

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**MARCH 1, 2018 to MARCH 31, 2018**

**I. ADMINISTRATIVE LAW**

**A. *Moore v. Corbin Board of Adjustment***

[2016-CA-001218](#) 03/09/2018 2018 WL 1219405

Opinion by Judge Johnson; Chief Judge Kramer and Judge Maze concurred.

An application for a dimensional variance was filed with the Corbin Board of Adjustment. The Board properly noticed and held a public hearing on March 17, 2016, regarding the requested variance. Appellants, who were opposed to the granting of the variance, were present and represented by counsel at the hearing. During the course of the hearing, evidence was taken on the record from all parties, but no vote was taken at the hearing before the Board adjourned the hearing. Following the hearing, the Board went into its regularly scheduled meeting, during which it voted to approve the application. The Board action was followed by a formal notice, dated March 22, 2016, mailed to all parties who attended the hearing, including appellants. While appellants received the notice on or about March 28, 2016, they did not file an appeal in the circuit court until April 21, 2016 - 35 days after “final action” by the Board. The circuit court dismissed the appeal as untimely pursuant to KRS 100.347. The Court of Appeals affirmed, holding that appellants were required to file their appeal within 30 days of the date that the Board took final action - in this case, March 17, 2016. The Court reiterated that when an appeal is granted by statute, strict compliance with its terms is required.

## II. APPEALS

### A. *Bruner v. Sullivan University System, Inc.*

[2016-CA-000834](#) 03/16/2018 2018 WL 1352138

Opinion and Order dismissing by Chief Judge Kramer; Judges Johnson and Maze concurred.

Appellant sought to appeal from a final order entered on April 29, 2016. His notice of appeal was due to be filed no later than May 31, 2016, pursuant to CR 73.02(1)(a) and CR 6.01. Appellant tendered his notice of appeal on May 31st through the Jefferson Circuit Court's electronic filing system, but he did not tender the requisite filing fee until June 8, 2016. CR 73.02(1)(b) mandates that a notice of appeal "shall not be docketed or noted as filed until such payment is made." Consequently, the Jefferson Circuit Court Clerk refused to docket appellant's notice of appeal until June 8th, which was outside the deadline for filing a notice of appeal. Because the deadline for filing a notice of appeal is jurisdictional, the appeal was dismissed.

### III. CONTRACTS

#### A. *Estate of Adams by and through Mitchell v. Trover*

[2017-CA-000301](#) 03/02/2018 2018 WL 1122314 DR Pending

Opinion by Judge Acree; Judges Clayton and J. Lambert concurred.

After Geneva Adams and appellees settled a disputed medical malpractice claim, and following the death of Adams, the circuit court entered a summary judgment, over appellant's objection, enforcing the settlement agreement. On appeal, appellant asserted a variety of arguments to set aside the agreement, but the Court of Appeals found none of them availing and, therefore, affirmed. Specifically, the Court found no evidence creating a genuine issue of material fact regarding appellant's claim of duress, which requires proof of violence or threats calculated to produce fear. The Court also determined that Adams' return of the uncashed \$50,000 settlement check months after the transaction did not alter the check's character as consideration for the agreement. Furthermore, the Court was unpersuaded by appellant's claims that Adams' low IQ, lack of education, and physical debilities were proof of her lack of capacity. Finally, the Court held that there was no genuine issue of material fact regarding whether Adams was aware of the subject matter of the settlement before, during, and after she executed the agreement.

**B. Jackson Hospital Corporation v. United Clinics of Kentucky, LLC**

[2017-CA-000558](#) 03/09/2018 2018 WL 1219401

Opinion by Judge J. Lambert; Judges Acree and Clayton concurred.

