

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
JUNE 2018 – APRIL 2019**

ADMINISTRATIVE LAW:

**Kentucky Board of Medical Licensure v. Jon M. Strauss, M.D.
2017-SC-000260-DG**

August 16, 2018

Opinion of the Court by Justice Hughes. All sitting; all concur. The Kentucky Board of Medical Licensure adopted the findings and conclusions of the hearing officer in a disciplinary matter and imposed a five-year probation period that allowed Strauss to continue practicing medicine with restrictions. On appeal, the circuit court found the order was supported by substantial evidence, the hearing officer did not err in not recommending a specific penalty to the Board and the Board did not err in not independently reviewing the entire hearing record and exhibits. The Court of Appeals reversed, concluding the hearing officer was statutorily required to recommend a specific penalty to the Board and then the Board was required to independently review the entire record before imposing discipline. Reversing the Court of Appeals, the Supreme Court noted that KRS 13B.110(1) requires the hearing officer's recommended order to include findings of fact, conclusions of law and a "recommended disposition of the hearing, including recommended penalties, if any." Examining the plain language of the statute and rejecting Strauss's alleged ambiguity, the Supreme Court held a hearing officer's order must recommend a disposition of the matter but it need not recommend a penalty. As for the Board's review, the Court held that under KRS 13B.120(1) it was required to "consider the record including the recommended order and any exceptions duly filed" but it was not required to conduct an independent review of the administrative record, in whole or in part. The Supreme Court remanded the case to the Court of Appeals for further review on the issue which it had not reached, the sufficiency of the evidence to support the Board's final order.

**Kentucky Retirement Systems v. Ronald Ashcraft
2017-SC-000345-DG**

November 1, 2018

Opinion of the Court by Justice Hughes. All sitting; all concur. After the denial of his claim for disability retirement benefits, Ashcraft sought judicial review in circuit. The circuit court upheld the administrative denial of the claim, but the Court of Appeals reversed. Both courts cited the "substantial evidence" standard of review from *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003). The Supreme Court granted discretionary review to examine the appropriate standard for judicial review of denials of applications for state disability retirement benefits, and to address the deference accorded to the fact-finding agency under KRS 13B.150. The Court, in upholding the *McManus* standard, concluded that when the decision of the fact-finder is in favor of the party with the burden of proof (the disability claimant), the issue on appeal is whether the agency's decision is supported by substantial evidence. When the fact-finder's decision denies a claimant's relief, on judicial review courts, at every level, should first consider whether the denial is supported by substantial evidence. If so, the court should then consider, as explained in *McManus*, whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it. Giving deference to the agency as fact-finder, and holding that Ashcraft failed to meet the purposefully high standard, the Supreme Court reversed the Court of Appeals and reinstated the agency's final decision denying his claim.

Veronica Bradley v. Kentucky Retirement Systems
2017-SC-000275-DG

November 1, 2018

Opinion of the Court by Justice Hughes. All sitting; all concur. Bradley, a member of the Kentucky Retirement Systems (KERS), was denied disability retirement benefits by the KERS Board. Although the circuit court reversed the Board on judicial review, the Court of Appeals concluded that the standard for reversal had not been met and reinstated the Board's denial of Bradley's claim. On discretionary review, Bradley challenged the *McManus* standard as inconsistent with the disability provisions of KRS Chapter 61 and the administrative law provisions of KRS Chapter 13B. The Supreme Court concluded that Bradley's application was addressed in a manner consistent with Kentucky statutes, that she failed to show that the Board's findings were not supported by substantial evidence and failed to address how her proof met the compelling evidence standard set forth in *McManus*. Holding that the *McManus* standard remains viable and controlling on judicial review of cases where the Board, as fact-finder, concludes that an applicant failed to meet their burden of proof, the Supreme Court affirmed the Court of Appeals and remanded the case to the trial court for reinstatement of the Board's decision denying Bradley's claim.

APPEALS:

William Robert Hagan, et al. v. Commonwealth of Kentucky, Transportation Cabinet
2018-SC-000084-DG

November 1, 2018

Opinion of the Court by Justice Venters. Minton, C.J.; Cunningham, Hughes, Keller, and VanMeter, JJ., concur. Wright, J., not sitting. The Transportation Cabinet, Department of Highways, commenced a condemnation action to acquire land owned collectively in fee simple by several tenants-in-common ("landowners"). The landowners did not contest the Commonwealth's authority to take the property under its powers of eminent domain, and the Circuit Court entered an interlocutory judgment allowing the taking. Following a jury trial to determine the compensation to be paid for the taking, the trial court entered a final order fixing the compensation to be paid and the landowners appealed. The landowner's notice of appeal failed to name the husband of one of the co-tenants, and upon motion of the Cabinet to dismiss for failure to name an indispensable party, the Court of Appeals dismissed the appeal. The Court of Appeals reasoned that the husband vested with an inchoate curtesy interest in the property was a necessary party to the appeal.

Upon discretionary review, the Supreme Court reversed, citing *Riley v Dept. of Highways*, 375 S.W.2d 245 (Ky. 1963) and *Dept. of Highways v Kelley*, 376 S.W.2d 539 (Ky. 1964), and holding that the owner of a fractional interest in the property taken by eminent domain party need not participate in the appeal taken by other affected owners and was, therefore not an indispensable party. The only issue for appeal was the adequacy of the compensation to be paid collectively for entire taking. Where the condemning authority has not appealed the amount of compensation it must pay and the authority for the taking is not being challenged, each owner of a fractional interest in the property may choose to appeal or not appeal, as they each perceive their best interest. The non-appealing owners are bound by the trial verdict and those choosing to appeal will be bound as determined by the results of the appeal.

For purposes of calculating the respective compensation of tenants-in-common or other fractional owners in an eminent domain action, the fractional interests in real property subject to condemnation are severable. The value of a vested but inchoate right of curtesy can be actuarially calculated as a fractional portion of the value of the taken property as determined by the jury, in a condemnation action. Each owner's proper compensation can be calculated by applying his or her fractional interest to the total valuation to which he or she is bound. The absence of an owner of a fractional interest, who by inadvertence or choice fails to appeal does not justify a dismissal of the appeal.

John B. Baughman v. Commonwealth of Kentucky, Energy and Environment Cabinet, et al.
2018-SC-000104-DG **April 18, 2019**

Opinion of the Court by Justice Hughes. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Buckingham, J., not sitting. Energy and Environment Cabinet brought suit against Jeffrey Bowling based on five wastewater treatment plants that were owned and improperly maintained by him. At the conclusion of the nine-year litigation, and despite numerous distributions to the receiver for services throughout the receivership, the court-appointed receiver was owed \$27,005. Recognizing the difficulty the receiver would have collecting from Bowling, the trial court assessed this amount against the Cabinet. On appeal, the Court of Appeals reversed, holding that only Bowling could be liable for the monies owed to the receiver. Affirming the Court of Appeals on discretionary review, the Supreme Court held that the expenses incurred by the receiver are not properly characterized as costs under Kentucky Rule of Civil Procedure 54.04, or Kentucky Revised Statute 453.010. Further, precedent does not support assessing the expenses against the Cabinet; the receivership was valid and the Cabinet is not liable merely because it initiated the receivership proceedings. No special circumstances justified requiring the Cabinet, a state agency funded in large part by taxpayers, to cure the receiver's deficiency. The trial court, although well-intentioned in light of the benefits realized as a result of the receiver's services, abused its discretion.

ARBITRATION:

Geoffrey T. Grimes v. GSHW Enterprises, LLC
2018-SC-00027-1

September 27, 2018

Opinion of the Court by Justice Venters. All sitting; all concur. GSHW and Grimes entered into an employment agreement which included a non-compete provision and an arbitration clause. The agreement also provided that in the event of a dispute, GSHW could seek pre-arbitration judicial remedies such as injunctive relief. The agreement made no express provision for such remedies for Grimes. Grimes left his employment and went to work for a competitor and filed a complaint in circuit court alleging breach of contract and various other claims. GSHW responded with a cross-motion to compel arbitration. The trial court declared the arbitration clause invalid and unenforceable for lack of mutuality because it allowed GSHW but not Grimes to have injunctive remedies. The Court of Appeals granted relief to GSHW compelling arbitration. On discretionary review, the Supreme Court affirmed, holding: (1) parties to an arbitration agreement may seek pre-arbitration injunctive relief in the absence of affirmative language expressly limiting that right. Even though the agreement did not expressly afford that option to Grimes, no lack of mutuality occurred because Grimes had that right anyway; (2) as a matter of first impression, the Court adopted Restatement (Second) of Contracts § 79 (1979): "If the requirement of consideration is met, there is no additional requirement of ... 'mutuality of obligation,'" thereby adopting the majority rule and abolishing the mutuality of obligation requirement in Kentucky, as for example identical rights to seek arbitration; (3) here, the employment agreement was supported by adequate consideration sufficient to meet the consideration element so as to bind Grimes to the agreement; and (4) the arbitration agreement was not unconscionable.

Northern Kentucky Area Development District v. Danielle Snyder
2017-SC-000277-DG

September 27, 2018

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Cunningham, Hughes, Keller, Venters, and Wright, JJ., sitting. All concur. VanMeter, J., not sitting. The Court found that KRS 336.700(2) prevents the Northern Kentucky Area Development District from enforcing an arbitration clause contained in an employment contract, specifically, because the District conditioned the employment of Danielle Snyder on her agreement to the clause. Because KRS 336.700(2) prohibits the exact action that the District took, the Court voided the arbitration agreement as ultra vires. Finally, the Court concluded that the Federal

Arbitration Act did not preempt KRS 336.700(2), as KRS 336.700(2) does not discriminate against arbitration agreements in any way, but rather the conditioning of employment on agreement to them.

AUTOMOBILE TRANSFERS:

The Travelers Indemnity Company v. Martin Cadillac, Inc. D/B/A Martin Dodge Jeep Chrysler v. Charles Armstrong, Etc.

2017-SC-000041-DG

November 1, 2018

Opinion of the Court by Justice Keller. Minton, C.J.; Cunningham, Keller, Venters, Wright, JJ., and Clark and Royse, SJ., sitting. All concur. Hughes and VanMeter, JJ., not sitting. Martin Cadillac, Inc. (Martin) accepted a vehicle as a trade-in on November 30, 2013; on December 6, 2013, Martin provided the vehicle to ABC Auction (ABC) to sell. There, DeWalt Auto purchased the vehicle. At that time, the title had not been provided to ABC, nor was it provided to DeWalt Auto. After the auction sale, Martin completed the statutorily required notice to the county clerk to record title assignment, but admitted it was not timely completed. The assignment to Martin was recorded by the county clerk on January 2, 2014. Johnathan Elmore purchased the vehicle from DeWalt Auto on January 19, 2014. On January 20, 2014, he provided proof of insurance through Nationwide to DeWalt Auto and took possession of the vehicle. On January 24, Martin delivered paperwork to ABC, transferring title and ABC transferred the proceeds check from the sale of the vehicle to Martin. On April 5, 2014, Elmore was in a car accident, and both he and his passenger, Craig Armstrong, were killed.

Travelers insured Martin; it argued that the transfer to ABC and, subsequently, DeWalt Auto, was not an assignment to a “purchaser for use” under Kentucky Revised Statute (KRS) 186.220(5) and, therefore, Martin was not required to verify proof of insurance before the sale. Martin had an assignment to the vehicle; but, if Martin complied with all the relevant requirements of KRS 186A.220, then it would not be considered the “owner” for insurance purposes, according to KRS 186.010(7)(c). The Court held that KRS 186A.220(5) does not apply to dealer-to-dealer transactions and a seller must only verify insurance when the buyer is a “purchaser for use,” a consumer buyer. Martin substantially complied with all the relevant requirements in KRS 186A.220 and, therefore, was not the “owner” of the vehicle at the time of Elmore’s accident.

BOARD OF CLAIMS:

Phyllis Roach v. Kentucky Parole Board, et al.

2017-SC-000250-DG

August 16, 2018

Opinion of the Court by Justice Cunningham. All sitting; all concur. This case concerns whether the Kentucky Parole Board is liable under the Kentucky Board of Claims Act for finding the plaintiff violated post incarceration supervision requirements of her release, which had been wrongfully applied to her by a trial court order. The plaintiff, Phyllis Roach, plead guilty to one count of sodomy in the second degree, for which the Meade Circuit Court sentenced her to a ten-year prison sentence and three years of post-incarceration supervision pursuant to Kentucky Revised Statutes (“KRS”) 532.043. Roach was charged with violating her post-incarceration release requirements. The Kentucky Parole Board determined that she had violated those conditions and imposed a thirteen-month penalty, incarcerating her at Kentucky Correctional Institution for Women in Shelby County. Thereafter, Roach petitioned the Shelby Circuit Court for writ of habeas corpus, arguing that the supervision statute did not apply to her because KRS 532.043 did not exist until July 15, 1998, at least seven years after she committed sodomy. The Shelby Circuit Court granted the writ and ordered her release. Following release, Roach brought this claim against the Parole Board in the Franklin Circuit Court for “wrongful incarceration.” The Franklin Circuit Court dismissed her claim and suggested the Board of Claims had proper jurisdiction. As a result, Roach filed a complaint before the Board of Claims. The Board of Claims rejected her claims, asserting: the Board of Claims does not have subject-matter jurisdiction over intentional torts like “false

imprisonment”; the Parole Board did not have a duty to question and disobey the Meade Circuit and the ALJ’s facially valid orders; and, even if the Parole Board had a duty to analyze the legality of such court orders, it would be a discretionary act for which liability is not abrogated. Roach appealed the dismissal to the Franklin Circuit, which reversed the Board of Claims. The Parole Board appealed to the Kentucky Court of Appeals. The Court of Appeals reversed, holding that the Parole Board’s revocation hearing was a discretionary act. Roach appealed. The Supreme Court of Kentucky granted discretionary review and held that the Board of Claims had properly dismissed Roach’s suit. The Parole Board’s revocation hearing was an adjudicative function: a discretionary act for which the Parole Board enjoys absolute immunity. Accordingly, the Court affirmed the Court of Appeals for alternative reasoning.

CONSTITUTIONAL LAW:

Fred Zuckerman and William Londrigan, as representatives respectively of the General Drivers, Warehousemen and Helpers Local Union No. 89 and the Kentucky State AFL-CIO, Affiliated Unions and their Members v. Office of the Governor, ex. rel. Matthew G. Bevin, in his official capacity as Governor, and the Commonwealth of Kentucky, Kentucky Labor Cabinet, ex rel. Derrick K. Ramsey, in his official capacity as Secretary of the Kentucky Labor Cabinet
2018-SC-000097-TG and 2018-SC-000098-TG **November 15, 2018**

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J., Hughes and Venters, JJ., concur. Minton, C.J., concurs by separate opinion in which Hughes and Venters, JJ., join. Keller, J., dissents by separate opinion in which Cunningham and Wright, JJ., join. Wright, J., dissents by separate opinion in which Cunningham and Keller, JJ., join. In 2017, Kentucky’s legislature passed, and the Governor signed, 2017 HB2 1, commonly referred to as the Kentucky Right to Work Act, 2017 Ky. Acts ch. 1, § 15 (the “Act”). Significantly, this Act amended KRS 336.130(3) to provide that no employee is required to become, or remain, a member of a labor organization, or to pay dues, fees, or assessments to a labor organization. The Act’s stated goal was “to attract new business and investment into the Commonwealth as soon as possible.” 2017 Ky. Acts ch. 1, § 14. The Kentucky Supreme Court held that the Franklin Circuit Court did not err in dismissing constitutional challenges to the validity of the Act, specifically that it violated the Kentucky Constitution’s provisions requiring equal protection of the laws, prohibiting special legislation, prohibiting takings without compensation, and that it was improperly designated as emergency legislation. The Court affirmed the Franklin Circuit Court’s Order dismissing the challenges to the Act.

Commonwealth of Kentucky, Cabinet for Health and Family Services, ex rel. Adam Meier, in his Official Capacity as Secretary of the Cabinet for Health and Family Services v. Ezra Claycomb, a Minor, By and Through his Next Friend, Natural Guardian and Parent, Tonya Claycomb and Tonya Claycomb on Behalf of all Others Similarly Situated
2017-SC-000614-TG
2017-SC-000615-TG **November 15, 2018**

The Court examined the constitutionality of the Medical Review Panel Act, which establishes a system for review of the merits of a medical malpractice claimant’s purported claim against a medical professional. The Court ultimately found the Act unconstitutional under Section 14 of the Kentucky Constitution, which states: “All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.” The Court determined that the Act’s proscription against a claimant filing suit in a Kentucky court before the earlier of the conclusion of the panel’s review of the claimant’s claim or nine months contravened the constitutional right of Kentuckians to file suit in a Kentucky court “without delay.”

Matthew G. Bevin, In His Official Capacity as Governor of the Commonwealth of Kentucky, et al. v. Commonwealth of Kentucky ex rel. Andy Beshear, Attorney General, et al.

2018-SC-000419-TGE

2018-SC-000421-TGE

December 13, 2018

Opinion of the Court by Justice Venters. All sitting; all concur. VanMeter, J., also concurs by separate opinion in which Cunningham and Wright, JJ., join. SB 151 was passed during the 2018 session of the Kentucky General Assembly ostensibly making several modifications to the various state government employee pension plans, including the pension plans for teachers, state police, and county employees. The Franklin Circuit Court struck down the legislation because the legislation failed to comply with the three readings clause contained in Section 46 of the Kentucky Constitution. Upon review, the Supreme Court held: (1) pursuant to separation of powers principles and the political question doctrine, whether the enactment of the legislation complied with the three readings clause was a justiciable issue; (2) the Attorney General's unsolicited advice to the General Assembly upon the passage of SB 151 did not create an attorney-client relationship with the General Assembly that disqualified him from participation in the current action; (3) Section 46 is a mandatory provision, not merely directory; and (4) the three-readings requirement of § 46 may be satisfied by merely reading the bill by its title, but only if the title accurately relates to the subject of the bill. The enactment of SB 151 failed in that compliance because the title by which it was read had nothing to do with the subject matter of bill's text. The legislation is, therefore, constitutionally invalid and declared void. Based upon this disposition, the Court did not address the plaintiffs' arguments challenging the substantive provisions of SB 151, including whether the legislation violated the inviolable contract statute or the impairment of contract provisions of the Kentucky and United States Constitutions.

CONTRACTS:

Baumann Paper Co., Inc. v. Kenneth Holland

2016-SC-000511-DG

June 14, 2018

Opinion of the Court by Justice Wright. All sitting. Minton, C.J.; Cunningham, VanMeter, Venters, and Wright, JJ., concur. Hughes and Keller, JJ., concur in result only. Kenneth Holland was an employee of Baumann Paper for forty-two years. Holland suffered from heart complications that led him to take early retirement. For the first several years of his employment with Baumann paper, Holland was covered by a defined pension plan. However, the company eventually discontinued its defined pension plan and discussed alternative employee benefits. Specifically, the company discussed a 401(k) plan, a profit-sharing plan, and a salary continuation agreement (SCA) with Holland. The SCA was signed by Mitchell Baumann (Baumann Paper's corporate secretary) and Holland in 1987. Upon his retirement in 2013, Holland obtained his benefits from the 401(k) and the profit-sharing plan and requested the SCA benefits.

Holland brought claims of breach of contract, quantum meruit, unjust enrichment, conversion, and fraud concerning the SCA. Baumann Paper countered that the SCA was not a binding agreement. The circuit court granted summary judgment for Baumann Paper on all claims and dismissed Holland's claim with prejudice. Holland appealed the breach of contract, quantum meruit, unjust enrichment, and fraud claims to the Court of Appeals. The Court of Appeals reversed the circuit court and held the SCA constituted a valid contract. That court remanded the matter to the trial court for further proceedings regarding whether Holland suffered a disability, and, if so, to determine Holland's damages. Baumann Paper sought discretionary review in the Supreme Court of Kentucky, which was granted.

The Supreme Court affirmed the Court of Appeals, holding that the SCA constituted a valid contract and remanded the case to the trial court for further factual determinations regarding the alleged breach of contract.

