

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
SEPTEMBER 2010**

I. ADMINISTRATIVE LAW

A. Elliot Electric/Kentucky, Inc. v. Kentucky Occupational Safety and Health Review Comm'n

[2009-CA-001997](#) 9/24/2010 2010 WL 3717293

Opinion by Judge Combs; Judge Caperton and Senior Judge Lambert concurred. The Court affirmed an opinion and order of the circuit court dismissing for lack of jurisdiction an employer's appeal of a decision of the Kentucky Occupational Safety and Health Review Commission. The Court held that when the employer appealed the Commission's decision to the circuit court three months after it became final, rather than within the allotted thirty days, it failed to meet the single condition precedent to the court's jurisdiction. Because the appeal failed to comply with the requirements of KRS 338.091(1), jurisdiction of the circuit court could not be invoked. The doctrine of equitable tolling could not apply to suspend the running of the thirty-day period because KRS 338.901(1) provided the exclusive means for contesting the final decision and strict compliance with its terms was required.

II. APPEAL AND ERROR

A. Hamilton v. Commonwealth

[2009-CA-000949](#) 9/24/2010 2010 WL 3717249

Opinion by Judge Combs; Senior Judge Lambert concurred; Judge Clayton dissented by separate opinion. The Court dismissed appellants' appeals from their convictions of trafficking in buprenorphine. Appellants entered conditional guilty pleas after the trial court denied their motion to dismiss the indictment based on their argument that Suboxone was improperly classified as a Schedule III drug. The court held that it was compelled to dismiss because the Cabinet for Health and Family Services was not named as a party to the appeal. As the promulgating administrative body, the Cabinet was an indispensable party to the appeal and KRS 13A.140(b) mandated that the Cabinet bore the burden to defend the regulation at issue.

III. CIVIL PROCEDURE

A. Mitchell v. Coldstream Laboratories, Inc.

[2009-CA-001885](#) 9/24/2010 2010 WL 3717282

Opinion by Judge Combs; Judge Caperton and Senior Judge Lambert concurred. The Court vacated and remanded an order of the circuit court dismissing appellant's counterclaim against his former employer. The Court held that the trial court erred by concluding that appellant failed to state a claim on his counterclaim in which he alleged that he had been wrongfully discharged for his refusal to violate the law in

the course of his employment and that his dismissal was contrary to a fundamental and well-defined public policy. The allegations met the bare elements of recognized causes of action and dismissal was premature. While the employer may have been entitled to more detailed information regarding the allegations before it was required to file a reply, the vehicle for seeking such expansion of the allegations was CR 12.05, which provided for a more definite statement.

IV. CRIMINAL LAW

A. **Berry v. Commonwealth**

[2009-CA-000951](#) 9/17/2010 2010 WL 3604113

Opinion by Judge Clayton; Chief Judge Taylor and Judge Thompson concurred. The Court affirmed an order of the circuit court denying appellant's fourth collateral motion for a new trial wherein he claimed that he was entitled to a new trial based upon the holding in *Chestnut v. Commonwealth*, 250 S. W.3d 288 (Ky. 2008). The Court held that the trial court did not err in denying the motion. The case did not involve a "flagrant miscarriage of justice." On direct appeal, the Supreme Court held that it was not error to fail to disclose an oral statement of a witness in discovery, there was convincing evidence aside from the testimony of the witness, and appellant had received significant direct and collateral review since his conviction 20 years prior. *Chestnut* could not be applied retroactively to afford appellant relief.

B. **Commonwealth v. Elliott**

[2009-CA-001603](#) 9/10/2010 2010 WL 3515795

Opinion by Judge Lambert; Judge Clayton and Senior Judge Henry concurred. The Court reversed an order of the circuit court granting a motion to suppress evidence of cocaine and drug paraphernalia found in appellee's automobile after he was arrested for driving under the influence and after he was secured in the back of a police vehicle. The Court held that the trial court erred as a matter of law in suppressing the evidence. The search was lawful under the revised "search incident to arrest" exception set forth in *Arizona v. Gant*, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), and the "automobile" exception because the officer had reason to believe the vehicle contained evidence of the offense of arrest and there was probable cause to believe that contraband was present in the vehicle.

