PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
October 2011

I. CAUSE OF ACTION

A. St. Luke Hospital, Inc.; E. Krebs, R.N.; T. Theisen; John Fey; John Howard Harris; and Ernest Pretot v. Shannon Straub

2009-SC-000027-DG **October 27, 2011**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Supreme reversed the decision of the Court of Appeals and reinstated the trial court's judgment. Supreme Court held that an action for money damages under KRS 446.070 is not available for alleged constitutional violations. Issues/holdings include: 1) in relation to KRS 446.070, the word "statute" will not be interpreted to mean constitution; 2) because adequate remedies existed at law, the Court declined to recognize a new tort cause of action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); 3) the trial court did not err when it refused to answer jury questions during deliberations; and 4) the trial court did not commit reversible error when it allowed evidence at trial of Straub's use of profanity or drugs.

II. CORPORATIONS

A. Shawnee Telecom Resources Inc., successor by Merger to Shawnee Technology, Inc. v. Kathy Brown

2009-SC-000574-DG **October 27, 2011**

Opinion of the Court by Justice Abramson. All sitting; all concur. In a dissenter's rights action under the Business Corporations Act, KRS Chapter 271B, both parties appealed from the trial court's appraisal of the dissenting shareholder's shares. Ruling in favor of the dissenter, the Court of Appeals held that her shares should not have been discounted for their lack of marketability. Affirming in part, the Supreme Court agreed that in a Chapter 271B appraisal proceeding, the dissenting shareholder is entitled to "fair value" which is his or her proportionate share of the company's value as a going concern as opposed to fair market value, the value applicable in a hypothetical sale of the shares to a willing buyer. Value can be determined under any method generally recognized in the business appraisal field for which there is supporting evidence and thus the Court of Appeals erred in categorically rejecting valuations under the net asset method. Fair value can include appropriate entity level discounts and premiums, where there is supporting expert testimony but shareholder level discounts for lack of control or lack of marketability are generally inappropriate.

III. CRIMINAL LAW

A. Christopher Chavies v. Commonwealth of Kentucky
2010-SC-000479-MR **October 27, 2011**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Chavies was convicted of manufacturing methamphetamine; receipt of stolen property worth $500 or more, but less than $10,000; and being a second-degree persistent felony offender. The Supreme Court affirmed his conviction, finding that (1) the trial court properly denied Chavies's motions to suppress the evidence seized in the search of his vehicle; (2) the trial court did not err by denying Chavies's motion for a directed verdict for the offense of manufacturing methamphetamine; (3) Chavies affirmatively waived the sufficiency of the evidence issue for the offense of receipt of stolen property; and (4) the trial court erred in allowing the introduction of dismissed and amended charges in the penalty phase of Chavies' trial, but the unpreserved error was not a sentencing issue and did not rise to the level of palpable error.

B. Sean Christopher Noakes v. Commonwealth of Kentucky
2010-SC-000568-MR **October 27, 2011**

Opinion of the Court by Justice Scott. All sitting; all concur. Appellant was convicted of murder and attempted murder following a jury trial at which the only contested issue was whether he was criminally responsible for his actions. On appeal, Appellant argued that the trial court erred by: (1) denying his motion for a limited directed verdict on the question of guilt for the murder charge; (2) instructing the jury that the definition of insanity did not include an abnormality manifested only by repeated criminal conduct; (3) instructing the jury that Appellant was required to prove the existence of extreme emotional disturbance (EED) beyond a reasonable doubt; and (4) allowing the Commonwealth to engage in a pattern of prosecutorial misconduct.

The Supreme Court determined that no error had been committed and upheld Appellant's conviction. Specifically, the Court held that Appellant was not entitled to a directed verdict because there was sufficient evidence to support his conviction for a crime related to the homicide. With regard to the insanity instructions, the Court found that there was no error because the instruction properly recited the standard set forth in KRS 504.020. The Court also held that Appellant could not seek to reverse his conviction based on the allegedly erroneous EED instruction because the instruction given was the one he requested. Finally, the Court held that alleged evidentiary errors do not constitute prosecutorial misconduct.

C. Jeremy D. Lawton v. Commonwealth of Kentucky

2010-SC-000206-DG **October 27, 2011**

Opinion of the Court by Justice Noble. All sitting; all concur. Lawton was convicted by a Fayette County jury of escape in the second degree and of being a persistent felony offender in the second degree. The charges arose when Lawton, who was serving a misdemeanor sentence in the Home Incarceration Program (HIP), removed an electronic monitoring device from his ankle and left the home where he was supposed to remain under the terms of his HIP agreement.

The Court held that Lawton could be properly convicted of second-degree escape under the portion of the statute that reads: "A person is guilty of escape in the second degree when he escapes from a detention facility …." KRS 520.030(1). For the purposes of the Home Incarceration Program, a home is a "detention facility," and escape from such a home can constitute second-degree escape.

