

**KENTUCKY SUPREME COURT
AUGUST 2020**

I. ARBITRATION

**A. LP Louisville East, LLC D/B/A Signature Healthcare of East Louisville, et al.
v. Kenneth R. Patton**

[2019-SC-0016-D](#)

August 20, 2020

[2019-SC-0211-D](#)

August 20, 2020

Opinion of the Court by Justice Hughes. Minton, C.J.; Lambert and VanMeter, JJ. Concur. Keller and Wright, JJ., concur in result only. Hughes concurs by separate opinion in which Minton, C.J., and VanMeter, J., join. Nickell, J., not sitting. Tommy Patton died shortly after suffering a fall at LP Louisville East, LLC, doing business as Signature HealthCARE of East Louisville (Signature), a long-term care facility. Kenneth R. Patton, Administrator of Tommy’s Estate and Tommy’s son, brought a negligence/wrongful death claim against Signature. Signature moved the circuit court to compel Kenneth to arbitrate the claims based upon the arbitration agreement Kenneth signed as Tommy’s authorized representative, and in his individual capacity, to secure Tommy’s admittance to the facility. The circuit court overruled the motion. The Court of Appeals affirmed in part as to Tommy’s Estate claims and reversed in part as to Kenneth’s individual wrongful death claim. On appeal, the Supreme Court held the arbitration agreement is enforceable as to Tommy’s Estate claim and Kenneth’s individual wrongful death claim. Applying the principles enunciated in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 590 (Ky. 2012), Tommy’s power of attorney document authorized Kenneth to enter into the mandatory arbitration agreement when exercising his agency powers as to Tommy’s “maintenance” and “health” by admitting him to a long-term care facility. Also, Kenneth had reasonable notice that he was signing the arbitration agreement in his individual capacity and the wrongful death claim is thus also subject to arbitration.

II. CRIMINAL LAW

A. Ricardo Taylor v. Commonwealth of Kentucky

AND

Jefferson Conrai Kaballah, Jr. v. Commonwealth of Kentucky

[2018-SC-0605-MR](#)

August 20, 2020

Opinion of the Court by Justice VanMeter. All sitting; all concur. Taylor and Kaballah appealed as a matter of right their convictions for Criminal Attempt – Murder, First Degree Assault, and of being a Persistent Felony Offender. The defendants alleged multiple errors, and the Court held that both Defendants should have received *Miranda* warnings prior to an interrogation which occurred while both were incarcerated and directly after the incident leading to

interrogation was committed. Evidence showed that both defendants were in custody during questioning and that no knowing and voluntary waiver of rights occurred. Further, the trial court should not have allowed a transcript of one Defendant's phone call drafted by the Commonwealth to be shown to the jury during closing arguments. However, both errors were deemed harmless. The Court affirmed all other claims of error on appeal. Accordingly, the Court affirmed the judgment and sentence imposed by the trial court.

B. Ricky Allen Bowen v. Commonwealth of Kentucky
2019-SC-0473-MR **August 20, 2020**

Opinion of the Court by Justice Keller. All sitting. Hughes, Keller, Lambert, Nickell, and Wright, JJ., concur. Minton, C.J., concurs in part and dissents in part by separate opinion in which VanMeter, J., joins. A Mason County jury found Ricky Allen Bowen guilty of attempted murder and theft by unlawful taking of a firearm. The trial court, consistent with the jury's recommendation, sentenced Bowen to twenty years of imprisonment on the attempted murder charge and five years of imprisonment on the theft by unlawful taking charge, to run concurrently for a total sentence of twenty years. The Supreme Court affirmed Bowen's conviction.

At trial, Bowen testified that he took a gun from his landlord's barn with the plan that he would kill his girlfriend with whom he had an argument, and then kill himself. Unbeknownst to Bowen, the gun was loaded with two shells of "rat shot" or "snake shot" that is typically used for pest control and consists of small pellets that spread out when the gun is fired. Bowen shot his girlfriend, admittedly trying to kill her, but was unsuccessful because of the rat shot that was loaded in the gun. He then realized he no longer wanted to kill her and tried to help her.

On appeal, Bowen argued that the trial court erred by (1) declining his request for a renunciation jury instruction and (2) denying his motion for directed verdict on the charge of theft by unlawful taking of a firearm. The Supreme Court noted there was no evidence that Bowen made any efforts to abandon his commission of the crime or took any steps to avoid its commission prior to the shooting. Rather, he completed the act of shooting his girlfriend, but failed to kill her as he had intended. Accordingly, the Court hold that the trial court did not abuse its discretion in declining to give a renunciation instruction.

