

**PUBLISHED OPINIONS  
KENTUCKY SUPREME COURT  
DECEMBER 2017**

**I. CONTRACTS:**

**A. Superior Steel, Inc. et al v. The Ascent at Roebbling’s Bridge, LLC, et al.**

**[2015-SC-000204-DG](#)**

**AND**

**The Ascent at Roebbling’s Bridge, LLC, et al. v. Superior Steel, Inc., et al.**

**[2015-SC-000636-DG](#)**

**AND**

**Dugan & Meyers Construction Company v. The Ascent at Roebbling’s Bridge, LLC, et al.**

**[2015-SC-000635-DG](#)**

**December 14, 2017**

Opinion of the Court by Justice Hughes. Minton, C.J.; Cunningham, Keller, and Venters, JJ., concur. VanMeter, J., concurs in part and dissents in part by separate opinion in which Wright, J., joins. The Ascent at Roebbling’s Bridge is a luxury condominium building in downtown Covington, owned by The Ascent at Roebbling’s Bridge, LLC (“Ascent”) and developed by Corporex Development and Construction Management LLC (“Corporex”). Corporex, the design builder for the condominium, contracted with Dugan & Meyers Construction Company (“D&M”) to serve as construction manager and general contractor. Subsequently, D&M retained Superior Steel, Inc. (“Superior”) and Ben Hur Construction Company, Inc. (“Ben Hur”) to perform steel fabrication and erection work. After revised design drawings required additional work outside the scope of the contract between D&M and Superior, Superior and Ben Hur proceeded with the work, but did not receive compensation. Subsequently, Superior and Ben Hur brought suit against D&M, Ascent, and Corporex.

After a trial, the Kenton Circuit Court entered judgment in favor of Superior and Ben Hur against D&M and Ascent for the cost of the extra work, unpaid retainage, and for attorneys’ fees incurred by Superior. Also, D&M prevailed on its indemnification cross-claim against Corporex and Ascent and on the negligence cross-claim asserted against it by Corporex and Ascent. Subsequently, the Court of Appeals reversed the trial court’s judgment in its entirety. Accepting discretionary review, the Court affirmed the judgment of the Court of Appeals in part, reversed in part, and remanded. The Court determined that Superior and Ben Hur did not have an adequate remedy at law against D&M and could recover on their unjust enrichment claim against Ascent. Also, while Superior was permitted to bring a breach of contract action against D&M, the Court concluded that D&M did not breach its contract with Superior in failing to pay for the extra construction work. As such, Superior was not entitled to an award of attorneys’ fees under its contract with D&M. As to the dispute between Ascent and D&M, while the Court held that the trial court’s instruction on Ascent’s negligence claim was sufficient, the trial court erred by failing to instruct on Ascent’s claim for breach of contract.

## II. CRIMINAL LAW:

### A. **Jerome Hawkins v. Commonwealth of Kentucky**

[2015-SC-000639-DG](#)

**December 14, 2017**

Opinion of the Court by Justice Wright. All sitting. Cunningham, Hughes, Keller, VanMeter, Venters, and Wright, JJ., concur. Minton, C.J., concurs in part and dissents in part by separate opinion. A Henderson Circuit Court jury convicted Jerome Hawkins of trafficking in four or more grams of cocaine among other charges. The Court of Appeals affirmed. Hawkins filed a motion for discretionary review to the Supreme Court of Kentucky, which the Court granted. On appeal, Hawkins argued: (1) that he was improperly convicted of trafficking in four or more grams of cocaine, as the Commonwealth's evidence failed to show that the substance seized contained four or more grams of pure cocaine; and (2) that the trial court abused its discretion in withholding the identity of a confidential informant.

As to the first issue, the majority looked to KRS 218A.010(5), which defines cocaine as, "a substance containing any quantity of cocaine, its salts, optical and geometric isomers, and salts of isomers." In its examination of the statute, the majority stressed that the Court must look to the "statute's plain meaning and . . . construe it in a way 'for all of its parts to have meaning.'" It stated the words "any quantity of cocaine" in the statutory definition could not be read to apply exclusively to pure cocaine—but must, instead, also apply to mixtures. After analyzing the second issue, the majority further held that the trial court did not abuse its discretion by withholding the identity of the confidential informant.

