**PUBLISHED OPINIONS**
**KENTUCKY SUPREME COURT**
**AUGUST 2017**

## I. ADMINISTRATIVE LAW:

### A. Kentucky Unemployment Insurance Commission v. Norman Wilson, et al.

2016-SC-000411-DG **August 24, 2017**

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Hughes, Keller, and VanMeter, JJ., concur. Wright, J., dissents by separate opinion in which Cunningham, J., joins. Civil Appeal, Discretionary Review Granted. *Question presented*: Whether the verification requirement of KRS 341.450(1) for appealing to the circuit court from an adverse decision of the unemployment compensation commission) was satisfied when the appellant signed an attached "verification" page without ever having the signature notarized or otherwise subscribed under oath. *Held*: KRS 341.450(1)'s verification requirement is a statutory precondition for vesting the appropriate court with the authority to engage in judicial review of the administrative appeal. By definition, a "verified" pleading must be signed under oath before an official authorized to administer the oath. Signing a document without the oath and the attestation of the administering officer does not comply with the statute. *Shamrock Coal Co. v. Taylor*, 697 S.W.2d 952 (Ky. App. 1985), which held that a defective complaint was in "sufficient compliance" with KRS 341.450(1) because it exhibited a clear attempt at verification is overruled.

## II. ATTORNEY FEES:

### A. Hughes and Coleman, PLLC v. Ann Clark Chambers, etc.

2015-SC-000435-DG **August 24, 2017**

Opinion of the Court by Justice Wright. All sitting; all concur. Personal-injury law firm Hughes & Coleman was hired by Travis Underwood after he was injured in a car crash. Underwood eventually became dissatisfied with the firm and fired them. Shortly after discharging Hughes & Coleman and hiring another attorney, Underwood agreed to a final settlement of his claims. The Supreme Court granted discretionary review to decide whether Hughes & Coleman was entitled to be compensated for their services rendered before being fired. The Court noted that, "[o]ur precedent entitles a discharged lawyer to receive, on a quantum meruit basis, a portion of a contingency fee on a former client's recovery—so long as the termination was not 'for cause.'" Because Hughes & Coleman's firing was not for cause under this rule, the Court held that the firm was entitled to quantum meruit compensation.

## III. CLASS ACTION:

### A. Mary E. McCann (Individually and on Behalf of all Others Similarly Situated) v. The Sullivan University System, Inc., d/b/a Sullivan University College of Pharmacy, et al.

2015-SC-000144-DG **August 24, 2017**

Opinion of the Court by Justice Wright. All sitting. Minton, C.J.; Cunningham, Keller, and Venters, JJ., concur. Hughes and VanMeter, JJ., concur in result only. Mary McCann filed a CR 23 motion to certify a class action in Jefferson Circuit Court. The trial court denied that motion as a matter of law and McCann appealed. The Court of Appeals affirmed the trial court's judgment and held KRS 337.385 does not authorize class actions. McCann then moved the Supreme Court for discretionary review, and the Court granted her motion. On appeal, McCann argued that the Court of Appeals erred by reading KRS 337.385 to prohibit class actions. The Supreme Court agreed with McCann, and held "as a matter of law, that CR 23 remains an available procedural mechanism applicable to McCann's cause of action brought under KRS 337.385." Therefore, the Court and reversed the judgment of the Court of Appeals and remanded the case to Jefferson Circuit Court.

