PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
JUNE 2017

I. CONTRACT:

A. Wanda Jean Thiele, et al. v. Kentucky Growers Insurance

2015-SC-000158-DG **June 15, 2017**

Opinion of the Court by Justice Cunningham. Minton, C.J.; Cunningham, Hughes, Keller, Venters, and Wright, JJ., sitting. Minton, C.J.; Hughes, Keller, and Venters, JJ., concur. Wright, J., dissents by separate opinion. VanMeter, J., not sitting. In 2004, Hiram Campbell purchased a homeowner's insurance policy from the Appellee, Kentucky Growers Insurance Company ("Insurer"). The policy provided coverage for Hiram's home. The policy was self-renewing and continued in effect after Hiram died in late 2005. Following Hiram's death, his daughter, Appellant Wanda Thiele ("Thiele"), moved into Hiram's residence. She was also the executrix of Hiram's estate. In January 2011, Thiele discovered extensive termite damage throughout the home, including damage to wall paneling and flooring. Upon discovering the damage, Thiele contacted Insurer to make a claim under the homeowner's policy provision covering collapse. Insurer denied Thiele's claim. Thiele filed a declaration of rights action in Rockcastle Circuit Court resulting in a judgment in Thiele's favor. On appeal, a unanimous Court of Appeals' panel reversed the trial court. The Supreme Court of Kentucky granted discretionary review, reversed the Court of Appeals, and held that Thiele's residence had not "collapsed" under the definition adopted in Niagara Fire Ins. Co. v. Curtsinger, 361 S.W.2d 762, 763 (Ky. 1962). In so holding, the Court declined to adopt the more lenient majority rule.

II. CONSTITUTIONAL LAW:

A. Kentucky CATV Association, D/B/A Kentucky Cable Telecommunications Association, Inc. v. City of Florence, Kentucky, et al.
AND
Lori Hudson Flanery, in her Official Capacity as Secretary of the Finance and Administration Cabinet, et al. v. City of Florence, Kentucky, et al.

2015-SC-000181 **June 15, 2017**

Opinion of the Court by Justice Keller. All sitting. Cunningham, Keller, VanMeter, Venters and Wright, JJ., concur. Minton, C.J., dissents by separate opinion in which Hughes, J., joins. The Circuit Court granted the Cabinet's and Kentucky CATV's motion to dismiss, holding that the tax at issue, the Telecom Tax, did not violate Sections 163 and 164 of the Kentucky Constitution, and that the General Assembly was granted the power to collect franchise fees in Section 181 of the Kentucky Constitution. The Court of Appeals reversed the Franklin

Circuit Court's judgment, holding that the Tax was in violation of Sections 163 and 164, entitling the City of Florence to summary judgment.

The Supreme Court granted discretionary review, and affirmed the Court of Appeals. The Court first held that Sections 163 and 164 of the Kentucky Constitution vest in municipalities the power to grant franchises and to collect fees in exchange for granting those franchises. The Court then held that, because municipalities were granted the right to collect franchise fees in Section 164, the General Assembly could not create a tax extinguishing that right via the power granted to it in Section 181. Lastly, the Court limited its holdings only to political subdivisions that are within the purview of Sections 163 and 164, and noted that nothing in its opinion prevents a municipality from choosing to voluntarily acquiesce to the Telecom Tax.

III. CRIMINAL LAW:

A. Darnell Smith v. Commonwealth of Kentucky

2015-SC-000301-MR **June 15, 2017**

Opinion of the Court by Justice Wright. All sitting; all concur. The Appellant was convicted of a number of offenses related to three robberies. On appeal, he claimed that: (1) admitting statements he gave to a detective while incarcerated on unrelated charges violated his *Miranda* rights; (2) barring him from introducing evidence that he refused to sign a *Miranda*-waiver form infringed his right to present a complete defense by preventing him from fully informing the jury of all the circumstances surrounding his statements to police; (3) admitting a sweatshirt with no connection to the charged offenses was reversible error; and (4) denying his motion to sever the robberies for separate trial was reversible error. The Supreme Court affirmed, holding that: (1) admitting the statements to the detective did not violate the Appellant's *Miranda* rights—although he asked for counsel's assistance in deciding whether to sign a waiver form, he did not request that counsel be present for questioning; (2) the trial court did not err in excluding evidence of his refusal to sign the waiver form because that fact alone did not speak to the reliability or credibility of his subsequent, voluntary statements; (3) any error in admitting the irrelevant sweatshirt evidence was harmless; and (4) joinder of the separate robberies did not result in actual undue prejudice.

