PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

APRIL 1, 2016 to APRIL 30, 2016

I. ADOPTION

A. ***Belden v. Cabinet for Families and Children***

2014-CA-001177 04/15/2016 2016 WL 1534638 Released for Publication

Opinion by Judge VanMeter; Judges Combs and J. Lambert concurred. On appeal from an order denying appellant's motion to inspect his adoption records, the Court of Appeals vacated and remanded, holding that the circuit court failed to make sufficient findings of fact in support of its decision to deny appellant's motion. KRS 199.572 provides that when an adopted person's biological parents are deceased or cannot be located by the Cabinet, a judge in the circuit court may grant an adopted person's motion to inspect his or her adoption records. The Court held that although the language in the statute is permissive, absent any standards for the circuit court to follow, decisions in these cases are inherently arbitrary. Therefore, the Court held that a circuit court's decision to open adoption records under KRS 199.572 should be made only when the petitioner shows good cause to inspect. Further, the Court provided a nonexclusive list of factors the circuit court should consider in deciding whether to grant an adopted person's motion to inspect his adoption records, including consideration for the respective rights and interests of the adopted person, the adoptive family, and the biological family. The Court ultimately vacated the circuit court's order and remanded the case for a factual determination of whether appellant had shown good cause for inspection of his adoption records.

II. APPEALS

A. ***Brooks v. Byrd***

2015-CA-000464 04/15/2016 2016 WL 1534692 Released for Publication

Opinion and order dismissing by Judge Nickell; Judges Stumbo and VanMeter concurred. The biological mother of two minor girls challenged the circuit court's award of sole custody to the children's father and weekend visitation to her. After the circuit court's order was entered, appellant filed a post-judgment motion pursuant to CR 52.02. While that motion was pending, Mother filed a notice of appeal to the Court of Appeals. The circuit court subsequently granted Mother's post-judgment motion and issued a new final custody order containing findings of fact and conclusions of law. Mother appended the new order to her appellate brief - even though it was not included in the appellate record certified by the circuit court clerk - but failed to file an amended notice of appeal. The Court of Appeals held that the new custody order converted the original custody order into an interlocutory order that was not subject to appeal. Because Mother never filed an amended notice of appeal addressing the new order, the Court was deprived of a complete record to review, and the appeal was consequently dismissed due to her failure to comply with CR 73.02(1)(e)(ii).

III. CHILD SUPPORT

A. ***Neighbors v. Commonwealth***

2015-CA-001616 04/08/2016 2016 WL 1389734 Released for Publication

Opinion by Judge Nickell; Judges Clayton and D. Lambert concurred. After a dissolution of marriage, the county attorney moved for judgment of child support arrearages. The circuit court found obligor to be $23,000 in child support arrears, and ordered him to continue paying $100 in weekly child support, as well as $150 each month to reduce the arrearage. On appeal, obligor alleged he was denied due process of law and the opportunity to cross-examine an adverse witness, and that he was told he had to have counsel to present proof. The Court of Appeals reversed and remanded upon finding a total absence of proof by either party. The subject action began when the county attorney filed a written Motion for Judgment of Arrearages, which stated that the circuit court had entered an order in December 2007 requiring obligor to pay $100 in weekly child support, and that since May 2015 an arrearage of $23,000 had accrued. Accompanying the motion was an affidavit from obligor's ex-spouse stating the actual arrearage was $39,000, but that $16,000 should be forgiven. When an evidentiary hearing was convened, the county attorney mentioned the 2007 order and the amount of the alleged arrearage, but offered no evidence of any sort. When the circuit court asked obligor - who appeared without counsel - whether he disagreed with anything the county attorney had said, he stated that he needed to know what he should do because one of the two children had moved in with him the previous night. The circuit court responded that he should "talk to an attorney or file the appropriate motion." Obligor then stated, "[A]nd he lived with me for several years," to which the court again responded, "You need to talk to an attorney or file the appropriate motion." Thereafter, without receiving any proof, the circuit court found obligor had been ordered to pay $100 each week in child support since December 2007, and that an arrearage of $23,000 had accrued since May 2015. In reversing, the Court of Appeals rejected the allegation that the circuit court had required obligor to hire an attorney, holding that in response to obligor's request for legal advice, that court had merely identified two options - speak to an attorney or file the proper motion. As to the other allegations of error, the Court determined that during the evidentiary hearing, the Commonwealth had the duty to prove not only entry of a valid child support order, citing *Sallee v. Sallee*, 468 S.W.3d 356 (Ky. App. 2015), but also the amount of the child support arrearage - perhaps through a government representative or the ex-spouse - which it was then the obligor's burden to refute. The Court held that the ex-spouse's affidavit was not admissible as proof of the amount of the child support obligation. Therefore, since the Commonwealth failed to offer any proof, reversal and remand of the circuit court's order was necessary.