As to Bowen's second argument, the Court noted that Bowen admitted his intent to use the gun as a murder weapon. Had Bowen carried out his plan, there would be no abandonment or return of the property by Bowen; rather, he would have been dead, leaving the gun behind as a key piece of evidence that may have been confiscated by police. Furthermore, a reasonable jury could believe that Bowen, who had been arguing with his girlfriend the evening before, intended to kill only her and not himself. A reasonable jury could believe that, under those circumstances, he had never planned to return the murder weapon to its rightful owner. The Court therefore concluded that, under the evidence as a whole, a

reasonable jury could infer that Bowen intended to permanently deprive Darnell of the gun. Accordingly, the Court held that the trial court did not err in denying Bowen's motion for directed verdict on the charge of unlawful taking of a firearm.

Chief Justice Minton, joined by Justice VanMeter, concurred in part and dissented in part. Chief Justice Minton would affirm the attempted murder conviction but would reverse the theft by unlawful taking conviction because the record contains no evidence that Bowen intended to deprive Darnell of the gun.

III. MEDICAL MALPRACTICE

A. Dennis Thomas, as Administrator of the Estate of Glenda Thomas, Deceased, et al. v. University Medical Center, Inc. d/b/a University of Louisville Hospital, et al.

[2018-SC-0454-D](#)

August 20, 2020

Opinion of the Court by Justice Keller. Minton, C.J.; Hughes, VanMeter, Wright, JJ., Foster and Bentley, S.J.; sitting. All concur. Lambert and Nickell, JJ., not sitting. Dennis Thomas, in his capacity as Administrator of the estate of his deceased wife, Glenda Thomas, and in his individual capacity, appealed the decision of the Jefferson Circuit Court to exclude from evidence a Root Cause Analysis ("RCA") and to grant a directed verdict in favor of Neurosurgical Institute of Kentucky, P.S.C. ("NIK") and the Court of Appeals' affirmation of the trial court.

Glenda Lee Thomas underwent an anterior cervical discectomy and fusion procedure. The surgery was performed at University Medical Center, Inc. ("UMC") by Dr. Aasim Kazmi, a sixth-year neurosurgical resident, under the supervision of Dr. Todd Vitaz, the attending surgeon. After the surgery, Mrs. Thomas suffered from anoxic encephalopathy, or brain injury from lack of blood flow. She passed away a few days later, after supportive care was withdrawn.

Dennis Thomas, in his capacity as administrator of his wife's estate and in his individual capacity, filed a medical negligence suit against UMC, Drs. Vitaz, Jernigan, and Kazmi, and NIK, a private neurosurgery practice to which Dr. Vitaz belonged. He later added claims of negligent training and supervision. During discovery, UMC revealed the existence of a "Root Cause Analysis and Action Plan" ("RCA").

Thomas argued that (1) the trial court erred in excluding the RCA under Kentucky Rule of Evidence ("KRE") 407; (2) the Court of Appeals misconstrued the evidence in the record and improperly considered and applied KRE 403; (3) the trial court erred in excluding the RCA when offered for impeachment purposes; and (4) the trial court erred in directing a verdict in favor of NIK.

The Supreme Court held that the trial court erred in excluding the RCA under KRE 407; however, that error was harmless. As a matter of first impression, the Court held that whether a post-incident investigatory report like the RCA is admissible turns on whether the report recommends a remedial change and whether that change was implemented. Generally speaking, KRE 407 will not prevent the admission of the report when its suggested remedial measures are not taken, as the information would not have made the incident less likely to occur. However, the Court acknowledged that it might be possible in rare situations to characterize such reports as “measures” which, if conducted previously would reduce the likelihood of the occurrence. If an investigatory report includes a recommendation for some remedial measure, and that measure is taken, the report is so inextricably intertwined with the subsequent remedial measure that it must be excluded as such under KRE 407.

In this case, the remedial measure recommended in the RCA was not taken, and the RCA itself was not a remedial measure, so the trial court erred in excluding the RCA under KRE 407. However, that error was harmless because the trial court properly excluded the RCA under KRE 403. The probative value of the RCA was minimal, and the potential for undue prejudice, confusion of the issues, or misleading the jury was high. Further, the Court held that the trial court did not err in excluding the RCA when offered for impeachment purposes, as it did not directly contradict the witness’s statements.

