

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
NOVEMBER 2011**

I. ARBITRATION

A. Padgett v. Steinbrecher

[2010-CA-000647](#) 11/4/11 2011 WL 5248170

Opinion by Judge Acree; Judge Stumbo and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court denying appellant's motion to dismiss in favor of arbitration on the grounds that it lacked jurisdiction under KRS 417.200 to enforce the parties' arbitration agreement because the agreement did not explicitly require that arbitration occur in Kentucky. The Court first held that it had jurisdiction to hear the appeal. Although the motion was styled as a motion to dismiss in favor of arbitration, as opposed to a motion to compel arbitration, the Court construed the order as an order denying a motion to compel arbitration, which was appealable under KRS 417.220(1)(a). The Court then held that because the arbitration clause failed to explicitly require arbitration in Kentucky, the circuit court correctly found that it lacked jurisdiction to enforce arbitration pursuant to KRS 417.200.

II. ATTORNEY AND CLIENT

A. Bradley v. Estate of Herman Lester

[2009-CA-002157](#) 11/10/11 2011 WL 5419696

Opinion by Judge Acree; Judge Dixon and Senior Judge Lambert concurred. The Court vacated and remanded an order of the circuit court awarding one-third of oil and gas royalties to the appellee estate pursuant to a contingency fee agreement between the deceased attorney and individuals who jointly owned an interest in the mineral rights of real property. The Court held that the attorney, who withdrew from representing the appellants, was limited to recovery on a *quantum meruit* basis and not under the original contingency fee agreement.

III. CIVIL PROCEDURE

A. Indian Ridge Properties, Inc. v. Schwartz, LLC No.1

[2010-CA-001518](#) 11/10/11 2011 WL 5438628

Opinion by Chief Judge Taylor; Judge Acree concurred; Judge VanMeter dissented by separate opinion. The Court affirmed an order and amended order of the circuit court dismissing appellants' action pursuant to CR 41.02(a) for failure to prosecute. The Court held that the circuit court did not abuse its discretion by dismissing the action. More than seven years had lapsed between the finality of an appeal for which the underlying action was held in abeyance and appellants' motion to remove the action from abeyance, no good cause was advanced for appellants' dilatoriness and the finding of prejudice to appellees could not be considered clearly erroneous.

IV. CRIMINAL LAW

A. **Agee v. Commonwealth**

[2010-CA-001122](#) 11/10/11 2011 WL 5419705

Opinion by Judge Wine; Chief Judge Taylor and Judge Caperton concurred. The Court affirmed a judgment of the circuit court entered after appellant entered a guilty plea following the court's denial of her motion to suppress evidence seized following a stop by police. The Court first held that the duration of appellant's detention did not exceed the scope of a reasonable Terry stop and therefore, the trial court did not clearly err in finding that the search of appellant's backpack was incident to her arrest for public intoxication. The Court then held that the search of appellant's backpack did not exceed the scope of a permissible search incident to her arrest. Although the backpack was not on appellant's person at the time of her arrest, she was holding the backpack at the time she was stopped, it was in the open only a few feet away and she exercised sufficient control over it to deny an earlier request to search it. Further, there was no evidence that appellant was handcuffed, fully restrained or moved to the police cruiser at the time the officers searched her backpack. The Court finally held that the officers had probable cause to arrest appellant. Although the officers could have exercised discretion in deciding whether to arrest appellant, they did not lack any reasonable, objective basis for concluding that she had committed the offense of public intoxication.

B. **Harper v. Commonwealth**

[2009-CA-002390](#) 11/4/11 2011 WL 5244826

Opinion by Judge Caperton; Judges Nickell and Wine concurred. The Court affirmed an order of the circuit court denying appellant's motion for a new trial based upon the failure of the courtroom recording equipment to produce a record of his jury trial. The Court held that appellant could not decline to prepare a narrative statement pursuant to CR 75.13 and subsequently decline to participate in the trial court's preparation of such a statement and then argue on appeal the adequacy of the record. Accordingly, the Court was required to assume the portions which were omitted supported the decision of the trial court.

