



## **June 13, 2008 - KENTUCKY COURT OF APPEALS DECISIONS (2008:29)**

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## **PUBLISHED (COA).**

### **MCKINNEY V. MCKINNEY**

**FAMILY LAW: Child support, findings of fact; trial court made no findings of fact re imputed income and thus reversed; COA requests SC to amend rules**

[2006-CA-002132](#)

PUBLISHED: REVERSING AND REMANDING

PANEL: DIXON PRESIDING; NICKELL, GRAVES CONCUR

JEFFERSON COUNTY

DATE: 6/13/2008

Ex-Husband appealed from TC's order imputing to him a monthly income of \$8,000 for the purposes of establishing child support in accordance with the Kentucky Child Support Guidelines.

#### **FACTS:**

Ex-Husband and Ex-Wife entered into a Marital Settlement Agreement that explicitly reserved the issues of child support expenses. After hearing, TC entered an order finding that Ex-Husband earned income from part-time work as an attorney but primarily by "flipping" real estate, imputing income to Ex-Husband of \$8,000 per month and ordering child support in accordance with the Kentucky Child Support Guidelines. However, TC did not parse out its calculation of Ex-Husband's imputed \$8,000 monthly income. Ex-Husband subsequently filed a CR 59 motion to alter, amend or vacate, as well as a motion pursuant to CR 52.02 requesting additional findings of fact regarding the imputation of \$8,000 monthly income. TC denied the motion for additional findings and this appeal ensued.

**ANALYSIS:**

Ex-Husband argued that there was no evidence submitted to support TC's imputation of \$8,000 in monthly income and that, at a minimum, he was entitled to additional findings as to how TC arrived at the \$8,000 figure. Ex-Wife responds that TC, in imputing income to both parties, opted to calculate child support based on the "potential income" of each party and that TC was not required to segregate Ex-Husband's potential earnings as an attorney from those generated by the real estate. CA found that the standard of review for appellate courts in child support matters is abuse of discretion.

CR 52.01 provides that in all actions tried upon the facts without a jury, the trial court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. Thus, the issue herein is whether the TC's omitted finding involves a matter which was essential to TC's judgment. CA found that, other than generally stating that the imputed income was derived from Ex-Husband's law practice, rental properties and capital gains, TC provided no explanation as to how it reached the \$8,000 a month figure. Without adequate factual findings, CA held that TC's decision could not be meaningfully reviewed and that the omitted finding involved a matter which was essential to TC's judgment. Thus, TC erred by denying Ex-Husband's motion for additional factual findings on this issue and the matter must be remanded for additional findings.

**CA'S NOTE TO SC REQUESTING MODIFICATION OF RULES:**

"In rendering the decision herein, we are cognizant of the fact that CR 52.01 specifically states that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41.02." Although the instant appeal arises from "decisions of motions," the issue of child support was initially raised in Ex-Wife's petition for dissolution and was only resolved after an evidentiary hearing. Thus, we conclude that the crux of this appeal stems from an action "tried upon the facts without a jury[,]" as set forth in CR 52.01. However, we are also of the opinion that CR 52.01, as currently written, is not only overbroad but illogical. The majority of orders and judgments from TC originate from a motion. Many motions require a court to try the issues upon the facts. To hold that a trial court is not obligated to make -7- findings of fact when ruling on a motion of any kind except as provided in CR 41.022 necessarily deprives litigants of an understanding of the order or judgment, as well as inhibits any type of meaningful appellate review. We would urge our Supreme Court and Rules Committee to review and revise CR 52.01."

Reversed and remanded.

