

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
MARCH 1, 2017 to MARCH 31, 2017

I. APPEALS

A. Calhoun v. Wood

[2016-CA-000972](#) 03/17/2017 2017 WL 1034545

Opinion by Chief Judge Kramer; Judges D. Lambert and Nickell concurred.

A female petitioner sought an interpersonal protective order (IPO) against a male respondent - a friend who desired to have a romantic relationship with the petitioner. The circuit court granted the petitioner an IPO and the respondent appealed. The Court of Appeals affirmed, holding that the evidence supported a finding that the respondent had stalked the petitioner and was sufficient to support the issuance of an IPO. Of particular note, the Court declined to hold that the appeal was moot because the IPO at issue had expired. Instead, the Court held that the appeal met the “collateral consequences” exception to mootness. Citing to *Caudill v. Caudill*, 318 S.W.3d 112 (Ky. App. 2010), the Court noted that testing the sufficiency of the evidence on which a DVO or IPO has been granted is never moot because entry of a DVO or IPO follows the alleged perpetrator forever in terms of background checks for employment purposes and volunteer work.

II. BANKS AND FINANCIAL INSTITUTIONS

A. *Deal v. First and Farmers National Bank, Inc.*

[2015-CA-001688](#) 03/31/2017 2017 WL 1193175

Opinion by Judge Jones; Judge Stumbo concurred; Judge Taylor concurred in result only.

Appellant brought this action under KRS 425.526, which creates a cause of action for a garnishee's failure to make a satisfactory disclosure in response to a garnishment order, against First and Farmers National Bank after discovering that the Bank did not disclose the existence of certain funds held in an account after being served with a garnishment order by appellant. The Bank moved for summary judgment on the basis that newly enacted federal laws, with which the Bank had complied, preempted KRS 425.501, *et seq.* The circuit court found that the Bank could have complied with both state and federal authorities; however, it granted summary judgment in favor of the Bank, as it found that appellant could not prove damages because all funds held by the Bank were protected from garnishment under federal law. On appeal, the Court of Appeals reviewed the applicable state and federal statutes as they pertain to garnishments and examined the relationship between those federal regulations and state statutes. The Court noted that there were numerous instances where the new federal regulations conflicted with Kentucky law. Despite these conflicts, however, the Court concluded that preemption was not complete and that the Bank was required to comply with aspects of state law that were not in conflict with federal law. Nonetheless, the Court agreed with the circuit court that appellant was not entitled to damages under KRS 425.526. While appellant argued that she was entitled to the full amount of her underlying judgment because of the Bank's noncompliance, the Court noted that the plain language of KRS 425.526 set a ceiling on the amount of damages a plaintiff could receive - no more than the garnishee owes to the plaintiff's debtor, and never greater than the judgment against the original debtor. The Court then held that in order to recover under KRS 425.526, a plaintiff must demonstrate that she has suffered actual damages. Appellant was unable to do so, as she conceded that all of her judgment debtor's funds held by the Bank were exempt from garnishment. Additionally, the Court briefly addressed appellant's state law claims for fraudulent misrepresentation and fraudulent omission, which had not been discussed separately by the circuit court. The Court noted that these claims also failed, as appellant could not establish that the Bank's actions caused her actual harm. Further, the Court noted that appellant could not base her claims on statements the Bank had made as part of the garnishment proceeding appellant instituted, as those statements were privileged.

III. CONTRACTS

A. Miniard v. Turner

[2015-CA-000075](#) 03/17/2017 2017 WL 1033998

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

Appellant received an assignment from her husband of real estate commissions due in contract between the Turners and Cooper Development for the sale of the Turners' farm in Jessamine County. The original contract between the Turners and Cooper was for a sale price of \$1.2M, with principal payments of \$100,000; appellant's husband's fee was equal to 3% of the contract, due as principal payments were made. Appellant's husband had received \$3,000 from the initial payment of \$100,000 towards the principal, with \$1.1M owed thereafter. Cooper never made another payment, although interest payments were made, and appellant was paid an additional \$15,000. In 2010, the Turners sold the note to R.J. Corman for \$500,000. Appellant then sued the Turners for unpaid commissions, claiming that she should have received an additional \$18,000. The Turners moved for summary judgment, arguing that the contract was for commissions due on the principal only, and that appellant's husband received a commission for Cooper's single principal payment. The circuit court agreed with the Turners and granted summary judgment in their favor. On appeal, appellant argued that there were genuine issues of material fact concerning the amount due and that case law supported her position that the commissions should not be tied to the sale price of the property. The Court of Appeals disagreed and held that summary judgment was appropriate because the case turned on a matter of contract interpretation: appellant's assignment, which was drafted by appellant and her husband and thus was construed against them, spoke only to commissions due as principal installments on the note were paid by Cooper. Furthermore, there was no evidence of bad faith by the Turners, who had overpaid appellant by \$15,000. Therefore, the circuit court was affirmed.

