PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
MARCH 2009

I. CIVIL PROCEDURE

A. Toyota Motor Manufacturing, Kentucky, Inc. v. Hon. Robert G. Johnson, Judge & Jeff Sergent, Real Party in Interest

2007-SC-000647-MR **March 19, 2009**

Opinion by Justice Noble; all sitting. In 1999, Sergent filed a wage and hour suit against Toyota. The Circuit Court granted Toyota's motion to dismiss on the grounds that its jurisdiction was limited to reviewing final decisions of the Kentucky Department of Labor administrative proceedings. In 2005, the Kentucky Supreme Court issued its opinion in Parts Depot v. Beiswenger, which held that circuit courts have parallel jurisdiction with the KDOL over wage and hour claims. Based on this change in law, Sergent filed a CR 60.02 motion seeking to have his case against Toyota reopened. The Circuit Court granted the motion, and Toyota sought a writ of prohibition from the Court of Appeals, arguing that the Circuit Court was proceeding outside its jurisdiction. The Court of Appeals denied the writ.

The Supreme Court reversed, holding that a change in the law is not a sufficiently extraordinary circumstance to grant CR 60.02(f) relief except where direct injustice would result otherwise. Since Sergent still had a remedy via a KDOL administrative proceeding, the Court concluded there was no injustice, despite Sergent's inability to receive an award of attorney fees or liquidated damages in that forum. While noting the deferential review given to grants of CR 60.02 relief, the Court held that the interests of fairness justified a finding of an abuse of discretion—particularly when the equities as they related to all parties involved were considered. In his dissent, Justice Cunningham (joined by Justice Venters), wrote that the majority was substituting its judgment for that of the lower court and that the majority could "point to no misapplication of the law or any unreasonable interpretation of existing precedent" by lower court.

B. Tom Duffy, Sr. et al v. Hon. Karen L. Wilson, et al.

2008-SC-000507-MR **March 19, 2009**

Opinion by Justice Venters; all sitting. Ryan Owens died following football practice at Henderson County High School. Two weeks

later, an adjuster for the school board's insurer conducted interviews with witnesses. Present at the interviews were two attorneys for the school board, one of whom (Wilson) made statements to the effect that he was not hired to sue or defend anyone. Owens' estate subsequently brought a wrongful death suit against the coaches and school board officials. The estate sought to compel production of the statements. The trial court granted the motion to compel concluding that the statements were not privileged attorney work product under CR 26.02(3) because, based on Wilson's remarks, they were not made in anticipation of litigation. The trial court further held that even if the statements were considered attorney work product, they would still be discoverable since the estate had a substantial need for the statements and would be unable to otherwise obtain them without undue hardship since the witnesses' memories would not be as clear as they were at the time of the interviews. The Court of Appeals affirmed, and the defendants sought a writ of prohibition blocking execution of the trial court's order to compel from the Supreme Court.

The Supreme Court reversed the Court of Appeals and ordered it to enter the writ, concluding that the statements were attorney work product as they were "clearly" taken in anticipation of litigation. The Court stated that Wilson's disclaimer, while truthful, was not a conclusive admission that litigation was not anticipated. The Court further held that the estate had not shown that it was unable to obtain a substantial equivalent of the statements without undue hardship; noting that the estate had presented no compelling argument that the witnesses' memories had substantially deteriorated since the time of the incident. In his dissent, Justice Cunningham wrote that common sense dictates that statements taken from witnesses within two weeks of the incident are not equivalent in quality or veracity to those taken six months later.

II. CRIMINAL LAW

A. Commonwealth v. David Nichols

2007-SC-000493-DG **March 19, 2009**

Opinion by Justice Cunningham; all sitting, all concur. Prior to trial, Nichols moved the Circuit Court for clarification of his obligation under RCr 7.24. Specifically, Nichols argued that he should not be required to disclose the identity of his expert witness or provide a report of the expert's expected testimony since the expert had not prepared any reports. The trial court entered an order stating that although Nichols was required to identify his expert, as long as the

expert had not prepared a report, there was no obligation to generate one solely to satisfy the rules of discovery. On interlocutory appeal, the Court of Appeals affirmed the trial court's ruling that the expert was not required to generate a report, but held on Nichols' cross-appeal that the trial court abused its discretion by ordering Nichols to disclose the identity of the expert.

The Supreme Court reinstated the trial court's order, holding that to require Nichols to prepare a report that would likely be used against him solely to comply with reciprocal discovery violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, as well as Section 11 of the Kentucky Constitution. The Supreme Court also held that the Court of Appeals was without jurisdiction to hear Nichols' interlocutory cross-appeal since KRS 22A.020 only provides for interlocutory appeals by the Commonwealth. (Note: this opinion includes a concise history of the development of criminal discovery law in Kentucky.)

