

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
MARCH 2011**

I. ADMINISTRATIVE LAW

A. Department of Labor v. Morel Construction Co., Inc.

[2010-CA-000193](#) 1/28/11 Ordered Published 3/25/11 Rehearing Pending
Opinion by Judge Moore; Judges Caperton and VanMeter concurred. The Court reversed an opinion and order of the circuit court reclassifying a Kentucky Occupational Safety and Health Act (KOSHA) violation of the standard set forth in 803 KAR 2:417 § 3(1)(b) from “serious” to “other than serious” and vacating a violation of 29 C.F.R. 126.754(e)(5)(i) because it found that the method of installation of sheet metal decking by appellees complied with the standard. The Court first held that the trial court erred in reclassifying the violation to “other than serious.” The employees’ exposure to a hazard or violative condition was relevant to the issue of establishing a violation in general and the degree of probability that an injury would occur was relevant to the issue of determining a penalty for a violation. However, neither factor had any bearing upon the issue of whether a violation should be classified as serious per KRS 338.991(11) and the circuit court misapplied the law when it turned to these factors to determine whether the violation of 803 KAR 2:417 § 3(1)(b) was properly classified as serious. The Court then held that there was substantial evidence to support that there was a serious violation based on the finding that an employee of appellees, not wearing fall protection, was exposed to an unprotected side or edge 42 feet in height and that it was certainly possible to sustain an injury from falling from that height, with a substantial likelihood of serious physical injury, or possibly death. The Court finally held that while 29 C.F.R. 926.754(e)(5)(i) did not require the decking to be impermeable to all forces of nature, the standard requiring the decking to be “immediately secured” was intended to prevent wind from displacing the decking and must be observed whenever specified conditions, practices or procedures were encountered. Thus, the Cabinet did not have to establish exposure to the ultimate danger presented by a hazard as a separate element independent of the violation but only need prove that an employee was exposed to a condition that did not comply with the standard. Because substantial evidence supported that appellees failed to immediately secure the metal decking from being displaced by wind, within the meaning of the regulation, and the testimony led to a reasonable inference that the metal decking was not secured from being accidentally moved or displaced by the wind, the circuit court erred in vacating the citation.

B. W.B. v. Commonwealth, Cabinet for Health and Family Services

[2010-CA-000361](#) 3/11/11 2011 WL 832101
Opinion by Judge Moore; Judge Lambert and Senior Judge Isaac concurred. The Court affirmed an order of the circuit court dismissing appellant’s declaratory judgment action under CR 12.02(f), wherein appellant sought to challenge the

constitutionality of the several statutes and regulations providing for how the Cabinet for Health and Family Services substantiates allegations of child abuse for purposes of placing an individual's name on Kentucky's Central Registry list of substantiated child abusers and how an accused may contest and appeal the substantiation. The Court first held that due process in this context did not require a jury trial. Kentucky law provides an accused with fair notice; a trial-type hearing which subjects the allegations to rigorous testing prior to listing on the registry; an accused has the right to adduce evidence, be represented by counsel and confront any witnesses; a written decision is issued, which can be appealed; and the investigating agency has the burden of proof. The Court also held that while due process requires an impartial decision maker, appellant failed to suggest or show that a hearing officer employed by the Cabinet was incapable of deciding the issue fairly. Therefore, appellant failed to carry his burden or cite to authority establishing that procedural due process under the Fourteenth Amendment to the United States Constitution, or under the Kentucky Constitution, compelled a jury trial, even if a protected liberty interest existed. The Court also held that appellant's other due process arguments were either without merit or not proper for review.

II. APPEAL AND ERROR

A. *Hamilton v. Commonwealth*

[2009-CA-000949](#) 3/25/11 2011 WL 1085324

Opinion by Judge Clayton; Senior Judge Lambert concurred; Judge Combs dissented by separate opinion. The Court remanded appellants' convictions of trafficking in buprenorphine, entered pursuant to conditional guilty pleas. Appellants reserved the right to appeal from a trial court order denying a motion to dismiss the indictments based on an argument that the regulation classifying buprenorphine as a Schedule III drug was invalid and therefore, the indictments were invalid. The Court held that the trial court erred in finding it did not have jurisdiction to consider the challenge to the regulation. While the appellants did not argue the constitutionality of the regulation below, it was made an issue when the trial court found that it did not have jurisdiction to review the federal agency's reasons for scheduling the drug. The Court remanded and directed that the Attorney General and the Cabinet for Health and Family Services should be made parties and the trial court, after arguments, should examine whether 902 KAR 55.025 Section 7 was rendered unconstitutional for the failure of the Cabinet to make sufficient findings before it classified buprenorphine as a Schedule III drug.

