

**PUBLISHED OPINION CASE SUMMARIES  
KENTUCKY COURT OF APPEALS  
AUGUST 2009**

**I. ADMINISTRATIVE LAW**

**A. Commonwealth, Cabinet for Health and Family Services v. Gambrel's Food Mart, Inc.**

[2008-CA-001243](#) 8/28/09 2009 WL 2633576

Opinion by Judge Stumbo; Chief Judge Combs and Senior Judge Buckingham concurred. The Court affirmed a judgment of the circuit court holding that appellee should not be disqualified from participating as a vendor in Kentucky's Women, Infants and Children (WIC) program. The Court first held that 902 KAR 4:040 Section 11(1)(b) and the federal WIC regulation, specifically 7 C.F.R. § 246.18(a)(1)(ii)(G) (2009), gave the vendor a right to an administrative hearing. The Court then held that the circuit court had jurisdiction over the matter. While the state regulation did not mention appeal to a court, because appellant was appealing not only its disqualification but also arguing the Cabinet was acting arbitrarily and in violation of the Kentucky and U.S. Constitutions, judicial review was proper. The Court then held that by allowing appellant a hearing but then not allowing review of the determination that there would be inadequate participant access if appellant were disqualified, the Cabinet acted arbitrarily. The Court ultimately held that the hearing officer relied upon substantial evidence in determining that there would be inadequate participant access if appellant were disqualified and therefore, the circuit court properly upheld that finding.

**II. ARBITRATION**

**A. Jacob v. Dripchak**

[2008-CA-001157](#) 8/21/09 2009 WL 2569128

Opinion by Judge Taylor; Chief Judge Combs and Judge Nickell concurred. The Court affirmed in part, and reversed and remanded in part, a judgment of the circuit court confirming an arbitration award in favor of appellee on claims related to an employment contract. The Court first held that the trial court did not err in failing to set aside the arbitration award as a result of improper demand or notice by appellee. While the demand did not set forth a detailed claim for damages, it put appellant on notice that appellee intended to arbitrate claims arising under a 2003 employment agreement. The Court then held that the trial court erred in confirming the award based upon a 1997 employment agreement and the renewals thereof. The arbitrator lacked jurisdiction to consider the claims as they related to the earlier agreements when the 2003 agreement clearly and plainly superseded and terminated the earlier agreements, which did not contain an arbitration clause.

### III. CONTRACTS

**A. New Life Cleaners v. Tuttle**

[2007-CA-001948](#) 8/7/09 2009 WL 2408337

Opinion by Judge Nickell; Judge Clayton concurred; Judge VanMeter dissented. The Court reversed and remanded a judgment of the circuit court in favor of an employee in a dispute over a contract containing a covenant not to compete. The Court held that the trial court erred in relying upon parol evidence to modify the express terms of the written covenant.

**B. Ramsey v. Lambert**

[2008-CA-000862](#) 8/7/09 2009 WL 2408413

Opinion by Judge Lambert; Judge Acree and Senior Judge Harris concurred. The Court affirmed a jury verdict awarding fees to appellees under an oral contract to provide services advising of potential thoroughbred horse racing prospects. The Court reversed a judgment in favor of the horse owner awarding reimbursement of veterinary fees based on a finding that appellee was not a licensed veterinarian in the State of Kentucky. The Court first held that the trial court erred in concluding that the heart scanning performed by appellee in order to identify racing prospects constituted the practice of veterinary medicine under Kentucky law. The heart scans were in no way utilized to diagnose or treat any of the horses, nor did anyone rely on such diagnosis or results thereof for treatment. Therefore, appellee did not practice veterinary medicine under the terms of KRS 321.181(5)(a). The Court further held that the trial court erred in finding that appellee was engaged in the unlawful practice of veterinary medicine in the State of Florida because Florida law required the prescribing, dispensing or administering drugs, none of which appellee did. The Court rejected appellants' argument that the contract was illegal because the argument was moot based on the holding that heart scanning was not the unlicensed practice of veterinary medicine and even so, the heart scans were not the object and purpose of the contract but rather the identification of racing prospects. Thus, the Court held that the trial court made no error in submitting the contract claims to the jury. The Court finally held that 1) the trial court did not abuse its discretion in excluding documents under KRE 401, which did not in any way pertain to the oral agreement and thus, were irrelevant; 2) the trial court did not abuse its discretion in ruling that appellee did not open the door for admission of the documents; 3) the trial court did not abuse its discretion in allowing the jury to hear how much money appellant made from owning the horse in question, as this was directly relevant to bonuses due under the parties' contract; 4) that the trial court did not abuse its discretion in failing to admonish the jury regarding closing argument which merely urged the jury to decide the case fairly; and 5) that the trial court did not err in holding that the discovery rule was inapplicable to a cause of action involving a violation of KRS 321.190.

