

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
AUGUST 2015**

I. CERTIFICATION OF LAW

**A. In Re: Appalachian Land Company v. EQT Production Company
[2013-SC-000598-CL](#) August 20, 2015**

Opinion of the Court by Justice Cunningham. All sitting. Barber, Cunningham, Keller, Noble, and Venters, JJ., concur. Venters, J., concurs by separate opinion in which Noble, J., joins. Abramson, J., dissents by separate opinion in which Minton, C.J., joins. This case involves a 1944 oil and gas lease. Appalachian Land Company (Appalachian) is the successor in interest to the original lessor to that lease, and EQT Production Company (EQT) is the successor in interest to the original lessee. Appalachian filed a class action lawsuit against EQT in the U.S. District Court for the Eastern District of Kentucky. Appalachian claimed that EQT underpaid royalties owed to Appalachian in exchange for natural gas EQT acquired from Appalachian's land. Appalachian's primary contention was that EQT was impermissibly deducting severance taxes prior to calculating a royalty value. The court disagreed and entered judgment on the pleadings in favor of EQT. On certification from the Sixth Circuit Court of Appeals, the Supreme Court of Kentucky certified that: 1) royalty owners are not statutorily liable for the severance tax assessed under KRS Chapter 143A; and 2) absent a specific contractual provision apportioning severance taxes, lessees may not deduct severance taxes or any portion thereof prior to calculating a royalty value. Accordingly, Appalachian is not liable for any portion of the natural gas severance tax.

II. CHILD SUPPORT

**A. C.D.G. v. N.J.S.
[2014-SC-000329-DGE](#) August 20, 2015
[2014-SC-000495-DGE](#) August 20, 2015**

Opinion of the Court by Justice Noble. All sitting; all concur. The Supreme Court held that trial courts have the discretion to award a credit against child support obligations for Social Security retirement benefits paid to a dependent child. That authority, the Court concluded, stems from the trial court's general authority and discretion to determine child-support issues, and that authority is not limited by KRS 403.211(15), which expressly provides for a similar credit for disability benefits. The Court further held that the trial court did not abuse its discretion in ordering the mother to reimburse the father for support payments made during a 22-month period of overlap when the child was also eligible for

Social Security dependent benefits, which were eventually paid in a lump sum. The Social Security anti-attachment provision did not shield the duplicative portion of the award from recoupment once the payment had been made, nor did the no-recoupment rule against retroactive changes to child support obligations apply to the circumstances in this case because allowing the father to recoup prior payments after the payment of the lump-sum Social Security dependent benefits did not retrospectively modify the original child support order. The trial court’s conclusion that the balance of the equities favored reimbursement was not an abuse of discretion in light of all the circumstances.

III. CIVIL PROCEDURE

A. Keith Randall Sparkman D/B/A In-Depth Sanitary Service Group, et al. v. Consol Energy, Inc. and Consol of Kentucky, Inc.

[2013-SC-000119-DG](#)

August 20, 2015

[2013-SC-000831-DG](#)

August 20, 2015

Opinion of the Court by Justice Abramson. All sitting; all concur. Consol Energy and Consol of Kentucky appealed a verdict and judgment in favor of Keith Sparkman d/b/a In-Depth Sanitary Service Group arising from a contract dispute. In the appeal to the Court of Appeals, the lower court reversed and remanded the trial court’s judgment on the grounds that the court erroneously had named a “non-party” in the judgment. The Supreme Court found that the parties had mutually consented to amend the complaint to reflect the correct party—a party that was later properly named in the judgment. In addition, the Court concluded that the naming of the parties in the notice of cross-appeal was sufficient to transfer jurisdiction to the Court of Appeals. The Court reversed and remanded the case to the Court of Appeals for that court to fully review the merits of the appeal and cross-appeal.

IV. CRIMINAL LAW

A. Julius Wallace v. Commonwealth of Kentucky

[2013-SC-000332-MR](#)

August 20, 2015

Opinion of the Court by Justice Noble. All sitting; all concur. Wallace was convicted of three counts of first-degree robbery, two counts of second-degree robbery, possession of a handgun by a convicted felon, and being a persistent felony offender. He was sentenced to 30 years in prison and appealed as a matter of right. See Ky. Const. § 110(2)(b). On appeal, he claimed (1) that he was entitled to a mistrial after the Commonwealth suggested during closing argument that several of its witnesses had not identified him from the stand because they were afraid, (2) that the trial court erred by striking a juror for cause, (3) that the admission of certified copies of various court documents containing inadmissible information

related to his prior misdemeanor and felony convictions during the penalty phase was palpable error, and (4) that the trial court should have held a separate trial before a new jury for the severed handgun charge, rather than holding one “trifurcated” trial at which all the charges were decided. In affirming Wallace’s conviction and sentence, the Supreme Court held that the alleged error regarding the Commonwealth’s closing argument statements was unpreserved for appellate review and not palpable error, that the for-cause strike of the potential juror was proper, and that the admission of inadmissible evidence at sentencing was not palpable error. The Court further concluded that trifurcating the trial—into two guilt phases where the robbery charges were decided before trying the handgun charge, followed by a consolidated penalty phase—was an appropriate method of preventing the prejudice of the jury learning of the prior conviction through the handgun charge from tainting the robbery charges and that, in this case, the robbery evidence did not taint the jury’s consideration of the handgun charge because the same evidence would have been admissible to prove Wallace’s possession of a handgun at a separate trial.