B. T+C Contracting, Inc. v. Louisville and Jefferson County Metropolitan Sewer District

[2015-CA-000333](#) 02/24/2017 2017 WL 729785 Rehearing Pending

Opinion by Judge J. Lambert; Judges Dixon and Jones concurred.

T+C, a general contractor, filed an action against a joint metropolitan sewer district, alleging that the contract for the sewer project violated the Fairness in Construction Act and the state constitution and that the district breached the contract in failing to pay for work performed to test, repair, and replace pipe. The district filed a counterclaim seeking liquidated damages for breach of contract, alleging that T+C had delayed in achieving substantial completion and final completion. The circuit court entered summary judgment in favor of the district on T+C's claims and, following a jury trial, entered judgment in favor of the district on its claim for delay in substantial completion and in favor of T+C on the claim for delay in final completion. On T+C's direct appeal, the Court of Appeals vacated several of the circuit court's rulings. For example, the Court held that the contract's alternative dispute resolution provision for contract disputes, which made the chief engineer's decision binding, was void and unenforceable under KRS 371.405(2)(a) of the Kentucky Fairness in Construction Act of 2007. The Court also remanded for reconsideration of the defective design claim and to permit discovery as to the actual damages incurred by the district to assess whether the claimed liquidated damages were excessive and an impermissible penalty. As to the district's cross-appeal, which related to the trial on the completion of the project and whether T+C was entitled to a change order, the Court affirmed, holding that T+C had set forth proof that the property owner did not want a pond replaced by introducing e-mail communication between her and T+C and that the jury instructions were proper in asking the jury to determine whether T+C had met the district's requirement to obtain a change order.

IV. CORRECTIONS

A. Lee v. Haney

[2015-CA-001470](#) 03/24/2017 2017 WL 1101485

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

The Court of Appeals reversed the circuit court's dismissal of the appellant's declaration of rights action (the circuit court concluded that appellant had failed to exhaust his administrative remedies). Appellant, a prisoner in the custody of the Kentucky Department of Corrections, challenged the prison adjustment officer's imposition of discipline after a hearing by "detail[ing]" and "submitting [a] written statement [of appeal] to the Warden" as stated in the applicable prison policies and forms. The warden received the submission on the 16th day after the adjustment officer's decision and disallowed the appeal because the submission was required to be made within 15 days of the decision. The Court of Appeals concluded that nothing in the policies or forms required the warden's receipt of the appeal within 15 days. Furthermore, the Court held that "[t]he adoption of RCr 12.04(5) and the mailbox rule did not eradicate the need for equitable tolling in some instances," including prisoner appeals of prison discipline decisions. The circuit court's dismissal of the declaration of rights action was reversed and the case was remanded to allow the circuit court to determine whether the warden's decision that the appeal was untimely should be reversed on the ground of equitable tolling.

V. CRIMINAL LAW

A. *Bailey v. Jones*

[2015-CA-001878](#) 03/31/2017 2017 WL 1193173

Opinion by Judge Dixon; Judges Clayton and D. Lambert concurred.

Appellant challenged the circuit court's order dismissing his appeal from a post-incarceration supervision revocation hearing. He was provided court-appointed counsel at his preliminary revocation hearing but was denied counsel at the final hearing. The Court of Appeals held that appellant was entitled to counsel under KRS 31.110(2)(a) "at all stages of the matter . . . including revocation of probation or parole." The Court noted that the Supreme Court has held that a defendant is entitled to counsel at every "critical stage" of criminal proceedings. Final hearings before the Parole Board are not mere perfunctory proceedings. For example, additional evidence may be presented at final hearings before the Parole Board and additional witnesses may be called to testify at such hearings, which could affect revocation and, therefore, constitute critical stages of criminal proceedings. Consequently, appellant was entitled to counsel at his final hearing before the Parole Board.

