

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

I. ARBITRATION

- A. Consultants and Builders, Inc. v. Paducah Federal Credit Union**
[2007-CA-001874](#) 09/19/2008 2008 WL 4270785
Opinion by Judge VanMeter; Judge Caperton and Senior Judge Guidugli concurred. The Court reversed and remanded an order of the circuit court granting temporary injunctive relief and restraining appellant from proceeding with arbitration related to a terminated construction agreement between appellant and appellee. The Court held that the challenges to the contract's validity on grounds of fraud and material breach were issues for consideration by the arbitrator and therefore, the trial court erred by issuing a stay of the arbitration proceedings.

II. CIVIL PROCEDURE

- A. Knight v. Hazard Coal Corporation**
[2007-CA-001712](#) 09/05/2008 2008 WL 4092838 DR filed 10/7/2008
Opinion by Judge Dixon; Judges Lambert and Stumbo concurred. The Court reversed and remanded a judgment of the circuit court in a dispute over the use of a coal haul road. The Court held that the trial court erred when it denied appellants the right to a trial by a jury. There was no dispute that appellants neither withdrew their demand for a jury trial, nor consented to a bench trial by written or oral stipulation and therefore, they did not waive their constitutional right to a jury trial on all issues. CR 38.01 and CR 38.04.

III. CRIMINAL LAW

- A. Gullett v. Commonwealth**
[2007-CA-002130](#) 09/19/2008 2008 WL 4271545
Opinion by Senior Judge Buckingham; Judges Caperton and Stumbo concurred. The Court affirmed a judgment of the circuit court concluding that when appellant pleaded guilty to criminal attempt to commit sexual abuse in the first degree, a misdemeanor, he was required to register as a sex offender. The Court held that because sexual abuse in the first degree was an offense defined in KRS 510.110, the offense was a sex crime as defined by KRS 17.500(8)(a) and thus, a criminal offense against a victim who was a minor, which required appellant to register as a sex offender under KRS 17.500(5)(a).

B. Ison v. Commonwealth

[2007-CA-001007](#) 09/26/2008 2008 WL 4367874 DR filed 10/8/2008
Opinion by Judge VanMeter; Judge Wine and Senior Judge Lambert concurred. The Court affirmed in part and reversed and remanded in part a judgment entered by the circuit court after a jury convicted appellant on multiple charges of reckless homicide, first-degree assault, first-degree wanton endangerment and criminal mischief, related to a motor vehicle accident wherein appellant lost control of his vehicle. The Court held that there was insufficient proof of the necessary mental states for the offenses of first-degree assault, first-degree wanton endangerment and reckless homicide and therefore, the trial court erred in overruling appellant's motions for directed verdict or JNOV on those charges. The Commonwealth provided no evidence to counter a toxicologist's conclusion that appellant was not under the influence or impaired by any chemical substance at the time of the collision, the toxicology report showed no alcohol or drugs in appellant's blood, the jury found appellant not guilty of DUI, and there was no evidence that appellant was speeding or driving erratically before his tires lost traction. The mere driving of a vehicle with worn tires was insufficient to satisfy the elevated wantonness element of first-degree assault and first-degree wanton endangerment as provided for in KRS 508.010(1)(b) and KRS 508.060(1). Similarly, absent some aggravating circumstance, this evidence was insufficient to support appellant's convictions for reckless homicide, as defined by KRS 60.020(4). The Court finally held that the trial court did not abuse its discretion by denying appellant's motion to sever the charges of failing to have automotive insurance and proper registration from the other charges, as those charges all stemmed from a single set of circumstances.

C. Noland v. Department of Corrections

[2007-CA-002411](#) 09/12/2008 2008 WL 4182376
Opinion by Judge Acree; Judge Dixon concurred; Judge Taylor concurred in result only. The Court affirmed an order of the circuit court dismissing appellant's petition for declaration of rights seeking to compel the Department of Corrections to credit time spent on parole against his imposed sentence after his parole was revoked. The Court held that House Bill 269 § 36(a), temporarily suspending the operation of KRS 439.344, which was meant to alleviate overcrowding of penal institutions and decrease the amount spent to incarcerate offenders, did not apply retroactively. Since appellant's parole was revoked prior to the effective date of the bill, he was ineligible for the relief provided by the Bill.