IV. CIVIL RIGHTS

A. ***Walker v. Commonwealth, Kentucky Educational Television***

2014-CA-000883 04/08/2016 2016 WL 1389798 DR Pending

Opinion by Judge Maze; Judges Stumbo and Taylor concurred. Appellant filed suit against his employer for employment discrimination due to race and retaliation under the Kentucky Civil Rights Act. The circuit court entered summary judgment for the employer. On appeal, the Court of Appeals affirmed. The Court first held that the "continuing violation" doctrine did not apply to permit appellant to bootstrap discrete acts of alleged race discrimination and retaliation, based on a failure to promote, that occurred outside the five-year limitations period governing such claims. The Court next held that appellant's claims were subject to analysis under the *McDonnell Douglas* burden-shifting framework, and not a "mixed motive" analysis under federal law that had not been expressly adopted in Kentucky. Applying the former test, the Court first noted that appellant was similarly situated to coworkers not in the protected class who were offered promotions, as required to make a *prima facie* case of race discrimination based on a failure to promote. However, the Court then held that the employer had met its burden of showing that the reasons for promoting appellant's coworkers over appellant were legitimate and nondiscriminatory. Appellant's countering assertion that the employer's reasons for passing him over for promotions on three separate instances were "vague" and "unsubstantiated," coupled with the deposition testimony of a former coworker that she never heard any complaints about appellant's work, without more, did not create a fact issue as to whether the reasons for the failure to promote appellant were a pretext for race discrimination. The Court further held that the evidence did not demonstrate that the employer's decision to pass over appellant for promotion on three occasions was in retaliation for appellant having filed a discrimination charge with the county human rights commission. There was no showing of a causal connection between the charge and non-promotions, and witnesses' deposition testimony that they had been told that appellant was "blackballed" due to filing the charge was inadmissible hearsay.

V. CONSTITUTIONAL LAW

A. ***Wedding v. Harmon***

2015-CA-000195 04/15/2016 2016 WL 1534682 Released for Publication

Opinion by Judge Kramer; Judges D. Lambert and Stumbo concurred. Father appealed a post-dissolution order enjoining him from copying and forwarding routine co-parenting emails to third parties and sending mass emails to the parties' friends, family, and other members of their community regarding the parties' dissolution, custody proceedings, and co-parenting process. On appeal, Father alleged the injunction violated his free speech rights. The Court of Appeals disagreed and affirmed on the basis that: (1) Father's emails were not constitutionally protected conduct but, rather, were intended to harass, annoy, or alarm Mother; (2) the injunction was narrowly drawn to proscribe Father's unprotected conduct; (3) the best interests of the children were supported by the family court's narrowly-drawn limitation on Father's speech; and (4) the injunction conformed to the modern approach adopted in *Hill v Petrotech Resources Corp.*, 325 S.W.3d 302 (Ky. 2010).

