

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

I. CIVIL PROCEDURE

A. Deskins v. Estep

[2007-CA-000514](#) 5/07/10 2010 WL 1814780

Opinion by Judge Taylor; Judges Moore and Thompson concurred. The Court reversed and remanded with directions a judgment of the circuit court awarding appellees damages arising from breach of a construction contract and in conjunction with a default judgment for liability. The Court first held that the circuit court did not abuse its discretion in granting the default judgment for liability or in denying CR 60.02 relief from that judgment. The Secretary of State was deemed the agent for service of process of the complaint and performed the duties as required by KRS 454.210 and made the statutorily required return to the circuit court showing that he completed the acts contemplated under the long-arm statute. CR 55.01 did not require that the motion for default judgment be served on appellant when he had not appeared in the action at the time the motion was filed. The Court also held that the circuit court did not abuse its discretion in declining to continue the hearing for damages. Appellant apparently received a copy of the circuit court order scheduling the damages hearing, as evidenced by his appearance at the designated time. The Court then held that the trial court erred when it failed to make findings of facts or conclusions of law, precluding the Court from making any meaningful review of the judgment. Further, the record in the case failed to support a damage award, there was no supporting documentation for any of the damage claims asserted at the hearing, nor did the expert's testimony support the claims. On remand, the circuit court was instructed to identify the existence of any construction agreements and their terms, to then apply the proper measure of damages to determine what damages, if any, arose from the alleged breach of the construction contract at issue in the litigation, and to determine what mitigation of damages occurred.

B. Hutcherson v. Hicks

[2009-CA-000370](#) 5/14/10 2010 WL 1926529

Opinion by Judge Taylor; Judges Stumbo and VanMeter concurred. The Court reversed and remanded a judgment of the circuit court dismissing appellants' medical malpractice action against appellee upon a jury verdict in his favor. The Court held that the circuit court abused its discretion by setting aside the judgment awarding appellants damages after entering a default judgment as to liability. The court erred in relying on *Howard v. Fountain*, 749 S.W.2d 690 (Ky. App. 1988), when appellee did not enter an appearance before the date of the damage hearing, appellants made a good faith attempt to serve him with notice of the damage assessment hearing, and appellee failed in his duty to notify the clerk of his correct

address. Appellee's actions resulting in the default were unreasonable and grossly dilatory and therefore, he could not demonstrate a valid excuse for his default. Further, appellants were clearly prejudiced by setting aside the default judgment awarding damages when appellee's actions resulted in significant delay of almost nine years and the initial damages award of \$211,953.39 was reduced to zero.

C. Swinford Trucking Co., Inc. v. Paducah Bank and Trust Co.

[2008-CA-001748](#) 5/21/10 2010 WL 2010732

Opinion by Judge Thompson; Judges Caperton and Clayton concurred. The Court reversed and remanded an order dismissing appellant's claims seeking compensatory and punitive damages and reasonable attorney's fees from appellee. Appellant alleged that, because of appellee's negligence, an employee was able to unlawfully withdraw funds from its accounts, resulting in economic losses. The Court held that, even though the employee had made full restitution under a restitution order, the doctrine of collateral estoppel did not preclude appellant from proceeding in a civil action to recover damages from appellee.

II. CRIMINAL LAW

A. Quist v. Commonwealth

[2008-CA-001031](#) 5/21/10 2010 WL 2010512

Opinion by Acting Chief Judge VanMeter; Judge Lambert and Senior Judge Harris concurred. The Court affirmed a judgment of the circuit court sentencing appellant to ten years' imprisonment for attempted unlawful transaction with a minor in the first degree. The Court first held that the trial court properly applied the "routine booking question exception" in denying appellant's motion to suppress his statements made to an agent at the police department following his arrest after he had requested an attorney and before his attorney arrived. The statements were made spontaneously, and not in response to any of the agent's questions while appellant was being processed, and the agent's questions were routine for booking purposes, not to induce appellant to say something incriminating. The Court next held that any error in admitting the testimony of appellant's daughter via web camera, in violation of the confrontation clause, was harmless when the testimony included little, if any, inculpatory evidence. The Court next held that the trial court did not abuse its discretion in denying appellant's motion for a mistrial. First, an officer's testimony that appellant was stopped in his vehicle outside a sting house and saw the officers coming at him was not inflammatory or highly prejudicial and any prejudice which may have resulted was removed by the court's admonition. Second, the officer's testimony that appellant sped away when the officers approached appellant's vehicle outside the house was properly admitted as lay witness testimony on the speed of the vehicle based on personal observations. The Court next held that the trial court did not err in denying appellant's motion for a directed verdict. The evidence of internet chats and telephone conversations was sufficient for the jury to find beyond a reasonable doubt that appellant believed he was communicating with a 13-year-old girl, which was sufficient to meet the requirements of KRS 506.010, the criminal statute under which appellant was

