

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
JULY 2012**

I. ATTORNEY AND CLIENT

A. *Abbott v. Cunningham*

[2010-CA-000147](#) 05/25/2012 2012 WL 1886477

Opinion by Judge Clayton; Judge Stumbo concurred; Judge Thompson concurred by separate opinion. The Court affirmed in part, reversed in part and remanded interlocutory orders of the circuit court denying appellants' petition to enforce garnishments through the attachment of assets, granting the appellee attorneys leave to apply the money they held in client trust accounts as legal fees accrued by the judgment debtors, and giving appellants a lien on any monies which were not used as attorney fees. The Court first held that the attorneys who had already applied all the funds that they held as retainers as fees in their escrow accounts prior to service of garnishment had no remaining fees upon which an attachment could stand. The Court then held that a "flat fee," such as the ones accepted in the judgment debtors' criminal cases, was earned immediately by the attorneys due to the inherent risk the attorneys took by accepting the fee and representation of the client, regardless of the time and effort which could be involved. Therefore, the trial court did not err in denying the petition to enforce garnishments, acknowledging the fact that the nonrefundable fees must be reasonable and reserving that issue until after the conclusion of the criminal cases.

B. *Benton v. Boyd & Boyd, PLLC*

[2010-CA-002058](#) 07/06/2012 2012 WL 2620545

Opinion by Judge Combs; Judge Moore and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court granting summary judgment to an attorney on appellant's claims for legal malpractice wherein appellant claimed damages for time she spent in jail when she was held in contempt for failing to pay a court-ordered amount to her ex-spouse. The Court first held that the circuit court did not prematurely grant summary judgment when the family court in the divorce action had thoroughly and precisely explained in detail why appellant was found to be in contempt and appellant failed to provide specific examples of what discovery could have been undertaken that would have affected the outcome. The Court next held that the circuit court did not err in finding that appellant was equitably estopped from asserting her negligence claims. The facts fell squarely within the definition of equitable estoppel when appellant remained silent in the family court about the funds in her retirement account, which had been liquidated; she was the only person who knew the true status of the account; she remained notably silent when the account was discussed in court; she presented no evidence to show that her attorney was aware of the true state of the account; and she admitted to having signed two false affidavits. The Court finally held that appellant failed to establish the

elements of legal malpractice and therefore, the circuit court did not err in dismissing the legal malpractice action.

II. CIVIL PROCEDURE

A. **Allen v. Jones**

[2011-CA-000576](#) 07/06/2012 2012 WL 2603661

Opinion by Judge Dixon; Judges Keller and Nickell concurred. The Court affirmed an order of the circuit court dismissing appellant's claims against a Tennessee resident based on lack of personal jurisdiction. The Court held the trial court did not err in finding that it did not have personal jurisdiction over appellee who sold a truck to a driver who later injured appellant. Appellee fully complied with the requirements of Tennessee law in transferring the vehicle, appellee did not transact business in Kentucky, did not contract to supply goods or services in Kentucky, and did not cause tortious injury by an act or omission in Kentucky. The Court further held that even if the transaction were governed by Kentucky law, the transfer of the title was properly completed and the driver's failure to title the truck in Kentucky did not impose liability upon appellee.

B. **Hazel Enterprises, LLC v. Community Financial Services Bank**

[2011-CA-002060](#) 07/27/2012 2012 WL 3047343

Opinion by Judge Moore; Judges Dixon and Thompson concurred. The Court affirmed an order of the circuit court denying appellant's motion to intervene in a foreclosure action for the purpose of protecting its interest with respect to an amount it sought to collect in excess of the purchase price for a certificate of delinquency. The Court held that the circuit court did not abuse its discretion in denying the post-judgment motion to intervene as a matter of right. Appellant did not acquire any rights with respect to the certificate of delinquency until the final confirmation of sale and order of distribution had been entered although, it was put on notice of a pending action and it made no attempt to intervene until after the Master Commissioner sought to set aside the sale of the tax bill. Moreover, reopening the litigation to account for appellant's late-acquired interests would have prejudiced the parties.