Digested by Michelle Eisenmenger Mapes

**COM. V. MARTIN**

**CRIMINAL: Expert Testimony - Daubert - "shaken baby syndrome"; Gatekeeping role for scientific evidence is to keep out unsupported legal conclusions and not choose sides**

[2006-CA-002236](http://www.louisvillelaw.com/lawwire/2008_29.htm)

PUBLISHED: REVERSING AND REMANDING

PANEL: HENRY PRESIDING; BUCKINGHAM CONCURS; THOMPSON CONCURS IN RESULT ONLY  
GREENUP COUNTY

DATE: 6/13/2008

In consolidated appeals, CA reversed circuit court order ruling that expert medical testimony about shaken baby syndrome was unreliable and therefore inadmissible under Daubert v. Merrell

Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The trial court's decision to exclude Dr. Spivack's testimony was an abuse of discretion, because it was founded on the unsupported legal conclusion that because there was dispute amongst the experts as to the possible cause of the infants' injuries, it was the court's role to choose the side it found more convincing and exclude the side it found less convincing, based in part on giving greater weight to "scientific" as opposed to "clinical" studies. The Daubert test is designed to keep out unreliable or "pseudoscientific" expert scientific testimony that would confuse or mislead the jury, or that cannot legitimately be challenged in a courtroom. This 'gatekeeping role of the trial court is designed to banish 'junk science' evidence from the courtroom. The testimony of the Commonwealth's experts in this case, even accepting the trial court's assessment of its flaws, could not be described as "pseudoscientific" or "junk science."

By Scott Byrd

## **LANE V. RICHARDS**

**LEGAL NEGLIGENCE: Statute of limitations; "Occurrence" and "Discovery" rules**

[2007-CA-000083](#)

PUBLISHED: REVERSING AND REMANDING

PANEL: ACREE PRESIDING; LAMBERT, ROSENBLUM CONCUR

LAUREL COUNTY

DATE: 6/13/2008

Held: Legal negligence claim filed more than one year after "occurrence" for the claim but within one year of "discovery" of "irrevocable, non-speculative injury" was timely.

Lane appeals TC's grant of summary judgment to Hugh Montgomery Richards on her legal malpractice claim holding that it was not filed within the one-year statute of limitations. Lane retained Richards in April 1998 to represent her on a federal court action against the Bell County School Board. This action was subsequently dismissed by the federal court on February 11, 2002. Lane then retained another attorney, H. Wayne Roberts, to handle her appeal. The appeal was also dismissed by the Sixth Circuit Court of Appeals on August 12, 2003. By letter dated September 12, 2003, Attorney Roberts advised Lane of the dismissal and his unwillingness to further appeal to the US Supreme Court, but did correctly advise her that she had 90 days from the dismissal date to file a writ. Roberts also informed Lane that in his opinion she had a malpractice claim against Attorney Richards, and conservatively stated that she had 1 year from August 12, 2003 in which to file such a claim. Lane then retained yet another attorney, Thomas Grady, to file the writ with the US Supreme Court in October 2003, and Attorney Grady verbally advised Lane that the writ had been timely filed. While not hearing back for some months, Lane wrote to Grady on July 28, 2004 inquiring about the writ status. In response, one of the partners in Grady's firm responded by letter dated December 28, 2004 advising Lane that Grady had been fired from the firm and more importantly, that he had prepared the writ but never filed it with the Supreme Court. Lane then filed this legal malpractice claim on November 3, 2005.

In its analysis, the COA notes that Lane's claim against the school board officially terminated on November 11, 2003 when the time for filing the writ expired. And while she learned of Richards' alleged legal negligence in September 2003 from Roberts, the COA noted that Lane did not discover her alleged injury until December 31, 2004 upon receiving the letter from Grady's firm. As the COA notes, KRS 413.245 governing professional negligence claims actually contains two different limitation periods, one from the date of "occurrence" and the second from the date of actual or constructive discovery of the cause of action. The COA held that the "occurrence"

