PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
AUGUST 2014

I. CONSTITUTIONAL LAW:

A. Louisville/Jefferson County Metro Government v. O'Shea's-Baxter, LLC, Etc., et al.

2013-SC-000085-DG **August 21, 2014**

Opinion of the Court by Justice Scott. All sitting; all concur. O'Shea's-Baxter, LLC, d/b/a Flanagan's Ale House (Flanagan's) challenged an order of the Alcoholic Beverage Control Board upholding the Louisville/Jefferson County Government's denial of Flanagan's application for a retail drink license. The issues involved concern KRS 241.075, which prohibits the issuance of a retail drink license to an applicant located in a "combination business and residential area" of a city of the first class or consolidated local government if another "similar establishment" is located within 700 feet of the applicant. Flanagan's challenged the constitutionality of KRS 241.075 on the grounds that it (1) constitutes local and special legislation in violation of Sections 59 and 60 of the Kentucky Constitution, (2) exercises arbitrary power and fails to provide for equal protection under the law in contravention of Section 2 of the Kentucky Constitution, and (3) unconstitutionally delegates zoning powers vested in local governments to the state. The Court of Appeals ruled that the statute was unconstitutional local and special legislation in violation of Sections 59 and 60 of the Kentucky Constitution. The Supreme Court affirmed the Court of Appeals, reversing the judgment of the Franklin Circuit Court and remanding with instructions for the circuit court to enter summary judgment in favor of Flanagan's.

II. CRIMINAL LAW:

A. Terry D. Mills v. Department of Corrections Offender Information Services

2011-SC-000755-DG **August 21, 2014**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Terry Mills was convicted of manufacturing methamphetamine while in possession of a firearm and being a first-degree persistent felony offender. Mills was subsequently categorized as a violent offender by the Department of Corrections, impacting his parole eligibility. As a matter of right, Mills appealed to the Court arguing the Department was erroneous in its violent-offender-classification because he was not convicted of a Class A felony or a dangerous Class B felony. In Mills's estimation, the General Assembly never intended nonviolent drug criminals to be violent offenders and KRS 218A.992 only enhanced the punishment, not the actual conviction.

The Court acknowledged Mills's argument was plausible given the strange wording of KRS 218A.992, but, upon closer inspection, its shaky foundation

revealed itself. Applying identical logic from Jackson v. Commonwealth, 363 S.W.3d 11 (Ky. 2012), a juvenile case dealing with KRS 218A.992's firearm enhancement, the Court noted that Mills's argument would result in jurisdictional chaos. KRS 218A.992 must operate to enhance the actual offense, rather than just the conviction. Otherwise misdemeanors enhanced to felonies would be in District Court, which has no jurisdiction to make final disposition of felonies. "In sum, KRS 218A.992 cannot be read as Mills argues because it would result in an evisceration—or, at the very least, blending beyond recognition—of the statutory jurisdictional demarcations between general-jurisdiction circuit courts and limited-jurisdiction district courts." The Court concluded Mills was properly classified as a violent offender because KRS 218A.992 enhanced his Class B felony—manufacturing methamphetamine, first offense—into a Class A felony and KRS 439.3401 dictates Class A felons are violent offenders.

B. Michael D. St. Clair v. Commonwealth of Kentucky
2011-SC-000774-MR August 21, 2014

Opinion of the Court by Justice Noble. All sitting; all concur. Cunningham, J., also concurs by separate opinion. Michael St. Clair was previously convicted of capital murder and sentenced to death, but his death sentence was reversed and the case was remanded for retrial of the penalty phase. See St. Clair v. Commonwealth, 140 S.W.3d 510, 524-25 (Ky. 2004). On remand, St. Clair was again sentenced to death. He again appealed as a matter-of-right, alleging numerous errors related both to his underlying conviction and the re-sentencing. The Supreme Court affirmed his convictions and sentence.

Three of St. Clair's claims were aimed at the underlying murder conviction. He claimed that a new guilt phase was required because of (1) changes in this Court's interpretation of KRE 404(b); (2) an impermissibly suggestive identification affecting his due-process rights; and (3) new forensic evidence about comparative bullet lead analysis (CBLA). In again affirming the murder conviction, the Court concluded that (1) the law-of-the-case doctrine barred the KRE 404(b) challenge; (2) the challenge to the identification was procedurally barred because it could have been raised in the first appeal; and (3) although the CBLA evidence would not be admissible in a trial held today, the revelations about CBLA evidence did not justify a new trial in light of the evidence of St. Clair's guilt.