Jackson Hospital Corporation challenged the entry of summary judgment in favor of United Clinics of Kentucky, LLC related to the breach of a contract of employment for a physician to practice medicine at the hospital. The parties had entered into a practice agreement with the physician that included advanced payments and debt forgiveness in exchange for remaining in practice on a full-time basis for a specified length of time. The contract also provided for joint and several liability for United Clinics and the physician in the event of a breach for any reason. The physician stopped his practice when he was civilly and criminally charged with sexual misconduct, and United Clinics refused repayment of the advanced funds when sought by the hospital. The circuit court agreed with United Clinics that it was impossible for the physician to continue practicing and for it to perform under the agreement without violating the law. The Court of Appeals reversed, holding that summary judgment actually should have been granted in favor of the hospital. The practice agreement was legally possible to enforce when it was entered into, and the agreement mandated repayment of the advanced funds in the event of a breach for any reason. Because United Clinics agreed and took the risk to be jointly and severally liable, it owed the advanced funds pursuant to the terms of the agreement.

#### **IV. CRIMINAL LAW**

**A. Howard v. Commonwealth**

[2016-CA-001404](#) 03/16/2018 2018 WL 1352134

Opinion by Judge Thompson; Judges Maze and Taylor concurred.

Appellant appealed from an order revoking his probation. He argued that the circuit court abused its discretion when it revoked his probation without considering the mandatory criteria for probation revocation set forth in KRS 439.3106. The Court of Appeals affirmed, holding that appellant's plea agreement, in which he agreed to a revocation of his probation without a hearing in exchange for the dismissal of new charges, rendered a hearing and, consequently, findings under the statute unnecessary.

## V. EMPLOYMENT

### A. *Kentucky Retirement Systems v. Chamberlain*

[2017-CA-000175](#) 03/30/2018 2018 WL 1546708

Opinion by Judge Combs; Chief Judge Kramer and Judge Thompson concurred.

Prior to his retirement, appellee sought counsel from the Kentucky Retirement Systems (KERS) concerning his benefits and the conditions restricting any future re-employment. He also consulted with KERS prior to obtaining any post-retirement employment. After appellee was elected Jailer of Mercer County, KERS sought to void his benefits and to recoup \$176,831.70 due to an alleged overpayment of the benefits he received. The KERS Board of Trustees voided appellee's retirement benefits, but the Franklin Circuit Court reversed. The Court of Appeals agreed with the circuit court and concluded that KERS was equitably estopped from voiding appellee's retirement benefits. The Court further held that KERS and its employees owe a fiduciary duty to members of the retirement systems when educating or giving advice to them, as outlined in KRS 61.650(1)(c). Because the application of equitable estoppel was appropriate in this case, KERS was barred from voiding or seeking any repayment of retirement benefits paid to appellee.

## VI. FAMILY LAW

### A. Cobane v. Cobane

[2016-CA-001869](#) 03/23/2018 2018 WL 1440105

Opinion by Judge Maze; Chief Judge Kramer and Judge Jones concurred.

Marc Cobane (Marc) appealed from findings of fact, conclusions of law, and a decree dissolving his marriage to Laurie Cobane (Laurie). Marc argued that the circuit court erred in its classification of his non-marital interests in certain property, its valuation of his interest in a family business, and in its division of marital property. The Court of Appeals first concluded that the circuit court erred by classifying as marital the encumbered balance in Marc's Employee Transition Program (ETP) account. This debt represented unearned income that Marc would have a right to receive only after the marriage. As a result, the circuit court erred by classifying the ETP funds as marital and also by including the encumbered ETP funds in the amount of divisible marital assets and in its calculation of the equalization payment due to Laurie. The Court further held, however, that the circuit court did not clearly err in classifying and valuing Marc's other interests, and the court did not abuse its discretion in its division of marital property with respect to those assets. For example, the Court rejected Marc's argument that the circuit court erred in its classification and valuation of his interest in an LLC that operated a farm in Nicholas County. Marc claimed that he contributed the proceeds from the sale of a pre-marital farm into the purchase of the Nicholas County farm. But while Marc established his non-marital interest in his previously owned property, he failed to meet his burden of tracing those proceeds into the Nicholas County farm or the LLC. Marc also argued that the circuit court erred in valuing his interest in the LLC - specifically by failing to apply a discount relating to minority ownership. The Court of Appeals held that a minority discount may be appropriate to value Marc's interest, but the decision to apply the discount lies rested within the discretion of the circuit court based upon the facts of the particular case. Here, the assets of the LLC consisted of only the farm and its livestock, and Marc had voluntarily reduced his equal interest in the LLC. Furthermore, Marc and his father had left the farm titled in their own names until after the dissolution action was filed. Under these circumstances, the evidence did not compel the application of a minority discount. Finally, the Court rejected Marc's contentions regarding the valuation of his non-marital interests in two retirement accounts and a life insurance policy, concluding that he had failed to establish that the increases in these accounts were attributable to his non-marital contributions.