## IV. CRIMINAL LAW:

### A. Larry Lamont White v. Commonwealth of Kentucky

2014-SC-000725-MR **August 24, 2017**

Opinion of the Court by Justice Cunningham. All sitting; all concur. Opinion of the Court by Cunningham, J. All sitting. All concur. This is a death penalty case where the Appellant, Larry Lamont White (White), raised thirty-three claims of error as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution and Kentucky Revised Statute ("KRS") 532.075. The Supreme Court of Kentucky held, inter alia, that: (1) the trial court did not abuse its discretion in finding that the crimes' similarities were sufficient to demonstrate Appellant's identity through his modus operandi. The trial court admonished the jury that the evidence of White's prior murder convictions was only to be considered as evidence of modus operandi and identity under KRE 404(b), not to establish White's action in conformity therewith; (2) Jury instructions did not need to define the terms "modus operandi" and "identity evidence" because there was no evidence that the terms go beyond a reasonable juror's understanding. To the extent that the terms needed clarification, their meanings were sufficiently "fleshed out" during closing arguments. *Lumpkins ex rel. Lumpkins v. City of Louisville*, 157 S.W.3d 601, 605 (Ky. 2005); (3) The trial court did not need to suppress White's DNA sample, because the trial court properly found the traffic stop lawful under *Lloyd v. Commonwealth*, 324 S.W.3d 384, 392 (Ky. 2010); and (4) White's appeal of the trial judge's refusal to recuse himself was dismissed for untimeliness of his motion. Although Judge Shake represented White in 1981 as an Assistant Jefferson County Public Defender, Judge Shake presided over the

current case for six years prior to White's recusal motion. White should have filed a motion for recusal "immediately after discovering the facts upon the disqualification rests . . . " *Alred v. Commonwealth, Judicial Conduct Commission*, 395 S.W.3d 417, 443 (Ky. 2012), which occurred long before trial. Additionally, no grounds for mandatory recusal existed under KRS 26A.015(2). Accordingly, the Supreme Court affirmed the Jefferson Circuit Court's judgment and sentence of death.

**B. Kyle Shea Holbrook v. Commonwealth of Kentucky**
2015-SC-000337-MR **August 24, 2017**

Opinion of the Court by Justice Hughes. All sitting; all concur. Holbrook was convicted for murder and tampering with physical evidence and sentenced to 20 years' imprisonment. Among his allegations of error, Holbrook contended that the trial court abused its discretion by permitting the expert testimony of an FBI agent regarding historical data analysis of cell phones and cell tower records. While explaining that the admission of historical cell-site evidence to establish an individual's identification is a matter to be assessed carefully, the Court concluded that the expert testimony satisfied the requirements of *Daubert Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and Kentucky Rule of Evidence 702. Further, as the testimony was relevant and probative to Holbrook's location at the time when the victim disappeared, the Court determined that its admission was not an abuse of the trial court's discretion. The Court rejected Holbrook's remaining claims of error and affirmed his conviction.

**C. Commonwealth of Kentucky v. Jeffrey Dewayne Clark, et al.**
2016-SC-000693-TG **August 24, 2017**

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J.; Hughes, Keller, Venters, and Wright, JJ., concur. VanMeter, J., dissents by separate opinion. Appellees Clark and Hardin were convicted of murder and sentenced to life in prison in 1992. In 2013, the Supreme Court held that Appellees were entitled to DNA testing of hairs found on the victim and the victim's fingernail scrapings and remanded the case for further proceedings. On remand, the circuit court held an evidentiary hearing on the claims raised in Appellees' CR 60.02 motion. The court granted the motion and vacated the Appellees' convictions. The Commonwealth appealed the ruling to the Court of Appeals and the Supreme Court granted transfer.

Upon reviewing the arguments presented by the Commonwealth and the Appellees – including the new evidence resulting from DNA testing – the Court concluded that the trial court did not abuse its discretion in vacating Appellees' convictions and granting a new trial. Accordingly, both Appellees were entitled to a new trial.

**D. Phillip Edmonson v. Commonwealth of Kentucky**
2016-SC-000427-DG **August 24, 2017**

Opinion of the Court by Justice Cunningham. All sitting; all concur. Opinion of the Court by Cunningham, J. All sitting. All concur. This is a first-degree sexual abuse case wherein Appellant, Phillip Edmondson (Edmondson), grabbed the buttocks of an eleven-year-old female. Soon after Appellant's conviction, but before final sentencing, Appellant filed a motion for a new trial pursuant to Kentucky Rule of Criminal Procedure ("RCr") 10.02. Appellant claimed he was denied a fair and impartial jury due to the jury foreman, Mark Danhauer, being the brother-in-law of Assistant Commonwealth Attorney Mike Williamson. The trial court denied Appellant's motion for a new trial. A unanimous Court of Appeals panel affirmed the trial court's judgment and sentence. The Supreme Court of Kentucky granted discretionary and held: bias must be presumed from the close relationship between Danhauer and Williamson. Danhauer was not qualified to sit on the jury panel and, had the relationship been exposed, he would have been removed for cause. Because Appellant never had the opportunity to challenge Danhauer's presence on the jury, he is entitled to a new trial. Accordingly, the Court reversed the Union Circuit Court's judgment of conviction and sentence and remanded this case for further proceedings consistent with this opinion.

