

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
JUNE 2014**

I. ADMINISTRATIVE LAW:

- A. Commonwealth of Kentucky, Kentucky Board of Nursing v. Sullivan University System, Inc., d/b/a Spencerian College, et al.**
[2012-SC-000622-DG](#) June 19, 2014

Opinion of the Court by Justice Scott. All sitting. Minton, C.J.; Abramson, Cunningham, Keller, and Venters, JJ., concur. Noble, J., dissents by separate opinion. Appellant, the Kentucky Board of Nursing, appealed the Court of Appeals' ruling that the Board acted unreasonably in interpreting its pass-rate regulation and applying it to Appellee, the Sullivan University System, Inc. Because the regulation at issue had been amended before the case reached the Supreme Court and the new regulation was not negatively impacting Appellee, the Supreme Court dismissed the case for mootness, vacated the Court of Appeals' ruling, and remanded to the trial court with instructions to dismiss.

- B. Bullitt Fiscal Court, et al. v. Bullitt County Board of Health**
[2013-SC-000023-DG](#) June 19, 2014

Opinion of the Court by Justice Cunningham. Minton, C.J.; Abramson, Noble, Venters, and Scott, JJ., concur. Keller, J., not sitting. On March 22, 2011, the Bullitt County Board of Health (the "Board") enacted Regulation 10-01 (the "Regulation") entitled, "A Regulation Related to the Protection of the Public Health and Welfare by Regulating Smoking in Public Places and Places of Employment." Section 4 of the Regulation prohibited tobacco smoke in "all enclosed public places within Bullitt County," specifically including bars, bingo facilities, hotels, motels, and restaurants." The Bullitt County Fiscal Court and eight cities in Bullitt County (collectively referred to as "Appellants") filed a petition for a declaration of rights against the Board in Bullitt Circuit Court. Appellants argued before the trial court, inter alia, that the Board had usurped their authority by enacting a substantive law without proper enabling legislation. The trial court agreed and held that the Regulation was invalid. A divided Court of Appeals panel reversed the trial court's ruling. The Supreme Court of Kentucky granted discretionary review and held that the health board exceeded its authority under KRS 212.230(1)(c) in enacting the regulation. Bullitt County Health Board Regulation No. 10-01 is therefore invalid and unenforceable. In so holding, the Court cautioned against the ascendance of a fourth branch of government—the regulatory state.

C. **Joseph B. Curd, Jr. v. Kentucky State Board of Licensure for Professional Engineers and Land Surveyors**

AND

Kentucky State Board of Licensure for Professional Engineers and Land Surveyors v. Joseph B. Curd, Jr.

[2012-SC-000165-DG](#)

June 19, 2014

[2012-SC-000169-DG](#)

June 19, 2014

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Joseph B. Curd, Jr., a Kentucky-licensed land surveyor, was sanctioned by the Board as a result of his expert testimony in litigation involving a boundary dispute. Specifically, the Board found that Curd ignored or suppressed material facts and failed to testify in an objective manner. Further, the Board found that Curd brought dishonor on the profession as a result of his testimony about a fellow land surveyor. Curd challenged the sanction in circuit court, arguing that he was entitled to absolute immunity; the Board's action violated separation of powers; and, further, the Board's action was unsupported by substantial evidence. The circuit court found the statutes under which Curd was sanctioned to be unconstitutionally vague as applied to Curd and on appeal, the Court of Appeals affirmed the circuit court's decision, save one statute. The Court denied Curd's absolute immunity claim, reaffirming and extending to witnesses providing live testimony its previous holding in *Maggard v. Commonwealth Bd. of Examiners of Psychology*, 282 S.W.3d 301 (Ky. 2008). The Court noted that absolute immunity does not mean witnesses are placed "beyond the reach of any punishment for improper testimony." Instead, absolute immunity is designed to protect witnesses from defamation lawsuits. Potential administrative discipline for witnesses promotes the policies of the judicial branch. The Court additionally held that a licensure board's monitoring of expert testimony does not violate the separation of powers outlined in the Kentucky Constitution. In fact, the Court pointed out that the licensure board may be more adept at monitoring expert testimony than the courts. The Court went on to hold that while the Board's action was supported by substantial evidence, review did not end there because the statutes under which the Board sanctioned Curd were unconstitutionally vague as applied to his expert testimony. Acknowledging lurking First Amendment concerns, the Court held the statutes the Board relied on to sanction Curd provided the possibility for arbitrary agency action. By the Court's estimation, only 201 KAR 18:142 Section 3, requiring objective and truthful testimony based on adequate knowledge of the facts in issue, technical competence, and honest conviction, passed constitutional muster. The Court concluded with a finding that the Board acted on substantial evidence in finding Curd violated 201 KAR 18:142 Section 3, but remanded the action to the Board for further consideration of Curd's sanction because the Board did not specify the degree to which the sanction was based on the statutes and regulations ruled unconstitutional.

