

**PUBLISHED OPINIONS**  
**KENTUCKY SUPREME COURT**  
**FEBRUARY 2016**

**I. CERTIFICATION OF LAW:**

- A. **In re: Robert A Winter, Jr., Plaintiff and Cameron Blau and Honorable Allison Jones, Intervening Plaintiffs v. Hon. Stephen D. Wolnitzek, in his Official Capacity as Chair, Judicial Conduct Commission, et al.**  
**2015-SC-000086-CL**      **February 18, 2016**

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, and Venters, JJ., concur. Noble, J., concurs in part and dissents in part by separate opinion in which Wright, J., joins. Certification of Law Request from the United States District Court for the Eastern District of Kentucky.

Questions presented: The United States District Court for the Eastern District of Kentucky requested the Kentucky Court to certify three multi-part questions of law related to Supreme Court Canons 5A(1)(a), 5A(1)(b), and 5B(1)(c). Held: 1) A judicial candidate is allowed to identify himself as a member of a political party but may not represent himself (or his opponent) as the nominee of a political party. 2) A judicial candidate cannot hold a formal or informal position in an organization whose principal purpose is to further the election or appointment of candidates to political office or achieve success for the political party. 3) A judicial candidate cannot make a statement that is objectively factually untrue, such as he is seeking re-election after initially being appointed to a position; a candidate is not prohibited from expressing subjective opinions and puffery.

**II. CRIMINAL LAW:**

- A. **Darryl Parker v. Commonwealth of Kentucky**  
**2014-SC-000228-MR**      **February 18, 2016**

Opinion of the Court by Justice Hughes. All sitting; all concur. Defendant was convicted of two counts of first-degree robbery, tampering with physical evidence, and being a convicted felon in possession of a handgun. He was sentenced as a second-degree persistent felon to twenty-five years in prison. Affirming the convictions and the sentence, the Supreme Court deemed non-prejudicial unpreserved claims of Moss [v. Commonwealth, 949 S.W.2d 579 (Ky. 1997)] and Robinson [v. Commonwealth, 926 S.W.2d 853 (Ky. 1996)] error, and held that the trial court had not abused its discretion by denying an eve-of-trial request for time to have the Commonwealth's DNA evidence independently analyzed. The Commonwealth's evidence had long been known to the defense, and the defendant offered no valid reason for excusing his delay in seeking the analysis.

**B. Alfred Ivey v. Commonwealth of Kentucky**

**2014-SC-000345-MR**

**February 18, 2016**

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Cunningham, Hughes, Keller and Wright, JJ., concur. Venters, J., concurs in result only by separate opinion. Ivey was convicted of two counts of rape of a minor. One of the crimes resulted in a child, and expert testimony about a DNA paternity test was used to establish that Ivey was the father. Ivey claimed (1) that the DNA expert should not have been allowed to testify about the ultimate probability of paternity based on an assumed 50% prior probability of paternity, and instead should have been limited to testimony about the paternity index, a calculation based on the DNA evidence alone; and (2) that the expert invaded the province of the jury by instructing it on how to consider the evidence. His primary complaint was that the 50% prior probability made improper assumptions about the evidence and resulted in an unreliable, if not misleading, probability of paternity.

In affirming, the Supreme Court held (1) that Ivey had not established that the expert's method was improper, and that any possible prejudice was cured by the expert's testimony about a spectrum of prior probabilities of paternity, which are based on assumptions about other evidence of paternity, to the paternity index to arrive at a spectrum of probabilities of paternity; and (2) that rather than invading the province of the jury, the expert's testimony properly assisted the jury in understanding the evidence or determining a fact in issue.