VI. CONTRACTS

A. ***White/Reach Brannon Rd., LLC v. Rite Aid of Kentucky, Inc.***

2013-CA-001899 04/29/2016 2016 WL 1719226

Opinion by Judge Clayton; Judges Kramer and Stumbo concurred. White/Reach Brannon Rd., LLC (White/Reach) and K. Stephen Reach appealed two orders granting partial summary judgment to Rite Aid, a third-party defendant, and also awarding attorneys' fees, expenses, and court costs of $102,200.36 to Rite Aid. The Court of Appeals affirmed. The case began as a foreclosure action by Town and Country Bank and Trust against White/Reach for nonpayment of three loans. The loans were personally guaranteed by K. Stephen Reach and were for the purchase and development of an 8.5-acre tract. White/Reach was to construct a Rite Aid pharmacy on part of the tract, which was to be leased to Rite Aid. Construction was initially delayed due to the economic crash in 2008. However, the banks stopped funding the project in 2010, and White/Reach was not able to construct the building. The parties then entered into a purchase agreement for Rite Aid to buy 2.37 acres from White/Reach. Rite Aid deposited the sales price of 2.46 million dollars into an escrow account. However, White/Reach did not sell the property within the time period specified in the purchase agreement. Moreover, White/Reach did not seek a release of its mortgage from the bank or advise the bank of the binding real estate purchase agreement. When the sale did not occur, Rite Aid terminated the purchase agreement. White/Reach then notified Rite Aid that it wanted to build the pharmacy. Rite Aid delivered formal notice of default of the lease, which allowed White/Reach 60 days to correct the default. White/Reach did not begin construction within the time period and Rite Aid then declared the lease to be finally terminated without any possible cure. White/Reach and Reach subsequently filed a third-party complaint in the foreclosure action against Rite Aid for breaches of the lease agreement, amendment to the lease, and a purchase agreement. White/Reach argued that Rite Aid caused the delay. Rite Aid responded that White/Reach's breach relieved Rite Aid from further performance. The circuit court agreed with Rite Aid and dismissed the complaint against it and awarded fees and costs. On appeal, White/Reach argued that the purchase agreement was not a novation of the lease but rather an executory agreement existing alongside the lease. White/Reach also argued that the building could have still been constructed; that it was not established that it acted improperly by not advising the Bank of the escrow account; that promissory estoppel did not apply; and that there were issues of material fact regarding indemnity and contribution claims. In affirming, the Court of Appeals determined that a novation had occurred, but even if it had not, White/Reach never completed construction of the building, which resulted in the breach of the lease and relieved Rite Aid of the obligation to pay rent. The Court further concluded that based on promissory estoppel,

White/Reach was estopped from denying the purchase agreement superseded the lease. The Court additionally held that any indemnity and contribution issues were properly dismissed and that the award of attorneys' fees and costs was proper.

VII. CRITICAL LAW

A. ***Caudill v. Commonwealth***

2014-CA-001095 04/22/2016 2016 WL 1612919 Rehearing Pending

Opinion by Judge J. Lambert; Judges Jones and Maze concurred. The Court of Appeals vacated appellant's conviction on three counts of first-degree wanton endangerment and remanded the case for a new trial after concluding that the jury instructions were erroneous under KRS 503.120(2). Citing to *Justice v. Commonwealth*, 608 S.W.2d 74 (Ky. 1980), appellant argued that the jury's finding that he was acting in his own self-defense precluded the convictions. The Court agreed with appellant's interpretation of *Justice*, but concluded that *Justice* was superseded by KRS 503.120(2). The Court noted that KRS 503.120(2) fundamentally changed the common law with respect to the privilege of self-defense where innocent bystanders are injured or placed in danger, and that justification is no longer grounds for acquittal where the defendant is charged with an offense involving wantonness or recklessness toward innocent persons. Accordingly, appellant remained capable of being convicted of offenses involving wantonness or recklessness toward innocent persons. Because the instructions given to the jury on this issue were erroneous, a new trial was merited.

B. ***Commonwealth v. Settles***

2012-CA-000638 04/29/2016 2016 WL 1719157

Opinion by Judge VanMeter; Judges Combs and J. Lambert concurred. Upon review of an order granting shock probation, the Court of Appeals vacated, finding that KRS 439.265(2) strictly requires a trial court to consider any motion for shock probation within 60 days of its filing and to enter a ruling within 10 days after considering the motion. Since KRS 439.265(2) is an exception to the general rule that a trial court loses jurisdiction over a case ten days after the entry of a final judgment, the Court held that a trial court does not have jurisdiction to enter an order granting or denying a motion for shock probation more than 70 days after such a motion is filed. Furthermore, the trial court's order seeking information from the defendant's incarcerating institution, entered 7 days after the trial court's hearing on the motion, was insufficient to toll the time for entering a ruling on the shock probation motion.

