

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
AUGUST 2012**

I. ARBITRATION

A. Michael Schnuerle, Amy Gilbert, Lance Gilbert and Robin Wolff v. Insight Communications, Company, L.P. and Insight Communications Midwest, LLC

[2008-SC-000789-DG](#)

August 23, 2012

[2009-SC-000390-DG](#)

August 23, 2012

Opinion by Justice Venters. All sitting. Minton, C.J., Abramson, Cunningham and Scott, JJ., concur. Schroder, J., concurs in part and dissents in part by separate opinion in which Noble, J., joins. Civil/Arbitration. Questions Presented – (1) does Kentucky law rather than New York law govern construction of internet service agreement notwithstanding a New York choice of law provision in agreement; (2) is agreement's ban on class action litigation enforceable under federal arbitration law; (3) is the general arbitration clause procedurally unconscionable; is (4) general arbitration clause substantively unconscionable; and (5) is confidentiality provision in arbitration clause substantively unconscionable. Held: (1) Kentucky law rather than New York law governs construction of internet service agreement notwithstanding a New York choice of law provision in agreement because customers executed agreements in Kentucky, Kentucky had a substantial interest in the protection of its residents in the area of commercial transactions, one of the principal claims arose under the Kentucky Consumer Protection Act, and New York had no discernible connection or interest in the subject matter of the litigation.; (2) agreement's ban on class action litigation is not enforceable under federal arbitration law pursuant to *AT & T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011); (3) the general arbitration clause was not procedurally unconscionable because its terms were reasonably disclosed; (4) the general arbitration clause is not substantively unconscionable; and (5) the confidentiality provision in the arbitration clause is substantively unconscionable because provision in effect favored internet service provider as a repeat participant in the arbitration process, and provider failed to identify any practical social utility to the provision.

B. Donna Ping, Executrix of the Estate of Alma Calhoun Duncan, Deceased v. Beverly Enterprises, Inc. et al.

[2010-SC-000558-DG](#)

August 23, 2012

Opinion of the Court by Justice Abramson. All sitting; all concur. The nursing-home Defendant in a tort action brought by the estate of a former resident moved to enforce an arbitration agreement signed at the same time as the resident's admissions agreement by the resident's attorney-in-fact, her daughter. The trial court concluded that the resident's daughter had not had authority to agree to

arbitration and denied the motion. The Court of Appeals reversed. Reversing the Court of Appeals' decision and reinstating the trial court's denial, the Supreme Court held that the daughter's authority under a durable power of attorney to make financial and health care decisions for her mother did not extend to an optional arbitration agreement and that the agreement was not otherwise enforceable under theories of apparent authority, equitable estoppel, or third-party beneficiary. The Court also held that even if the arbitration agreement had been valid, it would not have applied to the claims brought by the deceased resident's wrongful death beneficiaries.

II. ATTORNEY'S FEES

- A. B. Dahlenburg Bonar, P.S.C.; And Barbara D. Bonar v. Waite, Schneider, Balyess & Chesley Co., L.P.A.; Stanley M. Chesley; And Robert A. Steinberg**
[2010-SC-000087-DG](#) August 23, 2012

Opinion of the Court by Justice Cunningham. Justices Noble and Schroder not sitting; all concur. Where attorney voluntarily withdraws from representation, and no good cause exists for said withdraw, the attorney is not entitled to fees, either by contract or under a quantum meruit calculation. This rule applies when the attorney's fee agreement is directly with a client, as well as a fee-splitting agreement with co-counsel.

- B. Harold Gene Cunningham, et al. v. Diane Whalen et al.**
[2010-SC-000564-DG](#) August 23, 2012
[2011-SC-000174-DG](#) August 23, 2012

Opinion of the Court by Justice Schroder. All sitting; all concur. Held: (1) City did not violate Open Meetings Act (KRS 61.800 et seq.) when it discussed settlement of a pending lawsuit related to zoning in private, where the City voted to approve the settlement and passed the zone change ordinance at public meetings; (2) City did not violate residents' due process rights in approving the settlement.