B. Allen David Jones v. Commonwealth
2006-SC-000802-DG March 19, 2009

Opinion by Chief Justice Minton; Justice Schroder not sitting. Jones was indicted on charges of fourth offense DUI, third offense operating a vehicle on a DUI-suspended license and being a persistent felony offender in the first degree. The trial court allowed the Commonwealth to amend the fourth offense DUI charge to second offense DUI and the third offense operating on a DUI-suspended license to a second offense. The prosecution did this in order to save the PFO-I charge by applying one of Jones' prior DUI convictions as the qualifier for the PFO-I charge. Jones entered a conditional guilty plea. On appeal, he argued that KRS 189A.010(5)(d) and 189A.120(1) prohibit the Commonwealth from amending down the fourth offense DUI charge. The Court of Appeal affirmed the trial court, concluding that 189.120(1) only prevented the Commonwealth from "agreeing" to a defendant's motion to amend the charges. The Court of Appeals further held that the Commonwealth is free to make its own motion to amend.

The Supreme Court reversed, holding that while the General Assembly may have intended only to prohibit the Commonwealth from acceding to reductions that would lessen a defendant's ultimate sentence, the Court was bound to construe statutes as they are written. The Supreme Court also took exception to the Court of Appeal's "impermissibly narrow construction" of the word "agree" as it is used in 189A.120(1), asking rhetorically how it could be said that the Commonwealth did not "agree" to amending the

charges when the Commonwealth itself sought the amendments. Justice Cunningham dissented on the grounds that under Hoskins v. Maricle, an independent motion by a prosecutor must be sustained unless it is clearly contrary to manifest public interest. Further, he noted that 189A.120 does not expressly prohibit the Commonwealth from exercising independent discretion and seeking a more severe penalty.

C. Commonwealth v. Kevin T. McCombs
2007-SC-000127-DG **March 19, 2009**

Opinion by Justice Cunningham; all sitting, all concur. McCombs was convicted of violation of a protective order, first degree burglary and fourth degree assault. The Court of Appeals reversed the burglary and assault convictions on double jeopardy grounds, ruling that the same injury was used to prove both offenses. The Court of Appeals further held that the trial court committed reversible error by substituting "crowbar" for "deadly weapon" and "dangerous instrument" in the jury instructions-- ruling that determination was an issue for the jury to decide. The Supreme Court reinstated the convictions. Applying the Blockburger analysis, the Court held that the assault conviction required a finding of an intentional, wanton or reckless mental state while the first degree burglary offense required only that the accused "causes physical injury" with no culpable mental state requirement. Therefore, there was no double jeopardy violation. In reaching this conclusion, the Court overruled its decision in Butts. The Court agreed that the trial court erred in substituting "crowbar" for "deadly weapon" and "dangerous instrument" in the jury instructions since the jury should have been allowed to determine if a crowbar was a deadly weapon or dangerous instrument under the facts and circumstances. However, the Court held the error was harmless beyond a reasonable doubt.

III. EMPLOYMENT LAW

A. Lexington-Fayette Urban County Government v. Norman Johnson, et al.
2007-SC-000294-DG **March 19, 2009**

Opinion by Justice Schroder; Justice Noble not sitting. Appellees were three retired firefighters who opted out of the Lexington-Fayette Urban County Government (LFUCG) group health insurance plan. At the time they opted out, LFUCG's terms required retirees to pay 100% of the premium and stated decisions

to terminate coverage were considered irrevocable. Retirees were ineligible to ever rejoin the plan once they left. In 1999, LFUCG passed an ordinance that, in part, authorized payment of a portion of group health insurance premiums for retired police and firefighters "who retired prior to July 1, 1999 and who were participants in the group health insurance plan coverage" (emphasis added). Appellees attempted to enroll in the plan, but were refused by LFUCG, who told them that coverage was not available to them since they had previously opted out. Appellees brought suit. In 2000, LFUCG passed another ordinance clarifying the 1999 ordinance by specifically stating that those who previously opted out were not eligible to reenroll. The Appellees then amended their suit to include a claim that the 2000 ordinance violated their rights to equal protection under the state and federal constitutions.

The trial court held that there were no patent ambiguities in the 1999 ordinance and that Appellees were eligible to reenroll up until the countervailing ordinance was passed in 2000. The trial court also upheld the constitutionality of the 2000 ordinance. The Court of Appeals affirmed the trial court's decision regarding the 1999 ordinance, but reversed on the 2000 ordinance on the ground there was no rational basis for excluding Appellees from coverage after having admitted them in 1999.