## V. INSURANCE:

**A. Indiana Insurance Company v. James Demetre**
2015-SC-000107-DG **August 24, 2017**

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Cunningham, Keller, Venters, and Wright, JJ., concur. VanMeter, J., dissents by separate opinion. Demetre sued his insurer, the Indiana Insurance Company, for bad faith arising from breach of his insurance contract, violation of the Kentucky Unfair Claims Settlement Practices Act, and violation of the Kentucky Consumer Protection Act. Demetre, the owner of a vacant property that had previously operated as a gas station, was sued by a family occupying a nearby residence alleging the migration of petroleum and other similar substances. Subsequently, Demetre contacted his insurer which provided a defense and ultimately settled the family's claims. Indiana Insurance Corporation maintained that by providing Demetre with a defense and indemnification, he had no viable bad faith claim. After an eight-day trial, the jury awarded Demetre $925,000 in emotional distress damages and $2,500,000 in punitive damages. The Court of Appeals affirmed the trial court's judgment in its entirety. Accepting discretionary review, the Court affirmed the judgment of the Court of Appeals. The Court determined that Indiana Insurance Company's decisions to defend the insured under a reservation of rights, seek declaratory judgment, and settle tort claims did not preclude a bad faith claim. Further, the Court determined as a matter of first impression that the requirement outlined in *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012) for expert

medical or scientific proof is limited to claims of intentional or negligent infliction of emotional distress.

**B. State Farm Mutual Automobile Insurance Company v. Roniesha Adams f/k/a Roniesha Sanders, et al.**
2015-SC-000366-DG **August 24, 2017**

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, and VanMeter, JJ., concur. Venter, J., dissents by separate opinion which Wright, J., joins. Roniesha Adams, her son, and her son's father were passengers in a car being driven by Milton Mitchell. The car was rear-ended, and the driver of the other vehicle fled the scene. Mitchell and his passengers filed claims for benefits under Mitchell's uninsured motorist coverage. State Farm conducted an initial investigation and concluded that the claimants' statements were inconsistent. Therefore, the adjuster asked the car's occupants to give statements under oath, as provided for in the policy. Adams, on the advice of counsel, refused to give a statement under oath. Relying on the language of the policy, State Farm denied coverage and refused to pay any PIP or other benefits. Adams filed suit and the trial court granted declaratory judgment in favor of State Farm. The Court of Appeals reversed, holding that State Farm was required by statute to obtain a court order before it could require Adams to submit to questioning under oath. The Supreme Court reversed. In doing so, the Court held that the MVRA provides that claimants must submit certain information to an insurer and, if that information is not forthcoming, the insurer should seek relief from the court. See KRS 304.39-208. However, the information covered by the relevant statute involves the claimants' medical condition, not information regarding the underlying accident. Therefore, the Court held that State Farm was entitled to obtain information about the accident via questioning under oath. However, to obtain information about the occupants' medical conditions, State Farm was required to get a court order. Because some of the information State Farm wanted involved the accident, the trial court properly granted judgment in State Farm's favor.

## VI. REAL ESTATE:

**A. Anne M. Talley v. Daniel J. Paisley**
2016-SC-000092-DG **August 24, 2017**

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Cunningham, VanMeter, Venters, and Wright, JJ., concur. Keller, J., dissents by separate opinion in which Hughes, J., joins. Talley and Paisley never married, but cohabitated for fifteen years. Upon their separation, Paisley filed a complaint in circuit court, pursuant to KRS 389A.030, seeking to sell a property he and Talley had purchased together, and held in joint tenancy with right of survivorship, and divide the equity in proportion to the parties' respective contributions. By his calculation, Paisley had contributed 76.2% and Talley 23.8%. Following a bench trial, the Circuit Court found that the parties did not have an agreement regarding disposition of the property in the event

