

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

**I. ATTORNEY AND CLIENT**

**A. Lofton v. Fairmont Specialty Insurance Managers, Inc.**

[2009-CA-001631](#) 10/15/2010 2010 WL 4025920

Opinion by Chief Judge Taylor; Judge Combs concurred; Judge Thompson concurred by separate opinion. The Court affirmed an order of the circuit court awarding the attorney appellant expenses incurred in his legal representation on a personal injury claim but denying his claim for attorney fees. The Court held that the circuit court properly denied the claim for attorney fees when appellant voluntarily terminated the representation without just cause. The contract between appellant and the client provided that no settlement would be made without the client's consent and appellant withdrew when the client refused to follow appellant's advice concerning acceptance of a settlement offer.

**II. CIVIL PROCEDURE**

**A. Hallis v. Hallis**

[2009-CA-002051](#) 10/01/2010 2010 WL 3810844 DR Pending

Opinion by Judge Acree; Judge Nickell and Senior Judge Harris concurred. The Court affirmed a series of orders of the family court related to the pro se appellant's child support obligations. The Court reviewed appellant's appeal for manifest injustice after noting that his brief utterly failed to cite to the record and failed to inform the Court how the issues were preserved for appeal. The Court then held that any appeal from a 2006 order denying appellant's motion to require appellee to pay child support had already been affirmed on appeal and therefore, the Court was without jurisdiction to revisit the issue and further, any appeal from that order was untimely. The Court then held that appellant failed to advance any argument to support reversal of the more recent orders and review of those orders did not reveal any manifest errors.

**B. Mitchell v. Mitchell**

[2009-CA-001856](#) 10/08/2010 2010 WL 3928481 DR Pending

Opinion by Judge Lambert; Judge Clayton and Senior Judge Henry concurred. The Court reversed an order of the family court granting appellee's motion for attorney fees, expert fees and costs incurred as a result of a motion to modify maintenance filed by appellant. The Court held that the order denying the motion to modify maintenance was final and the family court lost jurisdiction to enter the subsequent order awarding fees because appellee failed to timely request additional findings of fact and a modification of the order pursuant to CR 52.02. The order denying the motion to modify maintenance was inherently final because it addressed the single claim in the motion to modify maintenance. Appellee's motion for attorney fees and costs was collateral to the family court's

ruling on the motion to modify maintenance and did not constitute a separate claim or right so as to create a multi-claim case to which CR 54.02 might apply. While it did not constitute a separate claim, it was an issue essential to the judgment. Because the order denying the motion to modify maintenance was final, a ten-day window existed for the family court to modify or appellee to move for modification of the order to include findings and a ruling on the motion for attorney fees.

### III. CONTRACTS

#### A. **Felix v. Lykins Enterprises, Inc.**

[2009-CA-000312](#) 10/22/2010 2010 WL 4137276

Opinion by Judge Acree; Chief Judge Taylor and Senior Judge Buckingham concurred. The Court affirmed in part and reversed in part a judgment of the circuit court denying appellant's motion to alter, amend or vacate a judgment on appellees' counterclaim for rental value of property, plus prejudgment and post-judgment interest, and an order denying appellant's post-judgment motion for damages. The Court first held that the circuit court did not err by denying appellant's supplemental motion for damages when there was no legal basis upon which to allow the circuit court to consider evidence two months after the judgment was entered. The Court next held that the circuit court did not abuse its discretion in denying appellant's motion for interest on the purchase price of the property at issue. The law-of-the case doctrine prevented the award of interest when the trial court did not award interest on the purchase price, appellant did not challenge that ruling on her first appeal, and the Supreme Court upheld the trial court order as it was written, without interest. The Court next held that the circuit court did not abuse its discretion when it required appellant to repay rental payments she received on the property when the decision was consistent with Ohio jurisprudence. The Court next held that because the issue of whether appellees' claim authorized a right to interest on the rental payments was substantive, Ohio law governed the award of prejudgment interest. Applying Ohio law, the Court held that to make appellees whole, prejudgment interest must be added to the award of rental payments but then, there must be a deduction of the amount of prejudgment interest on the purchase price because of the law-of-the case doctrine. Therefore, the circuit court erred by failing to deduct from appellees' award the value of retaining control of the purchase price until it was paid into escrow. The Court finally held that the circuit court applied the wrong interest rate under Ohio law. The Court then calculated the damage award and reversed with instructions for the circuit court to enter a new judgment awarding damages to appellees and releasing the purchase proceeds to appellant in accordance with the opinion.

