



**June 19, 2008 SUPREME COURT OF KENTUCKY DECISIONS (Vol. 2008:30)**

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## PUBLISHED (SCOKY)

**122 KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION V. EDWARDS**

**APPEALS: Interlocutory appeal not avenue of relief for restraining order, appeal dismissed by SC**  
[2007-SC-000927-1.pdf](#)

PUBLISHED: SUPPORTING DISMISSAL

OPINION BY NOBLE

BARREN COUNTY

DATE RENDERED: 6/19/2008; FINAL 7/20/08

Bo Edwards was a student-athlete at Barren County HS from his ninth to eleventh grades. In May 2007 the HS administration found he had violated the school's alcohol policy and declared him ineligible for athletics the following school year. He enrolled at Glasgow HS in June 2007 and requested that the KHSAA declare him eligible under the bona-fide-change-in-address exception to the KHSAA Bylaws Transfer Rule. The KHSAA denied the request; two hearings were held in 2007, and the Hearing Officer eventually recommended affirming the denial, finding that the residence exception was not available where the student left the sending school under penalty which would have resulted in their [sic] ineligibility at the sending school. The KHSAA adopted the Hearing Officer's recommendation and declared him ineligible to play the 07-08 school year.

Bo then filed a verified complaint with the Barren CC seeking judicial review of the decision; he also filed an ex parte motion for a temporary injunction barring enforcement of the decision. The Barren CC granted this ex parte motion in a document styled "Findings of Fact, Conclusions of Law and Temporary Injunction" entered 10/26/07.

On 11/13/07 the KHSAA filed a motion for interlocutory relief with the CAs under CR 65.07; the CAs denied the motion, finding that the KHSAA failed to show the CC's findings were clearly erroneous or failed to balance the parties' equities. The KHSAA then filed a motion for interlocutory relief with the

Supremes under CR 65.09, arguing it was entitled to relief because of the "special difficulties" presented by student athlete eligibility cases and because the CC abused its discretion.

Though neither party argued the issue, the Supremes noted that it is required, *sua sponte*, to address jurisdiction if necessary. The Supremes reviewed the proceedings below and found that temporary injunctions may only be granted with notice and a hearing. Here, the motion was styled a TI, but it was "ex parte," and provided neither notice nor hearing to the KHSAA. The CC's order, then was NOT a TI, and instead must be deemed a restraining order. See *Common Cause of Ky. v. Commonwealth*, 143 S.W.3d 634 (Ky., 2004) (holding that substance and form of order made it a restraining order, despite movant's claim that it amended its motion to argue for a TI). The Supremes point out that there is a difference between an Restraining Order and a Temporary Injunction, and the distinction is important, because there is no right to appeal or seek interlocutory relief from an Restraining Order, unlike a Temporary Injunction. Instead, the remedy for an Restraining Order is a motion for the trial court to dissolve the Restraining Order, which has the effect of automatically ending the Restraining Order unless the other side has also moved for a Temporary Injunction. See CR 65.03(5).

Because the Civil Rules make no provision for appeals from Restraining Orders, the Supremes held they could not address the merits of KHSAA's claim at this time. It therefore vacated the CAs decision and dismissed the KHSAA's CR 65.09 motion.

*By Cherry Guarnieri, ed.*

123 **ALKABALA-SANCHEZ V. COM.**

**CRIMINAL: MIRANDA WARNINGS; Defendant not considered in custody**

[2006-SC-000196-MR.pdf](#)

PUBLISHED: AFFIRMING

OPINION BY NOBLE; MINTON DISSENTS; SCHRODER DISSENTS W/O SEP. OP.

FAYETTE COUNTY

DATE RENDERED: 6/19/2008

SC upheld TC's denial of Defendant's motion to suppress statement and affirmed his conviction and 30 year sentence for criminal conspiracy to commit murder. Alkabala was not subject to custodial interrogation at the time he claims he was denied the warnings required under *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In light of the totality of the circumstances surrounding the interview, SC concludes that Defendant was not in custody during the first part of the interview, and when the questions pointed to a need for Defendant to be in custody, the Miranda warnings were properly given.

MINTON DISSENTS because all of the relevant circumstances (including the presence of multiple officers, the time of day of the interview, the length of the interview, the isolation of appellant from his family members before and during questioning, and the language barrier between appellant and the officers) have caused him to conclude that Alkabala-Sanchez was in custody from the beginning of his interview with the police.

