PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
NOVEMBER 2017

I. ARBITRATION:

A. Kindred Nursing Centers Limited Partnership, Etc., et al v. Beverly Wellner, Etc.

2013-SC-000431-I **November 2, 2017**

Opinion of the Court by Justice Venters. All sitting. Cunningham, Keller, and Wright, JJ., concur. Hughes, J., dissents by separate opinion in which Minton, C.J., and VanMeter, J., join. Upon remand for the United States Supreme Court in *Kindred v Clark*, at al., 137 S.Ct. 1421 (2017), the Supreme Court of Kentucky reaffirmed the interpretation of a power of attorney instrument set forth in *Extendicare Homes, Inc, v Whisman*, 478 S.W.3d 306 (Ky. 2015). While the express power of an attorney-in-fact "to demand, sue for, collect, recover and receive all debts, monies, interests and demands whatsoever now due or that may hereafter become due to me (including the right to institute legal proceedings therefore)" would authorize her to initiate an arbitration proceeding and to agree to resolve by an existing dispute by arbitration, it does not authorize the attorney-in-fact to enter into an optional free-standing, pre-dispute arbitration agreement coincidental with the principal's admission into a nursing home. The execution of the pre-dispute arbitration agreement does none of the things authorized by that power. Also, the execution of an optional free-standing, pre-dispute arbitration agreement is not authorized by the power to execute "conveyances and contracts . . . in relation to [the principal's] property" because a pre-dispute arbitration agreement coincidental to the principal's admission into a nursing home is not an act done "in relation to" property of the principal.

II. CIVIL PROCEDURE:

A. Ken Isaacs, et al. v. Jeff Caldwell et al.

2015-SC-000265-DG **November 2, 2017**

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Hughes, Keller, and VanMeter, JJ., concur. Wright, J., concurs in part and dissents in part by separate opinion in which Cunningham, J., joins. Following an adverse decision by the local planning commission, subdivision residents sought to appeal the decision to circuit court pursuant to KRS 100.347, filing the appeal at the last hour of the appeal period. Deputy clerk erroneously failed to issue summons on time. Counsel secured issuance of summons one day late but failed to make a diligent effort to serve the summons on an indispensable party for three weeks. Trial court granted dismissal of appeal. Upon review the Supreme Court held: (1) Deputy clerk error in failing to issue the summons forthwith justified application of equitable tolling to validate late issuance of the summons under *Nanny v.*

Smith, 260 S.W.3d 815, 817 (Ky. 2008); (2) Pursuant to statutory directive, judicial review of administrative actions is governed by the procedural rules applicable to original actions. Rule that commencement of an action occurs upon issuance of summons in good faith applies appeal of administrative action; (3) Commencement of the action requires a contemporaneous intention on the part of the initiating party to diligently attend to the service of the summons. Counsel's unreasonably delay in attempting to serve the summons fails to establish the issuance of summons *in good faith*." Accordingly, the appeal was not timely commenced.

III. CONTRACTS:

A. Saint Augustine School, et al. v. Janet Cropper

2016-SC-000243-DG **November 2, 2017**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. In a 7-0 decision, the Court affirmed, for different reasons, the Court of Appeals, holding that the ecclesiastical-abstention doctrine did not preclude the appellant from asserting a breach of contract claim against Saint Augustine School. The ecclesiastical-abstention doctrine prohibits secular courts from adjudicating predominantly religious issues, such as disputes relating to faith, doctrine, and denominational governance because doing so violates the Establishment and Free Exercise Clauses of the First Amendment. In this case, the appellant was a lay school administrator, and Saint Augustine School terminated her position for financial reasons. Because deciding the appellant's breach of contract claim did not involve "wading into doctrinal waters," the Court allowed the appellant's suit to proceed.

IV. CRIMINAL LAW:

A. Travis Jeter v. Commonwealth of Kentucky

2015-SC-000616-MR **November 2, 2017**

Opinion of the Court by Justice Hughes. All sitting; all concur. Defendant was convicted of first-degree robbery, first-degree possession of a controlled substance, and use of drug paraphernalia. He was sentenced as a first-degree persistent felon to terms of imprisonment, respectively, for life, for three years, and for twelve months. Defendant was accused of having injured a woman in the course of stealing her purse, and of having possessed a spoon with cocaine residue and a "crack" pipe. Affirming the Judgment, the Supreme Court rejected claims that the trial court erroneously denied defense pretrial motions to exclude eye-witness identification testimony, to continue the trial, and to sever the robbery charge from the drug-related charges.