**C. Darrell Jackson v. Commonwealth of Kentucky**

**2014-SC-000612-MR**

**February 18, 2016**

Opinion of the Court by Justice Venters. All sitting; all concur. Criminal Direct Appeal. Questions presented: 1) Whether the Appellant was entitled to a "no duty to retreat" jury instruction in connection with his claim of self-defense; 2) Whether evidence of Appellant's prior juvenile adjudication was properly admitted in the penalty phase of the trial; and 3) Whether the comity previously accorded by the Supreme Court to KRS 532.055(2)(a)6, which authorizes the use of prior juvenile court adjudications as evidence in criminal trials, should no longer apply. Held: 1) Because Appellant was concluding an illegal drug deal (collecting money owed) when he shot and killed the victim, he was not entitled to a no duty to retreat instruction under KRS 503.055(3). 2) Having a witness read from a summary of Appellant's juvenile record, rather than introducing the actual juvenile records of his adjudication, did not unduly prejudice the Appellant. The evidence was properly admitted. 3) In Commonwealth v. Reneer, 734 S.W.2d 794 (Ky.1987), the Supreme Court granted comity to KRS 532.055. Appellant's case does not present an abuse or injustice to compel reconsideration of the comity previously granted.

D. Commonwealth of Kentucky v. Phillip Dixon  
2014-SC-000511-DG February 18, 2016

Opinion of the Court by Justice Keller. All sitting; all concur. Acting on an anonymous complaint, Kentucky State Police (KSP) troopers approached a residential trailer in which they suspected Dixon was living and manufacturing methamphetamine. While one trooper proceeded toward the front door to perform a warrantless knock and talk, another trooper walked around the maintained area surrounding the trailer to watch for anyone fleeing out the backdoor. From this position about 15 feet behind the trailer the trooper observed evidence of methamphetamine manufacturing on the back porch. Suspecting that the trailer was an active methamphetamine lab, the troopers entered the trailer pursuant to exigent circumstances and cleared the inhabitants for safety reasons. During their sweep, the troopers observed further evidence of methamphetamine manufacturing in plain view. Based on these observations, KSP ultimately obtained a search warrant and later charged Dixon with numerous drug charges. Dixon moved to suppress all evidence collected from the trailer and argued that the troopers unlawfully exceeded the scope of the knock and talk by entering the protected curtilage of his residence. After a suppression hearing, the trial court denied Dixon's motion. The Court of Appeals reversed, finding that the trooper invaded the curtilage of Dixon's residence when he stood within 15 feet of the trailer.

The Supreme Court reversed the Court of Appeals and reinstated the trial court's judgment. In so doing, the Court considered *United States v. Dunn*'s four-factor curtilage analysis to determine whether the trooper's vantage point was within the trailer's protected curtilage. The Court found that the vantage point's proximity to the residence weighed in favor of suppression. However, after considering the remaining factors , including the presence of a surrounding enclosure, the area's use, and what the resident had done to secure his privacy, the Court concluded that, viewed in the totality, the trooper's vantage point was outside the trailer's curtilage. The Court reasoned that the trooper stood in the unmaintained area behind the trailer and that there was no evidence that Dixon used this area as an extension of his residence or intended to keep it private. Therefore, Dixon's Fourth Amendment rights were not violated when the troopers relied on their observations to enter his trailer and later obtain a search warrant.

### **III. EMPLOYMENT LAW:**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Cunningham, Hughes, Noble, Venters, and Wright, JJ., concur. Keller, J., concurs in result only. The trial court awarded Norton Healthcare summary judgment against a Kentucky Civil Rights Claim premised on Norton's alleged unlawful retaliation for Lual Deng (formerly Jacob Aker) filing a claim for racial

discrimination. Specifically, Aker alleged that Norton failed to rehire him for a position because of a prior claim he filed against Norton, despite never actually applying for a position. The Court of Appeals reversed Norton's summary judgment because it concluded that it would have been a futile gesture for Aker to apply for a position because Norton clearly established it would not consider Aker for employment. Norton appealed to this Court, arguing that (1) Kentucky Rules of Evidence (KRE) 408 bars admission of a telephone conversation between the parties' attorneys that formed the basis for Aker's claims, (2) the futile gesture doctrine is inapplicable to this case, and (3) Aker could not form a prima facie retaliation claim.