C. ***Djoric v. Commonwealth***

2014-CA-000268 04/15/2016 2016 WL 1534666 Released for Publication

Opinion by Judge D. Lambert; Judge Maze concurred in result and filed a separate opinion; Judge Thompson dissented. Appellant, a noncitizen with legal permanent resident status, filed a CR 60.02 motion for relief from his conviction on a guilty plea to possession of a controlled substance. Appellant was ordered to be deported from the United States because of the conviction 13 years after he entered the plea and 10 years after he completed his sentence. Appellant alleged in his motion that he did not enter a knowing, intelligent, or voluntary plea due to his lack of knowledge of its full consequences. The circuit court denied appellant's motion, and in a 2-1 decision, the Court of Appeals affirmed. In her majority opinion, Judge Lambert wrote that the circuit court did not abuse its discretion in finding appellant's nearly 13-year delay to file his motion to be unreasonable, as appellant could have learned of the immigration consequences of his guilty plea sooner. The Court further noted that the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed.2d 284 (2010), which imposes a duty on attorneys to advise noncitizen defendants of the deportation risks stemming from plea agreements, did not have retroactive application, and that a change in the law is not grounds for CR 60.02 relief except in "aggravated cases where there are strong equities." As to the latter point, the Court concluded that the circuit court acted well within its discretion in determining that appellant's immigration consequences were not of an extraordinary nature so as to justify relief. In his concurring opinion, Judge Maze agreed with the ultimate result, but disagreed with the majority opinion's initial conclusion that appellant failed to bring his CR 60.02 motion within a reasonable time.

D. *Hunt v. Commonwealth*

2014-CA-001207 04/29/2016 2016 WL 1719141

Opinion by Judge J. Lambert; Judges Combs concurred; Judge Thompson concurred in result only. Appellant was convicted of trafficking in a controlled substance in the first degree and was sentenced to a term of eight years' imprisonment. At final sentencing, the circuit court imposed court costs, fees, and restitution, and appellant challenged the imposition of these fines. The Court of Appeals affirmed in part and reversed in part. The Court first held that the circuit court did not err in ordering appellant to pay court costs and jail fees. However, the Court then agreed with appellant that the circuit court erred in requiring him to pay restitution to a non-victim, *i.e.*, the Pennyrile Narcotics Task Force, for reimbursement of money used to set up cocaine buys with appellant. The Court held that the task force was not a "victim" in the sense that the statutory scheme for restitution contemplates to be compensated for any harm it suffers.

E. *Jackson v. Commonwealth*

2013-CA-001890 04/15/2016 2016 WL 1534720 Released for Publication

Opinion by Judge J. Lambert; Judges Maze and Taylor concurred. Appellant challenged a judgment convicting him of criminal mischief, intimidating a participant in a legal proceeding, assault, and being a PFO II. The Court of Appeals affirmed the conviction, rejecting appellant's argument that the circuit court should have granted a directed verdict on the intimidation charge. Relying on *Edmonds v. Commonwealth*, 433 S.W.3d 309 (Ky. 2014), the Court held that the victim was a participant in the legal process when she attempted to call the police on a neighbor's telephone to report that she had been the victim of a crime. Although *Edmonds* was not rendered until after appellant's conviction, that holding applied to him because his conviction was not yet final. The Court also rejected appellant's argument that he had not hindered or delayed the victim's attempt to contact law enforcement; it was within the jury's fact-finding role to determine whether appellant hindered the victim's ability to communicate with police when he used physical force to remove the phone from the victim's hand and hit it against the wall.

F. ***Kennedy v. Commonwealth***

2014-CA-001911 04/15/2016 2016 WL 1534572 Released for Publication

Opinion by Judge Stumbo; Judges Combs and Dixon concurred. As a matter of first impression, the Court of Appeals held that KRS 186.170(1), which sets forth the requirements for the display of motor vehicle registration plates, applies to both permanent and temporary license plates. Therefore, the statute's requirement that rear license plates be illuminated at night was applicable to temporary tags, and thus a police officer had probable cause to stop a vehicle with an unilluminated temporary tag.