C. **Hill v. State Farm Insurance Company**

[2011-CA-001400](#) 07/06/2012 2012 WL 2604857

Opinion by Judge VanMeter; Judges Combs and Dixon concurred. The Court reversed and remanded an order of the circuit court granting summary judgment in favor of the appellee insurer and dismissing appellant's claims against it as barred by the applicable two-year contractual limitations provided in the insurance contract. The Court held that the trial court erred as a matter of law in finding that appellant's complaint was filed outside the contractual limitations period when appellant delivered to the circuit court clerk the motion to amend her original complaint to add the insurer as a defendant within the applicable two year limitation period, even though a hearing on the motion was not granted and the summons was not issued until after the limitations period had expired. The

filing of the timely motion for leave to amend and attaching the amended complaint, while also providing notice to the defending party, was sufficient to timely commence the action against the insurer.

III. CONSTITUTIONAL LAW

A. **Kant v. Lexington Theological Seminary**

[2011-CA-000004](#) 07/27/2012 2012 WL 3046472

Opinion by Judge Moore; Judge Acree concurred by separate opinion; Judge Keller dissented by separate opinion. The Court affirmed an order dismissing appellant's complaint against his employer, a theological seminary, wherein appellant alleged breach of contract and breach of the implied duty of good faith and fair dealing when the seminary terminated his employment. The Court held that the circuit court did not err in dismissing the complaint because both the ecclesiastical matters rule and the ministerial exception applied to the case and therefore, the seminary's action was protected by the First Amendment to the United States Constitution. Because the seminary was a religious institution, the First Amendment applied. Any inquiry into the rationale for the decision making as to who would teach the seminary students would be an inquiry into an ecclesiastical matter and therefore, the circuit court correctly determined that its jurisdiction was precluded. Given the total sectarian purpose of the institution, and the religious mission underlying the responsibilities of the faculty, the affirmative defense of the ministerial exception barred appellant's claims.

B. **Kirby v. Lexington Theological Seminary**

[2010-CA-001798](#) 07/27/2012 2012 WL 3046352

Opinion by Judge Caperton; Senior Judge Lambert concurred; Judge Acree concurred by separate opinion. The Court affirmed a summary judgment dismissing appellant's claims against his former employer, a theological seminary, for breach of contract, breach of implied duty of good faith and fair dealing, and race discrimination, after the seminary terminated his employment. The Court held that the trial court did not err in dismissing the claims because both the ecclesiastical abstention doctrine and the ministerial exception applied to the facts in the case, foreclosing judicial review. The ecclesiastical abstention doctrine applied because the Court could not delve into the claims without also considering the seminary's internal affairs regarding the restructuring of its curriculum to reflect the goals of its religious mission. The ministerial exception applied because appellant was entrusted to further the spiritual education of the next generation of church leaders, lead religious worship services, teach biblically based classes, model the ministerial role; he was a "called" teacher for purpose of carrying out his ministry; and was evaluated based on religious criteria. Therefore, the seminary, pursuant to the First Amendment, was free to decide who would further the instruction of its faith.

IV. CRIMINAL LAW

A. **Boards-Bey v. White**

[2011-CA-000818](#) 07/13/2012 2012 WL 2892358

Opinion by Judge Combs; Judge Lambert concurred; Chief Judge Acree dissented by separate opinion. The Court vacated and remanded an order of the circuit court dismissing appellant's petition for declaration of rights. The Court first held that the trial court did not err by not affording appellant time to respond to appellees' motion to dismiss. CR 12.01 was not implicated because the motion to dismiss was neither a pleading nor a cross-claim. The Court then held that the circuit court erred in dismissing the petition because appellant did not receive the due process rights to which he was entitled in a prison disciplinary proceeding when he was denied the right for an opportunity to call witnesses and present documentary evidence in his defense after he invoked his Fifth Amendment right to remain silent during the hearing. The assertion of the right did not equate to a waiver of the speech necessary to question witnesses nor did appellant's silence abrogate the duty of prison officials to investigate personally and to record the results of the investigation.