II. CONTRACT LAW:

A. **United Brotherhood of Carpenters v. Birchwood Conservancy, Etc., et al.** **[2011-SC-000659-DG](#)** **June 19, 2014**

Opinion of the Court by Justice Scott. All sitting. Minton, C.J.; Abramson, Cunningham, Keller, and Venters, JJ., concur. Noble, J., concurs in result only. Appellant, United Brotherhood of Carpenters (Union), volunteered to help build a barn for Birchwood Conservation Center (Birchwood), another unincorporated association. When the Union failed to complete the barn, Birchwood filed suit in Scott Circuit Court for breach of contract and later amended its complaint to include Ike Harris, a member of the Union. In a second amended complaint, Birchwood substituted Birchwood Conservancy, a corporation, as a party plaintiff. The trial court ultimately dismissed Birchwood's complaint. However, the Court of Appeals reversed the trial court and remanded for further proceedings. The Union was granted discretionary review and alleged that: (1) The Court of Appeals incorrectly concluded that the Union waived the defense of lack of capacity; (2) the Court of Appeals erred in holding that Ike Harris was a representative of the class; (3) the Court of Appeals failed to address the arguments presented by the parties; and (4) the trial court correctly found that the responses to the amended complaints properly related back to the initial complaint. The Supreme Court reversed the Court of Appeals' decision and reinstated the trial court's dismissal of Birchwood's complaint, holding that the Union had not waived its defense of lack of capacity.

III. CRIMINAL LAW:

A. **Brian Dewayne Edmonds v. Commonwealth of Kentucky** **[2012-SC-000395-MR](#)** **June 19, 2014**

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Abramson, and Keller, JJ., concur. Venters, J., dissents by separate opinion in which Cunningham and Scott, JJ., join. The Appellant, Brian Dewayne Edmonds, was convicted of first-degree sodomy, intimidating a participant in the legal process, second-degree wanton endangerment, third-degree terroristic threatening, and being a Persistent Felony Offender (PFO) in the first degree. On appeal, the Appellant alleged two errors: (1) that the trial court failed to properly limit the testimony of the sexual assault nurse examiner, and thereby committed reversible error; (2) the trial court erred by failing to grant his motion for a directed verdict on the charge of intimidating a witness in the legal process.

In affirming the Appellant's conviction and sentence, the Court noted that the trial court had not erred when it admitted a SANE's testimony. Her testimony was not improper prior-consistent-statement testimony as argued by the Appellant. Further, the Court noted that the SANE's repetition of the victim's statement "We never had anal intercourse" in the context it was stated by the victim was a proper statement for the purpose of medical diagnosis or treatment under KRE 803(4).

Of greater significance, the Court upheld the Appellant's conviction for intimidating a participant in the legal process. In doing so, the Court overruled its previous holding in *Moreland v. Commonwealth*, 322 S.W.3d 66 (Ky. 2010). The Court held that its previous decision in *Moreland* had interpreted KRS 524.040 too narrowly.

In overruling *Moreland*, the Court held that "witness" is defined to include a person who "may be called" as a witness, and that definition is included in the definition of "participant in the legal process," KRS 524.010(3). Further the Court reasoned that a person may still be guilty of an offense under KRS 524.040 when the victim is a person who may be called as a witness in an official proceeding in the future, even if the official proceeding has not yet begun or is not about to begin by virtue of KRS 524.040(2). The Court held that the Appellant's actions had hindered or delayed the reporting of a crime, and therefore, he was not entitled to a directed verdict.

Justice Venters dissented, joined by Justice Scott and Justice Cunningham, because he disagreed with the Majority's decision to discard *Moreland* and believed the Majority misinterpreted *Moreland*. Justice Venters also disagreed with the Majority because he believed Edmonds was entitled to a directed verdict because there was not sufficient evidence he hindered or delayed the reporting of a crime.

**B. Thomas Biederman v. Commonwealth of Kentucky
2013-SC-000034-MR June 19, 2014**

Opinion of the Court by Justice Keller. All sitting; all concur. Biederman attempted to murder his ex-wife by placing a pipe-bomb in her vehicle. A jury convicted him of attempted murder and use of a weapon of mass destruction.

Biederman raised five arguments on appeal. First, he argued that his conviction violated double jeopardy because both charges - attempted murder and use of weapon of mass destruction - arose from the same set of facts - his placement of a pipe bomb in his wife's car. The Supreme Court held that Biederman's argument failed because, although arising from the same set of facts, conviction for each charge requires proof of an additional fact which the other does not.

Second, Biederman argued that his convictions violated KRS 505.020(1)(b) and (c), which prohibit multiple convictions arising from a single source of conduct that require the jury to make inconsistent findings or that are part of an uninterrupted legal process. The Supreme Court held that KRS 505.020(1)(b) and (c) did not apply because Biederman's convictions did not require inconsistent findings by the jury or stem from uninterrupted legal process.

Third, Biederman argued that the jury, not the trial court, should have found that his ex-wife sustained serious physical injury, and that his sentencing as a violent offender was therefore improper. The Supreme Court, noting prior precedent, held that the trial court had not acted improperly.

Fourth, Biederman argued that it was structural error to not allow the jurors to use their notes during deliberations, and that he was entitled to review under the palpable error standard. The Supreme Court has previously held that it is reversible error to prevent jurors from using their notes during deliberations; however, the Court noted that Biederman and the Commonwealth agreed the jurors would not use their notes in their deliberations. Because invited errors, such as this one, are not subject to palpable error review, the Court found no error.

Finally, Biederman argued that he was wrongly denied his motion for directed verdict because the Commonwealth failed to prove the bomb was capable of causing death and the Commonwealth failed to prove its case. The Supreme Court held that, under the evidence as a whole, it was not clearly unreasonable for a jury to find guilt; therefore, Biederman was not entitled to a directed verdict.