G. ***Marino v. Commonwealth***

2014-CA-001163 04/29/2016 2016 WL 1719129

Opinion by Judge Kramer; Chief Judge Acree and Judge Clayton concurred. The Court of Appeals affirmed in this direct appeal involving a conviction for first-degree rape and first-degree burglary. The Court specifically affirmed the circuit court's denial of appellant's motions to suppress, which contended that a police detective's act of obtaining appellant's saliva sample from a Styrofoam cup without a warrant was an unconstitutional search, and that the subsequent blood sample taken from appellant was "fruit of the poisonous tree." Appellant had left the cup behind in the jail library following an attempted interrogation, and the detective took it and had appellant's saliva from the cup tested to see if it matched the DNA that was obtained from the rape victim via a rape test kit. The sample matched, and this match was used by the detective to obtain a search warrant for a sample of appellant's blood to ensure that appellant was a match to the DNA from the rape test kit. The Court of Appeals held that the Styrofoam cup was abandoned by appellant and that because someone would clearly have to dispose of the cup, which had been left on a table in the jail's library, the cup was garbage. Therefore, appellant relinquished any privacy interest in this inculpatory item when he left it in a location where a third party would collect it. Consequently, appellant retained no Fourth Amendment protection concerning the cup. The Court further held that because appellant acknowledged that the affidavit for the search warrant to obtain his blood sample was based solely on the results from the test of the saliva in the cup, he did not show that the search warrant was invalid or that the blood test results were "fruit of the poisonous tree."

H. ***Purdom v. Commonwealth***

2014-CA-002079 04/22/2016 2016 WL 2586080 DR Pending

Opinion by Judge Nickell; Judge Dixon concurred; Judge VanMeter dissented and filed a separate opinion. The Court of Appeals reversed appellant's convictions for distribution and possession of matter portraying a sexual performance by a minor. The Court held that the circuit court erred in allowing sexually explicit videos of the acts to be admitted into evidence because the circuit court failed to: (1) view the videos beforehand; (2) conduct the "probative value vs. undue prejudice" balancing test required by case law and KRE 403; and (3) make appropriate findings of fact before allowing the videos to be shown to the jury.

I. ***Yaden v. Commonwealth***

2014-CA-001951 04/29/2016 2016 WL 1719131 DR Pending

Opinion by Judge J. Lambert; Judge Maze concurred; Judge Taylor concurred in result only. The Court of Appeals affirmed a judgment convicting appellant of second-degree wanton endangerment and second-degree criminal mischief. Citing *Hager v. Commonwealth*, 41 S.W.3d 828 (Ky. 2001), appellant argued that the circuit court erred in instructing the jury on "mistaken belief in the need to act in self-defense," asserting that if the jury found he had acted recklessly in his mistaken belief that he needed to use deadly force to protect himself, the court should have instructed the jury to return a verdict of not guilty because a person cannot be recklessly wanton. The Court affirmed on this issue under the harmless error rule, reasoning that the jury did not convict appellant under the instruction containing this language, but convicted him under a separate instruction. The Court also affirmed the circuit court's decision to permit an insurance adjuster to testify about the damage to a vehicle as an expert. Although the Commonwealth did not properly identify the adjuster as an expert or notify appellant that he was being called to testify, it was within the circuit court's discretion to permit him to testify.

VIII. CUSTODY

A. ***Chadwick v. Flora***

2015-CA-001377 04/29/2016 2016 WL 1719278

Opinion by Judge Clayton; Judges Kramer and J. Lambert concurred. A grandmother sought custody and/or visitation of her three-year-old grandson. Grandmother also sought to hold the child's father in contempt for violating agreed visitation terms. The circuit court denied grandmother's petition, finding she was not a *de facto* custodian. The circuit court also denied the contempt motion, finding the father was not at fault for denying visitation, as the child was visibly upset at the thought of going to see grandmother, and the child's counselor testified to ongoing investigations into potential abuse of the child by grandmother and mother. On appeal, the Court of Appeals affirmed in part, and reversed and remanded in part. The Court first concluded that grandmother had standing to bring the petition, as she was a "person acting as a parent" under KRS 403.800(13)(a), having had physical custody of the child for at least six of the 12 months immediately preceding the petition's filing. The Court next held that grandmother was not a *de facto* custodian, as she co-parented the child with the child's mother. The Court also found no error with the denial of contempt and the admission of the child's counselor's testimony, as the latter was solely introduced for the contempt issue, not for the *de facto* custodian issue. Finally, the Court reversed and remanded the order inasmuch as it denied grandmother's petition for custody and visitation *in toto*. Grandmother was a "person acting as a parent" and a non-*de-facto* custodian could still establish facts that would entitle her to custody and/or visitation.

