

THE *Kentucky Lawyer* sm

— *the LawWire - Kentucky eLegal Law Summaries*

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Published and NonPublished Decisions From Kentucky

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- **Workers Compensation**
Peter Naake
- **Zoning**
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[Kentucky Law Blog](#)

- Some of you have already been getting the digests through the Kentucky Law Blog. You obviously see the writing on the wall as that is where we are eventually going. First, the blog is spam free. Second, it is much, much cheaper than the email missives. Third, it is easier for us to do. Fourth, it has public appeal and invites your active participation in the published product by emailing us notes, stories, links to stories, PLUS you can add your comments to the actual posting.
- The blog is nothing more than a web-based legal publication or journal. It is much more precise and succinct than the typical journal you read, but it is clearly easier to produce, distribute, and update. Think of a this law blog as a "points paper" on legal issues, cases, news, verdicts, etc.
- More importantly, the positive legal news on verdicts, trial results, pro-bono activities, charitable events, and all-around good works that each of you are needed to reverse the negative image we have. I know lawyers go good works, but the public does not. Your positive emails, commentaries, and stories are not only an acceptable self-promotion of yourself but of the bar in general.

How do you access the blog? Well, several ways. The hard way is go on-line each time and access the web pages directly from your internet browser at [Http://www.KentuckyLawBlog.com](http://www.KentuckyLawBlog.com). The easy way is an aggregator of "RSS" or "really simply syndication" feeds. PLEASE CONTINUE TO READ ON. IT AIN'T THAT TUFF. If you can use OUTLOOK EXPRESS, then you can use a blog feed reader. I will give you two ways to do this easily:

- First, if you have the [Firefox web browser](#) rather than Microsoft's Explorer, you can simply bookmark the site and its feeder. The "feeder" is a constantly updated page at our web-site indicating newest page additions. Rather than search and find for changes, the changes are automatically accumulated and posted in reverse chronological order with headlines and a few lines from the feed to clue you in on the contents. Click on the link, and you have the entire page. Any time you are using firefox and the page has an "rss" feed you will see a small 1/4 inch block in the bottom right hand screen of the browser with white and orange diagonal stripes. Click on the bookmark and it is saved as a favorite for future reference. Any time you click on the bookmarks then all your 'rss' blog feeds are automatically updated and you can click on those you want to read. Trust me. It's easier than it sounds, and I managed this before going to a blog/rss/feed aggregator.

[Click here to download firefox and read more about the program. FREE.](#)

- Second, obtain a blog feed reader. I tried "Feed Demon". You have 20 days to try it for free. Pay \$29.95 and you get a code to unlock it for keeps. It looks a little like Outlook with windows.

[Click here to read about FEED DEMON and download it.](#)

I tried the totally [free RSS Reader](#), but had validation errors in many of the blogs I wanted to follow.

In Feed Demon, I set up a channel GROUP for my law blogs and put all of those I watched in that group setting. Whenever I found a site I wanted to add to this group, then I would need to add a channel. If I already happened to have the site in my browser, then feed demon was a little more automatic (otherwise, I would copy the url for the site and paste it when asked for in Feed Demon)

I added a blog or rss feed, by adding a new channel through the drop down menu at the top (or control N). You are then asked the URL, the group etc.

- JUST TRY IT. You will also find, you can set up search criteria for on-lines news searches as well.
- Right now, all of our blog-posted pages come up on the RSS feed reader, but I hope to break it down in the future to allow certain categories to be monitored only. This would enable you to get updates on just a few or all categories at the site (eg., Sixth Circuit Update, Family Law Cases, Workers Comp Cases, Court of Appeals Published Cases, Supreme Court Published Cases, Criminal Law Update, TIPS or Torts, Insurance, Procedure Stuff).

Here are some examples of the categories we use at the Kentucky Law Blog. Click on them and see what you think.

- [2005 Kentucky Court of Appeals](#)
- [2005 Kentucky Supreme Court](#)
- [Criminal Law](#)
- [Family Law](#)
- [Sixth Circuit](#)
- [Torts, Ins. & Procedure](#)
- [Trials and Verdicts](#)
- [Workers Compensation](#)

Kentucky Court of Appeals Decisions

OCTOBER 21, 2005 - 19 Decisions

AOC LINKS - FULL TEXT

SUMMARIES OF DECISIONS

PUBLISHED COURT OF APPEALS DECISIONS FOR 10/21/2005

[2004-CA-001257](#)

PUBLISHED
REVERSING AND REMANDING
HUDDLESTON
Date: 10/21/2005

FAIRBANKS ARTIC BLIND CO. V. PRATHER & ASSOCIATES
BUSINESS - Corporations (Reinstatement, Validity of Acts)

COA applied the rationale of J.B. Wolfe and Joseph A. Holpuch, that it intended for reinstatement to restore a corporation to the same position it would have occupied had it not been dissolved and that reinstatement validates any action taken by a corporation between the time it was administratively dissolved and the date of its reinstatement. Simply put, the General Assembly meant what it said, that upon reinstatement, it is "as if the administrative dissolution . . . had never occurred."