B. Mikail Sajjaad Muhammand v. Kentucky Parole Board
[2013-SC-000420-DG](#) August 20, 2015

Opinion of the Court by Justice Abramson. All sitting. Minton, C.J.; Barber, Keller, Noble, and Venters, JJ., concur. Cunningham, J., concurs in result only by separate opinion. Defendant pled guilty to a new offense in reliance on the prosecutor’s promise that the guilty plea would not result in the revocation of the defendant’s conditional discharge stemming from a prior offense. After the Parole Board revoked the conditional discharge anyway and re-incarcerated the defendant for the prior offense, the defendant sought and was granted habeas corpus relief. On appeal by the Parole Board, the Court of Appeals reversed. Affirming the decision by the Court of Appeals, the Supreme Court held that the prosecutor’s unfulfilled promise did not render the defendant’s guilty plea void, that the defendant accordingly had adequate remedies available by way of direct or collateral review, and that his failure to pursue those remedies did not justify the invocation of habeas corpus.

C. Quintin Danell Lackey v. Commonwealth of Kentucky
[2014-SC-000001-MR](#) August 20, 2015

Opinion of the Court by Chief Justice Minton. All sitting; all concur. While on parole for various drug charges, Quintin Lackey was expelled from his treatment program for too many absences. Lackey was summoned to his parole officer’s office where he was immediately handcuffed and placed under arrest by a police officer. The handcuffs, however, caused Lackey discomfort so the police officer removed the cuffs in an attempt to remedy the situation. Lackey bolted for the door, trampled the police officer, and made his way out of the building. Lackey was captured soon

thereafter and a jury found him guilty of second-degree escape and being a first-degree persistent felony offender, sentencing him to twenty years' imprisonment. On appeal, Lackey argued he was entitled to a directed verdict on the second-degree escape charge and the jury should have been instructed on third-degree escape. The Court disagreed, holding that Lackey was in custody, despite not being physically restrained when the handcuffs were removed. In doing so, the Court reaffirmed prior examples of constructive custody, e.g. home incarceration with an ankle monitor. Next, the Court rejected Lackey's argument that because he was on parole he was not currently charged with or convicted of a felony for second-degree-escape purposes. The Court was clear: a parolee, while outside prison walls, is still serving his felony sentence. Parole, according to the Court, is simply a variation on imprisonment and does not excuse a convicted criminal from serving his sentence. Finally, the Court rejected Lackey's argument that he was entitled to a third-degree-escape instruction because there was no evidence to support the instruction.

D. Micah Holland v. Commonwealth of Kentucky

[2014-SC-000033-MR](#)

August 20, 2015

Opinion of the Court by Justice Venters. All sitting; all concur. Appellant was convicted for wanton murder and sentenced to twenty years' imprisonment. Upon review the Supreme Court held that: (1) evidence supporting the Commonwealth's theory that Appellant acted wantonly with respect to victim's death necessitated an instruction on wanton murder, and refuted Appellant's theory that the only possible verdicts justified by the evidence were not guilty and guilty of intentional murder; (2) the trial court properly declined to answer the request of a deliberating jury for clarification of the meaning of the word, "wantonly," as used in the jury instructions because the concept of "wantonness," as given in the definitional section of the instructions, is well-within the realm of one's ordinary experiences; (3) Appellant's argument that the trial court improperly excluded his proffered evidence concerning the victim's predisposition towards violence was unpreserved for review because Appellant failed to comply with KRE 103 by disclosing through proffer or avowal what the witness's testimony would have been upon the point as required by KRE 103 states; (4) the trial court properly instructed the jury on the issue of imperfect self-defense because the instructions given provided the jury with an accurate roadmap to navigate the legal intricacies involved under this issue; and (5) the trial court properly denied instruction on Appellant's theory that his crimes resulted from an extreme emotional disturbance because the evidence failed to adequately identify a "triggering event" that might have given rise to an emotional disturbance.

E. Cedric McNeil v. Commonwealth of Kentucky

[2014-SC-000163-MR](#)

August 20, 2015

Opinion of the Court by Justice Abramson. All sitting; all concur. Defendant was convicted of first-degree robbery and first-degree assault and was sentenced to a

total of twenty-eight years in prison. He was found to have injured a nonparticipant in the crime when, in the course of making his get away from a purse snatching, he ran the nonparticipant over with his car. Overruling *O'Hara v. Commonwealth*, 781 S.W.2d 514 (Ky. 1989), the Supreme Court affirmed both the robbery and the assault convictions and held that even when based on the physical-injury theory of aggravation, first-degree robbery does not merge, for double jeopardy purposes, with assault. The Court also held that minor jury-instruction and hearsay errors did not entitle the defendant to relief.