## VII. FRAUD

### A. *Gentry v. Noe*

[2017-CA-000039](#) 02/09/2018 2018 WL 794734

Opinion by Judge Maze; Chief Judge Kramer and Judge Johnson concurred.

Appellants challenged the dismissal of their fraud claim against appellee, a county clerk in Lee County. The claim arose from an incident in which appellee recorded an invalid marriage license for a woman and appellants' father, who was incapacitated and on his deathbed and who died prior to the license being recorded. The Court of Appeals affirmed. The Court held that appellant failed to allege facts which would amount to either fraud by misrepresentation or fraud by omission. First, fraud by misrepresentation would have required appellee to make a material representation to appellants, which according to the record did not occur in this case. Second, in order to prevail on the fraud by omission claim, appellants would have needed to establish that appellee had a duty to disclose the marriage license to them. Had appellee been asked to produce the marriage license, she would have had a duty to do so because it is a public record. However, appellee was never asked to do so. The Court of Appeals also agreed with the circuit court that appellee was entitled to qualified immunity for any claims against her in her individual capacity following the dismissal of the fraud claims.

## VIII. IMMUNITY

### A. *Hammond v. Little*

[2016-CA-000707](#) 02/23/2018 2018 WL 1037740 Rehearing Pending

Opinion by Judge Thompson; Judges Jones and Maze concurred.

Irma Little filed this action against Larry Hammond, in his official capacity as State Manager of the Breathitt County Schools; the Board of Education of Breathitt County; the Kentucky Board of Education; and Terry Holliday, in his official capacity as Kentucky Education Commissioner. She alleged that the provisions of KRS 161.011, applicable to classified school employees, were not complied with when there was a reduction in force and her contract was not renewed. In addition to alleging that appellants' actions violated Section 2 of the Kentucky Constitution and requesting declaratory judgment, Little also asked to be retroactively reinstated to her full contract for the 2013-2014 school year with no lost time, salary, or benefits. The circuit court granted Little summary judgment and awarded her lost wages and benefits for the 2013-2014 school year, including her out-of-pocket medical expenses and retirement contributions. The Court of Appeals reversed, holding that while Little could be awarded prospective relief, the award of back pay and retroactive benefits was precluded by immunity. The Court noted that KRS 161.011 did not expressly or by overwhelming implication waive immunity. Moreover, because Little's contract was later renewed for the 2014-2015 school year, there was no prospective relief available.



## IX. INSURANCE

### A. Andrews v. Travelers

[2016-CA-000107](#) 03/09/2018 2018 WL 1219414

Opinion by Judge Nickell; Judges Dixon and Johnson concurred.