limitations period ended on November 11, 2004, one year after her time for filing an appeal expired even though Lane did not yet know that she had been damaged by that time. Thus, this legal malpractice action was not timely filed under the "occurrence" limitations period. However, the COA notes that the 'discovery' limitation period does not begin to run until the cause of action was discovered or should have been discovered, which requires that all elements of the cause of action be known or discoverable. As the COA reasoned, the key question here is when should Lane have discovered that Richards' negligence had resulted in her "irrevocable, non-speculative injury"? The COA held that while Lane's cause of action accrued when Grady failed to file her writ and the judgment became final in November 2003, but her reasonable reliance of Grady's representations about the pending status of continued appeal prevented her from discovering the action accrual until she received the December 2004 letter from Grady's firm. As her case against Richards was filed within 1 year of this letter, Lane's Complaint was timely filed and not barred by KRS 413.245.

BY Chad Kessinger  
SCHILLER OSBOURN BARNES & MALONEY

**HIGHVIEW MANOR ASSOCIATION LLC V. LOUISVILLE METRO HEALTH DEPT.  
GOVERNMENT: Review of municipal code and enforcement (bingo halls)**

[2007-CA-000233](#)

PUBLISHED: REVERSING IN PART, VACATING IN PART, AND REMANDING  
PANEL: KELLER PRESIDING; CLAYTON, MOORE CONCUR  
JEFFERSON COUNTY  
DATE: 6/13/2008

COA accepted discretionary review in this matter to determine the scope of a district court's authority to review a decision of a local code enforcement pursuant to KRS 65.8831.

The underlying matter involves citations and fines imposed against bingo hall owners by the Louisville-Jefferson County Metro Government's Code Enforcement Board for violations of the Smoke Free Law, Louisville Metro Ordinance No. 123-2005. The facilities argued that they were exempt from application of the Smoke Free Law, as they leased their premises to charitable organizations that conducted bingo games as authorized by KRS 238.500, et seq., and thus were private organizations.

In response, the Health Department argued that the private organization exception did not apply, as there was no evidence that the facilities were not open to the general public, and that the district court was limited to a review of the record created before the code enforcement.

In its Findings and Order on April 26, 2006, the district court found that a conflict existed in the statutes regarding its jurisdiction: KRS 24A.010 provides that it does not have appellate jurisdiction, while KRS 65.8831 provides that in an appeal of a decision of the code enforcement board, the district court is limited to a review of the record the board created.

The district court determined that it had original jurisdiction of the matter. The district court further determined that the facilities were exempt from enforcement of the Smoke Free Law and that the charitable organizations that rented the bingo halls were exempt.

COA presumed the General Assembly (and, in turn, the Louisville Metro Government) was aware

that the district court had no appellate jurisdiction pursuant to KRS 24A.010(3) when it enacted KRS 65.8831, which limited the district court to a review of the record created before the code enforcement board. The district court is not permitted to conduct a de novo trial, but instead is merely permitted to review only that evidence and testimony introduced before the code enforcement board. The district court may not take additional evidence, but must confine itself to the board's record. It is incumbent upon the code enforcement board to ensure that its record is sufficient to provide for meaningful review.

Because it does not have appellate jurisdiction, the district court may conduct a de novo review of that evidence and is not confined to a determination as to whether the board's decision was arbitrary.

Therefore, the circuit court erred when it held that the district court could only review the board's action for arbitrariness.

Accordingly, COA reversed the circuit court's holding in this regard and remanded this matter to the circuit court to address the merits of the district court's decision, which must be supported by the board's record.

On remand, the circuit court shall first determine whether the district court properly concluded that the organizations operating the bingo games were private organizations. If so, then the circuit court must next determine whether the district court properly applied the private organization exemption to the owners of the respective facilities.

For the foregoing reasons, the Jefferson Circuit Court's Opinion and Order is hereby reversed in part and vacated in part, and this matter is remanded to the circuit court for further proceedings consistent with this opinion.