F. Lawrence Pate v. Department of Corrections AND Lawrence Pate v. Commonwealth of Kentucky

[2013-SC-000558-DG](#)

August 20, 2015

[2013-SC-000559-DG](#)

August 20, 2015

Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellant was indicted on the charge of manufacturing methamphetamine, second offense, a Class A felony. Appellant committed the offense while he was out of custody, awaiting final sentencing for manufacturing methamphetamine, first offense, in Pendleton County. Prior to trial, the Commonwealth presented Appellant with two different plea offers. Both offers amended the manufacturing methamphetamine, second offense, down to criminal attempt to manufacturing methamphetamine, first offense, a Class B felony. In doing so, the Commonwealth agreed to recommend a five year sentence to run consecutively to the twenty year sentence he would receive in the Pendleton County case. Appellant, however, was under the impression that he could potentially have both case sentences run concurrently, so he rejected both plea deals and decided to take his chances at trial. Moreover, Appellant was informed that manufacturing methamphetamine, second offense was considered a "non-violent offense," thereby requiring him to only serve twenty percent of his sentence, not including other sentence-reducing credits he may receive.

Appellant went to trial and was found guilty of manufacturing methamphetamine, second offense. The trial court ultimately sentenced Appellant to twenty years imprisonment. Pursuant to KRS 533.060(3), Appellant's twenty year sentence was ordered to run consecutively to his Pendleton County sentence, for a total of forty years imprisonment. All parties involved in his case, including the defense counsel, prosecution, and probation and parole officer, all believed Appellant's conviction would render him a "nonviolent offender." Once Appellant was committed to the Department of Corrections ("DOC"), he was classified as a violent offender. Over four years after he was sentenced, the General Assembly modified KRS 439.3401(1) to clarify that the violent offender classification should be given to all Class A felony offenders. As a result, the DOC notified Appellant that his non-violent offender status had been changed to violent offender. See KRS 439.3401(1), amended by KRS 439.3401(1)(a)-(i)(2006). Due to Appellant's reclassification, his parole eligibility and sentence expiration dates were recalculated. Accordingly, Appellant was not to be

released on parole until he served at least twenty years of his forty year sentence, and he can no longer obtain certain good-time credits.

Appellant filed three different pleadings asking for relief. First, Appellant filed a declaration of rights petition in the Franklin Circuit Court. As grounds for his petition, Appellant argued that the amendment to KRS 439.3401 constituted an ex post facto violation. Appellant also filed a motion for clarification of his sentence in the Bracken Circuit Court. Lastly, Appellant moved the Bracken Circuit Court to vacate, set aside, or correct his judgment of conviction and sentence pursuant to Kentucky Rules of Criminal Procedure (“RCr”) 11.42, or, in the alternative, Kentucky Rules of Civil Procedure (“CR”) 60.02. Both the Franklin and Bracken Circuit Court denied Appellant relief.

The Court of Appeals consolidated the three matters into one action. The Court of Appeals affirmed the ruling of both Circuit Courts, with the exception of the Bracken Circuit Court’s order denying Appellant’s RCr 11.42 motion. The Court of Appeals found merit in Appellant’s ineffective assistance of counsel claim based on trial counsel’s erroneous belief that the sentences could be served concurrently. The Court of Appeals believed that Appellant would have likely accepted the Commonwealth’s plea offers had he been correctly advised that any sentence received would run consecutively to his Pendleton County sentence. As a result, the Court of Appeals reversed the trial court’s order denying Appellant’s RCr 11.42 motion, and remanded the case back to the Bracken Circuit Court with directions for it to hold an evidentiary hearing.

When the case reached this Court, the following two issues were unresolved: whether the Franklin Circuit Court and the Court of Appeals erred in ruling that KRS 439.3401 does not constitute an ex post facto law; and (2) whether the Bracken Circuit Court and Court of Appeals erred in denying Appellant relief pursuant to CR 60.02. As to the first issue, we ruled that the amendments to KRS 439.3401 do increase the punishment Appellant would have received had the statute remained the same. Indeed, KRS 439.3401 changed Appellant’s classification to violent offender, which in turn, has a very real and direct effect on the actual time he will remain behind bars. However, the Court disagreed that the amendment to KRS 439.3401(1) was retrospective. The changes made to KRS 439.3401(1) were textual in nature and did not change the violent offender definition. This Court, therefore, held that KRS 439.3401 is not an ex post facto law, as there was no substantive change for the DOC to apply retrospectively.