Appellant was an injured passenger in an uninsured automobile accident. She applied for basic reparation benefits (BRB) through the Kentucky Assigned Claims Plan; her claim was assigned to Travelers. Appellant submitted medical bills exceeding \$10,000 to Travelers. However, shortly after doing so, she sent a letter to Travelers reserving the right to direct BRB payments. Appellant later filed suit against Travelers for its failure to issue BRB payments. Travelers moved for summary judgment, asserting that the BRB payments were not overdue because no direction of payment had been made pursuant to KRS 304.39-210. The circuit court agreed and entered summary judgment in favor of Travelers. The Court of Appeals affirmed, holding that the payments were not overdue under KRS 304.39-210(1) because “benefits are not overdue if a reparation obligor has not made payment to a provider of services due to the request of a secured person when the secured person is directing the payment of benefits among the different elements of loss.” Here, appellant reserved the right to direct payment, but she failed to actually direct payment after reserving this right; therefore, no BRB payments were overdue and the circuit court’s entry of summary judgment was correct.

## X. LANDLORD/TENANT

### A. *Foursome Properties, LLC v. Rite Aid of Kentucky, Inc.*

[2016-CA-000414](#) 03/23/2018 2018 WL 1439830

Opinion by Judge J. Lambert; Judges Maze and Nickell concurred.

Appellants - a commercial lessor, its individual members, and their related companies - brought a declaratory judgment action against lessee Rite Aid of Kentucky, Inc., which operated a pharmacy and retail store, concerning the application of radius restrictions in the exclusivity provision of the lease. The circuit court ultimately granted injunctive relief to Rite Aid, and the Court of Appeals affirmed. The Court held that appellants remained in privity of contract with Rite Aid, and were bound by the radius restrictions of the exclusivity provision of the lease following its assignment, where a lease section on successors and assigns stated that it was binding on the lessors “and” their respective legal representatives, heirs, successors, and assigns, and where Rite Aid did not acquiesce in the assignment. The Court further held that the radius restriction prohibiting the commercial lessor from “directly or indirectly” leasing to or otherwise permitting the operation of a pharmacy within three miles of the property on which Rite Aid operated a pharmacy, applied to bind the lessor’s members individually. The lessor was represented by counsel throughout the negotiation process of the lease, the lessor’s counsel added an exception for a related entity, and the precise wording of the exclusivity provision was discussed in negotiations.

## XI. PROPERTY

### A. *Abbott, Inc. v. Guirguis*

[2016-CA-000394](#) 03/23/2018 2018 WL 1440108

Opinion by Judge D. Lambert; Judges Combs and Johnson concurred.

Appellants challenged the entry of summary judgment in favor of appellee Samuel Guirguis. At issue was whether the circuit court properly awarded fee simple ownership of real estate formerly used as a railroad bed to Guirguis. The Court of Appeals found no error and affirmed. Abbott, Inc. and Guirguis both claimed ownership of this strip of land, which had been used as a railway line from its construction in the late 19th century until 2001. The rail line across the property was constructed in the late 1800's by the Illinois Central Gulf Railroad, and it was later conveyed to Paducah & Louisville Railroad, Inc. (P&L). After P&L abandoned its operation of the line, it executed a quitclaim deed conveying its interest in the entire stretch of railway bed to Abbott. The property at issue runs west-to-east and divides 1,066 acres of land owned by Guirguis into northern and southern portions. Guirguis sought to quiet title to the bed, which led to the subject lawsuit. In affirming, the Court agreed with the circuit court's conclusions that: 1) Illinois Central had never acquired fee simple title to the railroad bed, but instead held a prescriptive easement; 2) P&L's abandonment of the railway line constituted abandonment of any interest in the realty; 3) P&L's quitclaim deed to Abbott conveyed absolutely no interest in the property, because it lacked any interest to convey; 4) Abbott had no valid claim of adverse possession; 5) the doctrine of champerty cannot apply in this case because the possessor's interest could not ripen into title; and 6) the 2014 deed from the Russell appellees to Abbott had no effect, as the Russell appellees had no interest to convey.

## XII. TAXATION

A. *Department of Revenue, Finance and Administration Cabinet v. Revelation Energy, LLC*

[2015-CA-000930](#) 03/09/2018 2018 WL 1219418

Opinion by Judge Nickell; Judges Clayton and Jones concurred.

