

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
MAY 2009**

I. ADMINISTRATIVE LAW

A. Alliance for Kentucky's Future, Inc. v. Environmental and Public Protection Cabinet

[2007-CA-001186](#) 10/10/2008 2008 WL 4531018

Opinion by Judge Clayton; Judge Stumbo and Senior Judge Graves concurred. The Court affirmed a decision of the circuit court upholding an administrative decision approving a Regional Facility Plan (RFP) for building a new waste water treatment plant. The Court held that substantial evidence supported the circuit court conclusion that the RFP in question met the requirements of 401 KAR 5:006. The Environmental and Public Protection Cabinet acted within its statutory power, no evidence was provided to show that any party's due process rights were violated, substantial evidence existed to support the Cabinet's decision and the correct rule of law was applied. The Court also held that the challenge to the RFP was not moot.

II. CIVIL PROCEDURE

A. Robey v. Hinnners

[2008-CA-000989](#) 05/29/2009 2009 WL 1491387

Opinion by Senior Judge Buckingham; Judge Acree concurred; Chief Judge Combs dissented by separate opinion. The Court reversed and remanded an default judgment of the circuit court in favor of a non-resident seller of a vehicle on eBay to a Kentucky resident. The Court first held that the issue of personal jurisdiction could be raised by appellant even though a default judgment was entered. Although the case involved a default judgment, appellant contested the issue of personal jurisdiction by moving the court to dismiss the complaint on that ground. In a case of first impression, the Court then held that the transaction was a random, fortuitous and attenuated contact with Kentucky and therefore appellant did not have sufficient minimum contacts with Kentucky to allow a Kentucky court to assert personal jurisdiction over him. Merely placing the vehicle for auction on eBay did not alone create personal jurisdiction, the seller accepting the Application for Kentucky Certificate of Title/Registration did not create personal jurisdiction, the buyer taking the vehicle to Kentucky and discovering the defect did not create personal jurisdiction, the language in the eBay listing referring to a 1 month/1,000 mile Service Agreement did not create jurisdiction, and there was no evidence that the seller used eBay on any occasion other than this particular sale.

III. CRIMINAL LAW

A. **Adkins v. Commonwealth**

[2008-CA-000105](#) 05/22/2009 2009 WL 1424007

Opinion by Judge Thompson; Judge Caperton and Senior Judge Graves concurred. The Court affirmed appellant's conviction and sentence for second-degree unlawful imprisonment and three counts of first-degree sexual abuse. The Court held that the trial court did not abuse its discretion in excluding evidence that the victims were subjected to abuse by another family member because the evidence was precluded by KRE 412. First, the motion describing the evidence and the purpose for which it was to offered was not filed fourteen days prior to trial, nor was it introduced by avowal. Further, the facts as alleged by appellant, even if true, did not present a viable defense, as even if another family member abused the victims, this would not exonerate appellant from his separate criminal acts.

B. **Commonwealth v. Looper**

[2008-CA-000850](#) 05/08/2009 2009 WL 1272625

Opinion by Chief Judge Combs; Judge Acree and Senior Judge Buckingham concurred. The Court affirmed an order of the circuit court declaring unconstitutional KRS 150.40, which made the importation of the animal family Cervidae into the Commonwealth a Class D felony. The Court held that the statute was void for vagueness as it did not define the term "importation" so as to put a person on notice of what behavior was prohibited. It was possible to interpret the statute to prohibit mere entry into the Commonwealth from another jurisdiction, to prohibit entry with the intent to remain, to prohibit entry for the purpose of resale or to prohibit transportation through the Commonwealth from and to other states.

C. **Hamilton-Smith v. Commonwealth**

[2007-CA-002110](#) 04/03/2009 2009 WL 874780

Opinion by Judge Clayton; Judges Acree and Keller concurred. The Court affirmed an order of the circuit court requiring appellant to register as a sex offender for a period of twenty years after he pled guilty to one count of possession of matter portraying a sexual performance by a minor in violation of KRS 531.335. The Court held that because appellant committed a criminal offense against a victim who was a minor, which included any offense involving a minor or depiction s of a minor as set forth in KRS Chapter 531, he was required to register pursuant to KRS 17.510.

D. **Harris v. Commonwealth**

[2008-CA-001342](#) 05/29/2009 2009 WL 1491399

Opinion by Judge Lambert; Judges Caperton and Keller concurred. The Court affirmed an order of the circuit court denying appellant's motion filed pursuant to RCr 11.42. The Court first held that the issues of whether counsel was ineffective for failing to preserve for appellate review appellant's claim for a speedy trial and

whether appellant was denied his constitutional rights to a fair trial by an impartial jury were raised and rejected in his direct appeal and therefore, were not properly raised in the post-conviction proceeding. The Court also held that appellant's failure to state specifically the grounds upon which his claim that counsel was ineffective for failing to impeach a prosecuting witness with prior felony conviction precluded review. The Court also held that trial counsel was not ineffective for failing to call witnesses, some of whom were convicted felons, who would have only provided cumulative testimony. The Court also held that counsel was not ineffective for failing to object to statements made by the prosecutor that the jury had an opportunity to contribute to the "Take Back the Night" movement by finding appellant guilty because there was no likelihood that the argument affected the result or prejudiced the defense. The Court declined to address appellant's argument that counsel was ineffective for failing to hold the direct appeal in abeyance while he developed a record to support his ineffective assistance of counsel claims because assistance of appellate counsel was not a cognizable issue.