In regards to the second issue, the Court determined that Appellant was entitled to CR 60.02(f) relief. The Court found that Appellant was denied due process of law when he proceeded with a jury trial under the false pretense that, if convicted, he would be treated as an ordinary, non-violent offender. During his entire prosecution, Appellant was never informed that a conviction of manufacturing

methamphetamine, second offense would result in him being classified a violent offender. Instead, Appellant was told that the customary sentencing guidelines applied. With this mistaken belief in mind, Appellant rejected the Commonwealth's plea deals and stood trial. The Court has no doubt that Appellant would have sought conviction of a lesser crime had he been rightfully informed of the violent offender status that manufacturing methamphetamine, second offense carried. To bind Appellant to a sentence that carries such harsh terms, those of which he was unaware would apply, places the overall integrity of the judicial system in question. Thusly, the Court held that Appellant was entitled to extraordinary relief pursuant to CR 60.02(f), thereby requiring the Bracken Circuit Court to vacate its judgment and sentence upon remand, subject to retrial on the charge.

G. Commonwealth of Kentucky v. Floyd Wright AND Floyd Wright v. Commonwealth of Kentucky

[2013-SC-000226-DG](#)

August 20, 2015

[2013-SC-000824-DG](#)

August 20, 2015

Opinion of the Court by Justice Keller. All sitting; all concur. Wright was present for and assisted in the sale of cocaine to a confidential informant. During deliberation at trial, the jury asked to relisten to an audio recording of the sale in the jury room. Wright objected, but the trial court ruled that the recording was an exhibit and that the jurors were free to review it. However, the recording could only be played on the Commonwealth's attorney's laptop, so the court allowed the laptop to be setup in the jury room. After further deliberation, the jury convicted Wright of complicity to first-degree trafficking in a controlled substance and of being a second-degree persistent felony offender. Wright properly appealed, and the Court of Appeals reversed his conviction holding that allowing unfettered and unmonitored access to the prosecutor's files and the internet without even an admonishment was an abuse of the trial court's discretion.

The Supreme Court determined that the recording was not testimonial but simply a "real life" record of what transpired; therefore, the trial court did not err by permitting the jury to listen to it in the deliberation room. As to allowing the jury access to the laptop, the Court held that the mere possibility that the laptop contained prejudicial information and could access the internet did not affect the substantial rights of the parties. Moreover, the Court noted that Wright had failed to provide any proof of prejudicial information contained on the laptop or evidence of impermissible use. Finally, the Court held that Wright had an opportunity to ask the trial court for an admonition but did not and the trial court's failure to *sua sponte* give an admonition, if it was error, was not inconsistent with substantial justice.

Wright also made a number of unpreserved evidentiary arguments, which the Court determined did not rise to the level of palpable error.

H. Lisa A. Daugherty v. Commonwealth of Kentucky

[2013-SC-000764-MR](#)

August 20, 2015

Opinion of the Court by Justice Noble. All sitting; all concur. Daugherty was convicted of murder for shooting and killing her husband and of tampering with physical evidence for hiding the gun used in the shooting. The Supreme Court reversed and remanded for a new trial. In doing so, the Court held that the trial court abused its discretion in preventing Daugherty from testifying about her husband's prior felony conviction and statements he made to her following the shooting (ordering her to hide the gun because he was not allowed to have it due to his status as a felon) because the evidence was relevant to explain an alternate reason for her decision to hide the gun to rebut the contention that doing so was evidence of her guilty conscious for murdering her husband and was not barred by any exclusionary rule of evidence. The Court further held that the trial court abused its discretion in preventing Daugherty from testifying about statements made by her husband before, during, and after the shooting. The statements in question, including threats and commands that she kill him, were necessary to present a full picture of Daugherty's version of what happened; and without being able to repeat them at trial, she was limited to only describing what she did and what she saw her husband do, without the important context for those actions that the statements would have supplied. That the jury had already heard many of those statements in her recorded interview with police was insufficient to exclude her testimony on grounds that it was needlessly cumulative. The errors required reversal because they implicated Daugherty's due-process right to present a defense and were not harmless beyond a reasonable doubt.

I. Berry Hall v. Commonwealth of Kentucky

[2012-SC-000423-MR](#)

August 20, 2015

Opinion of the Court. All sitting. Minton, C.J., Abramson, Barber, Cunningham, Keller, JJ., concur. Noble, J., concurs in part and dissents in part by separate opinion in which Venters, J., joins. Berry Hall challenged his murder conviction on numerous grounds, including the admission of gruesome crime scene and autopsy photos, and a directed verdict motion on four counts of wanton endangerment. The Supreme Court found that Hall's motion for directed verdict as to the multiple counts of wanton endangerment were properly denied. The Court found that the admission of the highly prejudicial photographs was improper, and ordered that Hall's conviction and sentence be reversed and remanded for new proceedings.