### IV. CORPORATIONS

#### A. **Brooks v. Brooks Furniture Mfgs., Inc.**

[2009-CA-000200](#) 10/29/2010 2010 WL 4290068

Before the full Court sitting *en banc*. Majority opinion by Judge Thompson in which Chief Judge Taylor, Judges Caperton, Clayton, Dixon, Moore, Nickell and Stumbo concurred; Judge Acree concurred by separate opinion; Judge Wine concurred in part and dissented in part by separate opinion; Judge VanMeter dissented by separate opinion in which Judges Combs, Keller and Lambert joined. The Court affirmed in part, reversed in part and remanded orders of the circuit court determining the fair value of appellant's shares in a closely-held corporation, applying a twenty-percent marketability discount, awarding appellant five-percent interest, denying an assessment of attorney's fees and expenses against the corporation, denying discovery regarding post-merger stock ownership and denying appellant's motion for summary judgment. The Court held that under the Kentucky Dissenter's Rights statute, a marketability discount should not be applied in determining the fair value of a dissenter's shares in the context of a squeeze-out merger unless exceptional circumstances exist. To the extent that *Ford v. Courier-Journal Job Printing Co.*, 639 S.W.2d 553 (Ky. App. 1982), held otherwise, it was overruled. The Court also held that the trial court did not abuse its discretion in accepting the book value of the corporation based on actual financial statements; the trial court did not clearly err in accepting a valuation of furniture, fixtures and equipment based on an expert who viewed the premises and assessed the items, rather than the tax assessor values; the trial court did not clearly err in finding that the unpaid balance of a bonus was a liability of the corporation; the trial court did not clearly err in finding that officer salaries, which were the result of high corporate earnings, were not excessive so as to reduce the net asset book value; the trial court did not err in finding that environmental mediation costs were too contingent or speculative to be included on the adjusted balance sheet for valuation purposes; and the trial court did not err by rejecting part of a valuation that included portions of officers' salaries as a liability when the salaries were unilaterally reduced by the corporation and there was no basis upon which the officers could assert a right of entitlement for the amounts. The Court also held that the trial court did not abuse its discretion in setting an interest rate based on that at which the corporation could have obtained a bank loan. The Court also held that the trial court did not abuse its discretion in failing to assess attorney fees, expert fees and expenses against the corporation merely because the fair value of the shares materially exceeded that which the corporation offered to pay, the corporation substantially complied with the offer of a fair value and there was no evidence that the offer was made in bad faith. The Court also held that the trial court correctly denied a discovery request for details and documents regarding a gift of stock from one shareholder to another. The question of post-merger stock ownership was a collateral issue and irrelevant to the claim for fees and expenses. The Court finally held that there was no merit to appellant's claim that the trial court erred by failing to grant appellant's motion for summary judgment.

## V. CRIMINAL LAW

### A. **Abdul-Jalil**

[2009-CA-000487](#) 10/15/2010 2010 WL 4025849

Opinion by Judge Caperton; Judge Wine and Senior Judge Lambert concurred. The Court reversed and remanded a judgment of the circuit court entered on appellant's conditional guilty plea wherein he reserved the right to appeal the trial court's denial of a motion to suppress evidence discovered during the execution of a warrant to search a car appellant was driving. The Court held that an anonymous tip lacked information that was adequately predictive to show the special knowledge required to establish the indicia of reliability to justify impounding the car after appellant was stopped for traffic violations. Therefore, the seizure of the vehicle was lacking probable cause and thus, unconstitutional in light of the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution.

### B. **Brown v. Commonwealth**

[2009-CA-001272](#) 10/22/2010 2010 WL 4137422

Opinion by Judge Keller; Judges Combs and Lambert concurred. The Court reversed and remanded an order of the trial court purporting to correct a judgment of conviction and ordering appellant to pay restitution. The Court held that although appellant agreed to pay restitution as part of his plea agreement and the court acknowledged that agreement, the court did not incorporate that agreement into the sentence. The failure to incorporate the agreement into the sentence was substantive and not simply a clerical error. Thus, the failure to include restitution in the original sentence was not properly the subject of an RCr 10.10 motion/petition. Further, the Commonwealth failed to file a petition asking the court to set restitution within the 90 days required by KRS 431.200. Therefore, the petition was not properly before the trial court.

