

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JULY 1, 2008 to JULY 31, 2008**

I. ARBITRATION

A. Mortgage Electronic Registration Systems, Inc. v. Abner

[2007-CA-000574](#) 07/25/2008 260 S.W.3d 351

Opinion by Judge Dixon; Judges Acree and Taylor concurred. The Court affirmed an order of the circuit court denying a motion to compel arbitration. The Court held that the trial court did not err in finding that the arbitration clause was unconscionable and in denying appellants' motion to compel arbitration on appellees' counterclaim and claim for offset in a foreclosure action brought by appellants. Because the arbitration clause deprived appellees of any substantive remedies under the Home Ownership Equity Protection Act, 15 U.S.C. § 1639 (HOEPA) and the Truth In Lending Act, 15 U.S.C. § 1601 (TILA), to which they otherwise might be entitled, the arbitration clause was unconscionable and unenforceable.

B. Mt. Holly Nursing Center v. Crowdus

[2007-CA-001708](#) 07/25/2008 2008 WL 2852881 DR filed 08/22/2008

Opinion by Judge Keller; Chief Judge Combs and Senior Judge Henry concurred. The Court affirmed an order of the circuit court denying appellants' motion to enforce arbitration agreements related to nursing home services. The Court held that that there was no evidence that appellee, who signed the agreement as part of the admission documents admitting her friend to a nursing home, did not have apparent authority to sign the arbitration agreements on behalf of her friend. The nursing home employees did not ask for a power of attorney or otherwise attempt to determine whether appellee had the authority to sign the documents and the patient did nothing to hold appellee out as having authority. Further, there was no evidence that the patient acquiesced to appellee waiving her right to a jury trial. The Court then held that the arbitration agreements were not valid and enforceable. Because the patient was physically and mentally competent to sign the documents, by the express terms of the agreements, her signature was necessary and her friend's signature could not bind her to the agreements.

II. AUTOMOBILES

A. Keeton v. Lexington Truck Sales, Inc.

[2007-CA-001576](#) 07/18/2008 2008 WL 2780271 DR filed 08/15/2008

Opinion by Judge Acree; Judges VanMeter and Wine concurred. The Court affirmed in part and reversed and remanded in part a judgment entered against the buyer of a used commercial truck in an action against an auto dealership alleging fraud, violation of the Kentucky Consumer Protection statute, violation of the

federal Magnuson-Moss Warranty Act, and violation of KRS 186A.540. The Court first held that appellant's claim for fraud did not set forth the time, place and substance of alleged fraudulent statements and therefore summary judgment was properly entered on that claim. The Court next held that appellant's claim under KRS 190.270, involving an alleged rollback of the odometer, was not properly before the Court as it was raised for the first time on appeal. The Court then held that appellant, who purchased the vehicle for commercial purposes, was not a consumer entitled to protection under the federal Magnuson-Moss Warranty Act, 15 U.S.C. §2301 et seq. or the Kentucky Consumer Protection Act, KRS 367.120 et seq. Therefore, summary judgment was properly entered on those claims. However, the Court ultimately held that the trial court erred by finding that appellant could not prevail under KRS 186.A.540, which required disclosure in writing, with the purchaser's signature acknowledging the disclosure, of all damages resulting in repairs or repair estimates exceeding \$1,000. The statute required the disclosure of repairs, regardless of when or where the damages occurred. Because appellant was clearly a person within the class intended to be protected, he was entitled to assert a right of action for negligence against the auto dealership.

III. CIVIL PROCEDURE

A. **Young v. Richardson**

[2006-CA-002441](#) 07/25/2008 2008 WL 2852387 Reh denied 10/03/2008
Opinion by Senior Judge Henry; Judges Stumbo and Taylor concurred. The Court reversed and remanded an order of the circuit court, which vacated a partial summary judgment and order while a motion for discretionary review was pending in the Supreme Court. The Court held that the trial court abused its discretion and exceeded the bounds of its authority to enter an order directly concerning matters involved in a pending appeal. Although the trial court retained narrow jurisdiction to rule on a CR 60.02(f)/CR 60.03 motion, for which the discretionary review proceedings were abated, it did not retain jurisdiction to arrive at an equitable resolution of the case.

IV. CRIMINAL LAW

A. **Gaines v. Commonwealth**

[2006-CA-000861](#) 07/25/2008 2008 WL 2852334 Reh filed 08/11/2008
Opinion by Judge Thompson; Judge Caperton concurred; Judge Lambert dissented by separate opinion. The Court affirmed in part, and vacated and remanded in part for a new sentencing hearing, a judgment of the circuit court following appellant's conviction after a jury trial for numerous drug-related offenses. The Court held that the prosecutor's closing argument urging the jury to send a message to the community, by punishing appellant with the maximum possible sentence, violated appellant's right to a fair trial. The Court further held that the error was palpable and therefore, reviewable pursuant to CR 10.26, even though it was unpreserved.