[2004-CA-001536](#)

PUBLISHED
AFFIRMING IN PART,
VACATING IN PART, AND
REMANDING
KNOPF
Date: 10/21/2005

SANDOZ PHARMACEUTICALS CORP. V. GUNDERSON
EVIDENCE - Experts (Daubert)
DAMAGES - Punitives

CA affirms in part, vacates in part, and remands this medical/product liability case involving a death associated with the prescription drug Parlodel. (Jefferson Cir. Ct., Hon. Barry Willett, judge, presiding).

Mary Gunderson died suddenly in her sleep one week following the Caesarean birth of her second child. She had been given Parlodel, a postpartum lactation suppressant. The drug had a history of adverse reactions including seizures, strokes and heart attacks dating back to 1983. Plaintiffs prevailed at trial for a total judgment exceeding \$19 million, including more than \$11 million in punitive damages against manufacturer Sandoz. Sandoz and the prescribing physician appeal.

CA rejects all of appellants' arguments, however, it holds that the jury instructions improperly failed to instruct the jury that it was

not to award punitive damages to punish Sandoz for conduct that occurred outside of Kentucky, and vacates the punitive damage award and remands.

[2004-CA-001426](#)

PUBLISHED

AFFIRMING

HENRY

Date: 10/21/2005

NICHOLS V. COM.

CRIMINAL - Methamphetamine; Search and Seizure

An off-duty police officer spotted Nichols purchasing three or more boxes of Pseudoephedrine, a meth precursor, at an Elizabethtown grocery store late at night. The officer, who belonged to the Radcliff Police Department, contacted the Elizabethtown Police Department who dispatched an officer to the store. The E-Town officer was told of the description of Nichols' vehicle and subsequently made an investigatory stop. Nichols identified himself when asked his name and allowed a search of his vehicle. The officer then found cigarettes, marijuana, Kroger bags, and multiple boxes of Pseudoephedrine pills. Nichols also said that he was promised a payment of \$200 for buying the pills and that he knew they would be used to make meth. Following the denial of his suppression motion, Nichols entered a conditional guilty plea to Unlawful Distribution of a Meth Precursor and Possession of Marijuana. On appeal, he argued that police performed a Terry stop without reasonable, articulable suspicion that criminal activity was afoot. Although noting that it was a close call, CA held that a tip by a store security guard alleging that a customer has just purchased a large quantity of Pseudoephedrine, when considered with rational inferences from that act, does create a reasonable suspicion that criminal activity is occurring. Therefore, a brief investigatory stop is permissible.

NON-PUBLISHED COURT OF APPEALS DECISIONS FOR 10/21/2005

[2003-CA-000795](#)

NOT PUBLISHED

Date: 10/21/2005

MORRIS V. COM.

CRIMINAL - Voir Dire; Challenges for Cause

CA vacated and remanded Morris's convictions for Assault in the Third Degree and related offenses because the trial judge improperly refused to dismiss certain jurors for cause during voir dire. Because various jurors made comments reflecting bias against the defendant, the judge should have granted Morris's motions to strike for cause. The failure to do so meant that Morris had to use his peremptory strikes to remove the biased jurors. Prejudice to the defendant is presumed under such circumstances. Gamble v. Commonwealth, 68 S.W.3d 367, 373 (Ky. 2002).

[2004-CA-000928](#)
NOT PUBLISHED
Date: 10/21/2005

KIMELTON V. COM.
CRIMINAL - Composition of Jury Panel

Conviction for First-Degree Robbery affirmed. Primary issue on appeal was whether panel from which jury was drawn represented fair cross-section of community. Kimelton failed to show that women were underrepresented on the panel.

[2004-CA-001300](#)
NOT PUBLISHED
Date: 10/21/2005

GODBY V. COM.
CRIMINAL-
**Intimidating a Participant in the Legal Process;
Threat Element**

CA reversed Godby's conviction for Intimidating a Participant in the Legal Process (KRS 524.040) because the definition of "threat" in this statute encompasses only physical injury -- not economic loss. Because the Commonwealth only presented evidence of a threat of economic injury, the trial judge should have entered a directed verdict on this count.