J. Commonwealth of Kentucky v. James Bedway

[2012-SC-000771-DG](#)

August 20, 2015

Opinion of the Court by Justice Keller. All sitting. Minton, C.J., Abramson, Barber, Cunningham, and Venters, JJ., concur. Noble, J., concurs in result only by separate opinion. Bedway was arrested under suspicion of driving under the influence in violation of KRS 189A.010. After Bedway was transported to the Metro Corrections Facility, police advised him that he had fifteen minutes to attempt to contact an attorney before submitting to a court admissible breathalyzer test, as required by KRS 189A.105. Police later reported and testified that Bedway was referred to a phone, phonebook, and list of attorneys' numbers but that he did not attempt to contact an attorney. In contrast, Bedway testified that he asked if he could call his daughter to get the name of an attorney from her but that police denied his request. It was undisputed that at the end of the fifteen minute period Bedway submitted to the breathalyzer test and registered a blood-alcohol content of more than twice the legal limit.

During a bench trial, Bedway moved to suppress the results of the test. The district court denied the motion, noting that even if police had refused to let Bedway contact his daughter, that did not violate KRS 189A.105. Following the ruling, Bedway entered a conditional guilty plea and appealed to the circuit court. The circuit court reversed the district court, finding that the police had violated Bedway's statutory right to attempt to contact an attorney and that evidence of the breathalyzer test results should have been suppressed. The Court of Appeals affirmed that ruling.

The Supreme Court considered (1) whether Police violated Bedway's statutory right to attempt to contact an attorney and (2) if so, whether suppressing the test results was the appropriate remedy. As to the first issue, the Court analyzed three Court of Appeals's cases interpreting KRS 189A.105 and affirmed that police must make reasonable accommodations for arrestees who are attempting to contact specific attorneys. To determine the reasonableness of such accommodations, the Court provided a non-exclusive list of factors to consider. The Court ultimately agreed with the circuit court and Court of Appeals and held that Bedway's request was reasonable and should have been accommodated.

As to the second issue, Bedway argued that the results must be suppressed because there is no other reasonable way to deter police misconduct; the Commonwealth maintained that the exclusionary rule is improper because no Constitutional right is invoked in KRS 189A.105. The Court held that suppression was not the appropriate remedy for violation of the statute under these facts. The Court reasoned that because of Kentucky's implied consent statute, Bedway consented to provide a breath sample by operating a motor vehicle in the Commonwealth. Moreover, the Court had previously held that exclusion of evidence for violating the provisions of

the implied consent statute is not mandated absent an explicit statutory directive and that no such directed is provided by KRS 189A.105. Finally, the Court held that if police deliberately disregard the mandate to permit a defendant to attempt to contract an attorney or the defendant is prejudiced as a result of that deliberate disregard, *i.e.* the defendant might have refused the testing and thereby received a lesser sentence, evidence seized thereafter may be suppressed. The Court applied this rule and found that Bedway, who received the minimum sentence, was not prejudiced and that police did not deliberately disregard the statute. Therefore, the Court affirmed that police violated KRS 189A.105 by not allowing reasonable accommodation but reversed the Court of Appeals's holding that suppression was appropriate in this case.

V. EMPLOYMENT LAW

A. Administrative Office of the Courts v. Beverly Miller
[2013-SC-000373-TG](#) August 20, 2015

Opinion of the Court by Special Justice John S. Reed. Barber, Cunningham, Noble, and Venters, JJ., and Special Justices Charles E. English and John S. Reed, concur. Keller, J., concurs in result only. Minton, C.J.; and Abramson, J., not sitting. Miller brought suit against the Administrative Office of the Courts after she was terminated from her position as Jefferson County Jury Pool Manager. The circuit court granted summary judgment in favor of Miller, finding that she was a tenured employee and, therefore, she was entitled to the due process provided in the COJ Personnel Policies before she was terminated. The Supreme Court reversed, holding that, as a matter of law, Miller was not a tenured employee and was not entitled to termination due process. The Court also affirmed the order of the circuit court granting summary judgment to the AOC and dismissing Miller's claim under the Kentucky Whistleblower Statute, holding that Miller did not report or disclose previously concealed or non-public information that would entitle her to protection under KRS 61.102.

B. Mary Banker, et al. v. University of Louisville Athletic Association, Inc. AND University of Louisville Athletic Association, Inc. v. Mary Banker, et al.
[2013-SC-000778-DG](#) August 20, 2015

Opinion of the Court by Justice Keller. All sitting; all concur. ULAA hired Banker to work as an assistant track and field coach, and she signed a one year employment contract. During her tenure at the University, Banker made complaints about sexist comments and gender discrimination within her department to various levels of supervisors. ULAA terminated Banker less than a year after her employment. Banker filed suit against ULAA and the athletic director asserting, among other things, breach of contract, gender discrimination, and retaliatory discharge. After

trial, a jury found for Banker on her retaliatory discharge claim and awarded her emotional distress damages and lost wages. The trial court also awarded Banker attorney fees and denied ULAA's motions for a judgment notwithstanding the verdict (JNOV) and a new trial. ULAA properly appealed, and the Court of Appeals held that the trial court should have granted ULAA's motion for JNOV because ULAA offered testimony that two of Banker's supervisors decided not to renew Banker's contract six days before she made complaints.

