PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
JUNE 2015

I. APPELLATE PROCEDURE:

A. Bridgett Wright v. Ecolab, Inc., et al.

2013-SC-000653-DG **June 11, 2015**

Opinion of the Court by Justice Venters. All sitting; all concur. In a multi-party, multiple issue lawsuit, the summary judgment order dismissing claims against some, but not all, defendants failed to include the finality language contained in CR 54.02, and therefore remained an interlocutory order. However, when the plaintiff filed her notice of appeal from the interlocutory order, jurisdiction of the case transferred to the Court of Appeals. Therefore, the trial court's subsequent *nunc pro tunc* order purporting to supply the order with the missing finality language was ineffective. Upon review, the Supreme Court held: (1) that Court of Appeals properly dismissed plaintiff's attempt to appeal because no final order had ever been entered by the trial court, since premature notice of appeal had divested the trial court of jurisdiction to cure the deficient summary judgment order. *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990); and (2) the "relation forward" doctrine as explained in *Johnson v. Smith*, 885 S.W.2d 944 (Ky. 1994), was not applicable under this scenario because that doctrine can only operate when a premature notice of appeal can be related forward to a final and appealable judgment of the trial court. The doctrine does not apply where, as is this case, a final and appealable order has never been entered.

II. CHILD CUSTODY:

A. Kevin Addison v. Lydia Addison and Lydia Addison v. Kevin Addison

2014-SC-000309-DGE **June 11, 2015**
2014-SC-000582-DGE **June 11, 2015**

Opinion of the Court by Justice Barber. All sitting; all concur. Both parties sought review based on a post-decree modification in which the trial court awarded sole custody of the parties' two minor children to Kevin Addison. The Court of Appeals reversed and remanded, concluding that the trial court erred by arbitrarily limiting the time allotted for the hearing and by refusing to permit the children to testify. Lydia Addison cross-appealed contending that the trial court made additional errors by failing to relinquish jurisdiction to the Indiana trial court; by not applying the best interests of the child standard to each child; in failing to make findings of fact or conclusions of law regarding the parties' financial resources or otherwise address the issue of attorney's fees; and in failing to order Kevin to participate in a mental health evaluation.

The Supreme Court reversed the ruling of the Court of Appeals and further reinstated the ruling of the trial court. The Court held that given the trial court's familiarity with

this case and the ample time each party had to prepare its case within the time allotment, the trial court did not abuse its discretion by limiting this modification hearing to six hours. The Court went on to overrule *Coleman v. Coleman*, 323 S.W.3d 770 (Ky. App. 2010), in so far as it holds that a trial court must permit a child to testify in a proceeding involving custody/visitation, unless that child is found to be incompetent. On the issue of retaining jurisdiction, the Court held that the court's specific statement that it was retaining jurisdiction based on the length of time the case was pending before it and its familiarity with the issues of the case sufficed for consideration of the factors set forth in KRS 403.834. Furthermore, the Court upheld the trial court's rulings on the application of the best interest of the child standard, attorney's fees, and mental health evaluation.

III. CRIMINAL LAW:

A. Arnold Moore v. Commonwealth of Kentucky

2013-SC-000495-MR **June 11, 2015**

Opinion of the Court by Justice Venters. All sitting; all concur. Appellant was convicted of drug charges and of being a first-degree persistent felony offender (PFO). Upon review the Court held: (1) The hearsay exception for admissions against penal interest (KRE 804(b)(3)) applies only when the declarant is unavailable to testify; Appellant's belief that the declarant, if called as a witness, would invoke the Fifth Amendment privilege was insufficient to establish unavailability where no effort was made secure declarant's presence at trial; (2) Appellant was entitled to a directed verdict on the PFO charge because the documentary exhibits presented by the Commonwealth, in lieu of testimony of a knowledgeable witness, did not provide sufficient evidence from which the jury could reasonably infer that Appellant fit within one of the criteria KRS 532.080(3)(c). The PFO phase of the trial is a significant aspect of the prosecution; the evidentiary standards applicable in the guilt phase apply in the sentencing and PFO stages.

IV. DECLARATORY JUDGMENT:

A. Robert Carl Foley & Ralph Baze v. Steve Beshear, Governor of Kentucky, et al.

2013-SC-000777-MR **June 11, 2015**

Opinion of the Court by Justice Abramson. All sitting; all concur. Death-row inmates sought declaratory and injunctive relief in the Franklin Circuit Court to the effect that in death-penalty cases the executive clemency procedures provided for by Section 77 of the Kentucky Constitution are inadequate, so much so as to be facially unconstitutional under the Due Process Clause of the United States Constitution's Fourteenth Amendment. The trial court rejected this claim and dismissed the complaint. Affirming, the Supreme Court held that neither clemency practices in other states, nor criticism of state clemency practices by a sub-committee of the American Bar Association had altered the United States Supreme Court's holding in

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998), that state death-penalty clemency procedures comport with due process requirements as long as they ensure against arbitrary exclusion from consideration and against decisions so arbitrary as to be comparable to the flip of a coin. The appellants having made no showing that the Governor had or was likely to engage in such arbitrariness, their complaint was properly dismissed.