B. David Lee Moss v. Commonwealth of Kentucky

2016-SC-000165-DG **November 2, 2017**

Opinion of the Court by Justice Venters. All sitting; all concur. Criminal Appeal, Discretionary Review Granted. *Question Presented*: Whether the trial court erred by

allowing the prosecutor to use the defendant's silence as an adoptive admission of guilt. *Held*: To qualify as an adoptive admission through silence under KRE 801A(b)(2), the defendant's silence must be a response to statements of another person that would normally evoke denial by the party if untrue. Because the defendant had been talking to a police officer about his shooting of victim, he did not have a "natural and proper call" to contradict witness's outburst that he shot the victim "in the back for no reason." Consequently, the defendant's failure to respond to the accusation did not manifest an adoption or belief in the truth of the accusation and was not an adoptive admission under KRE 801A(b)(2). The trial court abused its discretion by admitting the witness's accusation and improperly allowed the corresponding inference that the defendant had tacitly adopted the accusation as his own admission.

C. Cole D. Ross v. Commonwealth of Kentucky
2016-SC-000287-MR **November 2, 2017**

Opinion of the Court by Justice Venters. All sitting; all concur. Appellant Ross was convicted of murder and arson. Issues presented: (1) whether the trial court should have directed verdict based upon the "inherent unbelievability" of the Commonwealth's principal witness; (2) whether the trial court erred by denying his motion for a mistrial; and (3) whether the prosecutor engaged in impermissible closing argument. Upon review the Court held: (1) testimony admitted into evidence must be disregarded during the directed verdict analysis when the substance of that testimony is so extraordinarily implausible or inherently impossible as to render it manifestly without probative value or patently unworthy of belief. The rule is not, as Appellant posits, that testimony admitted into evidence must be disregarded due to the witness's extraordinary lack of credibility as demonstrated by the usual manifestations of untrustworthiness; (2) Defendant was not entitled to a mistrial as a result of a news report broadcast the evening of the first day of trial because all juries were under an admonition not to watch media coverage of the trial, and upon inquiry no juror indicated that she had watched the news report and so Defendant had failed to show prejudice as a result of the broadcast; and (3) the prosecutor's statement in closing arguments that the jury could control "how Graves County feels about these type of crimes" did not result in reversible error because the trial court sustained the Defendant's objection and admonished the jury to disregard the statement.

V. NEGLIGENCE:

A. John Adams, M.D., et al. v. Mark Sietsema
2015-SC-000483-DG **November 2, 2017**

Opinion of the Court by Justice Venters. Minton, C.J.; Cunningham, Hughes, Keller, and VanMeter, JJ., concur. Wright, J., concurs in part and dissents in part by separate opinion. Civil Appeal; Standard of review of summary judgement. A county jail inmate brought medical negligence action against the doctor and practitioner serving as the primary health care providers for the jail after nursing staff at the jail failed to notify doctor of the inmate's continued pain and refusal to take prescribed

medication. Inmate alleged the doctor failed to adequately train staff on the use of his signature and on when to contact the doctor. Trial court granted summary judgment for the defendants when inmate failed to identify expert critical of doctor's training of nurses. *Questions presented*: (1) What is the standard of review for summary judgment based on lack of expert testimony? (2) Was summary judgment proper? *Held*: (1) The need for expert testimony is a sufficiency of proof matter. Whether evidence is sufficient to sustain a particular claim is a question of law, so summary judgment based on a failure of proof is reviewed de novo. (2) Here, expert testimony was required because the negligence alleged by inmate was neither admitted by defendants nor was it self-evident for application of *res ipsa loquitur*.