C. **Hensley v. Commonwealth**

[2010-CA-001489](#) 11/10/11 2011 WL 5438623

Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed an order of the circuit court denying appellant's motion to compel the Department of Corrections to recalculate his sentences so that his sentences would run concurrently. The Court held that there was no authority for the Court of Appeals to convert appellant's motion to compel into a motion to vacate his sentence or a motion under RCr 11.42 for ineffective assistance of counsel. Appellant could not argue for the first time on appeal that he received ineffective assistance of counsel or that his original request was in fact a motion to vacate judgment. Furthermore, any motion for relief under RCr 11.42 was outside the three-year limitation period and was not verified. Reviewing the motion to compel for error, the Court held that appellant did not follow the

procedure required by KRS 454.415 for inmates to raise sentence calculation questions.

D. Mills v. Department of Corrections

[2010-CA-001637](#) 11/10/11 2011 WL 5419719

Opinion by Judge Lambert; Judges Dixon and VanMeter concurred. The Court affirmed an order of the circuit court dismissing appellant's writ of mandamus, claiming that the Department of Corrections erroneously classified appellant as a violent offender, which the circuit court treated as a motion for a declaration of rights. The Court held that appellant was properly classified as a violent offender pursuant to KRS 439.3401 when he was convicted of manufacturing methamphetamine while in possession of a firearm

E. Phillips v. Commonwealth

[2010-CA-000969](#) 11/10/11 2011 WL 5419699

Opinion by Judge Lambert; Chief Judge Taylor and Judge Thompson concurred. The Court affirmed an order of the circuit court denying appellant's motion to dismiss the charges against him for failure to comply with sex offender registration and persistent felony offender in the first degree. The Court first held that appellant had no liberty interest in parole and therefore, he was not deprived of due process of law when his parole recommendation was rescinded prior to his release and he was required to attend a sex offender treatment program. The Court next held that the circuit court did not err in concluding that appellant had not served his time on the sex offenses prior to the 1998 and 2000 amendments to the Sexual Offender Registration Act. Pursuant to KRS 532.12(1)(b), appellant was still serving his sentence for rape and sodomy when the amendments went into effect. Further, since appellant was still incarcerated when the amendments went into effect, a sex offender risk assessment was not mandated and there were no due process or *ex post facto* violations in the denial of his parole and requirement to register as a sex offender.

F. Rowe v. Commonwealth

[2008-CA-000916](#) 11/18/11 2011 WL 5599412

Opinion by Judge Clayton; Judges Keller and Moore concurred. The Court affirmed orders of the circuit court denying appellant's separate motions for a new trial brought pursuant to RCr 10.02 after a jury convicted him of murder and attempted murder. The Court held that the trial court did not abuse its discretion in denying the motion for a new trial based on newly discovered evidence because appellant did not follow proper procedure when he failed to file affidavits stating the reason an enhanced version of a 911 tape was new evidence that, even with due diligence, could not have been obtained during trial. Notwithstanding the failure, the Court also held that the enhanced version of the 911 tape was not new evidence warranting a new trial since the 911 tape was presented at trial and the enhanced version would not have, with reasonable certainty, changed the result if a new trial were granted. The Court then held that the trial court did not err in denying the second motion for a new trial based

on newly discovered evidence because appellant failed to follow procedural prerequisites and made the motion outside the time constraints of RCr 10.06.

V. EMPLOYMENT

A. Kentucky Unemployment Insurance Commission v. Boone County Board of Education

[2010-CA-000083](#) 11/4/11 2011 WL 5244861

Opinion by Judge Acree; Judges Dixon and Keller concurred. The Court reversed in part, vacated in part and remanded an order of the circuit court finding that substitute teaching did not qualify as covered employment for purposes of unemployment benefits pursuant to KRS 341.055(4)(e) and KRS 341.050(1)(a). The Court held that the trial court erred in finding that substitute teachers were “noncovered employment” categorically and as a matter of law pursuant to KRS 341.055(4)(e). The Court held that without an evidentiary hearing wherein the parties were permitted to present evidence of the nature of the employment relationship, it was impossible to determine whether the claimant was an employee as contemplated by KRS 341.050(1)(a) or an independent contractor.