V. TAXATION:

A. Commonwealth of Kentucky, Hon. Lori Flanery, Etc., et al. v. AT&T Corporation

2013-SC-000800-DG **June 11, 2015**

Opinion of the Court by Justice Cunningham. All sitting; all concur. AT&T filed tax refund claims with the Commonwealth of Kentucky, Finance and Administration Cabinet, et al. (collectively, Cabinet), for the years 2002-2008. AT&T argued that it was entitled to refunds totaling $13 million under KRS 139.505. With the exception of a partial refund for the tax year 2002, the Cabinet denied AT&T's claims. AT&T filed a declaration of rights action in the Jefferson Circuit Court in 2011 alleging eight counts. Count one asserted that "the purported Budget Bill 'Amendments' to KRS 139.505 Contravene and Violate Section 51 of the Kentucky Constitution." The Jefferson Circuit Court dismissed the case for failure to exhaust administrative remedies. The Court of Appeals reversed the trial court and determined that the facial constitutional issue raised by AT&T was one that the Kentucky Board of Tax Appeals cannot decide, but that the other claims were properly dismissed. The Supreme Court of Kentucky reversed the decision of the Court of Appeals. Although AT&T raised a facial challenge to the constitutionality of a statute, the Court determined that AT&T was nevertheless required to exhaust its administrative remedies before seeking judicial review. In so holding, the Court relied on the prudential factors weighing against consideration of a case until the conclusion of the administrative process. See *W.B. v. Commonwealth*, 388 S.W.3d 108 (Ky. 2012). The Court concluded that compliance with procedural filing requirements are administrative concerns that must first be determined by the Cabinet.

VI. WORKERS' COMPENSATION:

A. Cassandra Falk, Etc., et al. v. Alliance Coal, LLC

2013-SC-000655-DG **June 11, 2015**

Opinion of the Court by Justice Keller. All sitting; all concur. Three miners were killed in two separate accidents at River View Coal, LLC and Webster County Coal, LLC, wholly owned subsidiaries of Alliance Coal, LLC. The survivors of the deceased miners filed civil claims against Alliance alleging that the deaths were caused, in part, by Alliance's independent acts of negligence. Alliance, as parent company, was self-insured for workers' compensation purposes and it "self-insured" its two subsidiaries. In order for the subsidiaries to be self-insured, Alliance had to guarantee that it would pay any benefits due if the subsidiaries could or would not. In

fact, Alliance paid all of the workers' compensation benefits to the survivors. Alliance moved for summary judgment arguing that it was a "carrier" and thus entitled to the immunity provided to carriers by the Workers' Compensation Act. The survivors appealed and the Court of Appeals affirmed.

The Supreme Court granted discretionary review, in part, to clarify and correct *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir. 1979) and to provide the Federal District Court for the Eastern District of Kentucky with guidance regarding a case currently pending before it.

The Supreme Court also affirmed. In doing so, the Court held that a parent company that insures itself as well as its subsidiaries is a carrier under the Act and thus entitled to immunity. The Court noted that the Act does not define "carrier" as "insurance company" or even as "insurance carrier." It defines "carrier" as an "insurer" authorized to insure the liability of employers. Because a parent company is authorized to "self-insure" the liability of its subsidiaries, a parent company that does so is a carrier. In this case Alliance was such a parent company.

The Court then addressed the 6th Circuit's holding in *Boggs* that a parent company, unless it is an up-the-ladder contractor, is not immune for its own acts of negligence. The Court noted that, absent some other relationship, the holding in *Boggs* was correct. However, since the Court found a special relationship in this case - Alliance completely "self-insured" River View and Webster County - Alliance was entitled to immunity.

B. Joseph Jewell v. Ford Motor Company, et al.
2014-SC-000234-WC **June 11, 2015**

Opinion of the Court by Justice Keller. All sitting; all concur. The only issue before the Court was whether an ALJ should include unemployment benefits when calculating average weekly wage. During the highest quarter in the fifty-two week period preceding his injury, Jewell had been laid off for two weeks. Ford completed the paperwork necessary for Jewell to receive unemployment benefits. Once he began receiving those benefits, Ford made supplemental or "sub-pay" payments sufficient to increase the combined amount Jewell received to 95% of his base pay rate. Jewell wanted to include both the amount of unemployment benefits and his sub-pay in the average weekly wage calculation. Ford wanted to exclude both. The ALJ found middle ground by including the sub-pay but excluding the unemployment benefits. The Board agreed with Ford that both should be excluded. The Court of Appeals reversed the Board and reinstated the ALJ's opinion. Jewell appealed the decision to exclude unemployment benefits, but Ford did not appeal the decision to include sub-pay.

