knowing and voluntary, counsel's advice that appellant would face the death penalty as a possible sentence was correct, and appellant was not forced into a plea agreement. The Court finally held that appellant's argument that counsel failed to move to suppress his incriminating statements was without merit. Appellant's claim that his girlfriend had not consented to the tape recording of her conversations was not supported by any evidence from which even a reasonable inference could be drawn.

D. Steen v. Commonwealth

[2009-CA-000070](#) 30/2010 2010 WL 2976897

Opinion by Judge Acree; Judges Stumbo and Senior Judge Lambert concurred. The Court affirmed appellant's conviction and sentence for manslaughter and driving under the influence. The Court held that the trial court did not err in denying appellant's motion for a directed verdict on the charge of manslaughter. A reasonable juror could find that the elements in KRS 507.040 for manslaughter in the second degree had been proven based on evidence of appellant's blood alcohol level an hour and twenty-five minutes and two hours and ten minutes after the crash

that killed the passenger in appellant's car, combined with a doctor's testimony regarding the variables that could affect the blood alcohol content of an individual.

IV. EMPLOYMENT

A. **Flock v. Brown-Forman Corporation**

[2009-CA-001184](#) 02/2010 2010 WL 2629581

Opinion by Judge Wine; Judge Acree concurred; Judge Combs dissented in part by separate opinion. The Court affirmed a summary judgment which dismissed appellant's employment discrimination and retaliation claims against appellee. The Court held that appellant failed to present sufficient evidence to support actionable claims for age discrimination, reverse-gender discrimination or retaliation. Although he presented a prima facie case of discrimination, he failed to present sufficient evidence to rebut appellee's legitimate nondiscriminatory reason for demoting him. He admitted that he gave improper advice about characterizing expenses and while his role in the incident may have been minor, appellee presented a legitimate reason for punishing him more severely than lower-level employees who were also involved. Absent evidence that the decision was motivated by appellant's age, he could not prevail by merely questioning appellee's business judgment. Also, appellant failed to show that he was similarly situated to the women involved in the incident and without evidence that appellee was the unusual employer that favors women over men, he could not prevail on the reverse-gender discrimination claim. Finally, appellant failed to present sufficient evidence to show that appellee subjected him to materially adverse employment actions because he filed the discrimination claims. Therefore, he could not establish a prima facie case of retaliation.

B. **Kentucky Retirement Systems v. Foster**

[2009-CA-001369](#) 23/2010 2010 WL 2867920

Opinion by Judge Acree; Judges Moore and Thompson concurred. The Court affirmed orders of the circuit court denying appellant CR 60.02 relief and enforcing a 2006 judgment against appellant granting appellee's request to purchase 23 months of service credit for time she was employed as a professor at the University of Kentucky, holding appellant in contempt for refusing to allow appellee to purchase the 23 months of service credit, and imposing the expense of appellee's attorney fees upon appellant as a sanction for contempt. The Court vacated orders of the circuit court directing appellant to restore a month of sick leave service credit it removed from appellee's account after an audit of the account and enjoining appellant from further auditing or adjusting appellee's account below a total of 325 months of service credit. The Court first held that the law of the case precluded appellant from contesting the issue of whether appellee was specifically entitled to purchase 23 months of service credit when the only issue raised in an earlier appeal was whether appellee was entitled to purchase any service credit at all. Appellant was not entitled to relief under any of its theories brought under CR 60.02. Therefore, the circuit court did not err in enforcing the 2006 judgment. The Court then held that circuit court erred when it ordered appellant to restore a month of sick

leave service credit. The only matter before the circuit court in the earlier judgment was the right to purchase the 23 months of service credit. Thus, *res judicata* did not apply and any question regarding the sick leave service credit must first be decided at the administrative level. For the same reason, the Court held that the trial court erred when it directed appellant to recalculate and adjust appellee's retirement benefits to reflect 325 months of service credit and enjoined appellant from altering or re-auditing appellee's account balance to anything less than 325 months. The Court next held that the trial court did not abuse its discretion in holding appellant in contempt for failing to obey the order to allow appellee to purchase 23 months of service credit. Appellant could not claim impossibility because it was at fault for failing to bring the issue of appellee's overlapping employment forward during the earlier proceedings and so, the law of the case mandated that it recognize appellee's right to the 23 months of service credit. The Court finally held that the trial court did not abuse its discretion in ordering appellant to pay appellee's attorney fees. In the context of the contempt proceedings the court had both the discretion and inherent legal authority to impose the fees, irrespective of appellant's status as a government agency.