convicted. Further, the Commonwealth was not required to allege that the fictitious victim committed an illegal act, as any sexual activity between a 46-year-old man and a 13-year-old girl was illegal. Also, based on the evidence that appellant drove to what he believed to be the residence of the 13-year-old girl to meet her, it was not clearly unreasonable for a jury to determine that appellant intended to engage in illegal sexual activities and completed a substantial step in pursuing that intention. The Court next held that the evidence did not support an instruction on attempted sexual abuse 2nd as a lesser-included offense and therefore, the trial court did not err by declining to so instruct the jury. The evidence showed that the fictitious victim willingly participated in the sexually explicit chats, scheduled to meet appellant, conversed with him over the telephone and that appellant intended to induce the victim to willingly engage in sexual activity and there was no evidence that appellant subjected the victim to sexual touching without her consent. The Court finally held that the trial court did not err by denying appellant's request to instruct the jury on the defense of entrapment. The evidence established that appellant made initial contact with the fictitious victim whose profile identified her as 13 years old, initiated sexually explicit chats, suggested meeting in person, spoke on the telephone with her, and drove to what he believed was her house to meet her. The fact that the victim invited him to come inside the house did not provide sufficient evidence of inducement or encouragement because going inside was not required to complete the crime.

III. EMPLOYMENT

A. **West v. Kentucky Retirement Systems**

[2009-CA-001176](#) 5/28/10 2010 WL 2133844

Opinion by Judge Wine; Judges Acree and Clayton concurred. The Court reversed and remanded an order of the circuit court affirming a denial of appellant's claim for disability retirement benefits by the Board of Trustees of the Kentucky Retirement Systems. The Court held that smoking could not be considered a pre-existing condition for the purposes of disability retirement in Kentucky. The Court also held that KRS 61.600(3) required only that a claimant come forward with some evidence that his condition did not predate his employment with the Commonwealth and that the Systems then bore the burden of going forward to rebut the evidence.

IV. FAMILY LAW

A. **Fraley v. Rice-Fraley**

[2009-CA-002167](#) 5/07/10 2010 WL 1815392

Opinion by Judge Moore; Judge Thompson and Senior Judge White concurred. The Court reversed a Domestic Violence Order (DVO) entered by the family court against appellant. The Court held that the family court abused its discretion in entering the DVO. The family court erred in considering the "impact" of a marriage counselor's uninformed opinion on appellee's fear of appellant. There were no allegations that appellant had ever acted violently toward appellee or threatened violent actions toward her. Therefore, the family court erred in finding that the

circumstances of the case met the definition of domestic violence or abuse because there was no evidence appellant inflicted the fear of imminent physical injury, as required by KRS 403.720(1). The Court also held that the family court did not abuse its discretion in allowing an unsworn, unidentified person to interject into the proceedings. Because appellant did not object to the statement during the hearing, the Court reviewed the error under the palpable error standard set forth in CR 61.02 and held that although it was improper for the statements to be made without the person first being sworn, the error did not result in a manifest injustice.

B. Young v. Young

[2008-CA-000845](#) 5/21/10 2010 WL 2010508

Opinion by Judge Nickell; Judge Keller and Senior Judge Lambert concurred. The Court affirmed in part, reversed in part and remanded a judgment of the circuit court classifying and dividing appellant's firefighter's pension plan as a marital asset. The Court first held that appellant's argument that the pension should not have been considered a marital asset to be divided in the divorce proceeding, based on the prohibition contained in KRS 61.690, was without merit. The legislation was not in effect on either the date the divorce action was filed or the date of dissolution. The Court next held that the trial court did not improperly include premarital contributions in the award. The Court then held that the trial court incorrectly set the valuation date on the date of appellant's twentieth anniversary of participation in the pension plan, instead of the date of the divorce decree. The Court finally held that the trial court properly utilized the delayed division method in allocating the pension benefits when it clearly weighed the evidence before determining the proper method of dividing the pension.