B. *Blanton v. Commonwealth*

[2015-CA-000989](#) 03/17/2017 2017 WL 1033708

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

Following his conviction on two counts of theft by unlawful taking, appellant challenged the trial court's denial of his motion to withdraw his guilty plea. The Court of Appeals affirmed, holding that the plea was intelligent, knowing, and voluntary and finding no merit in appellant's argument that the entry of his plea due to his desire to be immediately released to see his terminally sick mother made the plea involuntary. The Court also declined to consider appellant's motion under Federal Rule of Criminal Procedure 11(d)(2)(B) and *United States v. Hockenberry*, 730 F.3d 645 (6th Cir. 2013). The federal rule permits the withdrawal of a guilty plea if a defendant can show a fair and just reason for the withdrawal. However, the terms of the rule are not constitutionally applicable to state courts pursuant to *Roddy v. Black*, 516 F.2d 1380 (6th Cir. 1975).

C. *Commonwealth v. Crosby*

[2015-CA-000308](#) 03/24/2017 2017 WL 1101127

Opinion by Judge Thompson; Judges D. Lambert and Stumbo concurred.

The Court of Appeals affirmed an opinion and order denying the Commonwealth's petition for a writ of prohibition/mandamus. The petition sought relief from a district court order suppressing evidence seized following an arrest for DUI. The Court determined that the district court properly suppressed the evidence based on factual findings made pursuant to the four-factor test set forth in *Wells v. Commonwealth*, 709 S.W.847 (Ky.App. 1986). That test is used to determine whether a defendant operated or physically controlled a motor vehicle while intoxicated as needed to violate KRS 189A.010. The district court found that only two factors supported the Commonwealth's position: the defendant was awake and the motor vehicle was running. The other two factors were against the Commonwealth's position: the defendant's vehicle was safely parked and her intent not to drive was demonstrated by her using the driver's seat to smoke and text and by her statement to the investigating officer that she planned to return to the nearby party she was attending and spend the night. The Court of Appeals determined that pursuant to those findings, there was insufficient evidence to provide probable cause for an arrest.

D. *Commonwealth v. Kenley*

[2015-CA-001630](#) 03/17/2017 2017 WL 1034546

Opinion by Judge Clayton; Judges Dixon and D. Lambert concurred.

At issue was whether an inmate could be charged with first-degree promoting contraband for possessing a quantity of Fentanyl that was found in her pocket when she was treated for an overdose that occurred inside a detention center. Appellee argued that KRS 218A.133 prohibits prosecution for a criminal offense prohibiting the possession of a controlled substance if the person overdoses and seeks medical attention. The Court of Appeals noted that KRS 218A.133(2) precludes charging a person with “a criminal offense prohibiting the possession of a controlled substance” under conditions existing in the instant case. KRS 218A.133(3), on the other hand, removes from subsection (2) “the investigation and prosecution of any other crimes committed by a person who otherwise qualifies under this section.” Thus, if appellee was charged with a crime other than possession of a controlled substance, then she was not entitled to immunity from prosecution. The Commonwealth argued that because first-degree promoting contraband criminalizes a person inside a detention facility possessing an item that is capable of endangering the safety or security of the detention facility, then appellee could be charged with the latter, as it is not a criminal offense aimed at prohibiting the possession of a controlled substance. The Court of Appeals agreed. The Court further noted that the public policies announced in KRS 218A - helping to rehabilitate drug users, reduce criminal risk factors, and offer a potential alternative to incarceration - are not furthered by immunizing a currently-incarcerated person from first-degree promoting contraband. By possessing the dangerous contraband inside the prison, appellee was increasing criminal risk factors by endangering herself, other inmates, and employees at the detention center.

E. *Greer v. Commonwealth*

[2016-CA-001006](#) 03/10/2017 2017 WL 943971

Opinion by Judge Clayton; Judges Dixon and Nickell concurred.

Appellant was stopped by an officer of the Lexington Police Department. The officer had been advised to keep on the lookout for appellant - a convicted felon - and others who were suspected of being involved in drug-related activity. When the officer stopped appellant, he perceived that appellant's car windows were excessively tinted in violation of KRS 189.110(4). As the officer approached the vehicle, he detected the odor of raw marijuana. Appellant admitted to having marijuana in the vehicle. The officer attempted to confirm his suspicions about the tinting, but his tint meter malfunctioned. Other officers were summoned, but a second tint meter device also failed. Upon further search of the vehicle, the officer also found a handgun. The grand jury declined to indict appellant for excessive window tinting, but he was charged with being a convicted felon in possession of a handgun, possession of marijuana, and for driving in violation of his instructional permit. The circuit court denied appellant's motion to suppress based upon the officer's incorrect assessment of a vehicle equipment violation, which appellant contended was a mere pretext to give the police an opportunity to search his vehicle. Appellant entered a conditional guilty plea and this appeal followed. In affirming, the Court of Appeals first noted that there are no reported Kentucky decisions analyzing whether an officer's suspicion of improper tinting may form the basis for a traffic stop, but that federal courts have addressed this issue. The Court adopted the reasoning of the Sixth Circuit Court of Appeals, which allows officers to stop a vehicle for excessive tinting based on the officers' familiarity with window tinting and their estimate that the vehicle's windows were tinted substantially darker than permitted. Here, the officer's testimony at the suppression hearing amounted to substantial evidence supporting the circuit court's finding of reasonable suspicion for the stop. Therefore, the circuit court did not err in denying the motion to suppress.