D. Rogers v. Commonwealth

[2007-CA-001579](#) 09/12/2008 2008 WL 4182272 DR filed 10/13/2008
Opinion by Judge Dixon; Chief Judge Combs and Judge Lambert concurred. The Court affirmed appellants' convictions following a joint jury trial. The Court first held that the trial court did not err by denying appellants' motion to suppress evidence found in plain view in a hotel room. The police officer's failure to disclose that he was investigating a complaint about suspicious narcotics activity

was not a ruse so unfair and unconscionable as to be coercive. The Court distinguished the facts from those in *Krause v. Commonwealth*, 2006- S.W.3d 922 (Ky. 2006). The Court then held that the trial court did not err in allowing a police narcotics detective to testify as an expert witness without holding a Daubert hearing. The record reflected that the officer was well qualified to render an opinion. Further, as one appellant was convicted of possession of cocaine rather than trafficking, she could not establish that she was prejudiced by an officer's testimony regarding drug trafficking stereotypes. The Court finally held that the failure of the trial court to issue written findings of fact following a suppression hearing was not palpable error. RCr 9.78 did not mandate written findings and, while the court's failure to make written findings hampered appellate review, the Court was able to review the hearing and concluded that the trial court adequately conveyed its factual findings.

IV. EDUCATION

A. **Sajko v. Jefferson County Board of Education**

[2007-CA-000128](#) 09/19/2008 2008 WL 4268294 Reh filed 10/9/2008
Opinion by Senior Judge Buckingham; Judges Lambert and Moore concurred. The Court affirmed an order of a tribunal that upheld a school superintendent's termination of appellant's employment. The Court concluded that the tribunal lacked jurisdiction to consider appellant's appeal when she faxed a letter to the office of the school board's general counsel after regular business hours that was not read by general counsel until the following day, which was 11 days after the termination letter had been delivered to appellant. The Court held that appellant's failure to meet the timely notice requirement of KRS 161.790(3) denied the tribunal jurisdiction to consider her defense to the charges.

V. FAMILY LAW

A. **Brausch v. Brausch**

[2007-CA-002198](#) 09/12/2008 2008 WL 4182372 Modified 9/26/2008
Opinion by Judge Thompson; Judge VanMeter and Senior Judge Henry concurred. The Court affirmed an order of the family court awarding child support to appellee. The Court held that the court did not abuse its discretion in calculating appellant's child support obligation, excluding part of the year when appellant was still in school. Including the lower amounts was contrary to the parties' agreement and did not accurately reflect appellant's earning capacity. The Court then held that the trial court did not abuse its discretion when it denied a motion to suspend child support during the four weeks in the summer when appellant had parenting time, as appellee was still required to maintain the home and incur continued expenses for the benefit of the children even during their absence. The Court finally held that the family court did not abuse its discretion in refusing to include in the child support calculation the earned income tax credit and additional child tax credit appellee received. The EIC was a means-tested public assistance program such that it was exempted from inclusion pursuant to

KRS 403.212. Although the additional child tax credit was not a means-tested public assistance program, it was properly treated as a federal tax benefit included in the dependency exemption rather than included in income for the purpose of calculating child support.

B. Castle v. Castle

[2007-CA-001238](#) 09/12/2008 2008 WL 4182049

Opinion by Judge Lambert; Judge Taylor and Senior Judge Buckingham concurred. The Court affirmed an order of the circuit court finding that appellant's cohabitation with a non-relative was inequitable and terminating appellant's maintenance. The Court held that, while the cohabitation restriction in the maintenance award may have been unenforceable absent an agreement between the parties, the circuit court made sufficient findings to warrant the termination of maintenance under KRS 403.250. The Court also held that the trial court did not abuse its discretion in denying appellant's request for attorney fees in light of the financial resources of the parties, as KRS 403.220 made the award discretionary rather than mandatory.

C. S.J.L.S. v. T.L.S.

[2006-CA-001730](#) 09/12/2008 2008 WL 4181994

Opinion by Judge Acree; Judge Lambert concurred; Judge Keller concurred in result only. The Court affirmed a family court order overruling a motion to set aside a judgment of adoption and reversed a family court order overruling a motion to set aside a joint custody order in a dispute between two female partners. The Court held that: 1) It was clear error for the trial court to find that the biological mother's partner was a stepparent. The adoption should not have been initiated pursuant to KRS 199.470(4)(a), or concluded in reliance on KRS 199.520(2). 2) It was clear error for the trial court to accept the legal fiction that the women's relationship was equivalent to a marriage in order to circumvent the termination of the biological mother's parental rights as required by KRS 199.520(2). 3) KRS 199.520(2) was not subject to waiver. 4) It was error for the family court to rely upon the doctrine of estoppel to authorize the retention of parental rights of a biological parent whose child was adopted by a non-spouse. 5) Stepparent-like adoption does not exist under Kentucky law and the trial court erred in relying upon the reasoning and interpretation of foreign law. 6) The trial court erred by allowing the adoption without the permission of the Cabinet, in contravention of KRS 199.470(4)(a) and KRS 199.510(1), as the Cabinet's position that granting the adoption would require the termination of the biological mother's rights was not arbitrary or unreasonable. 7) KRS 199.540(2) barred the biological mother's collateral attack on the judgment of adoption more than one year after the judgment of adoption was entered. Therefore, the trial court did not abuse its discretion in denying a CR 60.02 motion, even based on lack of subject matter jurisdiction. Further, there was no fraud perpetrated upon the family court, as the court was aware that the parties were the same gender, were not married, and that the Cabinet did not approve. Therefore, the exception to the time limitation did not apply. 8) The balance of competing public policies expressed