The Supreme Court reversed the Court of Appeals. First, the Court did not find KRE 408 applies to the conversation between attorneys. The conversation was more aptly characterized as a verbalization of the parties' demands, rather than an attempt to settle the dispute. Second, the Court held that the futile gesture doctrine is inapplicable because it was never argued at the trial court. Such unpreserved arguments are inappropriate for appellate review *sua sponte*. And finally, the Court agreed that Aker failed to establish a *prima facie* retaliation claim under the Kentucky Civil Rights Act. Accordingly, the Court reinstated summary judgment in Norton's favor.

#### **IV. EVIDENCE LAW:**

**A. James Anthony Gray v. Commonwealth of Kentucky  
2013-SC-000374-MR February 18, 2016**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Gray was convicted on two counts of murder and one count of tampering with physical evidence, and was sentenced to forty-five years' imprisonment. He asserted a number of issues on appeal. Most notably, he claimed the trial court erroneously admitted a coerced confession against him at trial. The facts establish that Gray was interrogated for over five hours with the camera turned off, and law enforcement officers invoked a multitude of false evidentiary claims, including forged documents purporting to represent the results of a Kentucky State Police DNA lab report confirming that forensic evidence linked him to the murder. A unanimous Court reversed the trial court's decision not to suppress the evidence. The Court held that in instances where police use false documents to obtain a confession, a criminal defendant is entitled to a rebuttable presumption that the use of such documents is coercive. Because the Commonwealth was unable to rebut the coercive nature of this interrogative method, the Court reversed Gray's conviction and ordered a new trial.

The Court also took interest in the trial court's refusal to allow Gray to introduce an alternate perpetrator theory in his defense. He was not permitted to introduce the evidence because the trial court interpreted the Supreme Court's prior decision in *Commonwealth v. Beatty* to require proof of both motive and opportunity as a prerequisite to introduction. The Court took this opportunity to clarify the state of

alternate perpetrator evidence law, and to affirmatively declare that only the relevance provisions of the Kentucky Rules of Evidence are dispositive. The true test for admission of an alternate perpetrator theory is whether a defendant can establish such a theory is relevant and whether the theory's probative value is enough to counteract the great risk of confusion to the jury underlying many alternate perpetrator theories. In this case, the Court concluded Gray presented enough evidence to warrant admission of his theory.

**V. FAMILY LAW:**

**A. Linda Davis v. Karen Davis, et al.**

[2014-SC-000751-DG](#)

**February 18, 2016**

Opinion of the Court by Justice Cunningham. All sitting; all concur. The Appellant, Linda Davis, and her former husband, Matthew, divorced in 2003. Pursuant to a property settlement agreement ("Agreement"), Matthew agreed "to maintain his policy of life insurance with Monumental Life Insurance Company in the total amount of \$100,000.00 and will keep [Linda] as the beneficiary." Matthew died in 2011. Six weeks prior to his death, Matthew changed the beneficiary on his Monumental Policy, to his then-wife of two years, the Appellee, Karen Davis. Linda filed a proof of claim against his estate premised upon a breach of the Agreement which was denied. Linda intervened in the present action as a third party plaintiff to file a competing claim to those life insurance proceeds. Because the Agreement was not properly referenced or incorporated into the final decree dissolving Linda and Matthew's marriage, the court held that the Agreement was unenforceable. The Court of Appeals affirmed. The Supreme Court of Kentucky reversed and remanded. The Court held that a settlement agreement involving property division that was not properly incorporated or referenced in the final decree of dissolution may be enforced through an independent contract action. The Court also held that Linda is entitled to pursue all equitable claims and remedies available at common law. This includes a claim for unjust enrichment and the imposition of a constructive trust.