#### IV. CRIMINAL LAW

**A. Fuston v. Commonwealth**

[2008-CA-000819](#) 8/21/09 2009 WL 2569069

Opinion by Judge Wine; Judges Nickell and Stumbo concurred. The Court reversed and remanded an order of the circuit court denying appellant post-conviction relief under RCr 11.42 from his conviction for first-degree manslaughter. The Court held that the trial court clearly erred in finding that appellant did not qualify for the domestic violence exemption to the violent offender statute found in KRS 439.3401(5). There was substantial evidence in the record that appellant's sister and the victim were members of an unmarried couple as defined in KRS 403.720(2), the physical injuries the victim inflicted upon appellant's sister qualified as domestic violence, and there was a connection between the domestic violence and the events that led up to appellant shooting the victim.

**B. Hamilton v. Commonwealth**

[2008-CA-000300](#) 8/14/09 2009 WL 2475291

Opinion by Judge Moore; Judge Wine and Senior Judge Henry concurred. The Court reversed and remanded a jury verdict and judgment of the circuit court finding appellant guilty of wanton assault in the first degree and sentencing him to eleven years' imprisonment following the injury of his infant son. The Court held that the trial court erred in permitting expert testimony regarding Shaken Baby Syndrome (SBS) without holding a Daubert hearing to assess the reliability of SBS. At the time of the trial court's decision to deny appellant a Daubert hearing, the record contained few of the factors indicative of a complete record that would excuse the necessity of such a hearing. The Court further held that the trial court erred by taking judicial notice of SBS and shifting the burden to prove its unreliability onto appellant. The Court then held that the error was not harmless because the Commonwealth relied exclusively upon the SBS testimony without any other piece of direct evidence. Therefore, there was more than a substantial possibility that the verdict might have been different without the testimony. The Court also held that the trial court did not err by failing to give instructions on second or third-degree abuse, as they were not lesser-included offenses of the crime for which appellant was indicted. However, the trial court did err in giving an instruction on second-degree assault as a lesser-included offense.

**C. Howell v. Commonwealth**

[2008-CA-000270](#) 8/28/09 2009 WL 2633241

Opinion by Judge Moore; Judge Wine and Senior Judge Henry concurred. The Court reversed a jury verdict and judgment of the circuit court convicting appellant for assault in the second degree. Reviewing under RCr 10.26 for palpable error, the Court held that under the circumstances of the case, because appellant was not indicted for second-degree assault under KRS 508.020 but only for first-degree robbery under KRS 515.020(1)(a), the trial court erred in giving an instruction for second-degree assault as a lesser included offense of first-degree robbery. The Court further held that this was not a harmless variance between the indictment and

the instructions. The indictment relied upon injury to the victim, not the possession of a deadly weapon, as the element which elevated the crime to robbery in the first degree and the instructions required proof of the elements listed in KRS 515.020(1)(a), which were not the same elements necessary for a conviction under KRS 508.020(1)(b). Therefore, the error was not harmless as it resulted in an impermissible amendment of the indictment resulting in an erroneous conviction of an offense not charged in the indictment. But for the erroneous instruction a different result was probable resulting in a manifest injustice.

**D. Johnson v. Commonwealth**

[2008-CA-001093](#) 8/21/09 2009 WL 2569119

Opinion by Judge Caperton; Judge Thompson concurred; Senior Judge Graves dissented by separate opinion. The Court vacated and remanded an order of the circuit court revoking appellant's conditional discharge for the offense of flagrant non-support, probated on condition that appellant pay current child support and make payments on arrearages. The Court held that appellant should have been given the opportunity to present evidence arising post-plea of his inability to make the required payments.

