

PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
JUNE 2018

I. CONTRACT:

A. Baumann Paper Co., Inc. v. Kenneth Holland

[2016-SC-000511-DG](#)

June 14, 2018

Opinion of the Court by Justice Wright. All sitting. Minton, C.J.; Cunningham, VanMeter, Venters, and Wright, JJ., concur. Hughes and Keller, JJ., concur in result only. Kenneth Holland was an employee of Baumann Paper for forty-two years. Holland suffered from heart complications that led him to take early retirement. For the first several years of his employment with Baumann paper, Holland was covered by a defined pension plan. However, the company eventually discontinued its defined pension plan and discussed alternative employee benefits. Specifically, the company discussed a 401(k) plan, a profit-sharing plan, and a salary continuation agreement (SCA) with Holland. The SCA was signed by Mitchell Baumann (Baumann Paper's corporate secretary) and Holland in 1987. Upon his retirement in 2013, Holland obtained his benefits from the 401(k) and the profit-sharing plan, and requested the SCA benefits.

Holland brought claims of breach of contract, quantum meruit, unjust enrichment, conversion, and fraud concerning the SCA. Baumann Paper countered that the SCA was not a binding agreement. The circuit court granted summary judgment for Baumann Paper on all claims, and dismissed Holland's claim with prejudice. Holland appealed the breach of contract, quantum meruit, unjust enrichment, and fraud claims to the Court of Appeals. The Court of Appeals reversed the circuit court and held the SCA constituted a valid contract. That court remanded the matter to the trial court for further proceedings regarding whether Holland suffered a disability, and, if so, to determine Holland's damages. Baumann Paper sought discretionary review in the Supreme Court of Kentucky, which was granted.

The Supreme Court affirmed the Court of Appeals, holding that the SCA constituted a valid contract and remanded the case to the trial court for further factual determinations regarding the alleged breach of contract.

II. CLASS ACTIONS:

B. Melvin Hensley, et al. v. Haynes Trucking, LLC, et al.

[2016-SC-000180-DG](#)

June 14, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The Court reversed the Court of Appeals' determination that the trial court improvidently granted class certification, reinstating the trial court's class certification order

after finding the requirements of CR 23 to be satisfied. The Court also discussed whether certain issues along with class certification can be adjudicated on interlocutory appeal, including subject-matter jurisdiction, whether KRS 337.550(2) affords the procedural mechanism of a class action lawsuit, and certain aspects of Kentucky prevailing wage law.

III. CRIMINAL LAW:

A. Thomas Edward Davidson v. Commonwealth of Kentucky **2016-SC-000032-MR**

June 14, 2018

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Hughes, Keller, VanMeter, and Wright, JJ., concur. Cunningham, J., concurs in result only by separate opinion. Issues Presented: (1) Whether the trial court erred by failing to sever some of the thirty-one counts of robbery; (2) Whether the trial court erred by permitting three police officers to testify that the robberies were all related to each other; and (3) Whether the trial court erred by informing the jury that it had ruled that both defendants should be tried together on all charges. Upon review the Court held: (1) because the robberies occurred close in time and the eye-witness testimony consistently disclosed that one of the robbers wore a unique hat, and because the robberies all occurred near the co-defendants' place of residence, the trial court did not abuse its discretion by trying all thirty-one counts together; (2) the trial court misinterpreted and misapplied KRE 701 by allowing three police detectives to give lay opinion that the specific robberies were interconnected. The officers' opinions were not based upon their own perceptions but were drawn from information observed and related by others; plus the jury was fully capable of drawing its own conclusions from the evidence as to whether crimes were connected, and so the officers' opinions fail to qualify under KRE 701 because they could not be "helpful" to the jury. Error of admitting the opinions was harmless; and (3) the trial court's statement to the jury that the defendants were being tried together "because the Commonwealth has the right to have them indicted together and I have ruled as a matter of law that it's proper to try them together" was error, but the unpreserved argument did not rise to the level of palpable error.

B. Darrin Walker v. Commonwealth of Kentucky **2016-SC-000594-MR**

June 14, 2018

Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellant, Darrin Walker, sexually assaulted a minor child on numerous occasions. He was convicted of four counts of first-degree sodomy and one count of first-degree rape as a result. During trial, the victim was distressed and began crying during her testimony. The prosecutor positioned a television cart to block the direct line of sight between the victim and Appellant. Appellant argued that his confrontation right was violated. He specifically argued on appeal that the trial court's actions here violated KRS 421.350. The Supreme Court ruled that KRS 421.350 only applies to child witnesses who are twelve years old or younger. The victim here

was seventeen at the time she testified. Therefore, KRS 421.350 is inapplicable. However, KRS 26A.140 does apply. The Court held that the “unduly burdensome” standard stated in KRS 26A.140 is satisfied only when the defendant’s rights are negatively and materially impacted by the contested action. The Court concluded that that standard was not satisfied in the present case and, thus, affirmed Appellant’s convictions.