B. Jones v. Commonwealth

[2007-CA-000235](#) 07/25/2008 260 S.W.3d 355

Opinion by Judge Moore; Chief Judge Combs and Judge Caperton concurred. The Court affirmed in part and reversed and remanded in part a judgment of the circuit court denying appellant's motion to withdraw his guilty plea and convicting him of flagrant nonsupport. The trial court initially accepted appellant's guilty plea but then declined to accept the plea bargain agreement between appellant and the Commonwealth, which included a probated sentence. The court continued the matter to allow appellant to pay the support and when appellant failed to make the payments, the Court denied his motion to withdraw his guilty plea and sentenced him to five years incarceration. The Court first denied the Commonwealth's motion to dismiss the appeal as moot based on the fact that appellant later received shock probation. Because appellant did not receive the initial benefit of his bargain, continued to insist he was entitled to withdraw the guilty plea and challenged the failure of the court to hold a competency hearing, the issues on appeal were not moot. The Court then held that the trial court did not err by failing to hold a competency hearing when appellant provided no evidence that would lead the circuit court to have reasonable doubt of his competency. Although he had initially filed a motion for a psychological/psychiatric evaluation, he later withdrew the motion; he swore during his plea colloquy that he had never suffered from a mental disease and his unsworn statement that he suffered from anxiety and depression did not constitute sufficient evidence of reasonable doubt of his competency. The Court finally held that the trial court erred in denying appellant's motion to withdraw his guilty plea when the court declined to accept the recommendation of probation made pursuant to the plea agreement and explicitly stated during the original sentencing proceeding that if appellant failed to pay the support, the court would either set aside the plea and let appellant proceed to trial or sentence him without probation, depending on appellant's choice.

C. Lucas v. Commonwealth

[2007-CA-000321](#) 07/18/2008 258 S.W.3d 806

Opinion by Judge Thompson; Judges Caperton and Lambert concurred. The Court affirmed an order of the circuit court revoking appellant's probation. The Court held that the court did not abuse its discretion in revoking probation. The evidence established that appellant violate several conditions of his probation. Further, the trial court was not required to consider less severe alternatives to revocation when the record clearly established that the court attempted to impose conditions to help appellant make personal improvements and stay out of prison.

D. Phillips v. Commonwealth

[2006-CA-001230](#) 07/18/2008 2008 WL 2780979 DR filed 08/18/2008

Opinion by Judge Lambert; Judge Keller concurred; Judge Stumbo dissented by separate opinion. The Court affirmed appellant's conviction for trafficking in marijuana and cultivation of marijuana. The Court first held that the trial court did not err in denying a motion to suppress evidence found in connection with a warrantless search conducted after officers spotted what they believed to be

marijuana growing behind a barn on appellant's land. The existence of a locked agate at the edge of the property was insufficient, in light of the totality of the circumstances, to establish the barn as curtilage. The Court next held that the trial court did not err in allowing witnesses to testify that untested plants and/or plant material found on the property was marijuana when the samples were properly taken at random and the remaining samples were visually identified as marijuana. The Court then held that the trial court did not err in allowing testimony as to the weight of the marijuana when the plants were not actually weighed when, combined with the weighed marijuana, the weight of the un-weighed sixty-nine plants would only have had to combine for a weight of a little over three ounces. Further, the testimony of the police officers as to the approximate weight of the plants was admissible under KRE 701. The Court also held that it was within the trial court's discretion to permit general questioning regarding untested seeds, even though it had excluded testimony that the seeds were in fact marijuana seeds. The Court then held that the question, "While he had no duty to do so, did the defendant request any additional testing of the plants?" did not erroneously shift the burden of proof to appellant, in that the question sufficiently did away with any implication that the burden was on appellant to prove his innocence. The Court also held that appellant was not entitled to a directed verdict. The Court finally held that because appellant accepted a concurrent sentence of three years, his conviction was not a violation of the proscription against Double Jeopardy.