V. INSURANCE

A. Curtis Green & Clay Green, Inc. v. Clark

[2006-CA-000086](#) 5/21/10 2010 WL 2010506

Opinion by Judge Stumbo; Judges Keller and Lambert concurred. The Court affirmed a judgment of the circuit court declaring that the members of AIK Comp, a workers' compensation self-insurance group organized under 803 Kentucky Administrative Regulations 25:026, Section 3, were jointly and severally liable for all claims against the fund (as opposed to those of only their own employees). The Court first held that Senate Bill (S.B.) 86, transferring the regulation of group self-insurers to the Office of Insurance and specifically defining the self-insured groups as insurers, was not unconstitutional special legislation. The language applied to all workers' compensation self-insured groups and there were distinctive and natural reasons supporting the classification of self-insured groups. The Court also held that the retroactive effect of S.B. 86 was consistent with its purpose as a remedial statute because it rectified a defect in the previous law by subjecting self-insured groups to regulation under the Insurance Code and extended the right of the state and insureds to seek protection of the Insurance Code, thereby protecting injured workers' benefits. The Court then held that the application of S.B. 86 did not violate appellants' right to be governed by Workers' Compensation law. The Court, relying

upon federal caselaw interpreting Fed.R.Civ.P. 15, next held that the Franklin Circuit court had jurisdiction over the rehabilitation petition because the filing of the amended complaint after the passage of S.B. 86 was the equivalent to filing a new lawsuit. The Court next held that appellants' due process rights were not violated when neither the petition seeking rehabilitation nor summons was served on the individual members of AIK Comp. The notice provided by the Rehabilitator by first-class mail, posting on the AIK Comp website and publication through state-wide newspapers of all the hearings, rulings and other court proceedings was enough to put the members of the group on notice of all relevant actions. The Court finally held that by obtaining a waiver for aggregate excess insurance from the Office of Workers' Claims, but still maintaining specific excess insurance, the AIK Comp trustees fulfilled both the statutory requirements and their contractual obligations. Therefore, there was no breach of the Indemnity Agreement which would allow appellants to rescind the provisions that made all members jointly and severally liable for all workers' compensation claims raised against the group.

B. *Stewart v. Elco Administrative Services, Inc.*

[2009-CA-000828](#) 5/14/10 2010 WL 1928150

Opinion by Judge Dixon; Judge Nickell and Senior Judge Knopf concurred. The Court reversed and remanded an order of the circuit court granting summary judgment in favor of appellees, ruling that appellant constructively waived his right to basic reparations benefits (BRB) despite the fact he was injured while riding as a passenger in a secured automobile. The Court held that appellant's failure to procure insurance on his own vehicle could not act as a constructive waiver of his right to BRB. While public policy dictates that a motorist who voluntarily fails to comply with the insurance requirements of the MVRA should not be entitled to BRB if the accident and injury results from the operation or use of that uninsured vehicle, the same is not true when the injury is not attributable to the motorist's use or operation of the uninsured vehicle. Because appellant was not operating his vehicle, but was rather merely riding as a passenger in another vehicle, he was not prohibited from claiming BRB without a specific rejection of the limitation upon his tort rights as provided in KRS 304.39-060(4).