The Supreme Court found a latent ambiguity in the wording of the 1999 ordinance and determined that the ordinance did not include Appellees among those eligible to participate in the plan. The Court construed the phrase "who were participants" to exclude Appellees for two reasons: 1) presumably the phrase was there to exclude someone, otherwise it was meaningless; and 2) intent of the 1999 ordinance could be inferred from the subsequent ordinance which specifically excluded Appellees. Having determined Appellees were not eligible for the plan under the 1999 ordinance, the Court further held the question of the constitutionality of the 2000 ordinance was rendered moot.

Justice Abramson (joined by Justice Cunningham) dissented, writing that the phrase "who were participants" only excluded those who had never enrolled in the plan (for example, those who were covered by a spouse's plan). The minority also disagreed with the Court of Appeals conclusion that the ordinance violated equal protection, stating there was a rational basis under federal law and a reasonable basis under state law for the 2000 ordinance—and that merely because the LFUCG had redrawn the classifications was not a *de facto* equal protection violation.

IV. TORTS

A. Greg Beaver (d/b/a Beaver Construction Co.) v. Kevin Oakley & Crawford Electric, Inc.

2006-SC-000813-DG **March 19, 2009**

Opinion by Chief Justice Minton; all sitting, all concur. Oakley brought suit in tort against Beaver for injuries suffered at a construction site. The trial court granted summary judgment to Beaver, holding he was entitled to "up-the-ladder" immunity from tort liability as a contractor. The Court of Appeals reversed, holding that since Oakley's employer (Crawford Electric) had not contracted with Beaver's employer (Whitaker Construction Management) there was no contractor/subcontractor relationship though which Beaver could avail himself of up-the-ladder immunity. The Supreme Court reversed the Court of Appeals and reinstated the trial court's award of summary judgment in favor of Beaver, holding that a formal written contract between an injured worker's employer and an alleged tortfeasor is not essential to establish up-the-ladder immunity. While acknowledging that Crawford and Whitaker had contractual relationships with the property owner rather than each other, the Court concluded that the "paperwork obscured the reality of the functional contractor/subcontractor relationship."

V. WORKERS' COMPENSATION

A. Kentucky Employers' Mutual Insurance v. J&R Mining, Inc. et al.

2008-SC-000257-WC **March 19, 2009**

Opinion of the Court; all sitting; Justice Venters concurs in result only. Earl Reed, Jr., president and co-owner of a mining company, was killed in a work-related accident. The ALJ awarded survivor benefits to Reed's widow (also a co-owner). On appeal, the insurer argued that the policy specifically excluded officers of the company from coverage at Reed's request. In affirming, the Supreme Court held that under KRS 342.640, every officer of a corporation is also an employee for workers' compensation purposes. Employees wishing to opt out may only do so by properly executing the proper form and filing it with the Office of Workers' Claims. Since Reed had not rejected coverage in this specific manner, he was covered by the insurer's policy, notwithstanding his endorsement of the exclusion on the contract of insurance.

B. Larry Cain v. Lodestar Energy, Inc.; Hon. J. Landon Overfield, AJL; Workers' Compensation Board
2008-SC-000178-WC **March 19, 2009**

Opinion of the Court; all sitting; Justice Scott concurs in result only. Under KRS 342.732(1)(a), workers that are diagnosed with category-1 coal workers' pneumoconiosis, but who do not exhibit significant respiratory impairment are entitled to a retraining incentive benefit (RIB). Cain submitted a chest x-ray determined to show a category-2 disease. The x-ray submitted by the employer was determined to show a category-1 disease. Since the two reports were not in consensus, the x-rays were submitted to a panel of "B" readers as required under KRS 342.316(3)(b)4.e. Despite the fact that the evidence submitted by both parties showed at least a category-1 disease, the panel reached a consensus of a category-0 and the ALJ dismissed the claim.

The Supreme Court, consistent with its 2008 decision in Harper, rejected Cain's argument that KRS 342.316 was unconstitutional on its face since it a) imposed a higher clear-and-convincing standard to rebut a panel's finding whereas other claimants need only prove their injuries by a preponderance of the evidence; and b) coal workers are only permitted to prove their disease with x-ray evidence, thus excluding a workers' credible testimony. However, the Supreme Court held that KRS 342.316 was unconstitutional on equal protection grounds as applied to Cain and similarly situated workers whose employer also submitted evidence of a category-1 disease but whose claim was not subject to panel review. The Court further held that there is no rational basis for a claim to be submitted to review by a consensus panel when the worker's and employer's evidence both support the conclusion that the worker is entitled to a RIB award.