Nami Resources Company, LLC., et al. v. Asher Land and Mineral, LTD., et al.
2015-SC-000489-DG
2016-SC-000235-DG

August 16, 2018

Opinion of the Court by Justice Venters. All sitting; all concur. Civil procedure; Fraud and/or breach of contract in underpayment of oil and gas royalties; Punitive damages. NAMI acquired lease rights to extract natural gas from Asher, subject to ordinary obligation to pay royalties. After several years, Asher suspected that NAMI had violated the lease agreements by fraudulently breaching the leases by overstating expenses and understating the volume of gas extracted, thereby underpaying royalties. Issues: 1) Whether JNOV motion due on Good Friday was timely filed on the Monday following Good Friday; 2) Whether testimony of Asher's expert witness was sufficient to avoid directed verdict on underpayment of royalties; 3) whether jury verdict for punitive damages was proper. Held: 1) CR 6.01 provides that pleading due on a "legal holiday" is timely filed on the "next day which is not a Saturday, Sunday, of legal holiday." KRS 18A.190 (1)(c) designates Good Friday as a "holiday" upon which state offices may be closed for half a day. Therefore, pleading due on Good Friday was timely filed on the following Monday; 2) Asher's expert accounting witness presented evidence sufficient to avert a directed verdict and support the jury verdict; 3) Because Asher's claim was based upon contract, the economic loss doctrine governed available of punitive damages for breach of contract. Here, breach of contract, even if fraudulent, does not justify award of punitive damages, citing *Superior Steel Inc. v. Ascent at Roebing's Bridge, LLC*, 2017 WL 6380218 (Ky. 2017) (negligent performance of contract does not support demand for punitive damages.)

Beth Lewis Maze, et al. v. Board of Directors for the Commonwealth Postsecondary Education Prepaid Tuition Trust Fund, et al.
2017-SC-000233-DG

November 1, 2018

Opinion of the Court by Justice Venters. Minton, C.J.; Hughes, Keller, VanMeter, and Wright, JJ., concur. Cunningham, J., not sitting. A parent who entered into three Kentucky Affordable Prepaid Tuition Fund (KAPT) contracts pursuant to KRS 164A.700-164A.709 for prepaid college tuition for her children brought action seeking declaration that the 2014 statutory amendments to the KAPT plans adding time limits on use of the plans were unconstitutional if retroactively applied to her rights under pre-existing tuition contracts. The Franklin Circuit Court entered summary judgment in favor of the parent and the Court of Appeals reversed. Upon discretionary review, the Supreme Court reversed and held that (1) the express language of the KAPT contracts and incorporated KAPT statutes did not reserve to the Commonwealth unlimited discretion to alter its promise of performance, including the time limits for use of KAPT tuition; and (2) the retroactive application of statutory amendments that extinguished rights to benefits promised under KAPT contracts violated the federal and state Contract Impairment Clauses.

Louisville and Jefferson County Metropolitan Sewer District v. T+C Contracting, Inc.
2017-SC-000274-DG

December 13, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. In this complex construction contract matter, the Court interpreted the recently-enacted Kentucky Fairness in Construction Act (KFCA) and provided guidance on the law of liquidated damages. The Court found that claim-preservation provisions in construction contracts do not violate the KFCA, while provisions that prevent neutral third-party adjudication of a preserved claim do. The Court also reaffirmed the proper analysis a trial court must conduct when ascertaining the propriety of a liquidated damages award, specifically, according to the guidance provided in *Mattingly Bridge Co., Inc. v. Holloway & Son Const. Co.*, 694 S.W.2d 702 (Ky. 1985). Finally, the Court upheld the trial court's denial of the defendant's motion for directed verdict, in part, because of the application of the hearsay exclusion of "verbal acts" allowing for evidence precluding the grant of a directed verdict.

CLASS ACTIONS:

Melvin Hensley, et al. v. Haynes Trucking, LLC, et al.
2016-SC-000180-DG

June 14, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The Court reversed the Court of Appeals' determination that the trial court improvidently granted class certification, reinstating the trial court's class certification order after finding the requirements of CR 23 to be satisfied. The Court also discussed whether certain issues along with class certification can be adjudicated on interlocutory appeal, including subject-matter jurisdiction, whether KRS 337.550(2) affords the procedural mechanism of a class action lawsuit, and certain aspects of Kentucky prevailing wage law.

CORPORATIONS:

Keith Randall Sparkman, Etc. v. Consol Energy, Inc. et al.
2017-SC-000541-DG

April 18, 2019

Opinion of the Court by Justice VanMeter. Minton, C.J.; Hughes, Keller, and VanMeter, JJ., concur. Lambert, J., concurs in result only. Buckingham, J., not sitting. Wright, J., dissents by separate opinion. Keith Sparkman sued Consol Energy (parent company) and Consol of Kentucky (wholly-owned subsidiary) for tortious interference with contractual relations and breach of contract. Sparkman had janitorial services contracts at three mining sites owned by Consol of Kentucky. These contracts were terminated and Amy Little, Sparkman's employee, was given the contracts. Sparkman's strategy at trial was to show that Little was having an affair with Clell Scarberry, a mine foreman, and that Scarberry may have asked a Consol employee to give Sparkman's contracts to Little. Sparkman prevailed at trial on both claims, but the tortious interference claim was reversed by the Court of Appeals. The Kentucky Supreme Court granted discretionary review to determine whether a parent corporation has the authority to interfere with its wholly-owned subsidiary's contracts. The Court, in following the Restatement of Torts (Second), held that a parent corporation "has a privilege to interfere in the contractual relations of its wholly-owned subsidiary, unless it employs wrongful means or acts contrary to its subsidiary's interest." The Court further held that the alleged affair between Little and Scarberry, and the subsequent award of Sparkman's former contracts to Little was not "wrongful means" as contemplated by the Second Restatement. Accordingly, the Court affirmed the Court of Appeals.

CRIMINAL LAW:

Thomas Edward Davidson v. Commonwealth of Kentucky
2016-SC-000032-MR

June 14, 2018

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Hughes, Keller, VanMeter, and Wright, JJ., concur. Cunningham, J., concurs in result only by separate opinion. Issues Presented: (1) Whether the trial court erred by failing to sever some of the thirty-one counts of robbery; (2) Whether the trial court erred by permitting three police officers to testify that the robberies were all related to each other; and (3) Whether the trial court erred by informing the jury that it had ruled that both defendants should be tried together on all charges. Upon review the Court held: (1) because the robberies occurred close in time and the eye-witness testimony consistently disclosed that one of the robbers wore a unique hat, and because the robberies all occurred near the co-defendants' place of residence, the trial court did not abuse its discretion by trying all thirty-one counts together; (2) the trial court misinterpreted and misapplied KRE 701 by allowing three police detectives to give lay opinion that the specific robberies were interconnected. The officers' opinions were not based upon their own perceptions but were drawn from information observed and related by others; plus the jury was fully capable of drawing its own conclusions from the evidence as to whether crimes were connected, and so the officers' opinions fail to qualify under KRE 701 because they could not be "helpful" to the jury. Error of admitting the opinions was harmless; and (3) the trial court's statement to the jury that the defendants were being tried together

“because the Commonwealth has the right to have them indicted together and I have ruled as a matter of law that it’s proper to try them together” was error, but the unpreserved argument did not rise to the level of palpable error.

Darrin Walker v. Commonwealth of Kentucky
2016-SC-000594-MR

June 14, 2018

Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellant, Darrin Walker, sexually assaulted a minor child on numerous occasions. He was convicted of four counts of first-degree sodomy and one count of first-degree rape as a result. During trial, the victim was distressed and began crying during her testimony. The prosecutor positioned a television cart to block the direct line of sight between the victim and Appellant. Appellant argued that his confrontation right was violated. He specifically argued on appeal that the trial court’s actions here violated KRS 421.350. The Supreme Court ruled that KRS 421.350 only applies to child witnesses who are twelve years old or younger. The victim here was seventeen at the time she testified. Therefore, KRS 421.350 is inapplicable. However, KRS 26A.140 does apply. The Court held that the “unduly burdensome” standard stated in KRS 26A.140 is satisfied only when the defendant’s rights are negatively and materially impacted by the contested action. The Court concluded that that standard was not satisfied in the present case and, thus, affirmed Appellant’s convictions.

Corey M. Jeter v. Commonwealth of Kentucky
2017-SC-000232-DG

June 14, 2018

Opinion of the Court by Justice Cunningham. All sitting; all concur. This case involved issues of bond modification and bail credit release. Jeter was arraigned by the Jefferson District Court on a charge of one count of second-degree burglary. The district court set Jeter’s bond at \$10,000 full cash and granted him \$100 a day bail credit pursuant to KRS 431.066(5)(a). Following his indictment, the Jefferson Circuit Court “fixed” a new bond “in the interim” at \$10,000. Jeter filed a motion, inter alia, for bond modification and release on bail credit. After the hearing, the circuit court increased Jeter’s bond to \$20,000 full cash and found him ineligible for bail credit. The circuit court made oral findings and referred to them in its order denying Jeter’s motion, but they were not reduced to writing. A divided Court of Appeals upheld the trial court. The Supreme Court of Kentucky granted discretionary review. The Court held that the circuit judge appropriately granted Jeter’s request for an adversarial hearing on the motion to modify his bond under RCr 4.40(1). The circuit court considered Jeter’s record, including his history of prior failures to make appearances and whether he posed a danger to the community. Thus, the Court found that the circuit judge did not abuse his discretion in deciding to increase Jeter’s bond and deny bail credit. Further, the circuit judge made oral findings on the record during the hearing that Jeter was a flight risk and a danger to others in the community, which the Court held substantially complied with RCr 4.40(2).

Commonwealth of Kentucky v. Kyle D. Thompson
2016-SC-000365-DG

June 14, 2018

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Cunningham, Keller, and Venters, JJ., concur. VanMeter, J., concurs in part and dissents in part by separate opinion in which Wright, J., joins. Kyle Thompson was convicted of several crimes, including terroristic threatening and criminal attempt to commit kidnapping, arising from conduct directed at a high school student. He was sentenced to three years imprisonment followed by a five-year probation period. After release from prison, Thompson learned for the first time that because the intended victim of the attempted kidnapping was a minor, he was required to register as a sex offender under KRS 17.510. He pursued RCr 11.42 relief alleging his counsel was ineffective for having failed to inform him of this requirement. The trial court denied relief

but the Court of Appeals deemed the failure ineffective assistance. On discretionary review, the Supreme Court held that the traditional direct/collateral distinction was not well-suited to analyzing the alleged ineffective assistance but relying on the U.S Supreme Court's *Padilla v. Kentucky* analysis and *Pridham v. Commonwealth*, found that sex offender registration was a definite, serious and lifelong consequence of Thompson's plea that competent counsel would have informed him of prior to the plea. This registration requirement could be easily determined by reading the Kentucky statute and Thompson's counsel was ineffective in failing to do so and then inform his client accordingly. The Court thus affirmed the appellate court and remanded the case to the circuit court for a determination of the second prong of *Strickland v. Washington*, i.e., whether Thompson was prejudiced by the failure. Two justices concurred in part and dissented in part on the grounds that the circuit court had already addressed the prejudice prong, rendering remand unnecessary.

Robert Keith Woodall v. Commonwealth of Kentucky
2017-SC-000171-MR

June 14, 2018

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Hughes, Keller, VanMeter, Venters and Wright, JJ., sitting. Minton, C.J.; Hughes, Keller, VanMeter, and Venters concur. Wright, J., concurs in part and dissents in part by separate opinion. Cunningham, J., not sitting. Taking into account recent United States Supreme Court precedent, the Court held KRS 532.120(2), defining intellectual disability for the purpose of precluding the imposition of the death penalty, to be unconstitutional. The Court established that “prevailing medical standards” should always take precedence in a court’s determination when ascertaining a defendant’s potential intellectual disability in this regard.

Jack Franklin Elliott, Jr. v. Commonwealth of Kentucky
2016-SC-000350-MR

August 16, 2018

Opinion of the Court by Justice Keller. All sitting; all concur. Elliott pled guilty to two indictments charging manufacturing methamphetamine, first offense, and controlled substance endangerment to a child, fourth degree and manufacturing methamphetamine, first offense; three counts of controlled substance endangerment to a child, fourth degree; and persistent felony offender, second degree. The trial court imposed court costs in the amount of \$151.00 per indictment. Three years after the trial court entered its judgment, Elliott moved to waive and/or convert court costs into a definite jail term, which the trial court denied. Elliott appealed as a matter of right arguing that the court costs must be vacated because the trial court had made a finding of indigency, Elliott was represented by a public defender, and Elliott was granted leave to file his appeal in forma pauperis. The Court held that the imposition of court costs was proper under our precedent distinguishing “indigent” status and “poor person” status. Determining whether a defendant meets “poor person” status requires both a present tense evaluation of the defendant’s ability to pay court costs as well as the defendant’s ability to pay court costs in the future. This Court has previously held that a defendant who does not request such a determination by the trial court at sentencing has waived the right to contest the issue on appeal. Elliott failed to request that the trial court make a finding of “poor person” status at the time of sentencing, and as such, he was precluded from contesting the issue before this Court.

Rodney Bowling v. Commonwealth of Kentucky
2016-SC-000548-MR

August 16, 2018

Opinion of the Court by Justice Wright. All sitting; all concur. A Clay Circuit Court jury convicted Appellant, Rodney Bowling, of murder, driving under the influence, and two counts of first-degree assault. Bowling was sentenced to thirty years’ imprisonment and a \$500 fine. Bowling appealed to the Supreme Court of Kentucky, asserting six claims of error: (1) the trial court erred in denying his motion for a directed verdict as to murder, as he alleges the Commonwealth failed to prove aggravated

wantonness; (2) the trial court erred in allowing expert testimony exceeding the scope of the Commonwealth's RCr 7.24(1)(c) disclosure; (3) the trial court erred in the admission of laboratory reports in contravention of his right to confront witnesses against him; (4) the Commonwealth committed prosecutorial misconduct through statements made during its closing argument; (5) the trial court erred in convicting him of both murder and driving under the influence in violation of his right to be free from double jeopardy; and (6) the trial court erred in imposing a fine against him for driving under the influence after determining that he was indigent. The Supreme Court affirmed the trial court, holding: (1) the totality of the facts would allow a reasonable jury to conclude that Appellant was operating his motor vehicle under circumstances manifesting an extreme indifference to human life, and therefore, the trial court did not err in denying Bowling's motion for directed verdict; (2) because defense counsel presented evidence concerning the subjects covered by the Commonwealth's expert witness that were not disclosed, the trial court did not err in allowing the testimony; (3) while the trial court erred in allowing the admission of the laboratory reports without the accompanying testimony of the analyst who prepared the reports in contravention of Bowling's confrontation rights, said error was harmless beyond a reasonable doubt as there was no reasonable possibility it contributed to his conviction; (4) while the Court did not approve some of the prosecutor's statements in closing, they did not amount to palpable error as they were not flagrant; (5) Bowling's right to be free from double jeopardy was not violated through his convictions for both wanton murder and driving under the influence, as each crime requires proof of a fact the other does not; and (6) the trial court did not err in imposing a fine against Bowling for driving under the influence.

Dashawn Johnson v. Commonwealth of Kentucky
2016-SC-000615-MR
2017-SC-000037-TG

August 16, 2018

Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellant, Dashawn Johnson, was convicted of two counts of first-degree trafficking in a controlled substance (heroin and methamphetamine), one count of felony possession of firearm, and being a first-degree persistent felony offender (PFO). Appellant argued on appeal that reversible error occurred when the trial court instructed the jury on two counts of trafficking instead of one because heroin and meth were listed in the same subsection of the first-degree trafficking statute—KRS 218A.1412. The ultimate question here is whether Appellant's right to be free from double jeopardy was violated. The Supreme Court of Kentucky held, *inter alia*, that because KRS 218A.1412(1) criminalizes the trafficking of a, singular, controlled substance, the Commonwealth may bring multiple charges under KRS 218A.1412(1) when the defendant is found to have been trafficking multiple substances, regardless of their statutory grouping. In so holding, the Court clarified that Appellant's charges and convictions did not violate *Blockburger v. United States*. The Court concluded that to the extent *Commonwealth v. Grubb*, 862 S.W.2d 883 (Ky. 1993) conflicts with Court's present decision, it is overruled.

Commonwealth of Kentucky v. Damion Montrece Lane
2016-SC-000655-DG

August 16, 2018

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Cunningham, Hughes, and Keller, JJ., concur. VanMeter, J., dissents by separate opinion in which Wright, J., joins. Criminal Appeal; search of vehicle/driver detained for traffic stop. Police officer, operating in tandem with a canine officer in a second vehicle, initiated a proper traffic stop. The officer removed Appellee from the vehicle. Rather than commencing the issuance of a traffic citation, the two officers conducted a canine sniff search of the vehicle. The dog alerted. No drugs were found in the vehicle; but search of Appellee found drugs on his person. The trial court denied Appellee's motion to suppress that evidence. Question Presented: Whether the Court of Appeals erred by concluding that the sniff search unreasonably prolonged the traffic stop. Held: By suspending their attention from the traffic citation and immediately launching the dog's sniff

search, the officers did not “diligently” tend to the purpose of the traffic stop as required by *Rodriguez v. United States*, 135 S. Ct. 1609 (2015). The dog sniff search prolonged the stop beyond its original purpose, thus invalidating the search.

Donte Little v. Commonwealth of Kentucky
2017-SC-000112-MR

August 16, 2018

Opinion of the Court by Justice VanMeter. All sitting; all concur. Donte Little appealed as a matter of right his convictions of two counts of trafficking in a controlled substance in the first degree (less than two grams of heroin), two counts of trafficking in a controlled substance in the first degree (more than two grams of heroin), and one count of complicity to trafficking in a controlled substance in the first degree (more than two grams of heroin). He received a 20-year sentence.

On appeal, the Court affirmed the trial court’s denial of Little’s motion to exclude the testimony of the Commonwealth’s confidential informant but emphasized that the trial court’s imposition of a 48-hour disclosure period for witness disclosure was too short, and the Commonwealth’s withholding of the identity of its confidential informant witness until less than two days before a trial was unacceptable. That said, because Little was unable to articulate any specific prejudice resulting from the late disclosure (though some measure of prejudice could surely be presumed), the Court did not regard the lack of timely disclosure in this instance as substantial enough to compel a new trial.

With respect to the one count of complicity to trafficking in a controlled substance in the first degree, the Court held that the failure to name an accomplice in the indictment did not violate Little’s right to constitutional presentment and due process. Moreover, no palpable error resulted from the trial court’s denial of Little’s token motion for a directed verdict on this count. Little argued that the Commonwealth failed to prove his accomplice knowingly trafficked heroin, but, where proof of knowledge is required, the proof can be by circumstantial evidence. Here, the circumstantial evidence of the accomplice’s knowledge was sufficient to permit the jury to draw a reasonable conclusion that the accomplice knowingly trafficked heroin. Lastly, with respect to the complicity count, no palpable error resulted from the jury instructions, which Little argued resulted in a non-unanimous verdict. The jury was instructed on a single count of complicity, and the proof presented was of a single heroin transaction; thus, the type of unanimity violations delineated in *Harp v. Commonwealth*, 266 S.W.3d 813, 817 (Ky. 2008) and *Johnson v. Commonwealth*, 405 S.W.3d 439, 448 (Ky. 2013) did not occur.

In addition, the Court held that no palpable error resulted from the parole officer’s “good time” credit testimony during the penalty phase: Little argued that the parole officer’s testimony failed to indicate that meritorious “good time” credits were not automatic, and thus led the jury to recommend a longer sentence. However, the record showed that the parole officer correctly explained to the jury the various type of sentence credits an inmate is eligible to receive and conveyed that sentence credits were not guaranteed or automatic and under certain circumstances may with withheld or forfeited. Accordingly, the Court concluded that the jury was sufficiently informed as to the potential effects of sentence credits on any sentence it recommended.

Lastly, the Court found that no palpable error resulted from the prosecutor’s “send a message” speech during penalty phase closing argument, as it focused on deterrence for Little’s crimes and was made in response to Little’s plea for leniency during his penalty phase argument.

