

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

I. ADMINISTRATIVE LAW

A. Studor, Inc. v. Commonwealth, Office of Housing, Buildings and Construction

[2011-CA-000474](#) 05/04/2012 2012 WL 1556385

Opinion by Judge VanMeter; Judges Acree and Moore concurred. The Court affirmed an order of the circuit court denying appellant's petition for a writ of mandamus and motion for summary judgment and granting summary judgment in favor of appellees. The appellant manufacturer of a plumbing device, which it claimed minimized the need for vent piping, sought a writ ordering appellees to amend the Plumbing Code to permit the use of the device in Kentucky. The Court held that appellees' actions were not arbitrary or capricious and that appellant was afforded procedural due process. Appellant was provided with the opportunity to present evidence and an unfavorable outcome did not equate to a denial of due process; appellees actions were supported by substantial evidence; appellees were not required to present evidence in rebuttal or in opposition to appellant's evidence; and whether the device was evaluated under the "equal to or better than" standard under 815 KAR 20:020, rather than the "best known method" standard under KRS 318.150, appellees properly exercised their discretion in declining to amend the Code or otherwise approve the product.

II. ATTORNEY AND CLIENT

A. Cassady v. Wolf Creek Collieries Employee Burial Fund, Inc.

[2011-CA-000202](#) 05/11/2012 2012 WL 1649799

Opinion by Judge Combs; Judges Keller and Stumbo concurred. The Court affirmed an order of the circuit court denying appellant's motion for attorney fees brought pursuant to KRS 412.070. The Court held that the circuit court did not err in finding that appellant's cause of action did not result in a recovery that benefitted the appellee burial fund or the other members of the fund. The settlement reached in the lawsuit did not result in a common benefit - the fund did not recover any proceeds from a third-party source; the settlement allowed members to withdraw from the fund, which worked as a detriment to the fund; and the members who withdrew were far short of a majority of the fund members.

III. CIVIL PROCEDURE

A. Mullins v. Consol of Kentucky, Inc.

[2007-CA-001017](#) 05/18/2012 2012 WL 1757907

Opinion by Judge Nickell; Chief Judge Taylor and Judge Combs concurred. The Court reversed and remanded orders of the circuit court mandating that guardian *ad litem* fees be paid from a court-ordered escrow account. In a case of first impression, the Court held that the trial court judgment was unsupported by sound legal principles. KRS 453.050 required that the plaintiff directly bear the cost of any awarded GAL fees. Furthermore, CR 67.03 implied that the escrow should

be withdrawn only to satisfy the trial court's final judgment, not for other costs and fees.

IV. CONTRACTS

A. **Grass v. Akins**

[2010-CA-002265](#) 05/25/2012 2012 WL 1886527

Opinion by Judge VanMeter; Judges Keller and Stumbo concurred. The Court affirmed a summary judgment in favor of appellee on his claim that appellants breached their contractual obligation under a release liquidating the outstanding balance owed under an oral agreement and specifying a payment plan. The Court held that the circuit court did not err in granting summary judgment to appellee. In reaching that conclusion, the Court held that the terms of the original agreement and its intent were irrelevant to appellee's claim that appellants breached the terms of the release. Therefore, the parties' dispute regarding the terms of the original agreement did not constitute a genuine issue of material fact. The Court next held that the release was based upon valid consideration giving appellants an additional opportunity to meet their obligation and make payments over time and that this determination was a legal question for the court.