VI. OPEN RECORDS:

A. Utility Management Group, LLC v. Pike County Fiscal Court

2015-SC-000680-DG **November 2, 2017**

Opinion of the Court by Justice Hughes. Minton, C.J.; Keller, VanMeter, and Venters, JJ., concur. Wright, J., dissents by separate opinion in which Cunningham, J., joins. Utility Management Group (UMG), a privately-owned limited liability company, provides management and operational services to Mountain Water District (District). Residents of Pike County pay the District for water and sewer services provided to them through equipment and infrastructure owned by the District and in turn, the district pays UMG a monthly fee as specified in their contract. After an audit determined that the District paid UMG $36 million in a five-year period, the Pike County Fiscal Court made an open records request under KRS 61.870 and 61.872 for UMG's business records. UMG declined to produce the records arguing that it was a "wholly private entity." Subsequently, Pike County obtained an opinion from the Attorney General, 11-ORD-143, which concluded that UMG was subject to the Open Records Act. On appeal, the Circuit Court rejected the Attorney's General's analysis, concluded that a portion of the statute was unconstitutionally vague, and that UMG had no disclosure obligation under the Act. The Court of Appeals reversed, determining that UMG was subject to the Act as it existed at the time of the initial request and denial and that the statute was not unconstitutionally vague. The Court accepted discretionary review and affirmed the judgment of the Court of Appeals. The Court held that UMG was a "body" under the 1994 version of KRS 61.870(1)(h) and that statute was not unconstitutionally vague. The Court further held that the 2012 amendment to the statute did not apply retroactively. Accordingly, the case was remanded to the Pike Circuit Court for the entry of an order requiring UMG to comply with the Open Records Act.

VII. PRISON DISCIPLINE:

A. Janet Conover Warden, et al. v. Kristy Lawless

2016-SC-000320-DG **November 2, 2017**

Opinion of the Court by Justice Cunningham. Minton, C.J.; Hughes, Keller, Venters, and Wright, JJ., sitting. All concur. VanMeter, J., not sitting. This is a prison discipline case involving a fight between two inmates in which a Corrections officer was injured. One of the inmates involved in the altercation, Appellee, Kristy Lawless, was disciplined as a result of the officer's injury. She appealed that disciplinary determination through the appropriate channels and eventually exhausted her appeals as a matter of right resulting in a decision by the Court of Appeals ruling in her favor. The Kentucky Supreme Court reversed the Court of Appeals and held that in order to satisfy due process, Adjustment Officers (AOs) must do the following when inmates request that AOs review allegedly exculpatory evidence that is reasonably accessible and available for review: 1) review allegedly exculpatory records; 2) indicate that she reviewed the records in her written finding; and 3) consider the impact of that evidence when rendering her decision. That standard was satisfied in the present case by the AO's timely execution of a supplemental affidavit. For appeals before the circuit court, however, such findings are not necessary. Rather, the circuit court is required to review the allegedly exculpatory evidence in the event the AO failed to do so. In the absence of a dispute concerning whether the AO considered allegedly exculpatory evidence, the primary inquiry of the circuit court is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. That standard was satisfied here.

VIII. SOVEREIGN IMMUNITY:

A. Big Sandy Regional Jail Authority v. Lexington-Fayette Urban County Government

2016-SC-00008-DG **November 2, 2017**

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Cunningham, Hughes, and Keller, JJ., concur. Venters, J., concurs in result only by separate opinion which VanMeter, J., joins. Wright, J., dissents by separate opinion. Big Sandy Regional Jail Authority (Authority) sued the Lexington- Fayette Urban County Government in district court seeking reimbursement for the cost of housing prisoners held pursuant to warrants issued by Fayette County courts. The district court found that the Urban County Government was entitled to sovereign immunity and dismissed the action. The Authority appealed to the circuit court. The circuit court did not address the issue of sovereign immunity but affirmed the district court in finding that the county of arrest controls responsibility for the costs of incarceration. The Court of Appeals denied discretionary review, and this Court granted discretionary review.

Resolution of this case involves interpretation of KRS 411.025. KRS 411.025 states: "The fiscal court of each county shall provide for the incarceration of

prisoners arrested in the county or sentenced or held by order of the courts in the county." The Court held that this statute is not completely applicable to the situation presented. Nonetheless, pursuant to the language of the statute, the county responsible for the costs of incarceration is the county in possession of the prisoner. In this case, the Authority is responsible for incarceration costs because they were in possession of the prisoners arrested in the counties serviced by the Authority.