*By Scott Byrd, ed.*

124 **DAVIS V. HENSLEY**

**WORKERS COMP: Workers' Compensation Exclusive Liability does not apply to Governmental Agencies**

[2007-SC-000066-DG.pdf](#)

PUBLISHED: AFFIRMING

OPINION BY HARRIS (SPECIAL JUSTICE); MINTON, SCHRODER NOT SITTING

BOONE COUNTY

DATE RENDERED: 6/19/2008

In a tort action, both the employer and an up-the ladder general contractor are protected from liability by the injured worker if the employer or its general contractor have workers' compensation coverage. This case holds that a governmental entity, in this case the Kentucky Department of Transportation, does not enjoy immunity under KRS 342.690 because it is not liable for workers' compensation benefits as a general contractor. The Court based this on the definition in KRS 342.610 of up-the-ladder contractors as "persons", and KRS 342.630 defines "persons" and governmental entities separately. Thus the government cannot be an up-the-ladder contractor because it is not a "person". The implications of this decision could be that the state no longer has up-the-ladder responsibility to cover employees of subcontractors for the state who are uninsured for workers' compensation. However, the state will have to cover those workers through the Uninsured Employer's Fund. This decision does not address sovereign immunity, which should still apply to the Transportation Cabinet.

*By Peter Naake, ed.*

125 **UNINSURED EMPLOYERS' FUND V. CITY OF SALYERSVILLE**

**WORKERS COMP: "Up the ladder" liability does not apply to governmental entity (not a person)**

[2007-SC-000183-WC.pdf](#)

PUBLISHED: AFFIRMING

OPINION OF THE COURT

FROM COURT OF APPEALS

DATE RENDERED: 6/19/2008

The Supreme Court held that statute deeming up-the-ladder contractor to be employer if claimant's direct employer fails to provide workers' compensation coverage does not hold governmental entity liable as up-the-ladder employer of uninsured subcontractor's employees.

The City had maintained from the outset that it is not a contractor under KRS 342.610(2). As noted in *Mitchell v. Hadl*, 816 S.W.2d 183, 185 (Ky.1991), and previously in *First National Bank of Louisville v. Progressive Casualty Insurance Co.*, 517 S.W.2d 226, 230 (Ky.1974), the court normally confines itself closely to the analysis and theories presented by the parties. To do so in the present case would, however, result in a clear misapplication of KRS 342.610(2). Substantial evidence could not support a finding against the City under a correct interpretation of either subsection of KRS 342.610(2) because the City is not a "person" and, therefore, could not be a contractor for the purposes of imposing up-the-ladder liability. It is unnecessary under the circumstances to consider whether KRS 342.610(2)(a) applies to excavation for the purpose of installing sewer lines. Decision of Court of Appeals affirmed.

*By Michael Stevens, ed.*

126 **COUCH V. COM**

**CRIMINAL: Harmless error in admitting confidential statements from pre-trial services agency records**

[2007-SC-000372-DG.pdf](#)

PUBLISHED: AFFIRMING

OPINION BY SCOTT; CUNNINGHAM DISSENTS BY SEP. OP. WITH SCHRODER JOINING DISSENT

PERRY COUNTY

DATE RENDERED: 6/19/2008

SC affirmed Couch's conviction and five year sentence for failing to register as a sex offender pursuant to KRS 17.510. KRS 17.510 sets forth the registration system for individuals who have committed sex crimes or crimes against minors, their duties of registration, and the concomitant penalty for failure to register. Pursuant to RCr 4.08, information provided to pretrial services representatives is confidential and cannot be used at trial without the written consent of the defendant, except in certain enumerated exceptions, none of which are applicable here. RCr 4.08 states in pertinent part: "Information supplied by a defendant to a representative of the pretrial services agency during the defendant's initial interview or subsequent contacts, or information obtained by the pre-trial services agency as a result of the interview or subsequent contacts, shall be deemed confidential and shall not be subject to subpoena or to disclosure without the written consent of the defendant. Clearly, RCr 4.08 was violated here, as a pretrial services intake agent testified concerning confidential information supplied to her without Defendant's written consent, and none of the exceptions apply. How a violation of RCr 4.08 should be treated, however, is a matter of first impression in Kentucky. There was other substantial evidence presented at trial that Defendant was living in Kentucky at the time of the arrest. The error in this circumstance did not rise to the level of palpable error and was harmless beyond a reasonable doubt.

TC was properly within its purview to re-open and call such witness pursuant to RCr 9.42 and KRE 614. A trial court is vested with the authority to call and question witnesses pursuant to KRE 614. TC was proper in denying Defendant's request for a directed verdict, as a finding of guilt was not clearly unreasonable.

Although the testimony of witness violated rule of criminal procedure governing confidentiality of pre-trial services agency records, the SC held that trial court's error in admitting the testimony was harmless.