V. CRIMINAL LAW

A. **Butler v. Commonwealth**

[2010-CA-001578](#) 05/18/2012 2012 WL 1758103

Opinion by Judge Clayton; Judges Dixon and Lambert concurred. The Court affirmed in part, reversed in part and remanded a judgment of conviction and sentence entered after a jury found appellant guilty of one count of trafficking in a controlled substance. The Court first held that the trial court did not err by failing to suppress evidence of appellant's interactions with a police detective. The detective's testimony was sufficient to show the police had a reasonable and articulable suspicion giving rise to an inquiry of the passengers of the vehicle as to whether they were concealing something illegal. The detective's testimony that appellant was not free to leave was not dispositive of the issue of whether the questioning constituted a custodial interrogation. There was nothing to indicate to appellant he was being arrested, he was not touched or physically searched by the detective and he was not threatened with arrest. The Court next held that the trial court did not err in failing to grant a mistrial when the detective testified to facts the trial court previously adjudged to be inadmissible as overly prejudicial. The Court held that, given the weight of the evidence against appellant, appellant failed to show that the jury based its decision on something other than the evidence and that the admonition was unsuccessful in removing any prejudice. The Court finally held that the trial court erred in ordering the indigent appellant, who was facing a seven-and-one-half year sentence, to pay court costs and a felony fee upon release from custody when there was not a reasonable basis to believe that appellant would soon be able to pay the costs. In so holding, the Court distinguished the facts from those in *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012).

B. Commonwealth v. Grider

[2010-CA-001484](#) 05/11/2012 2012 WL 1649042

Opinion by Judge Moore; Judge Combs and Senior Judge Lambert concurred. In an opinion and order, the Court affirmed an order of the circuit court dismissing the indictment against appellee and denied as moot appellee's motion to dismiss the appeal as barred by the Double Jeopardy Clause. The Court held that the circuit court had authority to dismiss the indictment after declaring a mistrial. Although the circuit court erred in dismissing the indictment based upon a Brady violation, the court properly dismissed the indictment when the Commonwealth shifted its theories of criminal liability, depriving appellee of a fair opportunity to defend himself. Further, the circuit court did not err in finding that the defect in the indictment prejudiced appellee's substantial rights. The Court also held that although appellee waited until the jury was sworn to move for a mistrial, the circuit court did not abuse its discretion in dismissing the indictment with prejudice. The decision to move to dismiss was forced upon appellee when the Commonwealth disclosed, after the jury had been sworn and the trial began, that the charges were based upon violations for which appellee was neither charged in the indictment nor informed of through the bill of particulars. Because the jury was impaneled and sworn, the circuit court did not abuse its discretion in dismissing the indictment with prejudice because appellee's retrial was barred by the Double Jeopardy Clause.

C. Commonwealth v. Whitcomb

[2011-CA-000346](#) 05/25/2012 2012 WL 1886564

Opinion by Judge Caperton; Chief Judge Taylor and Judge Acree concurred. The Court reversed and remanded an order of the circuit court dismissing the charge of probation violation against appellee for lack of jurisdiction. The Court held that the trial court erred in finding that it did not have jurisdiction based on KRS 533.020 because the revocation did not occur within the probationary period. The trial court misinterpreted the holding in *Conrad v. Evridge*, 315 S.W.3d, 313 (Ky. 2010), which left open the possibility that estoppel may foreclose the time limitation imposed by KRS 533.020. Because appellant absconded to intentionally avoid the authority of the Court, the trial court retained jurisdiction.

D. Commonwealth v. Wright

[2011-CA-000996](#) 05/25/2012 2012 WL 1890365

Opinion by Judge Stumbo; Judge Combs and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court ruling that it lacked jurisdiction to hear the Commonwealth's motion to revoke appellant's probation after the five-year statutory period in KRS 533.020(4). The Court held that the circuit court correctly determined that it lacked jurisdiction, even though appellant had not made restitution. The Commonwealth was required to seek revocation or amendment of probation, if at all, at a time after appellee allegedly stopped paying restitution, but also before the expiration of the five-year term.

E. Day v. Commonwealth

[2010-CA-002035](#) 05/18/2012 2012 WL 1758127

Opinion by Judge Acree; Judges Combs and Keller concurred. The Court affirmed appellant's conviction for both first-degree robbery under KRS 515.020 and for first-degree unlawful access to a computer under KRS 434.845. The Court held that the conviction did not violate double jeopardy. Under *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), because first-degree unlawful access to a computer is not included within first-degree robbery, or vice versa, the conviction for both offenses did not violate appellant's constitutional protections against double jeopardy. Further, the legislature did not intend to prohibit convictions for both first-degree robbery and first-degree unlawful access to a computer arising from one underlying transaction or act. Moreover, the convictions did not arise out of one single act as the geographical and temporal separation of the robbery and the use of the victim's ATM card were two separate and distinct acts.