### C. **Carver v. Commonwealth**

[2008-CA-001404](#) 10/08/2010 2010 WL 3927710 Rehearing Pending

Opinion by Judge Acree; Judges Keller and Lambert concurred. The Court affirmed in part, reversed in part, and remanded a judgment of the circuit court convicting appellant of third-degree criminal child abuse and fourth-degree assault, sentencing her to 365 days' imprisonment, and imposing a \$500 fine for each charge, the sentences to be served concurrently. The Court first held that the trial court did not abuse its discretion in declining to excuse a juror for cause. While the juror may have cooperated with the prosecutor in an unrelated matter, there was no evidence of a contractual relationship between the prosecutor and the juror, the lapse of ten to fifteen years between the first case and the instant case, and the juror's statement that her experience would not affect her decision making was ample reason for the trial court to believe the juror would be fair and impartial. The Court next held that while the jury instructions regarding assault were deficient for failing to define "physical injury," any error was harmless when there was no evidence that the jury was actually confused by the

omission, the term was common, its meaning was plain, and the Commonwealth showed that no prejudice occurred as a result of the error. The Court next held that the instruction regarding third-degree criminal abuse was not erroneous when it fully defined every necessary term, despite the fact that the phrase “serious physical injury” contained the phrase “physical injury.” The Court next held that the jury instruction on third-degree criminal assault denied appellant a unanimous verdict when it combined all three theories contained in KRS 508.120(1) in one instruction, not all of which were supported by the evidence. Further, the definitions section included a definition of abuse which was not supported by the evidence. The Court finally held that the imposition of fines on the indigent appellant was not palpable error when trial counsel did not simply fail to raise the argument but instead asserted to the court that a fine could, in fact, be imposed.

**D. Clark v. Commonwealth**

[2009-CA-000073](#) 10/22/2010 2010 WL 4137179

Opinion by Judge Thompson; Judge Lambert concurred; Judge Wine concurred in part and dissented in part by separate opinion. The Court reversed appellant’s conviction and sentence finding him guilty of one count of receiving stolen property over \$300 and sentencing him to two-years’ incarceration, enhanced to five years by virtue of a persistent felony offender conviction. Reviewing for palpable error, the Court held that appellant’s due process rights were violated when the Commonwealth indicted on the PFO charge during the trial on the underlying offense without warning, without the opportunity to defend, and without notice to appellant of the severity of the potential penalty should he be found guilty. The Court then held that appellant’s Texas conviction, for which he was sentenced to one year in the county jail and fined \$2500, could not be used to support the PFO charge. A crime for which a maximum sentence of one year or less could be imposed is a misdemeanor and a crime for which the minimum sentence that could be imposed is one year or more is a felony. Therefore, if the sentencing range of a conviction which results in one year or less exceeds one year, it is a felony. Upon motion, a court shall conduct an analysis of the sentencing statute of the jurisdiction wherein the defendant was convicted. If the sentencing range imposes any sentence which exceeds one year, then that sentence is a felony. The one-year sentence imposed in Texas was the maximum sentence within the sentencing range of appellant’s conviction, and therefore it was a misdemeanor.

**E. Cox v. Commonwealth**

[2008-CA-000176](#) 10/08/2010 2010 WL 3927704

Opinion by Judge Clayton; Judges Caperton and Combs concurred. The Court affirmed a judgment of the circuit court sentencing appellant to ten years of imprisonment following his guilty plea to two counts of sexual abuse in the first degree, after denying appellant’s motion to withdraw his guilty plea. The Court first held that the trial court properly found that trial counsel was not ineffective. Appellant did not establish that his counsel’s performance was outside the

prevailing norms of professional assistance in helping him weigh the alternatives to pleading guilty and any misinformation counsel gave appellant about his parole eligibility did not rise to the level of gross or flagrant misadvice. Appellant was informed and knew that he must complete the Sex Offender Treatment Program and counsel negotiated a plea agreement that resulted in a much shorter sentence from the possible sentence he could have been subjected to if he went to trial. The Court next held that *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), did not extend to collateral consequences other than deportation. The Court finally held that trial court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea. The plea agreement appellant signed obligated him under KRS 17.495 to register as a sex offender and appellant knew he must submit to sexual offender risk assessment, test for HIV and DNA and complete the Sex Offender Treatment Program. His mere change of heart did not constitute adequate grounds for withdrawing his plea.

**F. Delacruz v. Commonwealth**

[2009-CA-001312](#) 10/08/2010 2010 WL 3927809

Opinion by Senior Judge Harris; Judge Keller concurred; Judge Thompson dissented by separate opinion. The Court reversed and remanded appellant's conviction for complicity to trafficking in marijuana greater than 5 pounds and sentence of 5 years of imprisonment. The Court held that the trial court erred in denying appellant's motion to suppress an incriminating statement which was given in violation of appellant's *Miranda* rights. After appellant initially indicated to police that he did not understand his rights, rather than rereading them, describing each individual right or providing appellant with rights written in Spanish, the detective only asked if he understood that he did not have to answer questions, an explanation that was incomplete and insufficient. Absent a showing by a preponderance of the evidence that appellant understood all of his *Miranda* rights, including his rights with respect to counsel, any waiver of rights was not knowingly and intelligently made. The Court also held that the court properly instructed the jury on the charge of complicity.