*By Scott C. Byrd, ed.*

127 **RAGER V. CRAWFORD & CO.**

**WORKERS COMP: Employer not liable for claimant's attorneys fees absent unless employer disputed medical expenses without reasonable ground**

[2007-SC-000567-WC.pdf](#)

PUBLISHED: AFFIRMING

OPINION OF THE COURT

FROM COURT OF APPEALS

DATE RENDERED: 6/19/2008

The workers' compensation claimant was successful in his defense of a post-award medical dispute with the employer regarding payments of medical bills. The ALJ awarded claimant's attorney a fee, but refused to impose liability for the fee on employer, finding that employer had a reasonable basis to contest the disputed expenses. Claimant appealed to the Workers Compensation Board which affirmed the ALJ. COA affirmed, and SC affirmed.

The Supreme Court affirmed the award of the attorneys fees and held the claimant was required, however, to pay his own attorney fee, absent a showing that employer had disputed the medical expenses without reasonable ground.

*By Michael Stevens, ed.*

128 **WARREN KEMPER, MD V. GORDON**

**TORTS: "Lost or diminished chance" of survival because of physician's misdiagnosis is not a recoverable claim in Kentucky**

[2005-SC-000306-DG.pdf](#)

[2006-SC-000077-DG.pdf](#)

PUBLISHED: AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

OPINION BY CUNNINGHAM; LAMBERT CONCURS IN RESULT ONLY BY SEP. OPINION WITH ABRAMSON JOINING; NOBLE DISSENTS BY SEP. OPINION WITH SPECIAL JUSTICE THOMAS C. SMITH JOINING; MINTON AND SCHRODER NOT SITTING

FROM JEFFERSON COUNTY

DATE RENDERED: 6/19/2008

This wrongful death case involves the profoundly sad death of a young mother, thirty-eight year old Lori Gordon. The decedent's family and estate (Gordons) alleged that Lori's death was the result of a negligent misdiagnosis by, among others, Dr. Warren Kemper. Various claims filed by the Gordons were resolved, both before trial and up through the return of the jury verdict. As a result, the jury's finding of no negligence on the part of Lori's healthcare providers had an impact only on Dr. Kemper. SCOKY granted discretionary review to address the decision of the Court of Appeals adopting the "lost or diminished chance" doctrine of recovery. In their cross-appeal, the Gordons argue separate grounds for reversal and a new trial. Further, in the event a new trial is granted, the Gordons asked SC to review numerous evidentiary issues.

While SC rejected the adoption of the "lost or diminished chance" doctrine of recovery, the did SC conclude the Gordons established sufficient grounds for a new trial.

Specifically, the holding in this case that the doctrine of lost or diminished chance for recovery or survival did not apply in medical-malpractice cases was containing in a plurality (rather than a majority opinion) which was authored by Cunningham, with one justice and one special justice concurring and two justices concurring in result only. As for the other issues raised, the SC held that whether physician breached standard of care in failing to diagnose patient's gastric cancer was for the jury; the trial court did not err and acted within its discretion in declining to qualify internist as an expert for purpose of giving an opinion as to likelihood of patient's survival had her gastric cancer been diagnosed by physician and in excluding a portion of testimony of one of plaintiffs' experts. However, the trial court's refusal to allow plaintiffs to question one of physician's experts about apparently inconsistent testimony that expert had given in a previous case was reversible error.

*By Michael Stevens, ed.*

129 **CHILDERS OIL CO. INC. V. ADKINS**

**EMPLOYMENT: Age discrimination found where employer made deliberate decision to hire young females at cash registers; punitive damages instruction constituted manifest injustice in employment discrimination claim**

[2007-SC-000032-DG.pdf](#)

PUBLISHED: AFFIRMING IN PART AND REVERSING IN PART

OPINION BY NOBLE

FROM PIKE COUNTY

DATE RENDERED: 6/19/2008

This case is on appeal from the Kentucky Court of Appeals, which affirmed the ruling of the Pike Circuit Court where Appellant, Childers Oil Company, Inc. (Childers), was held liable for age discrimination in employment and had judgment entered against it for compensatory damages, including lost wages and emotional distress, and punitive damages.

Childers raised four claims of error: (1) that its motion to dismiss should have been granted as it was not a proper party to the action; (2) that its motion for directed verdict at the close of all evidence should have been granted because Appellee, Bertha Adkins, failed to establish that Childers's reason for laying her off was a mere pretext; (3) that it was error for the circuit court to give an instruction on punitive damages for a cause of action under the Kentucky Civil Rights Act; and (4) that the circuit court erred by not granting Childers's motion for judgment n.o.v. or motion for a new trial because the award for emotional distress was not allowed under KRS 344.450 or, alternatively, the award was excessive .

