

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

I. ADMINISTRATIVE LAW

A. Gaines v. Kentucky Occupational Safety and Health Review Commission

[2009-CA-001794](#) 4/16/2010 2010 WL 1508195

Opinion by Judge Moore; Judge Caperton and Senior Judge Buckingham concurred. The Court affirmed an opinion and order of the circuit court dismissing as untimely appellant's declaratory judgment action and appeal from orders of the Occupational Safety and Health Review Commission. The Court first held that, pursuant to KRS 338.091, appellant's right to contest the final order dismissing his contest to a complaint filed by the Department of Labor expired 30 days after entry of the order. The Court then held that the agency retained no jurisdiction to repeal the final order or to purport to consent to allow appellant to file an answer. The Court then held that appellant's motion for reconsideration, filed after the final order was entered, could not stay the 30-day period allowed under KRS 338.901(1). Nothing in KRS 338 specifically conferred upon the Commission the power to reconsider or reopen a final order and therefore, it could not do so. Further, neither 803 KAR 50:010 § 49(1) nor KRS 338.091(2) could be interpreted to confer any authority upon the Commission to modify its final orders or extend the period of time for taking an appeal. The Court finally held the Commission did not violate appellant's due process rights as it was authorized to dismiss the case in a final order without a hearing when appellant failed to timely file an answer to the complaint.

II. CIVIL PROCEDURE

A. Doster v. Kentucky Parole Board

[2009-CA-000168](#) 4/2/2010 2010 WL 1253502

Opinion by Judge VanMeter; Judge Lambert and Senior Judge Harris concurred. The Court vacated and remanded an order of the circuit court, which *sua sponte* dismissed a petition for a writ of mandamus. The Court held that, irrespective of the merits of appellant's writ to compel the Parole Board to reconsider or review his case, the circuit court improperly *sua sponte* dismissed the writ without following the minimal due process procedures set forth in *Gall v. Scroggy*, 725 S.W.2d 867 (Ky. App. 1987).

B. Lattanzio v. Joyce

[2009-CA-000569](#) 4/2/2010 2010 WL 1253445

Opinion by Judge VanMeter; Judges Lambert and Stumbo concurred. The Court affirmed in part and reversed in part an order sanctioning a pro se claimant and ordering that he could not continue his lawsuit against appellees unless he hired an attorney. The Court first held that the trial court abused its discretion in ordering appellant to proceed with his litigation only under the supervision of an attorney.

Such an extreme remedy was not reasonable in light of the fact that no alternative sanctions were attempted prior to the order barring appellant from self-representation. All the powers of sanctioning under CR 11 and CR 37 were fully available to the trial court and the trial court was authorized under CR 41.02(1) to involuntarily dismiss the claims if the sanctions failed to engender compliance with the Rules of Civil Procedure. The Court then held that the trial court did not err in requiring appellant to pay \$350.00 in attorney fees under CR 11 for tendering filings that were not grounded in fact, not warranted under existing law or were interposed for an improper purpose. The perceived injustice in appellant's not receiving an advanced copy of a proposed order was not grounds for his improper filings and his failure to challenge the constitutionality of the particular local rule in a timely manner before the circuit court did not preserve the issue for appeal.

III. CORPORATIONS

A. **Sahni v. Hock**

[2007-CA-001785](#) 4/23/2010 2010 WL 1627972

Opinion by Judge Nickell; Chief Judge Combs concurred; Judge Taylor concurred in part and dissented in part by separate opinion. On direct appeal the Court affirmed in part, reversed in part and remanded a jury verdict in favor of appellee on her direct and shareholder's derivative claims for breach of fiduciary duty. On cross-appeal the Court reversed and remanded an award of attorney fees. The Court first held that the minority shareholder failed to make a sufficient demand for action as contemplated by KRS 271B.7-400(2) when she requested production of certain information and demanded an investigation but did not demand the commencement of legal action. However, because that the corporation refused to conduct an investigation of the allegations and the officers collectively controlled 80% of the stock, the demand requirement of the statute was excused for futility. The Court next held that the trial court did not abuse its discretion by concluding that the shareholder fairly and adequately represented the interests of the shareholders, as required by KRS 271B.7-400(1), when there were only four shareholders, two of which controlled 80% of the stock and were the named defendants in the action and the other shareholder had not participated in the proceeding and had been uninvolved in the events affecting the corporation. The Court next held that the shareholder failed to demonstrate a specific injury to outside the diminution in value of the corporate stock and that she therefore, did not sufficiently allege a direct cause of action under KRS 271B.8-300. The Court then held that the plain language of KRS 271B.7-400(4) limited the discretion of the trial court to award defendants attorney fees only if the proceeding in its entirety was commenced without reasonable cause. The fact that three claims went to the jury and two were successful, even though they were dismissed on procedural grounds on appeal, the proceeding was not wholly without merit. Therefore, the Court reversed the award of attorney fees. The Court declined to address the shareholder's argument that KRS 271B.7-400(4) was unconstitutional because the trial court did not address that claim and the party did not request any additional rulings on the issue.