III. APPEALS

A. *Tax Ease Investments 1, LLC v. Brown*

[2009-CA-001662](#) 3/4/11 2011 WL 744514

Opinion by Judge Acree; Judges Dixon and Stumbo concurred. The Court dismissed by opinion and order an appeal from a circuit court order invalidating appellant's lien on real property and a subsequent order denying a motion filed pursuant to CR 59.05 to alter, amend or vacate the initial order. The Court held that both orders were interlocutory and therefore, the Court did not have

jurisdiction to consider them. The first order granting partial summary judgment was not final and appealable because there was no resolution of the damages portion of any claim. Therefore, even if the CR 54.02 finality recitations had been included, the order would have remained interlocutory and non-appealable. The second order, denying the CR 59.05 motion, did not completely dispose of even a single claim and therefore, could not be certified by including the finality recitations of CR 54.02.

IV. ARBITRATION

- A. **Stanford Health & Rehabilitation Center v. Brock**
[2009-CA-000160](#) 1/29/10 2010 WL 323274 Ordered Published by S.Ct. Opinion by Senior Judge Knopf; Judges Caperton and Stumbo concurred. The Court affirmed an order of the circuit court finding that an arbitration agreement was unenforceable in a lawsuit initiated against a nursing home by the executor of an estate. The Court held that the circuit court findings were supported by substantial evidence and that the agreement was unenforceable when it was not signed by the deceased but rather, was signed by the deceased's sister who was not authorized to sign on his behalf. The deceased was mentally competent at the time he was admitted to the nursing home, he had no legal representative, he had not executed a power of attorney, he informed the admission coordinator that no one had the authority to act on his behalf, and he did not authorize his sister to sign his name.

V. CIVIL PROCEDURE

- A. **Honeycutt v. Norfolk Southern Railway Company**
[2009-CA-000895](#) 3/18/11 2011 WL 918633 Opinion by Judge Moore; Chief Judge Taylor concurred; Judge Thompson dissented by separate opinion. The Court affirmed an order of the circuit court denying appellant's motion to set aside an order dismissing his complaint pursuant to CR 77.02(2). The Court held that the trial court did not abuse its discretion in dismissing the complaint. Counsel's failure to notify the circuit court that he changed his mailing address and, as a result, failed to receive the court's *sua sponte* notice to show cause why the action should not be dismissed for lack of prosecution, did not warrant the order dismissing be set aside pursuant to CR 60.02. The order of dismissal was not void because appellant did not actually receive the notice to show cause as required by CR 77.02(2), as there was no authority in Kentucky that imposed a duty upon the circuit court clerk to track down the attorney who moved without giving notice to the court. Further, the circumstances did not fulfill CR 60.02(a)'s requirement of mistake, inadvertence, surprise or neglect and the rationale for setting aside the judgment did not fall into the category of an "extraordinary reason" to justify relief under CR 60.02(f).

VI. CONTRACTS

- A. **Owen v. DCR Mortgage III Sub I, LLC**
[2009-CA-001788](#) 3/25/11 2011 WL 1085335

Opinion by Judge Nickell; Judge Acree and Senior Judge Shake concurred. The Court affirmed a summary judgment of the circuit court in favor of appellee on its claim against appellants to enforce their personal guarantees on a promissory note and mortgages executed by a company for which one spouse was the principal. The Court held that summary judgment was properly granted. The record showed that appellants personally guaranteed the note and mortgages and but for the actions of the spouse, urging recognition of late claims against the proceeds of a sale of the secured property, the sales proceeds would have satisfied the debt owed to appellee. The absence of appellants' names from the list of creditors in the bankruptcy action was directly attributable to the spouse who was at the helm of the company. Moreover, appellants were apprised of all events in the bankruptcy proceedings. Any objection to the reasonableness of the sale was required to occur in the bankruptcy proceedings. Finally, appellee was not estopped from claiming the full amount due on the note.