C. **Maynes v. Commonwealth**

[2009-CA-002274](#) 9/24/2010 2010 WL 3717299

Opinion by Senior Judge Isaac; Judge Acree and Senior Judge Henry concurred. The Court affirmed an order of the circuit court imposing costs following appellant's guilty plea. The Court held that in KRS 31.110(1)(b), the legislature was referring to the costs of preparing and maintaining a defense for a needy person, not court costs after conviction, and that the more specific statute, KRS 31.211, controlled to allow for court costs to be assessable to a criminal defendant even though he qualified for appointment of counsel.

D. Schell v. Commonwealth

[2009-CA-001502](#) 9/17/2010 2010 WL 3604141

Opinion by Senior Judge Harris; Judges Keller and Thompson concurred. The Court affirmed an order of the circuit court denying appellant's motion for post-conviction relief under RCr 11.42. In a case of first impression the Court held that the trial court did not err in denying relief when the defense attorney revealed that appellant had been convicted of a previous felony during *voir dire*. Counsel was not ineffective. While the strategy was risky, it was neither unreasonable nor incompetent but was planned and analyzed in light of overwhelming evidence of guilt and intended as a means to ferret out those jurors who might be particularly harsh at the sentencing phase.

E. Smith v. Commonwealth

[2009-CA-001481](#) 9/24/2010 2010 WL 3716848

Opinion by Judge Keller; Judge Thompson and Senior Judge Harris concurred. The Court affirmed an order of the circuit court directing that cash seized from appellant be forfeited after appellant was convicted for various drug offenses. The Court held that the trial court did not err in directing the forfeiture. In reaching that conclusion the Court first held that the Commonwealth established a *prima facie* case for forfeiture pursuant to KRS 218A.410 and it was not necessary for appellant to be convicted of a trafficking charge but only that the Commonwealth show a nexus between the cash and its use to facilitate violation of the Controlled Substances Act, KRS 218A. The Court then held that appellant failed to meet his burden to rebut the presumption by clear and convincing evidence. The trial court was not persuaded that another person loaned appellant the cash, which was within its exclusive province as fact-finder.

V. FAMILY LAW

A. Carpenter-Moore v. Carpenter

[2010-CA-000164](#) 9/24/2010 2010 WL 3717303

Opinion by Senior Judge Harris; Judge Thompson concurred; Judge Keller concurred in result only. The Court affirmed an order of the family court denying appellant's motion to relocate with the parties' minor children. The Court first held that the procedures required by *Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003), were inapplicable because the custody decree was never modified. Therefore, any failure to follow its procedural mandates was harmless and the family court did not err in failing to summarily grant appellant's motion to relocate. The Court then held that the family court did not err in its determination that *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), was the applicable law. The Court finally held that the family court did not err when it found that relocation was not in the best interests of the children.

B. Guffey v. Guffey

[2009-CA-000932](#) 9/24/2010 2010 WL 3717246

Opinion by Judge Combs; Judge Caperton and Senior Judge Lambert concurred. The Court affirmed in part, reversed in part, and remanded a decree of dissolution issued by the family court. The Court first held that the trial court did not abuse its discretion in denying appellant's motion for a continuance. The factors in *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991) (overruled on other grounds by *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001)), were applicable. A continuance could have resulted in a significant delay; a continuance would have been inconvenient for the court, appellee and counsel; appellant did not attempt to request a continuance until a few days before the hearing, and appellant could not demonstrate identifiable prejudice. The Court then held that the family court abused its discretion in dividing the marital debt, including an anticipated deficiency judgment resulting from a foreclosure of the marital home, in light of the disparity between the parties' financial situations and the fact that appellant did not have any means of mitigating the foreclosure of the home when appellee had been ordered by the court to make payments on the mortgages.

C. J.M. v. Commonwealth

[2010-CA-000156](#) 9/10/2010 2010 WL 3515822

Opinion by Judge Acree; Judge Nickell concurred; Senior Judge Harris concurred by separate opinion. The Court affirmed an order of the family court denying a grandmother temporary custody of her three grandchildren in a neglect action. The Court reviewed the appeal for manifest injustice because appellant's brief did not cite to the record or state whether the issues raised were preserved for appellate review, as required by CR 76.12(4)(c)(v). The Court then held that there was no manifest injustice and the family court did not abuse its discretion by denying appellant's motion. Simply alleging the lack of a full evidentiary hearing was "unfair" did not warrant a finding of manifest injustice. Although, pursuant to KRS 602.090, the court was required to place the children with a qualified family member, the family court properly found that the grandmother was not qualified when there was evidence that appellant's daughter had been abused in the home, the Cabinet and the GAL recommended not granting temporary custody to appellant, and one of the children stated a preference not to be placed with appellant. The family court was not bound to follow the recommendation of out-of-state officials that the children should be placed with appellant.