[2004-CA-001313](#)
NOT PUBLISHED
Date: 10/21/2005

ROSE V. COM.
CRIMINAL - Post-Conviction Relief; CR 60.02

CA reversed and remanded Rose's conviction for Criminal Attempt to Manufacture Methamphetamine pursuant to his post-conviction motion for relief under CR 60.02. Under Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), his conviction must be reversed because there was no evidence that Rose possessed all of the ingredients to make meth. There was also no evidence that he had all of the equipment to do so.

[2004-CA-001373](#)
NOT PUBLISHED
Date: 10/21/2005

POSEY V. COM.
CRIMINAL - Child Sex Offenses; Directed Verdict

Posey's convictions for Third-Degree Sodomy were affirmed. The evidence as a whole was sufficient to induce a reasonable juror to find him guilty.

[2004-CA-001461](#)
NOT PUBLISHED
Date: 10/21/2005

ROLAND V. COM.
CRIMINAL -
Substituted this opinion for opinion rendered July 22, 2005.

2004-CA-002572 NOT PUBLISHED Date: 10/21/2005	DRAPER V. COM. CRIMINAL - Jury Instructions CA affirmed Defendant's convictions for second-degree burglary and for being a first degree persistent felony offender (PFO 1). The evidence did not support additional jury instructions on lesser-included offenses of second-degree burglary. Even though Jefferson Circuit Judge Geoffrey Morris improperly instructed the jury on PFO 1, CA held that this error was not preserved for appellate review and does not rise to the level of palpable error.
2004-CA-001440 NOT PUBLISHED Date: 10/21/2005	BINDER V. COM. CRIMINAL - RCr 11.42 CA affirmed Circuit Court's denial of Defendant's RCr 11.42 motion to vacate alleging ineffective assistance of counsel.
2004-CA-001461 NOT PUBLISHED Date: 10/21/2005	ROLAND V. COM. CRIMINAL - Substituted this opinion for opinion rendered July 22, 2005.
2004-CA-001500 NOT PUBLISHED Date: 10/21/2005	NORDIKE V. COM. CRIMINAL - Manufacturing Methamphetamine CA affirmed Defendant's convictions and 10 year sentence for two counts of knowingly possessing anhydrous ammonia in other than an approved container (KRS 250.991) and one count of complicity to manufacture methamphetamine (KRS 218A.1432(1)(a) and KRS 502.020). Defendant was not entitled to a directed verdict. TC did not err in its instruction to the jury on complicity to manufacture methamphetamine. Nordike was properly denied his motion to suppress the introduction of evidence (including photographs) concerning the offending tanks used to store the anhydrous ammonia.
2004-CA-001668 NOT PUBLISHED Date: 10/21/2005	SKAGGS V. COM. CRIMINAL - RCr 11.42 CA affirmed Jefferson Circuit Judge Stephen Ryan's order denying <i>pro se</i> Defendant's RCr 11.42 motion to vacate alleging ineffective assistance of counsel. Defendant was properly convicted of Escape 2nd Degree when he left the Hall of Justice while awaiting to be equipped with a home incarceration monitoring device.

[2004-CA-002132](#)

NOT PUBLISHED
Date: 10/21/2005

SUTTON V. COM.

CRIMINAL - DUI; Writ of Prohibition

CA **reversed** Circuit Court's entry of Writ of Prohibition against Bullitt District Court following suppression order. District court's conclusion that KRS 189A.103(7) was violated was proper because the factual findings were based on the stipulation agreed to by the parties that the selection of the Hardin Memorial Hospital to administer the blood test requested by Sutton was solely made by the police officer. The sanction for such a violation, suppression of the breathalyzer test, was well within the discretion of the district court.

[2004-CA-002294](#)

NOT PUBLISHED
Date: 10/21/2005

THOMPSON V. COM.

CRIMINAL -

CA affirmed Defendant's convictions and 10 year sentence for Receiving Stolen Property Over \$300.00 (KRS 514.110) and Persistent Felony Offender (PFO) in the Second Degree (KRS 532.080). Defendant was not entitled to a directed verdict of acquittal. Prosecutor's closing argument did not amount to palpable error requiring reversal.

[2004-CA-001166](#)

NOT PUBLISHED
Date: 10/21/2005

KIDD V. KENTUCKY RETIREMENT SYSTEMS

EMPLOYMENT LAW - State Disability Retirement Hearing

The hearing officer was not required to accept Kidd's testimony concerning her abilities or her employer's accommodations. See, *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). As the finder of fact within the context of an administrative proceeding, a hearing officer "is afforded great latitude in [his] evaluation of the evidence heard and the credibility of witnesses. . ."

