

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
MARCH 2009**

I. CIVIL PROCEDURE

A. Kaminski v. Bremner, Inc.

[2006-CA-002439](#) 03/27/2009 2009 WL 792518

Opinion by Judge Nickell; Judges Moore and Stumbo concurred. The Court affirmed a judgment of the circuit court entered subsequent to jury verdict finding in favor of appellee on his claim that he was terminated for filing a workers' compensation claim and an order denying a motion for a new trial alleging juror misconduct and irregularities in the jury verdict. The Court first held that the modification of the jury verdict by the foreman in open court did not constitute reversible error and that the trial court did not abuse its discretion in denying appellant's motion for a new trial. The trial court's action in invalidating the original verdict and sending jurors back to the jury room sanitized any irregularity or inconsistency. The Court next held that the trial court did not abuse its discretion in choosing to clarify a juror's agreement with the verdict instead of sending jurors back to the jury room for a third time. Further, the phraseology used by the trial court in posing the oral polling inquiry did not alter how each individual juror had already voted. The Court finally held that the trial court did not abuse its discretion in crafting the written jury instructions. Appellant's version was essentially the same as the one given by the Court, it was not confusing, it correctly reflected the law, and appellant accepted the instruction without complaint and did not suggest that it be clarified before jurors were returned to the jury room to resume deliberations.

B. Pavkovich v. Shenouda

[2005-CA-000866](#) 03/27/2009 2009 WL 792488

Opinion by Judge Acree; Chief Judge Combs and Judge Taylor concurred. The Court dismissed for lack of jurisdiction appellants' appeals from an order of the circuit court dismissing and referring to arbitration their breach of contract and fraudulent misrepresentation claims related to the purchase of real property and an order of the circuit court affirming an arbitrator's decision that the demand for arbitration was not timely. The Court held that the circuit court lost jurisdiction of the subject matter 10 days after its original order dismissing the claims with prejudice. Because appellants did not timely appeal, the Court could not address that dismissal. The Court then held that once the circuit court lost subject matter jurisdiction, appellants were required to comply with KRS 417.160 in order to invoke the circuit court's jurisdiction to review the arbitrator's decision. The trial court did not have subject matter jurisdiction to consider appellants' motion filed in the case that had long since become final.

II. CORPORATIONS

A. **Patmon v. Hobbs**

[2007-CA-002527](#) 03/27/2009 2009 WL 792601

Opinion by Judge Clayton; Judge Caperton concurred; Chief Judge Combs concurred by separate opinion. The Court affirmed in part and reversed and remanded in part a judgment of the circuit court finding that damages could not be awarded for the value of build-to-suit-lease agreements. The Court first held that appellee, a member of a limited liability company, owed a duty of loyalty to fellow members and the company, absent contrary provisions in the limited liability company operating agreement. The Court then adopted the corporate opportunity doctrine and held that appellee violated his duty and therefore, breached his fiduciary duty when he diverted the build-to-lease projects to his separate company. However, the Court remanded for further proceedings for the trial court to determine whether appellants could establish that they had the financial wherewithal to undertake the projects, for the trial court to determine a remedy for the breach of fiduciary duty, and for the trial court to follow the statutory guidelines of KRS 275.170.

III. CORRECTIONS

A. **Richardson v. Rees**

[2008-CA-000721](#) 03/27/2009 2009 WL 792748

Opinion by Judge Wine; Judges Caperton and Taylor concurred. The Court affirmed in part and reversed and remanded in part an order of the circuit court dismissing appellant's petition seeking a declaratory judgment that certain statutory and constitutional rights had been violated when he was denied 60 days Educational Good Time Credit (EGT) and a monetary incentive award for earning his GED, as well seeking punitive damages, costs and attorney fees. The Court first held that appellant's use of "et al." in his Notice of Appeal to designate seven individual respondents did not comply with CR 73.03(1) and therefore, the judgment was final and no longer appealable as to those individuals. However, because the Commissioner was individually named and he had the ultimate responsibility of deciding whether to award the credit, the other individuals were not indispensable parties. The Court then held that that the Department of Corrections correctly applied a limitation of one mandatory award of EGT for completion of one of the categories listed in KRS 197.045(1) and that awards of additional EGT credit were within the discretion of the Department subject to the guidelines set out in KCPP 20.1(II)(C)(1) and (2). The Court then held that the Department abused its discretion in denying appellant additional EGT credit for successfully completing his GED after he was directed to complete the GED class in order to enroll in a carpentry vocational program even though he presented a college transcript supporting his claim that his college degree should meet the requirements of a GED or high school diploma and after counselors assured him that he would be awarded the EGT if he obtained his GED. The Court next held that appellant's failure to move the trial court to amend its order pursuant to CR 52.02 or CR 59.05, precluded review of his

claim that the trial court failed to address his breach of contract claim. The Court finally held that appellant's claim that his equal protection rights were violated was brought for the first time on appeal and therefore, was unreviewable.