The remaining claims of error related to the resentencing. Most of these claims had been addressed by the Court before and thus were not novel. Two of the claims, however, were novel and merit discussion. Specifically, St. Clair alleged that the jury's statutory compensation, being less than minimum wage, violated his rights to due process and a fair and impartial jury, and that the trial court improperly allowed the sentencing jury to hear victim-impact evidence about a victim of another murder that was not the subject of this trial.

In rejecting the juror compensation argument, the Court held that jurors are not entitled to receive the statutory minimum wage during jury service. There is no employer-employee relationship between the state and jurors carrying out their

civic duty. The Court noted that its holding was in accord with other state and federal courts that had considered the issue.

With respect to the victim-impact evidence issue, the Court agreed that the victim-impact statute, KRS 532.055(2)(a)(7), did not permit testimony from a victim of other than "the crime" being tried; it was therefore erroneous to permit testimony from the widow of the victim of a separate and unrelated murder committed by St. Clair. The Court, however, determined that this error was harmless after clarifying that Brown v. Sanders, 546 U.S. 212 (2006), did not bar application of the harmless-error rule when a reviewing court determines a capital sentencing jury has heard improper victim-impact testimony. In light of the large quantity and nature of the other evidence presented against St. Clair and the nature and short duration of the improper testimony, the Court was convinced beyond a reasonable doubt that the improper victim-impact testimony did not contribute to the jury's death-penalty verdict.

C. Eric Henderson v. Commonwealth of Kentucky
2012-SC-000120-DG **August 21, 2014**

Opinion of the Court by Chief Justice Minton. All sitting. Abramson, Cunningham, Keller, Scott, and Venters, JJ., concur. Noble, J., dissents. Eric Henderson was convicted of possession of a handgun by a convicted felon and various other charges. Upon conviction, Henderson entered a conditional guilty plea and was sentenced to twelve years' imprisonment. Henderson's conviction centered on a social encounter with an erstwhile friend and some other acquaintances and his theory at trial was, essentially, that he was framed by these individuals. During trial, while on the stand, Henderson sought to testify regarding a previous similar encounter with his friend as well as hearsay evidence indicating the friend had said he would turn Henderson in to the police. Upon the Commonwealth's objection, the trial court refused to allow either piece of testimony. On appeal, Henderson argued the testimony was relevant to prove his theory of defense.

The Court of Appeals found Henderson did not put forth a sufficient offer of proof under KRE 103(a)(2); and, therefore, held both issues improper for appellate review. The Court affirmed the Court of Appeals, holding that while KRE 103(a)(2) does not require avowal-like specificity, it does require a meaningful description of the content of the excluded testimony, i.e., an indication of the facts sought to be elicited or the specific facts the witness would establish. The Court noted an offer of proof must contain some modicum of proof. Instead, Henderson's counsel made vague references to the general theory of defense but did not highlight what Henderson would actually say if given the chance to testify about the previous encounter. General statements might be sufficient, if, as in Weaver v. Commonwealth, 298 S.W.3d 851 (Ky. 2009), the trial court already has the content of the testimony to review. The insufficiency of Henderson's offer of proof left the Court with an inadequate record to determine properly the impact of any trial court error on the adequacy of Henderson's trial.

Finally, the Court held, to the extent it was erroneous, the trial court's exclusion of Henderson's proposed hearsay testimony was harmless.

D. Adrian Boyd v. Commonwealth of Kentucky
2013-SC-000146-MR **August 21, 2014**

Opinion of the Court by Justice Keller. All sitting; all concur. Boyd was convicted of assault, burglary, and being a PFO in the first degree. During voir dire, a potential juror stated that, if someone killed five of six people, that person should be killed and the Commonwealth should return to hanging murders. After that statement, Boyd moved to excuse the entire venire. The trial court denied that motion but did remove the juror for cause and admonished the remaining venire members. The Court held that the trial court did not abuse its discretion and the admonishment served to cure any prejudice the juror's comments may have caused.

During trial, the Commonwealth produced surveillance video from the victim's house. When the Commonwealth played the video for the jury, both the victim and a witness narrated. The Court reiterated that such narration is acceptable so long as the witnesses do not offer interpretations or opinions about what is on the video; or, as in this case, narrate events the witnesses did not personally observe. Permitting the witnesses in this case to testify about events they did not personally observe was, however, not palpable error. Furthermore, permitting a witness to make an identification from a surveillance video was not error.

