

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
OCTOBER 2008**

I. ADMINISTRATIVE LAW

**A. Bluegrass Automotive, Inc. v. Kentucky Unemployment Insurance Commission
[2007-CA-001526](#) 10/03/2008 2008 WL 4664228**

Opinion by Judge Dixon; Chief Judge Combs and Judge Lambert concurred. The Court affirmed orders of the circuit court dismissing appellant's complaint and amended complaint against the Kentucky Unemployment Insurance Commission related to a tax assessment. The Court held that the trial court properly dismissed the claim on jurisdictional grounds when appellant failed to file an appeal to the Commission within twenty days after the tax assessment was mailed, as required by KRS 341.430(2). The Court further held that because appellant failed to perfect its appeal pursuant to KRS 34.450 and did not invoke the jurisdiction of the circuit court, the civil rules never became effective and therefore, appellant could not rely upon CR 15.01 to amend its complaint to add the Division of Unemployment Insurance and other defendants. As such, the amended complaint was also properly dismissed.

**B. Commonwealth of Kentucky v. Home Federal Savings and Loan Association
[2007-CA-002353](#) 10/31/2008 2008 WL 4664228**

Opinion by Judge Wine; Judge Keller and Senior Judge Lambert concurred. The Court affirmed a declaratory judgment of the circuit court, which rejected the interpretation by The Office of Financial Institutions (OFI) of KRS 286.6-107 as allowing community or geographic charters for state credit unions. The Court first held that Home Federal Savings and Loan did not lack standing to bring the action. Because the case involved OFI's administration of its regulatory authority, Home Federal, as a competitor of the regulated credit unions showed an actual, justiciable injury. The Court next held that Home Federal was not required to exhaust any administrative remedies before bringing the action because the agency was acting in excess of its power and further, there were no administrative remedies to pursue. The Court then adopted the opinion of the trial court holding that the action was not barred by the doctrine of laches because any delay in bringing a challenge would have minimal impact, it would be error to allow the erroneous interpretation of the statute to continue, the Court's ruling was applied prospectively. The Court ultimately adopted the opinion of the trial court holding that OFI acted outside of the scope of its authority in allowing community-based charters because community (or geographic) fields of membership were not authorized under KRS 286.6-107.

II. CIVIL PROCEDURE

A. **Coffey v. Kehoe Rock and Stone, LLC**

[2007-CA-001695](#) 10/31/2008 2008 WL 4755004

Opinion by Judge Caperton; Judges Keller and Nickell concurred. On discretionary review, the Court reversed and remanded with directions for the circuit court to vacate a judgment of the district court. The Court held that the district court did not have subject matter jurisdiction to grant a forcible detainer based on a contract for a lease to mine limestone. The lease did not result in the creation of a landlord-tenant relationship but instead granted incorporeal interests within the land and KRS 24A.120 specifically excluded interest in land from the jurisdiction of the district court.

III. CRIMINAL LAW

A. **Bates v. Commonwealth**

[2007-CA-002070](#) 10/17/2008 2008 WL 4601296

Opinion by Judge Moore; Judges Nickell and Stumbo concurred. The Court affirmed an order of the circuit court denying appellant's motion filed pursuant to CR 60.02, claiming that his prior felony convictions merged and counted as only one prior felony conviction that could not be used to support his conviction for possession of a handgun by a convicted felon and also to support his conviction for PFO 2nd. The Court first held that KRS 532.080(4) was inapplicable to appellant's conviction for PFO-2nd, as the statute only applied to determining whether a person had two or more previous felony convictions to determine a defendant's guilt on a charge of PFO-1st. The Court then held that it was not improper for appellant to be convicted of both possession of a handgun by a convicted felon and PFO-2nd. Any of appellant's prior felony convictions could be used to support his conviction for possession of handgun by a convicted felon and any of the remaining convictions could be used to support the conviction for PFO-2nd.