B. University of Louisville v. Mark Rothstein
2016-SC-000220-DG **November 2, 2017**

Opinion of the Court by Justice Keller. Minton, C.J.; Cunningham, Keller, VanMeter, Venters and Wright, JJ., concur. Hughes, J., not sitting. University of Louisville (U of L) hired Mark Rothstein (Rothstein) as a professor of medicine in 2000. He was granted tenure and appointed as Herbert F. Boehl Chair of Law and Medicine and appointed as a Distinguished University Scholar under a five-year renewable contract. His contract was ultimately terminated and Rothstein sued U of L for breach of the contract. U of L claimed the defense of sovereign immunity as a bar to all claims. Franklin Circuit Court found that U of L had no immunity in this case and the Court of Appeals affirmed. The Supreme Court of Kentucky granted discretionary review and affirmed the Court of Appeals. The Court held that Kentucky Revised Statute (KRS) 45A.245 waives immunity for all claims against the agencies of the Commonwealth arising out of lawfully authorized written contracts with those agencies. The Court also held that this waiver is not limited to contracts entered into pursuant to Kentucky's Model Procurement Code but instead applies to all lawfully authorized written contracts with the Commonwealth's agencies.

IX. TORTS:

A. Angela Ford, et al. v. Harold Baerg, Jr., et al.
2016-SC-000136-DG **November 2, 2017**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. In a 7-0 decision, the Court affirmed the Court of Appeals, holding that the appellant's conversion claim against two different parties failed as a matter of law. To assert a successful claim of conversion, the plaintiff must satisfy seven elements. In this case, the plaintiff failed to satisfy the first two elements—(1) having legal title to the alleged converted property and (2) the right to the possess the property. The appellant granted the "thief" in this case signatory rights on her bank accounts. By virtue of this signatory status, the "thief" possessed apparent authority to transfer the appellant's funds to innocent third parties using a wire transfer and a negotiated check.

Regarding the wire transfer, as a matter of law, title to funds passes to the beneficiary bank upon acceptance of a payment order, as long as the beneficiary bank has no reason to know that the alleged converted property has been obtained through commission of a theft offense. In this case, the bank had no reason to know of the

thief's actions, whereby title and the right to possess the property transferred, causing the appellant's conversion claim to fail. Regarding the negotiated check, as a matter of law, once a payee receives the funds from a negotiated check, the drawer loses title and the right to possess those funds, and the appellant's conversion claim fails.

B. Lake Cumberland Regional Hospital, LLC v. Helan Adams
2016-SC-000181-DG
AND
Spring View Hospital, LLC v. Karen Jones (Now Epley)
2016-SC-000189-DG
AND
Spring View Hospital, LLC v. Joyce Spalding, Etc., et al.
2016-SC-000259-DG
AND
Joyce Spalding, Etc. et al. v. Spring View Hospital, LLC
2016-SC-000277-DG **November 2, 2017**

Opinion of the Court by Justice Keller. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter, and Wright, JJ., concur. These consolidated cases asked the Court to recognize negligent credentialing as a new tort in the Commonwealth. Plaintiffs brought medical negligence claims against their respective doctors and the hospitals in which the doctors were granted privileges. The trial courts dismissed plaintiffs' claims against the hospitals finding that negligent credentialing was not a recognized cause of action in this State. The Court of Appeals reversed, holding that such a claim did exist.

The Court declined to recognize a stand-alone cause of action of negligent credentialing. However, the law of the Commonwealth has long supported a plaintiff's claim of negligence against a hospital for the staffing of its physicians. Plaintiffs have an avenue of recovery through common law negligence.

X. WORKERS COMPENSATION:

A. Toyota Motor Manufacturing, Inc. v. Kathy Prichard, Etc., et al.
2017-SC-000031-WC **November 2, 2017**

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, and Wright, JJ., sitting. All concur. VanMeter, J., not sitting. Worker's Compensation; timeliness of reopening. In 2007, Prichard received an award of permanent partial disability benefits based upon a permanent impairment rating of eight percent. In 2009, the case was reopened and a modification of the original award was issued in 2011. In August 2014, Prichard moved to reopen the 2011 award and as a result, received an award for total disability. Issues presented: (1) was Prichard's 2014 motion to reopen barred by the four-year limitation period contained in KRS 342.125(3); and (2) did Prichard demonstrate through objective medical evidence a change in her disability indicating a worsening of her impairment as required for reopening a claim under KRS 342.125(1)(d). Upon review, the

Supreme Court held: (1) pursuant to *Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775 (Ky. 2008), the four-year limitation period for reopening a claim commences at the date of the most recent order granting or denying workers' compensation benefits, rather than from the date of the original award. Prichard's 2014 motion to reopen was timely because it was within four years of the 2011 award. Also, the updated medical conclusions of Prichard's two treating physicians supported the ALJ's conclusion that Prichard's condition had worsened from partial disability to total disability between the dates of the original award and the first reopening, and from then until the filing of the second reopening.