B. Douglas v. Commonwealth

[2011-CA-000066](#) 07/27/2012 2012 WL 3054118

Opinion by Judge Moore; Judge Stumbo concurred; Judge VanMeter dissented by separate opinion. The Court reversed and remanded a judgment of the circuit court convicting appellant of second-degree manslaughter and sentencing her to serve seven years of imprisonment. The Court held that the trial court abused its discretion in allowing evidence of appellant's hydrocodone prescription history and that its disclosure resulted in the improper admission of irrelevant and prejudicial evidence of other crimes or bad acts. The act of getting multiple hydrocodone prescriptions was not strikingly similar to the charged offense of second-degree manslaughter and therefore, it did not qualify for the pattern of conduct exception for admitting evidence of prior bad acts. Additionally, it was not relevant and the danger of undue prejudice from its admission outweighed any probative value when appellant did not have hydrocodone in her bloodstream at the time of the motor vehicle accident resulting in the charges against her. Moreover, the probative value, even if relevant, was substantially outweighed by the danger of undue prejudice. The insinuation that appellant was doctor shopping added to the undue prejudice. The Court further held that the error was not harmless because there was a reasonable probability that absent the error, appellant may have been convicted of the lesser included offense of reckless homicide.

C. Engles v. Commonwealth

[2011-CA-000483](#) 07/20/2012 2012 WL 2947775

Opinion by Judge Combs; Judge Thompson and Senior Judge Lambert concurred. The Court affirmed a judgment of the circuit court entered after appellant entered a conditional guilty plea to third-degree burglary and to being a persistent felony offender in the second degree wherein he reserved the right to appeal the denial of his a motion to suppress evidence. The Court held that while the evidence did not conclusively prove that appellant used a gun found in a ladies' room near in both time and place to the shoplifting incident that gave

rise to the charges, it was not an abuse of discretion for the court to allow it to be admitted as it was relevant to be considered by the jury for weight and credibility.

D. Shelton v. Commonwealth

[2011-CA-000282](#) 07/06/2012 2012 WL 2603655

Opinion by Judge Keller; Judges Dixon and Nickell concurred. The Court affirmed a judgment of the circuit court convicting appellant of first-degree assault. The Court held that the trial court did not abuse its discretion in explaining the language in the jury instructions regarding voluntary intoxication and wanton conduct by stating “it means that voluntary intoxication is not a defense to wanton conduct.” There was nothing in the court’s remarks to suggest that appellant’s alleged psychosis was not a defense to wanton conduct and the jury was given a complete instruction on extreme emotional disturbance, which would have allowed the jury to find that appellant was acting under the effect of a psychosis.

E. Southwood v. Commonwealth

[2011-CA-001277](#) 07/20/2012 2012 WL 2946124

Opinion by Judge Clayton; Chief Judge Acree and Judge Dixon concurred. The Court affirmed an order of the circuit court denying appellant’s motion to alter, amend or vacate an order revoking his probation. The Court held that the trial court did not err in revoking appellant’s probation by failing to make the specific finding that appellant could not be “appropriately managed in the community” pursuant to KRS 439.3106(1). The statutory language did not require the court to make specific findings of fact and the decision was consistent with the statute in that the trial court determined, based on pending charges against appellant, that there was no other sanction, short of revocation and incarceration, which would be appropriate.

F. Vaughn v. Commonwealth

[2010-CA-001698](#) 01/27/2012 2012 WL 246395

Opinion by Judge Dixon; Judges Lambert and Nickell concurred. The Court vacated in part and remanded orders of the circuit courts requiring the defendants to pay restitution to the Kentucky State Treasury for extradition expenses incurred by the Commonwealth. The Court held that the circuit courts erred as a matter of law in applying the restitution statutes to appellants. The statutory scheme did not authorize a trial court to impose restitution for extradition expenses because the Commonwealth was not a victim who suffered a loss as a result of the criminal acts committed by the appellants. While KRS 440.090 allowed the government to seek compensation from the Treasury, it did not provide that the fugitive must then repay the Commonwealth for those expenditures.