Daniel Cox v. Commonwealth of Kentucky
2017-SC-000147-MR

August 16, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The defendant challenged the trial court's admission of certain evidence under KRE 404(b)(1) and alleged that the trial court's instructions to the jury contained a fatal unanimity error. The Court found no error on the part of the trial court, in addition to clarifying Kentucky's unanimity law.

Mark McCoy v. Commonwealth of Kentucky
2017-SC-000261-MR

August 16, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The defendant challenged the trial court's denial of his request for a continuance and directed verdict. The Court held, in pertinent part, that a pneumothorax constitutes a "serious physical injury," and found no error on the part of the trial court in denying the defendant's motions for a continuance and directed verdict.

Trevor Brown v. Commonwealth of Kentucky
2017-SC-000289-MR

August 16, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The defendant challenged: the trial court's denial of his motion for a directed verdict and continuance; that his trial was held in the proper venue; admission of certain evidence and the Commonwealth's use of that evidence in closing statement; and the jury instructions for allegedly containing a fatal unanimity error. The Court found no reversible error on the part of the trial court, holding, in pertinent part, that a pneumothorax constitutes a "serious physical injury," in addition to clarifying Kentucky's unanimity doctrine.

Kalief Cummings v. Commonwealth of Kentucky
2017-SC-000448-MR

August 16, 2018

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J.; Cunningham, Hughes, and VanMeter, JJ., concur. Keller, J., concurs in part and dissents in part by separate opinion in which Venters and Wright, JJ., join. Appellant, Kalief Cummings, stabbed two women in Louisville, Kentucky. He was convicted of two counts of first-degree assault and for being a first-degree persistent felony offender. During trial, one juror served as a member of the jury, even though that juror was peremptorily struck by Appellant. It appears that no one, including the defense, realized that the juror was sitting on the jury. The Supreme Court of Kentucky held that this was not palpable error and affirmed the convictions. The Court specifically reasoned that Appellant failed to demonstrate that the juror at issue was biased, and that the defense should have been aware of the juror's erroneous presence on the jury due to the fact that counsel discovered a similar error prior to trial (removing a juror who was also not supposed to be on the jury).

Commonwealth of Kentucky v. Johnnie Douglas
2017-SC-000024-DG

August 16, 2018

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter, and Venters, JJ., concur. Wright, J., concurs in result only. This is a robbery case concerning whether a new trial is warranted where an impartial juror during the guilt phase later discovers his partiality during the penalty phase. During the penalty phase consideration whether Johnnie Douglas was a Persistent Felony Offender ("PFO"), the juror at issue discovered that he was Johnnie Douglas' victim from a prior robbery. After the juror told the trial judge of his recollection, the judge informed Douglas, defense counsel, and the Commonwealth. The judge instructed counsel to address the issue at the

sentencing hearing, but defense counsel stated during the hearing that Douglas decided to appeal his conviction rather than ask for a new trial based upon the potential bias of the juror at issue. Douglas appealed as a matter of right and the Supreme Court of Kentucky upheld his conviction, citing the juror's impartiality in the guilt phase of the trial, the overwhelming evidence against Douglas, and his failure to preserve the issue by moving for a mistrial. Prior to the Court rendering its opinion on his matter of right appeal, Douglas filed an RCr 11.42 motion pro se for ineffective assistance of counsel and requested appointment of new counsel. The trial court appointed new counsel, but denied Douglas' RCr 11.42 motion, finding that trial counsel's actions were a matter of trial strategy and did not amount to ineffective assistance. On appeal, the Kentucky Court of Appeals reversed the trial court and remanded Douglas' case for a new trial. The Supreme Court of Kentucky granted discretionary review and held that prejudice could not be presumed from the juror's presence on the jury because all parties—especially the juror himself—were unaware of the juror's relationship to Douglas during voir dire or the guilt phase of the trial. Additionally, trial counsel's decision to follow Douglas' instruction during the sentencing hearing and forego moving for a new trial was not ineffective assistance. The Court upheld Douglas's conviction but reversed his sentence and remanded it to the trial court for a new PFO and sentencing trial because those proceedings were fundamentally unfair due to the juror's revelation of his bias toward Douglas.

Ronald Lee King v. Commonwealth of Kentucky
2016-SC-000414-MR

August 16, 2018

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Hughes, VanMeter, Venters, JJ., concur. Keller, J., concurs in part and dissents in part by separate opinion, in which Cunningham and Wright, JJ., join. Ronald King appealed as a matter of right his convictions of two counts of first-degree sodomy, sentenced to life, and two counts of first-degree sexual abuse, sentenced to ten years for each count. The charges arose from the systemic abuse of his minor step-granddaughter. The Court held that the jury instructions on the sexual abuse counts violated the unanimity requirement since the jury was presented with multiple instances of sexual abuse for each instruction, identical except as to the address of the location of the abuse, yet King was charged with only one count for each residence. Accordingly, the Court reversed and remanded King's sexual abuse convictions. On remand, the trial court was also directed to address the sentencing error in running a term of years consecutively with a life sentence. The Court further held that the trial court erred in admitting a recorded phone call between King and his wife, Hope, during which Hope told King of the minor child's accusations of sexual abuse, as an adoptive admission, but found such error to be harmless given the breadth of evidence against King. The Court otherwise affirmed King's sodomy conviction, thus the life sentence remained.

Jeremy Kelly v. Commonwealth of Kentucky
2017-SC-000265-MR

August 16, 2018

Opinion of the Court by Justice Keller. All sitting; all concur. Kelly was indicted for first-degree rape, incest (victim under 18), first-degree sexual abuse, and unlawful imprisonment for the abuse of sixteen-year-old daughter, J.K. Kelly fled the state and, in his absence, the indictment was dismissed by the trial court to be "reinstated" upon Kelly's capture. After he was found, the trial court appointed defense counsel and the indictment was "reinstated" without objection. The jury found Kelly guilty of first-degree rape, incest, first-degree sexual abuse, and second-degree fleeing or evading. Kelly appealed as a matter of right on five allegations of error: (1) the prosecution, absent a new indictment after dismissal, violated his due process rights; (2) no evidence substantiated the conviction for second-degree fleeing or evading; (3) he should have been granted a mistrial due to the introduction of 404(b) testimony; (4) the verdicts were non-unanimous; and (5) the fine against Kelly, an indigent, was improper. The Commonwealth conceded the second-degree fleeing or evading conviction and the fine were both improper. The Court vacated that portion of the lower court's judgment. However, the Court affirmed on all other matters holding that: Kelly's due process rights were protected by the indictment despite the

flawed process; Kelly failed to request a mistrial and it was, thus, not warranted; and Kelly's verdicts were unanimous.

Daymond L. Malone v. Commonwealth of Kentucky
2017-SC-000593-MR

September 27, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The Court affirmed Daymond Malone's kidnapping with serious physical injury conviction. Malone argued on appeal that the facts of the case did not support the jury's finding that his infliction of serious physical injury upon the victim occurred during the kidnapping, which should have prevented Malone's kidnapping conviction from enhancement from a Class B to a Class A felony. However, the Court found that the jury reasonably inferred that, on the facts of this case, Malone manifested the intent to kidnap before he inflicted serious physical injury upon the victim. Looking to precedent from other jurisdictions that confirmed its holding, the Court found that the infliction of serious physical injury could be said to be the first step of the kidnapping. Thus, enhancement of the charge was proper.

Commonwealth of Kentucky v. Terrance Armstrong
2017-SC-000602-DG

September 27, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The defendant challenged the trial court's refusal to allow a witness to be questioned during cross-examination about his lifetime parole status stemming from a murder conviction that was more than thirty-years old. The Court held, in pertinent part, that a witness's status as a parolee is admissible on cross-examination as impeachment evidence showing bias or motive to lie under Kentucky Rule of Evidence (KRE) 611 despite the provision of KRE 609(b) that would render inadmissible evidence of the conviction upon which the witness's parole was based because it was too remote in time. The trial court's denial of the defendant's opportunity to ask the witness about his lifetime parole status was a violation of the Confrontation Clause but was harmless beyond a reasonable doubt.

William Truss v. Commonwealth of Kentucky
2016-SC-000337-MR

September 27, 2018

Opinion of the Court by Justice Wright. All sitting; all concur. A Jefferson Circuit Court jury convicted Appellant, William Truss, of two counts of murder. In accordance with the jury's recommendation, Truss was sentenced to life without the possibility of parole for twenty-five years. Truss appealed to the Supreme Court of Kentucky as a matter of right. Truss asserted (among other arguments the Supreme Court did not consider): (1) the trial court improperly conducted voir dire when Truss was unable to be present and (2) the trial court erred when it failed to grant immunity pursuant to KRS 503.085(1). The Supreme Court held that Truss's constitutional right to be present at jury selection was violated when voir dire was commenced in his absence. The Court held this constitutional error was not harmless beyond a reasonable doubt. As to immunity, the Court held the trial court had a substantial basis for finding probable cause to conclude that the Truss's use of force was unlawful.

James Lang v. Commonwealth of Kentucky
2017-SC-000286-MR

September 27, 2018

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Cunningham, Hughes, and Venters, JJ., concur. VanMeter, J., dissents by separate opinion in which Keller and Wright, JJ., join. The Court reversed James Ellis Lang's first-degree robbery conviction, finding that the trial court erred when it failed to grant a directed verdict on that charge. The Court compared the facts of the case with that of precedent and specifically found that Lang's actions did not satisfy the elements of KRS 515.020(1)(c).

The Court also found no violation of Lang’s right to a speedy trial. Finally, the Court noted that the trial court should make further findings as it pertains to Lang’s request to conduct opening and closing statements *pro se*.

Frederick Dorsey v. Commonwealth of Kentucky
2017-SC-000005-DG

November 1, 2018

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Cunningham, Keller, and VanMeter, JJ., concur. Wright, J., dissents by separate opinion, which Venters, J., joins. After entering a guilty plea, Dorsey sought to withdraw his plea during sentencing because he mistakenly believed that the judge had the ability to determine his parole eligibility, despite no such indication by his counsel and no reasonable basis for his belief. During the hearing on the motion to withdraw the plea, the trial court placed counsel under oath and questioned the advice given. Dorsey testified that he thought the judge could reduce the parole eligibility simply because he was the judge. Dorsey was sentenced in accordance with the plea agreement, and thereafter filed an RCr 11.42 motion alleging ineffective assistance of counsel and coercion. The trial court denied the motion and on appeal, Dorsey alleged that he was denied counsel because the attorney who represented Dorsey on his motion to withdraw his guilty plea was the same attorney who negotiated the plea and testified- creating a conflict of interest. Dorsey also alleged coercion because counsel had Dorsey’s mother visit him on the morning of trial and “virtually twist his arm” to force him to plead guilty.

The Supreme Court held that strong encouragement by family members does not rise to the level of coercion. Additionally, although the trial court mishandled the hearing on Dorsey’s motion to withdraw the guilty plea by quickly placing counsel under oath and hearing sworn testimony, Dorsey had competent representation during the hearing and his attorney was not placed at odds with representing Dorsey’s interests. Since there was no conflict of interest and no support of his coercion claim in the record, the Supreme Court affirmed the Court of Appeals.

William E. Mason v. Commonwealth of Kentucky
2017-SC-000569-MR

November 1, 2018

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter, and Wright, JJ., concur. Venters, J., concurs in result only by separate opinion. The defendant, William Mason, appealed his convictions and sentences to the Court as a matter of right, raising several challenges to the admission of certain evidence during his trial. Specifically, Mason challenged the admissibility of a detective’s video interrogations of him and two other witnesses on hearsay grounds. The Court found no merit in these arguments, but did clarify that the standard of review used to generally evaluate hearsay determinations is abuse of discretion. Mason also challenged the admission of polygraph examination evidence. The Court recognized that while Kentucky law normally prohibits admission of such evidence, Mason opened the door to the admission of such evidence when he purposefully elicited testimony about such evidence.

Shawn Tigue v. Commonwealth of Kentucky
2017-SC-000156-MR

November 1, 2018

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Hughes, Keller, VanMeter, and Venters, JJ., concur. Cunningham, J., concurs in result only by separate opinion in which Wright, J., joins. The defendant, Shawn Tigue, appealed to the Court as a matter of right, raising several issues for review relating to his first-degree murder conviction, for which he received a sentence of life without the possibility of parole. The Court found merit in some of Tigue’s arguments and reversed his first-degree murder conviction and life without the possibility of parole sentence, but affirmed the remainder of

Tigue's convictions and sentences. Specifically, the Court found: 1) the trial court erred in its application of KRE 404(b)(1), specifically, the modus operandi character evidence exception, and the prohibition against impeaching a witness on collateral facts; 2) there is no blanket prohibition in Kentucky law for the admissibility of expert testimony on the scientific phenomenon of false confessions; 3) the trial court erred in completely preventing Tigue from exploring the reasons behind missing/destroyed purportedly exculpatory evidence; and 4) the trial court erred in characterizing orders and threats as inadmissible hearsay evidence

Cleosey Darnell Henderson, II v. Commonwealth of Kentucky
2016-SC-000484-MR

December 13, 2018

Opinion of the Court by Justice Keller. All sitting. Hughes, Keller, VanMeter, and Wright, JJ., concur. Venters, J., dissents by separate opinion in which Minton, C.J., and Cunningham, J, join. Henderson attacked and sexually assaulted his neighbor. He was taken into custody in 2011 but was not tried until 2016. He was convicted and sentenced to the recommended enhanced sentence of 60 years. He appealed as a matter of right on several grounds, firstly alleging that he was entitled to a dismissal with prejudice because the delay had violated his constitutional right to a speedy trial. The Court affirmed the judgment and sentence, holding: (1) Henderson's right to a speedy trial was not violated; (2) the trial court did not err in determining there was no good cause to replace Henderson's appointed counsel; (3) there was no reversible error in the trial court's statements to Henderson as to hybrid or stand-by counsel; (4) there was no reversible error in the trial court's statements as to whether Henderson would have to testify in question and answer or narrative format, if he chose to testify at trial; (5) the trial court did not err in denying Henderson's motion to suppress; (6) although the trial judge misstated the law under KRE 412, there was no prejudicial error; and (7) the trial court did not err in prohibiting Henderson from recalling an out-of-state prisoner witness and requiring him to cross-examine her after she testified on direct examination for the Commonwealth.

Commonwealth of Kentucky v. Michael Padgett
2017-SC-000441-DG
2017-SC-000661-DG

December 13, 2018

Opinion of the Court by Justice Keller. All sitting; all concur. Michael Padgett was indicted for Assault, third degree, after he spat in the face of a prison deputy during an altercation. Prior to trial, the Commonwealth moved to exclude evidence of two disciplinary actions against the deputy, stating they were irrelevant to the case. One of the incidents led to the deputy's demotion; at the time of the altercation, he was a sergeant. The court did not enter a written order but stated that, given the information before him, he did not see it being admitted. At trial, defense counsel asked the deputy his rank and what his rank was at the time of the incident. The Commonwealth objected and moved for a mistrial. Over the defense's objection, and without providing an adequate opportunity to address whether an admonition would cure any error, the trial court granted a mistrial. The Commonwealth subsequently indicted Padgett as a persistent felony offender and retried him, after which, he was convicted and sentenced.

The Court of Appeals reversed and remanded for dismissal, finding that the mistrial was not manifestly necessary. Thus, Padgett's retrial was barred by the Double Jeopardy clauses of both the United States and Kentucky constitutions. This Court affirmed, also finding that the mistrial was not manifestly necessary. The Court clarified that a mistrial is an extreme remedy intended to cure prejudice that prohibits both parties from receiving a fair trial. It is not intended as a sanctioning tool for the court. There was no manifest necessity for mistrial and Padgett's retrial was constitutionally impermissible.

Ricky L. Welch v. Commonwealth of Kentucky
2017-SC-000528-MR

December 13, 2018

Opinion of the Court by Justice VanMeter. All sitting; all concur. Ricky Welch appealed as a matter of right from a circuit court judgment sentencing him to fifty-years' imprisonment for first-degree robbery, kidnapping, third-degree burglary, and for being a first-degree persistent felony offender. On appeal, the Court held that the Carroll Circuit Court did not abuse its discretion in: 1) excluding eyewitness expert testimony; 2) allowing law enforcement officers to present testimony based on their observations of boot prints and infrared camera images; and 3) determining that the photo pack used by law enforcement was not unduly suggestive. Further, as the circuit court committed no error, the Court held that no cumulative error warranted reversal. Accordingly, the Court affirmed the judgment and sentence imposed by the circuit court.

Commonwealth of Kentucky v. James E. Riker, Jr.
2017-SC-000483-DG

December 13, 2018

Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellee was arrested for driving while intoxicated. This was his third DUI offense. The legal issue in this case concerns the interpretation and application of two statutes permitting DUI suspects to obtain an independent blood test. The cost of the blood test was \$450, which Riker did not have on him at the time. Because of the prohibitive cost of the test, Riker argued that his statutory and constitutional rights were violated. The District Court disagreed and denied Riker's motion to suppress the intoxilyzer results. The Circuit Court reversed, which was affirmed by the Court of Appeals. The Supreme Court of Kentucky granted discretionary review and held that Riker's rights were not violated here. The Court specifically concluded that the arresting officer complied with the relevant statutes and that there is no constitutional right to receive and inexpensive blood test. In so holding, the Court reinstated the District Court's order denying suppression of the intoxilyzer evidence.

Robbie Whaley v. Commonwealth of Kentucky
2017-SC-000439-MR

February 14, 2019

Opinion of the Court by Justice Wright. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. A Kenton Circuit Court jury convicted appellant, Robbie Whaley, of seventeen counts: six counts of third-degree sodomy; criminal attempt to commit third-degree sodomy; six counts of first-degree sexual abuse; three counts of first-degree sodomy; and, in the final count, found him to be a first-degree persistent felony offender. In accordance with the jury's recommendation, the trial court fixed sentences totaling life without the possibility of parole for twenty-five years. Whaley appealed to the Supreme Court as a matter of right, Ky. Const. § 110(2)(b), and asserted several grounds for reversal of his convictions. The Supreme Court affirmed the trial court, holding: (1) the trial court did not err in denying Whaley's motion to sever the indictment; (2) the trial court did not err in allowing evidence of other crimes, wrongs, or acts (specifically, allowing evidence of drugs or alcohol, pornographic images and an act of uncharged sodomy); (3) the trial court did not abuse its discretion in disallowing cross-examination regarding pornographic evidence; (4) the trial court did not abuse its discretion in allowing expert testimony pertaining to evidence of anal sodomy; (5) the trial court did not abuse its discretion in denying the motion in limine and allowing the children to be referred to as victims; and (6) the trial court did not abuse its discretion by denying Whaley's motion for mistrial.

John Daniel Clark v. Commonwealth of Kentucky
2017-SC-000567-MR

February 14, 2019

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. The defendant, John Daniel Clark, appealed his convictions and sentences to the Court as a matter of right. Clark alleged three errors on the part of the trial court: 1) the trial court should have granted Clark's motion for a directed verdict on his tampering with physical evidence charges; 2) the trial court incorrectly instructed the jury on the perfect and imperfect protection-of-another defenses; and 3) the trial court erred in allowing the Commonwealth to introduce photographs of the victim's body.

The Court rejected Clark's first allegation of error, finding sufficient evidence to support Clark's tampering with physical evidence charges. The Court also rejected Clark's argument that the trial court provided the jury with erroneous jury instructions on perfect and imperfect protection-of-another, finding that the trial court's instructions conformed to the law and the trial court's arrangement of the order of instructions did not prejudice Clark. Finally, the Court applied the Kentucky Rules of Evidence regarding relevancy to hold that the trial court did not abuse its discretion in admitting into evidence photographs of the victim's body.

Perry Jack Probus, Jr. v. Commonwealth of Kentucky
2018-SC-000019-MR

February 14, 2019

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. The defendant, Perry Jack Probus Jr., appealed his convictions and sentences to the Court as a matter of right, raising several issues for review. The Court affirmed the entirety of the trial court's judgment, finding no reversible error. The Court recognized the principle of law that a complicitor to a crime may still be charged with a greater offense even though the principal to that crime pled guilty to a lesser-included offense. The Court also rejected Probus's evidentiary challenges. Finally, the Court rejected Probus's jury verdict challenge, finding that Probus did not allege a reviewable error.