- C. State Farm Mutual Automobile Insurance Company v. James Baldwin**
[2010-SC-000144-DG](#) August 23, 2012
And
Ronda Reynolds v. Safeco Insurance Company of Illinois
[2010-SC-000665-DG](#) August 23, 2012

Opinion of the Court by Chief Justice Minton. All sitting. Abramson, Cunningham, Noble, Schroder, and Venters, JJ., concur. Scott, J., concurs with statement. James Baldwin and Ronda Reynolds allegedly sustained injuries in separate highway incidents after objects came loose from unidentified vehicles and collided with their vehicles. A plastic sheet flew from an unknown truck and wrapped itself on the front of Baldwin's vehicle. And, in Reynolds's case, a sheet

of ice broke free from an unknown tractor-trailer and struck her vehicle. Both Baldwin and Reynolds sought uninsured motorist (UM) coverage for hit-and-run accidents through their automobile insurance policies. Baldwin's State Farm policy provided coverage when an uninsured motor vehicle "strikes" the insured vehicle. And Reynolds's Safeco policy covered damages when an uninsured motor vehicle "hits" the insured vehicle. The Supreme Court held that the "strike" and "hit" requirements in State Farm's and Safeco's UM clauses are satisfied if the uninsured vehicle, or an integral part it, makes physical contact with the insured's vehicle; or if the uninsured vehicle exerts force upon an intermediate object, which then makes physical contact with the insured's vehicle in a chain-reaction accident. The Court determined that neither the uninsured vehicles nor integral parts of them struck or hit Baldwin's or Reynolds's vehicles. Nor did the uninsured vehicles cause the plastic sheet or ice to strike or hit the insured vehicles by exerting force upon them. So the impact requirements in the UM clauses of Baldwin's and Reynolds's insurance policies were not met.

III. CRIMINAL LAW:

- A. **Quaynell Duron King v. Commonwealth of Kentucky**
[2011-SC-000110-TG](#) August 23, 2012
[2011-SC-000151-TG](#) August 23, 2012

Opinion of the Court by Justice Scott. All sitting; all concur. Appellant appealed his convictions in two separate cases, one of which involved a severed trial. The cases were consolidated in the Supreme Court to be heard alongside each other. Appellant assigned five allegations of error between the three trials. The Supreme Court affirmed his convictions in two of the trials, but reversed his conviction for Possession of a Controlled Substance, holding that he was improperly denied his right to proceed *pro se*. The Court also addressed two issues that were likely to recur upon remand. First, it noted that because the case was being remanded for a new trial, if Appellant was again found guilty he was permitted to invoke the as-amended penalty for first-degree possession of a controlled substance. Second, the Court noted that if on remand Appellant was again convicted of possession of a controlled substance, pursuant to KRS 532.110(3) any sentence imposed thereon must run consecutively to his sentence for escape—even if it results in an aggregate sentence of *more* than twenty years.

- B. **Edward John Jacobsen v. Commonwealth of Kentucky**
[2011-SC-000108-MR](#) August 23, 2012

Opinion of the Court by Justice Abramson. All sitting; all concur. Identified by two eye-witnesses of the crime, Defendant was convicted of robbing at gun point the manager of a Cash Advance store. He was sentenced as a second-degree persistent felony offender to a maximum term of thirty years in prison. Upholding the conviction and the sentence, the Supreme Court held (1) that the

photo-array shown to the eyewitnesses was not improperly suggestive; (2) that the trial court properly limited penalty range questioning during voir dire to the indicted offense; (3) that the Commonwealth's reference to the alleged gun during voir dire did not require a mistrial; (4) that the Commonwealth's duly corrected misstatement of the evidence during closing did not require a mistrial; and (5) that a mistrial during the original penalty phase did not require a retrial of the Defendant's guilt.

B. Commonwealth of Kentucky v. William Joseph Reed
[2011-SC-000111-DG](#) August 23, 2012

Opinion of the Court by Justice Schroder. All sitting; all concur. Held: (1) Trial court improperly imposed a felony fine on an indigent defendant; (2) The improper fine could be reversed without invalidating the defendant's and the Commonwealth's valid plea agreement, because the imposition of the fine was not part of the agreement, but rather was left to the discretion of the trial court.