**G. Harrod v. Edwards**

[2009-CA-000440](#) 10/29/2010 2010 WL 4290040

Opinion by Judge Acree; Judge Caperton concurred; Judge Keller dissented by separate opinion. The Court reversed an order of the circuit court finding that the Violent Offender Statute, KRS 439-3401(4), was inapplicable to all individuals sentenced as youthful offenders. The Court held that the circuit court applied the holding in *Commonwealth v. Merriman*, 265 S.W.3d 196 (Ky. 2008) too broadly. The Unified Juvenile Code gives the circuit court an opportunity to adjust the sentence, not determine how much of the sentence must be served. Therefore, the reconsideration of probation afforded under the Unified Juvenile Code was unaffected by the parole limits set forth in KRS 439.3401(4). Thus, appellee was subject to the limits on early parole set forth in KRS 439.3401(4).

**H. Phillips v. Commonwealth**

[2009-CA-000551](#) 10/22/2010 2010 WL 4137282

Opinion by Judge Combs; Chief Judge Taylor and Judge Nickell concurred. On discretionary review, the Court reversed an order of the circuit court affirming appellant's conviction in district court for violating a city ordinance by willfully failing to file an occupational license return. The Court held that appellant was denied due process of law when he did not have any opportunity to invoke the administrative pre-deprivation remedy guaranteed by the ordinance because the City never established the Board of Occupational License Appeals. The Court also held that the Commonwealth impermissibly imputed criminal *mens rea* to appellant from his mere failure to file a return, an impermissible assumption of guilt flowing from that omission, without proof of his actual mental state that would render the act criminal. The Court rejected appellant's arguments that the ordinance absolved him of any duty to file a return for the year preceding the effective date of the ordinance and appellant's arguments with respect to a number of evidentiary issues.

**I. Richardson v. Commonwealth**

[2006-CA-001568](#) 10/01/2010 2010 WL 3810014

Opinion by Judge Thompson; Judge Wine and Senior Judge Henry concurred. On remand from the Kentucky Supreme Court, the Court affirmed an order of the circuit court revoking appellant's probation. The Court held that while the revocation order did not contain any reference to the specific probation term or condition violated or to the violative conduct, in light of the decision in *Commonwealth v. Alleman*, 306 S.W.3d 484 (Ky. 2010), the untranscribed recording and the trial court's written findings, especially considering the fact that only one probation violation was alleged, were sufficiently complete to permit the parties and this Court to determine the evidence relied on and the reasons for revoking appellant's probation.

**J. Van Berg v. Commonwealth**

[2007-CA-002426](#) 10/01/2010 2010 WL 3810045

Opinion by Judge Moore; Judges Clayton and Keller concurred. The Court affirmed a judgment convicting appellant of first-degree trafficking in a controlled substance and first-degree possession of a controlled substance and sentencing her to six years of imprisonment for the trafficking conviction and three years of imprisonment for the possession conviction, to be served consecutively. The Court first held that the trial court did not violate appellant's rights under the Double Jeopardy Clauses of the United States and Kentucky Constitutions when it denied a motion to suppress evidence and instead granted appellant's alternative motion for a mistrial. Appellant could not complain on appeal when she requested the mistrial as an alternative to suppressing a tape recording and defense counsel admitted to the trial court that the Commonwealth was not at fault. Therefore, the double jeopardy bar to retrial was inapplicable. The Court next held that appellant's claim that she was entrapped was not

properly preserved for review when appellant neither proffered nor moved for an entrapment instruction. Even so, the trial court did not commit palpable error when it failed to instruct the jury on the defense of entrapment. Based on the evidence presented at trial, appellant was readily compliant with a confidential informant's first request for methamphetamine, she was not reluctant to transfer the drug, and she initiated the second discussion regarding exchange of a tank of anhydrous ammonia for the drug. The sheriff's department, through the confidential informant, merely provided an opportunity to transfer methamphetamine and appellant took advantage of it. The Court finally held that while the prosecutor's "send a message" argument was improper, the unpreserved claim did not amount to palpable error under RCr 10.26.