Boyd had been charged with two prior felonies, and he received concurrent sentences from two different circuit courts. Shortly after receiving the concurrent sentences, Boyd received shock probation. Boyd then committed a third felony and the court revoked his shock probation. Boyd argued that the two felonies for which he received the concurrent sentences did count for PFO purposes because the time he served before being shock probated was served in the county jail. According to Boyd, to count as a felony for PFO purposes, there must be a period of "imprisonment" which necessitates serving time in a state correctional facility or "prison." The Court held that incarceration is imprisonment for PFO purposes whether it takes place in a county jail or a state run facility. The Court agreed with Boyd that the concurrent sentences could only count as one felony. However, because he committed the third prior felony while out on shock probation, that crime counted as a separate felony, therefore, he had a total of two prior felonies, with the current felony being his third. That was sufficient to qualify Boyd for a PFO I conviction.

E. Donna Gaines v. Commonwealth of Kentucky
2013-SC-000545-MR **August 21, 2014**

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Abramson, Cunningham, Keller, and Noble, JJ., concur. Scott, J., concurs in result only. Criminal, Enhanced Parole Eligibility for Violent Offenders, and exceptions for Defendants who were Victims of Domestic Violence. Defendant was convicted of the murder of her husband, abuse of a corpse, and tampering with physical evidence. Upon review the Court held: (1) Defendant did not qualify for the

victim-of-domestic- violence exception to the enhanced parole eligibility requirement established for violent offenders by KRS 439.3401 because the acts of domestic violence committed against Defendant by her husband did not occur "with regard to" Defendant's act of killing her husband. To satisfy the "with regard to" element of the statute, there must be some connection or relationship beyond a mere temporal proximity between the domestic abuse and the murder; (2) neither the use-of-a-firearm enhancement provision contained in KRS 533.060 nor its victim-of-domestic-violence exception applies in cases of murder because murder is classified by statue as a "Capital Offense," and KRS 533.060 by its plain language applies only if the Defendant is convicted of a Class A, Class B, or Class C felony. Regardless of whether the death penalty is involved, murder is a Capital Offense, not a Class A felony.

F. Joseph Wilson v. Commonwealth of Kentucky
2012-SC-000474-MR August 21, 2014

Opinion of the Court by Justice Abramson. All sitting; all concur. Joseph Wilson appealed as a matter of right from a judgment of the Jessamine Circuit Court sentencing him to a twenty-five years prison term for first-degree burglary, three counts of theft by unlawful taking of a firearm (principal or accomplice), and one count of theft by unlawful taking, value $500.000 or more, principal or accomplice. The Supreme Court concluded that the trial court abused its discretion by admitting narrative portions of domestic violence petitions that had been filed against Wilson by a former girlfriend who testified at his trial. The Court held that the prejudicial effect of that evidence was significant and outweighed the limited probative value of the evidence. The Court also concluded that Wilson's three separate convictions of theft by unlawful taking of a firearm violated his Double Jeopardy rights because the three handguns were taken in a single transaction, constituting a single theft. Finally, the Court held that Wilson was not "armed with a deadly weapon" when he took possession of a locked steel box containing handguns because there was no evidence that the firearms were readily accessible.

III. ETHICS:

A. United State of America By and Through the United States Attorneys for the Eastern and Western District of Kentucky v. Kentucky Bar Association
2013-SC-000270-KB August 21, 2014

Opinion of the Court by Chief Justice Minton. All sitting; all concur. In November 2012, the Kentucky Bar Association formally adopted Ethics Opinion E-435, proclaiming the use of ineffective-assistance-of-counsel (IAC) waivers in plea agreements violate Kentucky's Rules of Professional Conduct. The United States Attorneys for both the Eastern and Western Districts of Kentucky petitioned the Court for review of E-435 shortly after its publication in March 2013. The United States argued the opinion violated the Supremacy Clause of the United States Constitution and was an inaccurate interpretation of Kentucky's ethical rules. 28 U.S.C. § 530B mandates federal attorneys comply with state

ethical rules. But the United States argued the Attorney General of the United States' regulation saying 530B should not be construed to alter federal substantive, procedural, or evidentiary law acted as a barrier to E-435's application.

Initially, the Court rejected the United States' notion that E-435 operated contradictory to federal law and, therefore, violated the Supremacy Clause. The Court acknowledged overwhelming Circuit Courts of Appeal precedent permitting defendants to engage in such waivers, but clearly stated that precedent is not binding on state courts, which have concurrent jurisdiction to interpret federal law. Furthermore, the Court noted that federal precedent would be persuasive if the Court was tasked with deciding, on its merits, whether a defendant could waive an IAC claim; but, the obligations of attorneys is the focus. E-435, according to the Court, is simply an ethical rule and does not seek to alter federal substantive, procedural, or evidentiary law.