C. Chrysalis House, Inc. v. Keith Tackett; Hon. Grant Roark, ALJ; & Workers' Compensation Board
2008-SC-000221-WC **March 19, 2009**

Opinion of the Court; Justice Noble not sitting. Tackett suffered a job-related injury subsequently returned to work after being awarded income benefits of $38.87 per week. Tackett later sought to reopen the case in order to receive double benefits pursuant to KRS 342.730(1)(c)2, asserting that his employment with Chrysalis House had ceased and he now earned five dollars per hour less than he did at the time of his injury. The employer argued that Tackett was not entitled to an increased benefit because he was discharged for cause, namely theft. The ALJ awarded the

increased benefit on the ground that the statute states the benefit is to be doubled in the event of cessation of employment "for any reason, with or without cause." The Supreme Court reversed, noting that while at first blush the statute requires an increase regardless of the reason for cessation of employment, when 342.730 is read as a whole, it provides that the cessation of employment must relate to the disabling injury. The Court remanded back to the ALJ for a determination whether employment ceased for reasons related to Tackett's injury.

VI. ATTORNEY DISCIPLINE

A. Kentucky Bar Association v. Bryan Kent Burlew
2008-SC-000500-KB **March 19, 2009**

The Supreme Court adopted the KBA Board of Governor's recommendation that attorney be suspended from the practice of law for three years. Attorney was found to have filed a motion for temporary custody on behalf of a client then done nothing further, and failed to communicate or issue a refund to the client. In a second matter, the attorney accepted a case in Indiana, where he was not admitted to practice law, made no attempt to be admitted *pro hac vice* or even appear in court. In a third matter, the attorney represented a juvenile in court even though his license was under suspension at the time. The attorney did not respond to any of the charges against him. The Court ruled that the three-year suspension would run consecutively to a three-year suspension given to the attorney in 2008 and that any attempt to have his license restored would first be processed by the KBA's Character & Fitness committee.

B. Kentucky Bar Association v. Steven O. Thornton
2008-SC-000768-KB **March 19, 2009**

The Supreme Court issued a public reprimand to attorney for failing to explain his fee structure to a first-time client and for failing to respond to request from the KBA for information regarding the ethics charges.

C. Kentucky Bar Association v. Kirk S. Bierbauer
2008-SC-000792-KB **March 19, 2009**

The Supreme Court ordered the permanent disbarment of attorney, after the KBA Board of Governors could not reach a decision on the appropriate discipline. In 2006, the attorney pled guilty in federal court to attempted manufacture of methamphetamine. The KBA

determined the attorney had also failed to return unearned fees, failed to diligently represent four clients, failed to keep the clients reasonably informed, and failed to act with reasonable diligence. The Court also found that the attorney had failed to respond to a lawful demand for information from the KBA.

D. Kentucky Bar Association v. Chris Miniard
2008-SC-000928-KB March 19, 2009

Supreme Court ordered attorney suspended from the practice of law for 61 days. The attorney did not respond to the complaint or subsequent charge stemming from a real estate transaction.

E. Kentucky Bar Association v. Charles C. Leadingham
2008-SC-000934-KB March 19, 2009

Supreme Court ordered attorney suspended from the practice of law for 61-days. The attorney was found to have failed to file a lawsuit despite accepting a fee to do so. Further, the attorney was found to have failed to act with reasonable diligence and to keep his client reasonably informed. The day before the KBA Board of Governors was to meet on this matter, the attorney tendered a response with a motion to file a late answer. The request was denied.

F. Kentucky Bar Association v. Vickie Lynn Howard
2008-SC-000935-KB March 19, 2009

Supreme Court adopted recommendation of the Board of Governors to suspend attorney from the practice of law for 181 days. The matter concerned three separate clients who claimed attorney had failed to see cases through to their completion and did not adequately communicate with them. The attorney responded to two of the complaints, referring to an unspecified illness which interfered with her "ability to clearly think." However, the attorney did not respond to the formal charges or otherwise provide evidence of a mitigating illness.

G. Kentucky Bar Association v. Jennifer Sue Whitlock
2008-SC-000936-KB March 19, 2009

Supreme Court adopted recommendation of the Board of Governors to suspend attorney from the practice of law for 181 days for multiple counts of misconduct. In one case, attorney accepted a fee, but never filed the bankruptcy petition. In another, attorney never informed her client that their bankruptcy petition had

been dismissed. The petition had in fact been dismissed for the attorney's failure to file the required Attorney Fee Disclosure. The attorney was found to have failed to act with reasonable diligence, failed to keep her client reasonably informer, failed to take reasonable steps to protect her clients' interests upon termination of litigation and failed to provide competent representation. Since she also failed to answer the charges against her, she was also adjudged to have failed to respond to a lawful request for information from a disciplinary authority.