Commonwealth of Kentucky v. John P. Roth, Jr.
2018-SC-000095-DG

February 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. Keller, J., dissents by separate opinion in which Wright, J., joins. The Court granted discretionary review in this criminal case to determine whether sufficient evidence existed to uphold the jury's finding of guilt on the part of John Roth Jr. in committing second-degree cruelty to animals. Roth, however, moved for this Court to strike the Commonwealth's brief and dismiss the Commonwealth's appeal for failing to comply with rules of appellate practice. Specifically, the Commonwealth failed to cite to the record when making factual assertions. Noting the Commonwealth's numerous deficiencies in this case, in addition to noting that the Commonwealth could have filed a reply brief to address Roth's assertion and correct its deficiencies but failed to do so, the Court found merit in Roth's contention. As such, the Court struck the Commonwealth's brief and dismissed the Commonwealth's appeal for failing to follow the rules of appellate practice.

Willie Ward v. Commonwealth of Kentucky
2017-SC-000343-MR

March 14, 2019

Opinion of the Court by Justice Hughes. Minton, C.J.; Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Willie Roger Ward was charged with holding a seventeen-year-old female at gunpoint

and forcing her to perform oral sex. He appealed as a matter of right from a judgment convicting him of first-degree sodomy, possession of a handgun by a convicted felon, and being a persistent felony offender (PFO) in the first degree, and sentencing him to forty years in prison. Finding no reversible error, the Supreme Court affirmed.

The Court held that: (1) the trial court did not err in denying Ward's motion to suppress the handgun or victim's testimony, since both were discovered as a result of a valid stop and search; (2) the trial court did not err in precluding Ward from introducing the victim's statement to a detective that she had previously performed acts of prostitution in the past, because the Rape Shield Law specifically protects victims against the admission of such evidence, and the statement did not directly pertain to the charged offenses; (3) evidence of the victim's age was properly admitted because background information about victims is generally admissible; and (4) evidence of the victim's age did not open the door to the victim's statement about past prostitution because Ward was able to effectively assert his defense that the victim was a prostitute without admitting the statement, and in any event, the evidence of the victim's age was properly admitted, rendering the "opening the door" theory inapplicable. However, (5) the trial court erred by refusing to allow Ward to stipulate to his convicted felon status based on *Anderson v. Commonwealth*, 281 S.W.3d 761 (Ky. 2009), but given that very little evidence regarding the prior conviction was introduced, this error was harmless. Finally, (6) the trial court did not err by failing to sever the possession of a handgun charge for trial by a different jury. Ward's trial was trifurcated and proceeded in three parts - a guilt phase for sodomy, guilt phase for being a convicted felon in possession of a handgun, and a penalty phase. Allowing the same jury that heard the sodomy charge to hear the handgun charge was not error because the handgun was used in the commission of the sodomy. The sodomy evidence was inextricably intertwined with the handgun evidence, and thus there was no abuse of discretion in denying severance.

Joshua T. Hammond v. Commonwealth of Kentucky
2017-SC-000629-MR

March 14, 2019

Opinion of the Court by Justice Hughes. Minton, C.J.; Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Joshua T. Hammond was convicted at trial of first-degree assault, first-degree robbery, reckless homicide, and tampering with evidence. To avoid jury sentencing, he entered a plea agreement and was sentenced to twenty-five years in prison. After a matter of right appeal, this Court ruled that the trial court erred because the first-degree assault charge should have merged with the reckless homicide charge. The case was remanded for resentencing, with instructions to vacate the first-degree assault charge but leave the other convictions intact, with the Court expressly noting that Hammond's twenty-five year sentence was not affected given the sentences he received for the remaining charges. At the resentencing hearing, Hammond sought to withdraw from the plea agreement and have a jury impaneled for penalty phase. The trial court denied his motion, and Hammond appealed.

Recognizing that a plea agreement creates a contract between a defendant and the Commonwealth, Hammond argued that vacating the assault conviction changed the terms of his contract, thereby creating an ambiguity. Rejecting Hammond's argument, the Court held that there was no ambiguity in the contract at the time it was formed, and no terms requiring interpretation. Hammond was essentially seeking a "do-over" due to a change in circumstances brought about by his successful first appeal. By entering into the agreement, Hammond assumed the risk of future changes in circumstances that could make his agreement appear to have been a bad bargain - a risk inherent in all contracts. Hammond knowing and voluntarily waived his right to jury sentencing and bargained with the Commonwealth for a twenty-five year sentence, which he received. Additionally, this Court's directive on remand in the first appeal was clear: "this case is remanded for entry of a new judgment consistent with this opinion. Because the twenty-year assault conviction was adjudged to run concurrently with the first-degree robbery conviction, the reversal of the assault conviction affects neither [Hammond's] total sentence nor

his parole eligibility.” Accordingly, the new judgment imposing a twenty-five year sentence was affirmed.

John Leroy Graham v. Commonwealth of Kentucky
2018-SC-000055-MR

April 18, 2019

Opinion of the Court by Justice Wright. All sitting; all concur. A Muhlenberg Circuit Court jury found Appellant, Jesse Leroy Graham, guilty of four counts of first-degree sodomy and two counts of first-degree sexual abuse. Appellant entered an Alford plea to six additional charges and was sentenced to thirty years’ imprisonment. The twelve charges concerned four separate victims, each of whom was under the age of twelve. Appellant appealed as a matter of right, Ky. Const. § 110(2)(b), alleging that: (1) the trial court abused its discretion in its admission of improper evidence pursuant to Kentucky Rules of Evidence (KRE) 404(b); (2) the trial court abused its discretion in denying Appellant’s motion for mistrial; and (3) the Commonwealth improperly questioned Appellant, amounting to a violation of *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997). The Supreme Court disagreed with Appellant’s arguments that his convictions should be overturned. The Supreme Court held that none of Appellant’s claimed KRE 404(b) errors resulted in the admission of evidence of other crimes, wrongs, or acts. Next, while acknowledging that bystanders should not gesture to a witness (and warning attorneys to warn bystanders in the future about such actions), the Court held that a mistrial was not warranted under the facts of this case wherein a bystander gave a child witness a “thumbs up” during a break in his testimony. Finally, the Court held that the Commonwealth asking Appellant if he believed the victims made up the story against him when the two locked themselves in a bedroom after becoming angry that Appellant would not take them fishing did not amount to a Moss violation. Rather, the Commonwealth never asked Appellant to characterize the victims’ testimony as untruthful. The Commonwealth just further explored a motive Appellant had presented in his direct testimony as to the victims’ motive for their accusations.

Ronnie Leach v. Commonwealth of Kentucky
2018-SC-000239-MR

April 18, 2019

Opinion of the Court by Justice Keller. All sitting; all concur. The Court affirmed Ronnie Leach’s conviction of six counts of Sexual Abuse in the First Degree, victim under 12; one count of Sexual Abuse in the First Degree; and four counts of Sodomy in the First Degree, victim under 12. Leach argued several grounds for relief: (1) the trial court erred when it allowed the government to present KRE 404(b) evidence; (2) the trial court erred when it did not allow the defense to present KRE 412 evidence; and (3) the trial court erred when it allowed Facebook messages into evidence when they were not properly authenticated. The Supreme Court held that allegations by someone else of sexual abuse by the defendant were admissible as modus operandi. As an issue of first impression, the Supreme Court also held that allegations by another person of sexual abuse perpetrated by the defendant that prompted disclosure of the abuse by the victim in the case was admissible as inextricably intertwined evidence. The Supreme Court also held that the victim’s prior allegations of sexual impropriety against another person were not admissible as they were not demonstrably false. Finally, the Supreme Court held that objection to admission of Facebook messages was waived by the defendant.

Kentucky Department of Corrections v. Mark Dixon
2017-SC-000127-DG

April 18, 2019

Opinion of the Court by Justice Hughes. Minton, C.J.; Buckingham, Hughes, Keller, Lambert, and Wright, JJ., sitting. All concur. VanMeter, J., not sitting. Dixon was sentenced to serve three consecutive sentences totaling twenty-six years in prison; ten years of the sentence was for first-degree assault, a violent offense as defined in KRS 439.3401. After completing ten years of his sentence, Dixon initiated an administrative review of his sentence contending that he was entitled to work-time credit on the

remaining sentences for the non-violent offenses. The Department denied the credit on the grounds that Dixon's total combined sentence of twenty-six years was not partitionable by offense and, as a violent offender, he was not allowed any work-time credit. A divided Court of Appeals' panel reversed the trial court, concluding Dixon was entitled to work-time credit on his nonviolent offense sentences. On discretionary review, the Supreme Court addressed whether the disallowance of sentence credit to a violent offender under KRS 197.047(6)(b) applies to the aggregate sentence imposed pursuant to KRS 532.120(1)(b) when it is composed of sentences for both violent and nonviolent offenses. Reversing the Court of Appeals, the Court held that when a criminal defendant is serving consecutive, indeterminate sentences, KRS 532.120(1)(b) directs that those sentences are to be combined into an aggregate term — a single, continuous sentence. The disallowance of work-time sentence credit to a violent offender in KRS 197.047 applies to the single, continuous sentence.

DEPENDENCY, NEGLECT AND ABUSE

Cabinet for Health and Family Services, Commonwealth of Kentucky on Behalf of the Minor Child C.R. v. C.B.

2018-SC-000092-DGE

September 27, 2018

Opinion of the Court by Justice Keller. All sitting; all concur. C.B.'s (Father's) child was found to be neglected by the Clark Circuit Court. The finding was made due to: (1) the child testing positive for controlled substances at birth; (2) C.B.'s and Mother's history of substance abuse; (3) C.B.'s and Mother's prior involvement with the Cabinet relating to other children; and (4) C.B.'s failed drug tests. The circuit court found that the Cabinet had proven the petition by a preponderance of the evidence. The Court of Appeals reversed, holding that the Cabinet's evidence was speculative and holding that KRS 600.020 did not apply to C.B. because C.B. never exercised custodial control or supervision over the child. The Court analyzed KRS 600.020, and, in reversing the Court of Appeals, held that the statute creates distinct classifications of relationships in determining individuals who can be found to have neglected a child. The phrase in the statute, "exercising custodial control or supervision" modifies "other person," not the biological parent; thus, the statute applies to those exercising custody or biological parents. The Court further held that there was sufficient evidence before the trial court to make a

ELECTIONS:

Kentucky State Board of Elections, et al. v. Karen E. Faulkner, et al.

2018-SC-000351-TG

December 13, 2018

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Hughes, Keller, and VanMeter, JJ., concur. Cunningham and Wright, JJ., dissent. Shortly after finishing first in the May 2018 primary election for the Jefferson District judge, 9th Division, Daniel "Danny" Alvarez died; Karen Faulkner had finished third in the race. Applicable statutes provide that the top two vote-getter the primary election get certificates of nomination to run on the November general election ballot. Faulkner filed a declaratory judgment action in Franklin Circuit Court alleging that as the third-place finisher, upon Alvarez's death, she became the second-place vote-getter and was thereby entitled to a certificate of nomination placing her name on the general election ballot. The Franklin Circuit Court agreed. Due to the need for an expedient resolution, the appeal was transferred directly to the Supreme Court. Upon review, the Court reversed, holding: (1) the Franklin Circuit Court had jurisdiction to issue its rulings against the Jefferson County Board and the other named parties; and (2) KRS Chapter 118A does not provide that the third-place primary election candidate ascends to second place, and hence to a place on the general election ballot, when either the of the top two vote-getters dies after the primary election but before certification of the primary election results.

ENVIRONMENTAL LAW:

**Cindy Muncie, et al. v. Patricia Wieseemann
2017-SC-000235-DG**

June 14, 2018

Opinion of the Court by Justice Cunningham. All sitting; all concur. This Case involved a claim for stigma damages that resulted from a faulty heating oil tank leaking oil from property maintained by Wieseemann onto the Muncies' property. Wieseemann, her insurer, and the Muncies made a partial settlement for the repair costs. Thereafter, Wieseemann motioned for summary judgment, arguing that Kentucky law does not allow the Muncies to seek a stand-alone claim for stigma damages without attendant repair costs. Because the Muncies had settled their repair costs, Wieseemann argued they could not seek stigma damages arising from the same claim. The lower courts agreed on this point and the Muncies were granted discretionary review before the Supreme Court of Kentucky. The Court held that damages for proven diminution in the fair market value of real property—in the form of repair costs and stigma damages—are recoverable where there has been actual damage to property. Additionally, the Court held that stigma damages may be rewarded in addition to remediation damages for an actual injury where the remediation does not fully compensate the injured party for the diminution in fair market value of their real property

FAMILY LAW:

**Karen Martin Doyle, Etc. v. James Samuel Doyle, Etc.
2017-SC-000358-DGE**

June 14, 2018

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Hughes, Keller, Venters, and Wright, JJ., concur. VanMeter, J., concurs in result only. Cunningham, J., dissents by separate opinion. Karen and James (Sam) Doyle were divorced by the Knott Circuit Court in 1995. The Court ordered Sam to pay Karen \$24,227.02 to equalize the division of marital property. The judgment was silent as to interest. Sam did not pay the ordered amount. Karen had garnishments issued on Sam's bank accounts which were returned as "no monies." Karen then filed a judgment lien on property owned by Sam in the amount of the judgment plus interest at the legal rate. Sam filed a motion to release the judgment lien and to prohibit the collection of interest. The court denied the motion to release the judgment lien but granted Sam's motion prohibiting the collection of interest. The trial court found that the judgment was unliquidated and silent as to interest. Karen appealed and the Court of Appeals held that the trial court's determination that the judgment was unliquidated was in error. Further, interest was not precluded just because the judgment was silent as to interest. The Court of Appeals also indicated that Kentucky Revised Statute (KRS) 360.040 and the granting of interest was within the trial court's discretion. The Court of Appeals remanded for consideration of interest and specific findings to support the decision.

On remand, the circuit court again denied interest and the Court of Appeals affirmed. This Court granted discretionary review. The issue presented by this case is whether the statutory interest rate in KRS 360.040 applies to unliquidated judgments. The Court held that the statute is clear. All judgments bear interest. If the judgment is liquidated, interest is mandated at the statutory rate. If the judgment is unliquidated, the trial court has discretion in the amount of interest awarded. The Court reversed and remanded for the entry of an award of interest at the statutory rate. The trial court abused its discretion in relying on irrelevant factors in denying Karen interest. Those factors included the trial court's perceived delay in Karen's attempt to collect on the judgment; Sam's alleged settlement overtures; Sam's belief that the obligation was not payable before issues of child support were resolved; and the trial court's emphasis on the fact that Karen had a judgment lien on Sam's property.

Laura Faye Smith v. Jimmy Howard McGill, Jr.
2017-SC-000395-DGE

September 27, 2018

Opinion of the Court by Justice Wright. All sitting; all concur. Following the resolution of the parties' custody case, the trial court ordered McGill to pay Smith's attorney's fees. The Court of Appeals reversed, relying on a line of Kentucky cases requiring a trial court to find a financial disparity in order to award attorney's fees under KRS 403.220. Smith filed a motion for discretionary review to the Supreme Court of Kentucky, which that Court granted. The Court overruled the line of cases requiring trial courts to find a financial disparity before awarding attorney's fees under the statute. The Supreme Court held the trial court acted within its discretion when assessing attorney's fees after considering the parties' financial resources (which is all the statute requires), reversed the Court of Appeals, and reinstated the trial court's judgment.

Sally A. May v. Donnie J. Harrison
2018-SC-000011-DGE

November 1, 2018

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J.; Hughes, VanMeter, and Wright, JJ., concur. Keller, J., concurs in result only by separate opinion in which Venters joins. Appellant, Sally A. May and Appellee, Donnie J. Harrison never married but had two sons, ages fifteen and thirteen. After one boy alleged that he and his brother were sexually abused while in May's custody, the Jessamine Family Court interviewed one of the boys in camera pursuant to KRS 403.270. During that interview, the judge questioned him extensively concerning the sexual abuse. As a result, the trial court suspended May's visitation rights and specifically ordered "that there be no contact between [Ms. May] and the two boys until either of their qualified mental health professionals believe it would be appropriate" In affirming the trial court, the Court of Appeals held that although the judge's questioning exceeded the bounds of KRS 403.290(1), the error was harmless. The Supreme Court of Kentucky granted discretionary review and held: KRS 403.270 gives the trial judge direction to make critical custody determinations for the best interest of the child. The statute enumerates several broad and encompassing factors to be considered in that decision making. This gives the judge wide fact-finding responsibility. Inherent with that statutory mandate is the authorization to seek out testimony from the child involved, as need be. As such, the trial court did not abuse its discretion here.

Cabinet for Health and Family Services, Etc. v. R.S., and A.S.
2017-SC-000587-DG

December 13, 2018

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Hughes, Keller, and VanMeter, JJ., concur. Wright, J., concurs by separate opinion in which Venters, J., joins. Cunningham, J., dissents by separate opinion. In this family law matter, the Court reviewed the trial court's finding of neglect against the mother and father of two young, male children. Three separate trial courts that reviewed the matter found that the parents, the father a convicted sex offender, neglected their children by allowing the children to be alone with the father. The Court affirmed the trial court's findings based on the details of father's past crimes, which included two separate acts of sexual abuse against an underage male family member, the father's subsequent probation violations, and the results of two psychological reports analyzing the father. The Court recognized that the proper standard of review in this case was abuse of discretion.

Dixie Meinders, et al. v. Daryl K. Middleton
2018-SC-000251-DGE

April 18, 2019

Opinion of the Court by Justice Lambert. All sitting. Buckingham, Hughes, Lambert, Keller, and Wright, J.J., all concur. Minton, C.J., concurring in result only in which VanMeter, J. joins. A child custody case

wherein the child’s biological mother misrepresented to Appellant Rhiannon Scronce that she was the child’s paternal aunt. Shortly after the child was placed with Rhiannon through a neglect action, it was established via paternity test that the child’s biological father was the Appellee Keith Middleton. The McCracken Circuit Court denied Middleton’s request for custody, finding that Rhiannon was the child’s de facto custodian. The Court of Appeals reversed that finding on the six-month time requirement but remanded the case for findings per *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). On appeal to this Court Scronce argued: (1) that the time period required to gain de facto status under KRS 403.270 does not have to be continuous, and may therefore be aggregated; (2) that KRS 403.270 requires a parent to file a separate legal proceeding in order to toll the de facto custodian time period in accordance with *Spreacker v. Vaughn*, 397 S.W.3d 419 (Ky. App. 2012); and (3) that a putative father, who has been established as the biological father of a child via paternity test, must nonetheless file a separate motion to establish paternity in order to establish legal, as opposed to factual, parenthood.

The Court rejected all of Scronce’s arguments, holding: (1) that the time period required to gain de facto custodian status under KRS 403.270 must be one, continuous period; (2) that any direct participation by a parent in a custody proceeding evincing a desire to regain custody is sufficient to toll the requisite de facto custodian time period under KRS 403.270, overruling *Spreacker v. Vaughn*, 397 S.W.3d 419 (Ky. App. 2012) in favor of *Heltsley v. Frogge*, 350 S.W.3d 807 (Ky. App. 2011); (3) that KRS 600.020(46)’s definition of “parent,” as well as the trial court’s recognition of Middleton as the child’s biological father, was sufficient to legally establish his parenthood; and (4) that Scronce therefore did not qualify as the child’s de facto custodian; and (5) that the sole custody of the child should be placed with Middleton as the Mother had agreed. The Court also held that the trial court erred in ordering an ICPC (Interstate Compact for the Placement of Children) home study as to the father’s home in Missouri because the statute does not apply to the “sending or bringing of a child into a receiving state by his parent.”