**E. Lawson v. Commonwealth**

[2004-CA-000553](#) 8/21/09 2009 WL 2568896

Opinion by Judge Clayton; Judges Moore and Stumbo concurred. The Court affirmed in part, and reversed in part and remanded, an order of the circuit court denying appellant's motion filed pursuant to RCr 11.42. The Court held that the trial court erred in failing to hold an evidentiary hearing on appellant's claims that trial counsel was ineffective for failing to ask the trial court for the correct number of preemptory challenges and failing to make a contemporaneous objection. The Court also held that appellant's other arguments related to counsel's effectiveness were either addressed and rejected on direct appeal or appellant failed to show that the outcome of the trial would have been different so that appellant was not entitled to an evidentiary hearing on those issues.

**F. Oller v. Commonwealth**

[2008-CA-000977](#) 8/21/09 2009 WL 2569080

Opinion by Senior Judge Harris; Judges Moore and Nickell concurred. The Court affirmed an order of the circuit court denying appellant's motion for post-conviction relief filed pursuant to CR 60.02. The Court held that the judge succeeding the recusing judge was authorized to hear the motion, even though the procedures for appointment of a special judge, as set forth in KRS 26A.020, were not followed and the judge acting in the case after the recusal and prior to the succession was not proper. The Court further held that appellant waived the issue of whether the succeeding judge had authority to consider the motion, as he failed to raise the issue in the trial court. The Court finally held that appellant's sixteen-year delay in bringing the motion was unreasonable and therefore, the trial court did not abuse its discretion in denying the motion.

## V. EDUCATION

### A. **Hicks v. Magoffin County Board of Education**

[2008-CA-001025](#) 8/21/09 2009 WL 2569107

Opinion by Judge VanMeter; Chief Judge Combs and Senior Judge Lambert concurred. The Court affirmed a summary judgment of the circuit court in favor of the appellee board of education on appellant's claim that the board failed to hire him. The Court held that appellant failed to meet his burden of providing affirmative evidence to show that he was a qualified teacher to support his claim that the board violated KRS 161.100 by rejecting him as a candidate for a teaching position awarded to an emergency certified teacher.

## VI. EMPLOYMENT

### A. **Thornton v. Office of the Fayette County Attorney**

[2008-CA-000740](#) 8/14/09 2009 WL 2475329

Opinion by Judge Clayton; Chief Judge Combs and Judge Nickell concurred. The court affirmed a summary judgment in favor of appellees on appellant's claim for retaliation under the Kentucky Whistleblower Act, KRS 61.102 and KRS 61.103. The Court held that the trial court properly found that appellant did not make a "good faith" report under KRS 61.102. Although hearsay did not necessarily obviate good faith, because appellant worked primarily out of the office and made no attempt to corroborate or discover firsthand information about the suspected activities, she failed to establish that her report was made in good faith. The Court also held that summary judgment was proper because appellant failed to provide specific facts to call into question the alleged motive for her termination in light of the employer's deposition stating lack of knowledge of the reporting. The Court finally held that appellant's actions did not support, aid or substantiate another person reporting the activity as contemplated under KRS 61.102(2) because she had no personal knowledge or information about the allegations.

### B. **Welsh v. Phoenix Transportation Services, LLC**

[2007-CA-001231](#) 8/14/09 2009 WL 2475206

Opinion by Judge Nickell; Senior Judge Rosenblum concurred; Judge Thompson concurred in result only. The Court affirmed a summary judgment of the circuit court in favor of the appellee employer on appellant's claims of wrongful discharge in violation of public policy and tortious interference with employment. The Court held that an employee claiming wrongful discharge due to a refusal to violate the law must show an affirmative request by the employer to violate the law. Therefore, the trial court properly granted summary judgment to the employer for appellant's failure to establish the necessary nexus between her firing and her belief that she was asked to engage in fraud or a tax evasion scheme.

## VII. FAMILY LAW

### A. **P.C.C. v. C.M.C.**

[2009-CA-000189](#) 8/21/09 2009 WL 2569222

Opinion by Chief Judge Combs; Judge VanMeter and Senior Judge Lambert concurred. The Court vacated a judgment of adoption that effectively terminated appellant's parental rights and allowed his son's stepfather to adopt him. The Court held that the evidence before the trial court did not establish clearly and convincingly that appellant willfully abandoned his son as required by KRS 199.502 to allow for adoption without the consent of the biological living parent. The evidence showed that appellant cared deeply about his son and that he intended to build a loving relationship with him but was consistently frustrated and prevented from doing so by the child's mother and stepfather. Therefore, the trial court erred as a matter of law by holding that appellant had abandoned his son.