C. Marcus D. Swan Commonwealth of Kentucky v.
[2011-SC-000085-MR](#) August 23, 2012
And
D'Andre Owens v. Commonwealth of Kentucky
[2011-SC-000086-MR](#) August 23, 2012

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Abramson, and Venters, JJ., concur. Cunningham, J., concurs in result by separate opinion in which Scott, J., joins. Schroder, J., concurs in part and dissents in part by separate opinion. Appellants Marcus D. Swan and D'Andre Owens were tried and convicted of multiple crimes related to a violent home invasion they carried out in 2008 in which they stole money and threatened to kill the home's inhabitants, one of whom they ultimately shot and one of whom they threatened to rape and sodomize.

The two appellants were tried together and the jury found Swan guilty of four counts of first-degree robbery, one count of first-degree burglary, two counts of first-degree assault, six counts of first-degree wanton endangerment, and one count of tampering with physical evidence. He was sentenced to the statutory maximum of 70 years. Owens was convicted of the same charges under a complicity theory, with the addition of one count of attempted first-degree sodomy as a principal. He was sentenced to the statutory maximum of 70 years.

The Court affirmed all of Swan's convictions and sentence in their entirety. The Court reversed Owens's conviction for first-degree wanton endangerment because the trial court erred in not granting a directed verdict on that charge because no reasonable jury could have found that the victim was exposed to the level of danger required in the statute. The Court also reversed Owens's first-degree assault conviction because he was entitled to, and did not receive, an instruction

on second-degree assault. Owens's other convictions and overall sentence are affirmed and his case is remanded to the trial court for correction of his judgment.

Cunningham, J., concurs in result and notes that the Commonwealth's strategy during closing argument of suggesting the jury should sentence the defendant to the statutory maximum sentence was appropriate.

Schroder, J., concurs in part and dissents on the grounds that the trial court did not err in denying Owens's motion for a directed verdict on the charge of first-degree wanton endangerment.

D. Commonwealth of Kentucky v. Joshua Abnee
[2011-SC-000507-DG](#) August 23, 2012

Opinion by Justice Venters. All sitting; all Concur; Criminal; Questions presented: (1) did allegation that the defendant's criminal record was in the jury room during jury deliberations raise a sufficient issue to merit further inquiry into whether the defendant was entitled to a new trial; and (2) was purported juror's unsworn, unverified, uncorroborated letter sufficient to warrant an evidentiary hearing on motion for a new trial. Held: (1) purported juror's allegation that defendant's criminal record was left where jury could see it involved an overt act of misconduct by which an extrinsic source of information was alleged to have corrupted the deliberation process which may entitle a defendant to a new trial, but (2) purported juror's unsworn, unverified, uncorroborated letter was insufficient to warrant an evidentiary hearing on motion for a new trial.

E. Billy Reed Caudill v. Commonwealth of Kentucky
[2011-SC-000119](#) August 23, 2012

Opinion of the Court Reversing and Remanding. All sitting; all concur. Criminal; murder, wanton endangerment. Questions presented: 1) whether there was insufficient proof to support a charge of murder because the Commonwealth failed to establish, beyond a reasonable doubt, that the Appellant was not privileged to act in self-defense; and (2) whether certain conduct of the Commonwealth Attorney during his cross-examination of Appellant amounted to reversible prosecutorial misconduct. Held: (1) witness's testimony provided sufficient evidence from which a reasonable juror could find Appellant guilty of murder; but (2) improper conduct during the Commonwealth Attorney's cross-examination, including statements made by the prosecutor concerning his personal opinion of the "duties" of neighbors and a line of questioning which suggested that the Appellant had a duty to retreat when confronted by the victim on Appellant's property, constituted reversible prosecutorial misconduct. The Court reversed the judgment of the Breathitt Circuit Court as to Appellant's convictions for murder and three counts of wanton endangerment, and remanded for further proceedings.