By Michael Stevens

**EBERENZ V. COM**  
**CRIMINAL: Double jeopardy**  
[2007-CA-000349](#)

PUBLISHED: AFFIRMING

PANEL: ACREE PRESIDING; NICKELL, BUCKINGHAM CONCUR

MEADE COUNTY

DATE: 6/13/2008

CA affirmed Defendant's convictions for First Degree Fleeing or Evading as well as First Degree Wanton Endangerment. These convictions do not violate the constitutional prohibition against double jeopardy. The determination to be made is "whether the act or transaction complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not." The question before this court is whether the language of "under circumstances manifesting extreme indifference to the value of human life" constitutes a separate element of First Degree Wanton Endangerment for double jeopardy purposes. As each offense contains at least one element not present in the other, convictions on both First Degree Fleeing or Evading and First Degree Wanton Endangerment will not trigger double jeopardy. Defendant was not entitled to a directed verdict of acquittal.

Digested by Scott C. Byrd

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**HACK V. LONE OAK DEVELOPMENT, INC.**

**REAL ESTATE: Economic loss rule for damage to real estate; privity**

[2007-CA-001431](#)

PUBLISHED: REVERSING AND REMANDING

PANEL: THOMPSON PRESIDING; COMBS CONCURS; ACREE CONCURS W/SEP.OPINION

MCCRACKEN COUNTY

DATE: 6/13/2008

CA reverses and remands entry of SJ for developer and drain installer in this homeowner's negligence claim.

Homeowners purchased lot from sellers who had purchased from Lone Oak Developers. Prior to this purchase, the developer contracted with Central Paving to install drain pipe. Nearly two years later the driveway and a portion of the yard collapse because Central Paving had used tree stumps and vegetation as fill under its drain pipe, which subsequently collapsed. Repairs exceeded \$50,000. The issue presented is whether, absent privity of contract, the Hacks can pursue a negligence action against the developer and installer. Homeowners admit no privity and assert claims in negligence.

Negligence does not require privity, however, when the damage is exclusive to property, the plaintiffs seeking to recover under a theory of negligent construction have encountered a legal quagmire because "one who is not a party to the contract or in privity thereto may not maintain an action for negligence which consists merely in the breach of the contract." In these homebuilder cases, there is a trend to deny a subsequent purchaser compensation for losses caused by the negligent construction under the theory of what is commonly referred to as the "economic loss rule."

The Kentucky Supreme Court implicitly adopted the economic loss rule in *Real Estate Marketing, Inc. v. Franz*, 855 S.W.2d 921 (Ky. 1994). "[T]his court recognizes that recovery is contingent upon damage from a destructive occurrence as contrasted with economic loss related solely to diminution in value, even though, as to property damage, both may be measured by the cost of repair. The rule was intended as a line of demarcation between contract and tort law, but some bemoan its increasing application, including construction litigation. In the present analysis, the court finds the use of the language "damaging event" in *Franz* pivotal.

The "damaging event" here was not limited to the drain pipe. This issue is properly left for a jury to determine. Under the circumstances of this case, the Court holds that the developer and installer owed the purchasers the duty to use reasonable care when the drainage pipe was installed. SJ is reversed.

Digested by John E. Hamlet

**WAL-MART STORES, INC. V. SMITH**

**WORKERS COMP: Work-Relatedness of PTSD**

[2007-CA-001469](#)

PUBLISHED: AFFIRMING

PANEL: NICKELL PRESIDING; CAPERTON, TAYLOR CONCUR

## WORKERS COMP

DATE: 6/13/2008

The claimant alleged an injury to her low back and post-traumatic stress disorder when the Wal-Mart store where she was working was shaken by a blast from a nearby mining operation. She was awarded benefits for a temporary low back injury and permanent disability for PTSD. Wal-Mart appealed on the basis that she did not prove a physical injury, and that a psychiatric disability can only be upheld if there is a permanent physical injury. The Court rejected these arguments on the basis that Kentucky law allows a psychiatric claim based only on temporary physical injury, and that there was substantial evidence of a physical injury. The Court included scathing criticism of Wal-Mart's arguments particularly since they cited to an Iowa case to argue that Kentucky had rejected using a claimant's own testimony as substantial evidence of injury (it has not), and relied on Wal-Mart's surveillance videos as proof that the claimant was not injured in the blast, when they were unclear and incomplete.