in KRS 199.520(2) and KRS 199.540(2) weighed in favor of allowing the biological mother to retain her parental rights. 9) The trial court lacked subject matter jurisdiction when it entered the joint custody order and therefore, the court erred by denying the biological mother's motion to set it aside. 10) The family court, as a court of general jurisdiction was authorized to determine custody between the parties and though utilization of KRS 403.270 was not mandated, it provided the court with guidance in determining custody.

D. T.A.N. v. M.J.

[2007-CA-002584](#) 09/26/2008 2008 WL 4368215

Opinion by Judge Lambert; Judges Stumbo and Thompson concurred. The Court affirmed an order of the circuit court denying a motion to modify visitation after awarding additional visitation to the father of the parties' child. The Court held that the trial court did not abuse its discretion in awarding visitation to the father. A custodial evaluation was not necessary, the trial court did not ignore its previous orders regarding drug screening for the father, and the court took into consideration a home study that recommended joint custody of the child.

E. Valentine v. Horan

[2007-CA-002010](#) 09/05/2008 2008 WL 4097597 Motion pending

Opinion by Judge Lambert; Judges Stumbo and Thompson concurred. The Court affirmed the entry of an emergency protective order and a domestic violence order prohibiting appellant from gathering or attempting to gather any information regarding appellee's address, employment or personal data and prohibiting appellant from coming within 1000 feet of appellee. The Court held that because appellant's trial and subsequent conviction of assault and sexual abuse arose from domestic violence against appellee, the standards of KRS 403.740 and KRS 403.750 for issuance of the protective orders were met. Given that appellant was soon to be released from prison and was inquiring about appellee after several years, there was a possibility that domestic violence may again occur and therefore, the DVO was properly entered. The Court also held that, even if appellant's assertions that he was not served with the petition and EPO were correct, the issue of notice was moot, as the EPO expired within fourteen days of its entry. Because KRS 403.750 did not have the notice and service requirement set forth in KRS 403.740, any fault with the EPO was additionally rendered moot by the entry of the DVO.

VI. INSURANCE

A. Best v. West American Insurance Company

[2007-CA-002289](#) 09/26/2008 2008 WL 4368208 Reh filed 10/16/2008

Opinion by Judge Moore; Judges Nickell and Stumbo concurred. The Court vacated and remanded a summary judgment in favor of the appellee insurer on appellant's claim alleging that the insurer had improperly denied his insurance claims for the alleged theft of vehicles and that the insurer violated the Kentucky Unfair Claims Settlement statute, KRS 304.12-230. The Court first held that the

trial court erred in granting summary judgment to the insurer, as there were issues of fact in dispute as to whether appellant fulfilled his contractual obligations to become the owner of the vehicles pursuant to a bona fide contract and as to how the person who took the vehicles obtained title. Enough evidence was presented to question whether the person who took the vehicles, claiming a superior right to ownership, could lawfully repossess the vehicles or whether appellant was the victim of a theft. The Court next held that the insurer failed to carry its burden of establishing that appellant failed to provide prompt notice of the loss so that it suffered substantial prejudice from the delay. The Court finally held that appellant's failure to include in his prehearing statement his challenge to a trial court finding that he did not have a claim for bad faith precluded review of that issue.