B. *Evans v. Hess*

2013-CA-002072 04/08/2016 2016 WL 1389799 Rehearing Pending

Opinion by Judge D. Lambert; Judges Combs and Dixon concurred. The Court of Appeals affirmed in part and reversed in part in three consolidated child custody appeals. Of note, the Court held that the circuit court had subject-matter jurisdiction over Mother's petition to register a foreign divorce, custody, and child support order originating in Montana, even if the petition contained language seeking modification of the terms of the foreign order, and even if a Montana court had not determined that a Kentucky court was a more convenient forum before the petition was filed. The Court noted that it had previously addressed the issue of whether the circuit court had subject-matter jurisdiction when considering Father's petition for a writ of prohibition. Thus, the resulting ruling became binding on both the circuit court and the Court of Appeals pursuant to the "law of the case" doctrine. The Court further held, as a matter of apparent first impression, that when a guardian *ad litem* is appointed in a child custody proceeding, it is the guardian *ad litem*, not the parent, who may invoke or waive the child's psychotherapist-patient privilege under KRE 507(b).

IX. EMPLOYMENT

A. ***Starr v. Louisville Graphite, Inc.***

2014-CA-000620 04/22/2016 2016 WL 1612940 DR Pending

Opinion by Judge Thompson; Judges Dixon and D. Lambert concurred. Appellant appealed from a summary judgment entered in favor of his former employer on his age discrimination claim under the Kentucky Civil Rights Act (KCRA), an order denying liquidated damages under the Kentucky Wages and Hours Act, and an award of attorneys' fees in an amount substantially less than requested. The Court of Appeals affirmed the summary judgment on the KCRA claim and the denial of liquidated damages, but reversed and remanded for reconsideration of the attorneys' fees awarded. The Court affirmed the summary judgment on the KCRA claim because Louisville Graphite lacked sufficient employees to be covered under the Act. The Court held that there was no material issue of fact regarding whether Louisville Graphite and a separate employer could be treated as a single employer to meet the statute's numerosity requirement. There was no evidence that the companies had any role in the day-to-day operations, finances, or personnel matters of the other company. The Court also affirmed the denial of liquidated damages under the Wages and Hours Act upon concluding that Louisville Graphite met its burden of demonstrating it acted in good faith and reasonably. The Court pointed out that any minor violations of the Act were the result of the company owner's attempts to assist a long-term employee financially. The Court held it would not further the purposes of the Act to impose such damages where the employer acted in good faith and not with the intent to disadvantage the employee. Finally, the Court reversed and remanded on the issue of attorneys' fees awarded pursuant to the Wages and Hours Act; the Court concluded that the circuit court erred when it did not first reach a lodestar figure by finding the reasonable hours spent on that claim and then multiplying that figure by a reasonable hourly rate. The Court also held that the amount awarded should not be reduced because of the employer's good faith pointing out that the purpose of the fee award is to provide access to the courts.

X. ESTATES

A. ***Gilbert v. Hoover***

2014-CA-001304 04/15/2016 2016 WL 1534588 Released for Publication

Opinion by Judge Combs; Judges D. Lambert and VanMeter concurred. Girlfriend filed a complaint against the executor of Boyfriend's estate for the reasonable value of Girlfriend's services to Boyfriend. The circuit court granted partial summary judgment for the executor, and the Court of Appeals affirmed that decision. Girlfriend had taken care of the decedent for a number of years before his death. She testified that she performed the services out of love and affection and that the decedent never promised to pay her for her assistance. The Court concluded that under these circumstances, it must be presumed that Girlfriend's services were performed gratuitously. Although the decedent allegedly verbally promised Girlfriend that he would make sure she was taken care of, such a statement did not amount to an agreement to compensate her for her services. In the absence of a writing or any other expression of the decedent's intent to pay Girlfriend for her services, the estate was entitled to deny her claim. Therefore, the Court upheld entry of summary judgment in favor of the estate.

XI. IMMUNITY

A. ***University of Louisville v. Rothstein***

2014-CA-000997 04/01/2016 2016 WL 1267992 DR Pending

Opinion by Judge Nickell; Chief Judge Acree and Judge Jones concurred. The University of Louisville challenged the Franklin Circuit Court's denial of its motion for summary judgment. U of L had asserted it was entitled to sovereign immunity on appellee's claims relating to an alleged breach of his written employment contract. The circuit court concluded immunity had been waived under the Kentucky Model Procurement Code (KMPC), KRS 45A.005 *et seq*. On appeal, U of L asserted the waiver of sovereign immunity contained in KRS 45A.245 did not apply to employment contracts. The Court disagreed, concluding the statute waived the defense of sovereign immunity in all written contract actions against the Commonwealth - including those subject to the KMPC. Because U of L is a state agency and the employment contract between U of L and appellee was written, the Court determined the waiver provisions of KRS 45A.245 were applicable. Thus, it was held, the circuit court correctly determined appellee's action was not barred by the defense of sovereign immunity, and the denial of summary judgment was affirmed.