F. Hamm v. Commonwealth

[2010-CA-000395](#) 05/11/2012 2012 WL 1649781

Opinion by Judge Lambert; Judges Thompson and VanMeter concurred. The Court reversed and remanded an order of the circuit court revoking appellant's pretrial diversion and imposing a sentence of incarceration for the sole reason that he failed to make his child support payments pursuant to the terms of a diversion agreement. The Court held that, pursuant to *Commonwealth v. Marshall*, 354 S.W.3d 822 (Ky. 2011), the circuit court abused its discretion in revoking the diversion without first addressing the factors in *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

G. Thornton v. Commonwealth

[2011-CA-000032](#) 05/11/2012 2012 WL 1651332

Opinion by Judge Dixon; Judges Keller and Nickell concurred. The Court reversed and remanded a judgment of the circuit court finding appellant guilty of direct criminal contempt. The Court held that the circuit court erred by failing to hold a sentencing hearing before it rendered the final judgment of contempt after it postponed imposing a sentence for the contempt charges until after appellant's trial concluded.

VI. FAMILY LAW

A. N.L. v. W.F.

[2010-CA-001787](#) 05/25/2012 2012 WL 1886490

Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. In four consolidated appeals arising from a juvenile action in which the family court found that appellant had neglected her children and subsequently awarded permanent custody to their respective fathers, the Court reversed and remanded. The Court first held that although an order denying a motion to alter, amend or vacate the custody award was inherently interlocutory, because the family court

stated its intention to make more detailed findings of fact, the notices of appeal were simply premature and related forward to the entry of the order containing the more detailed findings of fact. The Court next held that appellant failed to properly preserve the issue of whether the family court erred in its rulings entered following a temporary removal and dispositional hearings by failing to set forth specific factual findings relative to the children's removal and even if the issue had been properly preserved, the family court made adequate findings on the form orders. The Court next held that the family court had authority to hold a permanent custody hearing and an award of custody was not precluded by the structure of KRS Chapter 620, so long as the proper procedures were followed. The Court finally held that the family court erred in granting custody to the fathers. In order to grant permanent custody via a custody decree in a dependency action arising under KRS Chapter 620, the court was required to comply with the standards set out in KRS 403.270(2). Because the family court failed to sufficiently consider and make findings related to the factors set forth in KRS 403.270(2), the case was remanded for further proceedings.

B. Schaffeld v. Commonwealth, ex rel Schaffeld

[2010-CA-001301](#) 05/25/2012 2012 WL 1886483

Opinion by Judge Nickell; Judge Caperton concurred; Judge Combs concurred by separate opinion. The Court reversed and remanded orders of the circuit court partially revoking appellant's conditional discharge. The Court first held that although the circuit court erred in failing to set a purge amount or action upon finding appellant in contempt for failure to pay child support, the issue was not properly preserved and therefore, the Court could provide no relief despite the trial court's clear error. The Court then held that the circuit court erred when the written order revoking appellant's conditional discharge did not contain specific findings and the comments from the bench did not satisfy the specificity requirements of *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011), to find that appellant did not try to remain current in his child support obligation through his own fault, nor that his non-compliance with the court's prior order was willful.

VII. GOVERNMENT

A. Blankenship v. Lexington-Fayette Urban County Government

[2008-CA-002044](#) 05/04/2012 2012 WL 1557381

Opinion by Judge Clayton; Chief Judge Taylor and Judge Keller concurred. On remand from the Kentucky Supreme Court, the Court reversed and remanded an order of the circuit court dismissing appellant's claim for damages against the appellee county government on sovereign immunity grounds. The Court held that in light of *Madison County Fiscal Court v. Kentucky Labor Cabinet*, 352 S.W.3d 572 (Ky. 2011), the trial court erred in dismissing the claims. Pursuant to KRS Chapter 337, sovereign immunity was waived in the action.