V. EMPLOYMENT

A. Cherry v. City of Bowling Green

2011-CA-000591 07/20/2012 2012 WL 2946084

Opinion by Judge Nickell; Judges Caperton and Lambert concurred. The Court affirmed a judgment of the circuit court entered after a jury dismissed appellant's claims against the appellee city for damages resulting from work restrictions placed on him by the fire chief. The Court first held that the trial court did not err in granting the city's motion *in limine* to exclude testimony and evidence of other employees' misuse of city procurement cards. The proffered evidence dealt solely with the issue of appellant's inappropriate use of his procurement card, the city commission had previously dealt with that issue and no appeal was taken from those proceedings. Further, because all issues relating to that hearing had been argued and decided in federal proceedings, the law of the case doctrine prohibited them from being raised again. The Court next held that the trial court did not err in failing to grant appellant a directed verdict and rule as a matter of law that the fire chief's orders constituted a reprimand or reduction in grade for which appellant was entitled to a hearing under KRS 95.450. The record plainly showed that there were disputed facts as to this issue and therefore, the trial court was constrained from directing a verdict in appellant's favor. The Court next held that the trial court did not err in failing to properly instruct the jury when it adopted almost verbatim appellant's tendered instructions and thus, appellant could not be heard to complain regarding any defects in the instructions. The Court finally held that appellant's claim that the Claims Against Local Government Act unconstitutionally limited or prohibited him from recovering punitive damages from the city was untimely and without merit. First, the trial court's failure to issue a ruling on the constitutional challenge was not brought to its attention in order to give it a meaningful opportunity to rule. Nevertheless, the Court held that the argument was without merit based on the holding in *Louisville Metro Housing Authority v. Burns*, 198 S.W.3d 147 (Ky. App. 2005).

VI. FAMILY LAW

A. Ball v. Tatum

[2011-CA-001716](#) 07/20/2012 2012 WL 2947899

Opinion by Judge Nickell; Judges Lambert and Taylor concurred. The Court affirmed an order of the circuit court designating appellant's adoptive parents *de facto* custodians of her special needs child. The Court first held that the trial court did not err in designating appellees *de facto* custodians. KRS 403.270 did not require proof appellees were the child's sole, only or exclusive caregivers and financial supporters but only that they were the child's primary caregivers and primary financial supporters. The fact that appellant also cared for the child on occasion did not negate appellees standing to petition for custody when, for all practical purposes, appellees had assumed the role of parents and stood in appellant's place. The Court then held that the circuit court did not err or abuse its discretion in finding that placing the child in the joint custody of the parties was in the child's best interest, when the court considered all the relevant factors in KRS 403.270 to decide the matter.

B. Goshorn v. Wilson

[2011-CA-000574](#) 07/06/2012 2012 WL 2619711

Opinion by Judge VanMeter; Judges Combs and Dixon concurred. The Court affirmed in part, reversed in part, and remanded for further proceedings an order of the circuit court holding a prenuptial agreement valid and enforceable; finding appellant to have vacated the marital residence thus extinguishing any interest he may have had in his deceased wife's residence; and dismissing appellant's claims for fraud, misrepresentation and wrongful eviction against the deceased wife's children. The Court first held that the trial court did not err in finding that the prenuptial agreement was valid. The fact that appellant could have consulted with an attorney but chose not to, did not render the agreement invalid. The Court next held that the trial court erred by concluding that any interest appellant had in the marital residence had been extinguished. Appellant held a life estate in the marital residence which could only be terminated by a subsequent condition - his death or relocation from the home. Although appellant had purchased and moved into a condominium before his wife's death, this did not count as his relocation from the marital residence, since his interest in the residence did not vest until the wife's will was probated. Appellant's initial attempt to renounce the wife's will and his assertion that he was entitled to a life estate in the marital residence sufficed as an expression of a desire to move back into the home.