C. Runner v. Commonwealth of Kentucky

[2009-CA-001245](#) 02/2010 2010 WL 2629708

Opinion by Judge Dixon; Judge Nickell and Senior Judge Lambert concurred. The Court affirmed a judgment of the circuit court upholding a decision by the Kentucky Unemployment Insurance Commission to deny appellant's claim for unemployment insurance benefits. The Court held that the Commission's decision was based upon substantial evidence and that it did not misapply the law when it found that appellant had been discharged for misconduct as defined by KRS 341.370(6). Substantial evidence in the record supported the finding that appellant's termination was for misconduct in connection with her work, she was aware of her responsibilities, was capable of performing her duties and had been warned of the consequences of her actions. Her actions did not represent mere inefficiency or unsatisfactory conduct but rather, a refusal to perform her work as ordered over a lengthy period of time.

V. FAMILY LAW

A. Cabinet for Health and Family Services v. Bowman

[2009-CA-001830](#) 16/2010 2010 WL 2788201

Opinion by Judge Lambert; Judges Combs and Keller concurred. The Court affirmed an order of the family court denying a motion to modify child support brought by the Cabinet for Health and Family Services on behalf of a child's mother. The Court held that the family court's finding that there as no material change in circumstances, as required by KRS 403.213(1), was supported by the record. The allegation that state assistance was necessary to meet the child's medical needs was refuted by the record and there was no evidence demonstrating that the child's physical needs were not being met. The Court rejected the challenge to the initial child support order setting child support at \$0 because that order was never appealed. Even so, the Court held that the family court was permitted to

deviate from the child support guidelines, under KRS 403.211(3)(f), when it specifically found that the parties had agreed to child support that deviated from the guidelines and made a finding that the child was not on state assistance. Further, the family court was permitted to deviate from the guidelines under KRS 403.211(3)(g), when it found that the mother never paid child support in the 10 years the father had primary custody of the child.

B. Caudill v. Caudill

[2009-CA-002002](#) 23/2010 2010 WL 2868108

Opinion by Judge Nickell; Judge Stumbo and Senior Judge White concurred. The court reversed and remanded a domestic violence order (DVO) entered against appellant. The Court first held that, because of the continuing consequences of a DVO, the appeal was not moot even though the DVO had expired. The Court then held that the trial court erred in entering the DVO when there was no evidence of physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of the foregoing, as required by KRS 403.721(1). The fact that on one occasion appellant pushed appellee out of the way to enter the home was not substantial evidence to support the entry of the DVO.

C. Dudgeon v. Dudgeon

[2009-CA-000522](#) 23/2010 2010 WL 2867819

Opinion by Chief Judge Taylor; Judge Clayton and Senior Judge White concurred. The Court vacated and remanded an order of the family court denying appellant's motions to modify child support. The Court held that the child support guidelines in KRS 403.212 were inapplicable because the parties' combined monthly gross income exceeded the uppermost level of the guidelines and the familial circumstances were of an extraordinary nature rendering application of the guidelines unjust. Because the parties earned nearly equal incomes, exercised nearly equal physical custody of the children and shared almost equally other expenses associated with the children, the circumstances were of an extraordinary nature. Because the guidelines were inapplicable, the Court held that the family court erred by relying upon the rebuttable presumption found in KRS 403.213(2) as a basis for denying the motions to modify child support. The Court remanded for the family court to consider the motions to modify child support in accordance with KRS 403.213(1), requiring a showing of a material change in circumstances that was substantial and continuing.

D. Grayson v. Grayson

[2009-CA-001963](#) 16/2010 2010 WL 2788243

Opinion by Senior Judge Lambert; Judges Dixon and VanMeter concurred. The Court reversed an order of the circuit court granting limited grandparent visitation to the appellee grandmother. The Court held that the trial court erred as a matter of law in granting visitation to the grandmother when it failed to apply KRS 405.021 and determine whether visitation was affirmatively proven, by clear and convincing evidence, in the children's best interest. The record revealed little or no evidence that visitation would be in the best interest of the children. Instead, it established

that the grandmother had extreme animosity toward the mother, which would be inherently unhealthy for the children and would potentially undermine the relationship between the children and parents.

E. Ivy v. Commonwealth, Cabinet for Health and Family Services

[2009-CA-001279](#) 16/2010 2010 WL 2788173

Opinion by Judge Lambert; Judge Stumbo concurred; Judge Caperton dissented by separate opinion. The Court reversed an order of the family court holding appellant in contempt and ordering her to pay child support or be jailed for thirty days. The Court held that the family court abused its discretion in holding appellant in contempt and ordering her to pay \$60 per month in child support obligation and \$5 per month toward her child support arrearage. In reaching that conclusion, the Court rejected appellant's argument that she was subjected to criminal contempt and therefore, was entitled to an evidentiary hearing comporting with due process. Because appellant did not abide by the family court's order requiring her to pay child support, civil contempt proceedings were appropriate. The court then concluded that in light of the substantial evidence establishing appellant's inability to work or care for her child, it was impossible for her to pay child support or arrearages.

