

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**NOVEMBER 1, 2016 to NOVEMBER 30, 2016**

**I. ADMINISTRATIVE LAW**

**A. Longshore v. Kentucky Unemployment Insurance Commission**

[2015-CA-000676](#) 11/23/2016 2016 WL 6892584

Opinion by Judge D. Lambert; Judge Dixon concurred; Judge Maze dissented and filed a separate opinion.

The circuit court dismissed a petition seeking judicial review of an Unemployment Insurance Commission decision denying benefits on grounds of a lack of jurisdiction. In a 2-1 vote, the Court of Appeals reversed and remanded, holding that the petition was in substantial compliance with the statutory verification requirements set forth in KRS 341.450(1) even though it did not include notarized signatures. Appellant had apparently - and unintentionally - filed a draft of the petition rather than the final version. This version, while bearing the signatures of both client and counsel, did not bear the signature of a notary public verifying the petition. According to appellant, the final version, which appellant's counsel had intended to file, was in fact verified by a notary public. The Court concluded that the filing of the wrong draft, which included the verification statement, but not the notarized signatures, indicated a good faith attempt at compliance with KRS 341.450(1). Therefore, the circuit court erred in dismissing the petition. In dissent, Judge Maze asserted that the petition was properly dismissed because appellant had failed to strictly comply with KRS 341.450(1)

## II. CHILD SUPPORT

### A. Seeger v. Lanham

[2013-CA-001591](#) 11/18/2016 2016 WL 6818937 DR Pending

Opinion by Judge Clayton; Judges Combs and Maze concurred.

A non-married couple bore a child, and Mother sought to establish paternity and seek child support before the child turned four years old. Before the final judgment was entered, Father began receiving social security retirement benefits and the child began receiving social security dependent benefits. The Court of Appeals held that under these circumstances, the trial court had the discretion to apply the benefits received by the child as Father's dependent, in excess of Father's monthly child support obligation, to Father's pre-petition child support liabilities that pre-dated when the benefits were first received. Mother asserted that the benefits should only be applied as credit toward pre-petition child support liabilities from the date that the benefits began accruing. However, the Court held that any pre-petition child support liability was an obligation that accrued when a judgment was entered. Therefore, it was not an arrearage, as Father could not have accrued arrearage on a liability that had not been established, and the child had begun receiving the benefits before the judgment. The Court also held that in KRS Chapter 406 cases where the mother is represented by private counsel and the mother moves for child support under KRS Chapter 403 in addition to establishing paternity under KRS Chapter 406, the mother may request the trial court award attorneys' fees pursuant to KRS 403.220.

### III. COUNTIES

#### A. *Puckett v. Lexington–Fayette Urban County Government*

[2015-CA-000752](#) 11/23/2016 2016 WL 6892583 Rehearing Pending

Opinion by Chief Judge Kramer; Judges Clayton and J. Lambert concurred.

Two members of the Lexington-Fayette Urban County Government Policemen’s and Firefighter’s Retirement Fund filed an action pursuant to KRS 67A.520 alleging that the Lexington-Fayette Urban County Government (LFUCG) had failed to make its mandated 2011 contribution to the Fund. Their suit sought a court order compelling LFUCG, pursuant to the version of KRS 67A.520 in existence in 2011, to immediately make the full amount of that contribution, along with interest, at the rate that would have been earned had that sum been invested by the Fund. The circuit court ultimately entered summary judgment in favor of LFUCG. Reversing and remanding, the Court of Appeals held, based upon the plain language of the statute and its legislative history, that the amortization payments described in KRS 67A.520 are intended to address a shortfall in the Fund’s assets that exists by reason of legislative design - a funding scheme that permitted LFUCG to make minimal contributions and interest-only payments. The amortization payments are not intended to address a shortfall in the Fund’s assets that exists by reason of LFUCG’s noncompliance with its statutory duty to make annual contributions. Thus, any missed contributions on the part of LFUCG do not become a part of the unfunded liability that must be paid in 30 years.

## IV. CRIMINAL LAW

### A. *Forte v. Commonwealth*

[2015-CA-000410](#) 11/04/2016 2016 WL 6561529

Opinion by Judge J. Lambert; Chief Judge Kramer and Judge D. Lambert concurred.