**C. Clifford D. Rawls v. Commonwealth of Kentucky
2013-SC-000129-MR June 19, 2014**

Opinion of the Court by Justice Noble. All sitting; all concur. Appellant, Clifford D. Rawls, was convicted of manufacturing methamphetamine while in possession of a handgun, possession of marijuana, and possession of a handgun by a convicted felon after a stand-off with police.

Appellant was also found to be a first-degree persistent felony offender.

On appeal, Appellant asserted two claims of error. First, he alleged the trial court erred by failing to instruct the jury on unlawful possession of a methamphetamine precursor as a lesser-included offense of manufacturing methamphetamine. And, second, he claimed the trial court erred when it denied his motion for a suppression hearing and failed to suppress items seized pursuant to the search warrant. As part of this second argument, the Appellant alleged that the affidavit supporting the warrant was facially deficient because it failed to establish probable cause, and that the search warrant failed to name the items to be seized with particularity.

The Court, in affirming the Appellant's convictions and sentence, held that under the facts presented the trial court was not in error to decline to instruct on unlawful possession of a methamphetamine precursor as a lesser-included offense of manufacturing methamphetamine. As to the second issue, the Court held that Rawls's argument that he was entitled to an evidentiary hearing on the reliability of the confidential informants was not the same type of challenge governed by *Franks v. Delaware*, 438 U.S. 154 (1978). The Court noted that the Appellant never argued that the affidavit contained falsehoods or material omissions, as governed by *Franks*; rather, he argued that the affidavit was facially invalid and as presented did not support a finding of probable cause. Nevertheless, the Court held Rawls was not entitled to an evidentiary hearing because the Appellant's challenge to the affidavit amounted to a straightforward challenge to the affidavit as insufficient within its four corners and thus an evidentiary hearing on that issue was not necessary. As to the Appellant's argument that the warrant was insufficient for lack of particularity, the Court disagreed.

D. Lawrence M. Webster v. Commonwealth of Kentucky
[2013-SC-000381-MR](#) June 19, 2014

Opinion of the Court by Justice Scott. All sitting; all concur. A Jefferson Circuit Court Jury found Appellant, Lawrence Webster, guilty of second-degree manslaughter and of being a first-degree persistent felony offender. As a result, he was sentenced to twenty years' imprisonment. He appealed his sentence to the Supreme Court as a matter of right, Ky. Const. § 110(2)(b), alleging that the trial court erred by (1) phrasing the jury instructions in a manner that unfairly suggested to the jury that it had to acquit on the higher degree of homicide before considering any lesser offense and (2) reading the jury instructions at the beginning of the penalty phase instead of at the conclusion of the proof during sentencing. The Supreme Court affirmed Appellant's convictions, holding that (1) appellate review of phrasing of the jury instructions was unavailable because Appellant tendered instructions that were substantially similar to those given by the trial judge and (2) appellate review of timing of jury instructions was unavailable because the timing of the instructions was not a "true sentencing issue" entitled to automatic review and because Appellant failed to request palpable error review.

E. Jason Sevier v. Commonwealth of Kentucky
AND
Carolyn Baughman v. Commonwealth of Kentucky
[2012-SC-000238-MR](#)
[2013-SC-000265-TG](#) June 19, 2014

Opinion of the Court by Chief Justice Minton. All sitting. Abramson, Keller, Noble, Scott and Venters, JJ., concur. Cunningham, J., concurs in result only. Jason Sevier and Carolyn Baughman were jointly tried and convicted of multiple drug offenses when a consensual search of their trailer revealed their methamphetamine production. The charges they were convicted of included manufacturing methamphetamine, possession of a methamphetamine precursor, and fourth-degree controlled substance endangerment of a child.

Their appeals were consolidated before the Court, with both parties presenting nearly-identical arguments: first, whether the trial court's failure to dismiss an alternate juror before the start of deliberations constituted palpable error; second, whether convictions for manufacturing methamphetamine and possession of a methamphetamine precursor violated double jeopardy; third, whether they could be convicted of fourth-degree controlled-substance endangerment of a child without a parental or other authoritative relationship with the child at issue; fourth, whether the trial court properly ordered them to pay restitution to the Commonwealth to reimburse its costs to clean up the active chemical reactions taking place at their residence at the time of their arrest; and fifth, whether the trial court's properly imposed a partial public defender fee after finding them to be "poor persons."

As to the first issue, the Court found there was no constitutional error in providing a defendant with a more than the twelve jurors required by Section Seven of the Kentucky Constitution. So the trial court's failure to designate and dismiss an alternate juror prior to deliberations was not palpable error.

Second, the Court agreed that convictions for manufacturing methamphetamine and possession of a methamphetamine precursor violated double jeopardy under the Blockburger test because possession of a methamphetamine precursor is a lesser-included offense of manufacturing methamphetamine, when the manufacturing methamphetamine conviction is based on the possession of chemicals or equipment. Accordingly, the Court vacated the possession of a methamphetamine precursor convictions.

Third, the Court affirmed the convictions for fourth-degree controlled-substance endangerment of a child, holding that KRS 218A.1444 does not require a parental or special relationship for criminal liability to attach.

Fourth, the Court held that the trial court did not abuse its discretion by ordering restitution paid to the Commonwealth for the disposal of the chemically tainted items because the expenses were "extraordinary" and "outside the scope of typical expenses inherent in police work."

