

# THE *Kentucky Lawyer* <sup>sm</sup>

— *the LawWire - Kentucky eLegal Law Summaries*

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## *Published and NonPublished Decisions From Kentucky*

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# Kentucky Court of Appeals Decisions

**OCTOBER 14, 2005 - 19 Decisions****AOC LINKS - FULL TEXT****SUMMARIES OF DECISIONS****PUBLISHED DECISIONS - COURT OF APPEALS - 10/14/2005 NONE****NON - PUBLISHED DECISIONS - COURT OF APPEALS - 10/14/2005**[2004-CA-002364](#)

NOT PUBLISHED 69

Date: 10/14/2005

**FLAGET FUELS, INC. V. COM.****ADMINISTRATIVE LAW - Penalties by Agency for Violations of Mining Regs.**[2004-CA-001516](#)

NOT PUBLISHED 37

Date: 10/14/2005

**POLLITT V. COM. PUBLIC SERVICE COMM.****ADMINISTRATIVE LAW - Injunction**

Affirmed PSC injunction for numerous safety violations involving gas lines.

[2004-CA-000901](#)

NOT PUBLISHED 29

Date: 10/14/2005

**HINES V. FURLONG****CIVIL PROCEDURE - STATUTE OF LIMITATIONS (Notes)**[2004-CA-001006](#)

NOT PUBLISHED 53

Date: 10/14/2005

**BROWN V. LOWE'S HOME CENTERS, INC.****CIVIL PROCEDURE - Dismissal**

Dismissal with prejudice should be granted only in the most extreme cases. The trial court below failed to provide sufficient findings showing that it considered all of the factors listed in *Ward v. Housman*, 809 S.W.2d 717 (Ky. App., 1991), before granting a dismissal without prejudice. The CAs therefore vacated and remanded the dismissal due to the trial court's lack of findings in either its written orders or oral statements.

[2004-CA-001305](#)

NOT PUBLISHED 55

Date: 10/14/2005

**FELIX V. LYKINS ENTERPRISES, INC.****CIVIL PROCEDURE - Conflicts of Law (Kentucky law vs. out of state)**

The majority of the CA panel ruled that the trial court below wrongfully entered an order for summary judgment on a case whose parties also had litigation over a lease dispute pending in an Ohio court. The CA majority held that the trial court should have considered the doctrine of forum non conveniens before ruling on the matter. The CA held that Kentucky had no interest in the action and bore no significant relationship to the parties, the transaction or the res in question. It vacated the summary judgment and remanded for an order dismissing. Judge Miller dissented, stating that forum non conveniens was inapplicable to this case and that simply because the Ohio court was working on this case did not mean the Kentucky court automatically had to dismiss its case. He also addressed the merits of the Kentucky court's decision and found the court had both jurisdiction and sufficient cause to order a summary judgment.

<a href="#">2003-CA-001896</a> NOT PUBLISHED 69 Date: 10/14/2005	<b>DELONG V. COM.</b> <b>CRIMINAL - Search and Seizure (Sweep and Exigent Circumstances)</b>
<a href="#">2004-CA-001461</a> NOT PUBLISHED 49 Date: 10/14/2005	<b>ROLAND V. COM.</b> <b>CRIMINAL - Counsel (ineffective assistance)</b>
<a href="#">2004-CA-001462</a> NOT PUBLISHED 36 Date: 10/14/2005	<b>NEAL V. COM.</b> <b>CRIMINAL - 11.42 Denied</b>
<a href="#">2004-CA-001764</a> NOT PUBLISHED 51 Date: 10/14/2005	<b>COM. V. ARMSTRONG, HON.</b> <b>CRIMINAL - DUI; Independent Test</b>  CA affirmed Circuit Court's denial of the Commonwealth's Petition for Writ of Prohibition against District Judge Don Armstrong following his ruling to suppress the Defendant's breathalyzer test. Based upon the factors presented in <i>Commonwealth v. Long</i> , 118 S.W.3d 178 (Ky.App. 2003), Judge Armstrong did not abuse his discretion by concluding that the police officer had failed to reasonably accommodate the defendant's request for an independent blood test. Factors to be considered in determining the reasonableness of the police assistance include, but are not limited to, the following: (1) availability of or access to funds or resources to pay for the requested test; (2) a protracted delay in the giving of the test if the officer complies with the accused's requests; (3) availability of police time and other resources; (4) location of requested facilities, e.g., the hospital to which the accused wants to be taken is nearby but in a different jurisdiction; (5) opportunity and ability of accused to make arrangements personally for the testing.  <b>Note:</b> Although not a published decision, this case should provide some guidance for similar factual scenarios that have become increasingly common in Jefferson County. Frank Jewell on brief for the Defendant.
<a href="#">2004-CA-002223</a> NOT PUBLISHED 25 Date: 10/14/2005	<b>REYNOLDS V. COM.</b> <b>CRIMINAL - 60.02 Not Additional Opportunity for 11.42</b>
<a href="#">2004-CA-002228</a> NOT PUBLISHED 42 Date: 10/14/2005	<b>COLE V. COM.</b> <b>CRIMINAL - Prisons (Conditional Discharges)</b>
<a href="#">2004-CA-002329</a> NOT PUBLISHED 33 Date: 10/14/2005	<b>STONE V. COM.</b> <b>CRIMINAL - 11.42 denied</b>