F. Kelsay v. Carson

[2009-CA-002175](#) 16/2010 2010 WL 2788281

Opinion by Judge Moore; Judge Thompson and Senior Judge White concurred. The Court affirmed an order of the family court making appellee the primary residential custodian over the parties' minor child. The Court held that while appellee originally filed a pleading styled "Motion to Change Custody," under *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), it was actually a motion to modify the parties' visitation/time-sharing arrangements and therefore, was governed by KRS § 403.320. While the family court did not utilize the correct statute in determining the modification of visitation/time-sharing, it followed the same best interest standard governing KRS § 403.320. The evidence proved that appellant had a total of eight known violations regarding alcohol within the life of the child, including six DUIs, two of which occurred since the previous custody order, with blood alcohol levels of at least four times the legal limit. The Court held that the family court properly considered the evidence, demonstrating that it was in the best interest of the child that appellee become the primary residential parent.

VI. INSURANCE

A. Gibson v. Kentucky Farm Bureau Mutual Insurance Company

[2009-CA-000048](#) 09/2010 2010 WL 2696282

Opinion by Judge Acree; Judges Combs and Wine concurred. The Court affirmed in part, and reserved in part and remanded, a judgment of the circuit court entered upon a jury's verdict finding appellants liable for fraud and ordering them to pay damages. The appellee insurer filed a complaint seeking a declaration of rights to a truck appellants reported stolen and asserting a fraud claim against appellants. The

Court first held that the circuit court's refusal to strike for cause prospective jurors who were policyholders of the insurer was not erroneous absent a showing of any individual juror's actual bias. The Court next held that the admission of out-of-court statements made to the insurer's investigator was error. The statements were not admissible under KRE 801A(b)(1), as admissions of a party, or under KRE 804(b), as statements against the declarant's interest. However, the Court held that any error was harmless in light of the other evidence of fraud, including the signed, notarized title. The Court next held that it was improper for the trial court to instruct the jury on the issue of attorney fees or to enter judgment for such an award based on a jury's verdict. The award was a determination for the trial court to make in light of statutory, contractual or equitable considerations. The Court next held that there was competent evidence to support the award of investigation expenses and that the insurer was not required to provide exact calculations of the damages. The Court finally held that the evidence did not support the conclusion that appellants defrauded the individual appellee who acquired the truck as collateral for a loan to another individual. The individual could not prove all the elements of common-law fraud because he did not act in reliance upon any representation made by appellants.

VII. OPEN RECORDS

A. **Valentine v. Personnel Cabinet**

[2008-CA-001947](#) 30/2010 2010 WL 2976558

Opinion by Judge Caperton; Judge Stumbo and Senior Judge Lambert concurred. The Court affirmed a circuit court order reversing an opinion of the Attorney General that appellant was entitled to the personnel file of the prosecuting attorney in his criminal case, and dismissing appellant's complaint under the Open Records Act. The Court held that the information sought by appellant served no valid public interest and appellant failed to show how such a request would advance the public's interest in assuring that the agency in question was properly performing its function. Therefore, the trial court properly concluded that release of any of the information requested would amount to a clearly unwarranted invasion of personal privacy under the exclusion in KRS 61.878(1)(a).

VIII. PROPERTY

A. **Brown Sprinkler Corporation v. Somerset-Pulaski County Development Foundation, Inc.**

[2009-CA-001185](#) 16/2010 2010 WL 2787874

Opinion by Judge Keller; Judge Clayton and Senior Judge Buckingham concurred. The Court reversed a summary judgment in appellees' favor on appellant's action in *quantum meruit* for the installation of a sprinkler system. The Court held that the trial court erred when it determined that appellant was foreclosed from pursuing an equitable remedy because it negligently failed to perfect a mechanics' lien under KRS 367.010. Because KRS 376.010 did not expressly state that its remedy was sole or exclusive, the doctrine of unjust enrichment was not abrogated by its enactment. Thus, appellant's failure to properly file a mechanics' lien did not

preclude it from attempting to recover under a theory of unjust enrichment. The Court distinguished the holding in *Bolen v. Bolen*, 169 S.W.3d 59 (Ky. App. 2005). The Court rejected the argument that one of the purposes of KRS 376.010 was to provide notice of pending claims.

