

**PUBLISHED OPINIONS  
KENTUCKY SUPREME COURT  
APRIL 2011**

**I. AGRICULTURAL DIVISIONS OF LAND**

- A. Paul Nash, et al. v. Campbell County Fiscal Court, et al.**  
[2009-SC-000152-DG](#) April 21, 2011

Opinion of the Court by Justice Schroder. All sitting. The Supreme Court voided a county ordinance which required prior approval by the County or the planning commission of agricultural divisions of land. The “agricultural supremacy clause” in KRS Chapter 100 and the Right to Farm Act, KRS 413.072, exempt land to be used for agricultural purposes from zoning and subdivision regulations. A three-part test is used to determine whether a division of a parcel qualifies as an agricultural division. The ordinance violated the statutory scheme of Chapter 100, which does not require prior approval of conveyances for agricultural divisions. Justice Noble concurred in part and dissented in part by separate opinion in which Justice Abramson joined.

**II. BOARD OF CLAIMS**

- A. Nelson County Board of Education v. Gene A. Forte, Individually and as Administrator of the Estate of Carole Forte, et al. and Gene A. Forte v. Nelson County School District**  
[2010-SC-000149-DG](#) April 21, 2011

Opinion of the Court by Justice Noble; all sitting. In a wrongful death case against the Nelson County Board of Education—a governmental entity—the plaintiff had filed actions simultaneously in circuit court and at the Board of Claims. Both claims were dismissed: the circuit court case on the basis of governmental immunity; and the Board of Claims action for exceeding the statute of limitations period. The plaintiff appealed the circuit court ruling, but having failed to name the Board of Education—an indispensable party—in his notice of appeal, it was properly dismissed by the Court of Appeals. The Court of Appeals allowed the Board of Claims action to proceed however, finding no statute of limitations violation. The Supreme Court agreed that the statute of limitations did not bar the Board of Claims claim, but reversed the Court of Appeals because the Board of Claims action, when filed, was unripe. When a case is filed in circuit court against a governmental entity, the Board of Claims may only obtain jurisdiction once the court has awarded immunity to the defendant. By the same token, the circuit court filing tolls the statute of limitations for a Board of Claims action so that, upon finality of court litigation, the plaintiff may seek relief from that Board. Justices Abramson, Schroder, and Venters concur. Justices Cunningham and Scott concur in result. The Chief Justice also concurs in result but believes that the existing ministerial vs. discretionary

framework underlying the immunity resolution of this case should be abandoned.

Justice Cunningham and Justice Scott concurred in result only. Chief Justice Minton concurred in the result reached by the majority, but continues to believe we should abandon the artificial and often hard-to-apply distinctions (such as ministerial vs. discretionary functions) traditionally employed in resolving sovereign immunity issues as expressed in his separate concurring opinion in *Caneyville Volunteer Fire Department v. Green's Motorcycle Salvage, Inc.*, 286 S.W. 3d (Ky. 2009). Because these traditional distinctions remain the law in Kentucky, the Chief Justice believes the majority opinion properly applies our sovereign immunity precedent and reaches the correct result.

### III. CRIMINAL

**A. Prince Wilbert Woolfolk v. Commonwealth of Kentucky**  
[2010-SC-000389-MR](#) April 21, 2011

Opinion of the Court by Justice Venters. All sitting. Defendant was convicted of first-degree rape. The Court held: (1) that the trial court did not abuse its discretion by denying Defendant's motion for a competency evaluation and continuance after he manifested symptoms of incompetency during the trial; (2) that the trial court erred by informing Defendant that he could be prosecuted for perjury if he testified and merely denied the crimes, but the error was harmless beyond a reasonable doubt; and (3) that there was no violation of Defendant's right to a speedy trial because of a twenty-four year lapse of time between the crime and the bringing of the indictment because preindictment delay does not count for speedy trial purposes under Wingo. Justice Noble dissented by separate opinion, in which Justice Scott joined.