VII. CRIMINAL LAW

A. **Beeler v. Commonwealth**

[2009-CA-001133](#) 3/4/2011 2011 WL 744975 Rehearing Pending
Opinion by Judge Combs; Judge Clayton concurred with the opinion and delivered a separate opinion for the Court; Judge Wine concurred in result only with the opinion of Judge Combs and concurred with the opinion of Judge Clayton. The Court vacated appellant's conviction for conspiracy to manufacture methamphetamine in Hardin County after appellant pled guilty to a charge of attempt to manufacture methamphetamine in Hart County. The Court held that because both convictions arose from the same transaction and were not two distinct statutory provisions, jeopardy attached to the second conviction. The initial stop of appellant and his wife after they purchased pseudoephedrine in Hardin County did not constitute enough evidence to charge or arrest either appellant or his wife. It was only upon the search of appellant's home in Hart County that appellant was charged with any offense. Therefore, the initial stop and search of the home were both the same transaction or incident for purpose of the test outlined in *Blockburger v. U.S.*, 284 U.S. 299, 52 S.Ct. 180, 181, 76 L.Ed. 306 (1932).

B. **Commonwealth v. McClain**

[2010-CA-000256](#) 3/11/11 2011 WL 832091
Opinion by Judge Lambert; Judges Acree and Thompson concurred. The Court affirmed an order of the trial court granting appellee's motion to quash a search warrant and to suppress evidence. The Court held that the trial court did not abuse its discretion. Although the affidavit and warrant were facially valid, the intentionally or recklessly false statement made therein by the sheriff, resulting in the search of appellee's residence, warranted quashing the warrant and suppressing the evidence. Further, once the false statement was purged from the warrant, the warrant failed to establish the requisite probable cause to search appellee's residence based upon the totality of the evidence. Finally, because the sheriff did not act in good faith when he included misleading information in the

search warrant affidavit, his reliance on the information could not be deemed objectively reasonable and therefore, the circuit court correctly declined to apply the good faith exception in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

C. Easley v. Commonwealth

[2009-CA-000716](#) 3/18/11 2011 WL 922370 Rehearing Pending
Opinion by Judge Lambert; Judges Acree and Thompson concurred. The Court affirmed a judgment of the circuit court convicting appellant of numerous counts of exploiting an adult and sentencing him to 10 years' imprisonment. The Court first held that the trial court did not err by denying appellant's motion to suppress a review of his mother's bank records. An individual has no reasonable expectation of privacy in his/her bank records and therefore, the bank records were not subject to the protections of the Fourth Amendment or Section 10 of the Kentucky Constitution. The Court next held that the trial court did not abuse its discretion by excluding certain documents from being introduced at trial. RCr 7.24(9) permitted the trial judge to exclude the documents based on appellant's ongoing failure to cooperate with his defense counsel, refusal to produce the documents and his disregard for the trial court's discovery order. The Court next held that the trial court did not err by permitting the Commonwealth to present evidence of checks appellant wrote to himself outside the time period set forth in the indictment. The evidence was admissible under KRE 404(b) to show appellant's plan to take his mother's money soon after he took over as attorney-in-fact and to show that the checks he wrote during the time set forth in the indictment were not a mistake, an accident, or simply the result of poor bookkeeping. Further, the checks were probative as to whether appellant committed the acts at issue in the indictment and there was no reason to believe the jury became confused between the earlier checks and the checks written during the indictment period. The Court finally held that the trial court did not abuse its discretion by denying a second request to continue the trial. The length of time seemed excessive, appellant had already been granted previous continuances and demonstrated he was not cooperating with defense counsel, the delays appeared to be purposeful and caused by appellant, the case was not complex and appellant could not identify any prejudice.