There was testimony that store management had made a deliberate decision to seek to place young females at the cash registers, and the jury was informed of specific comments to that effect and that the store manager had told an employee that "the company wanted pretty, young girls up front to

draw in truck drivers and the `young ones' went `up there.'"`

In addition, a young female employee, Sabrina, was hired only eleven days prior to the claimant Adkins's discharge. At least five other persons, all more than ten years younger than Adkins, were hired to work in the store not long after Adkins's discharge. Lastly, although Adkins had originally been hired as a cashier and had held that position for several months, Childers retained the younger, less-experienced Sabrina and discharged the older, more-experienced Adkins.

In light of the evidence and testimony offered it was reasonable for the jury to conclude that Childers's reason for discharging Adkins was a mere pretext: Adkins was already trained and experienced as a cashier, yet Sabrina was hired just days prior to Adkins's discharge, and at least five other younger individuals were hired as cashiers between the time of Adkins's discharge and the store closing. The directed verdict motion was properly denied .

The trial court's instruction allowing punitive damages for an action brought under KRS 344.450 then, after the Supreme Court of Kentucky had expressly denied the availability of such damages, was clearly erroneous. The court concludes that that erroneous instruction resulted in a manifest injustice.

*By Michael Stevens, ed.*

130 **COMMONWEALTH OF KENTUCKY TRANSPORTATION CAB. V. SEXTON**

**TORTS: In absence of notice state highway department has no duty to inspect trees for dangerous defects**

[2006-SC-000454-DG.pdf](#)

PUBLISHED: REVERSING AND REMANDING  
OPINION BY MINTON; SCHRODER NOT SITTING  
FROM JEFFERSON COUNTY  
DATE RENDERED: 6/19/2008

The Supreme Court of Kentucky reverses and remands this property damage case against the Commonwealth, holding that, since the acts were not ministerial, the Commonwealth has not waived sovereign immunity. This case had created a new duty on the state's urban landowners owed to adjoining landowners to exercise ordinary care to prevent an unreasonable risk of harm arising from defective or unsound trees on the urban landowners' property. Because the Supreme Court was concerned about the magnitude of this new duty and the characterization of inspection of trees on all state-owned land for soundness as a ministerial act, it granted discretionary review.

The CA stated that inspection and removal of dead trees are ministerial acts if the highway department had a well-defined duty to inspect trees for dangerous defects, despite lack of actual notice of such defects, and then imposed such a duty of inspection. Neither approach is consistent with case law defining ministerial and discretionary acts.

In determining whether acts are ministerial or discretionary it is necessary to determine whether the acts involve policy-making decisions and significant judgment, or are merely routine duties. An agency's "routine duties" will typically be established by statutes or regulations that very clearly and specifically set them forth (with exceptions). The S.Ct. is unaware of any statutes or regulations specifically establishing a duty that the highway department inspect trees on its lands. Not only are there no statutes or regulations governing tree inspection in the absence of actual notice of unsound trees by the highway department, there was no existing Kentucky case law at the time of the property damage that imposed on the highway department a duty to inspect trees for soundness on its property. In fact, earlier decisions held that the highway department had no duty to inspect for dead trees even where the dead tree was located along a roadway.

To the extent that the department elected to conduct some tree inspections to promote public safety on the highways or even prevent damage to private property, this must have come about as a result of its employees' discretion to elect to perform such a function since this specific function was not required by any applicable law. Since this was clearly a discretionary act, the Commonwealth has not waived sovereign immunity for any alleged negligence in performing this act.

*By John Hamlet, ed.*

131 **WILLIAMS V. STATE FARM MUTUAL AUTOMOBILE ASSOCIATION**

**INSURANCE: UIM - "furnished" and "owned" have two distinct connotations and that the State Farm exclusion did not preclude UIM coverage for decedent under the parents' policy**

[2006-SC-000856-DG.pdf](#)

PUBLISHED: REVERSING AND REMANDING

OPINION BY SCHRODER

FROM MENIFEE COUNTY

DATE RENDERED: 7/15/2008

Williams appeals COA's opinion affirming TC's entry of summary judgment in favor of State Farm on Williams' claim for UIM benefits stemming from a one-vehicle accident in which Williams' son, Paul, was killed while riding as a passenger. Williams first presented a claim to State Farm under the policy insuring the vehicle involved in the accident (which happened to be owned by Williams' other son, Aaron, who was also killed), which was promptly paid. Williams then presented an UIM claim to State Farm under the policy insuring Williams and his wife's vehicle in which Paul was included as a household driver, but State Farm denied this claim based on the exclusion which provided that UIM coverage was not afforded where the injury occurred in a vehicle "furnished for the regular use of you, your spouse or any relative." At the TC level, State Farm successfully argued that the vehicle involved in the accident was owned by a relative (Aaron) that lived in the same household as the policyholders (parents), with the TC granting summary judgment by finding that the vehicle owned by Aaron was furnished for his use. On appeal, the COA affirmed the TC in a 2-1 decision and rejected Williams' argument that since the vehicle was owned by Aaron, it could not have been "furnished" by the parents to Aaron. The COA found no ambiguity in the exclusionary language by the mere omission of the phrase "owned by" in the clause. Williams again appealed.