C. Corey M. Jeter v. Commonwealth of Kentucky

[2017-SC-000232-DG](#)

June 14, 2018

Opinion of the Court by Justice Cunningham. All sitting; all concur. This case involved issues of bond modification and bail credit release. Jeter was arraigned by the Jefferson District Court on a charge of one count of second-degree burglary. The district court set Jeter’s bond at \$10,000 full cash and granted him \$100 a day bail credit pursuant to KRS 431.066(5)(a). Following his indictment, the Jefferson Circuit Court “fixed” a new bond “in the interim” at \$10,000. Jeter filed a motion, *inter alia*, for bond modification and release on bail credit. After the hearing, the circuit court increased Jeter’s bond to \$20,000 full cash and found him ineligible for bail credit. The circuit court made oral findings and referred to them in its order denying Jeter’s motion, but they were not reduced to writing. A divided Court of Appeals upheld the trial court. The Supreme Court of Kentucky granted discretionary review. The Court held that the circuit judge appropriately granted Jeter’s request for an adversarial hearing on the motion to modify his bond under RCr 4.40(1). The circuit court considered Jeter’s record, including his history of prior failures to make appearances and whether he posed a danger to the community. Thus, the Court found that the circuit judge did not abuse his discretion in deciding to increase Jeter’s bond and deny bail credit. Further, the circuit judge made oral findings on the record during the hearing that Jeter was a flight risk and a danger to others in the community, which the Court held substantially complied with RCr 4.40(2).

D. Commonwealth of Kentucky v. Kyle D. Thompson

[2016-SC-000365-DG](#)

June 14, 2018

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Cunningham, Keller, and Venters, JJ., concur. VanMeter, J., concurs in part and dissents in part by separate opinion in which Wright, J., joins. Kyle Thompson was convicted of several crimes, including terroristic threatening and criminal attempt to commit kidnapping, arising from conduct directed at a high school student. He was sentenced to three years imprisonment followed by a five-year probation period. After release from prison, Thompson learned for the first time that because the intended victim of the attempted kidnapping was a minor, he was required to register as a sex offender under KRS 17.510. He pursued RCr 11.42 relief alleging his counsel was ineffective for having failed to inform him of this requirement. The trial court denied relief but the Court of Appeals deemed the failure ineffective assistance. On discretionary review, the Supreme Court held that the traditional direct/collateral distinction was not well-suited to analyzing the

alleged ineffective assistance but relying on the U.S Supreme Court's *Padilla v. Kentucky* analysis and *Pridham v. Commonwealth*, found that sex offender registration was a definite, serious and lifelong consequence of Thompson's plea that competent counsel would have informed him of prior to the plea. This registration requirement could be easily determined by reading the Kentucky statute and Thompson's counsel was ineffective in failing to do so and then inform his client accordingly. The Court thus affirmed the appellate court and remanded the case to the circuit court for a determination of the second prong of *Strickland v. Washington*, i.e., whether Thompson was prejudiced by the failure. Two justices concurred in part and dissented in part on the grounds that the circuit court had already addressed the prejudice prong, rendering remand unnecessary.

E. Robert Keith Woodall v. Commonwealth of Kentucky

2017-SC-000171-MR

June 14, 2018

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Hughes, Keller, VanMeter, Venters and Wright, JJ., sitting. Minton, C.J.; Hughes, Keller, VanMeter, and Venters concur. Wright, J., concurs in part and dissents in part by separate opinion. Cunningham, J., not sitting. Taking into account recent United States Supreme Court precedent, the Court held KRS 532.120(2), defining intellectual disability for the purpose of precluding the imposition of the death penalty, to be unconstitutional. The Court established that "prevailing medical standards" should always take precedence in a court's determination when ascertaining a defendant's potential intellectual disability in this regard.