IV. YOUTHFUL OFFENDERS

A. Layw Thomas v. Commonwealth of Kentucky

[2018-SC-0437-MR](#)

August 20, 2020

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Opinion of the Court by Chief Justice Minton. All sitting; all concur. For crimes committed when he was seventeen years old, Thomas was prosecuted in circuit court as a youthful offender. He pleaded guilty to first-degree robbery, first-degree assault, second-degree wanton endangerment, and murder, with a twelve-year sentence recommended for the first four charges and twenty-year sentence recommended for the murder charge. The plea agreement provided all charges would run concurrently for a total of twenty years, but the agreement also contained a hammer clause that allowed the Commonwealth to recommend imposition of the statutory maximum for all offenses if Thomas failed to show for final sentencing. Thomas failed to appear at sentencing, so when Thomas was ultimately brought back before the trial court, it sentenced Thomas to the statutory maximum: life plus fifty years. After a successful appeal from the denial of his collateral attack on the judgment, the trial court imposed the same sentence on remand. On Thomas’s direct appeal from the resentencing, he claimed the trial court erred by: (1) failing to allow him to withdraw his guilty pleas, (2) denying his motion to disqualify the trial judge, and (3) sentencing Thomas, a youthful offender, without considering probation or conditional discharge as sentencing options.

The Supreme Court affirmed on all issues except for Thomas’s sentencing. The Court held that the trial court erred in failing to consider probation or another form of conditional discharge in accordance with KRS 533.010 before sentencing Thomas to imprisonment, as the relevant violent-offender statute is inapplicable to youthful offenders even if the youthful offender was over the age of 18 by the time of sentencing.

V. ATTORNEY DISCIPLINE

**A. Michael Stephen Wade v. Kentucky Bar Association
2020-SC-00050-KB August 20, 2020**

Opinion and Order of the Court. All sitting; all concur. Wade was suspended based on charges of professional misconduct relating to two separate criminal proceedings in Jefferson and Bullitt Counties. The Supreme Court’s order indicated that Wade’s suspension was to last for four years and six months or until he satisfied the full terms and conditions of the proceedings in the two criminal cases, whichever event were to occur last. The order also made his reinstatement subject to approval from the Character and Fitness Committee under SCR 3.505, and it imposed the condition that Wade continue participation in KYLAP and execute a release in favor of the Office of Bar Counsel so that Bar Counsel could obtain status-report information concerning his participation in KYLAP.

Wade applied for reinstatement in November 2018. The Character and Fitness Committee instructed Wade by letter to file a Character and Fitness Questionnaire for Certification for Reinstatement Form (“Questionnaire”), and provided directions on how to complete it, under SCR 2.300(1)(e). Wade never responded and never filed the Questionnaire, despite multiple attempts to contact him over the course of several months.

After eight months of trying and failing to have Wade submit the Questionnaire, the Committee issued a recommendation to deny Wade’s application for reinstatement. Wade was mailed a copy of a motion from bar counsel to the Board of Governors to accept the recommendation of the Committee, but Wade again failed to respond. In November 2019, the Board of Governors voted unanimously to accept the negative recommendation of the Committee to deny Wade’s application for reinstatement. The Court agreed with the Board’s recommendation noting that, at a minimum, Wade had failed to show compliance with the 2016 suspension order. Accordingly, Wade’s application for reinstatement was denied.

**B. Kentucky Bar Association v. George Michael Ingram
2020-SC-00070-KB August 20, 2020**

Opinion and Order of the Court. All sitting; all concur. The inquiry Commission issued a four-count charge against George Michael Ingram in one case file and a three-count charge against him in a second file. Service of each of the charges was completed pursuant to SCR 3.035(2) by serving the KBA Executive Director.

Ingram did not file an answer to either charge, and the Commission submitted the matter to the Board of Governors. The Board concluded that Ingram was guilty of each of the charges levied against him in those two cases and recommended that he be found so by the Supreme Court. However, no proposed discipline was agreed upon by the requisite number of Board members, and therefore the Board did not make a formal recommendation as to the imposition of discipline.