XI. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. Kenneth Joseph Bader

2017-SC-000312-KB **November 2, 2017**

Opinion and Order of the Court. All sitting; all concur. The KBA moved to suspend Bader for failure to answer a disciplinary charge relating to his failure to perform any work in his client's personal injury case. The three-count charge alleged violations of SCR 3.130(1.3) (failure to act with reasonable diligence and promptness in the representation of a client); SCR 3.130(1.4)(a)(3) (failure to keep client informed); and SCR 3.130(8.1)(b) (failure to respond to a lawful demand for information from a disciplinary authority).

In reviewing the record, the Supreme Court noted this was not the first time Bader had been cited and disciplined for his misconduct as a practicing attorney. The Court recently had found Bader guilty of violating SCR 3.130(3.4)(c) for knowingly disobeying an obligation under the rules of a tribunal and SCR 3.130(8.1)(b) for failing to respond to a lawful demand for information from a disciplinary authority. Bader also failed to participate in that disciplinary proceeding. Because of his committed violations, the Court suspended Bader from the practice of law for a period of thirty days.

The Court noted that Bader's misconduct in the present case mirrored that for which he had been previously disciplined and indicated repeated noncompliance with the rules of professional conduct. Accordingly, the Court ordered Bader suspended from the practice of law indefinitely.

B. Nancy Oliver Roberts v. Kentucky Bar Association

2017-SC-000388-KB **November 2, 2017**

Opinion and Order of the Court. Cunningham, Hughes, Keller, VanMeter, Venters, and Wright, JJ., concur. Minton, C.J.; not sitting. Respondent's reinstatement to practice of law after 6-day suspension in 2014 was unduly delayed when Bar Counsel objection to reinstatement due to a 2009 disciplinary proceeding being held in abeyance. Because of undue delay in completing the reinstatement process, the Board of Governor's recommended waiver of costs that Respondent would be otherwise assessed as a condition of reinstatement. Bar Counsel objected to cost waiver, arguing

that under SCR 3.510(1), such costs were mandatory and that the Board's waiver recommendation exceeded its authority. Upon review, the Supreme Court held that (1) Rule's directive that language that "Any additional costs will be paid by Applicant" did not employ the word "shall," which normally connotes a mandatory command, thus providing for discretion to excuse the payment of costs in proper circumstances; and (2) that all Board recommendations relevant to the just disposition of disciplinary matters can assist the Court in determining the appropriate resolution to such matters and are, therefore, proper. Board was authorized to recommend waiver of costs.

C. Kentucky Bar Association v. Justin Ross Morgan
2017-SC-000396-KB **November 2, 2017**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission charged Morgan with violating SCR 3.130(1.3) (failure to act with reasonable diligence and promptness in representing his client); SCR 3.130(1.4)(a)(4) (failure to promptly comply with a client's reasonable requests for information; SCR 3.130(1.5)(a) (charging an unreasonable fee); SCR 3.130(1.16)(d) (retaining a client's file, property, and unearned fee upon the termination of representation); and 3.130(8.1)(b) (failure to respond to a lawful demand for information from an admissions or disciplinary authority). The violations stemmed from Morgan's failure to provide any representation to a client in a child custody and fee dispute matter after accepting a retainer.

http://opinions.kycourts.net/sc/2015-SC-000265-DG.pdfIn reaching its recommendation in this case, the Board of Governors reviewed Morgan's disciplinary history, which included a private reprimand and three suspensions, most recently a 181-day suspension for failing to respond and failing to properly explain matters to his client. The Board ultimately voted to recommend that Morgan be suspended from the practice of law for one year and ordered to repay his client $8,500. The Court agreed with the Board's recommendation and sanctioned Morgan accordingly.