IV. EDUCATION

A. **Jones v. Board of Education of Laurel County**

[2007-CA-002598](#) 10/31/2008 2008 WL 4755327

Opinion by Judge Acree; Judge VanMeter and Senior Judge Henry concurred. The Court affirmed an order granting summary judgment to a board of education and superintendent on appellant's claim that she was denied a continuing service contract in violation of KRS 161.740. The Court held that the trial court properly granted summary judgment and that it did not erroneously construe the phrase "currently employed" contained in the statute. Although appellant was employed for four consecutive years, when she was notified that her employment would not continue for a fifth year but she was later reemployed as a substitute teacher, because she was not reemployed in her previous or then-current capacity, she was not currently employed when the offer of reemployment was extended. Therefore, the statute did not require the superintendent to issue a written continuing contract.

V. ELECTIONS

A. **Holsclaw v. Perkins**

[2008-CA-001604](#) 09/02/2008 Ord pub 10/03/2008

Opinion and order by Judge Clayton; Judges VanMeter and Wine concurred. The Court granted a motion to set aside an order of the circuit court that declared respondent a bona fide candidate for the office of Louisville/Jefferson County Metro Council Member and directed movants to place his name on the ballot for the election. The Court held that the circuit court was not free to amend KRS 118.212(1), which was otherwise plain and unambiguous, to allow the candidate to rescind his otherwise valid notice of withdrawal.

VI. EMPLOYMENT

A. **McCown v. Gray Kentucky Television, Inc.**

[2007-CA-001947](#) 10/31/2008 2008 WL 4755240

Opinion by Judge Acree; Judge VanMeter and Senior Judge Henry concurred. The Court affirmed a directed verdict and summary judgment of the trial court on appellant's claim that he was wrongfully terminated for refusing to sign a chemical screening consent and release form. The Court held that the trial court acted properly in directing a verdict in appellee's favor on the issue of wrongful termination and that appellant's termination did not violate KRS 336.700. The release form at issue did not purport to indemnify the employer in the event an employee suffered a personal injury due to the drug-testing procedure but merely protected the employer from claims by an employee who experienced adverse employment consequences after an incorrect positive drug or alcohol test result. Therefore, there was no evidence that appellant was fired for refusing to violate a law or as retaliation for exercising a legally protected right.

VII. FAMILY LAW

A. **A.P. v. Commonwealth, Cabinet for Health & Family Services**

2008-CA-000730 10/24/2008 2008 WL 4683290

Opinion by Judge Clayton; Judges Acree and Keller concurred. The Court vacated and remanded a judgment of the circuit court involuntarily terminating appellant's parental rights. The Court held that appellant's due process rights were violated when the trial court proceeded to take testimony when appellant's counsel was not present and without consulting with appellant as to whether she wished to proceed without counsel.

B. **Fehr v. Fehr**

[2007-CA-001495](#) 10/03/2008 2008 WL 4664225

Opinion by Judge Thompson; Judge Moore and Senior Judge Henry concurred. The Court affirmed in part and reversed in part a decision of the family court related to the division of property in a marriage dissolution action. The Court first held that the trial court had subject matter and personal jurisdiction over the parties.

Although the wife resided in St. Maarten, there was no evidence that she intended to establish permanent residency there or to abandon her Kentucky domicile. The Court then held, while the family court did not have jurisdiction to quiet title or to secure possession of the property located in St. Maarten, its in personam jurisdiction was sufficient to decide the parties' respective marital interests in the property. Further, since the marital domicile was in Kentucky and there was no prenuptial agreement or other indication that the parties intended to be governed by Netherlands Antilles' law in the event of dissolution of the marriage, Kentucky law applied. The Court then held that the trial court did not abuse its discretion by relying on the testimony of an unlicensed appraiser in determining the value of the property, as the lack of a real estate appraiser's license or certification did not by itself render the testimony inadmissible. The Court next held that the trial court did not abuse its discretion when it awarded each party a one-half interest in a mini-storage warehouse business. Although it was reasonable to conclude that the husband contributed more than the wife in acquiring the business, the wife contributed a corresponding amount in her effort as manager of the business both before and during the marriage. The Court finally held that the award of the St. Maarten residence to the wife was inconsistent with KRS 403.190 and the three-step process required by the statute. The parties' non-marital contributions were undisputed and the finding that the husband's contribution was not a gift was supported by substantial evidence. Therefore, the family court was required to award each party their respective non-marital interests before applying the factors in KRS 403.200 and awarding maintenance.