C. *Western Leasing, Inc. v. Acordia of Kentucky, Inc.*

[2008-CA-002237](#) 5/07/10 2010 WL 1814959

Opinion by Judge Lambert; Judges Acree and Keller concurred. The Court affirmed in part, vacated in part, and remanded a summary judgment in favor of the appellee insurance broker on appellant's claims related to a certificate of insurance (COI) issued to appellant's predecessor-in-interest. The Court first held that the trial court erred as a matter of law in ruling that the broker did not have a duty to exercise reasonable care or competence in the communication of information on the COI that it issued. The Court then held that there was sufficient evidence in the record to allow a reasonable juror to conclude that the predecessor-in-interest justifiably relied on the false information supplied by the broker. The Court distinguished the holding in *Ann Taylor, Inc. v. Heritage Ins. Svs., Inc.*, 259 S.W.3d 494 (Ky. App. 2008), and held, in a matter of first impression, that affirmative misrepresentations on the face

of a COI could give rise to claim of negligent misrepresentation in Kentucky. The Court also held that the trial court did not err in dismissing appellant's claim under the Unfair Claims Settlement Practices Act (UCSPA), KRS 304.12-230, because insurance brokers who operate as agents of the insured are not subject to regulation or liability under the UCSPA.

VI. PROPERTY

A. **1400 Willow Counsel of Co-Owners, Inc. v. Ballard**

[2008-CA-001155](#) 5/21/10 2010 WL 2010521

Opinion by Judge Nickell; Judges Combs and Taylor concurred. The Court reversed and remanded for a new trial a trial order and final judgment and an order denying a motion for judgment notwithstanding the verdict after a jury found in favor of the appellee condominium owner on her claims against the appellant condominium association. The Court first held that the trial court erred in not granting summary judgment or a directed verdict to the association on appellant's slander of title claim. Appellant's allegation that a lien and *lis pendens* notice were based on a false statement that she was responsible for the replacement cost of windows and thus, invalid, was time barred by the one-year statute of limitations. Further, the trial court erred in finding the claim related back under CR 15.03(1) to the filing of appellee's original complaint because at that point neither a lien nor a *lis pendens* notice had been filed and the original complaint sought only injunctive and declaratory relief and was wholly separate from the filing of the lien and the *lis pendens* notice. More importantly, the lien was provided for in the Master Deed. In addition, the lien and *lis pendens* comported with the statutory requirements of KRS 382.440(1) and did nothing more than give notice of appellant's claim against the unit. Finally, a document filed later merely reiterated information already published in the *lis pendens* notice and did not constitute a new publication date giving rise to a new limitations period. The Court next held that the trial court did not err in denying the association's motion for summary judgment on appellant's breach of fiduciary duty claim as there were genuine issues of material fact on whether the association breached its fiduciary duty. The Court then held that, pursuant to KRS 273.215(1), the directors of the condominium association owed their allegiance to the association as a whole, not to individual co-owners. Therefore, the breach of fiduciary instruction did not accurately conform to KRS 273.215(1) and reversal for a new trial was required. The Court finally held that prior to any award of attorneys' fees, an itemized bill for services, along with a suggested fee, should be filed in the record and the evidentiary hearing mandated by JRP 404 should be held.

B. **Mountain Water District v. Smith**

[2008-CA-002369](#) 5/21/10 2010 WL 2010749

Opinion by Acting Chief Judge VanMeter; Judge Keller and Senior Judge White concurred. The Court affirmed a judgment entered by the circuit court after a jury rendered a verdict in favor of appellants on their claim for property damage they suffered after appellant installed a new sewer system uphill from appellees' residence. In affirming, the Court distinguished the holding in *Ellison v. R & B*

Contracting, Inc., 32 S.W.3d 66 (Ky. 2000). The Court first held that the trial court did not err in denying appellant's motion for directed verdict. Appellees were not required to present evidence of diminution in value and cost of repair when they put on evidence demonstrating they were unable to repair the damage and they did not seek cost of repair damages but only sought diminution in value damages. The Court next held that the trial court did not err by not instructing the jury regarding cost of repair damages. An instruction requiring a jury to find the lesser amount between cost of repair and diminution in value was not required when no evidence was presented by either party to establish the cost of repair. The Court finally held that the trial court did not err by denying appellant's motion for judgment notwithstanding the verdict because appellants were not required to present evidence of cost of repair damages.

