

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

I. ATTORNEY AND CLIENT

A. Jenkins v. Jenkins

[2009-CA-000378](#) 11/5/2010 2010 WL 4366065

Opinion by Judge Thompson; Chief Judge Taylor and Judge Moore concurred. The Court affirmed in part, reversed in part and remanded a judgment of the circuit court finding that appellants authorized their counsel to enter into a settlement to dismiss their counterclaim. The Court first held that the trial court did not err when it found that two of the appellants consented to the settlement. The trial court, as the finder of fact, had the authority to believe the facts presented by one party over the facts presented by the other. The Court next held that while counsel were authorized to settle for two of the appellants, the record was devoid of evidence that they were authorized to settle for the remaining appellants because they did not give their individual informed consent. The Court finally held that because the trial court found that counsel had actual authority to settle for all, it failed to make findings on whether appellees suffered substantial harm due to their reliance on the settlement.

II. CIVIL PROCEDURE

A. Commonwealth v. Aubrey

[2009-CA-000728](#) 11/19/2010 2010 WL 4668976

Opinion by Judge Clayton; Judge Lambert and Senior Judge Henry concurred. The Court affirmed an order of the circuit court denying the Commonwealth's motion to dismiss an action seeking a declaratory judgment and injunctive relief on a challenge to the constitutionality of KRS 61.637(17). In a case of first impression, the Court held that the trial court properly concluded that the Commonwealth was not barred by sovereign immunity from participation in declaratory judgment actions.

III. CORPORATIONS

A. Cardiovascular Specialists, P.S.C. v. Xenopoulos

[2009-CA-001442](#) 11/24/2010 2010 WL 4740190

Opinion by Judge Keller; Judge Stumbo concurred; Judge Moore concurred in result only. The Court vacated and remanded an order of the circuit court directing the appellant professional service corporation to provide the appellee shareholder with certain documents and information. The Court first held that KRS 217B.16-010(2), requiring a corporation to maintain appropriate accounting records, did not contain a corollary statutory right for a shareholder to inspect those records. Therefore, that section was not relevant on appeal. The Court then held that KRS 271B.16-020(2)(b) was the relevant statute, giving a shareholder a right to inspect accounting records of a corporation under certain

circumstances. The Court then held that the trial court failed to make findings to determine whether the requested records were accounting records of the corporation or whether the requested records were “directly connected” to the alleged proper purpose of valuing appellee’s shares.

IV. CRIMINAL LAW

A. **Bristol v. Commonwealth**

[2009-CA-001096](#) 11/24/2010 2010 WL 4740183

Opinion by Judge Lambert; Chief Judge Taylor and Senior Judge Henry concurred. The Court affirmed a judgment convicting appellant of complicity to commit first-degree possession of a controlled substance, complicity to commit tampering with physical evidence, carrying a concealed deadly weapon, and being a second-degree persistent felony offender and sentencing appellant to seven years in prison. The Court first held that the trial court did not abuse its discretion in permitting testimony regarding whether or not appellant had money on his person when he was arrested. Given the particular circumstances, wherein two defendants were trying to pin the crimes charged on the other defendant, the trial court could not have prohibited the co-defendant’s counsel from cross-examining the police officer about the currency found on appellant without severely limiting the co-defendant’s theory of the case – that the drugs belonged to appellant because he intended to sell them. The Court also held that the trial court did not err in failing to grant a directed verdict. Based on the evidence, it was not unreasonable for the jury to find that appellant or his co-defendant, or both, possessed the drugs in question.