The Court of Appeals reversed and remanded a decision finding that appellee was entitled to a tax refund of \$1,033,728.46 pursuant to KRS 138.344(1). The circuit court determined that the tax refund statutes at issue were unconstitutional because they required a taxpayer to apply for and receive a pre-purchase refund permit, as set forth in KRS 138.345, prior to purchasing gasoline and petroleum eligible for a tax refund. In reversing, the Court held that a pre-purchase permit requirement was not unconstitutional because it was a valid procedural requirement.

### XIII. WORKERS' COMPENSATION

#### A. *D&L Mining v. Hensley*

[2016-CA-001166](#) 03/30/2018 2018 WL 1546760

Opinion by Judge Nickell; Judges Combs and Dixon concurred.

The Court of Appeals affirmed an award of permanent partial disability benefits under KRS 342.7305 and KRS 342.730. D&L Mining (D&L) argued that Hensley's hearing loss was a preexisting and active condition and submitted results of Hensley's hearing test conducted prior to his employment with D&L. That audiogram showed that Hensley's hearing loss was substantially the same before and after his employment with D&L. However, Hensley was unaware of the results of that hearing test until after he filed the instant workers' compensation claim. The Court of Appeals applied the holding in *Greg's Construction v. Keeton*, 385 S.W.3d 420 (Ky. 2012) that an employee is not required to show his last employment caused a measurable hearing loss, nor does it require a minimum period of exposure. The Court also affirmed the application of a three-times multiplier on the grounds that Hensley could no longer continue to work due to his inability to wear hearing protective devices during similar work.

**B. Napier v. Enterprise Mining Company**

[2014-CA-001473](#) 03/23/2018 2018 WL 1439998

Opinion by Judge Nickell; Chief Judge Kramer and Judge Clayton concurred.

The Court of Appeals vacated and remanded three decisions of the Workers' Compensation Board affirming the denial of permanent partial disability (PPD) income benefits based on application of the statutory 8% impairment rating threshold set forth in KRS 342.7305(2). The Court held that the statute's imposition of a higher impairment rating threshold for traumatic ear injuries than required for all other traumatic injuries under KRS 342.730(1)(b) and (c) was violative of Constitutional equal protection guarantees. In vacating, the Court held that the Supreme Court of Kentucky's decision in *Vision Mining, Inc., v. Gardner*, 364 S.W.3d 455 (Ky. 2011) was dispositive. First, the Court determined that KRS 342.7305(2) treated traumatic ear injury claimants with impairment ratings of less than 8% differently than all other traumatic injury claimants who were entitled to an award of PPD income benefits under KRS 342.730(1)(b) by qualifying for any impairment rating, as well as all other traumatic ear injury claimants who were likewise entitled to an award of PPD income benefits by meeting the challenged statute's higher impairment rating threshold. Second, the Court determined that traumatic injuries involving the ear are in all relevant and consequential respects the same as any other traumatic injury involving other organs, body parts, and systems, and all traumatic ear injuries are also essentially the same. Third, the Court determined that no rational basis or substantial and justifiable reason supported the statute's differing treatment of similarly-situated traumatically-injured claimants.

**C. Woods v. Private Investigations & Counter-Intelligence, Inc.**

[2017-CA-001240](#) 03/30/2018 2018 WL 1546283

Opinion and Order dismissing by Judge Johnson; Judges Dixon and Jones concurred.

The Court of Appeals dismissed this workers' compensation appeal on grounds that it was improperly taken. Appellant attempted to appeal directly to the Court from the decision of an Administrative Law Judge upon remand from a decision of the Workers' Compensation Board. The Court noted that it was limited to reviewing decisions of the Board pursuant to KRS 342.290 and CR 76.25(2). Consequently, appellant's attempt to bypass the Board was not permitted and dismissal was required.