Likewise, the Court rejected the United States' Supremacy Clause argument because there is simply no federal law mandating either the plea terms defense counsel must raise of his own accord or the terms a prosecutor must offer. Indeed, the Court pointed out that there is no constitutional right to a plea agreement, all terms aside.

Turning to the merits of E-435, the Court held it was a proper interpretation of Kentucky's ethical rules because the use of IAC waivers in plea agreements resulted in an unwaivable personal conflict of interest for defense counsel under SCR 3.130-1.7 and indirectly limits defense counsel's malpractice liability under SCR 3.130-1.8(h). For the prosecution, the use of IAC waivers, in violation of SCR 3.130-8.4(a), serves as an inducement for a fellow attorney—defense counsel—to violate or attempt to violate Kentucky's ethical rules. Finally, the Court held a prosecutor's use of IAC waivers does not align with the special expectation that a prosecutor will ensure the defendant is accorded procedural justice. As a result, IAC waivers in plea agreements violate the spirit of SCR 3.130-3.8 and the prosecution's role as a minister of justice.

IV. FAMILY LAW:

A. Kaven L. Rumpel v. Kathie W. Rumpel (now Wolford) and Diana L. Skaggs

2012-SC-000563-DG **August 21, 2014**

Opinion of the Court by Justice Abramson. All sitting; all concur. In a divorce action, the trial court awarded attorney's fees to wife pursuant to CR 37.03 as a sanction for husband's purported failure to admit an undisputable fact, and increased the marital property valuation pursuant to wife's CR 59.05 motion to reconsider. Husband challenged both rulings on appeal, and the Court of Appeals affirmed. The Supreme Court, reversing the decision to increase the value of the marital property, held that wife could and should have introduced "new" valuation evidence at trial and that CR 59.05 was not available as belated means to do so. Vacating the award of attorney's fees, the Court held that husband had valid reason to deny the fact he was asked to admit for the purposes of CR 37.03, so a sanction was not appropriate, but the Court remanded for consideration of a fee award pursuant to KRS 403.220.

V. IMMUNITY:

A. Virginia Gaither (Administratrix and Personal Representative of the Estate of Lebron Gaither, Deceased) v. Justice & Public Safety Cabinet, Commonwealth of Kentucky; and Department of Kentucky State Police; and Board of Claims
AND
Justice & Public Safety Cabinet, Commonwealth of Kentucky; Department of Kentucky State Police v. Virginia Gaither (Administratrix and Personal Representative of the Estate of Lebron Gaither, Deceased) and Kentucky Board of Claims, Commonwealth of Kentucky

2012-SC-000835-DG **August 21, 2014**

Opinion of the Court by Justice Venters. Minton, C.J.; Abramson, Cunningham, Noble, and Scott, JJ., concur. Keller, J., not sitting. Sovereign and Governmental Immunity; Board of Claims. Action filed in the Kentucky Board of Claims for damages arising from death of a confidential informant allegedly caused by the negligence of state police officers overseeing an investigation of drug trafficking. Held: 1) Kentucky Board of Claims under KRS 44.073(2) had jurisdiction over claim that decedent's death was caused by state police officers' negligent performance of ministerial duties within the course and scope of their employment; 2) As opposed to a "discretionary" duty or act, which necessarily requires the exercise of reason and judgment in determining how or whether the act shall be done or the course pursued, an official duty is "ministerial" when its performance is absolute, certain, and imperative, involving merely execution of a specific act; 3) a ministerial duty may arise from the obligation to comply with a common law duty, as well from the obligation to comply with the directives of an applicable statute or administrative regulation; 4) the evidence clearly supported the Board's finding that a "known rule" within the law enforcement profession was that a confidential informant must not be used in an undercover operation

after his identity has been compromised; compliance with that rule was absolute, certain, and imperative, and thus was a "ministerial" act; 5) notwithstanding the test applied in Fryman v. Harrison, 896 S.W.2d 908 (Ky. 1995), police officers overseeing the work of a confidential informant had a "special relationship" with the informant, and thus had a duty to exercise ordinary care, including compliance with police standards for use of a confidential informant; 6) experienced prosecutors and judges were properly qualified as expert witnesses under KRS 703 to testify as to appropriate police standards in the use of confidential informants; 7) retaliation against a confidential informant by the subject of his investigative work was a known risk and foreseeable consequence of using the informant after his identity had been exposed, and therefore the criminal act of murder could not be a superseding cause of the informant's death, relieving the police from liability for their own negligence in causing the informant's death; and 8) KRS 44.070(5), which limits the amount that may be awarded by the Board of Claims, speaks to the time that the award is made, not the time that the claim accrued.

