

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
MARCH 2013**

I. CRIMINAL:

**A. Commonwealth of Kentucky v. Deonte Simmons
[2011-SC-000118-DG](#) March 23, 2013**

Opinion of the Court by Justice Abramson. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. After a juror broke her ankle during an overnight recess, Simmons was convicted of trafficking in a controlled substance by the eleven remaining jurors. The Court of Appeals held that the eleven-juror proceeding violated Section 7 of the Kentucky Constitution unless Simmons had waived his right to a twelve-person jury. Affirming the Court of Appeals' remand for a hearing on the waiver question, the Supreme Court held that Section 7's guarantee of a jury trial includes the right to a twelve-member panel, that a defendant's waiver of that right must be knowing and voluntary and should be made a part of the record, but that where the record of waiver is ambiguous a remand to resolve the ambiguity is appropriate.

**B. Charles W. Nunley v. Commonwealth of Kentucky
[2011-SC-000331-MR](#) March 23, 2013**

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. Appellant was convicted of three counts of sodomy against his stepdaughter. On appeal Appellant raised two issues. First, he claims the Commonwealth's failure to disclose to him that the stepdaughter had seen a counselor in 2006 should have resulted in a mistrial. Second, Appellant complains that the trial court erred by designating a juror as an alternate and excusing him from having to deliberate in the case.

The Court held that Appellant was not entitled to a mistrial because the record did not indicate that the Commonwealth knew that Appellant's stepdaughter had been in counseling until during trial and thus could not have disclosed it prior to trial. A mistrial was inappropriate.

The Court also held that while the juror was not properly removed as an "alternate," as the trial court characterized it, the court did abuse its discretion by excusing the juror due to the appearance that the juror was biased.

**C. Commonwealth of Kentucky v. Danny Lee Ousley
[2011-SC-000403-DG](#) March 23, 2013**

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. Minton, C.J.; Abramson, Noble and Scott,

JJ., concur. Cunningham, J., concurs in result by separate opinion in which Venters, J., joins. Venters, J., also concurs in result by separate opinion in which Cunningham, J., joins. Police conducted two warrantless searches of a trash can in Appellant's driveway and discovered evidence of a digital scale and baggies with methamphetamine residue, and indicted Appellant for first-degree trafficking of a controlled substance, trafficking of marijuana within 1,000 yards of a school, and possession of drug paraphernalia. Appellant moved to suppress the evidence on grounds that it was an illegal search pursuant to Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. His motion was denied, he entered conditional guilty pleas on all counts, was sentenced to five years, and appealed.

The Court of Appeals reversed, holding that the search was illegal because it violated Appellant's reasonable expectation of privacy. The Commonwealth appealed and the Court granted discretionary review.

The Court affirmed the Court of Appeals on the ground that the trash can was located in the curtilage of Appellant's home and was therefore entitled to the same protection from warrantless searches as the home itself. Thus, absent a recognized exception allowing for a warrantless search of the home, the Court held that Appellant was entitled to suppression and a reversal of his convictions.

**D. Newell Stacy v. Commonwealth of Kentucky
2012-SC-000065-MR **March 23, 2013****

Opinion of the Court by Justice Scott. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. Minton, C.J; Abramson, Noble, and Venters, JJ., concur. Cunningham, J., concurs in result by separate opinion. Appellant, Newell Stacy, was involved in a riot that broke out at the Northpoint Training Center, a prison facility located in Burgin, Kentucky. A Boyle Circuit Jury found Appellant guilty of first-degree riot and being a first-degree persistent felony offender (PFO). For these crimes, Appellant received a twenty-year prison sentence. He appealed as a matter of right, Ky Const. § 110(2)(b), alleging that the trial court erroneously: (1) violated his due process rights by replaying witness testimony during the jury's deliberations in his absence, (2) violated his right to conflict-free counsel by permitting Department of Public Advocacy (DPA) Attorneys to engage in multiple representation of him and other defendants, (3) violated his speedy trial rights under KRS 500.110 and the Sixth Amendments to the United States Constitution, and (4) violated due process by permitting his witnesses to testify in shackles and prison garb. The Supreme Court affirmed Appellant's convictions and twenty-year prison sentence given that: (1) the trial court did not commit palpable error when it played witness testimony during jury deliberations as Appellant failed to establish that there was any "substantial possibility" that he would not have been convicted had he been present when the jury viewed the witness testimony; (2) Appellant failed to show a cognizable Sixth Amendment violation or prejudice resulting in reversible error