F. *Palmer v. Commonwealth*

[2014-CA-001017](#) 03/03/2017 2017 WL 836152 Rehearing Pending

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

Appellant was convicted of second-degree assault and received a ten-year sentence. On appeal, appellant raised issues concerning the introduction of character evidence during the guilt phase of trial and evidence of prior amended or dismissed charges in the penalty phase. The Court of Appeals affirmed, holding that the KRE 404(b) evidence was admissible to establish bias and to explain admissions that appellant had made to another person. The Court further held that while the introduction of documents detailing charges and factual recitations in prior criminal actions was in error, the error did not rise to the level of manifest injustice because the Commonwealth did not elicit testimony about the original charges or underlying facts.

VI. EDUCATION

A. *Mike v. Department of Education*

[2016-CA-000029](#) 03/10/2017 2017 WL 942869 DR Pending

Opinion by Judge Thompson; Judges Acree and J. Lambert concurred.

Appellant challenged an opinion and order affirming the decision of a statutory administrative tribunal convened by the Kentucky Department of Education, which determined that appellant engaged in conduct unbecoming a teacher and, therefore, was properly terminated by the Jefferson County Board of Education. Appellant's termination was based on findings that as principal of Louisville Male High School, he failed to follow ACT testing procedures and violated 703 KAR 5:080 by engaging in conduct for the purpose of increasing scores on ACT testing. The Court of Appeals affirmed appellant's termination based on conduct unbecoming a teacher. Although the Court indicated that mere negligence in supervising the testing may not have been sufficient to support termination, there was substantial evidence that appellant intentionally engaged in conduct to interfere with the investigation by ACT and the Kentucky Department of Education. Therefore, there was sufficient evidence that appellant engaged in conduct unbecoming a teacher within the meaning of KRS 161.790(1)(b).

VII. EMPLOYMENT

A. *Powers v. Keeneland Association, Inc.*

[2015-CA-001868](#) 03/31/2017 2017 WL 1193174

Opinion by Judge Jones; Judge Combs and Chief Judge Kramer concurred.

Appellant appealed from an order dismissing his claim of an alleged violation of Kentucky's Civil Rights Act (KCRA), KRS Chapter 344, against Keeneland Association, Inc. The trial court concluded that appellant was not an employee of Keeneland, but rather an independent contractor, and was, therefore, unable to invoke the protections of the KCRA. The Court noted that the KCRA defined an employee simply as "an individual employed by an employer." KRS 344.030(5). The Court then noted that in *Steilberg v. C2 Facility Sols., LLC*, 275 S.W.3d 732 (Ky. App. 2008), the Court adopted the common-law agency test to determine whether an individual was an agent or an independent contractor under the KCRA. After considering all of the factors under the common-law agency test in conjunction with one another, the Court agreed with the circuit court's conclusion that appellant was an independent contractor. While appellant may have received some benefits traditionally associated with being an employee, the freedom he enjoyed over his schedule, duties, and general work life was more typical of an independent contractor. Finally, the Court disagreed with appellant's assertion that the trial court had failed to allow him an opportunity to complete discovery.

VIII. FAMILY LAW

A. Harvey v. Robinson

[2015-CA-000915](#) 03/03/2017 2017 WL 836831 Released for Publication

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

On appeal from orders denying former wife's motion for a judgment for diminution of the value of real property that she received in a property settlement agreement in a dissolution action, the Court of Appeals affirmed. The Court held that the circuit court's interpretation of its prior order was not in error, noting that an appellate court owes deference to a circuit court's interpretation of its own order. The former husband had complied with the terms of the circuit court's prior order in removing business equipment and material from the subject property and returning the landscape to its original condition in keeping with the landscape of a residence in Lexington. The Court also held that the former wife failed to introduce proof of her damages based upon the increase in value of the property from the time of the property settlement agreement (\$856,000 in 2002) to the time she sold it (\$3.3M in 2014). The Court also rejected the former husband's argument that the circuit court erred in granting attorneys' fees because the award was not related to the diminution of value issue and because he failed to properly appeal that ruling.