[2004-CA-002478](#)

NOT PUBLISHED
Date: 10/21/2005

CHILDERS V. CLEM

FAMILY LAW - Custody (Modification)

Mother contended the trial court erred by failing to find that the November 13, 2003 ECO had expired, and that custody was reinstated in her, once seventy-two hours passed from the ECO's issuance without a temporary removal hearing pursuant to KRS 620.060(3). COA did not buy this and noted that KRS 620.060(3) specifically provides that the seventy-two hour period "may be extended or delayed upon the waiver or request of the child's parent or other person exercising custodial control or supervision."

[2005-CA-000532](#)
NOT PUBLISHED
Date: 10/21/2005

CALDWELL V. MAY
FAMILY LAW - Custody (de facto, grandparents)

Grandparents appealed denial of their petition to be named as de facto custodians and for temporary custody of their grandchildren. Affirmed.

An evidentiary hearing was conducted, and the family court issued an Order denying the grandparents' petition because they "failed to establish by clear and convincing evidence that they meet the requisites to qualify as the de facto custodians of [their granddaughter]."

COA stated decisions as to the admission of evidence are left soundly to the discretion of the trial court and will not be reversed absent a showing of an abuse of discretion. *Welsh v. Galen of Virginia, Inc.*, 128 S.W.3d 41, 51 (Ky.App. 2001). Moreover, and of particular relevance in this case, "the question of whether one party has put another at an unfair disadvantage through pretrial nondisclosures must be addressed to the sound discretion of the trial court." *Collins v. Galbraith*, 494 S.W.2d 527, 530 (Ky. 1973).

[2004-CA-001448](#)
NOT PUBLISHED
Date: 10/21/2005

MARLOW V. CONNELLY, JR.
TORTS - Legal Negligence

Legal negligence claim was barred by one-year statute of limitations in a claim regarding representation of an estate. The administrator cleaned out the estate's bank accounts and a public administrator was appointed. One of the heirs of the estate sued the estate's attorney nearly 6 years later but within one year of the closing of the estate. However, the cause of action accrued when the heir/beneficiary knew that the bank account had been emptied rather than the settlement.

[2004-CA-001885](#)
NOT PUBLISHED
Date: 10/21/2005

OLIVAS V. MUIR STATION, LLC
TORTS - Premises Liability

CA reverses and remands the TC dismissal of this slip-and-fall claim. (Fayette Cir. Ct., Hon. Mary C. Noble, judge, presiding).

Appellant was a nanny at Gainesway Farm in Lexington when she became stranded on a second-floor balcony when specially-designed security doors automatically shut and locked behind her. She fell trying to shimmy down a rain gutter, breaking several bones. The court dismissed the case on SJ before appellant had the opportunity to inspect the doors and depose the defendants. CA holds that SJ was inappropriate because it was not clear from the record that the heightened risk posed by the doors was obvious.

[2004-CA-002601](#)
NOT PUBLISHED
Date: 10/21/2005

MIDWESTERN INSURANCE ALLIANCE V. WATSON
WORKERS COMP - Personal Injury Claim, Subrogation, Atty Fees

The claimant was injured while driving for her employer, thus having both a workers' compensation claim and a personal injury claim. She settled her PI claim for \$47,500 and her workers comp claim for \$18,500, leaving open the right to future medical treatment. The Court held that the way to calculate the subrogation claim was to first subtract the part of the PI claim which represents pain and suffering - not a component of the comp claim. Next, the employee's attorney fees are subtracted from the subrogation lien. Since workers comp will pay future medical, the Court stated that if there is a subrogation lien left after the deductions above are made, the comp carrier can take a credit against future medical payments until their lien is satisfied. This case continues the confusion about subrogation after AIK v. Bush.

[2005-CA-001060](#)
NOT PUBLISHED
Date: 10/21/2005

MEIER V. KROGER
WORKERS COMP - Substantial Evidence

The employee appealed an adverse determination which was rejected because the evidence did not compel a different result.

[2005-CA-001096](#)
NOT PUBLISHED
Date: 10/21/2005

SPADE CORP. V. DELEON
WORKERS COMP - Substantial Evidence

The employee was awarded partial disability benefits in spite of a defense of lack of timely notice, and whether the injury occurred at work at all. The Administrative Law Judge ruled in the employee's favor, finding his testimony credible. The employer appealed, but the decision was affirmed as there was substantial evidence to support the award.