as a result of joint representation by DPA attorneys; (3) that Appellant was not deprived of his speedy trial rights seeing as he was largely responsible for the delay and suffered little prejudice as a result of the delay; and (4) although requiring witnesses to wear shackles and prison garb can be intrinsically prejudicial, we also find that the state's interest in providing for the public's safety may justify these practices under certain circumstances.

**E. Gabriella Simone Allen v. Commonwealth of Kentucky
2010-SC-000353-DG March 23, 2013**

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. Cunningham, Noble, Scott and Venters, JJ., concur. Minton, C.J.; concurs in result by separate opinion in which Abramson, J., joins. Appellant was convicted of perjury and theft by deception. On appeal, she claimed, among other things, that the trial court erred in excluding evidence of a complaining witness's prior convictions for possession of forged instruments and giving police a false name.

The Court held that KRE 608 does not bar a party from inquiring about dishonest conduct on cross-examination, even if that conduct led to a misdemeanor conviction, proof of which would not be allowed under KRE 609, which only allows evidence of felony convictions. Thus, the Court held that Appellant was entitled to ask about the witness's previous conduct of lying to the police, and the trial court's exclusion of that evidence was reversible error.

**G. Clayton Jackson v. Commonwealth of Kentucky
2011-SC-000390-MR March 23, 2013**

Opinion of the Court by Justice Scott. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. Minton, C.J.; Abramson, Noble, and Venters, JJ., concur. Abramson, J., also concurs by separate opinion in which Minton, C.J., Noble, Scott and Venters, JJ., join. Cunningham, JJ., dissents by separate opinion. A Clay Circuit Court jury found Appellant, Clayton Jackson, guilty of three counts of murder and one count of first-degree arson. For these crimes, he was sentenced to life imprisonment without the possibility of parole. He appealed to the Supreme Court as a matter of right, Ky. Const. § 110(2)(b), alleging that the trial court erroneously: (1) entered non-unanimous verdicts or, in the alternative, failed to grant his motion for a directed verdict; (2) denied his motion to designate a particular juror as an alternate; (3) permitted prosecutorial misconduct and misstatements during the Commonwealth's closing arguments; (4) denied his motion to suppress his confession; (5) permitted the Commonwealth's expert to testify under KRE 702; (6) failed to include a life option instruction and reasonable doubt definition in its jury instructions, and (7) failed to give a wanton murder instruction. The Supreme Court reversed, vacated, and remanded based upon the following findings: (1) the trial court properly denied Appellant's motion for a directed verdict because it would not be clearly unreasonable for a jury to find him guilty of murder and arson; and (2) the trial

court failed to properly determine whether the juror in question was, in fact, able to be impartial given that his responses to questions were tainted by the trial court's implicit assertions (and corresponding pressure) that he was required to serve – therefore the Court could not deem this error harmless harmless, and thus, held that the trial committed reversible error by failing to remove the questionable juror. Appellant's remaining allegations of error were either trial-specific or not properly preserved for the Court's review. Given that cause for reversal was found, the Court did not address the remaining issues.

F. Harlie Lewis v. Commonwealth of Kentucky
[2011-SC-000395-DG](#) March 23, 2013

Opinion of the Court by Justice Cunningham. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. Evidence was insufficient to support a conviction of first-degree burglary as defined in KRS 511.020 when Appellant committed an act inconsistent with the purposes of the business, but the owner of the business, or one with like authority, failed to personally communicate a revocation of Appellant's license to remain on the premises.