FARM ANIMALS ACTIVITY ACT:

Joe Daugherty, et al. v. Bobbi Tabor

2017-SC-000374-DG

August 16, 2018

Opinion of the Court by Justice Cunningham. All sitting; all concur. This is a personal injury case where a prospective horse buyer lost control of and was thrown from a horse she was test-riding and sustained injury. The plaintiff, Bobbi Tabor, presented herself as an experienced horse rider and requested to test-ride several horses. The issue presented concerned whether the stable owners and the stable were liable for her injuries under the Farm Animal Activities Act (“FAAA”). The trial court granted summary judgment in the defendants’ favor under the FAAA. The plaintiff appealed. The Court of Appeals of Kentucky reversed the trial court’s ruling and remanded for further findings of fact. The court found that issues of fact existed regarding defendants’ reasonable inquiry into Tabor’s riding ability and whether defendant Joe Daughtery or his farm hands contributed to Tabor’s injuries in their attempt to halt the out-of-control horse. The Supreme Court of Kentucky granted discretionary review and held that the FAAA abrogated defendants’ liability due to the inherent risks of farm animal activities. Defendants post the appropriate warning signs and conducted prudent inquiry into Tabor’s self-proclaimed riding ability before allowing her to test-ride any horses. Accordingly, the Court reversed the Court of Appeals and reinstated the trial court’s grant of summary judgment.

GOVERNMENTAL IMMUNITY:

Rodericka Bryant v. Louisville Metro Housing Authority, et al.

2017-SC-000367-DG

March 14, 2019

Opinion of the Court by Justice Keller. Minton, C.J.; Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. This case involves the death of a young child, Davion Powell. His mother, Rodericka Bryant, took him with her to visit her friend, Terrah Love, at Love’s apartment building, The 550 Apartments

(Apartments). Roderick Moss, who was involved in an ongoing feud with Love and others, came to the complex and began shooting. One of the stray bullets hit Davion and he ultimately died from the injuries. Bryant then sued Louisville Metro Housing Authority (LMHA), the owner and property management company of Apartments, and Juanita Mitchell, the property manager, for their failure to evict Love, thereby negligently causing Davion's death. Both the circuit court and the Court of Appeals held that LMHA was cloaked in governmental immunity, and Mitchell was shielded by qualified official immunity; thus, Bryant's case was dismissed. The Kentucky Supreme Court granted discretionary review, affirmed the lower courts and held: LMHA and Mitchell are both protected by the immunity doctrine. In so holding, the Court noted that the General Assembly has conclusively established its motive and statement of policy as to public housing and that it created housing authorities to administer duties that it recognized as essential and integral to the policy of the Commonwealth. The Court further held that Mitchell was always empowered with authority to decide what action was appropriate, change that decision, change the course of action, stop the proceedings, etc. Her actions were discretionary in nature.

GRANDPARENT VISITATION:

**David Morton, et al. v. Bruce Tipton
2018-SC-000390-DGE**

March 14, 2019

Opinion of the Court by Justice Hughes. Minton, C.J.; Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Maternal grandfather and step-grandmother had sole custody of children, with whom paternal grandfather sought visitation. After several years of proceedings regarding visitation, the trial court eventually ordered that paternal grandfather receive visitation with the children three times per year with certain restrictions. On appeal, the Court of Appeals held that the trial court applied the best interest factors enumerated in *Walker v. Blair*, 382 S.W.3d 862, 871 (Ky. 2012) even it did not cite the case, and properly applied the preponderance of the evidence standard in a custody dispute between grandparents. Affirming on discretionary review, the Supreme Court held that although the trial court did not cite *Walker*, its findings of fact reflect proper consideration and application of the best interest factors. As for the standard of proof, the trial court properly applied the preponderance of the evidence standard; the higher clear and convincing evidence standard adopted in *Walker* only applies in the event of a grandparent visitation dispute involving a custodial parent.

INSURANCE:

**American Mining Insurance Company v. Peters Farms, LLC.
2017-SC-000066-DG**

August 16, 2018

Opinion of the Court by Justice Cunningham. Minton, C.J.; Cunningham, Hughes, Keller, Venters, and Wright, JJ., sitting. Minton, C.J.; Cunningham, Hughes, and Venters, JJ., concur. Wright, J., concurs in part and dissents in part by separate opinion, in which Keller, J., joins. VanMeter, J., not sitting. This is a mineral trespass case concerning whether a mining insurance policy covers liability for the unauthorized removal of minerals from an innocent party not privy to the mining contract. Ikerd Mining, LLC wrongfully removed 20,212 tons of coal from land belonging to the plaintiff, Peters Farms, LLC. 19,012 tons were mined under Ikerd's mistaken belief as to the correct location of Peters' boundary lines. 1,200 tons were mined pursuant to a disputed oral lease agreement; Peters claimed that the lease was an ongoing negotiation that was never finalized. The trial court found that both incidents qualified as "accidents" constituting "occurrences" within the meaning of Ikerd Mining's Commercial General Liability ("CGL") policy coverage provided by American Mining Insurance Company ("AMIC"). The plaintiff appealed. The Court of Appeals of Kentucky affirmed the trial court's ruling. The Supreme Court of Kentucky granted discretionary review and held that Ikerd's actions were not "accidents" constituting "occurrences" under the CGL policy. The Court emphasized that Kentucky insurance law is governed by the fortuity doctrine, which was not satisfied here because of Ikerd's intent to mine the coal and its control over the

mining operation. Accordingly, the Court reversed the Court of Appeals and remanded to the trial court for entry of a judgment consistent with this ruling.

Government Employees Insurance Company v. Jordan Sanders, et al.
2016-SC-000546-DG

November 1, 2018

Opinion of the Court by Justice Wright. Minton, C.J.; Cunningham, Keller, Venters, JJ., concur. Hughes, J., concurs in result only. VanMeter, J., not sitting. GEICO denied payment of basic reparation benefits (BRBs) to cover claimants' medical treatment. The trial court granted summary judgment in favor of GEICO and the Court of Appeals reversed. The Supreme Court of Kentucky granted discretionary review and affirmed the Court of Appeals, though for different reasons. The question the Court considered was whether GEICO can deny BRB claims based on a paper review of the medical claims. The Court held it could not. Specifically, the Court stated: "The medical treatments and invoices are presumed to be reasonable. It requires prompt payment and recovery of any improper payment must be accomplished by filing an action in court."

Lee Comley v. Auto-Owners Insurance Company
2017-SC-000596-DG

December 13, 2018

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Hughes, VanMeter, Venters, and Wright, JJ., concur. Cunningham, J., dissents by separate opinion in which Keller, J., joins. In this insurance case, the Court found that the insurance policy exclusions at issue did not exclude coverage for damage occurring to the plaintiff's home. A third party's water main line burst, overflowing the nearby street and pouring into the plaintiff's house. The plaintiff sought coverage from the defendant pursuant to an agreed-to insurance policy. The trial court and Court of Appeals agreed with the defendant insurance company that the exclusions at issue applied to negate coverage. However, the Court found that the exclusions did not apply, as they referred to naturally-occurring, not man-made, events giving rise to water damage.

INTERLOCUTORY APPEAL:

Commonwealth of Kentucky, Cabinet for Health and Family Services, Etc. v. Lettie Sexton, Etc., et al.

AND

Coventry Health and Life Insurance, Etc. v. Lettie Sexton, Etc., et al.

AND

Lettie Sexton, Etc., et al. v. Commonwealth of Kentucky Cabinet for Health and Family Services, Etc.

AND

Coventry Health and Life Insurance v. Lettie Sexton, Etc., et al.

2016-SC-000529-DG

2016-SC-000534-DG

2016-SC-000540-DG

2016-SC-000095-DG

September 27, 2018

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter and Venters, JJ., concur. Wright, J., dissents by separate opinion. The Court recognized the principle of constitutional standing in Kentucky law, adopting the U.S. Supreme Court's test as espoused in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and holding that the plaintiff in this case did not possess the requisite constitutional standing to bring suit. The Court also made clear that a party cannot challenge constitutional standing in and of itself on interlocutory appeal, but that this issue is not waivable

and always present when a case is otherwise properly brought before a court, and that a court can raise the issue sua sponte.

JURISDICTION

Bingham Greenebaum Doll, LLP v. Meredith L. Lawrence
2017-SC-000105-DG

December 13, 2018

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Cunningham, Hughes, VanMeter, Venters, and Wright, JJ., concur. Keller, J., dissents by separate opinion. The issue before the Court was whether the Kenton Circuit Court erred in setting aside a default judgment previously granted to Bingham Greenbaum Doll, LLP and J. Richard Kiefer (collectively “Bingham”) against Meredith Lawrence on its counterclaim to enforce a promissory note made by Lawrence in partial payment of attorney’s fees owed by Lawrence to Bingham. Because Bingham’s counterclaim was a compulsory counterclaim to Lawrence’s action against Bingham for professional negligence and because Lawrence’s complaint necessarily called into question the validity of the promissory note, Bingham’s counterclaim seeking enforcement of the promissory note was justiciable notwithstanding that it was filed approximately 3½ months prior to the promissory note’s due date. The Court therefore held that the trial court erred in setting aside the default judgment and that the Court of Appeals similarly erred in affirming that Order. The case was remanded to the Kenton Circuit Court with directions to reinstate the default judgment in favor of Bingham.

JUVENILE LAW:

Commonwealth of Kentucky v. B.H.
2017-SC-000155-DG

June 14, 2018

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, Venters and Wright, JJ., concur. VanMeter, J., concurs in result only. B.H., a minor, had an extensive criminal history beginning when B.H. was nine years old. Multiple evaluations revealed that B.H. was not competent to stand trial. B.H. was charged with first-degree robbery and murder, and the Commonwealth moved to transfer B.H.’s case to circuit court pursuant to Kentucky Revised Statutes (KRS) 635.020(2) and 635.020(4), the statutes for discretionary and mandatory transfer, respectively. B.H. moved for a competency hearing and the district court found B.H. incompetent to stand trial prior to addressing the Commonwealth’s motion to transfer. The Commonwealth appealed to the circuit court arguing that the district court’s decision was not supported by substantial evidence. The circuit court affirmed the finding of incompetency. The Commonwealth moved the Court of Appeals for discretionary review and argued that the district court acted without subject matter jurisdiction when it addressed the issue of competency. The Court of Appeals held that the district court had subject matter jurisdiction and the Commonwealth’s argument was premised on particular case jurisdiction; thus, the Commonwealth waived its right to contest any error. This Court granted discretionary review.

The issue before this Court was whether the district court could address competency prior to ruling on a motion to transfer. The district court had subject matter jurisdiction because the General Assembly has granted the district court jurisdiction to hear juvenile cases. Any error argued by the Commonwealth would pertain to particular case jurisdiction and, because the Commonwealth did not raise the jurisdictional issue prior to discretionary review with the Court of Appeals, that argument has been waived. The Court further held that there is a constitutional right for a defendant to be competent to stand trial, and thus, the district court’s actions in addressing competency before the transfer hearing were proper.

LEGAL MALPRACTICE:

**Steven M. Jacobi v. F. Larry Holbert
2017-SC-000092-DG**

August 16, 2018

Opinion of the Court by Justice Keller. All sitting; all concur. Jacobi filed a legal malpractice claim against his appointed public defender, Holbert. The circuit court and Court of Appeals both held that public defenders, as state employees, are entitled to qualified immunity. The Court affirmed holding that the Department of Public Advocacy (DPA) is a state agency, performing an essential governmental function. As such, it is clothed in immunity and that immunity extends to employees performing discretionary functions, in good faith, and within the scope of employment. Jacobi's claim of negligence stemmed from improper legal advice. Counsel to a client is an inherently discretionary task; although there may be ministerial tasks by DPA employees, entitling a defendant to bring a claim through the Board of Claims, Jacobi's case was not. Holbert's task was discretionary and Jacobi did not allege that his advice was in bad faith or outside the scope of employment. The lower courts properly dismissed on the basis of qualified immunity.

**Meredith L. Lawrence, et al. v. Bingham, Greenebaum, Doll, LLP, et al.
2017-SC-000531-DG**

December 13 2018

Opinion of the Court by Justice Venters. All sitting; all concur. Former attorney Meredith L. Lawrence was convicted of tax evasion and his conviction was upheld upon direct appeal and against federal post-conviction collateral attacks. Thereafter, he brought an action against his defense attorney, alleging that that the attorney's negligent performance caused his convictions. The trial court dismissed the complaint on summary judgment; the Court of Appeals affirmed. Upon discretionary review, the Supreme Court adopted the Exoneration Rule, a rule previously applied by the Court of Appeals in similar cases and which has developed as the majority rule in sister-state jurisdictions. The Exoneration Rule provides that a criminal defense attorney may not be sued for legal malpractice in a case resulting in the conviction of his or her client unless the client has been exonerated by direct appeal or upon post-conviction relief. The rationale for the Rule is that the sole cause of the conviction is the criminal conduct of the client rather than the poor performance of the defense counsel. Thus, absent subsequent exoneration, the convicted defendant cannot establish that his attorney was the cause of his conviction.

MEDICAL MALPRACTICE:

**Richard C. Oliphant, M.D., et al. v. Billie Jo Ries, et al.
2017-SC-000208-DG**

February 14, 2019

Opinion of the Court by Justice Hughes. Minton, C.J.; Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. The Rieses' initiated the underlying litigation in this case after their daughter was born with severe disabilities as the result of losing much of her fetal blood volume, which stemmed from the mother's rare and dangerous medical conditions. After a 2010 jury verdict in favor of Oliphant, the Rieses appealed and the Court of Appeals reversed on a Daubert issue, but this Court unanimously reversed and remanded to the Court of Appeals for consideration of the Rieses' second claim of error. On remand, a divided appellate panel reversed again, holding that the trial court erred in limiting the testimony of one of the Rieses' experts. On discretionary review, the Supreme Court again reversed the Court of Appeals and, accordingly, reinstated the jury verdict.

The central issue in the litigation was the timing of the fetal bleed. The expert witnesses had several theories about the timing, relying on a variety of factors, such as red blood cell counts, heart rate, and equilibration. Five days before trial, the Rieses, with the trial court's permission, disclosed a new expert to testify in rebuttal to one of Oliphant's witnesses who planned to testify regarding red blood cells. Oliphant also had an expert that developed a mathematical formula to time the fetal bleed (the

equilibration testimony), which the Rieses were aware of approximately four months before trial. The Rieses sought to allow their newly-named expert to testify about both red blood cells and the mathematical formula. The sole issue on this appeal is whether the trial court erred in limiting the new expert's testimony strictly to red blood cells, thereby precluding him from testifying about the mathematical formula and equilibration. Because the Rieses knew about the formula approximately four months before trial, had previously disclosed expert witnesses that were capable of and expected to testify to rebut the calculations, and had an abundance of evidence regarding the timing of the fetal bleed, the trial court did not abuse its discretion in limiting the new expert's testimony. Further, contrary to the appellate court's holding, the parties were not required to supplement expert witness disclosures with every detail included in an expert's deposition.

PERSONAL INJURY:

**Sameena Asmat, etc. v. George W. Bauer, M.D., III, et al.
2016-SC-000560-DG**

September 27, 2018

Opinion of the Court by Justice Keller. All sitting; all concur. Sameena Azmat brought a medical malpractice action on behalf of her son, Nausher Azmat. Counsel proceeded with the case for several years before Azmat's attorney was permitted to withdraw from the case, less than six months before trial. The trial court ordered, upon defense counsel's request, that if Sameena did not secure replacement counsel she would be deemed to proceed in the action pro se. Unable to find counsel to take the case, Sameena filed motions and appeared before the court pro se. Defense counsel then argued that Sameena could not proceed pro se as a next friend because to do so would constitute the unauthorized practice of law. Defense counsel moved for summary judgment. The trial court agreed and dismissed the case with prejudice. The Court of Appeals affirmed. On discretionary review, this Court held that the trial court erred in permitting Azmat's counsel to withdraw. The Court further held that Sameena did not engage in the unauthorized practice of law because: (1) the Supreme Court has not previously held that such actions constitute unauthorized practice and (2) Sameena was under a court order to proceed as she did, thus her actions were expressly authorized. The Court reversed the Court of Appeals and remanded the case for further proceedings.

PROBATE:

**Steve Gregory v. Brandon Hardgrove and Casey Hardgrove
2017-SC-000669-DG**

December 13, 2018

Opinion of the Court by Justice VanMeter. All sitting; all concur. The issue before the Court was whether the Court of Appeals erred in affirming the Pulaski Circuit Court's dismissal of Steve Gregory's claim against the heirs of Harold Hardgrove (the "Decedent") seeking to enforce a judgment lien against real property owned by the Decedent at his death. The Court of Appeals affirmed the trial court's dismissal of Gregory's complaint seeking to intervene in a foreclosure action filed by Cumberland Valley National Bank and Trust Company ("CVNB"). In its foreclosure action, CVNB sought to enforce its mortgages against the Decedent's real property. The trial court held that Gregory failed to state a claim for which relief could be granted because at the time of death, the Decedent's real property passed to his heirs at law immediately, subject only to the claims of "creditors." Finding that Gregory's pending tort claim against the Decedent did not qualify him as a "creditor," the trial court dismissed his claim. The Court of Appeals affirmed. Upon review, the Supreme Court concluded that Gregory's tort claim, which accrued prior to the date of death, made Gregory a creditor of Hardgrove and now his Estate. Accordingly, the Court reversed and remanded the case.

QUALIFIED IMMUNITY:

Alicia Ritchie, et al. v. Arch Turner, et al.
2017-SC-000157-DG

November 1, 2018

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Cunningham, VanMeter, Venters and Wright, JJ., concur. Keller, J., concurs in part and dissents in part by separate opinion. Question presented: Whether school officials were entitled to qualified official immunity on claims brought by a student sexually abused by a former teacher. The student alleged the officials: 1) failed to supervise her, 2) failed to report the abuse of another student as required by Kentucky statute, and 3) failed to obtain text transcripts between the teacher and the other student. Held: The school officials were entitled to qualified official immunity. Under the circumstances of this case, the school officials' duty to supervise, the KRS 620.030 duty to report, and decision to obtain the text transcripts were discretionary acts. First, although the school administrators had both a statutory and school policy duty to supervise students, the administrators were not actually involved in the active supervision of students at the times relevant to the student's complaint. Consistent with *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014), the school officials were entitled to qualified immunity as they only had a general supervisory duty over the student. Second, in cases such as this when the alleged abuse was not actually observed by the officials who allegedly failed to report, KRS 620.030 first requires a baseline determination of whether there is "reasonable cause" to believe abuse has occurred or is occurring. Assessing the information gathered from the investigation and making the actual determination of whether reasonable cause exists requires personal judgment and is a discretionary function. After the superintendent investigated and concluded there was no reasonable cause to believe that a child was being or had been abused, no further action was required. Third, if an official engages in a good faith investigation regarding excessive texting between a teacher and student and uncovers no evidence that there have been any sexual texts exchanged, and then orally requests, but never obtains, documentation of the text messages for school records, that does not turn a discretionary act — investigation of potential abuse — into a ministerial act.

REAL PROPERTY:

C.W. Hoskins Heirs, a General Partnership Comprised of Greg Hoskins, et al. v. Ruth Farmer Wells, et al.
2017-SC-000004-DG

August 16, 2018

Opinion of the Court by Justice Hughes. All sitting; all concur. C.W. Hoskins Heirs and Phillip and Robin Lewis (Hoskins-Lewis) sought review of the Court of Appeals decision reversing the trial court judgment in a boundary dispute affecting coal royalties. After assessing evidence presented by professional land surveyors, considering the testimony of several witnesses, and walking the disputed property himself, the trial judge determined that Hoskins-Lewis's proposed boundary line was the correct location. The Court of Appeals reversed in a 2-1 decision, finding the evidence relied upon by the trial court to be lacking in quality and substantiality, and then holding the boundary line was as proposed by the Wellses. However, assessing the credibility of witnesses and making findings of fact are tasks exclusively within the province of the trial court. The Court of Appeals exceeded its scope of review by substituting its own opinion for that of the trial court. It is immaterial that the Court of Appeals' majority would have decided the case differently because the trial court's determination was supported by substantial evidence. Further, where both parties are asserting specific locations of a boundary line, each party bears the burden of proof to establish that location. Hoskins-Lewis met the burden of proof and the trial court's reliance on the evidence in support of their location was not erroneous. As such, the Supreme Court reversed the decision of the Court of Appeals and reinstated the Leslie Circuit Court's judgment in favor of Hoskins-Lewis.