The Supreme Court found Ingram guilty of violating two counts of SCR 3.130(1.3), two counts of SCR 3.130(1.4)(a), two counts of SCR 3.130(1.16)(d), and one count SCR 3.130(8.1)(b) in the two case files. Ingram had no prior orders of professional misconduct but was suspended for non-payment of bar dues and non-compliance with CLE requirements.

After reviewing the facts of the case and relevant caselaw, the Court suspended Ingram for 30 days to run consecutively to his administrative suspensions.

C. Kentucky Bar Association v. Mark Patrick Niemi
2020-SC-00072-KB August 20, 2020

Opinion and Order of the Court. All sitting; all concur. Niemi failed to comply with continuing legal education requirements for the 2009- 2010 educational year and was suspended on that basis in 2011. He never sought reinstatement to the practice of law following his suspension. In spite of the suspension, Niemi sent a demand letter on behalf of a client and held himself out to be engaged in the practice of law on both his Facebook and LinkedIn pages.

In January 2019, the Office of Bar Counsel mailed a bar complaint via certified mail to Niemi's bar roster address. The complaint was returned undelivered a month later. Following further investigation, the Office of Bar Counsel discovered that Niemi's bar roster address was invalid. In April 2019, the Office of Bar Counsel transmitted the bar complaint to the Fayette County Sheriff's Office to attempt personal service on Niemi at his correct address. After twelve unsuccessful delivery attempts, the complaint was returned undelivered.

The Inquiry Commission issued a four-count charge against Niemi in June 2019. The Inquiry Commission's charge asserted Niemi violated SCR 3.130(3.4)(c); SCR 3.130(5.5)(a); SCR 3.130(5.5)(b)(2); and SCR 3.130(8.1)(b). The Board found Niemi guilty on all counts. After considering his disciplinary history, the Board recommended that Niemi be suspended from the practice of law for 181 days, to run consecutively to any current suspensions.

Niemi did not participate in the underlying proceedings; therefore, the matter came before the Court as a default case pursuant to SCR 3.210. After reviewing the record, the Court agreed with the Board's recommendation and sanctioned Niemi accordingly.

D. Kentucky Bar Association v. Kimberly Shawn Ison Gevedon
[2020-SC-0182-KB](#)

August 20, 2020

Opinion and Order of the Court. All sitting; all concur. In January 2019, Gevedon was charged with theft by unlawful taking over \$500.00, a Class D Felony. It was alleged that she had stolen \$7,764.00 from the Morgan County Law Library Fund, where she served as treasurer. Gevedon pled guilty to the felony charge and received a one-year sentence with a five-year diversion.

Because of the felony conviction, Gevedon was charged by the Inquiry Commission with violating SCR 3.130(8.4)(b) and SCR 3.130(8.4)(c). She and her counsel of record were served with the charges in December 2019 but a response was never filed.

The Board of Governors found Gevedon guilty of violating both charges. After considering her lengthy history of disciplinary violations, the Board recommended that she be permanently disbarred. The Supreme Court agreed with the Board's recommendation and ordered Gevedon permanently disbarred in the Commonwealth of Kentucky.

E. Sands Morris Chewning v. Kentucky Bar Association
[2020-SC-0259-KB](#)

August 20, 2020

Opinion and Order of the Court. All sitting; all concur. Chewning moved for consensual discipline pursuant to Supreme Court Rule (SCR) 3.480(2) based on a negotiated sanction agreement with the Kentucky Bar Association (KBA). Chewning requested an order imposing a sanction of a thirty-day suspension, probated for two years on condition he attend and complete the next scheduled Ethics and Professionalism Enhancement Program (EPEP), receive no new disciplinary charges during the probationary period, and pay the costs of this proceeding. The KBA filed a response stating it had no objection to the Motion for Consensual Discipline.

The disciplinary charges against Chewning were based on his role in providing a recording device to a client in a custody case. Chewning used information from the recordings to gain an advantage for his client and was eventually indicted on three Class D felonies. He later pled guilty to one count of Criminal Attempt to Commit Eavesdropping, a Class A misdemeanor, and was fined \$500.

Based on these events, the Inquiry Commission issued a two-count charge against Chewning, citing violations of SCR 3.130(4.4)(a) and SCR 3.130(8.4)(b). Chewning admitted he violated the two rules. Because Chewning and the KBA agreed on the appropriate sanction and caselaw supported the proposed resolution in this matter, the Court held the sanction to be the appropriate discipline for Chewning's conduct and granted his motion.