**K. Ware v. Commonwealth**

[2009-CA-001730](#) 10/22/2010 2010 WL 4137463

Opinion by Judge Dixon; Judges Clayton and Wine concurred. The Court reversed and remanded an order of the circuit court revoking appellant's probation and ordering his five-year sentence for first-degree trafficking to run consecutive to a one-year Ohio sentence. The Court held that the trial court's reliance on *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996), was misplaced. Based on the holding in *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008), the Court held that KRS 533.060(2) governed the actions of the court with jurisdiction over the second subsequent offense, not the original court that granted conditional discharge. For purposes of revoking appellant's probation, KRS 533.040(3) and KRS 532.115, respectively, were controlling. Therefore, the trial court's authority to run appellant's sentences concurrently or consecutively was conditioned upon whether the revocation occurred within 90 days after the grounds for revocation were brought to the attention of the Department of Corrections. Because the affidavit seeking revocation of appellant's probation was not filed in the trial court until nearly 10 months after DOC first learned of the Ohio conviction, the trial court was prohibited from ordering appellant's sentences to run consecutively.

**VI. EMPLOYMENT**

**A. University of Kentucky v. Furtula**

[2009-CA-000811](#) 10/08/2010 2010 WL 3927774 Rehearing Pending  
Opinion by Senior Judge Harris; Judges Acree and Nickell concurred. The Court reversed and remanded judgments of the Fayette and Franklin Circuit Courts with orders to dismiss the cases against the University of Kentucky brought by employees seeking benefits under a long-term disability (LTD) policy offered by the University to full-time employees. The Court first held that the trial court properly found that insurance contracts were not involved when examining the parties' Unfair Claims Settlement Practices Act (UCSPA) claims. What the University established through the LTD benefits program was not an insurance business but rather, a welfare benefit plan. Additionally, appellants failed to demonstrate that they held any other type of written contract

with the University for LTD benefits via the LTD governing documents. The only thing the LTD program established was a mere expectancy of the opportunity to apply for LTD benefits. Moreover, even if contracts were formed, they were implied contracts, which could not overcome the University's sovereign immunity.

## VII. FAMILY LAW

### A. **Coleman v. Coleman**

[2010-CA-000277](#) 10/01/2010 2010 WL 3810876

Opinion by Senior Judge Harris; Judges Acree and Nickell concurred. The Court vacated and remanded an order of the circuit court denying appellant's motion to modify the joint custody of the parties' minor children. The Court first held that the trial court did not abuse its discretion in refusing to interview the child in chambers. The language of KRS 403.290 is permissive and does not require a trial court to interview a child. The Court then held that the trial court erred in excluding the child's testimony without a preliminary examination to determine her competency under KRS 601.

### B. **Humphrey v. Humphrey**

[2009-CA-002241](#) 07/30/2010 2010 WL 4026073

Opinion by Judge Caperton; Judges Lambert and Stumbo concurred. The Court affirmed an order of the circuit court making the father the primary residential custodian of the parties' minor children. The Court first held that the trial court correctly applied the best interests of the child standard set forth in KRS 403.320(3) and the holding in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). Although the father's motion was styled as a motion to modify custody, he sought a modification of timesharing. While relocation was the particular context in which *Pennington* was decided, the intent was to establish a distinction between a modification of custody and a modification of timesharing. The Court also held that the trial court did not abuse its discretion and its findings of fact were not clearly erroneous that it was in the best interests of the children to modify timesharing.

## VIII. INSURANCE

### A. **Auto Owners Insurance Co. v. Consumers Insurance USA, Inc.**

[2009-CA-000955](#) 10/08/2010 2010 WL 3927782

Opinion by Senior Judge Lambert; Judges Dixon and Keller concurred. The Court reversed and remanded a judgment of the circuit court finding that it lacked personal jurisdiction over an out-of-state insurer. The appellant auto insurance company sought recovery of payments it made to its insured for injuries she received due to the negligence of appellee's insured and for what it alleged was appellee's bad faith. The Court held that the trial court erred in finding that Kentucky did not have personal jurisdiction through the Kentucky long-arm statute, KRS 454.210, based on appellee's minimum contacts with the

state. By its automobile insurance contract with the negligent driver, appellee invested her with the right to drive lawfully in Kentucky and states other than her home state of Tennessee. Appellee availed itself of the privilege of acting in Kentucky by writing an automobile policy in an adjoining state with which Kentucky shares hundreds of miles of border, the automobile accident arose from appellee's insured's activity in Kentucky, and the commission of an automobile tort by the insured of a non-resident insurer was a sufficiently substantial connection to Kentucky to make the exercise of jurisdiction reasonable. Further, to allow appellee to succeed on its lack of jurisdiction claim, the insured would have been an uninsured driver in Kentucky with the result that the public policy of Kentucky would be entirely frustrated.