VI. MEDICAL MALPRACTICE:

A. Phillip Tibbs, M.D., et al. v. Honorable Kimberly N. Bunnell (Judge, Fayette Circuit Court) and Estate of Luvetta Goff, et al.

2012-SC-000603-MR **August 21, 2014**

Opinion of the Court by Justice Scott. Cunningham and Venters, JJ., concur. Noble, J., concurs in result only. Abramson, J., dissents by separate opinion in which Minton, C.J., joins. Keller, J., not sitting. Appellants, Phillip Tibbs, M.D., Joel E. Norman, M.D., and Barrett W. Brown, M.D., petitioned the Court of Appeals for a writ of prohibition directing the Fayette County Circuit Court to prohibit the production of an "incident" or "event" report created after the death of patient Luvetta Goff, arguing that the report fell within the federal privilege created by the Patient Safety and Quality Improvement Act of 2005, 42 U.S.C.A. § 299b-21 et. seq. The Court of Appeals granted the Appellants' writ, but Appellants appealed to the Supreme Court as a matter of right, arguing that the Court of Appeals erroneously limited the protective scope of the privilege. The sole issue on appeal before the Supreme Court was a question of first impression regarding the proper scope of the privilege established by the Act. While upholding the issuance of the writ, the Supreme Court reversed the Court of Appeals as to proper scope of the Act, and clarified the scope of the Act's privilege to be applied on remand.

VII. NEGLIGENCE:

A. Jeffrey T. Caniff v. CSX Transportation, Inc.

2012-SC-000750-DG **August 21, 2014**

Opinion of the Court by Justice Scott. Cunningham, Keller, Noble, and Venters, JJ., concur. Minton, C.J., dissents by separate opinion in which Abramson, J., joins. Appellant, Jeffrey T. Caniff, sought discretionary review by the Supreme

Court of the opinion of the Court of Appeals which affirmed the trial court's order granting Appellee's, CSX Transportation, Inc., motion for summary judgment due to Caniff's failure to obtain an expert witness. The Supreme Court granted discretionary review and reversed and remanded the case to the trial court, holding that the trial court abused its discretion by granting summary judgment pursuant to Caniff's failure to obtain an expert witness, as there were material facts at issue in the case. The Court held that while it would have been within the trial court's discretion to allow an expert to testify, it was not within its discretion to require an expert in order for Caniff's case to survive a motion for summary judgment, as the issues were within the common knowledge and experience of the jury.

VIII. STATUTORY CONSTRUCTION:

A. Virgin Mobile U.S.A., LP v. Commonwealth of Kentucky on Behalf of Commercial Mobile Radio Service Telecommunications Board AND Commonwealth of Kentucky on Behalf of Commercial Mobile Radio Service Telecommunications Board v. Virgin Mobile U.S.A., LP

2012-SC-000621-DG and **August 21, 2014**
2012-SC-000626-DG **August 21, 2014**

Statutory construction; Common law right of recoupment for money mistakenly paid; Award of attorney's fees. The Commonwealth of Kentucky, on behalf of the Commercial Mobile Radio Service Telecommunications Board (CMRS), brought suit to collect the statutory service charges for 911 emergency services from a provider of pre-paid mobile telephone service (Virgin Mobile). Based upon the traditional rules of statutory construction, the Court held: 1) the legislature intended to impose the burden of the CMRS service charge upon the CMRS customer, not mobile phone service providers; and 2) because the legislature mandated in the pre-2006 version of KRS Chapter 65, that the CMRS service charge be collected "in accordance KRS 65.7635," which directed that the charge be added to customer's monthly bills, prepaid service providers without a "normal monthly billing process" could not be compelled to collect the service charge. The Court also held that cellular telephone provider's right to refund of money it had mistakenly paid to the CMRS fund did not justify the provider to recoup the payment from other service charge collections owed to the CMRS fund. Award of attorneys' fees, when authorized by statute, is a matter left to the sound discretion of the trial court. In determining award of attorney's fees, the trial court must consider the "lodestar" factors approved in Hill v. Kentucky Lottery Corp., 327 S.W.3d 412 (Ky. 2010). The extent of a party's success is a crucial factor in determining the proper amount of an award of attorney's fees.