VIII. EMPLOYMENT

A. Harstad v. Whiteman

[2009-CA-000190](#) 3/4/2011 2011 WL 744287
Opinion by Judge Acree; Judges VanMeter and Wine concurred. The Court affirmed summary judgments and a trial verdict relating to the termination of appellant's employment with the appellee college. The Court first held that appellant failed to present evidence sufficient to create a genuine issue of material fact on his defamation claims. Based on the undisputed facts, the circuit court properly concluded as a matter of law that the statements regarding appellant's relationship with a graduate student were made within the context of the employment relationship and were subject to a qualified privilege. Absent a

showing the statements were malicious, the qualified privilege applied. Appellant's conclusory allegations based on suspicion and conjecture were not sufficient to create an issue of fact; it could not be inferred from inconsistencies among the defendants that the statements were intentional or reckless misstatements; and falsity alone would not demonstrate abuse of privilege when the statements were elicited by college personnel. The Court next held that the circuit court properly granted summary judgment on appellant's tortious interference claims. The employees of the college, acting as agents of the college, were not third parties and therefore, could not interfere with the contract. The Court next held that because appellant did not only argue on appeal that the verdict was not sustained by the evidence and the errors were otherwise properly preserved, CR 59.06 made appellant's failure to file a motion for a new trial irrelevant. The Court then held that the circuit court did not abuse its discretion by excluding evidence of disparate treatment on the basis that it was irrelevant to the breach of contract claim. The Court finally held that the circuit court properly instructed the jury on the breach of contract claim. The jury had a copy of the faculty manual to reference during deliberations and the instruction given allowed appellant to argue that the college deviated from its own procedures, and thereby breached the employment agreement, and to argue the absence of good faith based on the evidence presented. Further, the interrogatory presented to the jury subsumed the question of whether the college used lies, gossip and slander as a basis for the termination.

IX. FAMILY LAW

A. Carpenter v. Schlomann

[2010-CA-000027](#) 3/11/11 2011 WL 831945

Opinion by Senior Judge Lambert; Judges Caperton and Wine concurred. The Court reversed and remanded an order of protection entered on behalf of appellee. The Court held that the trial court erred when it relied upon the sworn testimony of only one party and the unsworn rebuttal of the other. Because appellant was not sworn, the trial court failed to conduct a full evidentiary hearing as envisioned by the statutes and caselaw. Further, the court could not rely upon extrajudicial evidence and because there was no proper evidentiary basis for a finding of domestic violence, the trial court's entry of a DVO was erroneous. The Court finally held that an emergency protective order was not improperly entered. Pursuant to KRS 403.740(1), the court could issue the EPO based on allegations that indicated the presence of immediate and present danger of domestic violence.

B. Faulkner v. Greenwald

[2009-CA-001802](#) 3/11/11 2011 WL 831714

Opinion by Senior Judge Lambert; Judges Caperton and Wine concurred. The Court reversed and remanded a memorandum and order of the circuit court dismissing appellant's personal injury lawsuit against a high school athletic director. Appellant filed the lawsuit after she was injured by a concession stand door at a high school soccer field. The Court held that safely maintaining the concession stand was a ministerial duty and therefore, the trial court erred in

concluding that the athletic director was entitled to official immunity. Whether the maintenance was negligently performed was a question for the trier of fact.

X. LICENSES

A. Gallien v. Kentucky Board of Medical Licensure

[2009-CA-000694](#) 3/25/11 2011 WL 1085320

Opinion by Senior Judge Lambert; Judges Caperton and Wine concurred. The Court affirmed an order of the circuit court dismissing the appellant doctor's petition for judicial review of an adverse determination by the Kentucky Board of Medical Licensure. The Court held that the trial court correctly dismissed the petition because it was not filed within the 30 days prescribed by KRS 311.593 and KRS 13B.140. In reaching that conclusion the Court held that an order of suspension was a final order, even though it was not directly designated as final and appealable, when it was made plain and obvious that it was. The Court rejected appellant's argument that it was not final because it did not address the disciplinary charges raised in the original complaint and emergency order of suspension. The Court also rejected appellant's argument that the hearing officer had the authority to extend the time for filing a petition for judicial review by reopening and reconsidering the inquiry panel's order of suspension.