Lexington-Fayette Urban County Government v. Justin T. Moore
2017-SC-000555-DG

November 1, 2018

Opinion of the Court by Justice Venters. All sitting; all concur. Lexington-Fayette Urban County Government (LFUCG) brought a condemnation action seeking a temporary construction easement and a permanent drainage easement across a portion of property owner's land. The property owner challenged the taking by asserting that LFUCG should be required to take all of the affected area in fee simple rather than a mere easement because the area to be affected by the easement is left essentially useless to the property owner. The trial court denied the challenge but on appeal, the Court of Appeals held that LFUCG was indeed required to take the property in fee simple. On discretionary review, the Supreme Court held that LFUCG properly sought to acquire only an easement rather than fee simple title, citing *City of Bowling Green v. Cooksey*, 858 S.W.2d 190, 192 (Ky. App. 1992), which held that a condemning authority “cannot acquire the property in fee simple if it can obtain access or use of the property through other privileges or easements.” The Court reaffirmed the *Cooksey* rule as the better public policy because “when a governmental unit needs to take a small area out of a larger estate, it should take the least possible interest, such as an easement, so that if the public purpose for the tract is concluded, it may be reintegrated into the original estate unburdened by the prior public taking.”

Don Hensley v. Keith A. Gadd and JHT Properties, LLC.
2017-SC-000189-DG
2017-SC-000431-DG

November 15, 2018

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J., Cunningham, Hughes, Venters, JJ., concur. Wright, J., concurs in result only by separate opinion in which Keller, J. joins. The Kentucky Supreme Court granted discretionary review to address the Court of Appeals’ opinion reversing in part/affirming in part the decision of the Garrard Circuit Court determining that Gadd and JHT had violated a restrictive covenant of their subdivision. The Supreme Court held that the Court of Appeals erred in reversing the decision of the Garrard Circuit Court. Specifically, the Court held that Gadd and JHT had violated the restrictive covenant by renting out the properties on a nightly and weekly basis when the covenant only allowed the lots to be used for “residential purposes” that were “occupied by one family.” “Commercial” activity, including the operation of a hotel, was permitted on only one lot in the subdivision, per the covenant. The Court further held that the nightly and weekly rental of the two properties constituted the operation of a hotel, in violation of a restrictive covenant prohibiting the operation of a business on any residential lot within the subdivision. The Court affirmed both the Court of Appeals and the Garrard Circuit Court regarding Gadd’s counterclaim of harassment as the record contained no evidence to support this claim.

TAXES:

Michael Scalise, et al. v. Suzette Sewell-Scheuermann
2016-SC-000246-DG

November 1, 2018

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Cunningham, VanMeter, and Wright, JJ., concur. Venters, J., dissents by separate opinion, which Keller, J., joins. The City of Audubon Park approved annual ordinances setting out a monthly assessment for sanitation services. However, the assessment generated more revenue than the costs of the services, and the City diverted the surplus revenue into a general fund to use for other city expenditures. Sewell-Scheuermann, as a taxpayer for the use and benefit of the City, brought suit under KRS 93.330 and 92.340 and the Kentucky Constitution seeking to recover the surplus revenue. The circuit court dismissed the action, for failure to state a cause of action due to lack of injury to the City, but the Court of Appeals reversed, concluding that pursuant to the statutes cited, the former Mayor and City Council members were personally liable for the surplus funds, despite the funds being used for other valid municipal purposes.

The Supreme Court determined that Sewell-Scheuermann properly stated a cause of action, but also recognized the longstanding offset defense available to city officials based on previous Supreme Court cases and the statutes preceding KRS 92.330 and 92.340. If the city officials could establish that the sanitation tax revenue was spent for valid city obligations, there would be no personal liability. However, moving forward this offset defense will no longer apply. On remand, the defendants must establish how the excess revenue was spent so that the factual issue of the validity of those expenditures can be determined.

TORTS:

Norfolk Southern Railway Company v. Sharon Johnson
2016-SC-000248-DG

August 16, 2018

Opinion of the Court by Justice Wright. All sitting. Cunningham, Hughes, Keller, VanMeter, Venters, and Wright, JJ., concur. Minton, C.J., concurs in result only. Sharon Johnson, a patrol officer, was injured during her foot pursuit of a suspect when she fell down an embankment on Norfolk Southern's property. The circuit court granted a directed verdict in favor of Norfolk Southern. Specifically, the circuit court found that the Fireman's Rule barred Johnson's recovery as a matter of law. Johnson appealed to the Court of Appeals, which reversed and remanded to the circuit court, holding that the Fireman's Rule did not bar Johnson's claim. Norfolk Southern filed a motion for discretionary review to the Supreme Court, which the Court granted. The Supreme Court reversed the Court of Appeals, holding that Johnson was barred from recovery pursuant to the Firefighter's Rule and reinstated the circuit court's ruling directing a verdict in favor of Norfolk Southern.

Nicole Peterson, Etc., et al. v. Bethany Foley, et al.
2017-SC-000028-DG

November 1, 2018

Opinion of the Court by Justice Cunningham. Minton, C.J.; Cunningham, Hughes, Venters, and Wright, JJ., sitting. Minton, C.J.; Hughes, Venters, and Wright, JJ., concur. Keller, J., dissents by separate opinion. Peggy McWhorter died in her sleep while incarcerated in the Russell County Detention Center. Her death was attributed primarily to a hydrocodone overdose. Appellant, the administratrix of McWhorter's estate, filed a wrongful death claim against the Jailor and Deputy Jailors. The trial court granted summary judgment in favor of the Jailors. In a split decision, the Court of Appeals affirmed the trial court's order. The Supreme Court of Kentucky affirmed and held that there was no need to address the issue of qualified immunity because Appellants could not prove causation at trial. More specifically, the undisputed evidence indicated that several different Deputies visited McWhorter's cell and signed the log at least every hour and, in fact, sometimes more frequently. It would be speculative to apportion fault amongst the various defendants. Moreover, Appellant could not demonstrate McWhorter's time of death. Therefore, the Jailors were entitled to summary judgment in their favor.

Raymond Hayes and Dena Hayes v. D.C.I. Properties-D KY, LLC and The Nelson Stark Company
2017-SC-000340-DG

December 13, 2018

Opinion of the Court by Justice VanMeter. All sitting. Cunningham, Hughes, Keller, VanMeter, Venters, and Wright, JJ., concur. Minton, C.J., concurring in result only. Alex Hayes, sixteen at the time, injured himself by driving and subsequently crashing a piece of heavy equipment while trespassing on private property. The trial court and the Court of Appeals dismissed his personal injury suit against the owner of the land and the machinery. The Kentucky Supreme Court granted discretionary review to address Hayes' contention that a jury should have been permitted to weigh and adjudicate the comparative fault of D.C.I. and the Nelson Stark Company in terms of failing to secure the construction site and the equipment. The Court held that as a trespasser, Hayes could not recover because KRS 381.232 provides

that “[t]he owner of real estate shall not be liable to any trespasser for injuries sustained by the trespasser on the real estate of the owner, except for injuries which are intentionally inflicted by the owner or someone acting for the owner.” Further, the Court held that, although the attractive nuisance doctrine no longer has a strict age cutoff in age, e.g., fourteen, in the Commonwealth, Hayes was capable of appreciating the dangers that coincided with driving a piece of heavy machinery after heavy drinking and smoking marijuana. The Court affirmed the trial court and Court of Appeals.

William J. Yung, et al. v. Grant Thornton, LLP

2016-SC-000571-DG

2017-SC-000151-DG

December 13, 2018

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Cunningham, Keller, VanMeter, and Wright, JJ., concur. Venters, J., concurs in part and dissents in part by separate opinion. Civil Appeal, Discretionary Review Granted.

The taxpayers (William J. Yung, Martha A. Yung, and the 1994 William J. Yung Family Trust) participated in a tax shelter marketed by an accounting firm (Grant Thornton, LLP). When the I.R.S. disallowed the tax shelter, the taxpayers brought suit to recoup approximately \$20 million, the combined total paid to the I.R.S. in back taxes, interest and penalties and paid to the accounting firm for fees. Following a bench trial, the trial court found the accounting firm liable for fraud and gross professional negligence in the marketing and sale of the tax shelter and awarded approximately \$20 million in compensatory damages and \$80 million in punitive damages.

Questions presented: 1) Must a fraudulent misrepresentation claim by a tax shelter participant against an accounting firm be dismissed because, as a matter of law, a taxpayer cannot justifiably rely upon the firm’s “more likely than not” tax opinion? 2) When a tax opinion is at issue in a civil fraudulent misrepresentation and fraudulent omission case, does a taxpayer implicitly waive attorney-client privilege with an outside tax firm which advised the taxpayer it could reasonably rely on the accounting firm’s tax opinion and that advice is used in I.R.S. tax litigation to support the taxpayer’s “reasonable cause” defense? 3) Are taxes and I.R.S. interest recoverable as compensatory damages? 4) Is the \$80 million punitive damage award unconstitutional under the facts of this case?

Held: 1) While some fraud cases suggest that a taxpayer’s reliance on a tax professional’s “more likely than not” tax opinion may play a role in establishing a lack of justifiable reliance, that determination is ultimately based upon the totality of the circumstances. When other facts are not present to cause taxpayer suspicion of the tax shelter’s legality and the tax opinion is held out as satisfying the Internal Revenue Code’s criteria regarding an opinion on which a taxpayer may reasonably rely, the tax opinion on its own does not serve as a red flag negating a taxpayer’s justifiable reliance on statements that a tax shelter strategy is proper. 2) An implied waiver of the attorney-client privilege did not occur. The taxpayer did not sue the outside tax firm and place at issue the advice received, and comparative fault is not an issue. The facts of this case do not warrant an extension of the implied waiver to a non-party’s legal advice. 3) Under Kentucky’s traditional tort damage principles, if the taxpayer has been injured, recovery should be allowed if the taxpayer meets the burden of proving causation and damages. Therefore, if the tax liability (i.e., taxes and interest paid to the I.R.S.) is a direct result of an accountant’s fraudulent or negligent conduct, a plaintiff’s out-of-pocket damages are recoverable. 4) The trial court viewed the accounting firm’s conduct as egregious and determined that a punitive damage award four times that of the compensatory damage award was needed to punish the firm and deter like future behavior. The \$80 million punitive damage award is not grossly excessive under the three guideposts provided by the United States Supreme Court for determining whether an award is grossly excessive or unreasonable. First, the accounting firms “repeated actions” and “intentional deceit” of their clients placed it at the high end of professional reprehensibility. Although the taxpayers may not have been

financially vulnerable, the reprehensibility of the firm's orchestrated, on-going deceit is not lessened or mitigated by the fact the firm defrauded people of wealth, rather than the financially vulnerable. Second, the firm's conduct was egregious and highly reprehensible, warranting a substantial punitive damage award. The \$80 million punitive damage award is not disproportionate to the harm suffered by the taxpayers, a 4:1 punitive/compensatory damage award. Third, the accounting firm was on sufficient notice of the possible legal consequences it could face for its highly reprehensible fraudulent and grossly negligent professional conduct. There is no indication that the \$80 million award is excessive compared to the potential penalties which could have been imposed on the firm. The trial court's \$80 million punitive damage award is constitutionally acceptable.

Jewish Hospital & St. Mary's Healthcare Inc., Etc. v. Barbara House, Etc., et al.

2017-SC-000440-DG

December 13, 2018

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter, and Venters, JJ., concur. Wright, J., concurs in result only. The Estate of Laura Alexander brought a medical malpractice suit against Jewish Hospital and Dr. Charles Sherrard. Dr. Sherrard settled his claims and was an "empty-chair defendant" at the jury trial against Jewish Hospital. At the close of the Estate's case, Jewish Hospital moved for directed verdict against Dr. Sherrard on the issue of breach of duty, claiming that all the proof established that his conduct fell below the standard of care. Over objection, the trial court directed verdict as to this issue and instructed the jury accordingly. The jury returned a verdict for Jewish Hospital.

The Court of Appeals reversed and remanded for a new trial. This Court reversed and reinstated the judgment of the circuit court, holding that, although the directed verdict here was improper, it was harmless error. Directed verdicts against a co-defendant are theoretically permissible but the opposing party, under CR 50.01, must have the opportunity to present proof and oppose the motion. Dr. Sherrard was an empty-chair defendant and did not present proof but the directed verdict at the close of the Estate's case was still procedurally improper. However, because the jury did not reach the instruction on Dr. Sherrard's liability and the Estate had continually argued that Dr. Sherrard's conduct fell below the standard of care, the error was harmless.

Barbara Smith v. Bonnie Smith

2017-SC-000348-DG

December 13, 2018

Opinion of the Court by Justice VanMeter. All sitting. Cunningham, Hughes, Keller, VanMeter, and Wright, JJ., concur. Minton, C.J., dissents by separate opinion in which Venters, J., joins. The Kentucky Supreme Court granted discretionary review to address the Court of Appeals opinion affirming a jury verdict apportioning 100% of the fault for a slip-and-fall on Barbara Smith based on an "ordinary care" jury instruction. The Court reversed, holding that the Knox Circuit Court erred in giving jury instructions which failed to account for Bonnie Smith's land entrant status and misstated the duty of care owed by Barbara. Specifically, the Court held that the Commonwealth continues to adhere to the three common law land entrant distinctions: trespasser, licensee, and invitee. *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 909 (Ky. 2013). The Court further held that by giving only a general "ordinary care" instruction at the end of trial, the Knox Circuit Court had failed to consider Bonnie's status at the time of her injury. Additionally, the Court held that Barbara was not entitled to a directed verdict as there remained a dispute as to whether Bonnie was a licensee or invitee, and whether, even if Bonnie was a licensee, Barbara met the proper standard of care based on Bonnie's status. The Court directed the Knox Circuit Court on remand to conduct further proceedings consistent with the opinion, and if retrial occurs, to give a proper instruction regarding Bonnie's status as a land entrant.

WHISTLEBLOWER ACT:

**Laurel Harper et al. v. University of Louisville
2016-SC-000632-DG**

November 1, 2018

Opinion of the Court by Justice Venters. All sitting; all concur. The Plaintiff, a former university employee, brought action against the university claiming she was wrongfully terminated in violation of Kentucky Whistleblower Act. At trial, the jury found in favor of the plaintiff and awarded her damages in form of backpay and mental anguish, plus interest and attorney fees. University appealed; the Court of Appeals reversed upon its conclusion that none of the plaintiff's claimed disclosures qualified for whistleblower protection under the statute. Upon discretionary review, the Supreme Court reinstated the jury verdict because at least some of the employee's disclosures met the statutory requirements. The Court also held that a "disclosure" of information which already widely known within the organization cannot qualify as a whistleblower disclosure under the Whistleblower Act; that complaints disclosed only to the putative wrongdoer generally cannot qualify as a whistleblower disclosure under the Act. Although the information disclosed must be more than the whistleblower's subjective opinion, the statute affords protection to disclosures of what the plaintiff merely suspected to be the kind of fraud, waste, and mismanagement objectively described in the Act. Disclosures to the news media does not qualify as a report to "any other appropriate body or authority," within meaning of provision of the Act.

WORKERS COMPENSATION:

**McCoy Elkhorn Coal Corp. – Insolvent Employer, et al. v. Jeannie Sargent, Etc., et al.
2017-SC-000616-WC**

August 16, 2018

Opinion of the Court by Justice Hughes. All sitting; all concur. The Administrative Law Judge held statutory beneficiaries of deceased mine worker were entitled to workers' compensation benefits enhanced by 30% pursuant to KRS 342.165 due to employer's failure to comply with workplace safety regulations, and that the Kentucky Coal Employers' Self-Insurers Guaranty Fund, which stepped into the shoes of the insolvent employer, was liable for the 30% enhancement. The Workers' Compensation Board affirmed. On appeal to the Court of Appeals, the Guaranty Fund did not challenge the applicability of the enhancement on the facts presented but did argue that it could not be liable for any enhancement based on the employer's intentional safety violations or interest. The Court of Appeals affirmed the Board. Affirming in a case of first impression, the Supreme Court held that the statutes creating the Guaranty Fund reflected a legislative intent that the Fund step in and fully meet all obligations of the insolvent employer, including the 30% enhancement and interest. The Court specifically rejected the Fund's argument that the 30% enhancement was a "penalty" which the Fund could not be required to pay under KRS 342.910(2).

**Active Care Chiropractic, Inc. v. Katherine Rudd, et al.
2017-SC-000377-WC**

September 27, 2018

Opinion of the Court by Justice VanMeter. All sitting. Cunningham, Hughes, Keller, VanMeter, Venters, and Wright, JJ., concur. Minton, C.J., dissented with opinion. The sole issue in dispute is the correct multiplier to be applied to Katherine Rudd's workers' compensation benefits. Active Care Chiropractic, Inc. employed Rudd part-time. While taking out the trash one day at work, Rudd slipped and fell, injuring her shoulder. After three shoulder surgeries, she returned to work. About a year after her return to work, Rudd voluntarily retired, for reasons not solely related to the work-related injury. The Administrative Law Judge determined that Rudd qualified for the two-multiplier under the plain wording of KRS 342.730(1)(c)2 and because Rudd's cessation from work was not due to intentional or reckless misconduct, per this Court's holding in *Livingood v. Transfreight, LLC*, 467 S.W.3d 249 (Ky. 2015). The Workers' Compensation Board affirmed. On appeal, the Supreme Court likewise affirmed, concluding that under the plain language of KRS 342.730(1)(c)2, voluntary retirement and removal from the

workforce for reasons not related to the workplace injury qualifies as “cessation of . . . employment . . . for any reason” and affords the application of the two-multiplier to benefits received. In so ruling, the Court emphasized its duty to accord to words of a statute their literal meaning and not breathe into the statute that which the Legislature has not put there. Further, the Court held that pursuant to Livingood, the only purported restriction on application of the two-multiplier is an employee’s intentional or reckless misconduct, which was nonexistent in this case. Thus, no exception to the unambiguous language of KRS 342.730(1)(c)2 precludes Rudd’s recovery of the two-multiplier.

Doug Trevino v. Transit Authority of River City, et al.
2018-SC-000629-MR

March 14, 2019

Opinion of the Court by Justice Keller. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. While operating a TARC bus in Jefferson County, Kentucky, Douglas Trevino was assaulted by a passenger resulting in injuries to his face, teeth, as well as causing post-traumatic stress disorder. TARC responded by denying the claim pursuant to the special defense provided in KRS 342.610(3). Having reviewed the on-board bus surveillance video, the ALJ concluded that Trevino’s intentional action, leading up to the assault which injured him, was the proximate cause of the assault. The Board and the Court of Appeals affirmed. The Kentucky Supreme Court affirmed and held: if a claimant’s aggressive or inflammatory behavior proximately causes violence, thus resulting in injury to the claimant, the claimant is not entitled to compensation under Kentucky’s Workers’ Compensation laws. In so holding, the Court noted that the ALJ’s conclusion was based on her review of the bus surveillance video as well as Trevino’s testimony. She clearly did not find Trevino’s version of the events credible. Therefore, the ALJ’s decision denying Trevino benefits pursuant to KRS 342.610(3) was supported by substantial evidence.

WRIT OF PROHIBITION:

Presbyterian Church (U.S.A) v. Hon. Brian C. Edwards, Judge, Jefferson Circuit Court, et al.
2016-SC-000699-MR

September 27, 2018

Opinion of the Court by Justice Wright. All sitting. Minton, C.J.; Hughes, and Keller, JJ., concur. Venters, J., dissents by separate opinion which Cunningham and VanMeter, JJ., join. Appellant, the Presbyterian Church, petitioned the Court of Appeals for a writ to prohibit the trial court from lifting its stay of discovery. The Court of Appeals granted the writ to the extent the trial court should limit discovery to that which was necessary to determine whether the church was entitled to ecclesiastical immunity. The church appealed to the Supreme Court of Kentucky, which affirmed the Court of Appeals’ order. The Supreme Court held that the church satisfied the “certain special cases” writ criteria as to broad-reaching discovery. However, it failed to meet this standard as to limited discovery the trial court may deem necessary in order to determine whether the church is immune from the present suit. The Court further instructed the trial court that “[t]he case should not proceed—whether with additional discovery (apart from that the trial court deems necessary in making the immunity determination) or otherwise—until the trial court rules on the threshold immunity issue.”