The Supreme Court granted discretionary review to consider whether a vehicle "furnished" to a relative includes a vehicle "owned" by the relative rather than the policyholder in the context of this UIM exclusion. The SC felt that the main case relied upon by State Farm (and the lower courts) to support its position, *Murphy v. Ky. Farm Bureau* (2003), was easily distinguishable in that the exclusion contained in the KFB policy at issue therein expressly excluded vehicles "owned by or furnished or available" for the regular use of family members. The SC found this language to be much broader in scope than the similar language contained in State Farm's policy. As Kentucky law dictates that terms in insurance contracts be given their plain, ordinary meaning according to the usage of the average person, the SC concluded that "furnished" and "owned" have two distinct connotations and that the State Farm exclusion did not preclude UIM coverage for Paul's estate under the parents' policy.

BY Chad Kessinger

132 **HARDIN COUNTY HOSPITAL D/B/A HARDIN MEMORIAL HOSPITAL V. WILKERSON**

**CIVIL PROCEDURE: Revival of claims and stay of proceedings pending insolvent insurer undergoing liquidation and statutes of limitation**

[2005-SC-000206-DG.pdf](#)

PUBLISHED: REVERSING

OPINION BY NOBLE; SCOTT DISSENTS BY SEP. OP. WITH CUNNINGHAM JOINING; MINTON NOT SITTING

FROM HARDIN COUNTY

DATE RENDERED: 6/19/2008

Bessie Wilkerson fell and injured her hip while a patient at the hospital; on July 16, 2002, while the case was still pending before the trial court, she passed away, and her son Charles was appointed executor of her estate. On June 20, 2003, the hospital's insurance company was declared insolvent by a Virginia state court and ordered into liquidation. The negligence lawsuit was not revived in the name of the estate within the twelve months following Bessie's death pursuant to KRS 395.278. On July 22, 2003, the hospital moved to dismiss on these SOL grounds. Charles argued that KRS 304.36-085 operated to toll the SOL for six months upon the declaration of the insurance agency's insolvency. The TC dismissed the action as not having been timely revived, and the CAs, in a divided panel, held that the action was "pending" at the time of insolvency and that the action was stayed for six months as a matter of law under KRS 304.36-085.

The Supremes initially noted that this case involves the tension between the revival statute (KRS 395.278) and KRS 304.36-085, which controls the staying of claims when Kentucky Insurance Guaranty Association (KIGA) steps in for an insolvent insurer undergoing liquidation. They examined the definitions of the statutes' various terms, including "proceeding" and "revival of action." They outlined the history of the revival statute, finding that "at common law, when the plaintiff died the lawsuit died with him." *Daniel v. Fourth & Market, Inc.*, 445 S.W.2d 699, 701 (Ky., 1968). Whether the stay provision of the KIGA Act can have any effect on the revival limitation period is a question of first impression here in the Commonwealth; only two other states had addressed the issue, and they were, naturally, split. The Supremes go into a fairly detailed and lengthy analysis on the issue, addressing the

notion that the revival statute has consistently been read as one of limitation and finding that the language of the KIGA stay statute is not self-executing and therefore does not automatically stay the proceeding (interestingly, the Supremes state: "[T]he statute states that proceedings 'shall . . . be stayed.' This use of 'shall' imposes a mandatory duty on a court to stay proceedings, but indicates that an affirmative act by a court is required to effect the stay"). The Court compares the KIGA stay to other self-executing stay laws, including 11 U.S.C. Section 362, the Federal Bankruptcy Code "Automatic Stay" statute, and eventually finds that even under a best-case interpretation of KRS 304.36-085 (as creating an automatic stay), it can have no effect on the statute of limitation absent a separate, coordinating savings statute. Finally, they find that allowing the KIGA stay to suspend the running of an SOL goes against the KIGA Act's stated purpose of permitting proper defense by the association of all pending causes of action.