XI. PROPERTY

A. Harston v. Commonwealth, Transportation Cabinet

[2010-CA-000615](#) 3/4/2011 2011 WL 744542

Opinion by Judge Nickell; Judge VanMeter and Senior Judge Shake concurred. The Court affirmed in part and reversed in part orders of three different circuit courts granting summary judgment to the Transportation Cabinet on its complaints seeking an injunction to have signs conveying religious messages, erected on private property, declared a public nuisance and removed. The Cabinet alleged that signs were advertising devices that violated Kentucky's Billboard Advertising Act, KRS 177.830 through 177.890; were erected after January 1, 1976; were visible, legible and identifiable from the main travelway; were not located in an area that qualified as an unzoned commercial area; did not qualify as on-premises signs; were not located in a protected area as the term was defined in 603 KAR 3:080 § 1(29); were located in an area that was neither industrial nor commercial nor within an incorporated municipality as of September 21, 1959; and did not have an approved permit from the Cabinet. The Court first held that the signs satisfied the definition of "advertising device" found in KRS 177.830(5) and whether the signs advertised in the traditional sense of the word was irrelevant in light of the clear, unambiguous statutory definition. The Court then held that the "on-premises" exemption could not be extended to the subject signs because the permit requirement was rationally related to the objectives of the Billboard Act, the Act implemented valid place and manner restrictions, and the Act was content neutral. The Court next held that while the Billboard Act was subject to analysis under the Religious Land Use and Institutionalized Persons Act (RLUIPA), codified in 42 U.S.C. § 2000cc(a)(1), the Act was supported by compelling state interests relating to public safety and aesthetics. The Court

finally held that the Act utilized the least restrictive means to meet its objectives because it did not totally ban communication. The Court reversed that part of one order that required appellants to apply for a permit. Because there were no disputed factual questions and the issue was confined to the validity of the Billboard Act and the applicability of the RLUIPA, requiring a permit application was unnecessary to seek judicial relief.

B. McCoy v. Thompson

[2009-CA-001585](#) 3/4/11 2011 WL 744508 Rehearing Pending
Opinion by Judge Acree; Judges Dixon and Stumbo concurred. The Court affirmed an order of the circuit court finding that appellee acquired a parcel of land via adverse possession. The Court held that the existence of a fence and appellee's efforts to keep it in good repair, coupled with the other uses found by the circuit court, supported the circuit court's conclusion. Therefore, the finding of adverse possession was not clearly or erroneous. The Court distinguished the holding in *Ennis v. Billingsly*, 264 Ky. 254, 94 S.W.2d 669 (1936), on the fact that the fence was considered the boundary line between the tracts and when appellee purchased the property he believed the fence was the boundary and the transacting parties intended that he acquire and possess the tract at issue.

XII. TORTS

A. Leighton v. CSX Transportation, Inc.

[2009-CA-001158](#) 3/11/11 2011 WL 831433
Opinion by Judge Acree; Judges Combs and Wine concurred. The Court affirmed an order of the trial court denying appellant's motion for a new trial of his tort claim against his employer on the ground that the jury was allowed to speculate about collateral source payments for medical expenses. In a case of first impression, the Court held that a jury instruction including a limitation on the award of damages, allowing appellant to recover no more than the amount of medical expenses not paid by the employer under The Railroad Employees National Health and Welfare Plan, was not improper. The Plan was not a collateral source of payment for the medical expenses.

XIII. WORKERS' COMPENSATION

A. Forbes v. Dixon Electric, Inc.

[2009-CA-000834](#) 4/30/10 2010 WL 1729101 Ordered Published by S.Ct.
Opinion by Senior Judge Knopf; Judges Clayton and Nickell concurred. The Court affirmed a summary judgment of the circuit court in favor of appellee after finding that the company was entitled to up-the-ladder immunity afforded by KRS 342.610 of Kentucky's Workers' Compensation Act for injuries a police officer sustained while directing traffic at an intersection where appellee was replacing wood poles with steel poles. The Court held that the Kentucky Supreme Court did not create a new test for up-the-ladder immunity when it rendered *General Electric Co. v. Cain*, 236 S.W.3d 579 (Ky. 2007), and the facts of this case fell squarely within the application of *Cain* and KRS 342.610. By virtue of its contract with the Lexington-Fayette Urban County Government to install and

repair traffic signals throughout the city, appellee had to provide for traffic control, which was done either by its employees or city police officers. Traffic control was unquestionably a regular and recurrent part of appellee's business. Appellee took on the role of a contractor while the police took on the role of sub-contractor at the time and place of the accident and therefore, appellee was entitled to up-the-ladder immunity.