C. Grant v. Lynn

[2007-CA-002193](#) 10/17/2008 2008 WL 4683213

Opinion by Judge Nickell; Judges Moore and Stumbo concurred. The Court affirmed orders of the circuit court granting grandparent visitation to appellee. The Court held that KRS 405.021 was not unconstitutional and that the trial court properly applied *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. 2004) in finding that visitation with the children's late mother's family was in their best interest.

D. Koerner v. Koerner

[2008-CA-000080](#) 10/17/2008 2008 WL 4601378

Opinion by Judge Thompson; Judge Moore and Senior Judge Henry concurred. The Court vacated an order of the family court modifying a Georgia child support decree. The Court held that under the Uniform Interstate Family Support Act (UIFSA), the issuing state has continuing, exclusive jurisdiction over a child support order if the obligor or the obligee continues to reside in that state. Because appellee continued to reside in Georgia, the Kentucky family court lacked subject matter jurisdiction to modify the child support decree.

E. Murphy v. Murphy

[2007-CA-002298](#) 10/10/2008 2008 WL 4531369 Reh filed 10/29/2008

Opinion by Judge Nickell; Judge Thompson and Senior Judge Rosenblum concurred. The Court affirmed in part and reversed and remanded in part an order

of the circuit court sustaining appellee's verified motion to modify custody of the parties' three minor children. The Court first held that the trial court did not err in holding a modification hearing, as appellee's verified motion recited sufficient facts to justify holding a hearing. The Court then held that the trial court did err in proceeding with the hearing in appellant's absence and without some assurance that she knew the custody modification hearing was occurring. Pursuant to *Guthrie v. Guthrie*, 429 S.W.2d 32 (Ky. 1968), the conclusion of the divorce action terminated the attorney-client relationship between appellant and her attorney and therefore, sending notice to the attorney did not effectuate service upon appellant. Further, the filing of notice of non-representation put the court and opposing counsel on notice that counsel no longer represented appellant. The Court finally held that the trial court erred in modifying custody without making the necessary findings required by KRS 403.340(3) and without reducing the findings to writing.

VIII. INSURANCE

A. **Cincinnati Insurance Company v. Hofmeister**

[2004-CA-002296](#) 10/17/2008 2008 WL 4601140

Opinion by Judge Acree; Senior Judge Knopf concurred; Judge Keller concurred in result only. The Court reversed on direct appeal and dismissed as moot on cross-appeal a judgment entered after a jury found the appellant insurer liable to appellees for fraudulent misrepresentation and for violation of the Kentucky Unfair Claims Settlement Practices Act (UCSPA), KRS 304.12-230, related to a tort claim stemming from an automobile accident. Appellant was the insurer for the tortfeasor's employer. The Court held that the trial court erred in failing to enter a directed verdict in the insurer's favor on the issue of whether the attorney hired by the insurer to represent the insured employer was an agent of the insurer for purposes of settlement negotiations. There was no evidence to support the finding of an agency relationship between the insurer and the attorney it hired to defend its insured. Further, the attorney began and maintained his representation of the employer as an independent contractor and therefore, the insurer could not be vicariously liable for any actions taken by the attorney in the performance of his representation of the insured. The Court next held that the trial court erred in failing to direct a verdict in favor of the insurer on the claim of fraudulent misrepresentation. The insurer was not vicariously liable for the statements made by the attorney, appellees' failed to prove reasonable reliance on representations made by the attorney and there was no evidence that the attorney knew the representations were false. The Court then held that the trial court erred in failing to direct a verdict in favor of the insurer on the claim for violations of the UCSPA, as the issue of the vicarious liability of the employer was fairly debatable and therefore, the insurer's actions were reasonable. Further, the trial court erred in allowing the case to go to a jury when the evidence revealed a complete absence of proof of tortious conduct, outrageous behavior, evil motive or reckless indifference by the insurer. Because the Court determined that appellant was entitled to a directed verdict, the cross-appeal challenging the reduction of the punitive damage award was moot.