However, the Court reversed Lawton's convictions because the jury instructions given did not properly list all the required elements for second-degree escape. The Court provided sample instructions to be used in future prosecutions for escape from home incarceration.

IV. CUSTODY CREDIT

A. Peter Bard v. Commonwealth of Kentucky

2010-SC-000283-DG **October 27, 2011**

Opinion of the Court by Justice Scott. Cunningham, Noble, Schroder, and Venters, JJ., concur. Minton, C.J., dissents by separate opinion. Abramson, J., not sitting. In 2002, Appellant was sentenced to twenty years in prison for a murder that took place in 1993. The trial court's judgment provided that Appellant was "entitled to credit for time spent in custody prior to sentencing, said time to be calculated by the Division of Probation and Parole." At the time of sentencing, Probation and Parole presented the trial court with its calculation of Appellant's presentencing custody credit, 3,086 days. Six years later, the Department of Corrections determined that Appellant had served his sentence, based on the award of 3,086 days of custody credit, and released him from prison. Several days later, Corrections asserted that Appellant's presentencing custody credit had been miscalculated. As a result, it modified Appellant's credit to 1,449 days and reincarcerated him.

On appeal, the Supreme Court held that the Department of Corrections lacked the authority to modify Appellant's presentencing custody credit. The Court reasoned that, under the plain language of the version of KRS 532.120(3) that was in effect at the time of Appellant's sentencing and reincarceration, the duty to award presentencing custody credit was vested exclusively in the trial court. The Court found that the trial court had incorporated by reference Probation and

Parole's initial calculation of 3,086 days and that Corrections could not subsequently reduce Appellant's credit. The Court also noted that any error in the trial court's judgment was judicial, not clerical, and could not be corrected under RCr 10.10 or CR 60.02.

V. FAMILY LAW

A. Commonwealth of Kentucky, Cabinet for Health and Family Services, and Larry Barnes v. Renee Ivy (now Knighten)

2010-SC-000527-DGE **October 27, 2011**

Opinion of the Court by Justice Abramson. Minton, D.J.; Noble, Schroder, and Venters, JJ., concur. Cunningham, J., concurs in part and dissents in part by separate opinion in which Scott, J. joins. In a contempt proceeding to enforce a child-support order, notwithstanding the fact that the child-support obligor's sole source of income was a monthly benefit under the federal Supplementary Security Income program (SSI), the family court held her in contempt for having failed to make payments. Holding that an SSI recipient has no ability to pay child support, the Court of Appeals reversed and remanded for an order abrogating the support obligation. Reversing in part, the Supreme Court held that the receipt of SSI benefits does not preclude a child-support obligation, but that the trial court retains broad discretion to deviate from the statutory amount of that obligation so as to avoid unduly burdening the recipient.

B. Cory Keifer v. Jaylynne Keifer

2010-SC-000694-DGE **October 27, 2011**

Opinion of the Court by Justice Venters. All sitting. All concur. Issue presented: Whether the trial court's failure to include specific findings of fact in post-decree order modifying the terms of child visitation indicated its failure to reflect consideration of the factors set forth in KRS 403.270(2) relating to custody determinations, and thus, required reversal. Held: CR 52.01 and the applicable sections of KRS Chapter 403 require written findings of fact in all orders affecting child custody. However, where trial judge had made adequate findings of fact at the conclusion of the hearing on the video record, reversal of judgment was limited to the entry of a new judgment that properly reflected in writing the trial court's findings.

VI. JURY INSTRUCTIONS

A. University Medical Center, Inc., D/B/A University of Louisville Hospital v. Michael G. Beglin, Individually; and Michael G. Beglin as Executor of the Estate of Jennifer W. Beglin; Michael G. Beglin as parent and next friend of the minor William Patrick Beglin; Michael G. Beglin as parent and next of Friend of the minor Kelly Ann Beglin; William Patrick Beglin, Individually; and Kelly Ann Beglin, Individually

2009-SC-000289-DG **October 27, 2011**
2009-SC-000839-DG **October 27, 2011**

Opinion of the Court by Justice Venters. All sitting; Minton, C.J., Abramson, Noble, and Schroder, JJ., concur. Scott, J., concurs in part and dissents in part by separate opinion, in which Cunningham, J., joins. Issues presented: (1) whether trial court's giving of a missing evidence instruction was proper; (2) whether it was permissible here to hold an employer liable for punitive damages based upon the gross negligence of an employee. Held: (1) missing evidence instruction should be given when it may be reasonably believed that material evidence within the exclusive possession and control of a party, or its agents or employees, was lost without explanation or is otherwise unaccountably missing. The trier of fact may infer that the evidence was intentionally and in bad faith destroyed or concealed by the party possessing it and that the evidence, if available, would be adverse to that party or favorable to his opponent. In this case, the evidence supported an inference that the Hospital intentionally and in bad faith destroyed the missing document, and so the missing evidence instruction was properly given; and (2) pursuant to KRS 411.184(3) that "In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question," under facts at bar, there was insufficient evidence that had Hospital authorized, ratified or could have anticipated the nurse's conduct which led to the injury of the patient, and thus the trial court erred by giving a punitive damages instruction against the Hospital.

