

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**NOVEMBER 1, 2014 to NOVEMBER 30, 2014**

**I. CRIMINAL LAW**

**A. *Commonwealth v. Newkirk***

[2011-CA-001819](#) 11/21/2014 2014 WL 6612430 DR Pending

Opinion by Chief Judge Acree; Judges Caperton and Nickell concurred. The Commonwealth sought reversal of the circuit court's ruling that testimony describing the contents of a destroyed surveillance video was inadmissible. The Court of Appeals reversed, holding that without reliance on any specific rule of evidence, a decision to exclude such testimony on the basis of the trial judge's subjective sense of fairness is arbitrary and unsupported by sound legal principles, thereby constituting an abuse of discretion. The Court found no other rule that could serve as the basis for affirming the circuit court's ruling and, therefore, held that such testimony is admissible pursuant to KRE 1004(1).

**II. EDUCATION**

**A. *Moss v. Kentucky State University***

[2013-CA-001431](#) 11/21/2014 2014 WL 6602516 DR Pending

Opinion by Judge VanMeter; Judges Kramer and Taylor concurred. A former employee, who had been terminated from her accountant position, brought an action against Kentucky State University (KSU) under the Kentucky Whistleblower Act. The circuit court granted KSU's motion for summary judgment, and the Court of Appeals affirmed, holding that appellant's complaints regarding unfair treatment by her boss amounted to nothing more than disagreements with a supervisor and thus were not actionable under the Whistleblower Act. The Court further held that appellant's complaints regarding the "impossible" task of reconciling KSU's financial accounts did not fall under the protection of the Whistleblower Act. The university was already aware of problems with reconciling accounts receivable and financial statements and had been attempting to address the accounting problem.

### III. FAMILY LAW

#### A. *Lambe v. Weber*

[2013-CA-000891](#) 11/14/2014 2014 WL 6092239 DR Pending

Opinion by Judge Dixon; Judges Moore and Nickell concurred. The Court of Appeals reversed in part and affirmed in part the family court's findings of fact, conclusions of law, and judgment in the parties' dissolution proceedings. The Court held that the family court properly found that appellee met the statutory criteria for an award of maintenance. However, the family court erred in calculating the maintenance award by including appellee's proportional share of the minor children's expenses in her own reasonable monthly expenses. Awards of spousal maintenance and awards of child support are two distinctly separate concepts that serve different purposes. The term "reasonable needs" as referred to in KRS 403.200(1) speaks in terms of whether the party seeking maintenance lacks sufficient property to provide for "his" reasonable needs and whether that party is unable to support "himself" through appropriate employment. Thus, in calculating the amount and duration of maintenance, a family court is not to consider any amounts expended by the party seeking maintenance for the care and support of a dependent child.

### IV. STATES

#### A. *Merrick v. Brown-Forman Corporation*

[2013-CA-002048](#) 11/14/2014 2014 WL 6092218 DR Pending

Opinion by Judge Stumbo; Judges Clayton and Combs concurred. The Court of Appeals reversed and remanded an order dismissing appellants' action. Appellants alleged that appellees, the operators of whiskey distilleries, emitted ethanol vapor into the atmosphere, which caused "whiskey fungus" to grow on outdoor surfaces. Appellants claimed appellees had a duty to minimize ethanol emissions. Appellees moved to dismiss the case, arguing that the federal Clean Air Act (CAA) preempted state tort claims. The trial court agreed and dismissed the cause of action. The Court of Appeals reversed and remanded and adopted the holding in *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3rd Cir. 2013), which stated that the CAA does not preempt state common law claims.