IV. CRIMINAL LAW

A. Cobb v. Commonwealth

[2009-CA-000193](#) 4/30/2010 2010 WL 1728846

Opinion by Judge Wine; Judge Clayton concurred by separate opinion; Judge Taylor dissented. The Court reversed and remanded an order of the circuit court denying appellant's RCr 11.42 motion, with instruction for the circuit court to set aside the judgment of conviction. The Court held that the trial court's findings that it was unclear how many peremptory challenges were used by the Commonwealth to strike African American jurors and that there was "likely" a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), were clearly erroneous. Further, the trial court erred in applying the law, as even if a *Batson* objection was raised, which could not be conclusively shown from the incomplete record, it was not raised before the swearing of the jury and the discharge of the remainder of the panel and thus, was untimely. The Court then held that trial counsel was ineffective for failing to raise a *Batson* objection when three out of four African Americans were struck by the Commonwealth and the fourth was eliminated by a random draw, resulting in an all-white jury. The Court then held that appellant sufficiently alleged constitutional grounds for collateral attack of his judgment and sentence. The fairness of a trial and the possibility of racism being injected into the jury selection process threatened the very integrity of the system so that appellant was not required to meet the second prong of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), by showing that the racial makeup of the jury affected the verdict.

B. Commonwealth v. Rhodes

[2009-CA-000336](#) 4/2/2010 2010 WL 1253217

Opinion by Judge Lambert; Judge Stumbo and Senior Judge White concurred. On discretionary review, the Court affirmed an order of the circuit court finding that appellee's conduct did not amount to a refusal to submit to an intoxilyzer examination and reversing a district court order finding that it did. The Court held that while there was no statutory requirement appellee understand or acknowledge the reading of the implied consent warning, the language of KRS 189A.105(2)(a) was mandatory and police officers were required to read the warning to appellee even if she was unruly or belligerent.

C. King v. Commonwealth

[2009-CA-000413](#) 4/16/2010 2010 WL 1508163

Opinion by Judge Keller; Chief Judge Combs and Judge VanMeter concurred. The Court affirmed appellant's conviction entered pursuant to a conditional guilty plea wherein he reserved the right to appeal the denial of a motion to suppress evidence. The Court first declined to address appellant's argument that no exigent circumstances existed which would have justified a warrantless search and seizure. While the initial order of the trial court referred to exigent circumstances as excusing the need for a search warrant, after appellant filed a motion to reconsider, the final order did not rely on exigent circumstances as the reason for denying the

motion to suppress. The Court then held that the trial court did not err in applying the four factors in *Quintana v. Commonwealth*, 276 S.W.3d 753 (Ky. 2008), and finding that the marijuana plants seized were found outside the curtilage and that their seizure was lawful. The Court next held that the trial court did not abuse its discretion when it undertook to view appellant's property when appellant's counsel did not object and stated that he thought it would be a good idea for the court to view the property. While the Court expressed concern over the fact that the trial court did not make a record of the viewing, because appellant did not ask the court to make a record of the viewing or for a hearing regarding what was said during the viewing, the issue was not preserved for appeal.