In a direct appeal from convictions for robbery, assault, and burglary, the Court of Appeals affirmed in part, reversed in part, and remanded. With respect to the robbery and burglary convictions, the Court rejected appellant's arguments that: (1) the jury's verdict was not unanimous related to the robbery and burglary convictions based upon the trial court's use of a combination instruction; (2) the trial court improperly failed to instruct the jury on facilitation; (3) the evidence before the grand jury was not sufficient to support an indictment; and (4) the trial court should have directed a verdict of acquittal on the robbery and burglary charges. However, the Court reversed appellant's assault conviction, holding that the Commonwealth failed to establish the "serious physical injury" prong of the assault charge because it did not present evidence showing the nature and severity of the gunshot wound to the victim's head or the severity of his headaches. The Commonwealth also failed to connect the victim's symptoms (headaches, eye watering, and eye twitching) to the gunshot. The Court concluded that the Commonwealth needed to present "a more exacting level of proof" of this element.

**B. Lane v. Commonwealth**

[2015-CA-001698](#) 11/04/2016 2016 WL 6543573 DR Pending

Opinion by Judge Clayton; Judges Combs and Maze concurred.

Appellant ran a stop sign and was stopped by an officer who had a K9 unit. Another officer in a cruiser stopped to assist. The two officers approached appellant's vehicle and noticed appellant moving furtively and looking over his shoulder. The officers had appellant exit the vehicle, where he was handcuffed and taken back to the second officer's vehicle for a safety pat down. The pat down revealed no weapons or contraband. While the safety pat down was occurring, the officer with the K9 unit retrieved the K9 officer and had it check the outside of appellant's vehicle. The K9 officer alerted on the driver's car door. A subsequent search of the vehicle revealed no contraband. The second officer then conducted a more thorough pat down of appellant and discovered a small quantity of cocaine in appellant's jean change pocket. Appellant alleged that the search violated his Fourth Amendment rights, and the Court of Appeals agreed. The Court first noted that the dog sniff was not related to the offense for which appellant was stopped, and it was not premised on probable cause or a reasonably articulable suspicion of drug-related activity. Moreover, the dog sniff extended the time it took to complete the traffic stop, as the officer with the K9 unit could have been writing the ticket and attending to the ordinary traffic stop duties rather than having the K9 unit sniff the car. Accordingly, appellant's conviction was reversed and the case was remanded for entry of an order suppressing the evidence found on appellant's person during the second pat down.

## **V. CUSTODY**

A. *Penticuff v. Miller*

[2015-CA-001101](#) 11/04/2016 2016 WL 6543577

Opinion by Judge Clayton; Judges Jones and Nickell concurred.

In this family law case, a child ostensibly had two fathers. Mark Miller was married to the child's mother when the child was born, and Carson Penticuff was the child's natural father. The mother misled Miller and Penticuff into believing the child was Miller's for the first few years of the child's life. Once the mother informed Penticuff that he was the natural father, DNA testing was conducted concluding to a 99.99% certainty that Penticuff was the child's father. Penticuff then sought a paternity determination along with custody, support, and visitation. The trial court concluded that Penticuff was the natural father but had waived his superior right to custody. It further held that the mother had not waived her superior right to custody and that because Miller was neither a *de facto* custodian nor the biological father, he had no legal claim to custody or visitation with the child. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court first held that the trial court erred by finding that Penticuff had waived his superior custody rights. To waive those rights, Penticuff had to have a knowing right that he voluntarily and intentionally surrendered. Here, Penticuff did not have a known right because the mother's deception kept him from being aware that he was the child's father. Furthermore, Penticuff's involuntary and unintentional surrender of his superior rights was best evidenced by the fact that he had taken appropriate steps to establish paternity and to begin having a relationship with his son once he was informed that he was the child's father. The Court also held that the evidence was insufficient to demonstrate that the mother had partially waived her superior right to parent to Miller. Although the mother gave the child Miller's last name, listed Miller on the child's birth certificate, and did nothing to counter Miller's belief that he was the child's father, evidence was presented that she was scared of Miller and his family, that she had been the subject of past violence and threats of violence by Miller, that she had previously obtained a DVO against Miller, and that Miller admitted he had violated the DVO. Finally, the Court determined that the child did not have an independent, cognizable legal right to maintain a relationship with Miller. The doctrine of paternity by estoppel could not be used by Miller as it only estops a legal father from disclaiming paternity when it suits him. The doctrine is a shield to protect a child, not a sword to be used by a person who wants to estop other parties from excluding him as a father. Here, the child had two biological parents, neither of whom was unfit to be a parent, and both of whom sought to exercise their superior custody rights to raise their child. Under these circumstances, Miller could not claim the child's independent right to maintain a relationship

with his psychological father.