C. Rice v. Rice

[2011-CA-002162](#) 07/06/2012 2012 WL 2605911

Opinion by Judge VanMeter; Judges Combs and Dixon concurred. The Court affirmed an order of the circuit court denying appellant's motion to alter, amend or vacate its order adopting a report of a domestic relations commissioner (DRC), which designated appellee as the primary residential custodian of the couple's three minor children during the school year. The Court held that the trial court did not abuse its discretion by refusing to grant appellant physical custody and that the trial court did not palpably err in naming appellee custodian of the children during the school year. Merely because appellee would be working during part of the time the children were in his custody and they would be watched by their paternal grandparents, did not mean that the court granted the grandparents custody nor did it improperly favor grandparents over biological parents. The Court next held that the DRC's findings that appellant's living situation was unstable and that designating appellee as the primary residential custodian was in the best interests of the children were not clearly erroneous when the DRC appeared to have considered all relevant factors in deciding what living situation would be best for the children.

D. S.S. v. Commonwealth, Cabinet for Health and Family Services

[2011-CA-001790](#) 07/06/2012 2012 WL 2605843

Opinion by Senior Judge Lambert; Judges Combs and Stumbo concurred. The Court affirmed an order of the family court finding that appellant's great-grandmother had standing to intervene as a *de facto* custodian under KRS

403.270. The Court held that the family court did not err as a matter of law in determining that the great-grandmother had standing to intervene as a de facto custodian. The Court rejected the argument that the great-grandmother was not the primary provider of financial support for any period of time merely because the sources of her income were Social Security and Social Security Insurance and only her husband worked outside the home.

VII. INSURANCE

A. **Stull v. Steffen**

[2011-CA-000229](#) 07/27/2012 2012 WL 3047130

Opinion by Judge Keller; Judges Taylor and Thompson concurred. The Court affirmed a summary judgment in favor of appellees on appellant's claim for injuries she received in an automobile accident. The Court held that the trial court did not err in finding that the claim was filed outside the statute of limitations in KRS 304.39-230(6). While only payment of personal injury protection (PIP) benefits could extend the statute of limitations and all PIP benefits had to be paid before the insurer could disburse MedPay benefits, the insurer's failure to exhaust PIP benefits did not convert all subsequent disbursements of MedPay benefits into PIP benefits but only converted the portion of MedPay benefits necessary to reach the PIP benefits. Therefore, the statute of limitations began to run on the date the PIP benefits were exhausted.

VIII. TORTS

A. **Gibson v. Hicks**

[2011-CA-001090](#) 07/27/2012 2012 WL 3047209

Opinion by Judge Thompson; Judges Lambert and VanMeter concurred. The Court reversed and remanded an order of the circuit court denying appellant's motion for summary judgment in an action filed against her by appellee for her failure to initiate an investigation under the Kentucky Adult Protection Act, KRS Chapter 209. The Court held that the circuit court erred in denying appellant's motion for summary judgment. In reaching that conclusion, the Court first held that the action against appellant was not precluded by the doctrine of res judicata because the question of appellant's immunity in her individual capacity was not presented in a prior appeal. The Court next held that because appellee was not in the Cabinet's custody or otherwise restrained by appellant or the Cabinet at the time she was neglected or abused, she could not meet the test in *Fryman v. Harrison*, 896 S.W.2d 908, 910 (Ky. 1995), to establish that appellant had a special relationship and thus, a common law duty to her. The Court next held that the clear and unambiguous language of the Act did not mandate a Cabinet employee investigate all allegations of abuse and neglect of a person eighteen years of age or older and the General Assembly did not intend the Cabinet to investigate every case of alleged abuse against an adult. Because appellant did not have actual or personal knowledge of appellee's mental or physical condition, she was only required to initiate an investigation if there was reasonable cause to believe that appellee was an adult as defined in the statute.

This determination was a discretionary act and therefore, appellant was entitled to qualified official immunity.