C. Porter v. Johnson County Judge Executive

[2009-CA-000428](#) 4/02/10 2010 WL 1253382

Opinion by Judge Dixon; Judges Lambert and Wine concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of appellees on appellants' declaratory action claiming that a gravel road cutting through their property was a private, rather than a public our county road. The Court held that the circuit court properly granted summary judgment when appellees produced evidence showing the road existed on the county road map in 1969 and evidence of fiscal court minutes updating the county road system in 1991, eighteen years of work orders evidencing the county's continuous maintenance of the road, and affidavits establishing that the road was a county road. Appellants' two-page response unsupported by any affidavits or other evidence did not create a genuine issue of material fact and therefore, summary judgment was proper. Further, because appellees were not establishing, discontinuing or changing the location of the road in 1991, but only performing a housekeeping task in readopting the county road map, KRS 178.050 was irrelevant.

VII. TAXATION

A. Hancock v. The Kentucky Board of Tax Appeals

[2009-CA-001144](#) 5/07/10 2010 WL 1815411

Opinion by Judge Taylor; Judges Moore and Thompson concurred. The Court affirmed a judgment of the circuit court determining that Prestonsburg Industrial Corporation (PIC) was exempt from paying ad valorem taxes and reversing an order of the Kentucky Board of Tax Appeals to the contrary. The Court first held that the circuit court erred in finding that a tract of property, for which the City of Prestonsburg agreed to accept \$1.00 in exchange for a portion of the proceeds to be realized from the sale of the property by PIC, was public property used for public purposes. While PIC promoted economic development and worked closely with the City, its fundamental nature was as a private entity. Although the purpose of the property was for a public benefit, the ownership was still private and therefore, it did not constitute public property used for a public purpose within the meaning of Section 170 of the Kentucky Constitution. The Court then held that PIC was a

purely charitable organization and its resources were used for the charitable purpose of promoting economic development in the community. Because the property was employed to fulfill that charitable purpose, it was exempt from ad valorem tax.

VIII. TORTS

A. **Abel v. Austin**

[2009-CA-000465](#) 5/28/10 2010 WL 2132745

Opinion by Judge Clayton; Judge Nickell and Senior Judge Knopf concurred. The Court affirmed an order of the circuit court granting the appellee attorneys motions for summary judgment on appellants' claims alleging breach of fiduciary duty, misrepresentation, and violation of the Kentucky fraudulent conveyance statute. The claim concerned the alleged mishandling or misappropriation of settlement funds and the trial court granted summary judgment based on a determination that the claims were brought outside the one-year limitation period found in KRS 413.245. The Court first held that the trial court did not commit palpable error in *sua sponte* extending the grant of summary judgment to all 50 appellants when the summary judgment motion was based on only one representative plaintiff. The trial court's exhaustive and thorough review of all the cases would have rendered individual rulings for the remaining forty-nine cases a useless formality. The Court next held that, pursuant to KRS 413.320, since Alabama's statute of limitations for legal malpractice was shorter than Kentucky's it was the applicable statute of limitations. Further, Alabama's malpractice cause of action was not so unlike Kentucky's so that they were not "like causes of action." Finally, no matter which limitations statute was applicable, appellants' claims were barred under either limitations period, rendering an incorrect choice-of-law decision as harmless error. The Court next held that the trial court had sufficient information to conclude that appellants' claims were time-barred as a matter of law and there were no genuine issues of material fact to submit to a jury. The Court then held that the trial court correctly interpreted appellants' misrepresentation claim based on the rendering of professional services, which was subject to KRS 413.245 and not the five-year statute of limitations set forth in KRS 413.120(12).

B. **Aull v. Houston**

[2008-CA-001238](#) 5/07/10 2010 WL 1814839

Opinion by Judge Acree; Judge Clayton and Senior Judge Harris concurred. The Court affirmed a partial summary judgment prohibiting appellants' claim for damages for their child's loss of future earning capacity in their wrongful death claim. The Court first held that the child's disability was so profound as to render him incapable of ever earning money by his labor. The Court then held that the child's speculative receipt of disability benefits was not proof of the destruction of his power to labor and earn money. Because damages under KRS 411.130 are measured by the loss resulting from the destruction of the decedent's power to labor and because the child did not experience, at the hands of appellees, the destruction of his power to labor, there was no genuine issue of fact regarding the entitlement to damages for the child's loss of future earning capacity. Therefore, summary

judgment was properly granted. The Court also held that nothing in the record at the time of the opinion prohibited appellants from continuing to pursue all categories of damages available pursuant to KRS 411.133 and KRS 411.135, except those specifically addressed in the opinion.