B. **McEntire v. Commonwealth**

[2009-CA-000916](#) 11/5/2010 2010 WL 4366124

Opinion by Judge Keller; Judge Stumbo concurred; Judge Moore concurred in result only. The Court affirmed in part, reversed in part and remanded a judgment of the circuit court entered following appellant’s conditional guilty plea to first-degree rape and kidnapping. The Court first held that appellant’s guilty plea did not extinguish his right to appeal the imposition of court costs and attorney fees. Reviewing under RCr 10.26, the Court held that the trial court failed to hold a nonadversarial hearing to determine whether appellant had the ability to pay the assessed costs and fees, as required by KRS 31.211(a). The Court also held that the requirement that appellant register as a sex offender under KRS 17.520 for lifetime was not a punishment but simply a status and therefore, it did not constitute cruel and unusual punishment.

C. **Pridham v. Commonwealth**

[2008-CA-002190](#) 11/19/2010 2010 WL 4668961

Opinion by Senior Judge Shake; Chief Judge Taylor and Judge Stumbo concurred. The Court reversed and remanded an order of the circuit court denying appellant’s motion filed pursuant to RCr 11.42 based upon a claim that counsel was ineffective for grossly misadvising him concerning parole eligibility. The Court held that, in light of the decision in *Padilla v. Kentucky*,

___ U.S. ___, 130 S.Ct. 1473, 1486, 176 L.Ed. 284 (2010), gross misadvice concerning parole eligibility may amount to ineffective assistance of counsel worthy of post-conviction relief. The Court remanded for the trial court to hold an evidentiary hearing to determine whether misadvice actually occurred and whether the requisite prejudice resulted.

D. Shemwell v. Commonwealth

[2008-CA-001742](#) 11/12/2010 2010 WL 4860355

Opinion by Judge Lambert; Chief Judge Taylor and Senior Judge Henry concurred. The Court affirmed an order of the circuit court directing that appellant's real property be forfeited due to its use in the commission of a violation of KRS Chapter 218A. The Court held that appellant's failure to present to the trial court the argument that forfeiture was only appropriate for the areas where manufacturing methamphetamine occurred, precluded review.

V. FAMILY LAW

A. Caskey v. Caskey

[2010-CA-000667](#) 11/24/2010 2010 WL 4740339

Opinion by Judge Moore; Judges Lambert and Nickell concurred. The Court reversed and remanded an order of the circuit court denying appellant's motion to make him the primary residential custodian of his daughter. The Court held that the trial court manifestly abused its discretion in denying the motion after finding that there was nothing that justified changing the status of the primary residential parent. Given the undisputed circumstances surrounding an attack on the child by the mother's best friend's husband while in the mother's presence, the attacker's admission that he caused physical injury to the child and placed in her serious physical injury, the mother's failure to protect the child or report the attack to authorities in a timely manner, and failure to take the child for medical care in a timely manner, were more than sufficient to show that it was in the child's best interest for the father to be designated as the primary residential parent.

VI. GOVERNMENT

A. Nolan v. Campbell County Fiscal Court

[2009-CA-001507](#) 11/24/2010 2010 WL 4740195

Opinion by Judge Acree; Senior Judge Harris concurred; Judge Nickell dissented in part by separate opinion. The Court reversed in part and affirmed in part an order granting partial summary judgment to the appellee Campbell County Fiscal Court and County officials on appellants' claim for injunctive relief and mandamus seeking an order for the County Clerk, Sheriff and PVA to be located at the County seat in Alexandria, Kentucky and vacated from the Fiscal Court Administration Building in Newport. The Court held that, considered in the context of the ordinary meaning of county seat, the Courthouse Acts and the government activities that occurred in Newport for decades preceding the adoption of the current constitution provided a sufficient basis

upon which the circuit court could conclude that the legislature intended Newport, as well as Alexandria, to serve as a county seat prior to 1891. The Courthouse Acts made clear which activities were required to be conducted in both locations and the acts were not repealed. Therefore, the Court was compelled to conclude that the activities must continue to occur in Newport. Because Newport became a county seat before 1891, and because after that date the county residents had not voted to eliminate either Newport or Alexandria as the county seat, the arguments regarding the Clerk, Sheriff and PVA office failed.