Here is the Supreme's conclusion, and it took them ten pages to reach it, y'all:

For the KRS 304.36-085 stay provision to come into effect, there must be a live, pending action to be defended by KIGA. The statute does not suspend or toll the running of a statute of limitation. Where a party to an action that may fall under KRS 304.36-085 has died, and the action had not been revived under KRS 395.278, there is no live, pending action for the stay to affect. This, of course, means that a dead action required to be defended by an insolvent insurer (and therefore KIGA) may be revived, even if a stay under KRS 304.36-085 is in place. However, [Charles'] action in this case was not revived within one year of the death of the decedent . . . Because the one year in KRS 395.278 is a period of limitation, to be strictly construed, the trial court properly dismissed the action.

Justices Scott and Cunningham dissented, with Justice Scott writing that he could not join the majority's conclusion that the death of a plaintiff in a lawsuit serves as an absolute abatement to that suit's status as a proceeding until revival is effectuated; it appeared to him that this was the very quandary which the revival statute was intended to address. He contends that while the revival statute does not affect an automatic personal succession of a decedent's representative to a lawsuit, it does, through a legal reality of statutory creation, permit the lawsuit itself--absent a personal holder of the lawsuit--to survive as a live action in its stead. He cites examples of common law principles being altered by statutory construction, including the wait and see statute approach to the common law rule against perpetuities (digester shudders with horror at memories of property classes).

J. Scott would find that the revival statute operates to maintain an action's status as a live proceeding so long as it is revived within the 12 month SOL. He would also find that KRS 304.36-085 should be construed to suspend the running of KRS 395.278's 12 month SOL upon a reciprocal's insolvency, citing its mandatory language and noting that there is no discretionary language in the statute which would otherwise indicate that a separate motion or some other action is required to render the stay enforceable. He concisely states, "Stay means stay." He also distinguishes Daniel, notes that revival beyond expiration of a limitations period is not without precedent (see CR 25.01; Snyder v. Snyder, 769 S.W.2d 70 (Ky. App., 1989), and examines the Harris v. Jackson case and its holding, 192 S.W.3d 297 (Ky., 2006), which he concludes is analogous to this matter.

*By Cherry Guarnieri*

### 133 **RICHARDSON V. LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT**

**GOVERNMENT: Claims Against Local Govt's Act require local governments to defend former employees when proper notice has been given**  
[2006-SC-000502-DG.pdf](#)

PUBLISHED: REVERSING

OPINION BY SCOTT; SCHRODER NOT SITTING  
FROM JEFFERSON COUNTY

DATE RENDERED: 6/19/2008

This case concerns whether the Claims Against Local Govt's Act ("CALGA") requires a local government to provide for the defense of former employees. Resolution of this issue turns on the interpretation of KRS 65.2005(1) which provides in pertinent part:

A local government shall provide for the defense of any employee by an attorney chosen by the local government in any action in tort arising out of an act or omission occurring within the scope of his employment of which it has been given notice pursuant to subsection (2) of this section. The local government shall pay any judgment based thereon or any compromise or settlement of the action except as provided in subsection (3) of this section and except that a local government's responsibility under this section to indemnify an employee shall be subject to the limitations contained in KRS 65.2002.

The Court held that the statute does require local governments to defend former employees when proper notice has been given. In so

holding, the Court explained:

The key to this case is the timing of the acts or omissions which form the basis for the civil claims, not the filing dates of the lawsuits. Thus, the analysis should focus on whether Richardson was a police officer at the time of the alleged tortious acts. This interpretation is consistent with the plain meaning of KRS 65.2005(l), which mandates that “[a] local government shall provide for the defense of any employee . . . in any action in tort arising out of an act or omission occurring within the scope of his employment.” (Emphasis added). The statutory language clearly evidences the General Assembly’s intent to provide a defense to employees - both current and former - in civil litigation, so long as the claims arise from public duties.

*By Hays Lawson*

134 **COFFMAN V. RANKIN**

**FAMILY LAW: Change of custody upon parent's relocation**

[2007-SC-000348-DGE.pdf](#)

PUBLISHED: REVERSING

OPINION BY LAMBERT; CUNNINGHAM DISSENTS BY SEP. OPINION WITH SCHRODER AND SCOTT JOINING IN DISSENT

FROM HARDIN COUNTY

DATE RENDERED: 6/19/2008

The parties divorced in 2001 and were granted joint custody of their two minor children. The mother was named primary residential custodian. In 2004, the father filed a motion to modify the custody decree due to his concerns regarding the mother's intention to move with the children and her engagement to an individual with past mental and addiction problems. During the pendency of the action, the mother was granted permission to relocate from Hardin County to Jefferson County with the children and her, now, new husband. An evidentiary hearing was held in 2006 and the Family Court named the father the primary residential custodian based on the best interests of the child standard. After the mother's motion to alter, amend, or vacate was overruled, she appealed. The COA held that the Family Court abused its discretion and proceeded without subject matter jurisdiction, and therefore reversed the Family Court's ruling.