F. Anthony Wayne Fagan v. Commonwealth of Kentucky
[2010-SC-000791-MR](#) August 23, 2012

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Anthony Wayne Fagan removed over \$30,000 worth of cable from the locomotives. The cost of repair for the locomotives totaled over \$400,000. A circuit court jury convicted Fagan of theft by unlawful taking over \$10,000 and three counts of first-degree criminal mischief. The trial court sentenced Fagan to a total of twenty years' imprisonment and ordered him to pay a total of \$181,264 in restitution to the victims. The judgment awarded Fagan 305 days of jail-time credit for time served. More than 10 days after rendering the judgment the trial court amended it by decreasing Fagan's jail-time credit to 174 days. On review, the Supreme Court held that Fagan's convictions for theft by unlawful taking over \$10,000 and first-degree criminal mischief did not violate double jeopardy because each conviction required proof of a fact that the other conviction did not. The Court also held that the \$100,000 cap on restitution found in KRS 533.030(3) was not applicable to the trial court's imposition of restitution because the court did not sentence Fagan to probation or conditional discharge. But the Court vacated the trial court's amended judgment and remanded to the trial court to reinstate the final judgment as originally entered. Because there was no indication in the record about how the error in jail-time credit came to be, the jail-time credit mistake was presumed a judicial error. So the trial court erred by amending the final judgment outside of the ten-day time frame provided by Kentucky Rules of Civil Procedure (CR) 59.05.

G. Jeffrey Wayne Chavies v. Commonwealth of Kentucky
[2011-SC-000140-MR](#) August 23, 2012

Opinion of the Court, reversing and remanding. All sitting; all concur. Held: Egregious amount of inadmissible character evidence in violation of KRE 404(a) and (b), combined with improper bolstering of alleged victims' testimony rose to the level of palpable error. Reversed and remanded for new trial.

H. Mark Bolton, Director Metro Corrections v. Rickie Irvin
[2010-SC-000520-DG](#) August 23, 2012

Opinion of the Court by Justice Schroder. Minton, C.J.; Abramson, Cunningham, and Venters, JJ., concur. Scott, J., concurs in part and dissents in part by separate opinion in which Noble, J., joins. Held: (1) Issue of a whether a district court improperly increased bail in a felony case is one capable of repetition, yet evading review, and is therefore not moot; (2) District court may increase the amount of a defendant's bail in a felony case following a preliminary hearing, where the only change in circumstances is the district court's finding of probable cause, because a reconsideration of bail following a finding of probable cause is authorized by RCr 3.14(1).

IV. WORKERS' COMPENSATION:

A. **Roger W. Tudor v. Industrial Mold & Machine Co., Inc.; Honorable Richard M. Joiner, Administrative Law Judge; and Workers' Compensation Board**
2011-SC-000589-WC August 23, 2012

Opinion of the Court. All sitting; all concur. This appeal concerned the method for excluding impairment from a non-compensable disability when calculating a worker's permanent partial disability benefit under the post-1996 version of KRS 342.730(1)(b). The ALJ relied on *Transport Motor Express, Inc. v. Finn*, 574 S.W.2d 277 (Ky. 1978), to calculate a benefit based on the entire post-injury impairment rating; then subtracted an amount equal to a benefit based on the claimant's pre-existing impairment rating; and awarded benefits based on the remainder. Reversing, the Board determined that the present version of KRS 342.730(1)(b) requires the calculation of income benefits to be based only on the permanent impairment rating caused by the injury being compensated. The Court of Appeals affirmed.

On appeal, the Supreme Court affirmed, holding that "KRS 342.730(1)(e) is unambiguous." The Court noted that the statute "prohibits 'impairment' from non-work-related disabilities to be considered when determining not only the extent of the worker's disability but also whether the worker's benefits will extend for 425 or 520 weeks." Unlike the statutes at issue in *Transport Motors*, the post-1996 versions of KRS 342.730(1)(b)-(e) do not require "compensation" for non-work-related disability to be excluded from an award. Rather, the statute prohibits "impairment" from a non-work-related disability from being considered when selecting the permanent impairment rating caused by an injury; when calculating the disability rating and permanent partial disability benefit; and when determining the duration of the benefit.