## VI. DAMAGES

### A. *Burkhead v. Davis*

[2014-CA-000012](#) 11/23/2016 2016 WL 6892587

Opinion by Judge Nickell; Judges Acree and Taylor concurred.

In an action stemming from a contentious dispute between neighbors, a jury awarded Burkhead nominal damages on a claim of nuisance, but awarded the Davises \$500 in compensatory damages and \$30,000 in punitive damages on counter-claims for nuisance, outrageous conduct, and malicious prosecution. Burkhead challenged the punitive damages award as unconstitutionally excessive. The Court of Appeals undertook a detailed analysis of the three “guideposts” regarding the constitutionality of a punitive damages award as set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and the application of those factors to the case at bar. The Court noted the general rule that damage ratios exceeding single digits are burdened with at least the appearance of unconstitutionality. However, upon examination of the record and application of the pertinent factors, the Court concluded that the reprehensibility of Burkhead’s conduct presented circumstances necessitating application of an exception to the single-digit damage ratio limitation. Therefore, the jury’s award was affirmed. On cross-appeal, Davis challenged the trial court’s rulings on the admissibility of three pieces of documentary evidence. The panel affirmed the trial court’s rulings upon determination that the proffered evidence constituted inadmissible hearsay and did not fall under one of the recognized exceptions for admissibility.

## VII. FAMILY LAW

### A. *Gibson v. Campbell-Marletta*

[2016-CA-000038](#) 11/04/2016 2016 WL 6543571

Opinion by Judge J. Lambert; Judges Combs and VanMeter concurred.

The Court of Appeals affirmed the circuit court's issuance of a domestic violence order and a subsequent order denying appellant's motion to alter, amend, or vacate, holding that the findings of the circuit court were neither clearly erroneous nor an abuse of discretion. Most notably, the circuit court rejected appellant's argument that the circuit court's entry of a DVO was improperly based upon his statement that he would exercise his statutory rights under the "Castle doctrine," which he argues he was entitled to make. The "Castle doctrine" permits the use of defensive force for those unlawfully and forcibly entering a residence. Appellant had threatened to exercise his rights under the "Castle doctrine" if Mother went on his property to retrieve their son's shoes. The circuit court found that this constituted an imminent threat of domestic violence, justifying the issuance of a DVO, despite the fact that appellant was out of town on the date of the incident. Mother did not attempt to forcibly or unlawfully enter appellant's property, as testimony reflected that appellant had given her permission to pick up the shoes within 48 hours of the incident. Appellant's reliance upon the Castle doctrine was also found to be disingenuous, because he was not present when mother stopped at his house to retrieve the shoes, and he was in no way threatened or intimidated by her to the point that he felt he needed to use deadly force to protect himself. Instead, the text messages between the parties reflected that when mother texted appellant that she was at his house to pick up the shoes, he stated that she had no right to be on his property and that he would shoot her if she ever came back. In the context of two parents co-parenting their son, this was an imminent threat of domestic violence. Mother also testified that she believed that appellant was setting up a justification for the future use of force.

## VIII. FRAUD

### A. *Thomas v. Thomas*

[2014-CA-000984](#) 11/23/2016 2016 WL 6892586

Opinion by Judge Nickell; Judge VanMeter concurred; Judge Maze concurred and filed a separate opinion.

A former husband sued his ex-wife, alleging that the exercise of undue influence by the ex-wife resulted in his execution of three deeds and a power of attorney, and his addition of her name to a bank account from which she later transferred more than \$21,000. The ex-wife alleged the existence of a partnership between the parties, and counterclaimed for harassment and terroristic threatening. The circuit court entered judgment on a jury verdict finding the existence of a partnership and no undue influence, partitioning partnership property, and awarding the former husband \$21,000 for breach of fiduciary duty. The ex-wife appealed, and the Court of Appeals reversed and remanded, holding that: (1) the ex-wife was entitled to amend her pre-trial compliance so as to specify the dollar amount of damages she sought on her counterclaims; (2) the trial court could not partition the parties' former marital home; (3) the jury should not have been asked to partition partnership property; and (4) the trial court could not award the former husband damages for breach of fiduciary duty.