### B. **Wilder v. Wilder**

[2008-CA-002289](#) 8/28/09 2009 WL 2633701

Opinion by Judge Lambert; Judge Stumbo and Senior Judge Henry concurred. The Court affirmed an order of the circuit court distributing marital funds from a federal stimulus payment entered more than ten days after entry of the final divorce decree. The Court held that the trial court did not abuse its discretion in granting appellee relief under CR 60.02. Appellee was unable to present her claim to the funds prior to the entry of the final divorce decree because the stimulus payment had yet to be distributed by the IRS and appellant presented no evidence that the payment was foreseeable or fairly discoverable at the time the divorce decree was entered. The Court next held that the trial court did not err in finding that the stimulus payment was marital property. The funds were generated from the marital estate and were the joint property of both parties. The Court finally held that the trial court did not abuse its discretion in distributing the funds equally to each party. The stimulus payment was assigned to each member of the family, not just the "income earner," evidenced by the fact that the check was made payable to both parties and could not be cashed without both signatures.

### C. **Young v. Holmes**

[2008-CA-001365](#) 8/28/09 2009 WL 2633653

Opinion by Judge Caperton; Judge Thompson concurred; Judge Wine concurred by separate opinion. The Court affirmed an order of the family court whereby the court ordered the parties' son to attend a parochial school. The Court held that the order did not violate appellant's First Amendment rights. The trial court's order utilized the best interest of the child standard and explicitly disclaimed any religious preference. Impropriety could not be presumed and appellant failed to meet her burden to prove that the decision was based upon religious interests. The Court then held that the trial court was not required to find that the child had special needs that made public school unsuitable before ordering that the child attend private school.

## VIII. JUVENILES

### A. **N.L. v. Commonwealth**

[2007-CA-001216](#) 8/14/09 2009 WL 2475190

Opinion by Senior Judge Lambert; Judge Wine concurred; Judge Keller concurred in result by separate opinion. On discretionary review, the Court vacated and remanded an order of the circuit court affirming a district court judgment finding that appellant was a juvenile sexual offender. The Court held that the district court erred in denying appellant's motion for a continuance of the dispositional hearing to allow appellant to obtain an independent sexual offender evaluation in order to challenge the conclusions of the juvenile sexual offender assessment submitted by the Department of Juvenile Justice. While nothing within the language of KRS 635.510(3) suggested that a defendant may use an expert witness to challenge the conclusions, KRS 610.110 expressly permitted it in order to determine the best interest of the child.

## IX. TORTS

### A. **Hamilton v. Trans Union Settlement Solutions, Inc.**

[2008-CA-001475](#) 8/14/09 2009 WL 2475430

Opinion by Senior Judge Lambert; Judges Clayton and Thompson concurred. The Court reversed and remanded for further proceedings a judgment of the circuit court granting appellants recovery on their claims against appellee related to a title examination in which it failed to discover a land use restriction in a deed. The Court first held that the trial court's determination that appellee breached its duty to exercise ordinary care in its examination of the title to the real property was not erroneous. The Court next held that the trial court did not err in calculating the damages that arose from the defective title abstract prepared in connection with a loan. The Court then held that the trial court lacked discretion to punish appellants by deducting their negotiated recovery of interest and attorneys' fees from the compensatory award to which they were entitled for what the trial court believed to have been improperly collected interest and attorneys' fees through negotiations with other parties. If the court believed that appellants, their attorneys or other parties behaved contemptuously or unethically, other remedies were available.

### B. **Price v. Garcia**

[2007-CA-001344](#) 8/7/09 2009 WL 2408156

Opinion by Judge Nickell; Judge VanMeter and Senior Judge Graves concurred. The Court affirmed a judgment of the circuit court dismissing appellants' personal injury claims with prejudice following a jury verdict finding that appellants had not incurred \$1,000.00 in reasonably necessary medical expenses required for recovery under KRS 349.39-060(2)(b). The Court held that the trial court properly admitted three items of testimony from the investigating officer who was neither listed nor qualified as an expert witness and even so, any error was harmless as the challenged testimony bore on fault, an issue not reached by the jury. In doing so the Court held that the issues were preserved for appeal because the circuit court ruled during trial

on the issues advanced on appeal. The Court then held that 1) the trial court did not abuse its discretion in permitting the officer to testify about the weather conditions the night of the accident as the facts were well within her perception at the scene; 2) the trial court did not abuse its discretion in allowing the officer's testimony in allowing cumulative testimony which was nothing more than an oral description of the damage depicted in photos of the accident scene and not accident reconstruction testimony; and 3) that the officer's testimony about carrying a child from the car involved in the accident was harmless, as it related to the issue of fault, which was not reached by the jury.