IX. STATUTORY INTERPRETATION:

A. Hon. George W. Davis, III v. Hon. Thomas D. Wingate, Judge, Franklin Circuit Court, Division II, Marc I. Rosen, and Commonwealth of Kentucky

2014-SC-000323-MR **August 14, 2014**

Opinion and Order. All sitting. Minton, C.J.; Abramson, Keller, Noble, and Venters, JJ., concur. Scott, J., dissents by separate opinion in which Cunningham, J., joins. Marc I. Rosen is a candidate for the 32nd Judicial Circuit, First Division; and, incidentally, previously served as a senior status judge. HB 427, enacted into law during the 2013 general session, prohibits any judge who elected to retire as senior status from becoming a candidate or nominee for any elected office during the five year term prescribed in KRS 21.580(1)(a)1. After filing the proper candidacy papers with the Secretary of State, Rosen filed a declaratory action in Franklin Circuit Court challenging the constitutionality of HB 427. George Davis, the incumbent circuit judge in the 32nd Judicial Circuit, First Division, intervened in the suit and filed a motion to dismiss. Close in time to Rosen's action, a concerned voter in Boyd County filed an action challenging the bona fides of Rosen's candidacy under KRS 118.176(2). Davis asserted Franklin Circuit was without jurisdiction because KRS 118.176 vested jurisdiction to determine the bona fides of Rosen's candidacy exclusively in Boyd Circuit and Rosen's declaratory action was a bona fide determination in substance. Franklin Circuit denied the motion, prompting Davis to seek a writ of prohibition from the Court of Appeals, which was denied. Davis then appealed that denial. In denying Davis's writ petition, the Court held that as a court of general jurisdiction, Franklin Circuit certainly had jurisdiction over Rosen's declaratory action. The Court agreed with Davis that a challenge to a candidate's bona fides must follow KRS 118.176; and, as a result, Boyd Circuit was the appropriate court for that action. Rosen's declaratory action, however, challenged the constitutionality of a statute delineating the requisite bona fides; but, Rosen's action did not challenge whether he possessed those bona fides. The Court also clarified the required elements in writ actions by noting that a writ action arguing the trial court is acting outside its jurisdiction does not require a showing of irreparable injury or lack of remedy by appeal.

X. WORKERS COMPENSATION:

A. Jackson W. Watts, Party in Interest and Loretta Langford v. Danville Housing Authority; Honorable J. Langford Overfield, Administrative Law Judge; and Workers' Compensation Board

2013-SC-000346 **August 21, 2014**

Opinion of the Court. All sitting; all concur. Watts, an attorney, filed this appeal to argue that an interlocutory proceeding in a workers' compensation case, specifically a medical fee dispute, should be considered separate from a claim for income benefits and therefore not subject to the statutory cap on attorney fees provided in KRS 342.320(2)(a).

The ALJ, Workers' Compensation Board, and Court of Appeals all held that an interlocutory award was a part of the "original claim," and thus subject to the cap on attorney fees. The Supreme Court affirmed. An interlocutory order is entered as a means to adjudicate a claimant's case and ultimately obtain a final judgment. It is a part of the claimant's original claim, i.e. their petition to receive redress for a work-related injury. Thus, Watts was not entitled to receive additional attorney fees for the interlocutory award entered in this matter which would exceed the statutory cap in KRS 342.320(2)(a).

XI. ATTORNEY DISCIPLINE:

A. Inquiry Commission v. John Greene Arnett, Jr.

2014-SC-000192-KB **August 21, 2014**

Opinion of the Court. All sitting; all concur. The Inquiry Commission petitioned to temporarily suspend Arnett under SCR 3.165 based on an affidavit from the Commonwealth's Attorney for Boone and Gallatin Counties that Arnett had misappropriated client funds. The facts alleged that Arnett had misappropriated $75,000 held in trust for a divorce client. There was further evidence that checks or withdrawal slips made payable to Arnett from the trust account were executed in an amount exceeding $175,000. After reviewing the petition and the affidavit, the Court agreed that the Inquiry Commission had supplied a reasonable basis to believe that Arnett had misappropriated, at the very least, the divorce client's $75,000. The Court noted that Arnett did not try to discredit the petition in any way and never explained the whereabouts of his client's funds. Accordingly, the Court held there was probable cause warranting temporary suspension under SCR 3.165.

B. Kentucky Bar Association v. Mark A. Bramble

2014-SC-000198-KB **August 21, 2014**

Opinion and Order. All sitting; all concur. Bramble was suspended from the practice of law in West Virginia because he was charged with attempted murder and wanton endangerment involving a firearm, and may suffer from impairment affecting his ability to practice law. The Office of Bar Counsel petitioned the Court for reciprocal discipline under SCR 3.435. Bramble filed a response stating that he had no objection to the relief sought.