VIII. PREEMPTION

A. Williams v. Chase Bank USA, N.A.

[2010-CA-002034](#) 05/25/2012 2012 WL 1886502

Opinion by Judge Nickell; Judges Moore and Thompson concurred. The Court affirmed an opinion and order of the circuit court granting summary judgment to the appellee bank on its debt collection action and on appellant's counterclaim for damages. The Court held that the circuit court properly granted summary judgment. In reaching that conclusion, the Court first held that the circuit court correctly determined that the bank was not required to obtain a certificate of authority before filing suit against appellant because the state statutory provision was preempted by the provisions of the federal National Bank Act, 12 U.S.C. §1 et seq. The Court next held that because appellant produced no affirmative evidence that there was a material issue of fact regarding the bank's status as a chartered national bank, summary judgment was appropriate. The Court finally held that the circuit court did not err in granting summary judgment on appellant's counterclaim without adequate discovery. Appellant lacked privity to assert his claims under the Consumer Protection Act because he was not a party to any agreements between merchants and the bank, which he claimed caused his alleged damages. The Court also rejected appellant's unspecified federal, common law and equitable claims stemming from the allegations regarding the effects of the bank's agreements with merchants because they were remote and derivative.

B. Zad, LLC v. Bulk Petroleum Corp.

[2010-CA-000023](#) 05/25/2012 2012 WL 1886471

Opinion by Judge Acree; Judge Stumbo concurred; Senior Judge Lambert dissented by separate opinion. On discretionary review, the Court reversed an order of the circuit court affirming a judgment of forcible detainer entered by the district court against appellant. The Court held that the Petroleum Marketing Practices Act (PMPA), 15 USC §§ 2801-2806, preempted state forcible detainer statutes, at least as applied to petroleum franchise agreements and therefore, it was improper for the district court to evict appellant under state law.

IX. PROPERTY

A. Lee v. Tipton

[2010-CA-002189](#) 05/18/2012 2012 WL 1792635

Opinion by Chief Judge Taylor; Judge Nickell concurred; Judge Combs concurred in result only. The Court affirmed in part, reversed in part and remanded an order of the circuit court adjudicating a boundary line dispute and awarding appellee damages representing a one-third interest in a tract of property conveyed by appellants to a third-party. The Court first held that the trial court erred in finding that appellee held a one-third interest in the tract of property conveyed by appellants to the third party. The language of the original devise containing the language "so long as she remains a widow" devised a fee simple subject to executory interest contingent upon divestment in the event the devisee remarried. When she did not remarry, the executory interest terminated upon her death. Thus, appellants' acquired fee simple absolute title by a deed of conveyance from the devisee. The Court then held that the trial court erred in establishing the location of a missing post used as a corner call in the will subdividing the property between the parties. The location resulted in an absurd boundary line

when considered in relation to the other calls in the properties' descriptions. The Court next held that the trial court erred in concluding that appellants' possession could not be hostile because it was premised upon the mistaken belief as to the true boundary line between the properties. A landowner's possession of real property subsequently discovered to have been based upon the mistaken belief as to the true boundary line may be deemed hostile. The Court finally held that the trial court correctly concluded that appellants could not establish the boundary line through the operation of the doctrine of boundary by estoppel because there was insufficient evidence proving their detrimental reliance.

B. West Vale Homeowners' Association, Inc.

[2011-CA-001157](#) 05/25/2012 2012 WL 1890367

Opinion by Judge Caperton; Judges Combs and Lambert concurred. The Court reversed and remanded an order of the circuit court granting appellee's CR 60.02 motion and finding that the appellant homeowner's association had waived its ability to enforce subdivision restrictions. The Court held that the circuit court abused its discretion in amending a permanent injunction under CR 60.02 based on actions taken by the homeowner's association after the injunction was entered. The Court further held that the actions taken by the homeowner's association after entry of the injunction was not "extraordinary" in nature, which was required to otherwise obtain relief under CR 60.02(f).