The SC granted discretionary review. The SC found that the Family Court did have subject matter jurisdiction, since the Family Court determined that the moving papers were sufficient. It also found that the Family Court did not abuse its discretion, as the Family Court issued a thorough findings of fact and conclusions of law in excess of 16 pages.

Dissenting Opinion: It was an abuse of discretion in the trial court's finding that there was substantial evidence to justify a change of custody. The evidence showed that the children are doing well with their mother. The majority of the fact finding concerned the new husband's past instability. However, there was no evidence that the new husband had suffered any problems during his relationship with the mother or in the last five years. The trial court based its findings on speculation of what might occur in the future. Also, KRS 403.270(3) was completely ignored, as there was no evidence that the mother's new relationship has affected her relationship with the children. More proof was needed to justify uprooting the children from their mother's care.

*By Michelle Eisenmenger-Mapes, ed.*

## ATTORNEYS

**INQUIRY COMMISSION V. GREGORY CURTIS MENEFFEE**

[2008-SC-000294-KB.pdf](#)

PUBLISHED: 337

DATE RENDERED: 6/19/2008

**COURT ORDERS PERMITTING MOVANT TO WITHDRAW AS A MEMBER OF THE KENTUCKY BAR ASSOCIATION –**

- HUGH MATHIS TALBERT V. 2008-SC-000391-KB IN SUPREME KENTUCKY BAR ASSOCIATION COURT ENTERED: JUNE 9, 2008
- STEPHEN SLOAN EBERLY V. 2008-SC-000403-KB IN SUPREME KENTUCKY BAR ASSOCIATION COURT ENTERED: JUNE 6, 2008
- ELIZABETH ANN SHAW V. 2008-SC-000439-KB IN SUPREME KENTUCKY BAR ASSOCIATION COURT ENTERED: JUNE 17, 2008

## NOT PUBLISHED (SCOKY)

### 135 **ST. CLAIR V. HON. JANET COLEMAN**

**Writ of Prohibition: Failed to show no adequate remedy at law**

[2007-SC-000901-0A.pdf](#)

NOT PUBLISHED: DENYING WRIT OF PROHIBITION  
MEMORANDUM OPINION  
FROM HARDIN COUNTY  
DATE RENDERED: 6/19/2008

Petitioner Michael D. St. Clair seeks a writ prohibiting the Hardin Circuit Court from retrying him on charges of capital kidnapping, attempted murder, arson and receiving stolen property on grounds that such a trial would violate both the Interstate Agreement on Detainers and his federal and state constitutional right to a speedy trial.

As Petitioner has not shown that he is without an adequate remedy by appeal, the petition was denied.

Writs of prohibition and mandamus are extraordinary in nature, and should be granted only in exceptional circumstances. Generally, such circumstances occur when : (1) the lower court is proceeding or is about to proceed outside its jurisdiction; or (2) the lower court is about to act erroneously, but within its jurisdiction, and there is no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result. The phrase "no adequate remedy by appeal" has been defined to require an injury suffered that "could not thereafter be rectified in subsequent proceedings in the case."

By Michael Stevens, ed.

### 136 **CHARLES V. COM.**

**CRIMINAL**

[2006-SC-000185-MR.pdf](#)

NOT PUBLISHED: AFFIRMING  
MEMORANDUM OP.  
FROM LETCHER COUNTY  
DATE RENDERED: 7/15/2008

137 **HARRIS V. COM**

**CRIMINAL: Speedy trial and "send a message" argument**

[2007-SC-000142-MR.pdf](#)

NOT PUBLISHED: AFFIRMING

MEMORANDUM OP.

JEFFERSON COUNTY

DATE RENDERED: 7/15/2008

Neither Kentucky law nor the federal constitution was offended by the nine-year delay in prosecuting this case against Harris or the fourteen-month delay in bringing the case to trial since neither delay resulted from the Commonwealth's negligence or other fault, and neither deprived Harris of a fair trial

Although the SC noted it had condemned similar arguments urging the jury to "send a message" or otherwise to participate in a crusade against crime, there was no palpable error absent a timely objection and the opportunity for a curative admonition.

By Michael Stevens, ed.

138 **DUNN V. GARY SLATER D/B/A CAROL DALE CONTRACTING**

**WORKERS COMP:**

[2007-SC-000202-WC.pdf](#)

[2007-SC-000238-WC.pdf](#)

NOT PUBLISHED: AFFIRMING

MEMORANDUM OP.