## **IX. JUVENILES**

### **A. N.K. v. Commonwealth**

[2010-CA-000041](#) 10/15/2010 2010 WL 4026085

Opinion by Judge Thompson; Judge Keller and Senior Judge Harris concurred. The Court vacated orders of the family court adjudging appellant a habitual truant and finding him in contempt and committing him to the Cabinet. The Court first held that the family court was without subject matter jurisdiction because the truancy complaint did not comply with KRS 630.069(2) and KRS 159.140 when an adequate assessment of the child was not performed. Thus, the truancy complaint should not have been received by the court designated worker. The Court then held that any admission to habitual truancy must be entered by the child, not by counsel, and that the court is required to inform the child of his rights under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), at the time it accepts an admission.

## **X. LICENSES**

### **A. Nurses' Registry and Home Health Corp. v. Gentiva Certified Healthcare Corp.**

[2009-CA-001175](#) 08/27/2010 2010 WL 4286318

Opinion by Judge VanMeter; Judges Acree and Wine concurred. The Court affirmed an opinion and order of the circuit court reversing the decision of the Cabinet for Health and Family Services, Division of Administrative Hearings and remanding the case to the Cabinet after the Cabinet denied a home health service provider's certificate of need application. The Court held that because the provider was currently licensed to serve the counties for which it sought the certificate, it was not seeking to establish a home health agency as defined by the State Health Plan. Therefore, it was not required to show an additional 250 patients in each county in need of health services. Although it would be required to surrender its original certificate in need covering the counties if the application was approved, there was no authority or precedent to conclude that meant it was not currently licensed to serve those counties.

## **XI. MINES AND MINERALS**

### **A. Star Run, Inc. v. Commonwealth of Kentucky Environmental and Public Protection Cabinet**

[2008-CA-002187](#) 10/29/2010 2010 WL 4289934

Opinion by Judge Moore; Judge Combs and Senior Judge Lambert concurred. The Court affirmed a judgment of the circuit court affirming the final order of the Secretary for the Environmental and Public Protection Cabinet affirming noncompliance, cessation order and penalty assessment against the appellant mining operation and requiring it to provide drinking water and connect well owners to a temporary water supply within 48 hours. The Court first held that there was substantial evidence to support the hearing officer's findings adopted by the Secretary that the well was impacted by groundwater from appellant's underground mine and therefore, to find a violation of KRS 350.421(2) and 405 KAR 18:060. The Court next held that KRS 350.421 and 405 KAR 18:060 were properly interpreted and applied. So long as part of the owners' water supply used for domestic and other legitimate purposes was "affected" by underground coal mining, the statute mandated replacement of the water supply. The water supply need not be the exclusive water supply. The Court next held that, regardless of the lack of a specific statutory standard to determine violations, substantial evidence supported the determination that the level of contamination was sufficiently elevated. The Court next held that the water replacement requirements were not invalid, given the broad delegation to the Cabinet to adopt regulations to carry out the General Assembly's intent to protect water supplies impacted by coal mining and that 405 KAR 18:060 was proper use of the Cabinet's authority. Further, given guidance from the Office of Surface Mining and Reclamation and Enforcement, the Kentucky regulations were not inconsistent with federal law.

## **XII. PROPERTY**

### **A. Parsley v. McCauley**

[2009-CA-000454](#) 10/29/2010 2010 WL 4290093

Opinion by Judge Caperton; Judges Combs and Senior Judge Lambert concurred. On discretionary review the Court reversed and remanded an order of the circuit court affirming an order of the district court determining that a fence between the parties' property was not a lawful fence and must be removed, that each party must assume half of the cost, and setting forth the boundary lines and guidelines under which new fencing was to be constructed. The Court held that the district court was without jurisdiction to make a determination as to the correct location of the disputed boundary line between the properties. Because the district court was required to not only determine the rights and obligations of the parties under the Kentucky Boundary Line Fence Act, KRS 256.030 and KRS 256.042, but also to determine the location of the boundary itself, the matter was beyond its subject matter jurisdiction. The Court further held that because the district court lacked subject matter jurisdiction, all of its decisions

concerning the construction of the fence and allocation of cost must also be reversed.