**B. A.H. v. W.R.L. and M.L.**

[2015-SC-000247-DGE](#)

**February 18, 2016**

Opinion of the Court by Justice Cunningham. All sitting; all concur. At issue was whether a biological mother's ex-partner, Amy, could intervene in a step-parent adoption proceeding. Amy also filed a motion for shared custody and visitation. The Kenton County Family Court granted Amy's motion to intervene and dismissed the adoption proceeding. The Court of Appeals reversed and held that Amy did not have standing to seek adoption. The Supreme Court of Kentucky reversed the Court of Appeals and reinstated the trial court's order granting intervention and dismissing the step-parent adoption action. The Court held that intervention as a matter of right under CR 24.01 was proper here because Amy asserted a cognizable custodial interest for purposes of intervening in an adoption proceeding.

## **VI. LIMITED REPRESENTATION AGREEMENTS:**

- A. Persels & Associates, LLC, et al. v. Capital One Bank (USA), N.A., et al.**  
**2014-SC-000131-DG February 18, 2016**

Opinion of the Court by Justice Cunningham. All sitting. Hughes, Keller, Noble, Venters and Wright, JJ., concur. Minton, C.J., concurs in result only. At issue was whether an attorney providing limited-representation to a pro se party was required to sign all pleadings and other court filings which the attorney either drafted or aided in drafting. The trial court answered this question in the affirmative and sanctioned the attorneys involved in this case for their failure to sign such pleadings and papers. The Court of Appeals affirmed. The Supreme Court of Kentucky reversed and held that limited-representation agreements are permissible so long as they are reasonable under the circumstances and satisfy additional mandates discussed in the Court's opinion. The Court specifically determined that the attorneys providing limited-representation in the present case were not required to sign the documents prepared as part of the limited-representation. As such, CR 11 does not apply. The Court remanded for the trial court to determine the reasonableness of the limited-representation agreements at issue here.

## **VII. WORKERS' COMPENSATION:**

- A. Trane Commercial Systems v. Delena Tipton; Hon. Thomas G. Polites,  
Administrative Law Judge, and Workers' Compensation Board**  
**2014-SC-000561-WC February 18, 2016**

Opinion of the Court by Justice Keller. All sitting; all concur. The only issue before the Court was whether the ALJ properly denied Delana Tipton's claim for temporary total disability benefits (TTD). Tipton, who had worked for Trane for 20 years, injured her knee while testing industrial air conditioning units. Tipton, who had been released to return to lighter duty work, returned to work at Trane but in a different job. Several months later, her physician released her to return to her pre-injury job duties. However, Tipton did not believe she could perform that job so she bid on and was permanently placed in her lighter duty job. The ALJ denied Tipton's request for TTD during the period following her return to work and before her release to return to her pre-injury job duties. The Board affirmed, but the Court of Appeals reversed, finding that, while on lighter duty, Tipton was not performing the type of work she performed pre-injury, and she was therefore entitled to TTD.

The Supreme Court reversed the Court of Appeals. In doing so, the Court analyzed previous opinions wherein the Court had found entitlement to TTD following a release to return to work. As the Court noted, in all of those prior cases, the claimant had not actually returned to work. Furthermore, the Court noted that the ALJs, the Board, and the Court of Appeals had occasionally used

the definition of "work" as used in KRS 342.730 for the word "employment" as used in KRS 342.0011. Those two words have different meanings. As the Court noted, the purpose of TTD is to compensate injured workers for lost wages.

Paying TTD to an injured worker who has returned to employment, simply because that employee is not performing the same type of work, does nothing to forward the purpose of TTD. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, *i.e.* work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. Finally, the Court did not attempt to define what those extraordinary circumstances might be but stated that an ALJ who makes such an award must set forth specific evidence based reasons for doing so.