IV. CRIMINAL LAW

A. **Allen v. Commonwealth**

[2007-CA-002079](#) 03/06/2009 2009 WL 563526

Opinion by Judge Wine; Senior Judge Buckingham concurred; Chief Judge Combs dissented by separate opinion. The Court affirmed a judgment and sentence of the circuit court convicting appellant on eleven counts of first-degree sexual abuse and sentencing him to eleven years' imprisonment. The Court held that the trial court did not err in refusing to strike for cause a prospective juror who had been a victim of sexual abuse. Based on the entirety of the prospective juror's responses, it could not be reasonably inferred that he was biased and therefore, RCr 9.36(1) did not require the trial court to excuse him. The Court also held that admission of letters and testimony regarding the relationship between appellant and the victim were properly admitted under KRE 801A(a)(2) to rebut an implied charge of recent fabrication; the trial court did not abuse its discretion in instructing the jury; the trial court did not err by allowing the prosecutor to ask if appellant had any reason to think another witness would lie so as to question whether any bias might exist on the part of a witness as to appellant; and appellant was not unduly prejudiced by a spontaneous comment from a police detective regarding prior EPO actions filed against him.

B. **Stoker v. Commonwealth**

[2008-CA-000354](#) 03/27/2009 2009 WL 792730

Opinion by Judge Caperton; Judges Dixon and VanMeter concurred. The Court affirmed an order of the circuit court denying appellant's pro se CR 60.02 motion. The Court held that the trial court did not abuse its discretion when it first undertook analysis under CR 60.02(f) and found that the motion was not raised in a reasonable time and then undertook a second analysis under CR 60.02(b) and found that appellant's newly discovered evidence claim was brought outside the one-year time limit. The Court also held appellant failed to state for a claim for relief under CR 60.02 when he failed to allege with specificity how the Commonwealth wrongfully obtained his conviction through the use of a satanic ritual abuse sham. The Court finally held that the trial court did not err in failing to hold an evidentiary hearing. First, RCr 10.26 was inapplicable in review of a decision under CR 60.02. Second, appellant failed to affirmatively allege facts to justify relief and therefore a hearing was not required.

V. FAMILY LAW

A. J.G. v. J.C.

[2008-CA-001023](#) 03/27/2009 2009 WL 792763

Opinion by Judge Stumbo; Judge Taylor and Senior Judge Graves concurred. The Court reversed and remanded a judgment of the circuit court finding that the appellee grandparents were de facto custodians. The Court held that because the child had not resided with the grandparents for one year, as required by KRS 403.270(1)(a), the trial court erred in finding that they were de facto custodians. Further, a motion to rescind temporary custody invoked the tolling provision of the statute and therefore, the days between the filing of the motion and the order ruling upon it did not count toward the time requirement. The Court also held that the grandparents were considered a single unit for the purposes of de facto custodianship.

VI. GOVERNMENT

A. St. Matthews Fire Protection District v. Aubrey

[2006-CA-000518](#) 03/27/2009 2009 WL 792493

Opinion by Senior Judge Henry; Chief Judge Combs and Judge Moore concurred. The Court affirmed a summary judgment dismissing claims against various county tax collection officials arising from their failure to assess and collect a portion of tax revenue due to the St. Matthews Fire Protection District. The Court held that the circuit court correctly found that the officers, sued only in their official or representative capacities, were protected from suit by the doctrine of sovereign immunity. The Court next held that, because the District's declaratory judgment claim was, for all practical purposes, a claim for damages for past negligent conduct, rather than a request for a declaration of rights to aid the parties in conforming their future conduct to the law's requirements, sovereign immunity barred the action. The Court then held because the District was not a party nor a third-party beneficiary to a letter memorializing an agreement regarding payment to the sheriff for preparation of tax bills, the contract claim failed. The Court finally held that sovereign immunity was not waived by the requirement that the officials post performance bonds or the authorization of recovery on the bonds.

VII. JUVENILES

A. C.W.C.S. v. Commonwealth

[2007-CA-002040](#) 03/20/2009 2009 WL 722729

Opinion by Judge Lambert; Judge VanMeter and Senior Judge Knopf concurred. The Court affirmed a judgment of the circuit court affirming a judgment of the district court denying a motion to suppress appellant's incriminatory statements and denying a motion to strike appellant's juvenile sexual offender evaluation. The Court held that because appellant's movements were not restricted in a degree associated with arrest when he was questioned by police at school, he was not in custody for Miranda purposes. Therefore, the district court properly denied a

motion to suppress the statements made during the school interview. The Court then held that the district court did not err in admitting the juvenile sexual offender evaluation prepared by an evaluator approved by the Department of Juvenile Justice, as required by KRS 635.510(3). The Court declined to hold that the juvenile sexual offender assessment must be performed by a licensed psychologist. The Court finally held that the district court did not abuse its discretion in declaring appellant a juvenile sexual offender when the evidence showed that he was not making progress in his counseling and immediately committed contempt of court by constructing a weapon and getting expelled from school after being placed in his grandmother's care.