### B. **John Gray v. Commonwealth of Kentucky**

[2016-SC-000070-MR](#)

**December 14, 2017**

Opinion of the Court by Justice Venters. All sitting; all concur. Criminal Direct Appeal. Questions Presented: Whether the trial court erred by 1) admitting improper evidence of prior bad behavior and 2) failing to grant a directed verdict on two counts of first-degree unlawful imprisonment. Held: (1) Gray's threat to shoot his girlfriend which precipitated the issuance of an EPO was admissible, despite KRE 404(b) because it was relevant to explain victim's delay in reporting Gray's later crimes against her and her family until after he was arrested for violating the EPO. Any prejudice created by admission of Gray's own statement that he had a "violent history" was cured by the trial judge's admonition. (2) The trial court instructed upon the primary charge of kidnapping and gave lesser included instructions on first and second degree unlawful imprisonment. Gray requested palpable error review of the trial court's failure to grant a directed verdict on first-degree unlawful imprisonment. Since a directed verdict is proper only for complete acquittal primary charge of kidnapping and its lesser included offenses, Gray's avenue of relief was to object to the giving of a jury instruction on first-degree unlawful imprisonment, which he failed to do. RCr 9.54(2) bars relief for the unpreserved claim that the trial court erred by giving the first-degree unlawful imprisonment instruction, even when presented under the guise of failing to enter a directed verdict on a lesser offense.

**C. Jerard Garrett v. Commonwealth of Kentucky**

[2016-SC-000263-MR](#)

**December 14, 2017**

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J., Hughes, Keller, VanMeter, Venters, and Wright, JJ. concur. Cunningham, J., concurs in result only. Criminal Direct Appeal. Garrett was convicted of two counts of murder, two counts of first-degree robbery, one count of first-degree wanton endangerment, and one count of terroristic threatening. He was sentenced to twenty-five years' imprisonment. The Court affirmed his convictions and sentence, holding that ballistics evidence from the Commonwealth's expert witness was properly admitted; the trial court properly joined the offenses of Garrett and his co-defendant for trial; a witness's in-court identification of Garrett during trial was permissible; the trial court did not abuse its discretion in overruling Garrett's objection to the alleged bolstering testimony of the detective; and the Commonwealth's use of CourtNet information to inquire into a witness's mailing address on a certain date was not improper.

**D. Linda Richmond v. Commonwealth of Kentucky**

[2016-SC-000389-MR](#)

**December 14, 2017**

Opinion of the Court by Justice VanMeter. All sitting; all concur. Opinion of the Court by Justice VanMeter. All Sitting. All concur. Richmond appealed as a matter of right from her conviction by jury and 70-year sentence arising from charges of one count of first-degree assault, 11 counts of first-degree criminal abuse, and one count of second-degree assault stemming from the abuse of her boyfriend's minor child, who has autism. This Court affirmed, holding that the trial court did not err in allowing the child's current foster mother to testify to background information about the child, since the foster mother did not testify about the abuse or its effect on the child, but rather described the current state of the child's abilities and stressors paramount to her abuse case. This Court also held that the foster mother's testimony did not constitute an improper victim impact statement. Last, this Court held that the foster mother's testimony about certain behaviors of children on the autism spectrum, specifically related to the minor child, was not improper expert testimony and was especially relevant to the abuse in this case.

**E. Phillip R. Conrad v. Commonwealth of Kentucky**

[2017-SC-000107-MR](#)

**December 14, 2017**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The Court affirmed the Circuit Court and held that certain procedural errors in the sentencing phase do not require a mistrial. The typical procedure for a combined truth-in-sentencing and persistent felony offender phase consists of: the jury in the combined bifurcated hearing could be instructed to (1) fix a penalty on the basic charge in the indictment; (2) determine then whether the defendant is guilty as a persistent felony offender, and if so; (3) fix the enhanced penalty as a persistent felony offender. When this procedure is not followed, but is corrected before the court accepts the final verdict, a defendant cannot be said to have been prejudiced.

### **III. DOMESTIC RELATIONS:**

#### **A. Sally Carol Grasch v. Albert Franklin Grasch, Jr. 2016-SC-000591-DG December 14, 2017**

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Cunningham, Hughes, Keller, Venters, and Wright, JJ., sitting. Minton, C.J.; Cunningham, Hughes, Keller, Venters, and Wright, JJ., concur. VanMeter, J., not sitting. The Court formally recognized pending contingent fee case contracts as marital property to be divided as part of the equitable division of the marital estate in a marital dissolution proceeding. The Court also adopted the use of the delayed-division method in doing so, and provided additional guidance to trial courts charged with ensuring such division.

### **IV. REAL PROPERTY:**

#### **B. William David Ellington and Jane Ellington v. Harlan Randall Becraft, et al. 2016-SC-000513-DG December 14, 2017**

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Hughes, Keller, VanMeter, and Venters, JJ., concur. Cunningham and Wright, JJ., concur in result only without opinion. Ellington claimed Smokey Hollow Road, located across Becraft's property was a county road, public road, or prescriptive easement by which he gained right of use. The trial court held that it was a county road, public road, and prescriptive easement. On appeal, the Court of Appeals held that it was neither a county road nor public road and that, although Ellington had acquired a prescriptive easement, it had been abandoned. The Court affirmed in part and reversed in part, holding that the road was neither a county road nor public road but that Ellington had acquired a prescriptive easement that had not been abandoned for the required statutory period. The Court clarified that a county road must be established by formal county action. The Court also clarified that creation of a public road does not require formal county action; however, it can be established through dedication by estoppel or prescription. Dedication by prescription requires adverse use for the fifteen-year statutory period. As to the prescriptive easement, abandonment of such must be for the same fifteen-year statutory period. Because there was no evidence that the pathway had been abandoned for that period, Ellington still retains a prescriptive easement over Smokey Hollow Road across Becraft's property.