B. Anthony Sturgeon v. Commonwealth of Kentucky

2015-SC-000585-MR **June 15, 2017**

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, Venters, and Wright, JJ., concur. VanMeter, J., concurs in result only. Criminal Direct Appeal. *Questions presented*: 1) whether trial court abused its discretion in declining to excuse two jurors for cause; 2) whether trial court erred by refusing to instruct the jury on the lesser offense of reckless homicide; 3) whether trial court erred by admitting into evidence hearsay text messages of murder victim under the KRE 803(3), the present state of mind hearsay exception.

Held: 1) that the trial court did not err by refusing to dismiss two jurors for cause. The Court further held that RCr 9.36, by its plain language, ("When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified.") is the exclusive standard for determining whether a juror should be stricken for cause, thereby abrogating a countervailing articulation of the rule that had been derived from *Mabe v. Commonwealth*, 884 S.W.2d 668 (Ky. 1994), and repeated in other cases over the years. 2) A jury instruction on the lesser offense of reckless homicide was not proper because defendant's conduct (pointing a loaded gun at victim "just to scare him" and then touching the trigger without knowing how sensitive it was) could not under any circumstances be regarded as "reckless" so as to qualify the homicide as reckless homicide under the elements stated KRS 507.050(1) and KRS 501.020(4). "Recklessness" means a failure to perceive a substantial and unjustifiable risk that one's conduct will create a substantial risk of death or serious physical injury, and defendant could not have failed to perceive the risk of death or serious injury associated with his conduct; and (3) the trial court erred by admitting into evidence several hearsay text messages of the victim made shortly before his death under the KRE 803(3), the present state of mind hearsay exception, because the statements were either irrelevant if they fell within the exception, or did not fall within the exception to begin with; however, any errors in admitting the statements were harmless.

C. Scot E. Gaither v. Commonwealth of Kentucky
2015-SC-000609-MR **June 15, 2017**

Opinion of the Court by Justice Venters. All sitting; all concur. Criminal Direct Appeal. The case was tried upon remand for new penalty phase trial. Questions presented: Whether the trial court erred by (1) admitting evidence describing victim's badly decomposed body not included in the agreed-upon summary of guilt phase evidence; (2) admitting victim impact testimony beyond allowable scope authorized by former version of KRS 532.055(2)(a)7; (3) limiting defendant's admission of mitigation evidence; and (4) allowing the prosecutor during closing argument to display physical evidence from the guilt-phase trial without prior notice. Held: (1) The guilt-phase testimony describing the gruesome decomposition of the victim's body was irrelevant and cumulative in nature but its admission was harmless; (2)(a) Evidence of crime's impact on multiple victims would have improper under the pre-2008 version of KRS 532.055(2)(a)7 applicable at time of offense, but allowable under post-2008 version of KRS 532.055(2)(a)7 in effect at penalty phase retrial. Application of post-2008 version of the statute did not violate ex post facto clauses of the state and federal constitutions and KRS 446.110, so the trial court did not err when admitting the victim impact testimony; (2)(b) The victim impact testimony expressing the family's fear and anguish over the crime was proper but their complaints about the protracted litigation and frustration that defendant could be released on parole were not proper; (3) Trial court's direction to "move on" when prosecutor objected to evidence describing defendant's kind interaction with his elderly mother did not unduly limit his mitigation evidence; (4) Generally, prior

notice of physical evidence to be displayed during closing arguments is not required; this rule applies as at retrial of penalty phase.