Finally, the Court reversed the partial public defender fee, acknowledging "the finding necessary to waive [mandatory court] costs evinces the most serious form of financial hardship in our judicial-fee framework" and concluded that such a finding is inconsistent with charging a partial public defender fee.

The Court remanded the case to the trial court to enter an order consistent with the multiple holdings outlined above.

**E. Commonwealth of Kentucky v. Brian Lemons
2012-SC-000431-DG June 19, 2014**

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Abramson, Cunningham, Noble, and Venters, JJ., concur. Scott, J., concurs in result only. Lemons was involved in a fight outside a club in Newport, Kentucky. During the fight, Lemons stabbed and killed Cory Kessnick. Lemons filed a motion to dismiss based on KRS 503.085, which provides immunity from criminal prosecution to persons who use force in defense of self or others, unless there is probable cause to believe the use of force was unlawful. The trial court denied Lemons's motion, finding that the Commonwealth had produced sufficient evidence to support a finding that probable cause existed to conclude Lemons's use of force was unlawful. In doing so, the trial court noted several inconsistencies in Lemons's statements to police and the varied and inconsistent statements given by other witnesses and participants in the fight. After conducting a de novo review of the evidence, a divided panel of the Court of Appeals reversed, holding that the Commonwealth had not met its burden of proving that Lemons's use of force was unlawful.

The Supreme Court reversed the Court of Appeals first noting that the legislature gave little guidance in the statute regarding the appropriate standard of review. Having noted that, the Court looked to other areas requiring a finding of probable cause, in particular focusing on the standard of review regarding the issuance of a search warrant. In those cases, the reviewing court should examine the record to determine if there was a substantial basis to support the trial court's conclusion. The reviewing court should not conduct a de novo review. Applying the substantial basis standard of review, the Supreme Court concluded that the trial court's finding of probable cause was supported by the evidence. Therefore, the Supreme Court reversed the Court of Appeals.

F. Commonwealth of Kentucky v. Leslie L. Lawson
[2012-SC-000614-DG](#) June 19, 2014

Opinion of the Court by Justice Scott. All sitting. Minton, C.J; Abramson, Cunningham, and Venters, JJ., concur. Noble, J., dissents by separate opinion in which Keller, JJ., joins. Appellee, Leslie Lawson, was found guilty of second-degree arson, second-degree burglary, and of being a first-degree persistent felony offender, for which he was sentenced to a total of eighty years' imprisonment. Appellee ultimately filed a motion pursuant to RCr 11.42 to vacate his sentence for ineffective assistance of counsel. That motion was denied by the trial court but subsequently granted by the Court of Appeals. The Commonwealth of Kentucky, as Appellant, sought discretionary review of the Court of Appeals' decision, arguing that: (1) the Court of Appeals improperly relied on *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007) in rendering its opinion; (2) the Court of Appeals improperly found the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984) was satisfied; and (3) the Court of Appeals improperly created a per se reversal rule using *Shane*. The Supreme Court granted discretionary review and reversed the Court of Appeals' decision, finding the Court of Appeals improperly relied on and applied *Shane*, and that Appellee did not satisfy the *Strickland* test, because he did not suffer demonstrable prejudice as a result of his counsel's error at trial.

IV. EMPLOYMENT LAW:

A. Charles T. Creech, Inc. v. Donald E. Brown, et al.
AND
Donald E. Brown, et al. v. Charles T. Creech, Inc.
[2012-SC-000651-DG](#)
[2012-SC-000693-DG](#) June 19, 2014

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Abramson, Cunningham, Scott and Venters, JJ., concur. Noble, J., concurs in result only by separate opinion. Donald Brown worked for Charles T. Creech, Inc. for 18 years. Creech provides hay to thoroughbred and other farms. During Brown's 16th year of employment, Creech asked Brown to sign a non-compete/non-disclosure agreement. The agreement provided that Brown could not work for a competitor

for three years after leaving Creech's employment; however, the agreement did not provide for any geographical limitation to the prohibition. Furthermore, Creech did not offer any particular incentive to Brown in exchange for his signature nor did Creech directly threaten Brown with loss of his job if he refused to sign the agreement. Shortly after Brown signed the agreement, Creech "demoted" him but did not alter his pay. Approximately two years later, Brown resigned from his position with Creech and took a job with Standlee, one of Creech's competitors. Creech then sued Brown and Standlee alleging breach of the non-compete/non-disclosure agreement and sought injunctive relief. Pursuant to Creech's motion, the trial court issued a temporary injunction. In doing so, the trial court provided a geographical limitation essentially prohibiting Brown from conducting business on behalf of Standlee within Kentucky.

Standlee and Brown sought interlocutory relief in the Court of Appeals, which the Court granted. In doing so, the Court of Appeals determined that the trial court abused its discretion in granting the injunction. The Court of Appeals also stated that there were significant questions regarding the enforceability of the agreement. When the case returned to the trial court, Brown and Standlee filed motions for summary judgment. The trial court, citing the Court of Appeals's opinion and noting the Court's objections to the enforceability of the agreement, granted those motions. Creech appealed and the Court of Appeals reversed, essentially holding that summary judgment was premature because the parties had not conducted sufficient discovery. All the parties sought discretionary review, which the Supreme Court granted.