X. TORTS

A. Allgeier v. MV Transportation, Inc.

[2010-CA-001907](#) 05/11/2012 2012 WL 1649089

Opinion by Judge Lambert; Judges Clayton and Dixon concurred. On direct appeal, the Court reversed and remanded a summary judgment in the appellee paratransit bus service's favor on appellant's claims for gross negligence brought after appellant was injured when she was dropped from her wheelchair while exiting a paratransit bus. On cross-appeal, the Court affirmed a judgment entered pursuant to a jury verdict in favor of appellant on her claims for negligent hiring, retention, training and supervision of a bus driver and for vicarious liability against the bus service. In the direct appeal, the Court held that trial court improperly granted summary judgment on the gross negligence claim. Appellant presented clear and convincing evidence that the bus service ratified, authorized or anticipated the conduct of the bus driver. Therefore, a trial for punitive damages was warranted. On the bus service's cross-appeal, the Court first held that the bus service properly preserved the issue of whether appellant's negligent hiring claims were improperly submitted to the jury. Because its motion for summary judgment was based on a legal issue and there were not any contested issues of material fact, the motion was sufficient for review. Further, the bus service also preserved the argument by moving for a directed verdict at the close of its evidence. However, the Court rejected the bus service's argument that because it admitted respondeat superior liability, it was entitled to summary judgment on the claims. The Court held that there was a distinction between the vicarious liability of the employer and the actual liability of the employer and

therefore, the admission to vicarious liability did not preclude appellant pursuing her claims for negligent hiring, retention, supervision or training. The Court next held that the trial court did not err by admitting evidence of the bus driver's prior history of alcoholism. While somewhat prejudicial, the evidence was relevant to appellant's negligent hiring claims. The Court next held that the trial court did not err by admitting evidence of a subsequent accident on another paratransit bus. The evidence was relevant to support appellant's claims of negligent training and supervision. The Court next held that the trial court did not err in admitting evidence of the bus service's contract to provide services. While the issue was preserved for review, the brief mention of the contract was at most, harmless error. Further, it showed that the bus service had an incentive not to conduct thorough investigations and to not report safety violations and thus, was directly related to its credibility regarding whether it conducted a thorough investigation of the accident. The Court next held that the jury instructions were not improper with respect to the duty of care and the scope of the bus service's liability for negligent hiring. The instructions were in accord with Kentucky's bare-bones approach and did not misstate the law.

B. Ingram Trucking, Inc. v. Allen

[2011-CA-000513](#) 05/11/2012 2012 WL 1649095

Opinion by Judge Dixon; Judges Keller and Nickell concurred. The Court affirmed an opinion and order of the circuit court granting summary judgment to appellees and concluding that appellant's action for damages incurred in a motor vehicle accident was time barred. The Court first held that the trial court correctly concluded that the action was governed by the two-year statute of limitations in KRS 413.125 and not the five-year statute of limitations in KRS 413.120(4) for a trespass against chattel. The record was devoid of any proof that the collision was intentional, which was required for an action for trespass against chattel. The Court then held that the trial court properly dismissed the action as filed outside the prescribed time limitation. The police report filed in the record was properly considered by the circuit court, the allegations in the petition were insufficient to avoid summary judgment, appellant did not plead facts necessary to establish a trespass to chattel, and the cause of action was nothing more than a property damage claim arising from an automobile accident.

XI. WORKERS' COMPENSATION

A. Big Lots v. Whitworth

[2011-CA-002188](#) 05/11/2012 2012 WL 1649042

Opinion by Judge VanMeter; Judges Lambert and Thompson concurred. The Court affirmed an opinion and order of the Workers' Compensation Board dismissing appellant's appeal from an order granting a worker's motion to reopen her workers' compensation claim. The Court held that the Board correctly determined that the order was interlocutory and therefore, properly dismissed the appeal. The order only determined that the worker established a prima facie showing to warrant a

reopening of the claim but did not adjudicate the claim that the worker's condition had worsened nor the claim that the worker was entitled to an increase in benefits.