IV. ENVIRONMENTAL LAW:

A. Cindy Muncie, et al. v. Patricia Wiesemann

2017-SC-000235-DG

June 14, 2018

Opinion of the Court by Justice Cunningham. All sitting; all concur. This Case involved a claim for stigma damages that resulted from a faulty heating oil tank leaking oil from property maintained by Wiesemann onto the Muncies' property. Wiesemann, her insurer, and the Muncies made a partial settlement for the repair costs. Thereafter, Wiesemann motioned for summary judgment, arguing that Kentucky law does not allow the Muncies to seek a stand-alone claim for stigma damages without attendant repair costs. Because the Muncies had settled their repair costs, Wiesemann argued they could not seek stigma damages arising from the same claim. The lower courts agreed on this point and the Muncies were granted discretionary review before the Supreme Court of Kentucky. The Court held that damages for proven diminution in the fair market value of real property—in the form of repair costs and stigma damages—are recoverable where there has been actual damage to property. Additionally, the Court held that stigma damages may be awarded in addition to remediation damages for an actual injury where the remediation does not fully compensate the injured party for the diminution in fair market value of their real property

V. FAMILY LAW:

A. Karen Martin Doyle, Etc. v. James Samuel Doyle, Etc.

2017-SC-000358-DGE

June 14, 2018

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Hughes, Keller, Venters, and Wright, JJ., concur. VanMeter, J., concurs in result only. Cunningham, J., dissents by separate opinion. Karen and James (Sam) Doyle were divorced by the Knott Circuit Court in 1995. The Court ordered Sam to pay Karen \$24,227.02 to equalize the division of marital property. The judgment was silent as to interest. Sam did not pay the ordered amount. Karen had garnishments issued on Sam's bank accounts which were returned as "no monies." Karen then filed a judgment lien on property owned by Sam in the amount of the judgment plus interest at the legal rate. Sam filed a motion to release the judgment lien and to prohibit the collection of interest. The court denied the motion to release the judgment lien but granted Sam's motion prohibiting the collection of interest. The trial court found that the judgment was unliquidated and silent as to interest. Karen appealed and the Court of Appeals held that the trial court's determination that the judgment was unliquidated was in error. Further, interest was not precluded just because the judgment was silent as to interest. The Court of Appeals also indicated that Kentucky Revised Statute (KRS) 360.040 and the granting of interest was within the trial court's discretion. The Court of Appeals remanded for consideration of interest and specific findings to support the decision.

On remand, the circuit court again denied interest and the Court of Appeals affirmed. This Court granted discretionary review. The issue presented by this case is whether the statutory interest rate in KRS 360.040 applies to unliquidated judgments. The Court held that the statute is clear. All judgments bear interest. If the judgment is liquidated, interest is mandated at the statutory rate. If the judgment is unliquidated, the trial court has discretion in the amount of interest awarded. The Court reversed and remanded for the entry of an award of interest at the statutory rate. The trial court abused its discretion in relying on irrelevant factors in denying Karen interest. Those factors included the trial court's perceived delay in Karen's attempt to collect on the judgment; Sam's alleged settlement overtures; Sam's belief that the obligation was not payable before issues of child support were resolved; and the trial court's emphasis on the fact that Karen had a judgment lien on Sam's property.

VI. JUVENILE LAW:

A. Commonwealth of Kentucky v. B.H.

2017-SC-000155-DG

June 14, 2018

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, Venters and Wright, JJ., concur. VanMeter, J., concurs in result only. B.H., a minor, had an extensive criminal history beginning when B.H. was

nine years old. Multiple evaluations revealed that B.H. was not competent to stand trial. B.H. was charged with first-degree robbery and murder, and the Commonwealth moved to transfer B.H.'s case to circuit court pursuant to Kentucky Revised Statutes (KRS) 635.020(2) and 635.020(4), the statutes for discretionary and mandatory transfer, respectively. B.H. moved for a competency hearing and the district court found B.H. incompetent to stand trial prior to addressing the Commonwealth's motion to transfer. The Commonwealth appealed to the circuit court arguing that the district court's decision was not supported by substantial evidence. The circuit court affirmed the finding of incompetency. The Commonwealth moved the Court of Appeals for discretionary review and argued that the district court acted without subject matter jurisdiction when it addressed the issue of competency. The Court of Appeals held that the district court had subject matter jurisdiction and the Commonwealth's argument was premised on particular case jurisdiction; thus, the Commonwealth waived its right to contest any error. This Court granted discretionary review.

The issue before this Court was whether the district court could address competency prior to ruling on a motion to transfer. The district court had subject matter jurisdiction because the General Assembly has granted the district court jurisdiction to hear juvenile cases. Any error argued by the Commonwealth would pertain to particular case jurisdiction and, because the Commonwealth did not raise the jurisdictional issue prior to discretionary review with the Court of Appeals, that argument has been waived. The Court further held that there is a constitutional right for a defendant to be competent to stand trial, and thus, the district court's actions in addressing competency before the transfer hearing were proper.