B. **Greg's Construction v. Jerry Keeton; Johnson Floyd Coal Company; Miller Brothers Coal Company; Apostle Fuels; Honorable Otto Daniel Wolff, Administrative Law Judge; and Workers' Compensation Board**
2011-SC-000605-WC August 23, 2012

Opinion of the Court. All sitting; all concur. Keeton sustained a work-related hearing loss. An ALJ determined that KRS 342.7305(4) placed the entire liability for income and medical benefits on Greg's Construction, the employer with whom he was last injuriously exposed to hazardous noise. The Board and the Court of Appeals affirmed. On appeal, Greg's argued that Keeton failed to prove an injury attributable to his employment with Greg's or to prove that the employment represented his last injurious exposure. Greg's also argued that KRS 342.7305(4) does not preclude apportioning liability among employers where the evidence permits.

The Supreme Court affirmed, holding that the record contained substantial evidence that audiograms and other testing revealed a pattern of hearing loss compatible with that caused by hazardous noise exposure and contained substantial evidence that the claimant sustained repetitive exposure to hazardous noise in the workplace, including his final employment with Greg's. The Court also held that the legislature had clearly indicated its intent to place liability on the claimant's last employer based on the language in KRS 342.7305(4), which states that "the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits."

C. James T. English Trucking v. Aaron K. Beeler; Honorable Douglas W. Gott, Administrative Law Judge; and Workers' Compensation Board
[2011-SC-000686-WC](#) August 23, 2012

Opinion of the Court. All sitting; all concur. An ALJ increased the claimant's partial disability benefit at reopening and tripled the entire income benefit awarded for his injury. The Board and the Court of Appeals affirmed. On appeal, the employer maintained that the ALJ erred by disregarding undisputed medical evidence when finding increased impairment at reopening and by tripling the entire partial disability benefit. The Supreme Court affirmed, holding that the the ALJ did not err because substantial evidence supported the finding of increased impairment as well as the finding that the claimant lacked the physical capacity at reopening to perform the type of work performed at the time of his injury. The combined effects of the impairment present at the time of the initial award and the additional impairment present at reopening entitled the claimant to triple benefits based on the whole of his disability for the balance of the compensable period.

D. Brent Arnold v. Toyota Motor Manufacturing; Honorable Richard M. Joiner, Administrative Law Judge; and Workers' Compensation Board
[2011-SC-000588-WC](#) August 23, 2012

Opinion of the Court. All sitting; all concur. Arnold was awarded TTD benefits for his work-related shoulder injury from "the date he stopped work, May 10, 2007" until May 8, 2009. The Board affirmed although the claimant never asserted that he was unable to work as of May 10, 2007, when he took family medical leave to care for his pregnant wife and children because she was ill. He argued that his gradual injury prevented him from working on May 15, 2007.

A divided Court of Appeals reversed on the ground that the opinion failed to contain "findings" adequate to make clear whether the ALJ considered and understood all of the evidence relevant to the date when TTD began. The court remanded the claim with directions to reconsider the issue and make additional findings.

On appeal, Arnold argued that the ALJ made findings adequate to support the award. The Supreme Court reversed to the extent that the ALJ made the findings

of fact required by KRS 342.0011(11)(a). However, the Court affirmed to the extent that the ALJ failed to state in the opinion that the evidentiary basis for finding that the claimant was not at a level of improvement from his injury that would permit a return to employment “from the date he stopped work, May 10, 2007.” Mindful that a worker's entitlement to TTD may or may not begin on that date that a gradual injury becomes manifest, The Court remanded the case to the ALJ to clarify that portion of the decision.