B. Nein v. Columbia

[2016-CA-000681](#) 03/03/2017 2017 WL 836828

Opinion by Judge Jones; Judge Combs and Chief Judge Kramer concurred.

Paternal grandparents petitioned the circuit court for grandparent visitation rights after Mother informed them she would no longer allow Child to spend time with them. The circuit court granted Grandparents visitation with Child. Mother appealed, arguing that the circuit court's order was arbitrary and inconsistent with the evidence presented at trial, and that the court improperly allowed the appointed Guardian ad Litem (GAL) to serve as both a friend of the court and GAL. The Court of Appeals affirmed. The Court analyzed the circuit court's order under *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012), which: (1) held that grandparents petitioning a court for visitation rights can overcome the presumption that a fit parent acts in the best interest of the child in denying visitation by showing with clear and convincing evidence that granting grandparent visitation is in the child's best interest, and (2) delineated factors for a court to consider when making its determination. The Court determined that the circuit court had properly presumed that Mother was acting in Child's best interest. Additionally, the Court concluded that the circuit court's findings of fact properly addressed the *Walker* factors. The Court indicated that so long as a trial court's order makes clear from its discussion that the court properly considered the *Walker* factors, there is no mandate to write out a detailed analysis, in outline form, for each factor. Accordingly, the Court of Appeals held that the circuit court's order was not arbitrary. As to Mother's contention that the circuit court had intermingled the roles of GAL and friend of the court, the Court determined that Mother had not properly preserved the issue for appeal. However, out of an abundance of caution, the Court briefly addressed the issue and held that nothing about the GAL's role in the proceeding violated the confines of *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014), and that there was no error to Mother.

IX. GARNISHMENT

A. *Netherwood v. Fifth Third Bank, Inc.*

[2015-CA-001533](#) 03/10/2017 2017 WL 942902

Opinion by Judge J. Lambert; Judges Dixon and Maze concurred.

In an appeal from an order dismissing appellants' complaint related to a garnishment on their bank accounts, the Court of Appeals affirmed, holding that the garnishment order was facially valid and that the debtor had sufficient notice to protect her interests. While the bank's notice did not include the AOC-150-1 Order of Garnishment, it was sufficient based upon the debtor's actual knowledge of the garnishment and the possible exemptions available to her. The Court further held that appellants failed to establish a claim for negligence or any injury because the bank properly garnished the funds in their accounts.

X. HEALTH

A. *Northern Kentucky Mental Health-Mental Retardation Regional Board, Inc. v. Cabinet for Health and Fa*

[2014-CA-000756](#) 03/17/2017 2017 WL 1035125

Opinion by Judge Dixon; Judges Combs and Jones concurred.

Northkey is a non-profit inpatient psychiatric hospital that provides acute short-term mental health care to children. The majority of these children rely on Medicaid to pay for their care. The Cabinet for Health and Family Services has been charged with reimbursing providers for Medicaid payments. The Cabinet implemented a 19.5% "parity adjustment factor" to reduce Northkey's reimbursement rate to approximately 88% of its actual costs of care for the Medicaid recipients. The Court of Appeals reversed the Franklin Circuit Court's decision upholding the Secretary's determination that this reduction was appropriate. In so doing, the Court held that the Cabinet impermissibly reduced Northkey's Medicaid reimbursement rate using a methodology that was not based upon a calculation specifically related to similar psychiatric hospitals, as required by KRS 204.560(2).

XI. IMMUNITY

A. *City of Brooksville v. Warner*

[2015-CA-000975](#) 03/17/2017 2017 WL 1033709 DR Pending

Opinion by Judge J. Lambert; Judge Clayton concurred; Chief Judge Kramer concurred and filed a separate opinion.

The City of Brooksville and Chief of Police Martin Hause filed an interlocutory appeal from an order determining that Chief Hause's allegedly negligent driving during a police pursuit was ministerial in nature and that Chief Hause was therefore not entitled to the defense of qualified official immunity in a civil suit. Chief Hause argued that he was entitled to qualified official immunity because he had been performing a discretionary act in deciding to undertake - and in how he had undertaken - a police pursuit. In rejecting this argument, the Court cited to previous case law holding that the safe operation of a police vehicle is a ministerial act and noted that the City of Brooksville General Policies and Procedures required officers to operate official vehicles in a careful and prudent manner and to obey all laws and all departmental orders pertaining to such operation. Those procedures also warned officers that "although the law does not prevent using emergency speeds while engaged in pursuit, it does hold the officer(s) criminally and civilly responsible for his/her actions." In light of this, the Court concluded that "[a]n officer has discretion to decide whether to begin, continue, or end the emergency pursuit, but not for the way he or she operates the police vehicle during the emergency pursuit. Driving is a matter of duty and training, and it is not subject to deliberation or judgment." Therefore, the Court affirmed the circuit court's denial of qualified official immunity.