The suspension imposed by the West Virginia Supreme Court of Appeals was temporary but open ended; it would expire no sooner than the conclusion of Bramble's pending criminal and attendant disciplinary matters. Although SCR 3.435(4) typically requires a final disciplinary decision and that the Court first issue a show cause order before reciprocal discipline is imposed, the Court determined that granting the petition and temporary suspension of Bramble's license was appropriate under the circumstances. The West Virginia rule under which Bramble was temporarily suspended is substantially the same as SCR 3.165, the substance of which clearly allowed for temporary suspension in this

case. Bramble's response to the petition, stating he had no objection to reciprocal discipline, amounted to a waiver of strict compliance with the requirements of SCR 3.435, including the ordinary procedural step of first ordering the attorney to show cause, and SCR 3.165. Bramble's circumstances were precisely the type for which our own temporary suspension rule was designed, as it was evident "that probable cause exist[ed] to believe that [Bramble's] conduct pose[d] a substantial threat of harm to his clients or to the public," SCR 3.165(1)(b), and "that probable cause exist[ed] to believe that [Bramble] is mentally disabled or is addicted to intoxicants or drugs and probable cause exist[ed] to believe [Bramble] does not have the physical or mental fitness to continue to practice law," SCR 3.165(1)(d).

C. Kentucky Bar Association v. Daniel Edward Pridemore
2014-SC-000218-KB **August 21, 2014**

Opinion and Order. All sitting, all concur. Pridemore had represented a client in a divorce and child-custody matter. The eventual divorce decree included a domestic violence order. Pridemore was retained by the client and paid $7,000 to pursue an appeal. He filed the notice of appeal but failed to timely respond to a subsequent motion to dismiss the appeal for procedural noncompliance. The appeal was dismissed. When the client contacted Pridemore after learning of the dismissal, Pridemore assured the client that the dismissal was a technical or clerical error and that he would have it reinstated. Pridemore and his client exchanged several emails over the following several months before Pridemore eventually advised that the appeal could not be reinstated. He eventually stopped responding to communications from the client.

The Inquiry Commission issued a charge against Pridemore that alleged violations of SCR 3.130-1.3; SCR 3.130-1.4(a)(3); SCR 3.130-1.4(a)(4); SCR 3.130-1.16(d); SCR 3.130-8.1(b); and SCR 3.130-8.4(c). Pridemore never responded to the bar complaint or the charge. His disciplinary history included a separate 30-day suspension and an ongoing suspension for non-payment of bar dues and failure to meet continuing legal education requirements.

The Board of Governors voted unanimously to find Pridemore guilty of all six counts. In light of Pridemore's disciplinary history and conduct, the Board recommended a 30-day suspension to be served consecutively to any other current or pending discipline, with reinstatement contingent upon compliance with the following conditions: (1) that he submit to evaluation by the Kentucky Lawyers Assistance Program; (2) the he attend and successfully complete the Office of Bar Counsel's Ethics and Professionalism Enhancement Program; and (3) that he pay the costs of this proceeding. Neither the Office of Bar Counsel nor Pridemore sought review by the Court under SCR 3.370(7). The Court declined to undertake review pursuant to SCR 3.370(8), thereby adopting the Board's recommendation pursuant to SCR 3.370(9).

D. Kentucky Bar Association v. William Kelly Fulmer, II
2014-SC-000232-KB August 21, 2014

Opinion of the Court. All sitting; all concur. Fulmer received a $2,000 retainer from a client. After some initial communications, Fulmer failed to respond to his client's attempts to contact him via voicemail, email, regular mail, and registered mail. The client eventually requested return of his retainer and any paperwork in Fulmer's possession. Fulmer did not respond and the client filed a bar complaint.

The KBA unsuccessfully attempted to serve Fulmer with the complaint by mail and through the Boone County Sheriff. Thereafter, the Inquiry Commission issued a charge against Fulmer, alleging that he had violated SCR 3.130-1.3 (failure to diligently represent client); SCR 3.130-1.4(a)(4) (failure to comply with client's request for information); SCR 3.130-1.16(d) (failure to take steps to protect client's interests once representation had been terminated); and SCR 3.130-8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority). The KBA was unsuccessful again in its attempts to serve the charge on Fulmer by mail and through the Boone County Sheriff.

The Board of Governors unanimously found Fulmer guilty on all five counts and recommended that he be suspended from the practice of law for 181 days, to run consecutively with his current suspension. The Board further recommended that Fulmer be directed to refund the $2,000 retainer fee to his client and be referred to the Kentucky Lawyer's Assistance Program. Upon reviewing the record, the Supreme Court Rules and relevant case law, the Supreme Court adopted the Board's recommendation and sanctioned Fulmer accordingly.