**B. Troy Anthony Tunstull v. Commonwealth of Kentucky**  
[2008-SC-000170-MR](#) April 21, 2011

Opinion of the Court by Justice Schroder. All sitting. The Appellant was convicted of four counts of second-degree robbery in connection with four bank robberies. In all of the incidents, the perpetrator(s) rushed into the bank, masked or otherwise disguised, and aggressively demanded money from the tellers, however, no weapon was shown, and no overt threat of physical force was made. The issue in this case was whether the trial court erred in denying Appellant's motion for directed verdict as to second-degree robbery and refusing to give theft by unlawful taking instructions. The Supreme Court held that a person rushing into a bank, masked or otherwise disguised, and demanding money carries with it an implied threat of physical force if the persons from whom money is demanded do not comply. Hence, the trial court properly denied the motion for directed verdict as to second-degree robbery. The Supreme Court limited *Swain v. Commonwealth*, 887 S.W.2d 348 (Ky. 1994), to its own facts, and held theft instructions were not warranted. Accordingly, the convictions for second-degree robbery were affirmed.

Justice Venters dissented by separate opinion in which Chief Justice Minton joined.

**C. Douglas Wayne Hall v. Commonwealth of Kentucky**  
[2009-SC-000244-MR](#) April 21, 2011

Opinion of the Court by Chief Justice Minton. All sitting. Defendant appealed from trial court judgment convicting him of second-degree manslaughter, first-degree assault, first-degree burglary, and first-degree robbery and sentencing him to an aggregate term of forty-five years' imprisonment. Supreme Court reversed assault conviction but affirmed other convictions and remanded for further proceedings.

Issues/Holdings Include: 1) indictment charging Hall with nonsensical offense of attempted wanton murder was harmless error, 2) trial court properly instructed jury on First-Degree Assault as lesser included offense of Attempted Murder under facts of this case, 3) Supreme Court declined to adopt strict statutory elements approach to determining which uncharged offenses jury can properly be instructed on as lesser included offenses of charged offenses and retained fact-based approach embraced in *Perry v. Commonwealth*, 839 S.W.2d 268 (Ky. 1992), 4) trial court erred in refusing to instruct jury on Facilitation to Assault given supporting evidence but properly denied instructions on Facilitation to Robbery and Facilitation to Burglary where Hall clearly helped plan robbery and burglary, 5) trial court properly refused to conduct further evidentiary hearings concerning allegations of juror misconduct raised post-trial as RCr 10.04 prohibits examining jurors to establish grounds for new trial other than to show verdict made by lot, 6) trial court properly denied new trial motion and declined to conduct post-trial evidentiary hearings concerning allegations that a witness watched portions of trial in jail given trial court's inquiry in trial and allowing cross-examination and impeachment in trial and lack of specific prejudice alleged. Justice Schorder concurred in part and dissented in part by separate opinion.

**D. Michael Allen Hallum v. Commonwealth of Kentucky and Joe B. Jones v. Commonwealth of Kentucky**  
[2009-SC-000762-DG](#) April 21, 2011  
[2010-SC-000049-DG](#) April 21, 2011

Opinion of the Court by Justice Scott. All sitting; all concur. In this appellate procedure case, the Court retroactively applied the prison mailbox rule to the prisoners' notices of appeal and motions to proceed *in forma pauperis*. Here, these documents were purportedly tendered to prison officials prior to the 30-day deadline, yet they were not received by the circuit court until after the expiration of the deadline. These cases were dismissed before the enactment of the prison mailbox rule, RCr 12.04(5), which currently resolves this issue. In a narrow holding, the

Court concluded that Appellants qualified for retroactive application of the prison mailbox rule.

Additionally, with the enactment of the prison mail box rule, the Court held that *Robertson's* equitable tolling provision was duplicative and superfluous, and overruled it. *Robertson v. Commonwealth*, 177 S.W.3d 789 (Ky. 2005).

**E. Ronald Birdsong v. Commonwealth of Kentucky**  
[2009-SC-000084-DG](#) April 21, 2011

Opinion of the Court. All sitting. Appellant was convicted of Robbery, Second Degree. The Court granted discretionary review to address whether aggressive action towards inanimate objects is sufficient force to constitute Robbery, Second-Degree when lacking any expressed threat of harm to a person. Appellant claimed his lack of expressed threats towards a person entitled him to a directed verdict on the charge of Robbery, Second-Degree. The Commonwealth claimed that his actions and attitude were sufficient to create a reasonable belief of a threat of bodily harm under KRS 515.030. Based on a plain-language reading of the text of the statute, the accepted definitions of words used therein, Kentucky precedents, and similar statutes and precedents from other jurisdictions, the Court affirmed the lower court's conviction of Robbery, Second-Degree.