B. Commonwealth v. Reinhold

[2007-CA-000661](#) 10/10/2008 2008 WL 4530900

Opinion by Senior Judge Rosenblum; Judge Nickell concurred in result only by separate opinion; Judge Thompson dissented by separate opinion. The Court affirmed an order of the circuit court that found that the appellee nonprofit publication designed to match subscribers with donors willing to pay the subscribers' medical expenses was not insurance. The Court held that, although the publication shared many similarities to insurance, because all risks and obligations to pay medical expenses remained with the subscribers, it did not meet the definition of insurance under KRS 304.1-030.

C. Kentucky Farm Bureau Mutual Insurance Co. v. Blevins

[2008-CA-000525](#) 08/22/2008 2008 WL 4530712 Ord pub 10/31/2008

Opinion by Judge Keller; Judges Thompson and Wine concurred. The Court reversed on direct appeal and affirmed on cross-appeal, a declaratory judgment holding that an insurer did have a duty to defend and provide coverage on a claim of fraudulent misrepresentation but that it had no duty to defend on claims for breach of contract and defective workmanship in an action brought against appellees by the purchasers of their home. The Court held that because the transaction involved was a private sale of residential property from one homeowner to another, there was no business transaction as required by Restatement (Second) of Torts § 552 and therefore, the tort of negligent misrepresentation could not be established. Because the tort was inapplicable, the insurer was not required to provide a defense or indemnification. The Court then adopted the holding in *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574 (6th Cir. 2001), and held that appellees allegedly false representation on the disclosure statement concerning the condition of the house did not cause the damage to the house. Therefore, the claim for breach of contract did not constitute an "occurrence" under the liability provisions of the homeowners' policy so as to trigger the insurer's duty to defend and indemnify.

IX. TORTS

A. Bolin v. Davis

[2006-CA-002259](#) 10/31/2008 2008 WL 4754848

Opinion by Judge Nickell; Judges Stumbo and Thompson concurred. The Court affirmed an order granting summary judgment to a county road engineer on an estate's claim for wrongful death after the deceased's truck skidded off a roadway at a sharp curve at the bottom of a steep hill, plunged into a creek, submerged upside down in icy water and trapped the deceased. The Court first held that the estate asserted a claim against the county road engineer in his individual capacity. Although the estate did not identify him in his individual capacity in the heading, body or demand, the complaint stated a claim based upon the engineer's individual actions and therefore, the complaint sufficiently stated a claim against the engineer in his individual capacity. Since he did not file a motion for a more definite statement under CR 12.05, the Court concluded that he was neither misled nor prejudiced. The Court then held that the engineer's decision not to install a

guardrail at the location, but rather to reduce the speed with signs to that effect, was a discretionary function for which he was cloaked in qualified official immunity. Therefore, the trial court did not err in granting summary judgment in his favor.

B. West v. KKI, LLC

[2007-CA-001463](#) 10/03/2008 2008 WL 4664232

Opinion by Senior Judge Henry; Chief Judge Combs and Judge Keller concurred. The Court affirmed a summary judgment granted to Kentucky Kingdom amusement park on appellant's claim related to injuries she allegedly suffered while riding a stand-up roller coaster. The Court held that the trial court properly granted summary judgment on appellant's theories of ordinary negligence in the operation of the roller coaster, products liability/design defect and products liability/manufacturing defect, as there was no evidence to support those theories. The Court then held that the trial court did not abuse its discretion in excluding, pursuant to Daubert, the testimony of appellant's amusement park safety expert on appellant's failure-to-warn claim. The expert's conclusions regarding the safety of the roller coaster were based upon little more than his exclusively subjective opinion. The Court further held that the testimony of appellant's medical expert was not sufficient to defeat summary judgment in that it was based upon the inadmissible testimony of the amusement park safety expert and appellant's anecdotal representations. After the exclusion of the expert's testimony, appellant could not show that there was a genuine issue of material fact and therefore, the trial court properly granted summary judgment on the failure-to-warn claim.