## IX. JUDGMENT

### A. *Goetz v. Asset Acceptance, LLC*

[2014-CA-000749](#) 11/18/2016 2016 WL 6818921

Opinion by Judge Acree; Judges Maze and Nickell concurred.

The Court of Appeals reversed and remanded an order denying appellant's motion to enforce a previously entered agreed judgment. The agreement resulted from negotiations regarding credit card debt. The agreement provided that if a satisfaction of judgment was not filed by appellee within thirty days of payment of the full negotiated settlement amount, appellee was liable for liquidated damages in the amount of \$10 per day until the obligation was fulfilled. Appellant, after learning no satisfaction of judgment had been filed, sought enforcement of the agreed judgment 425 days after satisfying the full amount owed. The circuit court denied the motion, but the Court of Appeals held that the language and terms of the agreement were sufficiently clear to constitute an effective and enforceable judgment. Thus, appellant was entitled to enforcement of the liquidated damages provision. The Court further held that the fact that the agreed judgment failed to include distribution directions to the circuit court clerk, as required by local rule, did not excuse appellee from being bound by the liquidated damages provision. Appellee was clearly aware of the document's terms and its own obligations under the judgment, and appellant's attorney provided appellee with a copy of the judgment. Finally, the Court rejected appellee's argument that the liquidated damages provision constituted an unenforceable penalty incompatible with Kentucky law and discussed the distinction between a penalty provision and one for liquidated damages.

## X. JUVENILES

### A. *S.S. v. Commonwealth*

[2015-CA-001368](#) 11/18/2016 2016 WL 6818919 DR Pending

Opinion by Judge VanMeter; Judges Combs and Thompson concurred.

On review from an order denying appellant's writ of prohibition, which sought to prevent a youthful offender transfer hearing, the Court of Appeals affirmed, holding that the trial court had jurisdiction to hold a transfer hearing to determine the proper court system for a defendant who was under the age of fourteen at the time of the felony, but who was now over the age of eighteen. KRS 635.020(7) mandates a transfer hearing when a previously minor defendant reaches the age of eighteen; however, KRS 635.020(2) limits transfer for a Class A felony to a defendant fourteen years or older. The Court held that each provision of KRS 635.020 enumerates distinct situations when a defendant may be transferred to circuit court as a youthful offender, and does not require imputing the minimum age of one section to another. Since appellant was now over the age of eighteen, pursuant to KRS 635.020(7) the district court was required to hold a transfer hearing to determine if he should be transferred to the circuit court to be tried as a youthful offender. Furthermore, the Court clarified that merely proceeding with a preliminary transfer hearing did not deny appellant due process or the protections of the juvenile code; rather, the hearing would determine the appropriate court system for appellant and would provide a forum to present his case regarding transfer.

## XI. NEGLIGENCE

### A. Resnick v. Patterson

[2011-CA-001657](#) 11/23/2016 2016 WL 6892588

Opinion by Judge J. Lambert; Chief Judge Kramer concurred; Judge Thompson dissented without separate opinion.

Appellant, while assisting his mother in her move from appellee's residence, sustained injuries after falling in appellee's backyard. Appellant and his wife sued appellee for compensation under a theory of negligence and failure to warn. The circuit court granted summary judgment in appellee's favor, and the Court of Appeals affirmed on appeal. However, the Supreme Court of Kentucky granted discretionary review and vacated and remanded the Court's decision for reconsideration under *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015); *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013); and *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013). Upon consideration of these cases, the Court of Appeals vacated the circuit court's order granting summary judgment and remanded for an analysis of the comparative fault, if any, of both appellant and appellee and whether summary judgment was appropriate under the circumstances. In so doing, the Court noted that because the trial court analyzed the case in terms of a duty, its reasoning was not in line with the Supreme Court's requirement that cases be considered in terms of foreseeability and comparative fault. The question was whether or not it was foreseeable to appellee that appellant might be on his property helping his mother move, might be distracted while carrying boxes from the storage shed, and might trip on a hole next to a tree stump. Ultimately, the trial court had to determine whether appellee did everything he reasonably could under the circumstances and to what extent appellant was responsible for his injuries.