The Supreme Court reversed the Court of Appeals holding that the agreement was not supported by consideration and, therefore, unenforceable. In doing so, the Court reviewed previous cases that found sufficient consideration when a post-employment non-compete agreement is part of a larger post-employment contract of employment and when continued employment is specifically contingent on signing the agreement. Neither of those cases applied to Brown because there was no implicit or explicit threat that he would be discharged if he did not sign the agreement, and the agreement was not part of a larger employment contract. As the Court noted, neither Brown's rights nor Creech's obligations changed as a result of the agreement. Brown remained an at-will employee, he received no increase in salary, he received no specialized training, and Creech was not obligated to provide anything to Brown. Therefore, there was no consideration.

In her concurring opinion, Justice Noble stated that she believed that the evidence created an implication that Brown would have been fired if he had not signed the agreement. Thus his continued employment constituted sufficient consideration to support the agreement. However, she stated that the agreement was not enforceable because it did not have any geographical limitation, which is a material term, and the trial court could not "blue line" in that limitation

V. SECURED TRANSACTIONS:

- A. Delphi Automotive Systems, LLC v. Capital Community Economic/Industrial Development Corporation, Inc.**
2012-SC-000249-DG June 19, 2014

Opinion of the Court by Justice Abramson. Minton, C.J.; Cunningham, Noble, Scott, and Venters, JJ., concur. Keller, J., not sitting. Commercial creditor with perfected security interest in defaulting debtor's equipment brought declaratory judgment action against a Community Development Agency that had lent development funds to the debtor. The circuit court and the Court of Appeals both held that the development agency's security interest in the debtor's equipment was superior to that of the commercial creditor notwithstanding the agency's failure to perfect its interest as provided for under Article 9 of Kentucky's Uniform Commercial Code (KRS Chapter 355). Reversing, the Supreme Court held that neither the statutory exceptions for "transfers by a governmental unit," and for security interests "expressly governed by another statute," nor general public policy concerns exempted the economic/industrial development agency from Article 9's security interest perfection requirements.

VI. SOVEREIGN IMMUNITY:

- A. Vera Furtula and Anthony Miller v. University of Kentucky, University Board of Trustees, and PNC Bank, et al.**
2011-SC-000332-DG June 19, 2014

Opinion of the Court by Justice Venters. Cunningham and Keller, JJ., concur. Minton, C.J. concurs in result, concurs in part, and dissents in part; Noble, J., dissents by separate opinion in which Scott, J., joins. Abramson, J., not sitting. Employees of a state university brought civil actions against the university, claiming a contractual right to benefits under a program for long-term disability compensation as reflected in the university's employee handbook and other personnel documents published by the university. The university moved for dismissal of the action upon grounds of sovereign immunity and the lack of a written contract for which immunity was waived under KRS 45A.245. The Kentucky Supreme Court held that the employees had neither a written nor implied contract with the university relating to disability compensation program, and thus there was no waiver of sovereign immunity under KRS 45A.245, because the university's employee handbook, its human resource policies, and documents relating to the program expressly disclaimed the creation of a contract and expressly reserved the university's authority to alter or amend the program at any time, thus making clear that the university did not intend to form a contract binding itself to the long-term disability.

VII. STATE CONSTITUTIONAL LAW:

- A. Ervin Klein, et al. v. Lori Hudson Flanery, in her Official Capacity as the Secretary of the Finance and Administration Cabinet, et al.**
AND
Louisville Soccer Alliance, at al. v. Steven L. Beshear, in his Official Capacity as the Governor of Kentucky, et al.
[2012-SC-000197-DG](#) **June 19, 2014**
[2012-SC-000071-DG](#) **June 19, 2014**

Opinion of the Court by Justice Abramson. All sitting. Minton, C.J.; Cunningham, Keller, and Noble, JJ., concur. Venters, J., dissents by separate opinion in which Scott, J., joins. In separate suits, regulated building contractors and charities that engage in regulated charitable gaming challenged the constitutionality of the General Assembly's end-of-biennium transfer of surplus regulatory fees to the General Fund. In both cases, the Court of Appeals upheld the transfers. Affirming, the Supreme Court held that while the collection of regulatory fees out of proportion to regulatory expenses and the use of the excess for non-regulatory purposes would amount to unlawful taxation, the General Assembly did not overstep constitutional bounds by transferring to the General Fund end-of-biennium surpluses remaining from regulatory fees duly proportioned to agency expenses.

VIII. TORTS:

- A. MV Transportation, Inc. v. Richard G. Allgeier (Executor of the Estate of Barbara Allgeier, Deceased)**
[2012-SC-000462-DG](#) **June 19, 2014**

Opinion of the Court by Justice Venters. All sitting; all concur. Wheelchair-bound passenger injured in a fall from a paratransit bus brought suit against paratransit bus company alleging negligence and gross negligence and asserting liability based upon company's direct negligence and liability of company for employee's negligence based upon respondeat superior. The trial court granted summary judgment to the company on the passenger's claim for punitive damages and, following trial, entered a judgment in favor of the passenger for compensatory damages based on the jury verdict. The Court of Appeals affirmed the verdict awarded for compensatory damages but reversed the dismissal of the punitive damage claim, and remanded for trial on punitive damages only. Upon review the Kentucky Supreme Court held: (1) as an issue of first impression, the company's concession that it was vicariously liable for driver's negligence under respondeat superior did not preclude the passenger's claim that the company was also directly liable for its own negligence upon her claims for negligent hiring, training, and retention; (2) that the motion in limine to exclude evidence of the driver's alcoholism did not relieve the defendant of the obligation to contemporaneously object when passenger's use of such evidence at trial exceeded the pre-trial ruling

restricting that evidence to impeachment purposes; (3) a limited retrial exclusively on the claim for punitive damages would not violate the company's right to a trial by jury under § 7 of the Kentucky Constitution, and would not violate the requirement of KRS 411.186(1) that punitive damages be tried along with claims for compensatory damages.