The crux of Banker's retaliatory discharge claim was that she was terminated because she made complaints. ULAA argued that all the evidence at trial proved that her supervisors were contemplating her discharge before she made any complaints. The Supreme Court considered the entire record and held that the jury could have reasonably inferred that ULAA was not contemplating terminating Banker before she made her complaints. Therefore, the Court concluded that a reasonable jury could have found—and did—that Banker proved her *prima facie* case and that there was sufficient evidence to support a reasonable inference that ULAA's stated reasons for discharging Banker were pretextual.

The Court also held that the trial court did not abuse its discretion when it denied ULAA's motion for JNOV as to the emotional distress damages. The Court did, however, strike the award for lost wages because Banker failed to put forth any proof that she looked for work after being discharged or otherwise attempted to mitigate her damages. Finally, the Court affirmed the trial court's award of attorney fees.

VI. EVIDENCE LAW

A. Loretta Sargent v. William Shaffer, M.D.

[2013-SC-000111-DG](#)

August 20, 2015

Opinion of the Court by Justice Venters. All sitting. Minton, C.J., Barber, Cunningham, and Noble, JJ., concur. Abramson, J., concurs in result only by separate opinion. Keller, J., dissents by separate opinion. Medical Malpractice; Informed Consent; KRS 304.40-320. Question presented: Whether trial court's jury instructions on the issue of informed consent must include provisions encompassing both subsection of KRS 304.40-320. The trial court instructed the jury only on the duty described in KRS 304.40-320(1), to the effect that a physician must act "in accordance with the accepted standard of medical or dental practice among members of the profession with similar training and experience" in obtaining informed consent. The Court of Appeals agreed. Upon discretionary review, the Supreme Court reversed, recognizing KRS 304.40-320 as a legislative extension further defining the duty to obtain the patient's informed consent, and holding that proper jury instructions for informed consent cases must include the language contained in both KRS 304.40-320(1) and KRS 304.40-320(2).

VII. FAMILY LAW

A. **Rachel Adams-Smyrichinsky v. Peter T. Smyrichinsky** [2013-SC-000812-DGE](#) **August 20, 2015**

Opinion of the Court by Justice Noble. All sitting; all concur. The parties had previously dissolved their marriage in Indiana, which was followed by several years of contentious litigation primarily involving issues of child custody, visitation, and support. Ultimately, the Indiana court entered an order providing, among other things, which party would be entitled to future federal tax exemptions for the parties' dependent children. Both parents and the child moved to Kentucky, and Appellee started the underlying action by filing a petition to modify custody, support, and visitation in Oldham Family Court. In particular, the petition sought to modify the duration of support, ending it when the children turned 18, and to change the assignment of the tax exemption. The Kentucky court purported to exercise jurisdiction over the matter under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), as adopted in KRS 403.800 to .880.

The Supreme Court determined that the Oldham Family Court was ultimately correct in exercising custody jurisdiction under the UCCJEA, but its jurisdiction to modify the Indiana child support orders was governed by the Uniform Interstate Family Support Act (UIFSA), as adopted in KRS 407.5101 to .5902. None of the procedural requirements to exercise jurisdiction over the out-of-state order under UIFSA were followed in this case, but the failure to object waived them. The substantive jurisdictional prerequisites under KRS 407.5613 were present because the parties and child had left the original state and now resided in Kentucky, and thus the Court found that the Oldham Family Court had continuing and exclusive jurisdiction over the support of the affected children. The Court, however, held that the trial court erred when it ordered support terminated upon the child reaching age 18 because Indiana law provides that support orders cease at age 19 and under UIFSA's choice-of-law provisions, duration of support is a matter of law of the issuing state that is a non-modifiable aspect of the issuing state's order.

The Court also held that the award of the dependent-child tax exemption to a party who does not qualify for it under the Internal Revenue Code, and the attendant order requiring the otherwise entitled party to sign an involuntary "waiver" of his or her federal statutory right to claim the exemption, requires the state trial court to meet the heavy burden of stating sound reasons that the award actually serves as a support issue, rather than a simple property matter, benefitting the child. Accordingly, the Oldham Family Court abused its discretion by assigning the exemption to Appellee because its only stated reason for doing so was that Appellee's income was higher, which was insufficient to support the assignment as a support issue benefitting the child.

VIII. LIMITATION OF ACTIONS

A. **James Overstreet, Etc. v. Kindred Nursing Centers Limited Partnership, Etc., et al.** [2013-SC-000620-DG](#) **August 20, 2015**