## XII. SUMMARY JUDGMENT

### A. Brown v. Griffin

[2014-CA-001049](#) 11/18/2016 2016 WL 6818920

Opinion by Judge Nickell; Judges Combs and VanMeter concurred.

In a medical malpractice action, appellant alleged that appellee negligently performed a total laparoscopic hysterectomy, resulting in an injury to her ureter. Appellant failed to disclose any medical experts regarding the appropriate standard of care and appellee's breach of that standard despite repeatedly assuring the trial court such disclosure would be forthcoming. The trial court warned appellant that the failure to produce expert testimony could eventually lead to dismissal of the case. Nearly thirty months after filing suit, and in the face of renewed motions to dismiss and for summary judgment, appellant filed a purported disclosure, arguing for the first time that appellee's own testimony was sufficient to infer a breach of the standard of care. The trial court disagreed and granted summary judgment based on appellant's failure to present a *prima facie* case of medical negligence. On appeal, appellant alleged that summary judgment was improper as the jury could have inferred appellee's negligence and no expert testimony relative to the standard of care was required. Appellant further argued that a review of the totality of the evidence was sufficient to establish a breach of the standard of care even though no witness testified using those "magic words." Finally, appellant contended that the trial court erroneously entered summary judgment solely as a sanction for her failure to timely disclose expert testimony. The Court of Appeals affirmed, concluding that expert testimony was required to establish the standard of care and a breach thereof. Appellant's belated attempt to assert differently was contrary to her assertions throughout the litigation, and the trial court correctly concluded that no legitimate dispute existed regarding the need for expert testimony. The Court further concluded that the record did not support an inference of negligence as urged by appellant, nor did it contain admissions of negligence by appellee. Finally, the Court reviewed the trial court's orders and concluded summary judgment was entered because of a failure of proof, not as an improper sanction.

### **XIII. TERMINATION OF PARENTAL RIGHTS**

#### **A. *K.M.J. v. Cabinet for Health and Family Services***

[2015-CA-001746](#) 11/04/2016 2016 WL 6543572

Opinion by Judge Maze; Judges Taylor and VanMeter concurred.

The Cabinet for Health and Family Services filed a petition seeking to terminate appellant's parental rights to her daughter. The circuit court granted the petition. On appeal, the Court of Appeals vacated and remanded, holding that the trial court's decision to "defer" the matter of appellant's termination beyond the period provided in KRS 625.090 was impermissible under the statute. KRS 625.090 requires a court to enter a decision either terminating parental rights or dismissing a TPR petition within 30 days of the conclusion of proof. Thus, the circuit court could not defer its decision beyond the statutory period following the conclusion of the TPR hearing.

#### XIV. WORKERS' COMPENSATION

##### A. *Homestead Family Farm v. Perry*

[2015-CA-001988](#) 11/23/2016 2016 WL 6892578

Opinion by Judge Dixon; Chief Judge Kramer and Judge Taylor concurred.

The Court of Appeals reversed and remanded a decision of the Workers' Compensation Board reversing an ALJ's dismissal of Perry's claim. Perry was employed as a truck driver and laborer for Homestead Family Farms. He injured his back unloading soybeans at Homestead's grain bins and filed a claim for benefits. The ALJ concluded that both Homestead and Perry were engaged in agricultural work pursuant to KRS 342.630(1) and 342.650(5) and dismissed Perry's claim pursuant to the agriculture exemption. The Board reversed the ALJ, finding that the statutory agricultural exemption did not apply to Perry because he was engaged in the commercial drying and storing of agricultural commodities when he was injured, which is an activity excluded from the definition of agriculture set forth in KRS 342.0011(18). The Court disagreed, holding that the Board misconstrued the definition of agriculture found in KRS 342.0011(18) and that there was no evidence to support the Board's conclusion that Perry was engaged in a "commercial" drying and storing activity. It was undisputed that Perry was tasked with hauling the harvested crops and unloading them at Homestead's storage silos. Testimony established that Homestead only harvested and stored its own crops and that the farm's sole source of income was from the eventual sale of those crops at market. Therefore, Perry's activities fit within the statutory definition of agriculture, *i.e.*, the "harvesting, and preparation for market of agricultural ... commodities ... and any work performed as an incident to or in conjunction with the farm operations." Consequently, Perry was a "person employed in agriculture" and not covered by the Act pursuant to KRS 342.650(5).