**B. Glenn Hampton v. Flav-O-Rich Dairies; Hon. William J. Rudloff,  
Administrative Law Judge; and Workers' Compensation Board**  
**2015-SC-000095-WC**

**February 18, 2016**

Opinion of the Court by Justice Keller. All sitting; all concur. The ALJ found Glenn Hampton to be permanently totally disabled. Flav-O-Rich appealed to the Board arguing, in pertinent part, that the ALJ's opinion lacked sufficient findings to permit a meaningful review. The Board agreed, vacating the ALJ's opinion and remanding for additional findings of fact. Hampton filed a petition for review with the Court of Appeals, arguing that the ALJ's opinion was sufficient, and his findings were based on evidence of substance. The Court of Appeals dismissed Hampton's appeal as prematurely filed from a non-final Board opinion. The Supreme Court reversed the Court of Appeals. Because the Court of appeals had not addressed the substance of Hampton's appeal, the only issue decided by the Court was whether the Board's opinion was final and appealable.

In finding that the Board's opinion was final and appealable, the Court first held that an opinion of the Board is final and appealable if it divests a party of a vested right or authorizes or requires a different award on remand. The Court clarified that the insertion of the word "and" for "or" in dicta in *Whittaker v. Morgan*, 52 S.W.3d 567, 569 (Ky. 2001) was incorrect. Applying the correct test to Hampton's claim, the Court found that the Board's opinion vacating the ALJ's opinion divested Hampton of a vested right – the ALJ's finding of permanent total disability. The Court also held that by vacating the ALJ's opinion, the Board nullified that opinion, thus authorizing the ALJ to enter a different award on remand. Thus, the Court remanded the claim to the Court of Appeals with instructions for it to consider the merits of Hampton's appeal.

**C. John Fuertes v. Ford Motor Co.; Hon. James Kerr, Administrative Law  
Judge; and Workers' Compensation Board**  
**2015-SC-000268-WC**

**February 18, 2016**

Opinion of the Court. All sitting; all concur. Fuertes suffered a work-related accident while employed by Appellee, Ford Motor Company. Before his

workers' compensation claim could be resolved, Fuertes was fired by Ford for "performance related issues." Fuertes contends that he was fired because of his work-related injuries.

After a review of the evidence, the ALJ found that Fuertes suffered a work-related injury to his right shoulder, right knee and neck. The ALJ declined to apply the two multiplier, 342.730(1)(c)2, to Fuertes's award because "[t]here is no evidence that [Fuertes's] cessation of employment was the result of his work-related injury." *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671 (Ky. 2009). After a series of appeals and remands, the Board ultimately agreed. The Court of Appeals affirmed the Board and this appeal followed.

The Court reversed and remanded. Since the ALJ issued his latest opinion, the Court reversed the portion of *Chrysalis House*, 283 S.W.3d 671, which held that the claimant's failure to earn the same or greater wages must be related to the work-related injury before the two multiplier may be awarded. *Livingood v. Transfreight, LLC*, 467 S.W.3d 249 (Ky. 2015). Instead now "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." Thus, on remand, the ALJ is to review the facts and apply the standard provided in *Livingood*.

The Court further held that since it is unlikely that the claimant would admit to misconduct, and since proving that type of misconduct occurred is a defense against application of the two multiplier, the burden of proof is upon the employer to show the claimant's termination was caused by the type of behavior described in *Livingood*.

## **VIII. WRITS:**

- A. **Allen Lloyd Lehmann v. Hon. Susan Schultz Gibson, Judge, Jefferson Circuit Court, et al.**

**2015-SC-000239-MR**

**February 18, 2016**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Allen Lloyd Lehmann was charged with various sexual-abuse crimes that occurred during his tenure as an ordained pastor of the Assembly of God church. While those charges were pending, the victims filed a civil suit against Lehmann. The Commonwealth moved to intervene in Lehmann's civil action and sought to stay discovery pending the resolution of its criminal prosecution. The trial court allowed the Commonwealth's intervention and stayed civil discovery—namely, Lehmann's attempts to take the victims' depositions. Lehmann sought a writ of mandamus from the Court, directing the trial court to allow him to proceed with discovery. A matter of first impression, the Court denied the writ and held the trial court did not act erroneously in staying discovery during a pending, closely related criminal

trial. In the Court's view, a party could circumvent the strict rules of criminal discovery by obtaining information via civil discovery—a much broader process. The trial court's stay was not erroneous because it operated to protect the integrity of the Court's procedural rules and criminal process. The Court listed seven factors trial courts could consider in deciding whether to stay civil discovery when faced with simultaneous civil and criminal proceedings: (1) the extent to which the evidentiary material in the civil and criminal cases overlap; (2) the status of the criminal proceeding; (3) the interests of any parties in staying the civil proceeding; (4) the prejudice to any parties from staying the civil proceeding; (5) the interests of persons that are not parties to the litigation; (6) court convenience; and (7) the public interest in the pending civil and criminal actions.