D. Chico Duwan Rucker v. Commonwealth of Kentucky
2015-SC-000328-MR **June 15, 2017**

Opinion of the Court by Justice Hughes. Minton, C.J.; Venters and Wright, JJ., concur. Cunningham, J., dissents by separate opinion in which Keller and VanMeter, JJ., join. Rucker was convicted for second-degree manslaughter, tampering with physical evidence, and fraudulent use of a credit card over $500. For those crimes, Rucker was sentenced to 20 years' imprisonment. The Court reversed Rucker's convictions due to the improper admission of his sexually explicit communications made after the victim's death. The trial court abused its discretion by admitting the explicit communication. Further, this error was not deemed to be harmless as the admission of this evidence created a serious doubt as to whether this error substantially influenced the result of the trial.

IV. EMINENT DOMAIN

A. Paducah Independent School District v. Putnam & Sons, LLC
2015-SC-000711-DG **June 15, 2017**

Opinion of the Court by Justice Hughes. Minton, C.J.; Cunningham, Keller, VanMeter, and Venters, JJ., concur. Wright, J., not sitting. As part of an effort to replace an aging middle school, the school district sough to obtain land to build a new facility. Accordingly, the school district successfully negotiated the purchase of the land necessary for the new school, with the exception of a lot belonging to Putnam & Sons LLC. After the parties were unable to agree on a valuation of the property, condemnation proceedings were initiated. Both parties took exception to the Commissioner's report and a bench trial followed. Putnam & Sons LLC appealed the trial court's award to the Court of Appeals which reversed. The Court of Appeals concluded that the trial court relied on outdated and otherwise incomplete evidence of the property's fair market value and erred in arriving at a value that was different from either expert's proof. Subsequently, the Court accepted discretionary review and determined that the trial court's approach was both legally sound and grounded in the record, necessitating reversal of the decision of the Court of Appeals and reinstatement of the trial court's judgment.

V. HEALTH CARE:

A. Kentucky Health, Inc. v. Jefferson Benjamin Reid, Jr., M.D.
2016-SC-000321-DG **June 15, 2017**

Opinion of the Court by Justice VanMeter. All sitting; all concur. Dr. Benjamin Reid alleged tortious conduct on the part of KentuckyOne Health ("the Hospital") in the review of his surgical privileges. Reid is a licensed general surgeon and was a member of the medical staff at the Hospital for over forty years. In

February 2013, Reid received a letter from the Hospital informing him that all his cases from January 2013 – June 2013 would be subject to a focus review. Reid claims that the chair of the Hospital's Medical Executive Committee called to inform him that the Committee had voted that Reid could no longer perform further surgical procedures unless accompanied by a practicing, board-certified general surgeon serving as proctor. That same day, he was not permitted to perform a previously-scheduled surgery without a proctor. Shortly thereafter, he received a letter from the Committee that he must be accompanied by a proctor for all future procedures; he did not perform any additional surgeries after February 2013. In August 2013, Reid received a second letter from the Committee informing him that his focus review had ended without finding any quality concerns, and he was granted conditional reappointment to the medical staff for six months. Reid did not take any further action to renew his medical staff membership, and his privileges lapsed. Reid filed a complaint alleging multiple torts; shortly thereafter, the Hospital filed for a judgment on the pleadings, claiming entitlement to immunity under the Health Care Quality Improvement Act of 1986 ("HCQIA") because the Hospital's conduct was in the course of a "professional review activity," and that, notwithstanding immunity, Reid's claims fail as a matter of law. The circuit court entered an opinion and order granting judgment on the pleadings, and dismissing all Reid's claims. Reid appealed to the Court of Appeals, arguing that the circuit court erred in concluding he had not overcome the rebuttable presumption that the Hospital was entitled to immunity. The Court of Appeals undertook a review of HCQIA's distinction between an "activity" and "action," and held that the Hospital's recommendations were an "action," thus vacating the circuit court's order and remanding for a determination of immunity.

The Supreme Court vacated the Court of Appeals, and remanded to the circuit court. The circuit court erred in issuing a judgment on the pleadings because, although the pleadings comply with the required notice pleadings, the record is not sufficient to grant such a motion without further well-pled allegations of fact. Although the Court of Appeals was correct in remanding to the circuit court, the Court of Appeals erred in holding the review of Reid constituted a "professional review action" since a factual dispute still exists on this issue. Because of these deficiencies, the Court vacated the Court of Appeals opinion regarding the Hospital's action/activity and remanded to the circuit court for the development of a more complete record.