D. Mosley v. Mosley

[2009-CA-000177](#) 9/10/2010 2010 WL 3515724

Opinion by Judge Thompson; Chief Judge Taylor and Judge Moore concurred. The Court reversed and remanded an order of the circuit court denying appellant's motion to amend her response to a petition for dissolution of marriage to include a request for maintenance. The Court held that the circuit court improperly denied the request and remanded for further proceedings regarding the issue of maintenance. Appellant did not become aware of appellee's significant inheritance until after appellee filed his circuit court brief. Although the inheritance was not subject to division, it was relevant to appellee's ability to pay maintenance while meeting his own needs. If appellant was entitled to maintenance, not permitting the amendment

worked a far greater injustice to appellant than permitting the amendment did to appellee.

VI. GOVERNMENT

A. **Hamblen v. Kentucky Cabinet for Health and Family Services**

[2009-CA-000369](#) 9/17/2010 2010 WL 3604103

Opinion by Chief Judge Taylor; Judge Combs concurred; Senior Judge Henry concurred in part and dissented in part by separate opinion. The Court affirmed in part, vacated in part and remanded an order of the circuit court dismissing appellant's complaint alleging that he was subjected to physical abuse, verbal abuse and neglect by staff at a state mental hospital. The Court first held that the appellees were clearly performing governmental functions and thus, were entitled to assert the defense of governmental immunity. The Court next held that the exception in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), was inapplicable because appellant did not properly raise a claim for relief arising under federal law. The Court finally held that immunity was not a bar to mandamus relief against the two named public officers for their alleged failure to perform ministerial duties and therefore, the trial court prematurely rendered summary judgment dismissing appellant's claim for mandamus relief (prospective injunctive relief).

VII. INSURANCE

A. **Reynolds v. Safeco Ins. Co. of Illinois**

[2008-CA-002258](#) 9/17/2010 2010 WL 3603982

Opinion by Judge Thompson; Judge Caperton concurred; Judge Acree concurred by separate opinion. The Court affirmed an order of the circuit court granting summary judgment to the appellee auto insurance provider on appellant's claim for compensation under the uninsured motorist clause in her insurance policy. The Court held that the trial court did not err in granting summary judgment to the insurer. The ice striking appellant's vehicle was not a "hit" as contemplated by the portion of the policy covering an insured against hit-and-run accidents. Therefore, the trial court correctly concluded that the facts in *Masler v. State Farm Mutual Automobile Insurance Company*, 894 S.W.2d 633 (Ky. 1995), were so similar that it was compelled to grant the insurer's motion. The Court rejected appellant's argument that *Shelter Mutual Insurance company v. Arnold*, 169 S.W. 3d 855 (Ky. 2005), impliedly overruled *Masler* and held that the holding in *Shelter Insurance* was limited to chain-reaction accidents.

B. **William C. Eriksen, P.S.C. v. Kentucky Farm Bureau Mut. Ins. Co.**

[2009-CA-000812](#) 9/3/2010 2010 WL 3447688 DR Pending

Opinion and order by Judge Moore; Judge Wine concurred; Senior Judge Harris concurred in part and dissented in part by separate opinion. On direct appeal, the Court affirmed an order of the circuit court dismissing a medical services provider's counterclaim to recover unpaid interest from an insurer under the Motor Vehicle Reparations Act (MVRA) and finding that the provider did not have standing under

MVRA to file a direct action against a reparations obligor. The Court held that the trial court did not err in dismissing the counterclaim as the holding in *Neurodiagnostics Inc. v. Kentucky Farm Bureau Mut. Ins. Co.*, 250 S.W.3d 321 (Ky. 2008) was applicable and therefore, the medical provider did not have a direct right of action to collect the interest provided for in KRS 304.39-210(2). The Court then dismissed the cross-appeal, holding that it was interlocutory because the trial court had not ruled on the provider's first amended counterclaim, which added claims of fraud and wrongful initiation of civil proceedings against the insurer.