V. JUDICIAL CONDUCT:

A. Russell D. Alred, Circuit Judge of the 26th Judicial Circuit v. Commonwealth of Kentucky
[2011-SC-000558-RR](#) August 23, 2012

Opinion of the Court by Chief Justice Minton. All sitting. Noble and Schroder, JJ., concur. Venters, J., concurs by separate opinion in which Abramson, J., joins. Cunningham, J., concurs, in part, and dissents, in part, by separate opinion in which Scott, J., joins. Russell D. Alred, Judge of the 26th Judicial Circuit of Kentucky, became the focus of a lengthy investigation by the Judicial Conduct Commission, culminating in formal charges consisting of twenty allegations of misconduct in office. Following an adversarial hearing on these charges, the commission found official misconduct on nine of the charges and ordered Judge Alred removed from office. On review, the Supreme Court held that (1) Judge Alred was not denied due process; (2) Judge Alred was not denied his rights under the Sixth Amendment; (3) no Commission members were required to disqualify; and (4) Judge Alred was given a sufficient opportunity to examine the factual information before formal proceedings began. The Court upheld the commission's findings regarding eight counts of misconduct, but reversed the commission's findings regarding one count. The Court found that Judge Alred engaged in a pattern of misconduct, displaying disregard for the law and the Kentucky Code of Judicial Conduct. And the Court agreed with the commission that there was good cause under Section 121 of the Kentucky Constitution to remove Judge Alred from his judicial office for misconduct, as defined in the Kentucky Code of Judicial Conduct.

VI. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. William Eric Minamyer
[2011-SC-000744-KB](#) August 23, 2012

Opinion and Order. All sitting; all concur. By prior order, the Court had imposed reciprocal discipline upon Minamyer based on unprofessional conduct in Ohio. The one-year suspension by the Supreme Court of Ohio was probated for one year, on the condition that Minamyer adhere to conduct set by the court. Minamyer failed to pay the costs associated with the Ohio disciplinary

proceedings, resulting in the Supreme Court of Ohio holding him in contempt, revoking his probation, and suspending him for one year. The Supreme Court of Kentucky held that, although Minamyer failed to show sufficient cause why reciprocal discipline should not be imposed, he did present several mitigating factors. Accordingly, the Court imposed reciprocal discipline of one year suspension but applied it retroactively to the date it was imposed by the Supreme Court of Ohio.

**B. Kentucky Bar Association v. Charley Greene Dixon
2012-SC-000006-KB August 23, 2012**

Opinion and Order. All sitting; all concur. The Court issued a public reprimand against Dixon after finding him guilty of violating SCR 3.130 – 1.15(b) for misconduct regarding his attorney escrow account.

**C. Kentucky Bar Association v. Juliette Alane House
2012-SC-000255-KB August 23, 2012**

Opinion and Order. All sitting; all concur. The Board of Governors recommended that House be suspended from the practice of law for 181 days for violating SCR 3.130-1.3, 3.130-1.4(b), 3.310-1.16(d), 3.130-8.1(b), and 3.130-8.4(c). However, because House was permanently disbarred from the practice of law in June 2012, the Board’s recommendation was rendered moot.

**D. James Grant King v. Kentucky Bar Association
2012-SC-000300-KB August 23, 2012**

Opinion and Order. All sitting; all concur. The Board of Governors recommended a public reprimand, subject to certain conditions, based on King’s admitted violation of SCR 3.130-8.4(b) following his conviction for Driving Under the Influence, third offense, and a subsequent conviction for driving on a suspended license. The Court adopted the Board’s recommendation and issued a public reprimand, with the stipulation that the reprimand may convert to a suspension of 61-days if King fails to adhere to certain conditions, including the requirements that he not commit any crimes and that he comply with all terms of his Supervision Agreement with the KBA and KYLAP.

**E. Patrick Edward Moeves v. Kentucky Bar Association
2012-SC-000302-KB August 23, 2012**

Opinion and Order. All sitting; all concur. Moeves, again facing charges of unprofessional and unethical conduct following a previous suspension for unethical conduct, moved the Court to withdraw his membership from the KBA under terms of permanent disbarment. Finding Moeves’ numerous ethical violations to be “appalling and reprehensible conduct,” the court granted his motion and permanently disbarred Moeves from the practice of law in Kentucky.

F. Heather Rochet v. Kentucky Bar Association
[2012-SC-000349-KB](#) **August 23, 2012**

Opinion and Order. All sitting; all concur. Rochet was suspended from the practice of law in December 2009 for non-payment of dues. In April 2012 she sought restoration of her membership. The Court found no impediment to her restoration and ordered Rochet restored to the practice of law in Kentucky.