Commonwealth of Kentucky v. Hon. John R. Grise, Chief Circuit Judge, Warren Circuit Court and William H. Meece
2018-SC-000472-OA

November 1, 2018

Opinion and Order by Chief Justice Minton. All sitting; all concur. Indigent petitioner filed an RCr 11.42 motion to set aside his death sentence. Petitioner requested the use of public funds to procure private experts to prove his post-conviction claims. The circuit court judge held an ex parte hearing to determine whether petitioner was entitled to public funds. The judge granted in part petitioner’s request and ordered the disbursement of public funds to pay for several of petitioner’s private experts.

The Commonwealth sought a writ of prohibition to stop public funds from being disbursed under the judge's order. The Commonwealth argued that the trial court had acted erroneously in holding the entire hearing ex parte and that the court should have first held an adversarial hearing to determine whether petitioner's requested private experts were "reasonably necessary" for a full presentation of petitioner's claims.

The Court first held that KRS 31.185(2), which allows an indigent criminal defendant to be heard ex parte with regard to a request to use private facilities for the evaluation of evidence, applies to post-conviction petitioners. The Court then held that the determination of whether the use of private experts is "reasonably necessary" for a full presentation of petitioner's claims must also be made at the ex parte hearing. Accordingly, the Court denied the Commonwealth's writ of prohibition.

Allstate Property & Casualty Insurance Company v. Robert Kleinfeld, DC, Etc., et al.

2018-SC-000417-MR

February 14, 2019

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. Lambert, J., dissents. The Court of Appeals granted Dr. Robert Kleinfeld's petition for a writ of prohibition, preventing Allstate Property & Casualty Insurance Co. from seeking discovery from Dr. Kleinfeld in Allstate's reparation benefits action against Jeffery Streeval. The Court reversed the Court of Appeals, finding that the Court of Appeals did not properly apply the extraordinary standard needed to be met for the granting of a writ.

Allstate served Dr. Kleinfeld a subpoena duces tecum and deposition duces tecum, seeking information relating to the conducting of an MRI on Streeval. Dr. Kleinfeld challenged the discovery requests on relevancy and trade secret grounds. The Court rejected both arguments, finding that the discovery requests fell within the ambit of relevant discoverable information, in addition to finding that Dr. Kleinfeld's assertion of the trade secret privilege lacked a factual basis. Finally, the Court, sua sponte, acknowledged Kentucky precedent supporting the existence of a rule of law allowing a nonparty an immediate right of appeal following an adverse discovery order.

WRONGFUL TERMINATION:

Carol Greissman v. Rawlings and Associates, PLLC

2017-SC-000518-DG

April 18, 2019

Opinion of the Court by Justice VanMeter. All sitting; all concur. Carol Greissman, a licensed attorney in Kentucky, was terminated by Rawlings and Associates, PLLC for refusing to sign an agreement providing, inter alia, for non-solicitation of Rawlings & Associates' customers or clients following cessation of employment. Greissman's refusal to sign was based on her belief that the provision violated a Rule of Professional Conduct prohibiting non-competition agreements between lawyers and law firms. SCR 3.130, Rule 5.6. The issue before the Court was whether the Court of Appeals erred in opining that the Rules of the Kentucky Supreme Court do not establish public policy which in turn may form a basis for a wrongful termination claim. The Supreme Court held that the Court of Appeals erred in holding that Greissman's complaint should have been dismissed for failure to state a claim, but nonetheless affirmed on other grounds. The Supreme Court concluded that the circuit court properly granted summary judgment in favor of Rawlings & Associates since the agreement at issue contained a savings clause which excepted the solicitation of legal work from coverage "to the extent necessary to comply with rules of professional responsibility applicable to attorneys." Thus, the agreement furnished to Greissman for signature did not violate SCR 3.130, Rule 5.6 as a matter of law.

ATTORNEY DISCIPLINE:

**Kentucky Bar Association v. Richard Graham Kenniston
2018-SC-000069-KB**

June 14, 2018

Opinion and Order of the Court. All sitting; all concur. Kenniston was charged in three separate disciplinary proceedings with failing to appear on behalf of clients, failing to return unearned portions of fees, and failing to communicate with clients. Although he initially communicated with the Office of Bar Counsel, Kenniston failed to respond to the charges initiated by the Inquiry Commission. The KBA moved under SCR 3.380(2) to have Kenniston suspended indefinitely due to his failure to timely respond. The Court agreed with the KBA's motion and ordered Kenniston suspended indefinitely.

**Kentucky Bar Association v. Myran Deshawn Chenault
2018-SC-000081-KB**

June 14, 2018

Opinion and Order of the Court. Keller, VanMeter, Venters, Wright, JJ., concur. Hughes, J., dissents to the extent that she would not probate any portion of the four-year suspension, in which Minton, C.J., joins. Cunningham, J., not sitting. Chenault was appointed as Master Commissioner and served in that capacity for several years. As part of her duties, Chenault was responsible for paying herself and her staff from the Master Commissioner's operating account. An annual audit of that account revealed substantial discrepancies in the audits for 2013 and 2014. Specifically, Chenault should have paid herself an annual salary of no more than \$58,000; however, in 2013, Chenault exceeded her authorized compensation by \$32,663.07, and in 2014, by \$27,520.83. She was criminally charged with Abuse of Public Trust, a Class C felony. She entered an *Alford* plea to an amended charge, which reduced the crime from a Class C to a Class D felony.

Following her *Alford* plea, Chenault was suspended from the practice of law pursuant to SCR 3.166.2 A bar complaint, charge, and hearing before a KBA Trial Commissioner followed. At the hearing, Chenault insisted that her withdrawal of unauthorized funds was an accounting error which occurred as a result of being overwhelmed with her job duties and not being properly trained. The Trial Commissioner ultimately recommended Chenault be found guilty of violating SCR .3.130(8.4)(b) and (c) and that she be suspended for a period of four years, retroactive to the date of her automatic suspension, with the final eighteen months of her suspension probated upon conditions that she comply with the conditions of her criminal diversion and complete the KBA's Ethics and Professionalism Enhancement Program.

The KBA's Board of Governors voted 13 to 4 to accept the findings and recommendations of the Trial Commissioner. Thereafter, KBA's Office of Bar Counsel filed a notice of review pursuant to SCR 3.370(7), arguing to this Court that the sanction recommended by the Board was inadequate.

After reviewing Chenault's file, the Court found no reason to upset the recommendation of the Trial Commissioner or the findings of facts and conclusions of law of the Board. Accordingly, Chenault was ordered suspended from the practice of law for a period of four years, with the final eighteen months of suspension to be probated with conditions.

**Kentucky Bar Association v. Dennis Michael Stutsman
2018-SC-000100-KB**

June 14, 2018

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission filed a four-count charge against Stutsman based on his failure to adequately represent a client in an adoption action. The counts included violations of SCR 3.130-1.1 (failure to provide competent representation); SCR 3.130-1.16(d) (failure to protect client's interests); SCR 3.130-3.2 (reasonable efforts to expedite litigation); SCR 3.130-8.1(b) (failure to response to a lawful demand for information from an admissions or disciplinary

authority.” Stutsman did not respond to the charge and the Board of Governors found him guilty of all four counts, recommending a 181-day suspension from the practice of law.

The Court reviewed the Board’s recommendation and Stutsman’s disciplinary history, which included a private reprimand, a public reprimand and a 30-day suspension, all for misconduct similar to violations in the present case. After reviewing the facts of the present case, the Court found Stutsman guilty of violating SCR 3.130-1.16(d); SCR 3.130-3.2; and SCR 3.130-8.1(b), and ordered him suspended from the practice of law for 181 days, to run consecutively with all suspensions currently imposed.

Kentucky Bar Association v. Daniel Alan Niehaus
2018-SC-000148-KB

June 14, 2018

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission issued a four-count charge against Niehaus based on his failure to pay his client and an insurance company’s subrogation claim out of settlement funds. The charge was mailed to Niehaus at his address of record but was returned undeliverable. He was constructively served under SCR 3.175(2) but did not respond to the charge.

In considering the appropriate discipline for the current charges, the Board considered Niehaus’s prior disciplinary history. In January 2017, the Board suspended Niehaus for failure to pay bar dues and non-compliance with CLE requirements. In February 2018, the Supreme Court of Kentucky suspended Niehaus for 181 days and ordered him to pay restitution to his client. And in November 2016, the Ohio Supreme Court suspended Niehaus from the practice of law due to disciplinary violations.

The matter was submitted to the Board as a default case under SCR 3.210(1). The Board voted 14-2 to permanently disbar Niehaus from the practice of law. The Supreme Court agreed with the Board’s assessment, declining to review its decision under SCR 3.370(8) and adopting its findings and recommendations under SCR 3.370(9).

Kentucky Bar Association v. Damian Gallaher
2018-SC-000160-KB

June 14, 2018

Opinion and Order of the Court. All sitting; all concur. In 2017, the Inquiry Commission issued four separate disciplinary charges against Gallaher. In each instance, Gallaher accepted payment from a client but failed to provide any representation. He was charged with violating SCR 3.130-1.3 (failure to act with reasonable diligence); SCR 3.130-1.4(a)(3) and (4) (failure to promptly provide the client with necessary information and explanation); SCR 3.130-1.16(d) (failure to properly terminate representation); and SCR 3.130-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Gallaher’s case proceeded to the Board of Governors as a default case pursuant to SCR 3.210. The Board found Gallaher guilty of committing 11 disciplinary infractions and voted 11-6 to permanently disbar him from the practice of law in the Commonwealth.

In determining the appropriateness of the Board’s recommendation, the Supreme Court considered Gallaher’s prior discipline. In February 2018, the Court suspended Gallaher from the practice of law for a period of five years based on six different KBA case files, each involving conduct similar if not identical to the conduct in the present case. Considering Gallaher’s history and his pending charges, the Court agreed with the Board’s recommendation and permanently disbarred Gallaher from the practice of law in the Commonwealth.

Sean Patrick Paris v. Kentucky Bar Association
2018-SC-000200-KB

June 14, 2018

Opinion and Order of the Court. All sitting; all concur. Paris moved to Colorado in June 1996. He failed to comply with Supreme Court Rule (SCR) 3.480(1) for withdrawal from the KBA and was suspended by Order of this Court for non-payment of dues on April 22, 1999. Since May 1997, Paris has practiced law in Colorado. He has never been disciplined, nor has he been required to surrender a license in Kentucky or any other state.

In November 2016, Paris filed an Application for Restoration pursuant to SCR 3.500(3). His application included a memorandum from the Office of Bar Counsel stating that he has no disciplinary matters pending against him, nor has he been the subject of any claims against the Clients' Security Fund. In addition, the Director of Continuing Legal Education (CLE) of the KBA provided a letter stating that Paris has complied with the CLE requirement for restoration. The Character and Fitness Committee reviewed Paris's application and rendered its Findings of Fact, Conclusions of Law, and Recommendation. The Committee determined that Paris's conduct since suspension has been appropriate and that nothing reported would disqualify him from readmission. The Board of Governors unanimously recommended approval of the restoration application and referred Paris to the Board of Bar Examiners for examination. Paris sat for the written examination and received a passing score.

Upon review of the record, the Court found that Paris met all requirements of SCR 3.500. Accordingly, the Court restored Paris to the practice of law in the Commonwealth.

Charles Frederick Merz v. Kentucky Bar Association
2018-SC-000208-KB

June 14, 2018

Opinion and Order of the Court. All sitting; all concur. Merz moved the Court for a public reprimand for his admitted violations of Supreme Court Rules (SCR) 3.130-1.15(d) and 3.130-8.4(c). Merz discontinued the use of his client trust account several years ago but left earned fees in the account and began depositing additional earned fees in the account. Merz's bank notified the Office of Bar Counsel in July 2015 of an overdraft of Merz's account that resulted from three paychecks to Merz's secretary. The Inquiry Commission issued a complaint and a Charge was filed. Merz responded to the Charge indicating that his general accounts had been garnished and he did not feel comfortable depositing payments from clients into his general account. Merz did not use the account as a trust account and intended to establish new bank accounts not subject to the garnishments. Merz acknowledged that he should not have used the previously designated trust account as a general account and has since transferred the funds in the trust account to new general bank accounts. Merz requested a public reprimand as a negotiated sanction for his actions. The KBA made no objection. Accordingly, the Court issued a public reprimand and ordered Merz to pay all costs of the disciplinary proceeding.

David Joe Porter v. Kentucky Bar Association
2018-SC-000115-KB

August 16, 2018

Opinion and Order of the Court. All sitting; all concur. Porter moved the Court to enter an Order resolving the pending disciplinary proceedings against him by imposing a Public Reprimand and a 181-day suspension, probated subject to conditions. The motion was the result of an agreement negotiated with Bar Counsel, pursuant to SCR 3.480(2).

The disciplinary proceedings at issue involved identity theft of Porter's status as an attorney by another attorney, John Brady, and a staff person, Charles Mills, who operated out of Porter's Lexington satellite office while Porter operated primarily out of Paintsville. Unbeknownst to Porter, Brady and Mills

deliberately withheld information from him, including mail, and held themselves out to prospective clients as Porter. This intentional misconduct was undertaken in such a way as to disguise what was occurring and led to numerous bar complaints being filed against Porter. Brady and Mills were charged criminally, and Porter acknowledged lack of appropriate oversight regarding the operation and supervision of the Lexington office.

The Inquiry Commission ultimately charged Porter with numerous violations of the Rules of Professional Conduct, which led to the agreed sanction and Porter's motion. Upon review of the facts of this case, the relevant case law, and Porter's disciplinary history, the Supreme Court concluded that the proposed discipline was adequate and sanctioned Porter accordingly.

Kentucky Bar Association v. Jason Thomas Butler
2018-SC-000149-KB

August 16, 2018

Opinion and Order of the Court. All sitting; all concur. Butler failed to timely respond to a client complaint. The Inquiry Commission resolved the complaint in Butler's favor but charged him with the failure to timely respond to the allegation. The failure to respond charge was resolved by the issuance of an Order of Private Admonition with Conditions in July 2016. Among the conditions was the requirement that Butler provide the medical records documenting the health issues that allegedly prevented him from responding to the client complaint and completing the Ethics and Professionalism Enhancement Program. Butler again failed to respond. So the Inquiry Commission withdrew the Private Admonition and issued a new charge for violating SCR 3.130(3.4)(c) for knowingly disobeying an obligation to the KBA.

The Board of Governors again issued its disciplinary recommendation requiring the filing of Butler's medical records. After five more months passed without compliance, the Supreme Court concluded that Butler had been given a reasonable time to comply with the obligation to file his medical records. Based on Butler's failure to comply and his previous suspension for nonpayment of dues, the Court found him guilty of violating SCR 3.130(3.4)(c) and suspended him from the practice of law for 30 days.

Kentucky Bar Association v. James Willis Harris
2018-SC-000209-KB

August 16, 2018

Opinion and Order of the Court. All sitting; all concur. The Board of Governors recommended that the Supreme Court find Harris guilty of violating SCR 3.130-1.4(a)(3) and 8.1(b). The Board also recommended that Harris be publicly reprimanded for these infractions. Harris did not participate in the proceedings, and the Court noted that he recently had been publicly reprimanded in a separate disciplinary proceeding and was under suspension for failing to pay his bar dues and failing to complete continuing legal education requirements. Because the case proceeded as a default case, the Court adopted the recommendation of the Board under SCR 3.370(9) and publicly reprimanded Harris.

Inquiry Commission v. Richard Graham Kenniston
2018-SC-000230-KB

August 16, 2018

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission petitioned the Supreme Court to temporarily suspend Kenniston for intentional misappropriation of client funds. Based on the claims and documentation provided by the Inquiry Commission, the Court found probable cause to believe Kenniston posed a substantial threat of harm to his clients or the public. Accordingly, the Court temporarily suspended Kenniston and restricted him from dealing with client funds held in any bank account.

Bethany L. Stanziano-Sparks v. Kentucky Bar Association
2018-SC-000259-KB

August 16, 2018

Opinion and Order of the Court. All sitting; all concur. Stanziano-Sparks moved the Supreme Court to impose a public reprimand with conditions that she successfully complete the next Ethics and Professionalism Enhancement Program and return money to her clients. The motion was the result of a negotiated sanction with the Office of Bar Counsel and the KBA did not object. Finding this sanction to be the appropriate discipline for the misconduct, the Court granted Stanziano-Sparks's motion and sanctioned her accordingly.

Kentucky Bar Association v. Christina Rose Edmondson
2017-SC-000650-KB

September 27, 2018

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission charged Edmondson in three separate matters, each of which proceeded as a default case under SCR 3.210. The Board of Governors found Edmondson guilty in all three cases and recommended that she be suspended from the practice of law for two years, with the suspension running consecutively to her current suspension. Under 3.370(9), the Court adopted the Board's recommendation and sanctioned Edmondson accordingly.

Kentucky Bar Association v. Matthew Ryan Malone
2018-SC-000246-KB

September 27, 2018

Opinion and Order of the court. All sitting; all concur. Malone signed his client's signature on eight documents, all with his client's permission. The signatures on six of the documents were notarized by employees of Malone's law firm as though his client had signed the documents in the presence of a notary. On the other two documents, the notary's signature and number were executed and affixed by Malone. Malone failed to inform the court or opposing counsel that he had signed his client's name with permission on the pleadings, that the pleadings were notarized by employees of his law firm, or that two of the eight pleadings contained false notary signatures.

After opposing counsel questioned him about one of the documents, Malone self-reported to the Kentucky Bar Association. The Inquiry Commission eventually filed a two-count charge against Malone alleging violations of SCR 3.130(3.3)(a)(1) (making a false statement of fact or law to a tribunal) and SCR 3.130(8.4)(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). The Trial Commissioner recommended that Malone be suspended from the practice of law for sixty days, with thirty days suspended for a period of one year on the condition that he receives no further disciplinary charges during that period.

Malone appealed from the Trial Commissioner's report and the case proceeded to the Board of Governors. The Board unanimously voted to reject the Trial Commissioner's report and considered the matter *de novo*. The Board agreed that Malone was guilty of the allegations in the charge. But the Board determined that Malone had permission to sign his client's name to the documents and that there was no harm or prejudice to anyone. Additionally, the Board noted that Malone did not financially profit from his actions and that Malone reported the violations to the KBA in a timely manner. Accordingly, the Board unanimously voted that Malone should receive a public reprimand.

After reviewing the record and factually similar cases, the Court agreed with the Board's recommendation and publicly reprimanded Malone for his conduct.

Kentucky Bar Association v. Robert Good Lohman, III
2018-SC-000334-KB

September 27, 2018

Opinion and Order of the Court. All sitting; all concur. The Kentucky Bar Association petitioned the Court to impose reciprocal discipline against Lohman under SCR 3.455. In May 2018, the Supreme Court of the State of Illinois entered an order suspending Lohman from the practice of law for one year. The Supreme Court of Kentucky ordered Lohman to show cause why reciprocal discipline should not be imposed. Lohman failed to respond, so the Court granted the KBA's motion and imposed reciprocal discipline, suspending Lohman from the practice of law in the Commonwealth for a period of one year.

Kentucky Bar Association v. Charles Edward Daniel
2018-SC-000348-KB

November 1, 2018

Opinion and Order of the Court. All sitting; all concur. The Tennessee Supreme Court found that Daniel had violated Rule 8.4(b) and (c) of the Tennessee Rules of Professional Conduct by misappropriating funds from his law partnership in a manner intended to conceal his actions from his partners. As a result, the Court imposed three years' suspension upon Daniel, with one year to be served on active suspension and the remaining two years on probation.

The Kentucky Bar Association then petitioned the Supreme Court of Kentucky for reciprocal discipline and requested the Court to order Daniel to show cause why reciprocal discipline should not be imposed. The Court entered a show cause order and Daniel failed to respond. Accordingly, under SCR 3.435, the Court imposed reciprocal discipline on Daniel, suspending him from the practice of law in Kentucky for three years, with one year to be served on active suspension and the remaining two years on probation.