VII. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. Richard Graham Kenniston
2018-SC-000069-KB June 14, 2018

Opinion and Order of the Court. All sitting; all concur. Kenniston was charged in three separate disciplinary proceedings with failing to appear on behalf of clients, failing to return unearned portions of fees, and failing to communicate with clients. Although he initially communicated with the Office of Bar Counsel, Kenniston failed to respond to the charges initiated by the Inquiry Commission. The KBA moved under SCR 3.380(2) to have Kenniston suspended indefinitely due to his failure to timely respond. The Court agreed with the KBA's motion and ordered Kenniston suspended indefinitely.

**B. Kentucky Bar Association v. Myran Deshawn Chenault
2018-SC-000081-KB June 14, 2018**

Opinion and Order of the Court. Keller, VanMeter, Venters, Wright, JJ., concur. Hughes, J., dissents to the extent that she would not probate any portion of the

four-year suspension, in which Minton, C.J., joins. Cunningham, J., not sitting. Chenault was appointed as Master Commissioner and served in that capacity for several years. As part of her duties, Chenault was responsible for paying herself and her staff from the Master Commissioner's operating account. An annual audit of that account revealed substantial discrepancies in the audits for 2013 and 2014. Specifically, Chenault should have paid herself an annual salary of no more than \$58,000; however, in 2013, Chenault exceeded her authorized compensation by \$32,663.07, and in 2014, by \$27,520.83. She was criminally charged with Abuse of Public Trust, a Class C felony. She entered an *Alford* plea to an amended charge, which reduced the crime from a Class C to a Class D felony.

Following her *Alford* plea, Chenault was suspended from the practice of law pursuant to SCR 3.166.2 A bar complaint, charge, and hearing before a KBA Trial Commissioner followed. At the hearing, Chenault insisted that her withdrawal of unauthorized funds was an accounting error which occurred as a result of being overwhelmed with her job duties and not being properly trained. The Trial Commissioner ultimately recommended Chenault be found guilty of violating SCR .3.130(8.4)(b) and (c) and that she be suspended for a period of four years, retroactive to the date of her automatic suspension, with the final eighteen months of her suspension probated upon conditions that she comply with the conditions of her criminal diversion and complete the KBA's Ethics and Professionalism Enhancement Program.

The KBA's Board of Governors voted 13 to 4 to accept the findings and recommendations of the Trial Commissioner. Thereafter, KBA's Office of Bar Counsel filed a notice of review pursuant to SCR 3.370(7), arguing to this Court that the sanction recommended by the Board was inadequate.

After reviewing Chenault's file, the Court found no reason to upset the recommendation of the Trial Commissioner or the findings of facts and conclusions of law of the Board. Accordingly, Chenault was ordered suspended from the practice of law for a period of four years, with the final eighteen months of suspension to be probated with conditions.

C. Kentucky Bar Association v. Dennis Michael Stutsman
2018-SC-000100-KB June 14, 2018

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission filed a four-count charge against Stutsman based on his failure to adequately represent a client in an adoption action. The counts included violations of SCR 3.130-1.1 (failure to provide competent representation); SCR 3.130-1.16(d) (failure to protect client's interests); SCR 3.130-3.2 (reasonable efforts to expedite litigation); SCR 3.130-8.1(b) (failure to response to a lawful demand for information from an admissions or disciplinary authority." Stutsman did not respond to the charge and the Board of Governors found him guilty of all four counts, recommending a 181-day suspension from the practice of law.

The Court reviewed the Board's recommendation and Stutsman's disciplinary history, which included a private reprimand, a public reprimand and a 30-day suspension, all for misconduct similar to violations in the present case. After reviewing the facts of the present case, the Court found Stutsman guilty of violating SCR 3.130-1.16(d); SCR 3.130-3.2; and SCR 3.130-8.1(b), and ordered him suspended from the practice of law for 181 days, to run consecutively with all suspensions currently imposed.

D. Kentucky Bar Association v. Daniel Alan Niehaus

2018-SC-000148-KB

June 14, 2018

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission issued a four-count charge against Niehaus based on his failure to pay his client and an insurance company's subrogation claim out of settlement funds. The charge was mailed to Niehaus at his address of record but was returned undeliverable. He was constructively served under SCR 3.175(2) but did not respond to the charge.