XII. JUVENILES

A. ***J. L. C. v. Commonwealth***

2015-CA-000320 04/01/2016 2016 WL 1268013 Released for Publication

Opinion by Judge Kramer; Judges D. Lambert and Stumbo concurred. The Court of Appeals vacated the family court's final dispositions in these juvenile cases, wherein the family court found the juveniles to be habitual truants. The Court of Appeals reasoned that the family court did not have subject matter jurisdiction over the three juveniles' cases because the information that the Director of Pupil Personnel provided on the Affidavit and Truancy Evaluation Form for each juvenile was incomplete and inadequate. Due to the fact that the information was incomplete, the Court held that school officials failed to satisfy the requirements set forth in KRS 159.140(1), which was required of them before filing their complaints in court, as stated in *S. B. v. Commonwealth*, 396 S.W.3d 928 (Ky. App. 2013).

XIII. MUNICIPAL CORPORATIONS

A. ***Sewell-Scheuermann for Use and Benefit of City of Audobon Park v. Scalise***

2014-CA-000915 04/15/2016 2016 WL 1534636 DR Pending

Opinion by Judge Jones; Judges Dixon and Thompson concurred. Appellant filed an action against the mayor of the City of Audubon Park and members of the city council, alleging that they had diverted a portion of the tax revenue generated from a sanitation tax and had placed such funds in the city's general fund for non-sanitation use. Appellant charged that the mayor and the city council members who voted to allow the expenditure of the sanitation tax revenue on unrelated items were in violation of Section 180 of the Kentucky Constitution, KRS 92.330, and KRS 92.340, and demanded judgment for the alleged unauthorized expenditures. The circuit court dismissed appellant's claims, finding that because the diverted funds were applied to the legal obligations of the city, the city was not actually harmed. The Court of Appeals reversed the decision of the circuit court, holding that the city was damaged under the plain meaning of KRS 92.340 and that the remedy for the violation is found within the statute and required appellees to repay the city. The Court explained that cities must state the purposes for their taxes in their levying ordinances and prohibit revenue generated under the levying ordinances from being used for any purposes other than those set forth in the ordinances. *See* KRS 92.330. Further, under KRS 92.340, the members of the city legislative body that vote to use any city tax revenue "for a purpose other than that for which the tax was levied or the license fee imposed . . . shall be jointly and severally liable to the city for the amount so expended." Finding no indication that the General Assembly intended to exempt liability if the officials use the funds on other city-related liabilities, the Court held that the plain language of the statute suggests that any use of the funds for a purpose other than the purpose specified in the ordinance is prohibited and results in liability. Because a tax that has been collected under a valid ordinance cannot be refunded, the only recourse available is to require those who participated in this conduct to refund the money to the city so that it can be used in the future for the purpose for which it was collected.