The Supreme Court held that unemployment benefits should not be included when calculating average weekly wage. In doing so, the Court noted that wages are "money payments for services rendered . . . received from the employer." KRS 342.140(6). As did the Court of Appeals, the Supreme Court determined that

unemployment benefits are not received from the employer and are paid when an employee is not rendering any service to the employer. Furthermore, the Supreme Court, citing to Professor Larson and cases from other jurisdictions, noted that workers' compensation benefits are designed to insure against work place injuries, not against fluctuations in the labor market.

VII. WRIT:

A. Stacey Caldwell v. Honorable A.C. McKay Chauvin, Judge, Jefferson Circuit Court, et al.

2014-SC-000390-MR **June 11, 2015**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Keller, J., concurs by separate opinion in which Barber and Noble, JJ., join. Caldwell, the plaintiff in the underlying suit, sought a writ of prohibition preventing the trial court from enforcing its order permitting counsel for the defendant in the underlying suit to conduct ex parte interviews with Caldwell's treating physicians. The order neither compelled the physicians' participation nor authorized disclosure of Caldwell's health information. In arguing for a writ, Caldwell claimed that HIPAA and Kentucky law prohibits defendants' counsel from conducting ex parte interviews with plaintiffs' treating physicians. The Court concluded that no authority forbids ex parte interviews with treating physicians. The Court also held that even though HIPAA does not prohibit ex parte interviews, its privacy rule "superimposes procedural prerequisites" regarding the disclosure of protected health information during the course of those interviews. The only way to satisfy HIPAA's procedural prerequisites, the Court held, is by obtaining a court order authorizing explicitly the disclosure of the plaintiff's protected health information. The order at issue did not satisfy this requirement, but the Court declined to issue a writ because the order was explicit in denying the necessary authorization.

VIII. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. James Douglas Osborne

2015-SC-000063-KB **June 11, 2015**

Opinion of the Court. All sitting; all concur. The Board of Governors recommended that Osborne be permanently disbarred from the practice of law for mishandling a client's case and misappropriating money from a client's trust account, all while practicing law with a suspended license. Osborne did not respond to the complaints and did not seek review of the Board's recommendation. Accordingly, the Court ordered that Osborne be permanently disbarred from the practice of law in the Commonwealth.

B. Michael Constantine Skouteris v. Kentucky Bar Association

2015-SC-000079-KB **June 11, 2015**

Opinion of the Court. All sitting; all concur. Skouteris appealed his suspension from the KBA due to his failure to pay his 2014-2015 bar dues. The KBA claimed that it sent Skouteris his dues statement via regular mail on two separate occasions. When he failed to pay, he was sent two emails notifying him of his delinquent status. A representative of the KBA then called Skouteris, who stated that he would pay his dues in full. However, he failed to do so and was subsequently suspended.

Skouteris appealed his suspension, claiming that he was unaware his bar dues were unpaid. In support of his argument, Skouteris claimed that he started a new law firm with a new office manager who failed to pay the dues and that the office had experienced issues with sending and receiving mail. He also provided the Court with a copy of a check made payable to the KBA that was allegedly mailed on Feb. 1, 2015. However, the KBA never received the check.

The Court ultimately concluded that Skouteris had not shown sufficient cause to revoke his suspension, noting that Skouteris still had not paid his dues. The Court further noted that Skouteris had been delinquent in paying his annual dues in several previous fiscal years. Accordingly, the Court held that Skouteris' suspension would continue until he complied with the mandates of SCR 3.050.

C. Kentucky Bar Association v. John Greene Arnett, Jr.
2015-SC-000153-KB June 11, 2015

Opinion of the Court. All sitting; all concur. During the course of an investigation of Arnett's misuse of client funds, the Boone County Sheriff's Department determined that Arnett had misappropriated money in a number of cases. The result was a multiple-count felony indictment and five separate disciplinary actions against Arnett. Neither Arnett nor is lawyer responded to the complaints and the matters were submitted directly to the Board of Governors as default cases under SCR 3.210. The Board ultimately and unanimously recommended that Arnett be permanently disbarred, noting that the only mitigating factor was his absence of a prior disciplinary history.

Neither the Office of Bar Counsel nor Arnett sought review by the Court and the Court declined to undertake its own review. The Court agreed that permanent disbarment was an appropriate sanction, noting the magnitude of Arnett's misconduct, which included the misappropriation of approximately $500,000 of client funds.

D. Kentucky Bar Association v. Rebecca Cox Venter
2015-SC-000155-KB June 11, 2015

Opinion of the Court. All sitting; all concur. The Board of Governors considered a total of thirteen charges in three separate files against Venter, all of which reached the Board as default cases under SCR 3.210. Of the thirteen charged counts, the Board found Venter guilty of eleven and not guilty of two and unanimously

agreed that she should serve a 181-day suspension and be referred to the Kentucky Lawyers Assistance Program (KYLAP) for evaluation and assistance. Given the multitude and gravity of Venter's violations and the fact that she failed to respond to any communication regarding the charges against her, the Court exercised its authority under SCR 3.370(9) and adopted the decision of the Board.