E. Williams v. Commonwealth

[2008-CA-000567](#) 05/22/2009 2009 WL 1424040

Opinion by Chief Judge Combs; Judge Acree concurred; Senior Judge Buckingham concurred in part and dissented in part by separate opinion. The Court reversed appellant's conviction and sentence entered subsequent to jury verdict finding him guilty of possession of a forged instrument. The Court held that the trial court erred in denying appellant's motion for a judgment of acquittal, as the Commonwealth failed to prove both appellant's intent to defraud, deceive or injure another and that the written instrument was capable of deception, as required by KRS 516.050 and KRS 516.010. The instrument to which the charge pertained had been torn and discarded; it was one-sided, printed on ordinary, white printer paper; it had not been cut out of the sheet of paper on which it was printed; and the reverse side of the paper bore a photograph of a child's face. Further, the circumstantial evidence could have proved innocence as well as guilt and could have applied equally to appellant's roommate. In addition, the Commonwealth acknowledged that the evidence did not prove the elements of the crime beyond a reasonable doubt. The Court also held that the issue was moot as to whether the trial court should have granted a motion for judgment of acquittal upon two charges on which the jury failed to reach a verdict. The trial court accepted the blank form without declaring a mistrial. Therefore, as a matter of law appellant was effectively acquitted of the charges.

IV. EMPLOYMENT

A. Cook v. Popplewell

[2008-CA-001249](#) 05/15/2009 2009 WL 1349145

Opinion by Senior Judge Buckingham; Judge Taylor concurred; Judge Stumbo concurred by separate opinion. The Court affirmed a summary judgment of the circuit court granted to the appellee county clerk and county on appellant's claims

she had been discharged from her employment as a deputy county clerk for seeking to run against the county clerk in an upcoming election in violation of 42 U.S.C. § 1983. The Court held that although the opinion in *Carver v. Dennis*, 104 F.3d 847 (6th Cir. 1997), was not binding on the Court, based on Kentucky Supreme Court precedent, the circuit court properly granted summary judgment on appellant's First Amendment claim because there was no right to candidacy under the First Amendment. The Court further held that the circuit court did not err in determining that appellant's right to run for public office was not a constitutionally protected liberty interest under the Fourteenth Amendment's Due Process clause.

B. Karem v. The Board of Trustees of the Judicial Form Retirement System
[2007-CA-002035](#) 05/15/2009 2009 WL 1347497

Opinion by Judge Moore; Judge Dixon and Senior Judge Knopf concurred. The Court affirmed an opinion and order of the circuit court denying the appellant legislator's request for a declaratory judgment that his retirement benefits should be calculated considering his salary while he was eligible to participate in the County Employees' Retirement System (CERS) and his salary while he participated in the Kentucky Legislators' Retirement Plan (LRP). The Court held that although KRS 61.680(2)(a) contained an ambiguity, the more specific statutes governing retirement benefits for members of the General Assembly patently illustrated the intent of the General Assembly that retirement benefits under the LRP were to be calculated using a set assumed salary as a legislator.

C. Kentucky Retirement Systems v. Martin

[2007-CA-002522](#) 05/22/2009 2009 WL 1423991

Opinion by Judge Caperton; Judge Keller and Senior Judge Guidugli concurred in result only. The Court affirmed an order of the circuit court, which reversed a decision by the Kentucky Retirement Systems denying benefits to a county clerk who as supervisor/employer granted to herself various accommodations to complete her term of office. The Court first held that clerk was not required to resign in order to prove her disability. While the accommodations might have been reasonable in the beginning their continuation could be unreasonable. The Court rejected the argument that accommodations given to an elected official acting as both employer and employee were automatically reasonable, as this would usurp the responsibility of the hearing officer mandated by KRS 61.600. The Court then concluded that the delegation, on a continuing basis, of the clerk's supervisory duties, an essential function of her job, was unreasonable as a matter of law in light of KRS 61.600 and as defined under the Americans with Disabilities Act. The Court finally held that the circuit court correctly concluded that the record compelled a finding that the clerk was disabled and that the hearing officer erroneously found otherwise.