VII. STATUTE OF LIMITATIONS

A. Interlock Industries, Inc., et al. v. Charles Rawlings, et al.; Rosenman's, Inc. v. Charles Rawlings, et al.; & Kentucky Flatbed Company, LLC v. Charles Rawlings, et al.

2010-SC-000264-DG **October 27, 2011**
2010-SC-000352-DG & **October 27, 2011**
2010-SC-000368-DG **October 27, 2011**

Opinion of the Court by Justice Schroder. Minton, C.J.; Abramson, Cunningham, and Noble, JJ., concur. Scott, J., concurs in part and dissents in part by separate opinion in which Venters, J., joins. The plaintiff, a truck driver, was injured while a forklift unloaded aluminum bundles from his truck. One of the bundles fell on the plaintiff as he was rolling up the straps that had been used to secure his load. The plaintiff filed suit 13 months after the accident.

The Supreme Court held that Kentucky's general one-year statute of limitations for personal injury applied, and that the two-year statute of limitation found in the Motor Vehicle Reparations Act (MVRA) did not apply. The MVRA extends the statute of limitations to two years for actions with respect to accidents occurring

in this Commonwealth and arising from the ownership, maintenance or use of a motor vehicle. Pursuant to case law and the plain language of KRS 304.39-020(6)(b), engaging in activity integral to the unloading of a truck does not constitute "use of a motor vehicle." The Court went on to hold that the plaintiff's actions in rolling straps constituted "unloading" within the meaning of the MVRA. Therefore, the MVRA's two-year statute of limitations did not apply. The Court reversed the Court of Appeals, and reinstated the trial court's summary judgment in favor of the defendants.

VIII. ATTORNEY DISCIPLINE

A. Kentucky Bar Association v. James B. Gray

2010-SC-000381-KB **October 27, 2011**

Opinion and Order of the Court. All sitting; all concur. Supreme Court revoked attorney's probation and reinstated the remainder of his five-year suspension for violating the conditions of his probation.

B. Kentucky Bar Association v. Margaret M. Jackson-Rigg

2011-SC-000212-KB **October 27, 2011**
2011-SC-000329-KB **October 27, 2011**

Opinion and Order of the Court. All sitting; all concur. The Supreme Court permanently disbarred an attorney from the practice of law based on her pattern of misconduct, multiple offenses, bad faith obstruction of the disciplinary process, illegal conduct, and her substantial experience in the practice of law. The attorney also had received three private reprimands and had been suspended three times.

C. Kentucky Bar Association v. Ronald E. Thornsberry

2011-SC-000352-KB **October 27, 2011**

Opinion and Order of the Court. All sitting; all concur. The Supreme Court suspended an attorney from the practice of law for thirty days. The attorney participated in a case in Ohio, and appeared before a judge, without filing a *pro hoc vice* motion. He represented to the court and the KBA that he had filed such a motion when no motion was ever filed. The attorney also failed to keep his client informed about the status of her case and failed to return files to her upon the termination of representation.

D. Kentucky Bar Association v. Joseph F. Bamberger

2011-SC-000378-KB **October 27, 2011**

Opinion and Order of the Court. All concur. Schroder, J., not sitting. The Supreme Court permanently disbarred an attorney from the practice of law due to the highly egregious nature of his ethical violations stemming from his participation in the "Fen-Phen" case.

E. Maureen Ann Sullivan v. Kentucky Bar Association
2011-SC-000533-KB October 27, 2011

Opinion and Order of the Court. All sitting; all concur. The Court adopted a negotiated agreement between Sullivan and the KBA that resolved four pending disciplinary proceedings against Sullivan. Sullivan was suspended from the practice of law for 61 days, with 31 days of that suspension probated for one year. Sullivan was required to complete the KBA's Ethics and Professionalism Enhancement Program and to refund certain client fees.

F. Christopher Vavro v. Kentucky Bar Association
2011-SC-000538-KB October 27, 2011

Opinion and Order of the Court. All sitting; all concur. The Supreme Court approved a negotiated sanction suspending an attorney from the practice of law for sixty-one days for continuing to practice law after he had been suspended for failing to comply with continuing legal education requirements. The attorney, while under suspension, sent a letter to an insurance company negotiating a settlement on behalf of a client.