FROM COA

DATE RENDERED: 7/15/2008

139 **WASTE MANAGEMENT INC. V. COLLINS**

**WORKERS COMP:**

[2007-SC-000460-WC.pdf](#)

NOT PUBLISHED: AFFIRMING

MEMORANDUM OP.

FROM COA

DATE RENDERED: 7/15/2008

140 **BELT V. CAMPBELL**

**WORKERS COMP:**

[2007-SC-000687-WC.pdf](#)

NOT PUBLISHED: AFFIRMING

MEMORANDUM OP

FROM COA

DATE RENDERED: 7/15/2008

141 **J.L. FRENCH AUTOMOTIVE V. DANIEL**

**WORKERS COMP**

[2007-SC-000789-WC.pdf](#)

NOT PUBLISHED: AFFIRMING

MEMORANDUM OP; ABRAMSON NOT SITTING

FROM COA

DATE RENDERED: 7/15/2008

142 **SULLIVAN V. COM.**

**CRIMINAL**

[2006-SC-000310-MR.pdf](#)

NOT PUBLISHED: AFFIRMING IN PART, REMANDING IN PART  
MEMORANDUM OP; LAMBERT CONCURS IN RESULT ONLY  
FROM COA

DATE RENDERED: 6/19/2008

143 **JENKINS V. COM**

**CRIMINAL: Search and seizure; good faith exception**

[2006-SC-000523-MR.pdf](#)

NOT PUBLISHED: REMANDING  
MEMORANDUM OP; SCOTT CONCURS IN PART BY SEP. OPINION WHICH SCHRODER JOINS  
FROM MONROE COUNTY

DATE RENDERED: 7/15/2008

Given all of the circumstances available to the deputies prior to the search, there was no "fair probability" that illegal contraband would be found . At best, it was merely a possibility . As such, the trial court erred in failing to grant Appellant's motion to suppress.

When an officer prepares an affidavit in good faith and a warrant is issued by a detached and neutral magistrate, subsequent invalidation of that search warrant will not result in suppression of the evidence. We have explained the rationale behind this "good faith" exception; and even when a search is conducted pursuant to a warrant, the exclusionary rule is still available in four instances: (1) where the issuing judge relied on information in the affidavit that the affiant knew to be false or misleading ; (2) where the issuing judge or magistrate has abandoned the requisite detached and neutral role; (3) where the affidavit is so lacking in indicia of probable cause that no law enforcement official could reasonably believe in the warrant's validity; and (4) where the affidavit is facially deficient due to its lack of particularity in describing the place of the search or the evidence to be seized.

Procedurally, when a defendant makes the threshold showing that an affidavit contains intentionally false or misleading information, he is entitled to a hearing pursuant to *Franks v. Delaware*, but it is the defendant's burden at this hearing to establish that the statements were made intentionally or with reckless disregard for the truth, that the deliberate falsity or reckless disregard is that of the affiant, that negligence or mistake does not account for the falsity, and that the falsehoods were material

Accordingly, the SC remanded this matter to the Monroe Circuit Court with directions to conduct a hearing pursuant to *Franks* to determine the applicability of the Leon good faith exception in light of Deputy Gerald's testimony at trial.

By Michael Stevens, ed.

144 **ALLEN V. COM**

**CRIMINAL**

[2006-SC-000407-MR.pdf](#)

NOT PUBLISHED: REVERSING  
MEMORANDUM OP; SCOTT DISSENTS BY SEP. OPINION WITH ABRAMSON & CUNNINGHAM JOINING  
FROM LETCHER COUNTY

DATE RENDERED: 6/20/2008

## **COURT ORDERS GRANTING MOTION FOR DISCRETIONARY REVIEW – JUNE 11, 2008**

1. BRANNON SCOTT WINN V.COMMONWEALTH OF KENTUCKY  
2006-SC-000876-DG FAYETTE
2. COMMONWEALTH OF KENTUCKY V. DAVID NICHOLS  
2007-SC-000493-DG MCCRACKEN
3. COMMONWEALTH OF KENTUCKY, TRANSPORTATION CABINET, DEPARTMENT OF  
HIGHWAYS V.BILL JOHNSON, INDIVIDUALLY, ET AL.  
2007-SC-000678-DG KNOTT
4. COMMONWEALTH OF KENTUCKY V. LENNIE G. HOUSE  
2008-SC-000114-DG FAYETTE
5. ASHLAND HOSPITAL CORPORATION, D/B/A KING'S DAUGHTERS MEDICAL CENTER  
AND PAUL MCDOWELL V.MARY BETH CALOR, M.D.  
2008-SC-000317-DG BOYD

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