Opinion of the Court by Justice Venters. All sitting; all concur. Plaintiff Overstreet, Executor of his mother's estate, brought a lawsuit against a Kindred Nursing Home affiliated facility alleging multiple violations of KRS 216.515, a statute detailing personal rights of nursing home residents. Question presented: Whether claims brought under KRS 216.515 are subject to the five-year statute of limitations provided by KRS 413.120(2) for liabilities created by statute. Upon discretionary review, the Supreme Court held that: (1) to the extent that claims ostensibly brought under KRS 216.515(6) merely reflect claims indistinguishable from common law personal injury actions, they are subject to the one-year limitation period for personal injuries as prescribed by KRS 413.140, since such claims do not assert "liabilities created by statute;" (2) claims otherwise brought under KRS 216.515 to the extent that they assert liabilities that did not exist at common law and were created exclusively by KRS 216.515, are subject to the five-year statute of limitations provided by KRS 413.120(2); and (3) pursuant to the survivorship statute, KRS 411.140, actions to recover damages for personal injury to a nursing home resident, or for injury to the resident's real or personal property, survive the resident's death and may be brought by the personal representative of an injured resident's estate; however, actions otherwise brought to enforce rights created exclusively by KRS 216.515 must be brought by the "resident or his guardian" (which excludes a personal representative in probate) pursuant to KRS 216.515(26), and further, are not encompassed by the survivorship statute, and therefore do not survive the resident's death.

IX. MINERAL LAW

A. **Nobe Baker, Etc. et al. v. Magnum Hunter Production, Inc.** [2013-SC-000497-DG](#) **August 20, 2015**

Opinion of the Court by Justice Abramson. All sitting; all concur. Landowner/gas lessors sought a declaration that lessee gas-production companies had miscalculated and underpaid royalties due under the leases. The trial court denied relief, and the Court of Appeals affirmed. Affirming the Court of Appeals, the Supreme Court held that Kentucky law adheres to the "at the well" approach to gas-royalty calculation (as opposed to the "marketable product" approach advanced by the landowners), and under that approach the lessee companies had appropriately deducted various production costs from their gross revenues in arriving at an "at the well" gas value for the purposes of royalty calculation.

X. WORKERS' COMPENSATION

A. Alton Livingood v. Transfreight LLC, et al.

[2014-SC-000100-WC](#)

August 20, 2015

Opinion of the Court by Justice Barber. All sitting; all concur. Appellant, Alton Livingood, injured his shoulder at work. He sought temporary total disability benefits while on light duty, because he did not perform his customary work as a forklift operator. Appellant also maintained that he was terminated due to his disabling shoulder injury, and that he was entitled to the two multiplier under KRS 342.730(1)(c)2. The ALJ denied the request for temporary total disability benefits, because Appellant had performed most of his light-duty activities before the injury and was paid the same rate. The ALJ was not persuaded that Appellant was terminated due to his injury and declined to award the two multiplier under KRS 342.730(1)(c)2 and *Chrysalis House v. Tackett*, 283 S.W.3d 671 (2009). The Workers' Compensation Board and the Court of Appeals affirmed. The Supreme Court affirmed the denial of temporary total disability benefits, and reversed and remanded with respect to the two multiplier. The Court also overruled *Chrysalis House* to the extent that it held the reason for cessation of work at the same or greater wage under KRS 342.730(1)(c)2 must relate to the disabling injury. The Court held that KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases "for any reason, with or without cause," except where the reason is the employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another.

B. Garrard County Fiscal Court v. Julie Camps; Honorable J. Landon Overfield, Chief Administrative Law Judge; Honorable Allison E. Jones, Administrative Law Judge; and Workers' Compensation Board

[2014-SC-000610-WC](#)

August 20, 2015

Opinion of the Court. All sitting; all concur. Garrard County Fiscal Court filed this appeal to argue that wages from Julie Camps's former concurrent employer should not be included in calculating her average weekly wage ("AWW"). Camps worked for Garrard County as a paramedic and also for Clark County in the same capacity. Camps quit her job with Clark County hoping to find employment closer to her home. However, before she obtained new concurrent employment, she suffered a work-related injury while working only for Garrard County. She filed for workers' compensation arguing that the wages she earned while working for Garrard County and Clark County should be included in her AWW calculation.

The Administrative Law Judge, relying on *Wal-Mart v. Southers*, 152 S.W.3d 242, 246-47 (Ky. App. 2004), found that since Camps was not employed by both Garrard

County and Clark County on the day of her injury, she could not include both wages in her AWW calculation. The Board affirmed. The Court of Appeals, in a two-to-one opinion, found that Southers misconstrued the test for when an injured party can claim concurrent employment and reversed. The majority held that as long as there was “proof the claimant was working under contracts with more than one employer during the relevant look-back period” and proof the employer knew of the other job, the concurrent employment wages could be used. Thus, even though Camps was not employed by Clark County on the date of her work-related injury with Garrard County, those wages could be included in the AWW calculation.

The Court reversed. Southers correctly stated the test for concurrent employment. This conclusion was supported by a reading of the plain language of KRS 342.140(5). Thus, to be able to claim concurrent employment, the employee must be working under two contracts for hire at the time of the injury and the employer at which the claimant was injured must be aware of the second job. Since Camps was no longer employed by Clark County at the time of her injury, she was not concurrently employed for purposes of her AWW calculation.