II. PERSONAL INJURY:

A. Garnett Gibson (as Executor and Personal Representative of the Estate of Topsy Gibson) v. Fuel Transport, Inc.
And
Fuel Transport, Inc. v. Garnett Gibson (as Executor and Personal Representative of the Estate of Topsy Gibson)
[2010-SC-000072-DG](#) March 21, 2013
[2010-SC-000682-DG](#) March 21, 2013

Opinion of the Court by Justice Cunningham. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. Evidence was insufficient to sustain award of punitive damages where plaintiffs failed to establish causation between truck's mechanical failure and subsequent collision with oncoming motorist. Though compensatory damages award was sustainable under theory of ordinary negligence, there was no evidence of requisite gross negligence to support jury's punitive damages award.

III. WORKERS' COMPENSATION:

A. Unemployed Employers' Fund v. Matthew Stanford; U.S. Army Cadet Corps, Inc.; Bluegrass Area Development District; Honorable Chris Davis, Administrative Law Judge; and Workers' Compensation Board
And
U.S. Army Cadet Corps, Inc. v. Matthew Stanford; Bluegrass Area Development; Uninsured Employers' Fund; Honorable Chris Davis, Administrative Law Judge; and Workers' Compensation Board

[2011-SC-000651-WC](#)
[2011-SC-000652-WC](#)

March 23, 2013
March 23, 2013

Opinion of the Court. Minton, C.J., Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. Stanford was a participant in a summer job program operated by the Bluegrass Area Development District called By Learning You Earn (“BLUE”). As a part of this program, he was paid an hourly minimum wage and received health and workers’ compensation insurance from Bluegrass, but was assigned to work with US Army Cadet Corp, Inc. (“USACC”). USACC did not carry workers’ compensation insurance. Stanford suffered an injury while working for USACC which rendered him permanently and totally disabled.

The Administrative Law Judge granted Stanford benefits and found that USACC was a subcontractor for Bluegrass, and that Bluegrass had up-the-ladder liability for the workers’ compensation benefits. The Workers’ Compensation Board reversed the ALJ’s determination that Bluegrass had up-the-ladder liability because it was not a contested issue at the Benefit Review Conference and because Bluegrass was a statutorily created entity. KRS 342.610(2); *Uninsured Employers’ Fund v. City of Salyersville*, 260 S.W.3d 773 (Ky. 2008). It found USACC to be solely liable to pay Stanford’s benefits. The Board further ordered USACC to compensate Bluegrass for any of the medical bills it previously paid on Stanford’s behalf. USACC’s appeal to the Board was dismissed as untimely because it was filed in response to a petition for reconsideration filed by Stanford which was found to be improper. The Court of Appeals affirmed the Board’s decision.

The Unemployed Employers’ Fund then filed the present appeal contesting the determination that it (because USACC is uninsured) must repay Bluegrass for the expenses it paid on Stanford’s behalf. USACC filed a cross-appeal contesting the finding that its appeal was untimely filed and that it was the sole employer of Stanford.

The Supreme Court held that USACC’s appeal was timely filed and should have been considered by the Board. This holding is based on the fact that USACC could not have known that the second petition for reconsideration filed by Stanford was a nullity until the ALJ ruled as such. Since the USACC’s appeal was timely if the petition for reconsideration not been a nullity, the Board should have heard the appeal.

In reviewing the merits of USACC’s appeal, the Court held that the loaned employee doctrine as described in *Labor Ready, Inc. v. Johnston*, 289 S.W.3d 200, 206 (Ky. 2009) leads to the conclusion that USACC and Bluegrass share responsibility for being Stanford’s employer. Bluegrass effectively hired Stanford to be a part of their summer job program, and then assigned him to work for USACC, who filled the role of being a special employer. Therefore, on remand, the ALJ should enter an order allocating the costs for Stanford’s workers’ compensation benefits between the two employers.