their relationship ended, and ordered the equity in the residence to be divided equally between them. On appeal, the Court of Appeals declined to disturb the Circuit Court's finding that the parties had no agreement about what would happen to the property if their relationship ended, but reversed as a matter of law and held that Paisley was entitled to be proportionately reimbursed by Talley for payments he made during their joint tenancy. The Supreme Court granted discretionary review, affirmed the Court of Appeals, and held that with respect to the division of proceeds from the sale of jointly-held property when the cotenants have no agreement regarding how sale proceeds would be split, to the extent one tenant contributed more than his or her half to the discharge of encumbrances, liens, taxes, that tenant is entitled to contribution from the other. The Supreme Court directed the Circuit Court on remand to determine that amount that will equalize the respective contributions of the parties to the property, and then split equally the balance of the proceeds from the sale of the property, allotting 50% to each party.

## VII. SOVEREIGN IMMUNITY:

### A. Kentucky State Police v. Terry Scott, et al.

2016-SC-000303-DG **August 24, 2017**

Opinion of the Court by Justice VanMeter. All sitting; all concur. Terry Scott and Damon Fleming failed to appeal the denial of their respective grievances against the Kentucky State Police ("KSP") by the Personnel Cabinet, under KRS Chapters 13B and 18A, and subsequently filed an original action in Franklin Circuit Court asserting various state law claims and constitutional issues. We held that exhaustion of administrative remedies was required in this case and therefore reverse to the trial court with instructions to dismiss this action. The Circuit Court concluded that KSP committed "flagrant violations of the hiring procedures required in KRS Chapter 18A[,]" but noted the administrative violations are not before the court by Scott's and Fleming's failure to exhaust admirative remedies. The Circuit Court, however, held that Scott and Fleming had met their burden of showing a prima facie case of an equal protection violation, for which KSP had failed to prove any rational or reasonable justification, entitling them to equitable relief. On appeal, the Court of Appeals, in a split opinion, affirmed the Circuit Court. The Court of Appeals majority opinion rejected KSP's argument that Scott and Fleming failed to exhaust their administrative remedies, on the basis that such exhaustion is not required when attacking the validity of a statute or regulation as void on its face because an administrative agency cannot decide constitutional issues. The Supreme Court reversed the Court of Appeals, and held that the exception to exhaustion set out in *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001), was inapplicable because Scott and Fleming did not attack the constitutional validity of a statute or regulation either on its face or as applied. Instead, they challenged KSP's application of hiring statutes and regulations in its hiring decision which, they claim, has injured them. Under KRS 18A.095, administrative jurisdiction over penalization is vested in the Personnel Board. Irrespective of whether the Personnel Board's 2007 decision regarding Scott's and Fleming's claim was correct, their obligation was to appeal timely that decision to the Franklin Circuit Court. KRS 13B.140, 18A.100. That determination is long since

final, and operates as res judicata of any matters arising from the facts as alleged by Scott and Fleming. Because the Supreme Court decided this case on the basis of Scott's and Fleming's failure to exhaust their administrative remedies, it did not reach the other issues raised.

## VIII. WORKERS COMPENSATION:

### A. Family Dollar v. Mamie Baytos, Widow of Stephen Baytos, Deceased, et al. AND Mamie Baytos, Widow of Stephen Baytos, Deceased v. Family Dollar, et al.

2015-SC-000194-WC **August 24, 2017**
2015-SC-000208-WC **August 24, 2017**

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Cunningham, Hughes, Keller, Venters, and Wright, JJ, sitting. All concur. VanMeter, J., not sitting. The Supreme Court affirmed the Court of Appeals and held that while a decedent has settled all of his or her workers compensation claims for potential income benefits via a negotiated settlement, the settlement does not bar the decedent's spouse from asserting additional claims for income benefits. The spouse of a decedent who wishes to seek additional benefits may not do so via KRS 342.125, but must file his or her own claim for benefits in his or her own right.