VI. MEDICAL MALPRACTICE:

A. Alex Argotte, M.D. v. Jacqulyn G. Harrington

2015-SC-000465-DG **June 15, 2017**

Opinion of the Court by Justice Venters. All sitting. Cunningham, VanMeter, and Wright, JJ., concur. Keller, J., concurs in part and dissents in part by separate opinion in which Minton, C.J., and Hughes, J., join. Civil appeal; Medical malpractice; informed consent. Plaintiff filed suit alleging that defendant

physician violating informed consent standard established by KRS 304.40-320 by implanting an IVC filter without adequately explaining the risk that the filter could fracture into small pieces which, in turn, could lodge in vital organs. The trial court directed a verdict in favor of defendant physician after opening statement in which plaintiff's counsel admitted he would not call an expert witness to testify to applicable medical standard. *Question presented*: 1) Whether the trial court erred by dismissing plaintiff's claim immediately after opening statement; and 2) whether plaintiff could proceed to trial of a claim based upon lack of informed consent without expert medical witness. *Held*: 1) A trial court may enter a directed verdict on opening statement only when counsel has made a judicial admission that clearly and definitely discloses absence of a viable cause of action or defense; 2) directed verdict was improper in this case. Under the facts of this case, the plaintiff's admission that a medical expert would not be called did not negate her ability to prove claim for lack of informed consent. KRS 304.40-320 creates two-prong standard for informed consent: physician must inform patient of risks associated with treatment consistent with medical standard of practice and must communicate associated risks in a manner that would provide a reasonable individual with a general understanding of the risks involved. Failure to comply with the second prong does not require expert medical testimony, consequently the trial court acted erroneously in dismissing plaintiff's claim after opening statement.

VI. STATUTORY INTERPRETATION:

A. Garrard County, Kentucky v. Kevin Middleton

2015-SC-000581-DG **June 15, 2017**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Kevin Middleton was named interim jailer following the resignation of Garrard County's long-time jailer. Garrard County does not operate a full-service jail. He agreed to a salary lower than his predecessor enjoyed and the county fiscal court set the salary for the next term of office at a reduced amount. Middleton won re-election and sued for the difference between his predecessor's salary and the pay he received as interim jailer. He also argued that as a jailer that does not operate a full-service jail, Kentucky statutory law prohibits the fiscal court from ever reducing his salary. And he additionally sought attorney's fees. The trial court awarded him back pay but denied his other claims. The Court of Appeals affirmed and reversed in part, also agreeing with his theory that the fiscal court may not reduce the jailer's salary.

The Court unanimously affirmed the Court of Appeals decision. Specifically, the Court held that KRS 441.245(3) unambiguously states that the pay for jailers that do not operate full-service jails shall at least equal the amount he received the year before. It rejected Garrard County's argument that reference to the "rubber dollar" doctrine imposed a temporal limitation and that such an interpretation was unsupported by the plain meaning of the statute and contrary to the context of the statute as a whole.

VII. WORKERS COMPENSATION:

A. LKLP CAC, Inc. v. Brandon Fleming, et al.

2016-SC-000407-WC **June 15, 2017**

Opinion of the Court by Justice Keller. All sitting; all concur. In 2010, an ALJ awarded Fleming benefits based on a physical permanent impairment rating of 13% and a psychological permanent impairment rating of 5%. Fleming filed a motion to reopen in 2014, alleging a worsening of condition and an increase in impairment. A different ALJ found that Fleming had a 23% physical permanent impairment rating and a 12% psychological permanent impairment rating. In pertinent part, the ALJ relied on LKLP CAC's expert in concluding that Fleming had a 235 physical permanent impairment rating. LKLP CAC argued that the ALJ's reliance was misplaced because that physician opined that Fleming had a 23% physical permanent impairment rating at the time of the opinion and award, thus, according to that physician, Fleming's physical permanent impairment rating had not increased. The majority of the Workers' Compensation Board, the Court of Appeals, and the Supreme Court disagreed. In doing so, the Supreme Court noted that the original ALJ's finding that Fleming had a 13% physical permanent impairment rating during the initial litigation was res judicata. The Court then held that it is the ALJ's opinion regarding permanent impairment rating that controls, not a physician's. While either party presumably could have presented evidence that Fleming had a 23% physical permanent impairment rating during the initial litigation, neither did. Thus, the ALJ on reopening could be bound by evidence that was never presented during the initial litigation.