XII. JUDGMENT

A. *Chesley v. Abbott*

[2014-CA-001725](#) 03/10/2017 2017 WL 943973 DR Pending

Opinion by Judge Acree; Judges Combs and Jones concurred.

The members of a class action suit against the manufacturer of weight loss drugs brought an action against the attorneys for the class for breach of fiduciary duty and punitive damages, alleging that the attorneys wrongfully retained settlement funds. The circuit court entered summary judgment in favor of the members for \$42 million but denied summary judgment as to one attorney - Stanley Chesley. The Court of Appeals affirmed in part and reversed in part, and on further review, the Supreme Court of Kentucky affirmed. The members again moved for partial summary judgment against Chesley, and the circuit court granted the motion and held Chesley jointly and severally liable with the other attorneys for \$42 million. The judgment, however, left the issue of punitive damages unresolved. On appeal, the Court of Appeals affirmed the grant of summary judgment. The Court first held that it had appellate jurisdiction to review the case because a partial summary judgment that determines liability and compensatory damages is separable from an interrelated punitive damages claim for purposes of CR 54.02. Under KRS 411.186(1), Kentucky considers punitive damages a separate claim and not merely an additional remedy along with compensatory damages. Thus, it was within the circuit court's discretion to utilize CR 54.02 to make the interlocutory judgment final and appealable. The Court further held that the circuit court properly applied offensive issue preclusion to prevent appellant from re-litigating issues resolved in an earlier proceeding - in this case, an attorney disciplinary proceeding. The Court also held that it was proper to hold appellant jointly and severally liable for the acts of other members of a joint enterprise and that pre-judgment and post-judgment interest were properly applied and calculated.

B. Etscorn v. Etscorn

[2016-CA-000233](#) 03/24/2017 2017 WL 1101126

Opinion and Order dismissing by Judge Clayton; Judges Combs and Taylor concurred.

A wife appealed a trial court's order in a marital dissolution action granting summary judgment to the husband, his sons, and business entities that had been joined on wife's motion as third-party defendants. The sons and the business entities had moved to be dismissed from the action pursuant to CR 9.02 and 12.02(f), and the motion was granted. The order of dismissal noted that it was final and appealable with no just cause for delay. The wife then filed a CR 59.05 motion to alter, amend, or vacate the order dismissing the parties. Notably, the motion did not allege any error with the CR 9.02 and 12.02 rulings. Instead, it claimed that the sons and the business entities were indispensable parties under CR 19 and, alternatively, asked the trial court to make the dismissal "without prejudice" so that the wife could rejoin the parties at a later date. The trial court denied the motion and again cited that its CR 59.05 order was final and appealable with no just cause for delay. Many months later the wife filed a motion pursuant to CR 21 and 19 to add the sons and their business entities as indispensable parties. Though the sons and the business entities objected on multiple grounds, including the fact that they had already been dismissed as parties and that the wife had not appealed the final and appealable order dismissing them, the trial court nonetheless re-added them as parties. The sons and business entities eventually moved for summary judgment, which was granted. The Court of Appeals issued an opinion and order dismissing the appeal and voiding the orders granting summary judgment and adding the sons and business entities to the litigation because the previous order dismissing them with prejudice was not appealed. The trial court lacked jurisdiction to re-add the sons and business entities after it had already dismissed them with prejudice in an order designated "final and appealable" and "with no just cause for delay." Furthermore, the wife was prohibited from arguing that the trial court erroneously designated the previous dismissal as "with prejudice" or "final and appealable" because the order was facially an adjudication on the merits and it was not timely appealed.

XIII. MINES AND MINERALS

A. Potter v. Blue Flame Energy Corporation

[2015-CA-000873](#) 03/03/2017 2017 WL 836942 DR Pending

Opinion by Judge Taylor; Judges Jones and D. Lambert concurred.

Landowners brought an action against entities that claimed an interest in oil and gas estates on the landowners' property, seeking damages resulting from the entities' extraction of oil and gas. The circuit court granted summary judgment in favor of the entities. The Court of Appeals reversed and remanded, holding that the deed to the property conveyed fee simple title in the surface estate and mineral estate to the landowners' predecessors in title, excepting only the coal estate. Therefore, the landowners owned the oil and gas estates.