<a href="#">2004-CA-000813</a> NOT PUBLISHED 44 Date: 10/14/2005	<b>TOFTNESS V. KENTUCKY RETIREMENT SYSTEMS</b> <b>EMPLOYMENT - State Disability Retirement</b>
<a href="#">2003-CA-000789</a> NOT PUBLISHED 31 Date: 10/14/2005	<b>COUCH V. COUCH</b> <b>FAMILY LAW - Custody (Change of)</b>
<a href="#">2004-CA-001309</a> NOT PUBLISHED 119 Date: 10/14/2005	<b>S.R.D. V. T.L.B. (FORMERLY T.L.D.)</b> <b>FAMILY LAW - Paternity (Estoppel to deny)</b>
<a href="#">2004-CA-002395</a> NOT PUBLISHED 33 Date: 10/14/2005	<b>SHAIN V. BURNETT</b> <b>FAMILY LAW - Custody (temporary); Best Interests of Child</b>
<a href="#">2004-CA-001409</a> NOT PUBLISHED 33 Date: 10/14/2005	<b>CHILDRESS V. TAYLOR DEVELOPMENT, INC.</b> <b>PROPERTY - Restrictive covenants</b>
<a href="#">2004-CA-000861</a> NOT PUBLISHED 28 Date: 10/14/2005	<b>TURNER V. DEPT. OF CORRECTIONS</b> <b>TORTS - Defense (Sovereign Immunity)</b>  CA affirms TC dismissal of inmates' claims for assault & battery for seizure of blood samples for failure to state a claim on which relief could be granted.  Authorizing statute was in effect for both inmates and officials were protected by sovereign immunity. Also, inmates failed to notify the Attorney General of challenge to statute's constitutionality.
<a href="#">2005-CA-000380</a> NOT PUBLISHED 32 Date: 10/14/2005	<b>CARITAS MEDICAL CENTER V. STOUT</b> <b>WORKERS COMP - Multipliers</b>  Because of her injury, the claimant was unable to return to the job she was doing at the time of the injury, but the employer gave her a sedentary job paying the same wages. The ALJ determined, pursuant to Fawbush v. Gwinn, that the claimant would not be able to continue to earn the same wage into the indefinite future, and awarded benefits using the triple multiplier. The employer appealed this decision, and it was affirmed by the Board and by the Court of Appeals. The Fawbush v. Gwinn decision has created a whole new line of decisions like this, because it calls for a finding by the ALJ that is highly speculative - whether the claimant can continue to earn the same wage into the indefinite future despite the injury.

## Sixth Circuit Court of Appeals Published Decisions

**Oct. 10-14, 2005**

Opinion	DocketSheet	Pub Date	Short Title/District
<a href="#">05a0412p.06</a>	<a href="#">04-1518</a>	2005/10/12	Johnson v. Luoma Eastern District of Michigan at Detroit
<a href="#">05a0413p.06</a>	<a href="#">03-3166</a>	2005/10/12	Hodge v. Hurley Northern District of Ohio at Cleveland
<a href="#">05a0414p.06</a>	<a href="#">04-1655</a>	2005/10/13	USA v. Owens Western District of Michigan at Grand Rapids
<a href="#">05a0416p.06</a>	<a href="#">04-2502</a>	2005/10/14	USA v. Ibarra-Hernandez Western District of Michigan at Grand Rapids

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- Thank you, LouisvilleLawWire

\*\* The links from this page are to the Kentucky Administrative Office of the Court's (AOC) web site at [www.KyCourts.net](http://www.KyCourts.net) which contains both Published Judge: and unPublished Judge: opinions of the Kentucky Supreme Court and Kentucky Court of Appeals. First, opinions that are labeled "NOT TO BE Published Judge:" shall never be cited or used as authority in any other case in any court of this state. CR 76.28(4)(c). This is true even after the unPublished Judge: opinions become final. Secondly, although opinions labeled "TO BE Published Judge:" may be cited as authority in any court of the Commonwealth of Kentucky, the opinions shall not be cited until all steps in the appellate process have been exhausted and they become final.

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