### **XIII. TAXATION**

**A. Commonwealth, Finance and Administration Cabinet v. Lexington-Fayette County Government**

[2009-CA-002220](#) 10/08/2010 2010 WL 3928508

Opinion by Senior Judge Harris; Judges Acree and Nickell concurred. In a case of first impression, the Court affirmed an order of the circuit court affirming an order of the Kentucky Board of Tax Appeals. The Court held that the term “base revenue” in KRS 136.650(3) was not ambiguous when read in the context of the entire telecommunication tax legislation enacted in 2005. The only reasonable interpretation of the term “base revenue” was revenue resulting from a franchise fee, and from no other source. Interpreting the term “base revenue,” the Court concluded that the Board of Tax Appeals and Franklin Circuit Court did not err in directing the Department to re-determine the amount of appellee’s hold harmless distribution to be made under the provisions of KRS 136.650 and 136.652 by utilizing its base revenue.

### **XIV. TORTS**

**A. Boon Edam, Inc. v. Saunders**

[2008-CA-001606](#) 10/15/2010 2010 WL 4025735

Opinion by Judge Caperton; Judges Acree and Thompson concurred. The Court affirmed a judgment awarding appellee damages arising from injuries she sustained when a revolving door manufactured by appellant struck her. The Court first held that the trial court did not err or abuse its discretion in allowing appellee’s expert witness to testify. The witness’s extensive knowledge, education, training and professional experience qualified him as an expert in the matter. There was no requirement that he have worked in the revolving door industry and there was no precedent mandating that he could not rely upon or evaluate tests performed by another. The court next held that the trial court did not err in denying the manufacturer’s motion for a directed verdict because there was not a complete absence of proof as to whether the door was in a defective condition unreasonably dangerous for use when it was placed on the market. The Court also held that the trial court did not err in denying the manufacturer’s motion for directed verdict based upon the statutory presumption of non-defectiveness established by KRS 411.310(2) when appellee presented ample evidence that the door was defective. The Court finally held that because appellant failed to object to the jury instructions for the award of future pain and suffering, or to tender jury instructions, it failed to preserve any error for review under CR 51(3).

**B. Ragland v. Digiuro**

[2009-CA-000186](#) 10/22/2010 2010 WL 4137183

Opinion by Senior Judge Harris; Judges Acree and Nickell concurred. The Court affirmed in part and reversed in part and remanded a judgment awarding an estate damages in the amount of \$63,341,708.00 in its wrongful death claim against appellee and an order denying a motion to alter, amend or vacate the judgment. The Court first held that the law-of-the case doctrine applied to the issue of whether the wrongful death action was commenced within the applicable statute of limitations because the Court of Appeals had already decided that the claim was not barred by the statute of limitations. Subsequent caselaw did not change the law with regard to the primary basis for the Court of Appeals decision and the pertinent facts upon which the Court of Appeals based its finding did not change after the rendering of the opinion. The Court then held that the punitive damage award of \$60 million was constitutionally excessive in that it violated appellant's federal due process protections. Although the murder of the deceased was sufficiently reprehensible, in light of the substantial compensatory award of more than \$3.3 million, the 18-to-1 ratio of punitive to compensatory damages was grossly excessive in relation to the State's legitimate interests in punishment and deterrence. The Court directed the circuit court to reduce the amount of punitive damages to the constitutionally acceptable amount of \$30 million, representing a single-digit ratio of 9-to-1.

- C. River Run Farm, LLC v. Storm**  
[2009-CA-000096](#) 10/15/2010 2010 WL 4025772 Rehearing Pending  
Opinion by Judge Clayton; Judge Combs and Senior Judge Lambert concurred. The Court affirmed a summary judgment in favor of an individual home builder and a jury verdict in favor of a circulation pump manufacturer on appellants' claims for negligence brought after a fire in their home which originated with the water circulation pump. The Court first held that the trial court properly granted summary judgment to the home builder. The individual, who oversaw the construction of the home but was not in the business of building, could not be held liable to a purchaser of the home for negligence. The Court next held that the trial court did not abuse its discretion by precluding the admission of an x-ray of the pump's terminal box cover to impeach an expert witness when appellants did not reveal the x-ray to the expert until just before the trial, the expert was not present when the x-ray was taken, and appellants did not present an expert witness to provide a foundation for the x-ray. The Court next held that there was not sufficient evidence for the trial court to grant a new trial under CR 59.01(b). The Court next held that the trial court did not err in admitting other expert testimony. The Court finally held that the trial court did not err in omitting the language "without a reasonable notice or warning of danger" from the jury instructions when neither sets of tendered instructions contained the language set forth in John S. Palmore, *Kentucky Instructions to Juries* § 49.02 (5th Ed., 2006), and it did not appear the language would benefit appellants.
- D. Taylor v. King**  
[2009-CA-001599](#) 10/01/2010 2010 WL 3810797 DR Pending