VIII. WRONGFUL DEATH:

A. The Estate of Christina Wittich, Etc. v. Michael Joseph Flick

2015-SC-000114-DG **June 15, 2017**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The Court affirmed the Court of Appeals and held that the statute of limitations for a wrongful death claim against a criminal defendant begins to run no later than the date of public indictment. Generally, a wrongful-death claim commences upon the appointment of a personal representative or no longer than two-years from the date of death. The present case resolved a question which had split two Court of Appeals panels, namely, does the statute of limitations toll until the conviction of the defendant. In a 7-0 decision, the Court held that the statute of limitations for a wrongful death claim begins to run no later than the date of public indictment.

IX. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. Roger D. Varney, II

2017-SC-000101-KB **June 15, 2017**

Opinion and Order of the Court. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter, and Venters, JJ., sitting. All concur. Wright, J., not sitting. The Inquiry Commission filed twelve charges against Varney stemming from three separate disciplinary files. Although Varney filed answers to the charges, he did not participate in either the prehearing conference or the hearing before the Trial Commissioner. The Trial Commissioner ultimately recommended a finding of guilty on all charges in each of the three consolidated files and recommended suspension for a period of 181 days and payment of restitution to Varney's clients.

The Board of Governors ultimately adopted the Trial Commissioner's findings and recommended sanction. Neither Varney nor Bar Counsel filed a notice of review with the Supreme Court under SCR 3.370(8) and the Court declined to review the Board's decision under SCR 3.370(9). Accordingly, the Court adopted the Board's recommendations, finding Varney guilty of twelve disciplinary charges, suspending him from the practice of law for 181 days, and ordering payment of restitution to his clients.

B. Kentucky Bar Association v. David Thomas Sparks

2017-SC-000115-KB **June 15, 2017**

Opinion and Order of the Court. All sitting; all concur. Sparks, who was under suspension by three separate orders of the Supreme Court, was charged by the Inquiry Commission with violating several Rules of Professional Conduct. Numerous unsuccessful attempts at service were made by mail and the Warren County Sheriff's Department. Due to Sparks' failure to respond to the charge, the Commission submitted the matter to the Board of Governors under SCR 3.210(1). The Board unanimously found Sparks guilty of each alleged violation. After considering Sparks' prior disciplinary history, the Board unanimously recommended that Sparks be suspended from the practice of law for one year, to run consecutively with the other pending suspensions.

The Supreme Court reviewed the record and agreed that the Board reached the appropriation conclusions as to Sparks' guilt. Accordingly, the decision of the Board was adopted and Sparks was suspended from the practice of law for one year to run consecutively with the two, 181-day suspensions previously ordered by the Court. Sparks was further referred to the Kentucky Lawyers Assistance Program, directed to attend and successfully complete the KBA's Ethics and Professional Enhancement Program, and directed to refund any unearned fees to his client.

C. Jamie L. Turner v. Kentucky Bar Association
2017-SC-000117-KB **June 15, 2017**

Opinion and Order of the Court. All sitting; all concur. The KBA suspended Turner's license for failure to comply with CLE requirements. The Supreme Court gave Turner an extension to appeal that suspension. In her appeal, Turner stated she had attended an out-of-state conference and thought her CLE hours had been reported. She also stated that, when she was unaware of the deficiency until she received the notice of suspension. Once she became aware of the suspension, Turner took steps to fulfill her CLE obligations, and she asked to be relieved from going through the restoration process provided in the Supreme Court Rules. Based on the record, the Supreme Court held that Turner had not presented sufficient evidence to justify relieving her from complying with the restoration process.