C. Young v. Carran

[2008-CA-000082](#) 10/24/2008 2008 WL 4683236

Opinion by Senior Judge Lambert; Judges Keller and Wine concurred. The Court affirmed an order granting summary judgment to the appellee law firm on appellant's claims under HIPAA for the inadvertent disclosure of her medical and psychiatric records to the opposing party in child custody litigation. The Court held that KRS 446.070, which provided an avenue by which a damaged party may sue for a violation of a statutory stand of care, did not extend to federal statutes. The Court then held that 42 U.S.C. § 1320d-6 and its corresponding regulations did not impose a duty of care on appellees allowing for a Kentucky common law negligence per se claim. The Court declined to consider appellant's preemption claims as they were not presented to the trial court.

X. UCC

A. Harrington v. Asset Acceptance, LLC

[2007-CA-002400](#) 10/10/2008 2008 WL 4531376

Opinion by Judge Moore; Judge Thompson and Senior Judge Henry concurred. The Court reversed and remanded a summary judgment in favor of appellee on appellee's claim to recover a deficiency balance on a simple interest note and security agreement. Appellee purchased appellant's account after appellant's vehicle was repossessed and sold by the bank that retained the security interest in the

vehicle. The Court held that the circuit court erred in granting appellee's motion for summary judgment and in denying appellant's motion for summary judgment. Appellee failed to prove that it was entitled to collect on the debt evidenced by the note and security agreement between appellant and the bank, as promissory notes are specifically excluded from the definition of account in KRS 355.9-102(1)(b)(3)(a). Therefore, even if appellee purchased the account, it did not necessarily include the right to collect on the note without evidence that it also purchased the note. The Court also held that appellee was not entitled to summary judgment on its claim that the vehicle was sold in a commercially reasonable manner pursuant to KRS 355.9-627. The bank was the secured party at the time the vehicle was sold and was not made a party to the action. Further, there was no evidence presented by appellee to show that the bank's sale of the vehicle was commercially reasonable. The Court finally held that appellant was entitled to summary judgment, as appellee failed to present evidence that it had the right to collect the deficiency.

XI. WILLS AND ESTATES

A. Amos v. Clubb

[2007-CA-001181](#) 10/03/2008 2008 WL 4664231

Opinion by Judge Lambert: Judges Stumbo and Thompson concurred. The Court reversed and remanded a summary judgment in a will contest. The deceased's physical weakness and mental impairment at the time the will was executed, the possible unnatural distribution under the will, the significance of appellees' presence during all meetings with the attorney who drafted the will, the allegations that the deceased's blood relatives were restricted from access, and the allegations that appellees had complete and total control over the deceased's business affairs were badges of undue influence. Therefore, the Court held that there were genuine questions of material fact precluding summary judgment

XII. ZONING

A. Citizens for Preservation of Jessamine County, LLC v. Cooper Development, LLC

[2007-CA-001460](#) 10/17/2008 2008 WL 4601268

Opinion by Judge VanMeter; Judge Wine and Senior Judge Lambert concurred. The Court affirmed in part, and reversed and remanded in part, an order of the circuit court that reversed a decision of a planning commission denying a landowner's application to proceed with a cluster development as a permitted use within an agricultural zone. The Court affirmed that part of the order finding that the planning commission erred when it concluded that it was vested with the discretion to permit or deny the proposed development plan based on the general principles and spirit of a comprehensive plan or based on a perception of need for the development in the community when a cluster development was specifically permitted use within an agricultural zone. The Court further held that the circuit court did not err by concluding that the planning commission acted arbitrarily and

exceeded its authority by rejecting the application on the basis of the practicality of using remaining space for agricultural pursuits when there was uncontradicted evidence that the standards for reserved acreage were satisfied. However, the Court also held that the trial court erred by making several de novo findings of fact and by finding that the planning commission acted arbitrarily regarding issues related to the adequacy of proposed sewage disposal and landscaping and related to the location of residential lots within a flood plain.