D. *Rodgers v. Commonwealth*

[2008-CA-002287](#) 4/9/2010 2010 WL 1404475 Rehearing Pending
Opinion by Chief Judge Combs; Judges Keller and VanMeter concurred. The Court vacated and remanded for a new trial appellant's conviction of first-degree sexual abuse. The Court held that appellant's rights to due process and to a fair trial were violated when the prosecution, in its closing argument, improperly altered the requisite standard of proof by implying that a lower degree of proof should apply. The Commonwealth exceeded the limit set in *Johnson v. Commonwealth*, 184 S.W.3d 544 (Ky.2005), when it declared, "if you find yourself . . . thinking 'yeah I know the defendant did it, but I just don't think the Commonwealth proved their case,' well I submit to you that if you know he did it, then this case was proven." This urged the jury to employ a subjective, personal standard far below the requisite objective, legal level of reasonable doubt. The trial court then failed to offer a sufficient admonition to cure the error. The Court also held that appellant was not denied a fair trial when the trial court excluded evidence that the child's mother was convicted of child abuse for slapping the child because the issue was whether appellant, not the mother, abused the child. The Court also held that the trial court did not abuse its discretion in excluding most of the letters the child's mother wrote to appellant when appellant was able use of one of the letters to present his defense theory. The Court also held that the trial court did not improperly allow the Commonwealth to characterize appellant's move from Kentucky as evidence of his guilt. The jury was presented with evidence that it could weigh to decide whether appellant had fled to escape prosecution or for a variety of other possible, plausible reasons. The Court finally held that appellant's argument that he was denied due process because of inadequate notice concerning one of the Commonwealth's witnesses was moot in light of the remand for a new trial.

V. EDUCATION

A. *Carter v. Smith*

[2007-CA-001853](#) 4/2/2010 2010 WL 1253450
Opinion by Judge Nickell; Judges VanMeter and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court voiding appellant's consulting contract due to an Open Meetings Act (OMA) violation and denying appellant's motion to alter, amend or vacate the order. The Court first held that the trial court

correctly found that appellant was an independent contractor under a personal services contract (PSC), not an employee, and that the consulting contract was not a personnel matter that could be legally discussed by the school board in executive session. While the board's acceptance of appellant's voluntary resignation as school superintendent during an executive session was proper, the board violated the OMA when it negotiated the consulting contract during the closed session. An independent contractor is not an employee under the OMA and a PSC for an independent contractor is not excepted from the requirement that its negotiation occur in public view. The Court further held that appellant's resignation was voluntary and the PSC awarded to him became void upon the trial court's issuance of a restraining order preventing further payment under the PSC. The Court also held that the trial court properly denied compensation under a theory of *quantum meruit*. Appellant did not argue in his cross-claim that he was entitled to payment under the theory, he did not move for leave to amend his cross-claim under CR 15, his claim for compensation was based upon the written PSC and therefore, he could not seek relief based on an implied contract, and he received an unconscionable amount of money for the small amount of work he performed. On the cross-appeal, the Court held that the action taken by the board was voidable, not void from its inception, and therefore, the payment made prior to the entry of the trial court order enjoining the payment of future sums under the contract, were not recoverable by the board.

VI. EMPLOYMENT

A. **Brown v. Louisville Jefferson County Redevelopment Authority, Inc.**

[2008-CA-001890](#) 4/9/2010 2010 WL 1404433

Opinion by Judge Lambert; Judge Acree concurred; Judge Keller concurred in part and dissented in part by separate opinion. The Court affirmed in part, vacated in part, and remanded a summary judgment in favor of appellee and dismissing appellant's claims of promissory estoppel/detrimental reliance and fraud arising from an employment relationship between appellant and appellee. The Court ultimately held that summary judgment was premature as to the two claims. The facts, when viewed in a light most favorable to appellant, were susceptible to a conclusion that he was promised employment by appellee for a definite term (until he became eligible for retirement benefits). Further, the claims were not precluded as a matter of law. If a jury should believe appellant's testimony that appellee knowingly induced him to forgo another job opportunity by expressly agreeing to employ him for a specified time, then his failure to provide additional reciprocal consideration was not a bar to his claim.

VII. FAMILY LAW

A. **Chappell v. Chappell**

[2009-CA-000634](#) 4/16/2010 2010 WL 1508037

Opinion by Chief Judge Combs; Judges Clayton and Stumbo concurred. The Court affirmed an order of the family court concerning child custody, visitation issues and

distribution of marital property. The Court first held that, given the permissive rather than mandatory language of KRS 403.290(1) and the abundance of other evidence introduced about the children and their relationships, the family court did not abuse its discretion by determining not to conduct an in-chambers interview of the children. The Court next held that the findings of fact included in the custody decision were supported by substantial evidence and that in light of those findings, the trial court did not abuse its discretion by finding it was in the best interest of the children for their mother to be designated as the primary residential custodian. The Court finally held that the trial court did not err in its distribution of the marital property.

