

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JUNE 1, 2013 to JUNE 30, 2013

I. CRIMINAL LAW

- A. [Al-Aridi v. Commonwealth](#)
[2011-CA-001046](#) 06/28/2013 2013 WL 3238271

Opinion by Judge Lambert; Judges Caperton and Moore concurred.

On discretionary review, appellant challenged the denial of his CR 60.02(e) motion to vacate his 2002 guilty plea, which was upheld by the circuit court, upon the basis of *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010). Padilla held that the failure to advise a defendant about the immigration consequences of a criminal plea could constitute ineffective assistance of counsel. Relying upon *Chaidez v. United States*, ___ U.S. ___, 133 S. Ct. 1103, 185 L.Ed.2d 149 (2013), the Court affirmed the circuit court and held that Padilla could not be retroactively applied to appellant's conviction, which had been final long before Padilla's rendition.

- B. [Ashlock v. Commonwealth](#)
[2012-CA-000619](#) 06/14/2013 2013 WL 2660203 (Released for Publication)

Opinion by Judge Nickell; Judges Combs and Maze concurred.

The Court of Appeals affirmed the circuit court's denial of a motion to suppress and held that the United States and Kentucky Constitutions do not prohibit the warrantless search of trash receptacles deposited outside the curtilage of a residence despite the existence of a municipal anti-rummaging ordinance.

- C. [Grimes v. Commonwealth](#)
[2012-CA-000112](#) 06/07/2013 2013 WL 2450504 (DR Pending)

Opinion by Judge Stumbo; Chief Judge Acree and Judge VanMeter concurred.

The Court of Appeals affirmed an order denying a motion to suppress statements made after an arrest for violation of KRS 222.202(1), alcohol intoxication in a public place. Addressing an issue of first impression, the Court held that a private vehicle constitutes a "public place" under KRS 525.010(3) when actions within the vehicle produce offensive or proscribed consequences in a public place. In this instance, the defendant interfered with a valid traffic stop on a public highway.

II. EMPLOYMENT

- A. Downs v. CSX Transp., Inc.
[2010-CA-001041](#) 06/21/2013 2013 WL 3120191 (DR Pending)

Opinion by Judge Taylor; Judges Dixon and Lambert concurred.

A railroad worker brought a negligence action under the Federal Employers' Liability Act (FELA) against the employer railroad (CSX) and a refrigerator retailer (GE) for injuries sustained when a refrigerator fell out of a railroad car and struck the worker. CSX filed a third-party action for indemnity against the refrigerator's manufacturer (LG), alleging it had negligently loaded the refrigerator into the railroad car. Following a jury verdict finding no breach of the applicable standard of care by CSX or GE, the circuit court dismissed the worker's negligence claims. On appeal, the Court of Appeals noted that under FELA, an employee who suffers injury caused in whole or in part by the employer's negligence may recover his or her full damages from the employer, regardless of whether the injury was also caused in part by the actions of a third party. The Court consequently held that because the employer is liable for injury caused only in part by its negligence, FELA does not permit apportionment between the employer's negligence and other jointly-liable tortfeasors. The Court also recognized that the employer may seek indemnity against a third-party tortfeasor, but that any such indemnity action is controlled by state law. The Court then determined that apportionment of fault under KRS 411.182 is inapplicable in an indemnity action. The Court concluded that while the circuit court had, therefore, erred by submitting an apportionment instruction to the jury upon CSX's indemnity claim, the error was harmless as the jury found that neither CSX nor GE were negligent in causing the employee's injury.

- B. Kentucky Unemployment Ins. Com'n v. Blakeman
[2012-CA-000915](#) 06/14/2013 2013 WL 2659938 (DR Pending)

Opinion by Judge Lambert; Chief Judge Acree and Judge Stumbo concurred.

The Court of Appeals affirmed the circuit court's reversal of a decision of the Kentucky Unemployment Insurance Commission denying unemployment benefits to appellee. The Court held that a claimant is entitled to unemployment benefits upon a showing that she did not voluntarily quit and was discharged for reasons beyond her control. In this case, the reason for discharge was appellee's legitimate inability to pass a physical agility test.

- C. Kentucky Unemployment Ins. Com'n v. Campbell County Detention Center
[2012-CA-001206](#) 06/07/2013 2013 WL 2450723 (DR Pending)

Opinion by Judge Stumbo; Judge Combs concurred; Judge VanMeter dissented.