### B. Cheryl Blaine v. Downtown Redevelopment Authority, Inc., et al.

2016-SC-000081-WC **August 24, 2017**

Opinion of the Court by Justice Hughes. All sitting; all concur. Blaine suffered a work-related injury in June 2007, returned to work after approximately seven months, and suffered a second work-related injury in April 2011. In evaluating the worker's compensation claim for Blaine's June 2007 injury, the Administrative Law Judge (ALJ) erroneously concluded that Blaine had not claimed entitlement to permanent total disability (PTD) benefits following her injury. The Workers' Compensation Board remanded the case to the ALJ to consider PTD benefits, and if Blaine was not entitled to PTD benefits, the ALJ was then required to determine the appropriate permanent partial disability (PPD) benefits pursuant to Kentucky Revised Statute (KRS) 342.730 and *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). Blaine appealed the ruling of the Worker's Compensation Board to the Court of Appeals which affirmed. Affirming the judgment of the Court of Appeals, the Court rejected Blaine's request to reconsider *Fawbush* or reinterpret KRS 342.730(1)(c)2. Rather, the Court agreed with the Court of Appeals that remand to the ALJ was necessary to assess Blaine's entitlement to PTD or PPD benefits.

### C. Larry Kidd v. Crossrock Drilling, LLC, et al.

2016-SC-000406-WC **August 24, 2017**

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Hughes, Keller, VanMeter, and Venters, JJ., concur. Wright, J., dissents by separate opinion in which Cunningham, J., joins. Kidd filed a claim alleging work-related injuries against his

employer, Crossrock. Following the hearing before the ALJ, Kidd and the insurance adjustor for Crossrock engaged in settlement negotiations, settling that Crossrock would make a $55,000 lump-sum payment with a waiver of vocational rehabilitation benefits. Neither the ALJ nor Crossrock's attorney was aware of the settlement discussion. Before Kidd's attorney could file a Form 110, the Department of Workers' Claims' standard form for settlement agreements, the ALJ issued its opinion, awarding Kidd approximately $17,600 for temporary total disability but denying Kidd permanent partial disability, permanent total disability, and future medical benefits. Kidd then filed a petition for reconsideration based on the alleged settlement, which the ALJ denied, concluding Kidd failed to properly present the settlement by filing Form 110 or by presenting a verified motion to adopt the settlement agreement, thus the settlement was outside the scope of a petition for rehearing. Both the Board and the Court of Appeals affirmed. On the sole issue of whether Kidd properly preserved the issue of the alleged settlement agreement, the Supreme Court affirmed the Court of Appeals. This Court held that, although the omission of a Form 110 is not fatal to Kidd's claim, under KRS 342.265(1), he was required to file a verified motion with the settlement correspondence and sufficient documentation in order for the terms of the settlement to be properly before the ALJ; the ALJ and Board properly declined to address this issue.

**D. Steel Creations by and through KESA, et al. v. Injured Workers' Pharmacy, et al.**
**AND**
**Injured Workers' Pharmacy, et al. v. Steel Creations by and through KESA, et al.**
2016-SC-000222-WC **August 24, 2017**
Opinion of the Court by Justice Keller. Minton, C.J.; Cunningham, Hughes, Keller, Venters, JJ., and Special Justices David Samford and Kimberly McCann, sitting. All concur. VanMeter and Wright, JJ., not sitting. This workers' compensation claim involved two primary issues. The first is whether a pharmacy is a medical provider for purposes of the employee choice of provider provisions of the statute and regulations. The second involved how to interpret the workers' compensation pharmacy fee schedule. As to the first issue, the Court held that a pharmacy is a medical provider, thus entitling an injured worker to choose where to have prescriptions filled. In doing so, the Court noted that, while the Act does not define medical provider, it does include medications under the definition of medical services. Because medical services are provided by medical providers, it follows that pharmacists, who provide medications, are medical providers. As to the second issue, the Court held that the workers' pharmacy fee schedule, which is contained in 803 KAR 25:092, in essence says what it says, i.e. that a dispensing pharmacy is entitled to be reimbursed for the actual wholesale price it paid plus a $5.00 dispensing fee. Because the parties had not put on any proof regarding the actual wholesale price paid and the ALJ had not made any finding regarding the correct reimbursement rate, the Court remanded for additional fact finding and proof taking.