VIII. PROPERTY

A. **City of Pikeville v. Pike County, Kentucky**

[2008-CA-001056](#) 03/20/2009 2009 WL 723065

Opinion by Senior Judge Buckingham; Judges Dixon and Nickell concurred. The Court affirmed an order of the circuit court granting a motion to dismiss appellants' petition for declaration of rights and statutory action challenging a vote against the annexation of property belonging to appellees. The Court held that the appellant City was precluded from contesting the election pursuant to KRS 120.250, because the statute gave only electors who were qualified to and did vote in the election the right to contest it. The Court further held that appellants did not have an equitable right to challenge the vote, as their claim that appellees submitted an untruthful affidavit in order to vote on the annexation question fell within the parameters of the statute and therefore, could only be brought in an action pursuant to the statute. Any action for declaratory relief apart from the statute could only be brought in a suit alleging the election was void, not merely voidable.

B. **Holly Creek Production Corp. v. Rose**

[2008-CA-000260](#) 03/27/2009 2009 WL 792722

Opinion by Judge Clayton; Judges Moore and Stumbo concurred. The Court affirmed in part and reversed and remanded in part a judgment of the circuit court terminating an oil and gas lease. The Court held that because there was no end date to the landowner's option to request that pipelines be buried, appellant was required to bury the pipelines with the cost to be determined by the court and that because the lease must be enforced, it was not forfeited. The Court then held that the trial court properly concluded that there was no genuine issue of material fact and that farm-tap amounts should be included in the calculation of royalties. The Court finally held that the trial court did not abuse its discretion in dismissing a counterclaim for legal fees incurred to defend against appellee's claim of trespass, as the action for trespass appeared to be brought in good faith.

C. **Riley v. Flagstar Bank, FSB**

[2008-CA-000174](#) 03/27/2009 2009 WL 792716

Opinion by Judge Moore; Judges Clayton and Stumbo concurred. The Court reversed and remanded an order of the circuit court granting a directed verdict

against appellants on their claims for penalties under KRS 382.365, due to appellee's failure to release a lien on a mortgage. The Court held that because the version of KRS 382.365 in effect at the time that a fax sent was sent to appellee regarding its failure to timely release the lien did not define what constituted written notice, only reasonable notice was required. Therefore, the trial court erred in holding that the fax could not constitute written notice under the statute in effect at the time. The Court also held that the trial court erred in holding that the attorney's signature stamp on the fax created doubt concerning the sufficiency of the notice, as this was a factual issue for the trier of fact. The Court then held that, because private parties were involved in the transmission of the fax, the circuit court erred in holding that appellee's due process rights were violated. The Court next held that the circuit court erred in finding that the original mortgage holder should have been given written notice, as the statute in effect at the time only required written notice to the lienholder. The Court ultimately held that the evidence was sufficient to allow a jury to infer that appellee had received the fax and that such constituted written notice of its failure to release the lien. The determination of whether appellants' acted in good faith was a question of fact for the jury. Therefore, the trial court erred in granting the directed verdict.

IX. TORTS

A. Wasson v. Morris

[2008-CA-000780](#) 03/06/2009 2009 WL 563599

Opinion by Judge Stumbo; Judge Taylor and Senior Judge Graves concurred. The court affirmed an order of the circuit court granting summary judgment to the county sheriff on a Kentucky state trooper's negligence claim for injuries he received in the line of duty while responding to a domestic disturbance call. The Court held that summary judgment was proper in that appellee owed no duty of care to appellant because there was no special relationship. The Court further held that appellee was absolutely immune from suit in both his official and individual capacities. The Court distinguished the holding in *Jones v. Cross*, 260 S.W.3d 343 (Ky. 2008) and held that KRS 70.040 did not waive appellee's absolute official immunity because neither appellee, nor the deputy who allegedly failed to give specific facts about the call to appellant, owed a duty of care to the trooper.

X. WORKERS' COMPENSATION

A. Airtran Airways, Inc. v. Fortney

[2008-CA-001223](#) 03/27/2009 2009 WL 804216

Opinion by Judge Clayton; Judges Lambert and Wine concurred. The Court reversed an opinion of the Workers' Compensation Board reversing an ALJ decision that a widow was not entitled to workers' compensation benefits when her husband, a pilot, died in an airplane accident while taking a flight on ComAir to Atlanta to begin his workday for AirTran. The Court first held that the widow's issue regarding the "going and coming" rule was preserved for appellate review and was properly before the Board when it was listed as a contested issue at the benefit

review conference. The Court then held that because the deceased was going to his workplace when the accident occurred, the going and coming rule was applicable and that the Board erred by holding that the reciprocal jumpseat agreement between the airlines benefited AirTran so as to bring it under the employer conveyance exception to the coming and going rule.