B. Pearce v. University of Louisville

[2009-CA-001813](#) 11/18/11 2011 WL 5599540

Opinion by Senior Judge Lambert; Judge Wine concurred; Judge Caperton dissented by separate opinion. The Court affirmed an opinion and order of the circuit court affirming an administrative decision allowing the appellee university to terminate appellant’s employment as a university police officer. The Court first held that the university was not judicially estopped from arguing the inapplicability of KRS 15.520 when it initially conceded the point at a post-termination hearing. The university reversed its course before the administrative proceeding was over and appellant suffered no prejudice in the trial court when he was unrestricted in arguing the applicability of the statute, which was considered *de novo* without deference to the hearing officer’s determination. The Court then held that KRS 15.520 applied only to disciplinary actions initiated by a citizen’s complaint and not to disciplinary actions initiated by internal departmental concerns. The Court also held that procedural irregularities did not warrant reversal. Appellant could not complain that he was prejudiced by failure to follow KRS 15.520, which was inapplicable; appellant did not suffer any prejudice with respect to an initial “review board,” which simply reviewed the circumstances regarding a fire alarm incident, as an internal investigation into possible discipline was not initiated until after the review board’s findings had been made; and appellant was not deprived of any procedural due process. Appellant’s non-participation in a pre-termination hearing because his counsel was not allowed to attend, resulted in a waiver of any claim of a due process violation emanating from the proceeding. Further, appellant suffered no prejudice to his right to defend against the charges when a comprehensive *de novo* post-termination hearing was held in which he was represented by counsel; he was afforded an opportunity to present evidence and

witnesses and cross-examine the university witnesses; he was given, before the hearing, copies of all exhibits and names of all persons the university would call as witnesses; and when the hearing officer's decision specifically provided that it was based exclusively upon the evidence admitted at the post-termination hearing. The Court then held that the hearing officer's findings that appellant violated department policy in failing to respond to a report of a fire alarm, in failing to timely prepare an incident report and in pursuing a driver going the wrong way on a one-way street, and finding that appellant was incompetent, were supported by substantial evidence in the record. The Court finally held that the hearing officer's decision to terminate appellant's employment, as opposed to some lesser punishment, was not arbitrary and capricious.

C. Trading Post Management Company, LLC v. Kentucky Unemployment Insurance Commission

[2010-CA-000453](#) 11/4/11 2011 WL 5244939

Opinion by Judge Acree; Chief Judge Taylor and Judge Combs concurred. The Court reversed in part, vacated and remanded an opinion of the circuit court affirming an order of the Kentucky Unemployment Insurance Commission determining that the eight appellants were successors-in-interest to the tax account and tax rate of the predecessor corporation pursuant to KRS 341.540. The Court held that because the Commission improperly treated all eight LLCs as if they constituted a single business, instead of assessing the relationship between the predecessor corporation and each of the purported successors individually, the findings of the Commission were incomplete. Upon remand, the circuit court was instructed to remand the matter to the Commission for entry of an order consistent with 787 KAR 1:300, Section 2.

VI. FAMILY LAW

A. Burton v. Burton

[2011-CA-000573](#) 11/23/11 2011 WL 5865455

Opinion by Judge Lambert; Chief Judge Taylor and Judge Thompson concurred. The Court affirmed an order of the circuit court modifying the parties' parenting time in favor of the appellee father. The Court first held that the trial court correctly treated appellee's motion for custody as a motion to modify parenting time, as it was originally styled, when appellee did not seek to alter the joint custody arrangement but simply wanted to modify his parenting time. The Court then held that the circuit court's findings of fact were not clearly erroneous and it did not apply incorrect law in determining the best interests of the children. The determination that it was in the children's best interests for appellee to be the primary residential parent was supported by extensive findings of fact and the trial court was in the best position to judge the credibility of the evidence.