XIV. STATUTE/RULE INTERPRETATION

A. *Robbins v. Lexington-Fayette Urban County Planning Commission*

[2015-CA-000638](#) 03/17/2017 2017 WL 1034493

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

Appellants, adjacent property owners, appealed the circuit court's dismissal of their claim against the Lexington-Fayette County Urban Planning Commission (and its members) and AT&T regarding proposed construction of a cellular phone tower in the Hill 'N Dale neighborhood in Lexington, Kentucky. The Planning Commission had approved AT&T's application to construct the tower, and appellants appealed to the circuit court pursuant to KRS 100.347(2) and 100.987(10). The Planning Commission and AT&T moved to dismiss pursuant to KRS 100.347(4) on the grounds that appellants failed to name the landowner (Oleika Shriner's Temple) as a party to the appeal. The circuit court agreed and dismissed the appeal. On appeal, appellants argued that the circuit court erred in requiring the landowner to be named, asserting that KRS 100.987(10) does not require it and that this statute provides for an independent grant of authority to appeal separate from KRS 100.347. In the alternative, appellants argued that the circuit court erred in denying appellants' request to amend their complaint to include the landowner. The Court of Appeals affirmed, holding that KRS 100.347 is the controlling statute and that KRS 100.987 does not provide for a separate cause of action. Furthermore, the circuit court was correct in denying appellants' motion to amend their complaint pursuant to *Board of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978) (“[O]ne of the conditions precedent to the exercise of judicial power by the circuit court was not met and it was required to dismiss the appeal for want of jurisdiction.”). Thus, failure to name the landowner was fatal to the appeal.

XV. TRIALS

A. *Alph C. Kaufman, Inc. v. Cornerstone Industries Corporation*

[2014-CA-001790](#) 03/10/2017 2017 WL 943972 Rehearing Pending

Opinion by Judge Acree; Judges Clayton and Jones concurred.

The Court of Appeals reversed in part and affirmed in part a jury verdict in a multi-claim business action. The claims raised included breaches of contract and fiduciary duty, violation of the uniform trade secrets act, tortious interference with contractual relations and prospective business advantages, fraud, and aiding and abetting relative to several of these claims. At trial, the contract claim was dependent upon the jury finding the existence of a non-compete agreement; the fraud claim was dependent upon the jury's finding that the contract did not exist. Because the jury found in favor of the plaintiff on both claims (based on the simultaneous findings that the contract both existed and did not exist), the Court of Appeals concluded that these were irreconcilably inconsistent verdicts and reversed all claims dependent upon the existence or non-existence of the agreement. Additionally, although the Court affirmed the jury's liability determinations as to all other claims, it reversed the damages determinations and allocations to allow for the re-allocation of damages among the various claims for which liability was found to exist upon a second trial.

XVI. TRUSTS

A. *Beardmore v. JP Morgan Chase Bank, N.A.*

[2014-CA-001536](#) 03/31/2017 2017 WL 1193190

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

Appellant challenged an order and separate judgment converting two trusts into a directed trust system and transferring the place of administration of these trusts to Delaware. Appellant argued that the circuit court did not have subject matter jurisdiction to decide the matter based upon the application of the recently enacted Uniform Trust Code (UTC), KRS 386B.1-010 *et seq.* The Court of Appeals affirmed, first holding that the circuit court retained jurisdiction of the matter once the UTC took effect based upon its findings that returning the matter to the district court would substantially interfere with the effective conduct of the judicial proceedings and would prejudice the rights of the parties pursuant to KRS 386B.11-040(1)(c). The Court went on to hold that the circuit court's decision to modify the trusts was based upon sufficient findings of fact and was not in error pursuant to the doctrine of equitable deviation and the favorable income tax laws in Delaware, which would save the trusts money over their remaining life.

XVII. WORKERS' COMPENSATION

A. *Voith Industrial Services, Inc. v. Gray*

[2016-CA-001083](#) 03/24/2017 2017 WL 1101484

Opinion by Judge Dixon; Judges Combs and Nickell concurred.