B. Wooldridge v. Zimmerer

[2009-CA-001786](#) 4/23/2010 2010 WL 1628764

Opinion by Judge Clayton; Judges Taylor and Thompson concurred. The Court vacated and remanded an order of the family court extending a domestic violence order (DVO) for an additional three years. Appellee filed a petition under KRS 403.750(1) for a second DVO the day before the original DVO expired but failed to file a motion under KRS 403.750(2) for an extension of the original DVO. The family court judge extended the original DVO after finding that there was insufficient evidence for the entry of a new DVO. The Court held that the family court lacked jurisdiction to extend the original DVO after its expiration.

VIII. PROPERTY

A. Citizens National Bank of Jessamine County v. Washington Mutual Bank

[2008-CA-000155](#) 4/9/2010 2010 WL 1404391

Opinion by Judge Nickell; Judge Keller and Senior Judge Lambert concurred. The court reversed an order of the circuit court accepting the report and recommendations of a master commissioner finding that the appellee bank held a valid, first and prior security interest in a manufactured home. The Court held that the trial court erred in accepting the master commissioner's incorrect findings that the foreclosure action accompanied by the filing of a notice of *lis pendens* defeated the appellant bank's assertion of a priority claim against the home based upon its later-acquired perfected security interest. Because the homeowner did not comply with the requirements of KRS 186.A.297, the manufactured home remained personal property and KRS 186A.190 provided the sole means of perfecting a security interest in property for which a certificate of title was issued. Therefore, there was no dispute that appellant perfected its lien by placing a notation of the lien on the certificate of title. The notice of *lis pendens* applied only to the real estate which was the subject of the foreclosure action, not the manufactured home located on, but not attached to, the real estate.

B. Wells Fargo Financial Kentucky, Inc. v. Thomer

[2008-CA-001837](#) 4/23/2010 2010 WL 1628065

Opinion by Senior Judge Lambert; Judge Nickell concurred; Judge Keller concurred in result only. The Court reversed and remanded a summary judgment entered in

favor of the appellees, judgment lien holders, on their claim that their lien achieved superior status to appellant's mortgage when a new promissory note and mortgage were executed. The Court held that the trial court erred in granting summary judgment in favor of the appellees and not granting summary judgment in favor of appellant. The appellees failed to show that appellant and the mortgagors intended to effectively subordinate the first lien position with respect to the mortgage. All of the evidence supported the conclusion that the original indebtedness was merely consolidated and increased by means of the later note. Further, KRS 382.520 revealed an overwhelming legislative intent to protect the interest of mortgage lenders. Although appellees could show they were prejudiced, they could not show that the extension of additional credit was not within the scope of the future advance clause of the original mortgage.

IX. UTILITIES

A. Jent v. Kentucky Utilities Company

[2008-CA-001565](#) 4/23/2010 2010 WL 1628055

Opinion by Senior Judge Buckingham; Judges Acree and Moore concurred. The Court affirmed an interlocutory judgment of the circuit court in favor of the appellee utility company on its petition to condemn the appellants' property. The Court first held the utility company was not required to exhaust the appeals process before initiating condemnation proceedings. The mere filing of an appeal did not stay the legal effectiveness of an order of the commission. Therefore, the utility company was not required to have a final non-appealable certificate of public convenience and necessity before initiating condemnation proceedings. The Court next held that appellants failed to meet their burden of establishing a lack of public necessity and that conflicts in the testimony of the respective witnesses were reserved to the finder of fact. The Court next held that because the utility company had already obtained the certificate of public convenience and necessity from the Public Service Commission, although the award was currently on appeal, there was a reasonable assurance that the construction of the power lines would proceed. Therefore, the condemnation proceedings were not premature. The Court finally held that a review of the record did not support appellants' allegations that the utility acted in bad faith in the proceedings.

X. WORKERS' COMPENSATION

A. Gardner v. Vision Mining, Inc.

[2009-CA-000874](#) 4/9/2010 2010 WL 1404661

Opinion by Senior Judge Lambert; Judge Wine concurred; Judge Keller concurred in part and dissented in part by separate opinion. The Court reversed and remanded an opinion of the Workers' Compensation Board affirming the dismissal of the appellant worker's claims after two physicians reached a consensus, pursuant to KRS 342.316(3)(b)4.f, that the worker was negative for coal workers' pneumoconiosis (CWP). The Court held that KRS 342.316, as applied to coal

workers, was unconstitutional. The Court concluded that there was no rational basis for imposing a different procedure and a higher burden on CWP claimants than on other occupational pneumoconiosis claimants. Therefore, the statute was unconstitutional insofar as it required the three-member consensus panel and imposed a higher burden of proof