B. Collett v. Dailey

[2010-CA-002115](#) 11/23/11 2011 WL 5866240

Opinion by Judge Clayton; Senior Judge Lambert concurred; Chief Judge Taylor dissented by separate opinion. The Court affirmed a domestic violence order

entered by the circuit court based on its finding that appellant had perpetrated acts of domestic violence against his mother. The Court held that appellant's preventing caregivers from attending to his mother, from giving his mother her medications and food and from providing physical support and assistance to her, as well as his removal of night lights and placement of throw rugs in areas where his elderly mother would need to walk in her fragile condition, met the statutory definition of domestic violence in KRS 403.720, because it put appellee's mother (or, in this case, her guardian) in fear of imminent physical injury and serious physical injury.

C. D.G. v. Commonwealth

[2011-CA-000298](#) 11/18/11 2011 WL 5599628

Opinion by Judge Combs; Judges Moore and Nickell concurred. The Court vacated and remanded an order of contempt and an order designating appellant to be a status offender. The Court held that the trial court improperly accepted appellant's admission of guilt without an adequate *Boykin* colloquy.

VII. OPEN RECORDS

A. Eplion v. Burchett

[2009-CA-001741](#) 11/4/11 2011 WL 5244818

Opinion by Judge Acree; Judge Stumbo and Senior Judge Lambert concurred. The Court affirmed in part, reversed in part, and remanded an order of the circuit court denying appellant's petition for a declaration that he was entitled to production of records regarding his stay at a detention center and denying appellant's demand for assessment of a monetary penalty against various detention center officials. The Court first held that while the requested records did not exist, the circuit court erred in determining that appellant was not entitled to any relief under the Open Records Act. The Act required the agency to respond in writing, even when it was unable to supply the records requested. Therefore, appellant was entitled to relief in the form of a written explanation and an order requiring the officials to conduct additional investigation and to provide the circuit court and appellant with a written explanation of their findings. The Court then held that the circuit court did not err in denying appellant's demand for the assessment of a monetary penalty. While the coercive effect of granting the relief was not a proper consideration under KRS 6.1882(5), appellant waived the issue of whether the officials' noncompliance with the Open Records Act was willful when he failed to present evidence of willfulness and then failed to request that the circuit court enter findings of fact regarding the willfulness of the officials' behavior.

VIII. PROPERTY

A. Carroll v. Carroll

[2010-CA-000824](#) 11/4/11 2011 WL 5244952

Opinion by Judge Moore; Judges Dixon and Thompson concurred. The Court affirmed an order of the circuit court denying appellants' motion for summary judgment and granting summary judgment to appellees, finding that an easement

by necessity existed and that appellees had sufficiently proven that the easement was strictly necessary. The Court held that the circuit court did not err in finding an easement by necessity existed. In the context of the facts of the case, appellees were not required to prove that they could not obtain access through any other adjoining property. The Court then held that the circuit court did not err in determining that the action was not barred by a statute of limitations and that as long as the necessity existed, an action could be maintained to establish a right of access. The Court also held that the circuit court did not err in finding that appellees' claim was not barred by a mediation agreement executed a year-and-a-half prior to the filing of the action. Appellants failed to produce any evidence to rebut testimony that the release did not address the easement claim. The Court then held that the circuit court did not err in finding that appellees were not barred from asserting their claim under the doctrine of unclean hands when appellants failed to provide any evidence to support the allegations of fraud, illegality or unconscionable conduct. The Court finally held that the circuit court did not err in granting an easement appurtenant, rather than an easement in gross. By definition, a easement by necessity must always be appurtenant because there must be both a dominant and servient estate. Further, Kentucky courts disfavor easements in gross and will construe an easement as appurtenant whenever possible.