The Court of Appeals affirmed a decision of the Workers' Compensation Board that affirmed in part, vacated in part, and remanded an Administrative Law Judge's award of permanent partial disability benefits to Astin Gray. Gray was employed as a janitor for appellant, and he was assigned to clean the paint shop facility at an automobile manufacturing plant. Gray was injured after inhaling the fumes of a chemical solvent used to clean the paint robots. The ALJ awarded Gray permanent partial disability benefits based on a finding that Gray sustained occupational asthma, RADS, and sleep apnea as a result of the work injury. The ALJ also found that Gray was entitled to an enhanced benefit pursuant to the three multiplier in KRS 342.730(1)(c)1. The Board affirmed the ALJ's findings regarding the application of the three multiplier and the ALJ's finding of work-related sleep apnea. In affirming, the Court held that the Board properly concluded that the lay and medical evidence supported an award of enhanced benefits pursuant to KRS 342.730(1)(c)1 and *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). The Court also held that the Board properly determined that substantial evidence supported the ALJ's finding that Gray sustained work-related sleep apnea.

XVIII. ZONING

A. *Drakes Creek Holding Co., LLC v. Franklin-Simpson County Planning & Zoning Commission*

[2015-CA-000789](#) 03/31/2017 2017 WL 1193189

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

This opinion addressed several disputes arising from the grant and subsequent revocation of a conditional use permit (CUP) to operate a rock quarry by the Franklin-Simpson County Board of Zoning Adjustment. In affirming, the Court of Appeals first held that the grant of the CUP was proper. The Court noted that the Board's findings of fact were sufficient and that all due process rights were properly respected. The Court next held that the Board's subsequent decision to revoke the CUP was arbitrary, and that the circuit court's decision to reinstate the CUP was appropriate. The Court noted that the adoption of ordinances prohibiting commercial trucks from hauling material on a county road used to access the subject property did not render compliance with the CUP "impossible." The ordinances did not prevent the operation of a quarry, nor did they restrict all vehicles from using the access road. One could buy gravel from the quarry and transport it in another manner that comported with the CUP conditions and applicable law. Because uncertain commercial feasibility does not equal impossibility, the circuit court correctly rejected this position.

B. Southwest Clark Neighborhood Association, Inc. v. Branham

[2015-CA-001645](#) 03/31/2017 2017 WL 1193184

Opinion by Judge Jones; Judge Combs and Chief Judge Kramer concurred.

Appellee, The Allen Company, Inc., applied to the Clark County Kentucky Planning and Zoning Commission for a zoning map amendment, seeking to rezone property from agricultural to heavy industrial so that it could operate a quarry on the property. Following a hearing, the Planning Commission recommended denial of the application. The Clark County Fiscal Court, however, chose not to accept the Planning Commission's recommendation and instead enacted an ordinance approving the rezoning application. In support of its decision, the Fiscal Court found that the proposed amendment was in agreement with the Clark County Comprehensive Plan, that the existing classification for the subject property was inappropriate, and that the proposed zoning classification was appropriate. Appellants, Southwest Clark Neighborhood Association, Inc., appealed the Fiscal Court's decision to the Clark Circuit Court, which ultimately affirmed the Fiscal Court's approval of the ordinance granting the zoning amendment application. On appeal, appellants argued that: (1) the Fiscal Court lacked the statutory authority to approve a rezoning to allow quarrying activity, as neither the comprehensive plan nor the zoning regulations provide for such land use; (2) the ordinance failed to include adjudicative findings of fact sufficient to support the conclusion that the current zoning of the property was inappropriate and that the proposed rezoning was appropriate; (3) the Fiscal Court acted beyond its statutory powers by approving a rezoning conditioned on binding elements that it lacked the statutory authority to impose; (4) the Fiscal Court acted arbitrarily and contrary to adopted regulations by considering Allen's proposed development plan prior to the plan's being reviewed by the Planning Committee; (5) the Fiscal Court exceeded its statutory power and acted arbitrarily in considering the zoning map amendment application with respect to a certain portion of the property as the submission of the application in relation to that parcel was contrary to the Planning Commission's bylaws; and (6) the Fiscal Court denied appellants their due process rights. In affirming, the Court of Appeals held that the Fiscal Court acted within its statutory authority in adopting the application for rezoning. The Court noted that a comprehensive plan need not delineate every possible land use - it should instead serve as a guide for development. The Court also determined that the Fiscal Court's findings of fact in support of the rezoning were sufficient, in that they referenced multiple elements of the Comprehensive Plan and all of those findings were supported by the record. As to appellants' argument that the Fiscal Court had no authority to impose binding elements, the Court concluded

that the argument was unmeritorious, as it was based on the Binding Elements Enforcement Act, which has no application in Clark County. Additionally, the Court found that the Fiscal Court's reference to a proposed development plan did not constitute an improper approval of that development plan; that the Planning Commission was not in violation of its own bylaws by considering Allen's application; and that appellants had not been denied due process.