B. Cincinnati Insurance Company v. Hofmeister

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

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

- C. Rudolph v. Shelter Insurance Companies**
[2007-CA-000799](#) 09/05/2008 2008 WL 4091648 Reh filed 09/17/2008
Opinion by Judge Clayton; Judge Dixon and Senior Judge Graves concurred. The Court vacated and remanded a summary judgment in favor of the appellee insurer on a claim that the insurer was liable under a contract for homeowner's insurance after a fire destroyed appellants' home. The Court first held that one of the appellants, not a party to the complaint against the insurer and not a signatory to the insurance application, was properly dismissed as a party to the appeal. The Court then held that the trial court erred in granting summary judgment to the insurer. Whether appellant was aware of his false answer to a question regarding his felony conviction when he signed the application for insurance was a question of fact for a jury.
- D. Tennessee Farmers Mutual Insurance Company v. Jones**
[2007-CA-000911](#) 09/12/2008 2008 WL 4182022 DR filed 10/15/2008
Opinion by Judge Lambert; Judges Dixon and Stumbo concurred. The Court affirmed a circuit court judgment finding personal jurisdiction against the appellant Tennessee insurer and awarding attorney's fees and prejudgment interest to appellee on a claim for that the insurer violated the Kentucky Unfair Claims Settlement Practices Act, KRS 304.12-230, related to a claim for personal injuries appellee received in an automobile accident. Appellant insured the Tennessee resident who owned the vehicle driven by the person responsible for the causing collision. The Court held that the trial court did not err in finding personal jurisdiction through Kentucky's long-arm statute. The accident occurred in Kentucky; appellee, a Kentucky resident, filed her third-party claim in Kentucky; there was no privity of contract between appellee and appellant in any state; and appellant investigated and adjusted the claim in Kentucky. Further, allowing the insurer to ignore a legitimate claimant would undermine the intent of the UCSPA. The Court then held that the trial court properly awarded appellee attorney's fees and prejudgment interest under KRS 304.12-235. While the statute was ambiguous on whether interest and attorney fees were available to third-party claimants, KRS 304.12-230 evinced the intent by the legislature to allow for a more expansive reading of the statute. The Court finally held that appellee's failure to move the trial court for a new trial, precluded the Court from reviewing her argument on cross-appeal that she was entitled to a new trial on damages.

VII. PROPERTY

- A. Humbert Mortgage, Inc. Money Purchase Plan v. Redell**
[2007-CA-000948](#) 09/05/2008 2008 WL 4091662 Rel for pub 10/15/08
Opinion by Senior Judge Buckingham; Judge Stumbo concurred; Judge Caperton concurred by separate opinion. The Court affirmed an order of the circuit court approving the purchase and exercise under a right of redemption in real property purchased by appellant at public auction in a master commissioner's sale. The Court first held that the one-year time limit of KRS 426.530(1) was applicable for

exercising the right of redemption. Although the circuit court action consisted of a claim by the City to collect delinquent property taxes, the property was sold to enforce appellant's mortgage lien. Therefore, the 60-day time limit in KRS 91.511(2) was inapplicable. The Court then held that the original property owner's son had the authority to transfer the right of redemption free of the debt owed to appellant because the property owner died before the commissioner's sale and therefore, the property was owned by the son by intestate succession. When the property did not sell for two-thirds of its appraised value, the son's right of redemption arose. The Court finally held that CR 60.02(f) could not be used to set aside the sale, as there were no reasons of an extraordinary nature to justify relief under the rule.

- B. Price v. Godby**
[2007-CA-001347](#) 09/05/2008 2008 WL 4092818 Rel for pub 10/16/08
Opinion by Judge Stumbo; Judges Dixon and Nickell concurred. The Court reversed and remanded orders granting summary judgment in favor of an auctioneer of appellant's farm and the buyers of the farm at auction. The Court first held that there was a genuine issue of material fact as to whether the reservation of appellant's house from the sale was consideration for a release or whether it was merely an additional term to the underlying auction sales contract. The Court then held that the trial court erred as a matter of law in holding that appellant lost her interest in the house after failing to move it from the property in a reasonable time, that the merger doctrine negated any agreement to reserve the house from the sale, and that summary judgment should have been granted in favor of appellant. All parties agreed that appellant intended to retain her ownership of the house. After appellant and the buyers entered into a lease agreement, absent evidence that appellant abandoned the property, the buyers' only remedies were that of a landlord - to sue for damages and back rent. Further, the merger doctrine did not apply and the fact that the exemption was not referenced in the deed was a mutual mistake requiring reformation of the deed.

VIII. REAL ESTATE

- A. Eitel v. Owen**
[2007-CA-002164](#) 09/19/2008 2008 WL 4271698 DR filed 10/17/2008
Opinion by Judge Lambert; Judges Stumbo and Thompson concurred. The Court affirmed a summary judgment entered in appellee's favor on appellant's claim for a real estate fee related to the sale of appellee's apartment complex after appellee sold the complex to buyers who had rejected a counter-offer during the sale contract period. The Court held that the trial court correctly determined that the sale occurred well after the expiration of the listing agreement and extension and that appellant failed to produce affirmative evidence that appellee acted in bad faith by intentionally deferring the sale until after the listing agreement expired.

IX. WORKERS' COMPENSATION

A. R.O. Giles Enterprises, Inc. v. Mills

[2008-CA-000709](#) 09/26/2008 2008 WL 4379584

Opinion by Judge Moore; Judges Nickell and Stumbo concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming a finding by the ALJ that appellant was an up-the-ladder contractor pursuant to KRS 342.610(2)(a). The Court held that there was substantial evidence to support the finding that appellant entered into a contract for the service of removal of timber from its property for the purpose of generating revenue and to facilitate the subsequent removal of coal by strip mining. Therefore, it was subject to liability under the unambiguous terms of the statute.