E. Shegog v. Commonwealth

[2007-CA-000680](#) 07/25/2008 2008 WL 2852437 DR filed 09/16/2008
Opinion by Judge Thompson; Judges Caperton and Lambert concurred. The Court affirmed an order of the circuit court denying appellant's motion for post-conviction relief pursuant to RCr 11.42. The Court held that defense counsel was not ineffective for withdrawing a request for funding and failing to obtain a ruling on the admissibility and funding of eyewitness identification expert testimony. At the time of trial the question of whether criminal defendants could obtain and introduce testimony from eyewitness identification experts was unsettled. The Court also held that the failure of the Commonwealth to disclose a plea bargain with a material witness in an unrelated case prior to appellant's trial was immaterial because it did not undermine the confidence of the jury's verdict.

F. Watkins v. Commonwealth

[2007-CA-000869](#) 07/11/2008 2008 WL 2696836 DR filed 08/07/2008
Opinion by Judge Acree; Judges VanMeter and Wine concurred. The Court affirmed a judgment of the circuit court sentencing appellant to six years in prison pursuant to a conditional plea of guilty to charges of speeding in excess of 26 miles per hour over the speed limit, failure to comply with instructional permit, fleeing or evading the police in the second degree, possession of marijuana under eight ounces, possession of a controlled substance in the first and second degree, cocaine. Appellant reserved the right to challenge the legality of the search of the automobile he was driving prior to his arrest. The Court held that the trial court did not err in finding that appellant's vehicle was abandoned when, while being pursued, appellant

sought to evade police, came to a stop in a median between lanes of traffic, immediately got out of the car, and fled into a wooded area. Once he fled the scene, he could not establish that he retained a reasonable expectation of privacy in the automobile.

G. Worley v. Commonwealth

[2007-CA-000175](#) 07/03/2008 2008 WL 2610236 DR filed

Opinion by Judge Acree; Judges Dixon and Taylor concurred. The Court affirmed appellant's conviction and sentence for first-degree manslaughter. The Court held that the trial court did not err by denying appellant's motion to dismiss the indictment or by denying a motion for a directed verdict pursuant to KRS 503.085. The trial court correctly found that appellant's defense at trial, that the gun accidentally discharged, precluded him from claiming that he was legally justified in shooting the victim, such as would confer immunity from prosecution. The Court further held that KRS 503.085 was not meant to apply to cases pending when it was enacted. The statute did not specifically state it was retroactive and KRS 446.110 did not apply, as there was no language mitigating penalties, since persons affected by the statute would never face prosecution, conviction or punishment. The Court then held that appellant was not entitled to dismissal or a missing evidence instruction when the shotgun used to kill the victim was stolen from the sheriff's office. Even if the Commonwealth acted in bad faith, the shotgun's exculpatory potential was not readily apparent. The Court also held that the trial court did not abuse its discretion in excluding expert testimony regarding the shotgun or in excluding the deceased's juvenile court records.

V. FAMILY LAW

A. Downs v. Downs

[2007-CA-000979](#) 07/11/2008 2008 WL 2696874 DR filed 08/11/2008

Opinion by Judge Clayton; Judge VanMeter and Senior Judge Knopf concurred. The Court affirmed an order of the circuit court granting summary judgment to appellee on appellant's claim seeking the imposition of a constructive trust on life insurance proceeds based on a settlement agreement signed by his parents when he was a minor. The Court first held that, because appellant was a minor at the time his parents entered into the settlement agreement in which they agreed to maintain life insurance policies for the benefit of their child, KRS 413.170 applied and therefore, the statute of limitations did not bar appellant from bringing the action. The Court ultimately held that the trial court did not err in granting summary judgment to appellee. The words "infant child" in the settlement agreement were not words of identification and applying their plain meaning, there was no requirement for appellant's father to maintain a life insurance policy for his benefit beyond his age of majority.

VI. GOVERNMENT

A. **Louisville/Jefferson County Metro Ethics Commission v. Schardein**

[2007-CA-001356](#) 07/18/2008 259 S.W.3d 510

Opinion by Judge VanMeter; Judge Clayton and Senior Judge Knopf concurred. The Court affirmed an order of the circuit court finding that the Metro Ethics Code did not apply to employees of the Louisville/Jefferson County Metropolitan Sewer District (MSD) and granting a motion for summary judgment to appellees on their complaint seeking to enjoin proceedings before the Ethics Commission on the basis that the Ethics Commission had no jurisdiction over MSD. The Court held that MSD was not an agency of the urban-county government within the meaning of KRS 65.003. The urban-county government had no operational control over MSD and MSD was financially independent and therefore, it was an independent municipal corporation.