Kentucky Bar Association v. Kenneth Joseph Bader
2018-SC-000376-KB

November 1, 2018

Opinion and Order of the Court. All sitting; all concur. Bader was charged with violating several Rules of Professional Conduct. The charges arose from four separate disciplinary files and related to Bader's failure to perform services for which he was hired, failure to return unearned fees to clients, failure to keep clients informed, and practicing law while suspended.

The Supreme Court noted Bader's disciplinary history, which included a private admonition, a 30-day suspension, and an indefinite suspension after he attempted to practice law during the 30-day suspension. The Court also noted Bader's failure to participate in the previous disciplinary proceedings.

The Board of Governors found Bader guilty of all charges pending against him and voted to suspend him for two years. The Court adopted the Board's recommendation and suspended Bader from the practice of law in Kentucky for two years.

Christopher David Wiest v. Kentucky Bar Association
2018-SC-000537-KB

November 1, 2018

Opinion and Order of the Court. All sitting; all concur. Wiest applied for reinstatement to the practice of law under SCR 3.510(3). The Board of Governors unanimously recommended his reinstatement.

Wiest's suspension arose from unlawful securities trading. He was suspended by the Supreme Court of Ohio and the U.S. District Court for the Southern District of Ohio. The Supreme Court of Kentucky then imposed reciprocal discipline and suspended Wiest from the practice of law for two years.

In January 2108, the Ohio Supreme Court determined that Wiest had substantially complied with the order of suspension and reinstated him to the practice of law. The U.S. District Court for the Southern District of Ohio also reinstated him.

The Character and Fitness Committee of the Kentucky Office of Bar Admissions recommended that Wiest's application be approved, and Bar Counsel filed a motion recommending that the Board accept the Committee's recommendation. The Board of Governors then voted unanimously to reinstate Wiest. The Court agreed with the Board's recommendation and ordered Wiest reinstated to the practice of law in Kentucky

Kentucky Bar Association v. Myra DeShawn Chenault
2018-SC-000081-KB

December 13, 2018

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, VanMeter, Venters, and Wright, JJ., sitting. All concur. Cunningham, J., not sitting. Chenault was criminally charged with Abuse of Public Trust, a Class C felony, for paying herself more than her authorized compensation while serving as the Montgomery County Master Commissioner. She entered an *Alford* plea to an amended charge, which reduced the crime from a Class C felony to a Class D. The circuit court sentenced Chenault to two years' imprisonment, diverted for three years on the conditions that she pay restitution and commit no new offenses. Chenault paid \$60,000 in restitution to the Administrative Office of the Courts in June 2015.

Following her *Alford* plea, Chenault was suspended from the practice of law pursuant to SCR 3.166. A bar complaint, charge, and hearing before a KBA Trial Commissioner followed. At the hearing, Chenault insisted that her withdrawal of unauthorized funds was an accounting error which occurred as a result of being overwhelmed with her job duties and not being properly trained. The Board of Governors found that Chenault was genuinely remorseful for her conduct. The Board considered the fact that, since Chenault's automatic suspension from the practice of law, she had two disciplinary complaints against her; however, the Board noted that neither of these complaints involved conduct bearing upon her honesty, trustworthiness, or fitness to practice law in the future and issued private admonitions related to both those complaints.

The Board ultimately recommended Chenault be found guilty of violating SCR 3.130(8.4)(b) and (c) and that she be suspended for a period of four years, retroactive to the date of her automatic suspension in June 2015, with the final eighteen months of her suspension probated upon conditions that she comply with her criminal diversion and complete the KBA's Ethics and Professionalism Enhancement Program. The Office of Bar Counsel filed a notice of review under SCR 3.370(7), asking the Court to permanently disbar Chenault or, at a minimum, to suspend her for a minimum of five years.

After reviewing the file, the Court found the Board's recommendation compelling and suspended Chenault accordingly.

Kentucky Bar Association v. Steven Harris Keeney
2018-SC-000377-KB

December 13, 2018

Opinion and Order of the Court. All sitting. Minton, C.J.; Hughes, Keller, VanMeter, and Venters, JJ., concur. Cunningham, J., dissents by separate opinion in which Wright, J., joins. Keeney was hired to represent a woman in an insurance claim and a civil suit after a small plane flew into her house. A series of alleged disciplinary violations ensued, which resulted in the Inquiry Commission filing a charge against Keeney on the following eight counts: (1) Lack of Diligence, SCR 3.130(1.3); (2) Inadequate Communications, SCR 3.130(1.4)(a); (3) Unreasonable Fee, SCR 3.130(1.5)(a); (4) Conflict of Interest, SCR 3.130(1.8)(h); (5) Safekeeping Property, SCR 3.130(1.15)(a); (6) Failure to Obey Court

Orders/Rules, SCR 3.130(3.4)(c); Criminal Conduct, former SCR 3.130(8.3)(b), now (8.4)(b) and; (8) Dishonesty, Deceit, or Misrepresentation, former SCR 3.130(8.3)(c), now (8.4)(c).

After a hearing and briefing by both parties, the Trial Commissioner found Keeney guilty of all eight counts and recommended a five-year suspension. Subsequently, the Board of Governors found Keeney guilty of all but Counts Three and Seven and recommended a two-year suspension. Both parties filed a notice of review with the Supreme Court under SCR 3.370(7).

The Court agreed with the Board that Keeney committed at least six of the charges against him, noting the “litany of misconduct” by Keeney and the detrimental impact it had on his client’s health and welfare. But the Court disagreed with the Board’s recommendation for a two-year sentence, determining instead that Keeney should be suspended from the practice of law for four years. Accordingly, the Court suspended Keene for four years and ordered him to pay the costs of the proceedings.

Inquiry Commission v. Joseph W. Bolin
2018-SC-000448-KB

February 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. The Inquiry Commission petitioned the Supreme Court to temporarily suspend Bolin under Supreme Court Rule (SCR) 3.165(1)(a), because there was probable cause to believe that Bolin had misappropriated almost \$1 million in client funds. In its petition, the Commission noted that Bolin had been indicted on criminal charges related to the misappropriation and likely had violated the Rules of Professional Conduct. In response to the Supreme Court’s Order to Show Cause, counsel for Bolin stated that Bolin had no objection to the entry of an order temporarily suspending him from the practice of law. Counsel stated that Bolin had closed his law practice and closed his office.

Considering the Commission’s petition and Bolin’s response, the Court agreed there was a reasonable basis to believe that Bolin misappropriated funds he held for others or had otherwise been improperly dealing with client funds. Accordingly, the Court granted the petition and temporarily suspended Bolin from the practice of law.

An Unnamed Attorney v. Kentucky Bar Association
2018-SC-000575-KB

February 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. The Movant, an Unnamed Attorney, moved the Supreme Court under SCR 3.480(2) to accept his negotiated sanction with the Kentucky Bar Association of a Private Reprimand with Conditions for violations of SCR 3.130(1.9)(c) and SCR 3.130(1.11)(a). The Court approved the negotiated sanction. But the parties and the Court believed other members of the Bar would benefit from a published, redacted opinion addressing application of SCR 3.130(1.9) and SCR 3.130(1.11) due to the lack of existing precedent. The name of the Movant was omitted to protect the anonymity of the attorney being privately reprimanded.

Unnamed Attorney worked for several years in various legal capacities for a city government (“City”). Unnamed Attorney left the full-time employment of City for private practice but still contractually represented City in some matters. A client retained Unnamed Attorney to represent her in a civil claim involving City. Thereafter, Unnamed Attorney reached out to his former employer in an attempt to gain written consent to represent the woman in a dispute over a zoning permit in which City could potentially be sued. City originally consented to Unnamed Attorney’s representation but withdrew its consent and filed a motion to disqualify Unnamed Attorney. The trial court disqualified Unnamed Attorney, holding that he “substantially and personally participated” on behalf of City in matters substantially similar to

those he was now litigating for his private client. Subsequently, the Inquiry Commission issued charges against Unnamed Attorney for violating SCR 3.130(1.9)(c) and SCR 3.130(1.11)(a).

In analyzing the allegations against Unnamed Attorney, the Court noted there was little precedent on either of the rules he was alleged to have violated, but particularly SCR 3.130(1.11)(a). In this case, the Court determined that Unnamed Attorney did not receive proper informed consent when, after his former employer consented to allow him to represent his client in a simple zoning permit dispute with the potential for a lawsuit, he filed a thirty-seven-page complaint alleging City violated the Americans with Disabilities Act, the Fair Housing Act, and several other non-zoning issues. Prior to filing his consent, Unnamed Attorney should have contacted City and again requested informed consent, confirmed in writing, to represent his client in this new endeavor. Ultimately, City would have denied his request, and Unnamed Attorney would have needed to withdraw as counsel for the client. However, he would have been in compliance with the Rules in that scenario.

Because Unnamed Attorney had no prior discipline and admitted to the violations, the Court determined that the negotiated sanction for a private reprimand was appropriate and sanctioned Unnamed Attorney accordingly.

Fred Garland Greene v. Kentucky Bar Association
2018-SC-000600-KB

February 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ, sitting. All concur. Greene moved the Court to enter a negotiated sanction imposing a three-year suspension. The Supreme Court noted that Greene had a history of prior discipline, including seven private admonitions; one public reprimand and a thirty-day suspension; and a 181-day suspension with 61-days probated for one year upon conditions. The present matter involved three consolidated KBA disciplinary files that arose from a period of time when Greene was suspended from the practice of law. In each instance, Greene continued to represent a client despite his suspension.

After reviewing the facts of the disciplinary files and relevant case law involving similar disciplinary violations, the Supreme Court agreed with the terms of the negotiation sanction and ordered Greene suspended from the practice of law in the Commonwealth for three years, retroactive to March 1, 2017.

Kentucky Bar Association v. Christy Handley Shircliff
2018-SC-000607-KB

February 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ, sitting. All concur. Shircliff failed to respond to a charge of four separate violations of the Kentucky Rules of Professional Conduct. The Inquiry Commission alleged violations of SCR 3.130(8.1)(b) (failure to respond to a demand for information from a disciplinary authority); SCR 3.130(1.3) (failure to act with reasonable diligence and promptness in representing a client); SCR 3.130(1.4)(a)(4) (failure to promptly comply with a request for information); and SCR 3.130(1.16)(d) (failure to take steps to protect a client's interests upon termination of representation). The Court agreed with the Commission's findings and entered an order suspending Shircliff for an indefinite period of time under SCR 3.380(2).

Leah Stacy Fink v. Kentucky Bar Association
2018-SC-000647-KB

February 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ, sitting. All concur. Fink received a two-count charge for violating the Kentucky Rules of Professional Conduct. Fink filed a Motion for Consensual Discipline, in which she requested a suspension for a period

of five years, or until she has satisfied the terms of her probation in an underlying criminal case, and continued cooperation with KYLAP. The Board made no objection to the Motion. Noting significant mitigating circumstances, the Court agreed with the proposed discipline and sanctioned Fink accordingly.

Kentucky Bar Association v. Rachelle Nicholle Howell
2018-SC-000438-KB

March 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. The Board of Governors recommended the Supreme Court find Howell guilty of violating SCR 3.130-1.3 (nine counts); 3.130-1.4(a)(3); 3.130-1.4(a)(4) (nine counts); 3.130-1.15(e); 3.130-1.16(d) (ten counts); and 3.130-8.1(b) based on ten consolidated disciplinary files. The Board also recommended that the Court suspend Howell for ninety days, with an additional ninety-one days to be probated for a period of two years with conditions.

Bar Counsel argued before the Court that the Board erred in its disciplinary recommendation because it was not supported by substantial evidence and was clearly erroneous as a matter of law under SCR 3.370(5)(a)(1). Bar Counsel further argued that Howell's suspension, which permits automatic reinstatement, unduly depreciated the seriousness of Howell's misconduct.

Noting that the recommendation of the Board is merely advisory under SCR 3.360, the Court agreed with Bar Counsel. The Court discounted the mitigating factors offered by Howell and determined, based on precedent, that Howell's reinstatement to practice law in the Commonwealth must be contingent upon the approval of the Character and Fitness Committee. Accordingly, the Court ordered that Howell be suspended for a period of one hundred and eighty-one days, with the suspension continuing until she is reinstated to the practice of law by order of the Court under SCR 3.510.

Kentucky Bar Association v. Justin Neal O'Malley
2018-SC-000664-KB

March 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. In October 2018, the United States Bankruptcy Court for the Eastern District of Kentucky permanently disbarred O'Malley from the practice of law in that court. The KBA filed a petition for reciprocal discipline under SCR 3.435.

O'Malley was previously suspended for 181 days by the Supreme Court for his actions in another bankruptcy case concluding in violations of SCR 3.130(1.1) (competency); 3.130(1.16)(d) (duties upon termination of representation); 3.130(3.3)(a)(1) (making a false statement of fact to a tribunal); 3.130(3.4)(c).

In the present case, O'Malley's clients contacted a Chapter 13 Bankruptcy Trustee to resolve their issues after their case was closed without discharge in late 2017. The Trustee discovered that O'Malley had forged another attorney's name on legal documents and had failed to return his clients' money, using it instead for personal expenses. The Trustee moved to disbar O'Malley, and the parties eventually signed an Agreed Order wherein O'Malley agreed to be permanently prohibited from practice in the United States Bankruptcy Court for the Eastern District of Kentucky and to pay his clients \$10,500 within 30 days.

The KBA filed a reciprocal discipline petition with the Supreme Court in December 2018. O'Malley failed to respond to the petition as directed under SCR 3.435. Accordingly, the Court ordered O'Malley permanently disbarred from the practice of law in the Commonwealth.

Bryan Edward Bennett v. Kentucky Bar Association
2019-SC-000069-KB

March 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Attorney Bryan Edward Bennett and the Kentucky Bar Association agreed to a negotiated sanction under SCR 3.480(2) to impose a public reprimand of Bennett for violations of Supreme Court Rules 3.130(1.3) (lawyer shall act with reasonable diligence and promptness in representing a client), 3.130(1.4)(b) (lawyer shall explain a matter to a client to permit that client to make informed decisions regarding representation), and 3.130(1.16)(d) (lawyer shall protect client's interests upon termination of representation). Bennett failed to adequately represent his client in his client's immigration proceedings, putting his client at risk for deportation. The Court approved the negotiated sanction, to which the KBA did not object, in light of *Teater v. Kentucky Bar Ass'n*, 243 S.W.3d 349 (Ky. 2008), after Bennett admitted his guilt, promised to take Continuing Legal Education classes in the field of immigration law, and took steps to rectify his actions.

Carroll Hubbard, Jr. v. Kentucky Bar Association
2018-SC-000436-KB

April 18, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Buckingham, J., not sitting. Hubbard was counsel for a party in a contentious case. While the case was pending, Hubbard clipped a picture of opposing counsel and her wife from a newspaper, drew an arrow to the couple, and wrote several derogatory terms beneath the photograph. He then addressed the envelope to opposing counsel and her wife and mailed it to them.

At a hearing in the visitation case, Hubbard denied that he mailed the newspaper clipping, despite the judge directly asking him on two separate occasions if he had done so. Hubbard was then sworn-in after being called as a witness by opposing counsel and, under oath, denied it was his handwriting on the envelope. Opposing counsel filed a bar complaint against Hubbard and the next day Hubbard self-reported to the KBA, filing a complaint on himself. In his self-report, Hubbard admitted to mailing the clipping to opposing counsel and her wife and issued an apology.

The Inquiry Commission charged Hubbard with five counts of misconduct, including two counts of violating SCR 3.130-3.3(a)(1), for knowingly "mak[ing] a false statement of fact or law to a tribunal." Hubbard admitted he violated this rule by denying to the court that he had any involvement in mailing the newspaper clipping. The Inquiry Commission also charged Hubbard with two counts of violating SCR 3.130-8.4(c), which provides that "it is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Hubbard admitted he violated the rule by denying to opposing counsel twice during the hearing that he sent the clipping to her and his wife. Finally, Hubbard was charged with one count of violating SCR 3.130(8.4)(b), which provides: "[i]t is professional misconduct for a lawyer to: . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Hubbard admitted that his conduct in denying under oath that his handwriting was on the envelope addressed to opposing counsel amounted to a violation of this rule. Specifically, Hubbard violated KRS 523.040 (false swearing – a Class B misdemeanor). Hubbard further admitted to filing a JCC complaint against the judge as a retaliatory and vindictive act, and to lying to another local attorney regarding the nature of the JCC complaint.

The parties agreed the appropriate sanction for Hubbard's ethical violations was a sixty-day suspension from the practice of law on the condition that he send written apologies to the judge, opposing counsel, opposing counsel's wife, and the local attorney to whom he lied about the JCC complaint. Hubbard moved the Court to approve the negotiated sanction and the KBA did not object.

After examining relevant case law, the Court agreed that Hubbard was guilty of all charged counts, and that a sixty-day suspension was the appropriate sanction. The Court further ordered Hubbard to send apology letters to the aggrieved parties and to file the letters with the circuit clerk and the Office of Bar Counsel.

Inquiry Commission v. Andrew Nicholas Clooney
2018-SC-000595-KB

April 18, 2019

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission provided four verified complaints filed by Clooney’s former clients against Clooney and his firm, Clooney Law Office. The Inquiry Commission also attached a standard complaint, for a total of five complaints, all representing civil actions filed in Jefferson Circuit Court. The Office of Bar Counsel also received bar complaints relating to three of the five civil actions. In all of the cases, it was alleged that Clooney misappropriated or mishandled client funds, including forging clients’ signatures on settlement releases.

Based on these allegations, the Inquiry Commission petitioned the Court to temporarily suspend Clooney under Supreme Court Rule (SCR) 3.165(1)(a) and 3.165(1)(b), which permits temporary suspension if there is probable cause to believe an attorney has been misappropriating or mishandling funds, or that his conduct poses a threat of harm to his clients or the public. A show cause order was issued on February 14, 2019, but Clooney failed to respond. The Court held there was sufficient supporting evidence in the record to warrant temporary suspension. Accordingly, the Court ordered Clooney temporarily suspended, pending further orders.

Kentucky Bar Association v. Christy Hanley Shircliff
2018-SC-000607-KB

April 18, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Buckingham, J., not sitting. The Kentucky Bar Association (“KBA”) moved the Court to set aside the findings of guilt in the Court’s February 14, 2019 Opinion and Order, which found Shircliff guilty of a pending disciplinary charge and suspended her indefinitely under SCR 3.380(1). Shircliff also moved the Court to amend, alter, or vacate the opinion because she had submitted an answer to the disciplinary charge. Although the answer was submitted after the original deadline, the KBA deemed the answer to be filed and Shircliff was no longer in default. Finally, the KBA moved the Court to order Shircliff to show cause as to why she should not be held in contempt of the Court for violating the February 14, 2019 order of suspension, alleging that she had practiced law after the date the order became effective.

The Court agreed with the KBA and set aside the findings of guilt contained in the February 14, 2019 Opinion and Order, finding instead that the underlying disciplinary case was still pending at the KBA. The Court denied Shircliff’s motion to amend, alter, or vacate the February 14, 2019 order of indefinite suspension because Shircliff has failed to file a response to the KBA’s motion seeking indefinite suspension with this Court and had failed to account for her failure to file an answer to the underlying disciplinary charge before the original deadline. Finally, the Court ordered Shircliff to show cause as to why she should not be held in contempt of the Court for violating the February 14, 2019 order of indefinite suspension.

Kentucky Bar Association v. Andrew Nicholas Clooney
2019-SC-000114-KB

April 18, 2019

Opinion and Order of the Court. All sitting; all concur. The Kentucky Bar Association (KBA) petitioned the Supreme Court to indefinitely suspend Clooney from the practice of law under Supreme Court Rule (SCR) 3.380(2) for violating SCR 3.200 by failing to answer a KBA charge. The charge was initiated

because of Clooney's failure to answer a Bar Complaint filed by a former client. Upon review of the record, the Court agreed that the proposed sanction was appropriate under SCR 3.380(2) and indefinitely suspended Clooney from the practice of law in the Commonwealth.