IX. UNIFORM COMMERCIAL CODE:

**A. Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Company
2012-SC-000267-DG **June 19, 2014****

Opinion of the Court by Justice Noble. All sitting; all concur. The Appellant, Mark D. Dean, P.S.C, had an escrow account with the Appellee, Commonwealth Bank & Trust Company. An employee of the Appellant, who was an authorized signatory on the account, engaged in a fraudulent check-kiting scheme and embezzled money from the Appellant. Three years after the embezzlement was discovered, Appellant filed Uniform Commercial Code and common-law claims against the Appellee. The opinion of the Court addressed whether the Appellant's claims were barred by the one-year repose period of KRS 355.4-406, as determined by the Court of Appeals, or alternatively by the three-year statute of limitations under KRS 355.4-111.

Appellant alleged that the bank had violated Articles 3 and 4 of the Uniform Commercial Code and asserted several common-law causes of action. The Appellee moved for summary judgment on all claims, arguing that the UCC claim was barred by the three-year statute of limitations, KRS 355.4-111, and that the common-law claims were displaced by the UCC. The trial court agreed.

The Court of Appeals affirmed the decision of the trial court. Specifically, the court concluded that KRS 355.4-406 and the deposit agreement imposed a duty on the firm to examine the firm's bank statements for unauthorized signatures including those outside actual or apparent authority. Further, the court held that failure to bring unauthorized signatures to the bank's attention within one year was a substantive bar to the Appellant's claims and that KRS 355.4-406 was applicable to all causes of action related to the checks, whether they were based on the UCC or common law.

The Court affirmed the decision of the Court of Appeals on different grounds. The Court reasoned the employee had actual and apparent authority to write checks on the account under the UCC definition of "authorized signature" contained in KRS 355.1-201(2)(ao). Because the employee's signature was in fact authorized, the Court concluded that the one-year repose period contained in KRS 355.4-406 had no applicability to the Appellant's claims. Further, the Court concluded that the Appellant's claims, both UCC and common law, were barred because the discovery rule, as set out in KRS 355.4-111, was not available to the Appellant in the circumstances presented because reasonable diligence would have exposed the kited checks and thus revealed the financial harm.

X. WORKERS COMPENSATION:

**A. Kimberly Hanik v. Christopher & Banks, Inc., Honorable R. Scott Borders, Administrative Law Judge; and Workers' Compensation Board
2012-SC-000791-WC **June 19, 2014****

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Abramson, and Venters, JJ., concur. Scott, J., dissents by separate opinion in which Cunningham and Noble, JJ., join. Christopher & Banks is one of several stores located in a mall in Louisville. The mall has a large parking lot in front of the stores which has some designated employee parking. Hanik, who worked as an assistant manager at Christopher & Banks, slipped and fell on "black ice" in a lot located behind the store. The evidence submitted to the ALJ indicated that some of Christopher & Banks's employees parked in the back lot while others parked in the general public lot in front of the store. The ALJ also considered testimony from Hanik and one other employee that they had been told by the Christopher & Banks manager to park in the back lot. Other employees testified that they had never been told by anyone from Christopher & Banks where to park. It was undisputed that Christopher & Banks had no maintenance obligations for either the back or front lots.

Based on that evidence, the ALJ concluded that Hanik's injury did not occur within Christopher & Banks's operating premises, and he dismissed her claim. A divided Workers' Compensation Board reversed the ALJ concluding that the evidence compelled a finding that Christopher & Banks controlled the back lot because it required employees to park there or in designated spots in front of the store. The Court of Appeals reversed, finding that the ALJ's opinion was supported by evidence of substance and that the Workers' Compensation Board had engaged in impermissible fact finding.

The Supreme Court affirmed the Court of Appeals. In doing so, the Court first undertook a historical review of the development of the operating premises rule. Based on that review, the Court set forth a four part analysis to be used when applying the operating premises rule: (1) whether the employer, either directly or indirectly, owns, maintains, or controls the parking facility or a portion thereof; (2) whether the employer designated where in the parking facility its employees are to park; (3) whether the employee parked in the designated area; and (4) whether the employee was taking a reasonable path from his/her car to his/her work station when injured. Applying this four part test to Hanik's claim, the Court concluded that the ALJ's opinion was supported by evidence of substance.

In his dissent, Justice Scott agreed that the four-part test was appropriate. However, he stated that the evidence overwhelmingly favored a finding that Christopher & Banks had at least indirect control over the parking lot; it had designated the back lot for employee parking; and the lot, because of its location, would not be used by the general public. Based on these findings, Justice Scott would have reversed the Court of Appeals and reinstated the Board's opinion.