Justice Venters dissented by separate opinion, in which Chief Justice Minton joined.

**IV. DOMESTIC RELATIONS**

**A. Roy Shane Howard v. Sondra Howard**  
[2009-SC-000442-DG](#) April 21, 2011

Opinion of the Court by Chief Justice Minton. All sitting. Trial court's rulings on post-divorce decree motions (including motion to modify child support, motion to hold party in contempt, and motion for attorney's fees) affirmed. Issues/holdings include: 1) trial court properly denied post-decree motion to modify child support due to lack of evidence of "material and continuing change of circumstances" since decree, especially lack of evidence of changes since decree to justify discontinuing imputation of income to father based on finding of voluntary under-employment in decree (which was not timely appealed) and no requirement to show bad faith for finding of voluntary under-employment, and 2) trial court could properly enforce divorce decree obligation to make payments on marital debt (not accompanied by hold harmless clause) through its contempt powers even though payor spouse received post-decree Chapter 7 bankruptcy discharge and payee spouse failed to institute adversary proceedings in bankruptcy court under recent amendments to federal bankruptcy law especially as Kentucky

state courts have concurrent jurisdiction to determine whether a particular debt was discharged in a Chapter 7 bankruptcy. Justice Scott concurred in part and dissented in part by separate opinion, in which Justice Noble and Justice Cunningham joined.

**V. JUDICIAL STATEMENTS PRIVILEGE**

**A. Morgan & Pottinger Attorneys, P.S.C. v. Noel Mark Botts and GMAC Mortgage Corporation v. Noel Mark Botts**

[2009-SC-000515-TG](#) April 21, 2011

[2009-SC-000751-TG](#) April 21, 2011

[2009-SC-000818-TG](#) April 21, 2011

Opinion of the Court by Justice Cunningham. All sitting. The judicial statements privilege applies to statements made in the course of a disciplinary matter before the Kentucky Bar Association, including statements made in the complaint initiating such proceedings. Further, the privilege encompasses the act of filing an attorney ethics complaint, so as to bar later suits for abuse of process, outrage, or malicious prosecution. Justice Noble dissented by separate opinion. Justice Scott also dissented by separate opinion, in which Justice Schroder joined.

**VI. TAXATION**

**A. Wells Fargo Bank v. Commonwealth of Kentucky, Finance and Administration, Department of Revenue F/K/A Revenue Cabinet and Central Bank of Jefferson County, Inc., F/K/A First Bank, Inc. v. Commonwealth of Kentucky Finance and Administration Cabinet, Department of Revenue, F/K/A Revenue Cabinet**

[2008-SC-000419-DG](#) April 21, 2011

[2008-SC-000427-DG](#) April 21, 2011

Opinion of the Court by Special Justice Lawrence L. Jones. Justices Abramson and Noble not sitting; all concur. Opinion by Special Justice Lawrence L. Jones, II. Justices Abramson and Noble not sitting. All concur. This is a consolidated appeal to consider whether general tax liens under KRS 134.420(2) (now KRS 131.515) are superior to later filed mortgage liens, and to consider if equitable subrogation will displace the priority of an earlier-filed tax lien. On the first issue, the Supreme Court held that the old KRS 134.420(2) set the priority of general tax liens over all other liens.

On the second issue, the Supreme Court affirmed the Court of Appeals, holding that as a professional lender the Appellant should have had actual or constructive knowledge of any defects in the title, and that any lender with actual or constructive knowledge of an earlier recorded lien may not receive a reordering of priority based on equitable subrogation.

## **VII. WORKERS COMPENSATION**

### **A. Pella Corporation v. Joyce Bernstein, et al.**

[2010-SC-000448-WC](#)

April 21, 2011

Opinion of the Court. All sitting; all concur. Bernstein alleged repetitive trauma injuries to her neck, back, and shoulders. The ALJ found that the neck and back injuries produced a combined permanent impairment rating of 33%. The ALJ also found that Bernstein sustained a permanent left shoulder injury but that the right shoulder injury did not warrant a permanent impairment rating, basing the latter finding on certain medical evidence and Bernstein's testimony that she no longer had any right shoulder complaints. Inasmuch as her physician failed to apportion the 10% impairment rating that he assigned based on "adhesive capsulitis of the shoulders greater on the left than the right," the ALJ concluded that the evidence did not permit an award for the left shoulder injury. Reversing, the Board held that the ALJ had discretion to apportion the impairment rating and could find reasonably that the left shoulder injury produced a 6 to 10% rating. The Court of Appeals affirmed. Also affirming, the Supreme Court noted that the permanent impairment rating an injury produces is a medical question but that an ALJ has some discretion to select the impairment rating upon which to base an award. The court concluded that the ALJ was free under the present circumstances to consider the relevant medical evidence; select a reasonable impairment rating; and award income benefits.