E. Kentucky Bar Association v. Cabell D. Francis, II
2014-SC-000233-KB August 21, 2014

Opinion and Order. Minton, C.J., Abramson, Cunningham, Keller, Noble and Scott, JJ., concur. Venters, J., not sitting. The Office of Bar Counsel received notices of numerous payments made on Francis's client trust account that were returned for insufficient funds over the course of several months. Francis failed to respond to multiple notices sent by the Office of Bar Counsel seeking explanations for the payments, many of which appeared to have been for personal matters.

The Inquiry Commission then filed a complaint asserting Francis engaged in misconduct in his handling of his trust account. Francis failed to respond to this complaint. As a result, the Inquiry Commission issue a one-count charge alleging violation of SCR 3.130-8.1(b), and Francis again did not respond. The Inquiry Commission then issued another charge alleging violation of SCR 3.130-1.15(a) and SCR 3.130-8.1(b) (the Court determined that the latter count in the second charge was duplicative of the same count in the first charge and dismissed it accordingly). Again, Francis filed no answer in response.

A separate complaint was filed against Francis relating to a failure to refund a client an unearned fee. Francis did not respond to this complaint, and the Inquiry Commission issued another charge against Francis alleging violation of SCR 3.130-1.16(d) and SCR 3.130-8.1(b). Francis again failed to file any response to the charge.

The Board of Governors voted unanimously to find Francis guilty of all charges. In light of Francis's conduct and disciplinary history, including two prior private admonitions, the Board recommended Francis be suspended from the practice of law for 181 days, that he be required to refund the client, and that he be required to pay the costs of this proceeding. Neither the Office of Bar Counsel nor Francis sought review by the Court under SCR 3.370(7). The Court declined to undertake review pursuant to SCR 3.370(8), and thus adopted the Board's recommendation pursuant to SCR 3.370(9) (except insofar as it dismissed the duplicative count).

F. John E. Dutra v. Kentucky Bar Association
2014-SC-000258-KB August 21, 2014

Opinion and Order. All sitting; all concur. Dutra admitted that he engaged in professional misconduct in violation of SCR 3.130-1.4(a)(2) by failing to consult with a client about a check issued from the client's trust account to pay for representation in a new indictment; SCR 3.130-8.1(b) by failing to respond to an Office of Bar Counsel request for information despite having been given notice that failure to respond could result in an additional charge; and SCR 3.130-8.4(c) by withdrawing funds from the client's trust account for purposes other than to benefit the client (such as making payments to Dutra's law firm), by failing to inform the client of the withdrawals, by failing to provide an accurate balance of the account, and by refusing the client's requests for copies of account records. Dutra moved the Court under SCR 3.480(2) to impose a 181-day suspension, with 61 days to be served and the remaining 120 days to be probated subject to the following conditions: (1) that he comply with the notification requirements of SCR 3.390(b); (2) that he not receive any charge of profession misconduct based on conduct occurring or discovered after entry of the Court's order; and (3) that if his probation is revoked and the remainder of his sentence imposed, then he must comply with the provisions of SCR 3.510(3) for reinstatement. The KBA did not object to the motion. After reviewing the allegations, Dutra's previous disciplinary record, and relevant cases cited by Bar Counsel, the Court concluded that the discipline proposed was adequate.

G. James Grant King v. Kentucky Bar Association
2014-SC-000259-KB August 21, 2014

Opinion of the Court. All sitting; all concur. King comingled client funds and personal funds in his escrow account, failed to maintain sufficient funds in his escrow account to pay settlements to two clients and to pay his clients' Medicaid liens, and he paid personal expenses from his escrow account. King ultimately made his clients whole.

King moved the Supreme Court to suspend his law license for one hundred eighty days (180) with sixty one (61) days to serve and the remainder to be probated for two (2) years with conditions. The KBA did not object, and the Court granted King's motion.

H. Seth Jarad Johnston v. Kentucky Bar Association
2014-SC-000288-KB **August 21, 2014**

Opinion of the Court. All sitting; all concur. Johnston entered a guilty plea in the US District Court for the Eastern District of Kentucky to several criminal charges, including mail fraud, wire fraud, obstruction of justice, distribution of controlled substance analogues, and tax fraud. Johnston admitted that his actions violated a number of Rules of Professional Conduct and requested the Supreme Court grant him leave to resign from the KBA under terms of permanent disbarment under SCR 3.480(3). The Court agreed that Johnston's motion to withdraw his membership was appropriate and ordered that he be permanently disbarred from the practice of law.