VII. INSURANCE

- A. **Burton v. Kentucky Farm Bureau Mutual Insurance Company**
[2009-CA-001056](#) 11/05/2010 2010 WL 4366178
Opinion by Judge Thompson; Chief Judge Taylor and Judge Moore concurred. The Court affirmed a summary judgment of the circuit court declaring that appellant was not entitled to underinsured motorists benefits under a policy of insurance issued by appellee. The Court held that the clause excluding UIM coverage of a vehicle owned by the insured or a family member was enforceable.

VIII. OPEN RECORDS

- A. **Doe I v. Conway**
[2009-CA-000641](#) 11/12/2010 2010 WL 4860373
Opinion by Judge Acree; Judges VanMeter and Wine concurred. The Court affirmed a circuit court decision to allow public inspection of agency records containing allegations that appellants were engaged in wrongdoing. The Court held that while the records arguably contained information of a private nature concerning the appellants, the public's interest in inspection outweighed any privacy interest that may exist. Therefore, the privacy interest exception set forth in KRS 61.878(1)(a) was inapplicable. As to the first appellant, the conduct allegedly occurred on government time, while on government-sponsored trips and among government employees. Even if the investigation did not lead to criminal charges, sweeping changes were made by the agency subsequent to the investigation. Further, the appellant was recently appointed to another position within state government. As to the second appellant, while not a public official, the alleged improprieties occurred during his dealings with the state government and government employees and he continued to be involved with state government in his capacity as a registered lobbyist. The Court finally held that the fact that the primary person interviewed in the file wanted the information to remain confidential did not create a privacy interest for appellants.

IX. TAXATION

- A. **Department of Revenue v. Cox Interior, Inc.**
[2009-CA-001691](#) 11/5/2010 2010 WL 4366351

Opinion by Judge Caperton; Senior Judge Lambert concurred in result only; Judge Combs concurred by separate opinion. The Court affirmed an order of the circuit court affirming a decision of the Kentucky Board of Tax Appeals concluding that appellee had timely filed its claim for a refund of its payment of an ad valorem tax assessment, despite its failure to protest that assessment prior to paying taxes. The Court held that Revenue *Cabinet v. Castleton, Inc.*, 826 S.W.2d 334 (Ky. App. 1992), was applicable and the KBTA properly determined that the same principle that governed refunds under KRS 134.580 applied to property tax refunds under KRS 134.590. While KRS 131.110 gives a taxpayer the right to protest within forty-five days, it did not preclude taxpayers from seeking a refund if they paid the tax and later discovered the amount was assessed in error. KRS 134.590 provides taxpayers with a two-year window to retrieve property taxes that were not owed. All that KRS 134.590 requires is that taxpayers exhaust their administrative remedies, which appellee did.

X. TORTS

A. Peyton v. Neonatal Intensive Care Experts, II, PLLC

[2009-CA-001411](#) 11/19/2010 2010 WL 4669093

Opinion by Judge Lambert; Judge Combs concurred; Judge Keller concurred by separate opinion. The Court reversed and remanded a summary judgment in favor of appellees on appellant's claim alleging gross negligence and malpractice in the generation and reading of a toxicology report rendered in conjunction with the labor and delivery of appellant's son. The Court held that the trial court prematurely determined that appellees were immune from civil liability pursuant to KRS 620.030 and KRS 620.050 when they reported incorrect toxicology results to Child Protective Services, who in turn removed the child from appellant's care. There was conflicting evidence in the record as to whether CPS requested the screening performed on appellant or whether her admissions to prior drug use triggered the screening. The record seemed to indicate the CPS requested the screening but the order granting summary judgment presumptively stated that the admissions triggered the screening. Because the outcome of the case, in particular the applicability of the immunity conferred by KRS 620.050(1) and the exception to immunity in KRS 620.050(14), depended upon who initiated the report of abuse, the issue of fact had to be resolved by the trial court.