Digested by Peter Naake

### **CABINET FOR HEALTH AND FAMILY SERVICES V. CONWAY, ATTORNEY GENERAL EVIDENCE AND DISCOVERY: Confidential KASPER records are not privileged and are discoverable**

[2008-CA-000027](#)

PUBLISHED: OPINION AND ORDER DENYING CR.76.36 RELIEF IN PART AND GRANTING RELIEF IN PART

DATE: 6/13/2008

The Commonwealth of Kentucky, Cabinet for Health and Family Services, petitioned COA to direct the respondent trial court to vacate its order which required it to produce to counsel for Christopher Warner, defendant below, information concerning Matthew Baumler's prescription drug history contained in its KASPER records.

On the basis of a plain reading of KRS 218A.202(6), the COA was unable to discern any intent by the General Assembly to elevate the confidential KASPER records to a privileged status and held the statute does not create any privilege regarding KASPER data.

The trial court erred, however, in ordering the records to be produced directly to Warner's counsel solely based on a determination that counsel's arguments provide "good cause for the relief requested" and without undertaking any prior review of the records themselves to establish their relevancy to the subject matter of the action pending before it. An additional procedural step is required prior to any ordered release of the documents to the parties' counsel, and the amended order shall require the Cabinet's Records Custodian to produce the records to the trial court under seal and for its in camera review in order to determine what portion of those records, if any, is relevant to the subject matter at issue and may be released to the parties' counsel.

By Michael Stevens

### **CABINET FOR HEALTH AND FAMILY SERVICES V. JUDGE BARTLETT GOVERNMENT RECORDS: Discovery of KASPER information required**

[2008-CA-000046](#)

**PUBLISHED: OPINION AND ORDER DENYING CR.76.36 RELIEF IN PART AND GRANTING RELIEF IN PART**

**DATE: 6/13/2008**

CA concluded that the TC correctly determined, in accordance with Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003), that individual's rights to due and compulsory process took precedence over any conflicting language included in KRS 218A.202, and that it had the authority to order the Cabinet to produce the requested KASPER information for discovery purposes. However, counsel's arguments do not provide "good cause" for the relief requested, and an order compelling the custodian to produce the KASPER shall require the custodian to produce the records under seal for in camera review by the trial court.

Digested by Scott C. Byrd

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**NOT PUBLISHED (COA)**

**ORLANDI V. A RELIABLE TEMPORARY LLC**

**APPEAL: Timely filing is jurisdictional; language of finality not binding**

[2006-CA-000954](#)

**PUBLISHED: 77**

**DATE: 6/13/2008**

**JOBE V. JOBE**

**FAMILY LAW: Dissipation of assets**

[2007-CA-000302](#)

**PUBLISHED: 89**

**DATE: 6/13/2008**

**GRAHAM V. COM**

**CRIMINAL: guilty plea and waiver of rights**

[2007-CA-000749](#)

**PUBLISHED: 86**

**DATE: 6/13/2008**

**E.L. BURNS CO. INC. V. DAVID ENGINEERING AND CONSTRUCTION INC.**

**BUSINESS: Contracts; purchase order contracts and performance showing understanding of terms**

[2007-CA-000793](#)

**PUBLISHED: 115**

**DATE: 6/13/2008**

**HAMILTON V. HAMILTON**

**FAMILY LAW: "Restrict" as used in time sharing custody arrangements**

[2007-CA-000809](#)

**PUBLISHED: 86**

**DATE: 6/13/2008**

ANDERSON V. COM  
CRIMINAL: 60.02 untimely  
[2007-CA-000930](#)  
PUBLISHED: 73  
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DATE: 6/13/2008

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