Opinion by Judge Wine; Judge Moore and Senior Judge Harrison concurred. The Court reversed and remanded a declaratory judgment finding that the Dram Shop Act, KRS 413.241, prohibited recovery of punitive damages. The Court first held that the prior interpretations of the Act were consistent with the clear language of the statute that punitive damages may not be recovered for a claim under the Act. However, in a case of first impression, the Court then held that the Act's implicit prohibition of recovery of punitive damages violated the jural rights doctrine and separation-of-powers provision of the Kentucky Constitution. Therefore, it was unconstitutional to the extent that it prohibited recovery of punitive damages.

**E. Willis v. Louisville/Jefferson County Metropolitan Sewer District**  
[2009-CA-001874](#) 10/22/2010 2010 WL 4137492

Opinion by Judge Wine; Judge Caperton and Senior Judge Lambert concurred. The Court affirmed a summary judgment of the circuit court in favor of appellee on appellant's claims of loss of consortium and negligent infliction of emotional distress (NIED) stemming from the death of her minor granddaughter for whom she served as legal guardian. On an issue of first impression, the Court held that it was compelled to follow the clear language of KRS 411.135, which did not extend a loss of consortium claim to grandparents, guardians or other custodial family members. The Court next held that it was without authority to abandon the "physical impact rule" as applied to bystanders in NIED cases. Therefore, the Court affirmed the summary judgment on both claims.

**XV. WILLS AND ESTATES**

**A. Ladd v. Ladd**

[2009-CA-001630](#) 10/01/2010 2010 WL 3810822

Opinion by Senior Judge Harris; Judges Moore and Wine concurred. The Court affirmed in part, reversed in part and remanded a declaratory judgment in favor of appellee wherein appellee sought a ruling as to whether certain assets belonged to her husband's estate or in a trust. The Court first held that the judgment under review was a summary judgment and thus the standard of review was one for summary judgment. The Court next held that the trial court erred to the extent that it based its determination of whether an asset belonged to the trust solely on whether or not the deceased had transferred legal title to the trust. Significant issues of fact existed to preclude summary judgment on the issue of what assets were transferred to the trust at the time of its creation. The Court next held that significant issues of material fact existed with respect to property allegedly acquired after the trust was created and therefore, summary judgment was not warranted concerning that property. The Court next held that material factual issues also existed regarding the deceased's intent in transferring property to the trust and whether or not he intended to defraud appellee of her dower rights. The Court next held that the trial court did not err in determining that no issue of material fact existed with respect to whether certain assets were acquired with proceeds of trust assets. The trust document itself permitted the

deceased to utilize the corpus during his lifetime for property over which he still exercised possession and control. After withdrawal of the assets they were no longer part of the trust. The Court finally held that the trial court did not err in granting summary judgment in appellee's favor on the issue of whether she violated the trust's no-contest clause. Appellee was not contesting the validity of the trust but only a determination that assets not transferred into the trust or eventually withdrawn from the trust be declared to be non-trust assets.

## **XVI. WORKERS' COMPENSATION**

### **A. Abel Verson Construction v. Rivera**

[2009-CA-000771](#) 10/15/2010 2010 WL 4108551

Opinion by Judge Acree; Judge Keller concurred; Judge Lambert dissented. The Court affirmed in part and reversed in part an opinion of the Workers' Compensation Board affirming in part and remanding in part an ALJ's opinion awarding an undocumented immigrant worker benefits based on a finding of permanent partial impairment and temporary total disability. The Court held that KRS Chapter 342 was not preempted by federal immigration law to the extent Kentucky law permits benefit payments to undocumented aliens. The Court also held that the Board properly reversed and remanded the case to the ALJ for the purpose of reconsidering whether the employer should have been assessed a penalty for violations of state or federal workplace safety statutes or regulations and if so, whether such violations caused the worker's accident. The Court also held that the Board improperly reversed the ALJ's refusal to qualify the worker's witness as an expert on occupational safety regulations. The Court finally held that the Board properly affirmed the ALJ's decision with respect to the employer/employee relationship, the workers' weekly wage and his total temporary disability when the decision was based on substantial evidence.

### **B. Graham v. TSL, Ltd.**

[2010-CA-000547](#) 10/08/2010 2010 WL 3928528 N/A Filed in S. Ct.

Note that this appeal was appealed to the Kentucky Supreme Court and therefore, it is no longer a published opinion of this Court.