VII. INSURANCE

A. **Ann Taylor, Inc. v. Heritage Insurance Services, Inc.**

[2007-CA-000317](#) 07/11/2008 259 S.W.3d 494

Opinion by Judge Moore; Judges Keller and Thompson concurred. The Court affirmed a summary judgment in favor of appellees on appellant's claim for negligent misrepresentation. Appellant was the certificate holder of an insurance policy covering a carrier contracted to transport cargo between warehouses. The cargo was stolen from an unattended tractor trailer and the insurer declined coverage because the policy excluded theft of cargo from an unattended vehicle. The Court held that the certificate of insurance was only evidence of insurance coverage and could not be relied upon by a claimant for the full terms of the policy. Therefore, the trial court properly granted summary judgment to appellees.

VIII. PROPERTY

A. **Acton v. Acton**

[2007-CA-000239](#) 07/03/2008 2008 WL 2610241 Reh denied 09/15/2008

Opinion by Judge Acree; Judge Stumbo and Senior Judge Graves concurred. The Court affirmed in part and reversed and remanded in part an order of the circuit court ordering the sale of a farm owned in equal shares by appellant and her two brothers. The Court first held that the evidence was not so overwhelming that the trial court was required to find that the son of one of the brothers exerted undue influence on the parties' mother to re-convey the brother's interest in the property he had previously conveyed to her. The Court next held that, in light of the conflicting testimony, it was not clearly erroneous for the trial court to find that the brother came into possession of the deed and that the three siblings each had one-third interest in the property. The Court then held that the circuit court erred in finding that appellant received sufficient notice of the deposition of an appraiser and in denying her motion to strike the deposition when she did not receive notice until the morning of the deposition and the deposition was taken in a non-adversarial setting.

The Court then held that the finding that the property was indivisible was clearly erroneous as the finding was based on that deposition. The Court finally held that, pursuant to the holding in *Bettes v. Rogers*, 135 S.W.2d 74 (Ky. 1939), it was an abuse of discretion for the trial court to award costs and fees to the brothers.

IX. TORTS

A. **Commonwealth, University of Kentucky Hospital v. Douglas**

[2007-CA-000647](#) 07/18/2008 2008 WL 2779448 DR filed 08/18/2008
Opinion by Judge Acree; Judge Nickell and Senior Judge Buckingham concurred. The Court affirmed an order of the circuit court, which affirmed a decision of the Board of Claims on the claim of an estate for civil negligence against appellant, Commonwealth of Kentucky University of Kentucky Hospital, Albert B. Chandler Medical Center of the University of Kentucky. Appellant first filed a civil negligence claim in circuit court alleging medical malpractice. The claim was dismissed as being barred by sovereign immunity and a claim was then filed with the Board of Claims. The Board overruled appellant's motion to dismiss the claim as untimely. The Court held that the tolling language in KRS 413.270 was intended to apply to suits against the Commonwealth and that the dismissal of the claim by the circuit court for lack of jurisdiction properly triggered the tolling provisions of the statute. The Court also held that, given the difficulty in defining the extent of sovereign immunity at the time the claim was filed in circuit court, the claim could have been filed in the circuit court in good faith so that estate could avail itself of the tolling provision.

X. WORKERS' COMPENSATION

A. **AK Steel Corp. v. Pollitt**

[2007-CA-001698](#) 07/18/2008 259 S.W.3d 505
Opinion by Judge Thompson; Judges Nickell concurred; Judge VanMeter dissented by separate opinion. The Court affirmed an opinion and order of the Workers' Compensation Board affirming an opinion and order of the ALJ on a worker's claim for income and medical benefits related to lung problems associated with exposure to asbestos. The ALJ dismissed the worker's claim for income benefits but determined that he was entitled to receive medical benefits to monitor a calcified pleural plaque condition. The Court held that the ALJ properly awarded medical benefits for the medical monitoring of the worker's condition as part of the treatment of an occupational disease, as the condition was a precursor to a well-known occupational disease, asbestosis. Further, the fact that the ALJ dismissed the claim for income benefits as a result of an occupational disease, did not preclude an award of medical benefits to monitor the condition.

B. **White v. Great Clips**

[2007-CA-001855](#) 07/18/2008 2008259 S.W.3d 501
Opinion by Judge Thompson; Judge Taylor and Senior Judge Buckingham concurred. The Court affirmed in part and vacated and remanded in part an order of

the Workers' Compensation Board that reversed a decision of the ALJ awarding appellant future medical benefits. The Court held that the Board's reversal of an award of future medical benefits for appellant's neck and shoulder injuries was proper in that the claim for the neck and shoulder injuries was dismissed prior to the ALJ's opinion and order. However, because the ALJ failed to make essential findings of fact regarding why the back injury warranted an award of future medical benefits, in light of a finding that the injury was not compensable, it was necessary to vacate and remand to the ALJ for additional findings of fact.