IV. ATTORNEY DISCIPLINE:

A. **Kentucky Bar Association v. Stanley M. Chesley**
[2011-SC-000382-KB](#) **March 23, 2013**

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. The Board of Governors found that Chesley had violated eight provisions of the Kentucky Rules of Professional Conduct for his conduct in the settlement of the case of *Darla Guard, et al., v. A.H. Robbins Company, et al.* The Board recommended permanent disbarment and requested an order from the Court awarding restitution to his affected former clients in the amount of \$7,555,000.00. Upon review, the Court found Chesley guilty of the following violations: SCR 3.130-1.5(a) (Attorney's fee of over \$20 million exceeded amount established by client contract and contract with co-counsel, and was otherwise unreasonable); SCR 3.130-1.5(c) (Attorney and co-counsel failed to provide clients with a written statement stating the outcome of the matter and showing the remittance to the client and method of its determination); SCR 3.130-1.5(e) (Attorneys dividing fees without the consent of clients confirmed in writing); SCR 3.130-1.8(g) (Attorney representing two or more clients participated in making an aggregate settlement of the claims of the clients . . . without consent of clients and without disclosure of the existence and nature of all the claims. . . and of the participation of each person included in the settlement; SCR 3.130-3.3(a) (Attorney knowingly made a false statement of material fact or law to a tribunal); SCR 3.130-8.3(c) [now codified as SCR 3.130-8.4(c)] (Attorney engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation following the initial distribution of client funds and concealed unethical handling of client funds by others); and SCR 3.130-5.1(c)(1) (Attorney knowingly ratified specific misconduct of other lawyers). The Court permanently disbarred Chesley from the practice of law in the Commonwealth but declined to order restitution due to pending civil litigation.

B. **Kentucky Bar Association v. Curtis Donald Britt**
[2012-SC-000670-KB](#) **March 23, 2013**

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. Britt was suspended from the practice of law indefinitely by the Ohio Supreme Court pursuant to an agreed stipulation of facts and violations. After reviewing the facts, the Kentucky Supreme Court saw no reason why Britt should not be subjected to identical discipline under SCR 3.435. Accordingly, the Court granted the KBA's petition for reciprocal discipline and suspended Britt indefinitely from the practice of law in the Commonwealth.

C. **Kentucky Bar Association v. Kungu Njuguna**
[2012-SC-000710-KB](#) **March 23, 2013**

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. Njuguna was charged with violating SCR 3.130-8.3(b) (committing a criminal act that reflects adversely on the lawyer's honesty,

trustworthiness, or fitness as a lawyer) and SCR 3.130-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The first charge was related to Njuguna's guilty plea to second-degree wanton endangerment, second-degree fleeing and evading police, and disorderly conduct. The disciplinary charge related to these offenses was issued in December 2009. Njuguna filed a response admitting to pleading guilty to the misdemeanor offenses. However, in April 2010, before a hearing could be held on the disciplinary charge, Njuguna filed a motion to withdraw from membership in the KBA. The motion falsely stated Njuguna was "an active member in good standing and that no disciplinary investigations, complaints or charges were... pending against [him]." This false statement led to the second charge against Njuguna. The two charges were consolidated and a hearing was held before a trial commissioner. Njuguna admitted to the misconduct in both charges. The trial commissioner found him guilty and found, as a matter of fact, that Njuguna "has suffered and continues to suffer from alcohol abuse." The trial commissioner recommended a 181-day suspension and a five-year monitoring program with KYLAP. Njuguna appealed the findings but before the Board could meet to consider the case, the KBA Office of Bar Counsel moved to supplement the record with evidence that Njuguna had been arrested in August 2012 for DUI third offense. The Board voted 18-0 to find Njuguna guilty of both charges and recommended a 180-day suspension with 90 days to be probated for five years on the condition that Njuguna enroll in a 30-day inpatient treatment center for alcohol abuse and anger managements and that he execute and completely full a five-year contract with KYLAP. The Office of Bar Counsel sought review by the Supreme Court under SCR 3.370(7).