XIV. NEGLIGENCE

A. ***Johnson v. Norfolk Southern Railway Company***

2014-CA-001298 04/15/2016 2016 WL 1534275 DR Pending

Opinion by Judge Dixon; Judges Combs and D. Lambert concurred. In a premises liability action brought by a police officer against a railway company, the Court of Appeals reversed a directed verdict in favor of the railway company entered on the grounds that the Firefighter's Rule barred the officer's recovery as a matter of law. Under the Firefighter's Rule, firefighters and public protection agents such as police officers are required to assume the ordinary risks of their employment, a dangerous occupation, to the extent necessary to serve their public purpose; the Rule operates as a defense for those who are the owners or occupiers of the property the agents are employed to protect. *Sallee v. GTE South, Inc.*, 839 S.W.2d 277 (Ky. 1992), sets forth three prongs necessary to the application of the Firefighter's Rule as adopted in Kentucky: (1) the purpose of the policy is to encourage owners and occupiers, and others similarly situated, in a situation where it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk; (2) the policy bars public employees (firefighters, police officers, and the like) who, as an incident of their occupation, come to a given location to engage a specific risk; and (3) the policy extends only to that risk. The Court concluded that in this case appellee did not fit within the first prong of the Rule. Appellant had responded to a call about an individual acting in a disorderly manner at the end of a street adjacent to Centre College. After the individual fled the scene, appellant and another officer chased him on foot across a field and through a tree line located on appellee's property. At the end of the pursuit, appellant fell to the bottom of a steep embankment located on the other side of the tree line, suffering injuries to her wrist and eye. The Court noted that there was no evidence that appellee had placed the call regarding the suspect or was even aware of the incident, the company did not create the risk that necessitated or caused appellant's presence on the property, and appellant was injured by a risk different in both kind and character than the one she was called upon to engage. Ultimately, appellant's entering onto the property and subsequently falling down the embankment was the result of wholly independent factors not involving appellee. Although appellant assumed all of the risks inherent with being a police officer, she "was not injured by the risk [s]he was called upon to engage, but by a risk different in both kind and character." *Sallee*, 839 S.W.2d at 279. Accordingly, on remand determination of appellee's liability for appellant's injuries would depend not upon the Firefighter's Rule, but rather upon those considerations which generally govern the relationship between possessors of real property and those who are injured on it.

XV. PROPERTY

A. ***Polis v. Unknown Heirs of Jessie C. Blair***

2014-CA-000306 04/15/2016 2016 WL 1534651 Released for Publication

Opinion by Judge Nickell; Judges Combs and Taylor concurred. The heir of the original owner of certain disputed property filed an action seeking a judicial sale of the property. The circuit court granted default judgment in favor of the heir, but subsequently granted a motion to intervene filed by a party who claimed to have purchased the disputed property at a Master Commissioner's sale. The Court of Appeals affirmed, first holding that the circuit court acted within its discretion in allowing the alleged purchaser of the subject property to intervene and in abating its earlier default judgment and order of sale pending further proceedings. Although the circuit court had already entered default judgment in favor of the heir; the heir was aware that the alleged purchaser claimed an interest in the disputed property but failed to notify her of the pending proceedings until after default judgment had been rendered. Upon learning of the existence of the action, the alleged purchaser moved to intervene within a very brief time period; moreover, the parties' claims of ownership had common questions of fact and law. The Court further held that an earlier deed from the original owner to a successor-in-interest included the disputed tracts. Thus, the purchaser of the successor's property was the owner of the tracts rather than the heir of the original property owner.

XVI. UCC

A. ***Airrich, LLC v. Fortener Aviation, Inc.***

2013-CA-001985 04/29/2016 2016 WL 1719313

Opinion by Judge VanMeter; Judges Combs and Nickell concurred. Upon review of a summary judgment order, the Court of Appeals affirmed, holding that under KRS 355.3-311(2), an airplane owner's check to the company storing the airplane with notations in the memo line expressing that the check was for hangar rent did not amount to a "conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim," and, therefore, the hangar company's claim for storage fees was not barred. Absent a clear statement that a check is intended to be in full satisfaction or payment of the claim, acceptance of the payment does not foreclose a claim for payment. Additionally, since no prior contract or agreement existed between the parties, the Court held that the hangar company was not owed hangar rent for the months it stored the airplane prior to its first demand for a monthly storage fee.

XVII. WORKERS' COMPENSATION

A. ***Finke v. Comair, Inc.***

2014-CA-000624 04/29/2016 2016 WL 1719311

Opinion by Judge Jones; Chief Judge Acree and Judge J. Lambert concurred. Appellant challenged the determination of the Workers' Compensation Board that she did not have an unfettered right to have her father present during an Independent Medical Examination, and that the Administrative Law Judge did not abuse his discretion in determining that appellant failed to present a "compelling reason" why she could not submit to the examination without her father present. The Board also upheld the ALJ's decision that appellant was not entitled to receive any benefits during the time of her noncompliance. The Court of Appeals affirmed, holding that upon request an ALJ has discretion to order deviations in IME protocol so long as the examinee demonstrates a "good cause" basis for the requested deviation. However, vague allegations of "general discomfort," as offered here, are insufficient to show good cause. If the examinee has privacy concerns, she may request an *ex parte* communication with the ALJ or leave to file her concerns under seal. Finally, the Court held that benefits properly suspended under KRS 342.205(3) cannot be retroactively restored.