V. INSURANCE

A. **Franklin v. Safe Auto Insurance Company**

[2008-CA-000615](#) 05/01/2009 2009 WL 1160357

Opinion by Judge Wine; Judges Dixon and Keller concurred. The Court reversed and remanded a summary judgment in favor of an insurer, wherein the circuit court found that appellants were not the owners of a vehicle at the time it was involved in an accident. The Court held that the trial court erred by focusing on the fact that the record title was still in the seller's name at the time of the accident. The Court concluded that the filing of the paperwork was not a prerequisite to transfer of title between the individual seller and the individual buyer. Rather, title to the vehicle transferred upon the seller's and buyer's completion of the transfer of title and odometer statement on the certificate of title and delivery of the completed form to the buyer. The Court further held that completion of a vehicle transaction record (VTR) was not necessary because the certificate of title was issued after February 2000, and thus met the statutory requirements for conveyance under KRS 186A.215. Therefore, appellants were the owners of the vehicle for purposes of MVRA and coverage under the insurance policy. The Court also held that any other irregularities in the transaction were not material to the motion for summary judgment. The Court declined to consider the insurer's argument regarding proof of damages, as the only issue before the trial court was whether appellants were owners and the dispute over the amount and apportionment of damages was outside the scope of the appeal.

VI. PREEMPTION

A. **Housing Authority of Covington v. Turner**

[2007-CA-002562](#) 05/29/2009 2009 WL 1491330

Opinion by Judge Thompson; Judge Keller concurred; Judge Moore concurred by separate opinion. On discretionary review, the Court affirmed an order of the circuit court affirming a holding of the district court that the doctrine of preemption did not preclude the application of a tenant's right to remedy her drug-related breach of lease pursuant to KRS 383.660(1), contained within the Uniform Residential Landlord and Tenant Act (URLTA). The Court held that 42 U.S.C. § 1437d(1)(6) did not preempt KRS 383.660(1) because there was no prohibition in the federal law against affording a public housing tenant the right to remedy the breach, there was no irreconcilable conflict between the statutes, and the application of the state statute did not defeat the objectives of the federal statute. Further, the Housing Authority exercised its discretion when it gave the tenant the rights conferred by the URLTA by incorporating the Act into the lease.

VII. TORTS

A. **Bentley v. Trinity Christian Academy**

[2008-CA-000574](#) 05/29/2009 2009 WL 1491351

Opinion by Judge Dixon; Judge Moore and Senior Judge Knopf concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of the appellee private school on appellant's claims for denial of due process, breach of contract, libel and slander, and invasion of privacy related to the expulsion of a student from the school. The Court first held that the school's student handbook did not guarantee the same due process protections as provided in public schools and even if it did, because the student was informed of the allegations against her and was given the opportunity to respond and defend her actions, her due process protections were not violated. The Court then held that the school did not breach the contract by failing to follow the five-step disciplinary process or failing to document prior discipline issues in writing as the school retained the discretion to expel or suspend a student who committed a major offense, even if it was a first offense. Further, the student failed to avail herself of the required remedy of following the proper grievance procedure for appeal to the school board. The Court next held that appellant failed to present sufficient evidence of libel and slander. The headmaster's interviews with students to question them as to the details of what they had heard or observed of the alleged incidents was not slander when there was no allegation that he divulged information or opinions to the students. Further, emails from the headmaster to the school board following the student's dismissal were properly characterized as internal reporting memos and fell under the purview of a qualified privileged communication. The Court finally held that appellant failed to present sufficient evidence to support a claim for invasion of privacy. A letter sent to parents requesting permission to discuss with students their knowledge of the dismissed student did not contain any details of the dismissal and parents were specifically informed that students were not obligated to discuss the matter. The Court rejected appellant's claim that the letter gave unreasonable publicity to the student's private life and that it placed her in a false light. The complaint, which was public record, contained more detailed information than that included in the letter, the student published information on her MySpace page and the mother discussed the dismissal with a number of other parents. Therefore, neither had an expectation of privacy.

B. **Morgan v. Bird**

[2007-CA-001630](#) 05/29/2009 2009 WL 1491301

Opinion by Judge Lambert; Judges Moore and VanMeter concurred. The Court affirmed an order of the circuit court dismissing appellants' claims brought against a neighbor, a City, members of the city council and a police officer. The Court held that the trial court properly dismissed the claim for failure to state a claim for which relief could be granted, as appellants failed to show that the neighbor acted in bad faith when she reported to the police her suspicion that appellants' toddler son was drinking beer. Therefore, the neighbor was entitled to

immunity under KRS 620.030. Further, the one disagreement related to the events did not suggest a level of malice or bad intent required to prove the neighbor acted in bad faith. The Court further held that it did not matter that the neighbor reported the suspected neglect to her son, a member of a local law enforcement agency, as allowed by the statute. The Court then held that because there was no bad faith by the neighbor and the officer properly followed the guidelines outlined in the statute for reporting the claim to the Cabinet for Health and Family Services, the claims against the city and city council members for failure to properly supervise and/or train the officer were properly dismissed. The Court further held that the trial court did not err in granting summary judgment on the claim that the officer illegally searched appellants' home. The officer merely followed the Cabinet worker through the home as she conducted her investigation, appellants did not object to the officer entering their home, no property was seized and the officer's observations had no weight on the Cabinet worker's decision to place the child with a relative pending drug tests of the parents and a live-in friend. The Court finally held that appellants' claim of intentional infliction of emotional distress by the police officer was without merit.