### **B. Ila Nickell v. Diversicare Management Services, et al.**

[2010-SC-000481-WC](#)

April 21, 2011

Opinion of the Court. All sitting. All concur. The Board entered an opinion that affirmed a decision in Diversicare's favor on November 3, 2009. On December 3, 2009 Nickell transmitted to the Clerk of the Court of Appeals by United States Postal Service express mail a document styled as a motion for an extension of time in which to file her "brief." She sought leave for an extension of time through December 15, 2009 in which to file her petition for review; stated various justifications for the request; and asserted that neither CR 76.25(2), nor CR 6.02, nor any judicial decision prohibited enlargement of the time for filing a petition for review. The Court of Appeals construed CR 76.25(2) as mandating dismissal and denied the motion. The Supreme Court reversed and remanded, however, directing the Court of Appeals to consider the merits of the motion for an extension of time and proceed accordingly. The court noted that a petition for review serves two functions, much like a motion for discretionary review. It is both the means to invoke the court's jurisdiction over the matter and the means to allege error in the decision below. The court concluded that use of the phrase "within the time allowed" in the second sentence of CR 76.25(2) rather than the words "30 days" has significance and implies that the

time for filing a petition for review may be enlarged pursuant to a motion filed before it expires. The court reasoned that Nickell invoked the Court of Appeals' appellate jurisdiction by filing her motion for an extension of time within the 30-day period specified in CR 76.25(2); thus, the court erred by denying the motion without considering the merits of her request for what amounted to an enlargement of time in which to file a brief.

## **VIII. ATTORNEY DISCIPLINE**

**A. Kentucky Bar Association v. Della Tarpinian**  
[2010-SC-000180-KB](#) April 21, 2011

Opinion and Order imposing \$5,000.00 fine for contempt of Supreme Court. All sitting; all concur. The Respondent was alleged to have engaged in the unauthorized practice of law by operating a legal document service. Following a warning letter from the Kentucky Bar Association and the continued operation of Respondent's business, the Supreme Court issued a show cause order, directing that the Respondent show cause why she should not be held in contempt for engaging in the unauthorized practice of law. The Respondent denied the allegations, and the matter was referred to a Special Commissioner. The Special Commissioner found that the Respondent prepared and drafted pleadings, motions, orders and other documents in nine uncontested divorce cases and one other domestic case; completed a child support worksheet and calculated child support obligations; and prepared a contract and bond for deed, which was filed and recorded. The Special Commissioner found that the Respondent knew these documents were intended by her customers to achieve or further objectives impacting their legal rights, and that she was paid money for drafting these documents. The Supreme Court concluded that the Respondent had engaged in the unauthorized practice of law, and imposed a \$5,000.00 fine for contempt

**B. Inquiry Commission v. Jimmie Green Orr, Jr.**  
[2011-SC-000010-KB](#) April 21, 2011

Opinion of the Court. All sitting; all concur. Court orders temporary suspension of attorney until subsequent order of the court and restricted from dealing with client funds held in any escrow account.

**C. Kentucky Bar Association v. William David Rye**  
[2011-SC-000057-KB](#) April 21, 2011

Opinion of the Court; Justice Cunningham not sitting. Supreme Court adopted Trial Commissioner's recommendation to publicly reprimand Respondent for the commission of certain ethical violations.

**D. Kentucky Bar Association v. Michael R. McMahon**  
[2011-SC-000105-KB](#)

April 21, 2011

Opinion of the Court. All sitting; all concur. Court unanimously adopted the recommendation of the KBA to suspend attorney for 181 days, probated for 2 years for violation of SCR 3.130-1.3 and SCR 3.120-1.8(e).