## IX. WRONGFUL DEATH:

### A. Floyd Lawrence Patton, Adm'r of the Estate of Stephen Lawrence Patton v. David Bickford, et al.

2013-SC-000560-DG **August 24, 2017**

Opinion of the Court by Justice Venters. Minton, C.J., Hughes, Keller, and Wright, J.J. concur; Cunningham, J., concurs in result only be separate opinion; VanMeter, J. not sitting. Civil Appeal, Discretionary Review Granted. Question presented: 1) Whether public school administrators and teachers had governmental immunity in wrongful death action arising from suicide of student, allegedly resulting from bullying of other students which school personal failed to control; 2) whether suicide allegedly resulting from bullying and tormenting behavior may form the basis for a wrongful death claim by the decedent's estate, and whether the suicide is intervening event and superseding cause of death that bars such wrongful deaths actions; 3) whether the affidavits submitted by Estate attesting that the decedent was persistently bullied at school, that the teachers were aware of it and failed to take corrective action created a genuine issue of material fact so as to mover come school officials motion for summary judgment. Held: 1) that the trial court correctly determined that the school administrators were protected by qualified immunity and entitled to summary judgment on that ground because the duty to implement a code of appropriate student behavior was a ministerial duty that administrators had satisfied by enacting extensive policies regarding bullying and harassment, the choice of specific provisions and the assessment of their adequacy being purely of discretionary character; and that the teachers are not immune from suit on the basis of qualified official immunity because the duty of the Teachers to report bulling was a ministerial duty to which immunity does not attach; (3) action in wrongful death will lie for suicide proximately caused by negligence of teachers failing address bullying behavior; the suicide was not an intervening, superseding cause that bars such actions; 4) trial court properly granted summary judgment under the facts and circumstances as presented in the record in this case because the Estate was unable to make a prima facie showing that the teacher's conduct was the cause-in-fact (the "but-for" cause) or the proximate cause of the suicide.

## X. ATTORNEY DISCIPLINE:

### A. Bryan Edward Bennett v. Kentucky Bar Association

2017-SC-000241-KB **August 24, 2017**

Opinion and Order of the Court. All sitting; all concur. Bennett was hired to file an adjustment of immigration status for his client. The client paid him a retainer fee but Bennett, who was inexperienced in immigration status adjustments, failed to properly file the paperwork within the mandated timeframe. The United States Customs and Immigration Service then issued a Notice of Action rejecting Bennett's client's adjustment status application and returning the filing fee. However, Bennett failed to

return any funds to his client and failed to communicate with his client after she learned her application was rejected.

The Inquiry Commission issued a six-count charge against Bennett. He admitted to the misconduct as described in the charge and, in an effort to resolve the disciplinary action, repaid his client and negotiated a sanction with the Office of Bar Counsel under SCR 3.480(2). Bennett moved the Court for a public reprimand and the KBA agreed that the recommended discipline was appropriate and supported by similar cases.

After reviewing the facts and the relevant cases, the Court found that the consensual discipline proposed by Bennett and agreed to by the KBA was appropriate. Accordingly, Bennett's motion for a public reprimand was granted.

**B. Kentucky Bar Association v. Carl Wayne Gibson**
2017-SC-000247-KB **August 24, 2017**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission issued a four-count charge against Gibson, alleging he violated SCR 3.130(1.3); 3.130(1.4)(a)(3); 3.130(1.4)(a)(4); and 3.130(8.4)(c). Gibson filed an answer admitting to the factual allegations but denying that he violated any rules of professional conduct. His case was submitted to a Trial Commissioner, who recommended the following sanctions: a thirty-day suspension from the practice of law; a refund of fees to his client for failing to perform the agreed-upon legal services; and payment of the costs of the disciplinary proceedings.

Neither Gibson nor the KBA filed a notice of appeal from the Trial Commissioner's report and the Court declined to take further review. Accordingly, under SCR 3.370(9), the Court adopted the Trial Commissioner's findings of fact and recommended sanctions verbatim.