VIII. PROPERTY

A. **Cadleway Properties, Inc. v. Bayview Loan Servicing, LLC**

[2009-CA-001428](#) 9/24/2010 2010 WL 3717258

Opinion by Judge Keller; Judge Combs concurred by separate opinion; Judge Lambert dissented by separate opinion. The Court reversed and remanded a summary judgment entered in favor the appellee after concluding its mortgage was superior to appellant's mortgage. The Court first held that the trial court did not err in applying *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002), and granting appellant relief under CR 60.02 after finding that appellant did not receive a copy of the order granting summary judgment. Therefore, the appeal was timely taken. The Court then held that the master commissioner and the trial court were correct in concluding that a subordination agreement was unambiguous. However, the subordination agreement did not unambiguously subordinate appellant's mortgage to appellee's mortgage because the subordination agreement unambiguously subordinated appellant's mortgage to an unrelated mortgage as recorded in the mortgage book. The Court then held that the trial court erred in concluding that the agreement was subject to reformation. In reaching that conclusion the Court first declined to address appellant's argument that appellee failed to plead reformation in its amended complaint because appellant failed to comply with CR 76.12(4)(c)(v), which requires a statement in the brief as to how the issue was properly preserved for appellate review and a review of the record indicated that the issue was not raised below. The Court next rejected appellant's argument that appellee failed to present sufficient evidence showing that it was entitled to reformation because appellant presented no evidence challenging appellee's evidence for reformation. However, the Court finally held that appellee was not entitled to reformation as a matter of law. Because the statement relied on by the trial court and master commissioner was inadmissible hearsay, there was insufficient evidence to establish appellee's right to reformation by clear and convincing evidence. Therefore, summary judgment was not appropriate.

IX. TORTS

A. **York v. Petzl America, Inc.**

[2009-CA-001483](#) 9/24/2010 2010 WL 3717266

Opinion by Senior Judge Buckingham; Judges Clayton and Keller concurred. The Court reversed and remanded a summary judgment entered in favor of appellee in a

personal injury action. The Court first held that summary judgment was not appropriate. Even though appellant had agreed to indemnify settling parties, his liability claims were not extinguished merely because he would be responsible for any judgment rendered in his favor against appellee. No agency or quasi-agency relationship existed between the parties, nor could it be said that any negligence on the part of the settling parties was the entire or primary cause of appellant's injuries. A jury could decide that appellant was injured solely as a consequence of appellee's negligence or that appellee and the settling parties were all equally liable, which would bar any claims for indemnity by appellee. Further, because there was no determination made regarding the settling parties' liability, there could be no summary judgment on the issue of common law indemnity. The Court next held that appellant did not waive the issue of whether the trial court erred by granting appellee summary judgment by not specifically stating the issue in his prehearing statement. Appellant substantially complied with CR 76.03 by clearly stating the issue upon which the summary judgment was based.

X. WILLS AND ESTATES

A. Cheek v. Love

[2009-CA-002296](#) 9/17/2010 2010 WL 3604119

Opinion by Judge Lambert; Judge Clayton and Senior Judge Henry concurred. The Court affirmed a summary judgment in a declaration of rights case where the trial court ordered that the proceeds of an estate be distributed in unequal portions among the deceased's nineteen living grandchildren and two great-grandchildren. The Court held that the use of the legal term "per stirpes" in conjunction with "my grandchildren" revealed an intention that the deceased's children were to provide the stirpital root and that each grandchild was to take by representation through his or her parent (the deceased ancestor). Therefore, the circuit court did not err in dividing the estate.

XI. WORKERS' COMPENSATION

A. Campbell v. Hauler's Inc.

[2009-CA-001727](#) 9/3/2010 2010 WL 3447613

Opinion by Judge Thompson; Judge Lambert concurred; Judge Combs concurred in result only. The Court affirmed an opinion of the Workers' Compensation Board that reversed in part, vacated in part, and remanded a claim to the Administrative Law Judge for further findings of fact. The Court held that it was within the absolute discretion of the Board to remand the opinion of the ALJ for further findings of fact. The ALJ failed to articulate the substantial evidence that supported the determination that an accident caused the worker's fatal heart attack and therefore, the opinion did not afford meaningful review. The Court then held that the Board correctly applied KRS 324.730(4). Because the worker's widow was sixty-two years old at the time of her husband's death and qualified for Social Security benefits under 42 U.S.C.A. § 402(e), she did not qualify for a minimum two years of income benefits.