The Court of Appeals reversed the judgment of the circuit court that reversed the decision of the Kentucky Unemployment Insurance Commission to award unemployment benefits to an employee. The Court held that the employee carried his burden of proving good cause for his

work absences and tardies and that the circuit court impermissibly substituted its judgment for that of the Commission.

III. FAMILY LAW

- A. Hicks v. Halsey
[2012-CA-001154](#) 06/14/2013 2013 WL 2659860 (Released for Publication)

Opinion by Judge Combs; Judges Moore and Taylor concurred.

The Court of Appeals affirmed the family court's determination that appellee was the *de facto* custodian of appellant's child. The main issue on appeal was whether a motion to set aside a guardianship was sufficient to toll the time period of the *de facto* custodian statute (KRS 403.270). The Court held that guardianship and custodianship are two different things. Therefore, the motion to set aside the guardianship was irrelevant in the context of a *de facto* custodian action. However, the Court remanded to the family court for specific written findings regarding the best interest of the child.

IV. IMMUNITY

- A. Mattingly v. Mitchell
[2012-CA-000083](#) 06/21/2013 2013 WL 3105373 (DR Pending)

Opinion by Judge Thompson; Judges Combs and Stumbo concurred.

In an action where a vehicle occupant was killed in a collision allegedly caused by a police officer's high-speed pursuit of another vehicle, the Court of Appeals held that the circuit court properly denied summary judgment in favor of the police officer on the basis of qualified official immunity because his pursuit of the other vehicle was a ministerial act. The police department's standard operating procedures contained specific directives to officers regarding when a pursuit could be initiated and continued and when it must be terminated.

- B. Mucker v. Brown
[2012-CA-001013](#) 06/07/2013 2013 WL 2450491 (DR Pending)

Opinion by Judge Thompson; Judges Combs and Stumbo concurred.

The Court of Appeals held that the circuit court properly denied summary judgment in favor of a school plant operator on the basis of qualified official immunity. A school employee filed an action against the plant operator in her individual capacity after the employee slipped on ice that had accumulated on the school's sidewalk. The Court held that although the plant operator may have had the discretion to decide when and where to begin clearing the sidewalk, she had the ministerial duty to clear the sidewalk of ice prior to the time students, parents, and staff

members were reasonably anticipated to arrive at the school. Therefore, because her duties in this regard were ministerial in nature, she was not entitled to qualified official immunity.

V. LICENSES

- A. Fisher v. Com., Public Protection Cabinet, Dept. of Housing, Bldgs. and Const., Div. of Plumbing
[2011-CA-001951](#) 06/14/2013 2013 WL 2660441

Opinion by Judge Moore; Chief Judge Acree and Judge Taylor concurred.

The Court of Appeals affirmed the decision of the Department of Housing, Buildings and Construction revoking appellant's master plumber's license on grounds that he was a convicted sex offender. The Court held that appellant's felony sex offenses fell within the category of offenses described in KRS 335B.010(4), which made it mandatory for the Department to determine whether appellant had been "rehabilitated" pursuant to KRS 335B.020(3) prior to issuing him a master plumber's license. The Department had been unaware of appellant's prior felony offenses and had failed to make any determination regarding whether he had been rehabilitated as the law required. Therefore, the Court held that the Department had acted in excess of its authority in originally issuing appellant a master plumber's license. Consequently, the Department's subsequent invalidation of appellant's master plumber's license was proper, albeit for reasons other than those relied upon.

VI. NEGLIGENCE

- A. Carberry v. Golden Hawk Transp. Co.
[2011-CA-000269](#) 06/21/2013 2013 WL 3105549 (Released for Publication)

Opinion by Judge Nickell; Judges Lambert and Taylor concurred.