**V. TORTS:**

**A. Richard Storm v. Louis Martin**

**2016-SC-000457-DG**

**December 14, 2017**

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Hughes, VanMeter, Wright, JJ., concur. Venters, J., dissents by separate opinion in which Cunningham and Keller, JJ., concur. Martin was injured by a downed tree while riding his motorcycle shortly after a significant windstorm. Martin filed an action alleging negligence due to the failure to remove the tree or warn as to the hazard against Storm, the Metro Louisville County Engineer and Assistant Director of Public Works, as well as Pullen, the Director of Public Works, in their individual and official capacities, as well as Louisville Gas and Electric Company. Following discovery, the trial court held that Pullen was entitled to qualified immunity in his official capacity and dismissed the claims against him, but declined to extend this immunity to Storm, the interlocutory appeal of which was denied by the Court of Appeals. At trial, the jury returned a unanimous verdict for Storm, finding that Martin had not proven by a preponderance of the evidence that Storm failed to comply with his duty as set forth in the instruction and pursuant to KRS 179.070(1)(j). The trial court denied Martin's subsequent motion for JNOV/new trial without written findings or a hearing. On appeal, the Court of Appeals reversed and remanded for a new trial, holding that Martin was not entitled to a directed verdict, but was entitled to a new trial since the jury's findings that Storm did not fail to comply with his statutory duty was against the weight of the evidence, and in so finding that he did not exercise ordinary care, overlooked his specific statutory duty. On appeal, Martin did not allege erroneous jury instructions, however, the Court of Appeals opined that the jury instructions contributed to the jury's erroneous verdict. This Court affirmed the Court of Appeals' denial of a directed verdict but reversed the grant of a new trial. This Court held that the jury instructions did contain the requisite specific duty language required of a statutory duty, and that Martin cannot now object to jury instructions for the first time on appeal, especially when the given instructions were nearly identical to those he proposed. This Court also held that since Storm's duty was ministerial, not absolute, the duty was thus an issue for the jury to determine.

**VI. ATTORNEY DISCIPLINE:**

**A. Meredith Lynn Lawrence v. Kentucky Bar Association**

**2017-SC-000519-KB**

**December 14, 2017**

Opinion and Order of the Court. All sitting; all concur. A formal complaint was filed against Lawrence in 2011 after he was indicted in the U.S. District Court for the Eastern District of Kentucky on charges of tax fraud. He was temporarily suspended from the practice of law after he was convicted of those charges. He served 24 months and made full restitution in the amount of \$128,000.

Lawrence moved the Supreme Court to suspend him for a period of five years, to be applied retroactively to July 6, 2012, the date of his temporary suspension. The KBA did not object to the proposed sanction, which was negotiation under SCR 3.480(2). The Court agreed that the proposed sanction was appropriate and ordered Lawrence suspended from the practice of law for five years, to be applied retroactively to July 6, 2012.

**B. Danny Perkins Butler v. Kentucky Bar Association**  
**[2017-SC-000530-KB](#) December 14, 2017**

Opinion and Order of the Court. All sitting; all concur. Butler moved the Supreme Court to allow him to resign under terms of permanent disbarment for his admitted violations of the Rules of Professional Conduct. The KBA did not object and the Court granted the motion, ordering Butler permanently disbarred from the practice of law in Kentucky.

**C. Kentucky Bar Association v. Alan Richard Stewart**  
**[2017-SC-000556-KB](#) December 14, 2017**

Opinion and Order of the Court. All sitting; all concur. The U.S. Patent and Trademark Office (USPTO) entered a default judgment against Stewart, excluding him from practice for violating federal regulations regarding practice before USPTO; causing harm to a client; and failing to acknowledge, defend, or rectify this misconduct. The Supreme Court of Minnesota, in response to a petition for reciprocal discipline, indefinitely suspended Stewart from the practice of law with no right to petition for reinstatement for five years. The Kentucky Bar Association (KBA) petitioned this Court for reciprocal discipline. Stewart failed to file any response to the Court's order asking him to show cause as to why he should not be suspended from the practice of law for five years, consistent with the order of the Supreme Court of Minnesota. Accordingly, the Court ordered Stewart suspended from the practice of law for five years and required Stewart to pay all costs associated with the disciplinary proceedings against him.