B. Poe v. Gaunce

[2010-CA-001774](#) 11/4/11 2011 WL 5244969

Opinion by Judge Moore; Judges Combs and Nickell concurred. The Court affirmed an order of the circuit court finding that appellee owned two burial sites and a monument located on a family cemetery plot. The Court first held that the circuit court's finding that the individual who purchased the plots and monument was the owner of the entirety of the interment ease was not clearly erroneous because it was supported by substantial evidence. His name was on the express easement deed issued by the cemetery and his daughter testified that she was present when he purchased the four burial plots. The Court then held that appellants' claim of adverse possession must fail because individuals buried in two of the plots were buried with the record owner's knowledge and consent. The Court then held that substantial evidence supported a finding that the particular purpose of the appellant heirs' easement ceased to exist, had been rendered impossible of accomplishment, and was abandoned after the individuals who were designated to be buried in the plots were disinterred and buried elsewhere. When the owner of the express easement for interment made designations of specific burial plots for the interment of the specific individuals, the individuals received an easement for that particular purpose. Any rights the appellants had was solely derived from the burial of, or the prospect of burying, the specific individuals in the plots and the vacated burial site reverted back to the ownership of the person, or heirs of the person, who originally purchased the easement. The Court next held that the trial court did not err in finding that appellees owned the monument. The monument merely reflected and was part of the then-extinguished burial easements. The Court finally held that appellants

were not entitled to their legal costs pursuant to KRS 411.120 because the matter was adjudicated in favor of appellees.

IX. TAXATION

A. U.S. Bank National Association v. Tax Ease Lien Investments 1, LLC

[2011-CA-000472](#) 11/18/11 2011 WL 5599687

Opinion by Judge Stumbo; Judges Moore and Wine concurred. The Court reversed and remanded an order of the circuit court approving a master commissioner's recommended dispersal of funds from the sale of a parcel of real property, giving priority to liens held by a city and county. The Court held that, pursuant to KRS Chapter 134, the liens resulting from the non-payment of *ad valorem* taxes were not rendered inferior by the sale of certificates of delinquency from municipalities to third-party purchasers and therefore, the circuit court erred in approving the dispersal of funds. The Court remanded for entry of a *pro rata* distribution of the proceeds.

X. TORTS

A. PCR Contractors, Inc. v. Danial

[2010-CA-000247](#) 11/4/11 2011 WL 5244930

Opinion by Judge Moore; Judge Nickell concurred; Judge Combs concurred in result only. The Court affirmed in part, reversed in part and remanded a summary judgment in favor of appellee on appellant's claims for fraudulent and negligent misrepresentation based upon an alleged promise by appellee to personally guarantee payment to appellant relating to a contract appellant entered into with a company partly owned and co-managed by appellee. The Court first held that the trial court erred in concluding that there was no evidence to defeat summary judgment on the fraudulent misrepresentation claim. It was for the trier of fact to resolve whether the evidence supporting that appellee actually made the promise was more convincing than the evidence to the contrary and whether appellant's reliance upon it was reasonable and justified. The Court also held that appellant's pleadings, taken together with the sum of the evidence, adequately stated a prima facie claim of fraudulent misrepresentation. The Court then held that the trial court did not err in dismissing the negligent misrepresentation claim. Assuming appellant proved that appellee made a promise he never intended to carry out, he did not make the promise carelessly but rather, made it knowing it was false. In addition, consistent with Restatement (Second) of Torts § 552 and Kentucky law, appellee's intent to perform a promise or agreement could not form the basis of a negligent misrepresentation claim.

XI. WORKERS' COMPENSATION

A. Hampton v. Intech Contracting, LLC

[2011-CA-001195](#) 11/18/11 WL Cite Not Yet Available

Opinion by Judge Thompson; Chief Judge Taylor and Judge Lambert concurred. The Court affirmed an opinion and order of the Workers' Compensation Board affirming an order of the ALJ dismissing appellant's claim alleging that he fell

from a bridge and was severely and permanently injured within the scope and course of his employment. The Court held that the Board correctly determined that appellant's injuries did not originate from a risk connected with his employment and did not flow from his employment as a rational consequence. His work on the deck of a bridge did not place him in a position of risk. Although he was atop the bridge deck, he did not fall from the bridge deck but rather, he placed himself in a position of risk when he climbed over the guardrail.