B. Peoples Bank of Northern Kentucky, Inc. v. Crowe Horwath

[2010-CA-001709](#) 07/13/2012 2012 WL 2892352

Opinion by Judge Thompson; Judges Clayton and Stumbo concurred. The Court affirmed a judgment of the circuit court entered following a jury verdict in favor of appellee on appellants' claims for professional negligence and breach of fiduciary duty in performing its auditing duties. The Court first held that the trial court properly instructed the jury that criminal wrongdoers caused the appellant bank's losses. Regardless of whether liability could be apportioned, the instruction was not confusing or misleading and the evidence supported the instruction that informed the jury that the criminal wrongdoers breached their duties owed to the bank and that their breaches caused the losses to the bank. The Court next held that the trial court properly instructed the jury that the bank's agents caused losses to the bank in connection with check conversions. The instruction was not confusing or misleading and the evidence regarding the converted check scheme was presented to prove that the converted checks were the cause of the bank's undercapitalization and ultimate closing. The Court next held that the trial court did not abuse its discretion in admitting expert testimony describing the duties of bank directors and, specifically, appellant's directors. The nature and scope of the duties owed a financial institution by its directors was a matter beyond the experience of the average juror. The Court finally held that the any error by the trial court in directing a verdict in favor of the individual auditor's favor was harmless when the jury was not informed that the individual was dismissed from the action and the jury was properly instructed that the firm was accountable for the conduct of its CPA's, including the individual auditor.

IX. WILLS AND ESTATES

A. Blackwell v. Blackwell

[2010-CA-001691](#) 07/13/2012 2012 WL 2892351

Opinion by Chief Judge Acree; Judges Caperton and VanMeter concurred. The Court affirmed in part, reversed in part and remanded an order of the circuit court which affirmed a judgment and order of the district court dismissing appellant's claims against her ex-husband's estate. The Court first held that the circuit court properly affirmed the portion of the district court order that found that a letter of notice of disallowance was adequate as contemplated by KRS 396.055(1) when it clearly and unequivocally disputed, rejected and disallowed the claim. The Court further held that the notice of disallowance substantially complied with the statute when it was sent by an agent acting on the personal representative's behalf. The Court then held that the circuit court erred in affirming that portion of the district court order finding that appellant's claim was barred for appellant's failure to file a timely enforcement action against the personal representative. The notice of disallowance did not comply, substantially or otherwise, with KRS 396.055(1) when it clearly failed to include

any language warning appellant that an action against the personal representative must be commenced not later than 60 days after the mailing of the notice. The failure did not render the disallowance letter void but rather, appellant was no longer bound to bring the enforcement action within the 60-day limitations period but only within a reasonable time, which she did when she filed it within the six-month period for presenting claims to the estate as set forth in KRS 396.011.

B. Rose v. Ackerson

[2010-CA-001094](#) 07/27/2012 2012 WL 3046330

Opinion by Senior Judge Lambert; Chief Judge Acree and Judge Stumbo concurred. The Court affirmed an order of the circuit court awarding the proceeds of an annuity to appellees on behalf of an estate. The Court first held that the trial court did not abuse its discretion when it determined that the complaint was sufficient to state a cause of action when it plainly alleged that appellant was asserting a claim for the annuity proceeds, which she had acknowledged were to be used for the debts of the estate. The Court next held that the trial court did not abuse its discretion when it determined the appellant would be unjustly enriched if she were to retain the annuity funds. Appellees' failure to assert the existence of unjust enrichment did not preclude the court from making the legal conclusion that appellant would be unjustly enriched after finding that appellant acquired the annuity proceeds by fraudulent inducement. The Court next held that the trial court did not err in determining that there was clear and convincing evidence that appellant agreed to use the annuity funds to pay the estate's debts and that her failure to do so would render it unconscionable for her to retain the funds. The Court next held that the trial court did not err when it found the existence of an agreement between appellant and the deceased that the annuity would be used to pay the debts of the estate. This did not alter the terms of the policy but rather, limited the actions of appellant after receipt of the funds. The Court finally held that appellant failed to preserve her defense of "unclean hands" when she untimely and inadequately raised the defense for the first time in a post-trial motion.