In considering the appropriate discipline for the current charges, the Board considered Niehaus's prior disciplinary history. In January 2017, the Board suspended Niehaus for failure to pay bar dues and non-compliance with CLE requirements. In February 2018, the Supreme Court of Kentucky suspended Niehaus for 181 days and ordered him to pay restitution to his client. And in November 2016, the Ohio Supreme Court suspended Niehaus from the practice of law due to disciplinary violations.

The matter was submitted to the Board as a default case under SCR 3.210(1). The Board voted 14-2 to permanently disbar Niehaus from the practice of law. The Supreme Court agreed with the Board's assessment, declining to review its decision under SCR 3.370(8) and adopting its findings and recommendations under SCR 3.370(9).

E. Kentucky Bar Association v. Damian Gallaher

2018-SC-000160-KB

June 14, 2018

Opinion and Order of the Court. All sitting; all concur. In 2017, the Inquiry Commission issued four separate disciplinary charges against Gallaher. In each instance, Gallaher accepted payment from a client but failed to provide any representation. He was charged with violating SCR 3.130-1.3 (failure to act with reasonable diligence); SCR 3.130-1.4(a)(3) and (4) (failure to promptly provide the client with necessary information and explanation); SCR 3.130-1.16(d) (failure to properly terminate representation); and SCR 3.130-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Gallaher's case proceeded to the Board of Governors as a default case pursuant to SCR 3.210. The Board found Gallaher guilty of committing 11 disciplinary

infractions and voted 11-6 to permanently disbar him from the practice of law in the Commonwealth.

In determining the appropriateness of the Board's recommendation, the Supreme Court considered Gallaher's prior discipline. In February 2018, the Court suspended Gallaher from the practice of law for a period of five years based on six different KBA case files, each involving conduct similar if not identical to the conduct in the present case. Considering Gallaher's history and his pending charges, the Court agreed with the Board's recommendation and permanently disbarred Gallaher from the practice of law in the Commonwealth.

F. Sean Patrick Paris v. Kentucky Bar Association

2018-SC-000200-KB

June 14, 2018

Opinion and Order of the Court. All sitting; all concur. Paris moved to Colorado in June 1996. He failed to comply with Supreme Court Rule (SCR) 3.480(1) for withdrawal from the KBA and was suspended by Order of this Court for non-payment of dues on April 22, 1999. Since May 1997, Paris has practiced law in Colorado. He has never been disciplined, nor has he been required to surrender a license in Kentucky or any other state.

In November 2016, Paris filed an Application for Restoration pursuant to SCR 3.500(3). His application included a memorandum from the Office of Bar Counsel stating that he has no disciplinary matters pending against him, nor has he been the subject of any claims against the Clients' Security Fund. In addition, the Director of Continuing Legal Education (CLE) of the KBA provided a letter stating that Paris has complied with the CLE requirement for restoration. The Character and Fitness Committee reviewed Paris's application and rendered its Findings of Fact, Conclusions of Law, and Recommendation. The Committee determined that Paris's conduct since suspension has been appropriate and that nothing reported would disqualify him from readmission. The Board of Governors unanimously recommended approval of the restoration application and referred Paris to the Board of Bar Examiners for examination. Paris sat for the written examination and received a passing score.

Upon review of the record, the Court found that Paris met all requirements of SCR 3.500. Accordingly, the Court restored Paris to the practice of law in the Commonwealth.

G. Charles Frederick Merz v. Kentucky Bar Association

2018-SC-000208-KB

June 14, 2018

Opinion and Order of the Court. All sitting; all concur. Merz moved the Court for a public reprimand for his admitted violations of Supreme Court Rules (SCR) 3.130-1.15(d) and 3.130-8.4(c). Merz discontinued the use of his client trust account several years ago but left earned fees in the account and began depositing additional earned fees in the account. Merz's bank notified the Office of Bar

Counsel in July 2015 of an overdraft of Merz's account that resulted from three paychecks to Merz's secretary. The Inquiry Commission issued a complaint and a Charge was filed. Merz responded to the Charge indicating that his general accounts had been garnished and he did not feel comfortable depositing payments from clients into his general account. Merz did not use the account as a trust account and intended to establish new bank accounts not subject to the garnishments. Merz acknowledged that he should not have used the previously designated trust account as a general account and has since transferred the funds in the trust account to new general bank accounts. Merz requested a public reprimand as a negotiated sanction for his actions. The KBA made no objection. Accordingly, the Court issued a public reprimand and ordered Merz to pay all costs of the disciplinary proceeding.