The Court of Appeals affirmed the entry of summary judgment in an action where the appellant - an assault victim who was assaulted by a long-haul trucker in a motel parking lot - sought damages against appellee, the trucker's employer, for negligent hiring and retention and negligent training and supervision. Using appellee's tractor-trailer, the trucker had detoured to drive his girlfriend to meet appellant, her ex-husband, in a motel parking lot. Following a dispute, the trucker assaulted appellant and caused him significant head injuries. In affirming the entry of summary judgment, the Court determined that appellant had not established that: (1) the trucker was unfit for his job as a long-haul trucker, and (2) hiring him created an unreasonable risk of harm as required for a claim of negligent hiring and retention. Because neither 49 C.F.R. § 391.21 nor the standard federal job application for a truck driver requires information about an applicant's criminal history, appellant's claim that appellee negligently investigated the trucker before hiring him was unfounded. Moreover, the trucker's alleged failure to list two recent employers was not attributable to appellee because the trucker certified that he had submitted a truthful application. Furthermore, because the assault occurred unbeknownst to appellee,

without its approval or authorization, and not in furtherance of its business, appellee could not have foreseen that the trucker would assault appellant where appellee did nothing to place the trucker in proximity to appellant, especially where the trucker's on-the-job conduct and performance gave no indication that the assault was imminent or even possible. Finally, the Court held that summary judgment was not entered prematurely where the facts of the assault were undisputed and no amount of discovery would change the fact that the assault did not occur in the course and scope of the trucker's employment.

B. Lewis v. Faulkner Real Estate Corp.

[2009-CA-001224](#) 06/14/2013 2013 WL 2711081 (Released for Publication)

Opinion by Judge Clayton; Judges Taylor and Thompson concurred.

On remand from the Kentucky Supreme Court, the Court of Appeals affirmed the circuit court's determination that appellee was not liable in negligence for foot injuries sustained by a pedestrian when he stepped in a hole next to a sidewalk on appellee's property and fell. Citing to *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), the Court determined that there were no genuine issues of material fact and that appellee was entitled to summary judgment as a matter of law. The record supported the circuit court's conclusion that the hole next to the sidewalk in question was "open and obvious," that the pedestrian would have seen it if he had been looking, and that appellee had no reason to anticipate the harm from the hole.

VII. NEW TRIAL MOTION

A. Crawford v. Marshall Emergency Services Associates, PSC

[2011-CA-001750](#) 06/14/2013 2013 WL 2660572 (DR Pending)

Opinion by Judge Moore; Chief Judge Acree and Judge Taylor concurred.

The Court of Appeals affirmed the circuit court's denial of appellant's motion for a new trial following a defense verdict in a medical malpractice action. After interviewing jurors post-verdict, appellant alleged that one juror had been inattentive during the trial; that another juror had stated during the trial that it was an "open and shut case"; and that another juror had stated during deliberations that a verdict in appellant's favor would result in higher medical bills and insurance premiums and would ruin the appellee doctor's practice. The Court held that a new trial was not merited because appellant's allegations were based entirely upon post-trial juror affidavits or hearsay statements, which are generally inadmissible as evidence and incapable of impeaching a verdict. Because the affidavits and hearsay statements relied upon by appellant met no exception to this general rule of inadmissibility, the circuit court committed no error in denying appellant a new trial.

VIII. ROADS

A. Cary v. Pulaski County Fiscal Court
[2011-CA-002272](#) 06/07/2013 2013 WL 2450519

Opinion by Judge Moore; Judges Clayton and Maze concurred.

In consolidated appeals concerning whether two roads in Pulaski County qualified as “county roads” within the meaning of KRS 178.010(1)(b), the Court of Appeals affirmed in part, reversed in part, and remanded. The Court first held that because the county fiscal court failed to enter a formal order adopting the first of these two roads into its county road maintenance system, the circuit court committed reversible error in finding that the road qualified as a “county road” as described in KRS 178.010(1)(b). As to the second road, the Court noted that the fiscal court had entered a formal order of adoption and, due to the length of time between the entry of its order and the filing of this action by the plaintiffs, was entitled to a presumption that it properly “established” the road in question as a county road pursuant to either KRS 178.080 or KRS 178.115. Moreover, the length of time between when the fiscal court entered its order and began improving and maintaining the road in question and the filing of this action by the plaintiffs estopped the plaintiffs from enjoining Pulaski County from maintaining this road as a county road or excluding the public from using it as such. The Court further held that the circuit court did not err in ordering the plaintiffs to remove a gate they had erected over a part of the road not specifically encompassed within the fiscal court’s order of adoption because plaintiffs’ neighbors, who sought removal of the gate in question, were entitled to have the gate removed as a private nuisance. Furthermore, the Court concluded that the circuit court acted within its sound discretion by ordering the removal of the gate but refraining from holding the plaintiffs in contempt for erecting it.