**D. Kentucky Bar Association v. Edward A. Mayer
2012-SC-000823-KB March 23, 2013**

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. Mayer's conduct arose out of a March 2003 automobile accident in which his client, Lauren (Bratcher) Stanley, was seriously injured. Mayer and Stanley signed a 28% fee agreement for his representation in the matter, which ultimately settled for \$200,000. Mayer deposited the first \$100,000 check into his escrow account in May 2004, and in November of that same year the balance of that account was \$2,940.10, despite lack of payment to Stanley. In September 2004, Mayer received the other check which he held until February of the next year, at which point he also deposited that check into his escrow account. By December 2005, the balance of Mayer's escrow account was only \$1,518.82, despite the fact that he paid only \$10,000 to Stanley and \$30,000 to Humana on its claim against the proceeds. In 2006 Mayer paid no money to Stanley, in 2007 he paid her \$40,000, and in 2008 he paid her another \$40,000. In 2009, more than five years after receiving the second settlement check, Mayer paid Stanley another \$20,000, bringing the total paid to \$110,000, \$4,000 less than the \$114,000 owed to her. This resulted in Mayer receiving a 30% fee instead of the agreed upon 28% fee. During that five year period, Mayer treated the funds as his own. Stanley repeatedly tried to reach Mayer, but was seldom able to do so. When she did speak with him, he assured her that everything was

taken care of. In 2010, Stanley filed a bar complaint, and it was only after this that Mayer agreed to meet with her. Mayer then wrote her two checks for \$5,000 with the instruction to “get the Bar Association off his ass.” After a hearing on the matter, the Trial Commissioner’s report found Mayer guilty of all five charges presented, and recommended permanent disbarment. The Board of Governors then decided, by a vote of 20 to 0, that the findings of the Trial Commissioner were supported by substantial evidence and thus not clearly erroneous. For this reason the Kentucky Bar Association (KBA) recommended that Mayer be found guilty of violating: 1) SCR 3.130-1.4(a), (2) SCR 3.130-1.5(c), (3) SCR 3.130-1.15(a), (4) SCR 3.130-1.15(b), and (5) SCR 3.130-8.3(c) (since renumbered as SCR 3.130-8.4(c)). The KBA also recommended permanent disbarment. The Supreme Court held that case law supports the KBA’s recommendation and the Board of Governors’ determination. Thus, Edward A. Mayer was permanently disbarred from the practice of law in Kentucky, and may never apply for reinstatement.

D. Kentucky Bar Association v. Henry J. Curtis
[2012-SC-000826-KB](#) March 23, 2013

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. Curtis failed to take any action in a case after his client paid him a retainer, leading to disciplinary charges for violating SCR 3.130-1.3 (reasonable diligence and promptness in representing a client), SCR 3.130-1.4(a)(3) (keeping client reasonably informed about the status of a matter), and SCR 3.130-1.4(a)(4) (promptly complying with reasonable requests for information). Curtis did not file an answer to the charges and the matter proceeded as a default case before the Board of Governors. The Board found Curtis guilty and, considering his history of prior discipline, voted to recommend a public reprimand and payment of costs. Neither the Office of Bar Counsel nor Curtis sought review by the Court and the Court declined to undertake review. Accordingly, the Board’s recommendation was adopted.

E. Robert C. Bishop v. Kentucky Bar Association
[2013-SC-000044-KB](#) March 23, 2013

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. Bishop admitted to professional misconduct based on twelve ethical violations stemming from two disciplinary cases and, with the agreement of the KBA, proposed a sanction of suspension from the practice of law for a period of sixty-one days, with thirty-one days probated for two years. The Court found Bishop guilty of all charges and concluded that the proposed discipline was appropriate.