XI. ATTORNEY DISCIPLINE

A. Jason P. Price v. Kentucky Bar Association

[2014-SC-000289-KB](#)

August 20, 2015

Opinion and Order of the Court. All sitting; all concur. In 2014, the Supreme Court issued a private reprimand with conditions against Price. One of those conditions was that Price attend and complete an Ethics and Professionalism Enhancement Program. Price attended the program but failed to complete it because he did not pay the required fee. Price could not offer a reason why he failed to pay, despite continuing to practice law for 11 months following attendance. Because Price failed to meet the stated condition, the Court, acting in accordance with the original order, converted the 2014 private reprimand into a public reprimand.

B. Kentucky Bar Association v. Richard Grove Ward

[2015-SC-000128-KB](#)

August 20, 2015

Opinion and Order of the Court. All sitting; all concur. Ward was suspended from the practice of law for one year in Ohio. The Ohio Supreme Court found that Ward violated numerous ethical rules stemming from breaching client confidence in a trust matter and co-mingling client and personal funds following a real estate transaction. Upon a motion from the KBA, the Supreme Court imposed reciprocal sanctions against Ward in Kentucky. Pursuant to Supreme Court Rule 3.435(4), an attorney may contest the imposition of reciprocal discipline by proving fraud in the out-of-state disciplinary hearing or that the misconduct established warrants substantially different discipline in Kentucky. The Court considered the Ohio

Supreme Court's findings of fact and Ward's arguments and found that there was no fraud in the out-of-state proceedings and that the one-year suspension was not unduly harsh. The Court imposed a reciprocal one-year suspension from the practice of law in Kentucky, to run concurrently with the Ohio suspension for an effective suspension of 162 days.

C. Kimberly Lynn Bunton v. Kentucky Bar Association

[2015-SC-000219-KB](#)

August 20, 2015

Opinion of the Court. All sitting; all concur. Bunton entered an *Alford* plea to two counts of first-degree official misconduct and was sentenced to twelve months on each count with the sentences to run concurrently. The sentence was conditionally discharged for two years, or until restitution is paid. As a result of her conviction, the Inquiry Commission charged Bunton with having violated SCR 3.130-8.4(b) and SCR 3.130-8.4(c). Bunton admitted to professional misconduct and moved the Court to impose the negotiated sanction of a one-year suspension, to be probated for two years, conditioned upon her abiding by the terms of her conditional discharge in her Jefferson County criminal case, and upon incurring no further criminal or disciplinary charges. The Court agreed that the discipline proposed by Bunton and agreed to by the KBA was adequate and sanctioned Bunton accordingly.

D. Kentucky Bar Association v. Justin Ross Morgan

[2015-SC-000250-KB](#)

August 20, 2015

Opinion of the Court. All sitting; all concur. Morgan was found in contempt of court for failing to pay a court-ordered child support obligation for which a 30-day jail sentence was imposed. He eventually accumulated a child support arrearage of more than \$23,000. Based on these events, the Inquiry Commission issued a three-count charge against Morgan alleging violations of SCR 3.130-3.4(c) by failing to pay child support as ordered, SCR 3.130-8.4(b) by failing to comply with the support order to such an extent as to constitute the crime of flagrant non-support under KRS 530.050(2), and SCR 3.130-8.4(c) by failing to pay his child support as ordered. Morgan initially responded by admitting all the factual allegations but denying that they constituted ethical violations. Thereafter, all additional attempts to contact Morgan failed, and there was no further contact made between him and the KBA. The trial commission assigned to the case conducted a hearing, and thereafter recommended that Morgan be suspended for 90 days. In doing so, the trial commission noted that the three charges all stemmed from a single issue, his failure to meet his child-support obligation; that there was no evidence of aggravating factors, such as violation of duties owed to a client; that his violations were primarily breaches of duties owed to his family and the legal system; and that Morgan's mental state should be accounted for as a mitigating factor in light of the fact that he had essentially disappeared. Neither Morgan nor Bar Counsel appealed the trial commissioner's recommendation, so the matter was submitted directly to the

Supreme Court under SCR 3.360(4). The Court declined to undertake review under SCR 3.370(8), and accepted the trial commissioner's decision as to Morgan's guilt of the charged ethical violations and recommendation that he be suspended from the practice of law for 90 days, which it found to be appropriate in light of the above-mentioned mitigating factors and Morgan's disciplinary history.

E. Inquiry Commission v. Jason Paul Price

[2015-SC-000267-KB](#)

August 20, 2015

Opinion of the Court. All sitting; all concur. Price's client in a child custody matter, who was on probation or parole, complained to her probation and parole officer that Price was not working diligently, if at all, on her case. The client also complained to her probation and parole officer that Price had requested additional money in order to bribe prosecutors and judges involved in her case. The probation and parole officer contacted the Commonwealth attorney who sent the local police chief to interview the client. During the course of the interview, Price sent an email to the client requesting more money or "15 pain pills" in lieu of the requested money. The police then monitored the transaction and arrested and charged Price with first degree trafficking. Based on the preceding, the Inquiry Commission petitioned for temporary suspension of Price's license, a petition the Court granted.