XI. WRITS:

- A. Jefferson County Board of Education v. Honorable Brian C. Edwards,
Judge, Jefferson Circuit Court, et al.**
[2013-SC-000444-MR](#) June 19, 2014

Opinion of the Court by Justice Abramson. Minton, C.J.; Cunningham, Noble, and Venters, JJ., concur. Keller, J., dissents by separate opinion in which Scott, J., joins. Dismissed teacher brought breach of contract and tort claims against the Board of Education in circuit court. The Board moved to dismiss the tort claims on grounds of immunity and to dismiss the contract claim because the plaintiff had failed to exhaust his administrative remedies. When the trial court denied the motion to dismiss the contract claim, the Board moved the Court of Appeals for a writ compelling the dismissal. The Court of Appeals denied the motion and held that the teacher's failure to exhaust his administrative remedies did not deprive the circuit court of jurisdiction to hear his claim and that otherwise the Board's appellate remedy was adequate. Reversing, the Supreme Court held that in teacher disciplinary cases governed by KRS 161.790, exhaustion of administrative remedies is a jurisdictional prerequisite to an action in circuit court, and under the circumstances presented a writ should issue.

XII. ATTORNEY DISCIPLINE:

- A. Kentucky Bar Association v. Thomas E. Roberts**
[2013-SC-000615-KB](#) June 19, 2014

Opinion of the Court. All sitting; all concur. In October 2013, Roberts was given a 30-day suspension by the Court. The suspension was stayed and slated to be conditionally discharged upon Roberts' compliance with various conditions, including completing a KYLAP referral and assessment within 30 days. Roberts failed to contact KYLAP. Accordingly, the Office of Bar Counsel moved the Court to issue an order requiring Roberts to show cause why the temporary stay should be lifted and why the 30-day suspension should not be imposed. The Court granted the motion and ordered Roberts to show cause. Roberts failed to respond and the Court suspended him from the practice of law for 30 days.

- B. Kentucky Bar Association v. Brian Patrick Curtis**
[2013-SC-000765-KB](#) June 19, 2014

Opinion of the Court. All sitting; all concur. In June 2012, Curtis was suspended from the practice of law for failing to meet the minimum continuing legal education requirements for the year ending June 30, 2011. While suspended, Curtis continued in the representation of one of his clients. In November 2012, the Inquiry Commission issued a Complaint. Curtis did not respond. Thereafter, the Inquiry Commission filed a formal charge. Again, Curtis failed to respond.

In a separate matter, in August 2013, Curtis was barred from practicing before the United State Bankruptcy Court for the Western District of Kentucky for his lack of diligence in bankruptcy cases filed within the prior six months.

Curtis's prior discipline included a private admonition for violation of SCR 3.130-1.3 (diligence); a private admonition for violation of SCR3.130-1.4(a)(4) (communication), SCR 3.130-1.16(d) (abandoning representation and not returning file), and SCR 3.130-8.1(b) (knowingly failing to respond); and an order suspending Curtis for 60 days, requiring him to attend EPEP, and to pay \$2,328.25 in restitution for violations of SCR 3.130-1.4(a)(4), SCR 3.130-1.15(b), SCR3.130-1.16(d), and SCR 3.130-8.1(b). Although Curtis' 60-day suspension period ended and he did attend EPEP, the Office of Bar Counsel objected to his automatic reinstatement because he remained noncompliant with the CLE requirements, failed to pay restitution to a client, failed to pay the cost of attending EPEP, and had other disciplinary matters pending.

The Inquiry Commission issued a charge against Curtis for the violations arising from his continued representation of a client while suspended for failure to meet the minimum CLE requirements. The charge alleged violations of SCR 3.130-1.3; SCR 3.130-3.4(c); SCR 3.130-5.5(a); SCR 3.130-5.5(b)(2); and SCR 3.175(1)(a). The Board voted of Governors unanimously to find Curtis guilty of the first four charges and not guilty of the fifth charge. Taking into consideration Curtis's prior disciplinary history, the Order of the Bankruptcy Court, and the applicable law, the Board, in a split decision, recommended that Curtis be suspended from the practice of law for 90 days, re-attend and complete EPEP, and pay all associated costs of the proceedings.

Under SCR 3.370(8), the Court allowed Bar Counsel and Curtis 30 days to file briefs. Once again, Curtis was unresponsive and failed to file a brief in his defense. Upon considering Bar Counsel's brief, Curtis's disciplinary history, his multiple offenses, and his continuing failure to respond in this matter, the Court ordered Curtis suspended from the practice of law for 180 days and required him to re-attend and complete EPEP and pay all costs associated with this proceeding.

**C. Inquiry Commission v. Cassandra L. Schmidt
2014-SC-000112-KB June 19, 2014**

Opinion of the Court. All sitting; all concur. The Inquiry Commission petitioned the Court for an order temporarily suspending Schmidt from the practice of law under SCR 3.165(1)(b) and (d) until such times as the merits of a disciplinary proceedings could be determined. The motion was based on several letters and an affidavit from an Assistant County Attorney, which claimed that Schmidt had been arrested for alcohol-related offenses on four separate occasions and that Schmidt had failed to appear on behalf of several clients at court hearings. Schmidt provided the Court with a response in which she admitted to suffering from alcohol addiction but denied that she failed to appear on behalf of her clients. Schmidt also indicated that she had been in an intense alcohol treatment program.