B. *Dukes v. Link*

[2009-CA-000183](#) 02/2010 2010 WL 2629492

Opinion by Judge Thompson; Judge Nickell and Senior Judge Buckingham concurred. The Court affirmed a judgment of the circuit court finding that an express easement existed over property owned by appellants in favor of the adjoining property owned by appellee. The Court first held that the omission of the easement description in appellants' chain of title did not extinguish the easement appurtenant described in all recorded deeds in appellee's chain of title. The Court distinguished the holding in *Oliver v. Schultz*, 885 S.W.2d 699 (Ky. 1994), and concluded that the recording of the instrument granting the easement by the common grantor bound the subsequent purchasers of the tract burdened by the easement, regardless of whether it was included in the purchaser's deed. The Court also held that the trial court did not err in finding that appellee did not abandon the easement. Appellee and his predecessors used the easement, the easement was visible, and there was no evidence that appellants asserted ownership of the easement or interfered with appellee's enjoyment of the easement until they erected a gate less than a year prior to filing the action.

C. *Hall v. Mortgage Electronic Registration System, Inc.*

[2009-CA-001001](#) 23/2010 2010 WL 2867838

Opinion by Judge Clayton; Judge Keller and Senior Judge Buckingham concurred. The Court affirmed in part, reversed in part, and remanded a circuit court order denying statutory penalties under KRS 382.365 and awarding attorney fees and costs on appellants' claim that the lien on their property was not timely released. The Court first held that the trial court did not err in denying statutory penalties when appellants did not provide adequate written notice to the lienholder. The notice stated that no release deed was effectuated instead of stating that release was improperly filed. As a result, the lienholder had good cause for not filing a new release of the lien. The Court further held that scrivener's errors in preparing the release met the "good cause" requisite for not imposing the statutory penalties. The Court then held that the trial court did not err in denying appellants' motion for summary judgment because a legitimate controversy existed regarding the effectiveness of the release. On the cross-appeal, the Court held that the trial court erred by not limiting the award of attorney fees and costs under KRS 382.365, to those incurred only prior to the release.

D. *Jaimes v. Thompson*

[2008-CA-002355](#) 30/2010 2010 WL 2976706

Opinion by Judge Acree; Judges Keller and Lambert concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of appellees on appellant's claim for injuries she sustained when she slipped and fell on property

owned by appellee. The Court held that because the appellee landlord did not retain control of the premises where appellant's injuries occurred, he was not liable for appellant's injuries. Therefore, the trial court properly granted summary judgment.

IX. TORTS

A. **Celina Mutual Insurance Company v. Harbor Insurance Agency, LLC**

[2009-CA-000790](#) 16/2010 2010 WL 2788164

Opinion by Judge Clayton; Senior Judge Buckingham concurred; Judge Caperton dissented by separate opinion. The Court affirmed two orders of the circuit court granting summary judgment in favor of appellees on the appellant insurance company's negligence and indemnity claims alleging that the appellee insurance agency submitted an application for the appellee insured that failed to reflect a prior fire loss. The insured's home and contents were destroyed in a fire and appellant paid pursuant to the policy. The Court first held that the trial court did not abuse its discretion in granting summary judgment on the negligence claims when appellant failed to identify an expert witness to show that appellees negligently failed to properly disclose information on the insurance application. The Court then held that summary judgment as to the indemnification claim was proper. First, there was no express or implied contract for indemnity. Second, appellant's claim of a common law right of indemnification failed because without negligence, there could be no tortious conduct.

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

[2007-CA-001192](#) 16/2010 2010 WL 2812967

Opinion by Judge Wine; Judges Clayton and Dixon concurred. On remand from the Supreme Court, the Court affirmed in part, reversed in part, and remanded a judgment of the circuit court on an estate's claim against a hospital for negligence and under the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. The Supreme Court remanded the action for reconsideration in light of *Martin v. Ohio County Hospital Corp.*, 295 S.W.3d 104 (Ky. 2009). The Court first held that, even in light of the analysis in *Martin*, the Hospital was not entitled to a directed verdict on the EMTALA claim. A jury could find that the Hospital did not meet its stabilization duties under EMTALA, notwithstanding a doctor's determination that the deceased was stable at the time of his discharge. The Court also held that the claims under EMTALA and for medical negligence were not mutually exclusive and therefore, a failure to provide stabilization of an emergency medical condition may amount to a violation of EMTALA and medical negligence and the damages may overlap. While the Hospital may have been entitled to a different instruction on the EMTALA claim based upon the analysis in *Martin*, it had not requested a new trial, only a finding that it was entitled to a directed verdict. The Court then adopted the portions of the prior opinion relating to trial issues, the award of unliquidated damages and the award of punitive damages and remanded for a new trial on punitive damages.