Sixth Circuit Court of Appeals Published Decisions

Oct. 17-21, 2005

[CA6 Home](#)

PUBLISHED OPINIONS

Opinion	DocketSheet	Pub Date	Short Title/District
05a0417p.06	04-6279	2005/10/18	Copper v. Copper Western District of Tennessee at Memphis
05a0418p.06	04-6286	2005/10/19	Sidney Coal Co Inc v. Social Sec Admin Eastern District of Kentucky at Pikeville
05a0418p.06	04-6291	2005/10/19	Sidney Coal Co Inc v. Social Sec Admin Eastern District of Kentucky at Pikeville

05a0419p.06	04-5958	2005/10/20	Lowery v. Fed Express Corp Western District of Tennessee at Memphis
05a0420p.06	04-3124	2005/10/21	Shkabari v. Gonzales State of Michigan Agency
05a0421p.06	04-1835	2005/10/21	Andretti v. Borla Performance Eastern District of Michigan at Detroit
05a0421p.06	04-2406	2005/10/21	Andretti v. Borla Performance Eastern District of Michigan at Detroit
05a0421p.06	04-2404	2005/10/21	Andretti v. Borla Performance Eastern District of Michigan at Detroit

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION OPINIONS

Opinion	DocketSheet	Pub Date	Short Title/District
05a0847n.06	04-5358	2005/10/17	Adams v. Holland Middle District of Tennessee at Nashville
05a0848n.06	04-6220	2005/10/17	Wilkerson v. Autozone Inc Western District of Tennessee at Jackson
05a0849n.06	04-4140	2005/10/17	USA v. Hilson Northern District of Ohio at Youngstown
05a0850n.06	04-4258	2005/10/17	Cinti School Dist v. Bd of Educ Southern District of Ohio at Columbus
05a0851n.06	02-5610	2005/10/18	USA v. Coffelt Eastern District of Tennessee at Chattanooga
05a0852n.06	03-3519	2005/10/18	USA v. McCullough Southern District of Ohio at Cincinnati
05a0853n.06	04-3944	2005/10/18	Martin v. Hurley Southern District of Ohio at Cincinnati
05a0854n.06	04-5579	2005/10/18	King Records Inc v. Collectables Inc. Middle District of Tennessee at Nashville
05a0855n.06	04-6082	2005/10/18	J.S. Haren Co v. Macon Water Auth Eastern District of Tennessee at Chattanooga
05a0856n.06	04-6262	2005/10/18	USA v. McCutchen Western District of Tennessee at Jackson
05a0854n.06	04-5579	2005/10/18	King Records Inc v. Collectables Inc. Middle District of Tennessee at Nashville
05a0857n.06	03-6489	2005/10/18	Bass v. Janney Montgomery Middle District of Tennessee at Nashville
05a0857n.06	04-5951	2005/10/18	Bass v. Janney Montgomery Middle District of Tennessee at Nashville
05a0858n.06	04-2552	2005/10/18	Bradley v. Birkett Eastern District of Michigan at Detroit
05a0859n.06	04-3303	2005/10/19	Elias Abbo v. Gonzales State of Michigan Agency
05a0860n.06	04-3369	2005/10/19	Dushi v. Gonzales State of Michigan Agency

05a0861n.06	04-4164	2005/10/19	Ivy Woods Health v. Thompson State of Ohio Agency
05a0857n.06	03-6489	2005/10/18	Bass v. Janney Montgomery Middle District of Tennessee at Nashville
05a0857n.06	04-5951	2005/10/18	Bass v. Janney Montgomery Middle District of Tennessee at Nashville
05a0862n.06	03-2311	2005/10/19	USA v. Hopkins Western District of Michigan at Grand Rapids
05a0863n.06	04-6164	2005/10/19	Howser v. Crossville Police Middle District of Tennessee at Cookeville
05a0864n.06	04-5614	2005/10/19	USA v. Frederick Eastern District of Tennessee at Chattanooga

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We also quote and copy extensively and freely from the decisions; and we may occasionally, inadvertently, and unintentionally forget to place some words in quotes. However, we do the best we can. The commentaries etc. may be our own and are designed to stir your thinking and to get you going. The commentaries and notes are done quickly and briefly so they may not be the final word on the topic and should engender commentary on their own as well.

- Thank you, LouisvilleLawWire

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"Clicking" on the link in the left column should bring up the full text of the decision in "pdf" format as listed on the AOC's web site.

Hints: (1). Disable pop up stoppers. (2). Make sure Adobe Reader is installed. (3). If the case does not open up in a separate browser window, then 'left click' on the decision link while pressing the control key. (4). Do not close the Adobe Reader window which allows each decision to 'pop' up into it thereafter.

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