The Court reviewed Schmidt's criminal convictions and charges, which consisted of Assault in the Fourth Degree – Domestic Violence Minor Injury; Operating a Motor Vehicle under the Influence of Alcohol/Drugs, Second Offense; Alcohol Intoxication in a Public Place, First Offense; and Alcohol Intoxication in a Public Place, Second Offense. The Court also reviewed Schmidt's response to the allegation that she failed to appear on behalf of her client, noting that Schmidt claimed she was only obligated to appear for one client and that she appeared on that client's behalf at a rescheduled hearing date. The Court further noted that Schmidt had been in in-patient treatment since December 2013 and had not accepted a client since November 2013, and that Schmidt stated she was not currently practicing law because she was focusing on her recovery.

The Court determined that a temporary suspension was not appropriate under SCR 3.165(1)(b), which requires proof of substantial harm to the attorney's clients or the public. But the Court held that the suspension was justified under SCR 3.165(1)(d), which allows for a temporary suspension when it appears that probable cause exists to believe that an attorney is mentally disabled or is addicted to intoxicants or drugs and probable cause exists to believe she does not have the physical or mental fitness to continue to practice law. Because Schmidt was residing in an in-patient treatment facility, coupled with her admission that she abandoned her law practice, the Court found it was clear that her alcoholism was a debilitating condition that robbed her of the mental fitness needed to practice law. Accordingly, the Court agreed with the Inquiry Commission that Schmidt's license to practice law should be temporarily suspended pending disciplinary proceedings under SCR 3.165(1)(d).

**D. John W. Markham v. Kentucky Bar Association
2014-SC-000156-KB June 19, 2014**

Opinion of the Court. All sitting; all concur. Markham moved the Court to issue a public reprimand for his admitted violation of SCR 3.130-8.3(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). Under SCR 3.480(2), which allows an attorney to negotiate an appropriate sanction with the KBA, Markham admitted that he violated SCR 3.130-8.3(c) by suggesting to an acquaintance that he withdraw funds from his bank account to hide them from the Kentucky Revenue Cabinet. Upon reviewing the record, the Court agreed that a public reprimand was an appropriate punishment for Markham's misconduct and sanctioned him accordingly.

**E. James K. Murphy v. Kentucky Bar Association
2014-SC-000157-KB June 19, 2014**

Opinion of the Court. All sitting; all concur. Murphy moved the Court to enter an Order resolving the pending disciplinary proceeding against him by imposing a public reprimand with certain conditions, including the condition that the reprimand could be converted to a 61-day suspension if Murphy failed to comply with the conditions. Murphy was arrested in February 2013 for aggravated DUI, third offense. He pleaded guilty to the offenses, a class A misdemeanor, but failed

to provide the Office of Bar Counsel with a copy of the judgment upon his conviction, as required under SCR 3.320.

The Inquiry Commission issued a two-count charge against Murphy alleging a violation of SCR 3.130-3.4(c) for not complying with SCR 3.320 and a violation of SCR 3.130-8.4(b) by committing aggravated DUI, third offense. Murphy admitted that his conduct violated the Rules of Professional Conduct and asked the Court to enter an order in conformity with his negotiations with the Office of Bar Counsel. Upon reviewing the allegations, Murphy's previous disciplinary record, and the cases cited by Bar Counsel, the Court concluded that the proposed discipline was appropriate and sanctioned Murphy accordingly.

**F. Donald Kyle Deskins v. Kentucky Bar Association
2014-SC-000197-KB June 19, 2014**

Opinion of the Court. All sitting; all concur. Deskins negligently filed his client's quitclaim deed in the wrong county while representing her in the dissolution of her marriage. The client retained Deskins to resolve problems that arose because of the misfiled deed. For thirteen (13) months Deskins misled his client into believing he had filed an action in order to address those problems. However, Deskins never filed any action and did not return his client's money or her file until after she filed a bar complaint against him.

Deskins moved the Supreme Court to suspend his law license for thirty (30) days to be probated for one (1) year, with conditions. The KBA stated no objections to Deskins's motion, which the Supreme Court granted.

**G. Richard Clayton Masterson v. Kentucky Bar Association
2014-SC-000257-KB June 19, 2014**

Opinion of the Court. All sitting; all concur. Masterson admitted that he engaged in professional misconduct by violating various ethical rules in his representation of two clients. He moved the Court under SCR 3.480(2) to impose a 181-day suspension, with 30 days to serve and 151 days probated for two years upon certain conditions. The KBA did not object to the motion. Masterson was charged in two separate counts with violating SCR 3.130-1.1; SCR 3.130-1.3; SCR 3.130-1.4(a)(4); SCR 3.130-1.4(b); SCR 3.130-1.16(d); SCR 3.130-3.3(a)(1); SCR 3.130-3.4(c); and SCR 3.130-8.4(c). He admitted professional misconduct by violating each of the Supreme Court Rules cited in the Inquiry Commission's charges and, under SCR 3.480(2), agreed with the KBA to the imposition of discipline. After reviewing the record, the standards, and other relevant authorities, the Court concluded that the discipline proposed by Masterson was adequate. Accordingly, Masterson was suspended from the practice of law for 181 days, with all but 30 days of the suspension probated for a period of two years based on certain conditions, including the provision that Masterson not receive any further disciplinary charges during the two-year period and that he attend and successfully complete, at his own expense, the Ethics and Professionalism Enhancement Program (EPEP).