**C. Trent v. Teco Coal Corporation**

[2008-CA-000486](#) 5/22/2009 2009 WL 1424031 Ordered Pub 8/21/09  
Opinion by Judge Clayton; Judges Moore and Stumbo concurred. The Court affirmed a judgment of the circuit court entered subsequent to a jury verdict apportioning fault between the parties on appellant's claim related to an automobile accident. The jury apportioned 50 percent liability to appellant, 50 percent to the driver of the bus that rear ended appellant after she stopped at a yellow traffic light and zero percent liability to the appellee coal company that appellant claimed left dust and debris to accumulate on the stretch of road where the accident happened. The jury awarded no damages to appellant. The Court first held that appellant properly preserved her objections to the jury instructions by submitting jury instructions and by participating in extensive discussion regarding the jury instructions. The Court then held that the jury instructions were not confusing and did not erroneously refer to a non-party to the action. The use of the phrase "the substantial factor" rather than "a substantial factor" was not so substantial as to cause prejudice and appellant failed to provide any evidence that the jury was prejudiced or would have decided the case differently. Further, the instructions were not erroneous and correctly stated the law as to the duty of care of the individuals. The Court then held that appellant was not entitled to an instruction on negligence per se as to the coal company's negligence when she failed to prove that the coal company violated any regulation. The Court next held that the trial court did not abuse its discretion in denying appellant's motion for a new trial with respect to the issue of damages. Although conflicting, the evidence was sufficient for the jury to conclude that appellant did not sustain a compensable injury.

**X. WORKERS' COMPENSATION**

**A. Baptist Hospital East v. Possanza**

[2009-CA-000082](#) 8/7/09 2009 WL 2424212  
Opinion by Judge Lambert; Judges Caperton and Keller concurred. The Court affirmed a decision of the Workers' Compensation Board reinstating a worker's claims for benefits. The Court held that the Board did not err in its interpretation and application of KRS 342.165(2) that all three factors must be present before compensation could be denied. Because the employer failed to show a causal connection between the workers' claim for a neck injury and the misrepresentation related to a low back condition, the worker was improperly denied compensation.



The Court rejected the employer's claim that the connection arose out of the fact that the worker would not have sustained the injury had he been honest about his physical condition at the time he took the job.

**B. Ranger Contracting v. Morley**

[2008-CA-001037](#) 8/28/09 2009 WL 2707394

Opinion by Judge Nickell; Judges Caperton and Keller concurred. The Court affirmed an order of the Workers' Compensation Board affirming an ALJ's award of medical benefits to a worker and his treating physician following the reopening of a claim resulting from a disputed medical fee. The Court held that the ALJ did not err in allowing the reopening of the claim outside the two-year statutory window provided by KRS 342.185(1). The doctor's medical opinion alone, that the worker's recurring back pain was a consequence of the injuries he sustained in the work-related fall and claimed prior to the original award, was substantial evidence upon which the ALJ could reasonably find a causal connection between the back pain and the originally claimed work-related injuries. Therefore, the medical treatment for back pain was compensable under KRS 342.020. The Court further held that the ALJ properly determined that the motion to reopen for medical benefits associated with his ongoing back pain was not barred by the two-year statute of limitations. KRS 342.185 does not require workers to timely provide notice and file claims for all known symptoms but only for all known conditions.

**C. Williams v. Farmers Stockyard, Inc.**

[2008-CA-000785](#) 8/7/09 2009 WL 2408399

Opinion by Judge Caperton; Senior Judge Buckingham concurred; Judge Stumbo dissented by separate opinion. On discretionary review, the Court affirmed a judgment of the circuit court reversing a district court order regarding creditors' claims to workers' compensation benefits paid to the estate of a deceased worker. The Court held that the creditor exemption in KRS 342.180 did not apply to money received by an estate when a worker died without dependents.