## **IX. ATTORNEY DISCIPLINE:**

### **A. Kentucky Bar Association v. Rodger William Moore 2015-SC-000383-KB**

**February 18, 2016**

Opinion and Order of the Court. All sitting; all concur. The Ohio Supreme Court suspended Moore for two years with conditions, based on the parties' agreed stipulations of facts and violations. The suspension was related to Moore's involvement in two separate shoplifting incidents and his subsequent false statements to the Cincinnati Bar Association regarding his conduct.

At the KBA's request, the Supreme Court of Kentucky issued a show-cause order requiring Moore to show cause why identical reciprocal discipline should not be imposed under SCR 3.435. Moore filed a response but it did not establish legally sufficient grounds to prevent the imposition of identical reciprocal discipline. Accordingly, the Court granted the KBA's request and suspended Moore from the practice of law in the Commonwealth for a period of two years, with the second year stayed subject to the conditions outlined in the Supreme Court of Ohio's order of suspension.

### **B. Kentucky Bar Association v. David Thomas Sparks 2015-SC-000425-KB**

**February 18, 2016**

Opinion and Order of the Court. All sitting; all concur. Sparks settled a personal injury lawsuit on behalf of a client and received an \$11,000 check, which he deposited into a non-IOLTA escrow account. Sparks failed to follow-up with his client regarding the status of the settlement check and failed to respond to requests to provide regular, written status reports to his client and to release all money owed to his client. A bar complaint was filed against Sparks, who failed to respond. The Inquiry Commission then issued a six-count charge against Sparks alleging violations of various disciplinary rules. The Commission further remanded the matter for Bar Counsel to determine if Sparks had an escrow account and if documentation regarding the account could be obtained.

Sparks filed for leave to file an answer. Another attorney, Marshall, agreed to represent Sparks *pro bono*. Shortly thereafter, Sparks wired \$11,000 into Marshall's escrow account to be appropriately dispersed. Marshall also filed an answer on behalf of Sparks, stating that Sparks was prepared to make substantial admissions of fault and raising concerns regarding Sparks' mental and emotional health, which may have resulted in his inattention to his client and the KBA.

Following a hearing, the Trial Commissioner found that five of the six counts against Sparks had been proven by a preponderance of the evidence and expressed concerns about Sparks's mental status and his understanding of the use of escrow accounts. The Trial Commissioner recommended that Sparks be suspended from the practice of law for 181 days, 120 days of which should be probated on the condition that Sparks attend 30 hours of ethics education and business management education, including the use of escrow accounts. The Board of Governors approved the Trial Commissioner's decision and Bar Counsel filed a Notice for the Court to review the Board's decision under SCR 3.370(7).

After reviewing previous cases involving similar misconduct, the Court agreed with the Board's recommendation and suspended Sparks from the practice of law for 181 days, with 61 days to serve and the balance probated for two years with conditions.

**C. Kentucky Bar Association v. Jeanette Mari Conrad  
2015-SC-000694-KB February 18, 2016**

Opinion and Order of the Court. All sitting; all concur. The Supreme Court of Illinois suspended Conrad for six months for the unauthorized practice of law and for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. At the KBA's request, the Supreme Court of Kentucky issued a show-cause order requiring Conrad to show cause why identical reciprocal discipline should not be imposed under SCR 3.435(4). Conrad failed to show cause and the Court imposed reciprocal discipline, suspending Conrad from the practice of law for a period of six months.