PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
OCTOBER 2012

A. Constitutional Law

1. Jacob Gingerich; et al. v. Commonwealth of Kentucky
2011-SC-000379-DGE **October 25, 2012**
And
Menno Zook; et al. v. Commonwealth of Kentucky
2011-SC-000380-DGE **October 25, 2012**

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Cunningham and Schroder, JJ., concur. Venters, J., concurs in result only by separate opinion. Scott, J., dissents by separate opinion in which Abramson, J., joins.
Appellants, members of the Old Order Swartentruber Amish, were convicted of violating KRS 189.820 for failing to display a reflective sign on their buggies. They appealed on the grounds that the statute violates their right to freely exercise their religion under the Kentucky Constitution. The Court of Appeals affirmed and this Court granted discretionary review.
The Court found that the statute was constitutional and held that the Kentucky Constitution, like the Free Exercise Clause of the First Amendment to the United States Constitution as interpreted by the United States Supreme Court, requires that a neutral statute of general applicability only meet the "rational basis" standard of review because Sections 1 and 5 of the Kentucky Constitution do not afford greater protection to freely exercise one's religion than its federal counterpart.
Venters, J., concurred in result only on the ground that the Court should not be bound by federal jurisprudence when interpreting the Kentucky Constitution.
Scott, J., dissented on the ground that the Kentucky Constitution provides greater protection to freely exercise one's religion than the U.S. Constitution.

B. CRIMINAL

1. David Stiger v. Commonwealth of Kentucky
2008-SC-000864-DG **October 25, 2012**

Opinion of the Court by Justice Abramson. Minton, C.J.; Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J., not sitting. Defendant pled guilty to several offenses including five counts of first-degree robbery, a "violent offense" for the purposes of KRS 439.3401, the violent offender statute. Pursuant to the plea bargain, he was sentenced as a first-degree persistent felon to concurrent terms totaling twenty years, the minimum sentence allowed. Alleging that plea counsel had erroneously assured him that he would be eligible for parole in four

years, whereas under the violent offender statute he must serve seventeen years (85%) before becoming eligible for parole, defendant moved for relief from his guilty plea pursuant to RCr 11.42. The trial court denied relief, and the Court of Appeals affirmed. Upholding the lower courts' rulings, the Supreme Court held that although under *Padilla v. Kentucky*, 559 U.S. ___, 130 S.Ct. 1473 (2010), plea counsel's alleged misadvice amounted to ineffective assistance, defendant had failed to allege how, in the circumstances of a minimum sentence for numerous "violent offender" crimes, the alleged misadvice had been prejudicial.

2. Derek Keeling v. Commonwealth of Kentucky
2010-SC-000351-MR **October 25, 2012**

Opinion of the Court by Justice Scott. All sitting; all concur. The Court affirmed Appellant's guilty but mentally ill (GBMI) convictions for murder and first-degree assault. In so doing, it held CR 41.02(3) unconstitutional as a separation of powers violation when applied to criminal cases, thereby overruling *Commonwealth v. Hicks*, 869 S.W.2d 35 (Ky. 1994) and *Commonwealth v. Taber*, 941 S.W.2d 463 (Ky. 1997). The Court also held that: (1) the trial court did not abuse its discretion by instructing the jury that "treatment shall be provided" to a GBMI defendant; (2) substantial evidence supported a finding that Appellant was competent to stand trial; (3) the trial court did not err by denying Appellant's request to instruct the jury on first-degree assault under extreme emotional disturbance; (4) the trial court did not err in denying Appellant's motion to suppress statements to law enforcement; and (5) the trial court did not err by denying Appellant's motion to sever the murder charge from the attempted murder charge.

3. Keith Edward Meyers v. Commonwealth of Kentucky
2010-SC-000515-DG **October 25, 2012**

Opinion of the Court by Justice Scott. All sitting. Minton, C.J.; Abramson, Cunningham, Noble, and Venters, JJ., concur. Schroder, J., concurs in result only. Appellant was convicted of possession of a firearm by a convicted felon and of being a second-degree persistent felony offender. The trial court permitted Appellant's wife to testify at trial pursuant to KRE 504(c)(2)(A) (an exception to KRE 504(a)'s spousal testimonial privilege). The Court held that this was error, as Appellant's trial for possession of a firearm by a convicted felon did not meet the requirements of the exception, as it was not a "proceeding in which [Appellant was] charged with wrongful conduct against the person or property of" his wife. The error was deemed harmless under the circumstances of the case, and Appellant's convictions were affirmed.

4. Commonwealth of Kentucky v. Russell Tim Pridham, Jr.
2011-SC-000126-DG October 25, 2012
And
Jason Cox v. Commonwealth of Kentucky
2010-SC-000733-DG October 25, 2012

Opinion of the Court by Justice Abramson. All sitting; all concur. In separate cases decided together, both defendants sought relief from guilty pleas on the ground that plea counsel had misadvised them regarding the parole eligibility ramifications of their respective crimes. Affirming Court of Appeals rulings granting relief in one case (*Pridham*) and denying it in the other (*Cox*), the Supreme Court held that under *Padilla v. Kentucky*, 559 U.S. ___, 130 S.Ct. 1473 (2010), counsel's alleged failure to advise Pridham that KRS 439.3401, the violent offender statute, rendered him ineligible for parole for twenty years (as opposed to six years otherwise) amounted to ineffective assistance, whereas counsel's failure to advise Cox of the uncertain but possibly adverse parole ramifications of completion of his sex-offender treatment obligation did not.

5. William D. Slone v. Commonwealth of Kentucky
2011-SC-000493-MR October 25, 2012

Opinion by Justice Venters. Minton, C.J., Abramson, Cunningham, Noble and Scott, JJ., concur. Schroder, J., not sitting. Criminal; *Questions presented*: (1) did the trial court abuse its discretion by granting the Commonwealth's motion for a continuance on the morning of the trial; (2) did the trial court err by not permitting Appellant to cross-examine the victim about her failure for trial; (3) did the trial court err by permitting a rape victim to testify regarding her fear of getting a sexually transmitted disease from her rapist; (4) should a mistrial have been granted upon discovery of an incomplete disclosure of medical witness's forensic report; (5) did the trial court err by (a) failing to conduct a competency evaluation prior to trial, and (b) by failing to send Appellant for further medical testing prior to sentencing; (6) was prosecutor's reference during closing argument to defendant's failure to tell police that he had a sexual encounter with the victim an improper comment on the right to remain silent; and (7) did the trial court err by excusing juror for cause. *Held*: (1) the trial court did not abuse its discretion by granting the Commonwealth's motion for a continuance on the morning of trial; (2) victim's fear of contracting a sexually transmitted disease as a result of rape was relevant and proper subject of testimony; (4) denial of mistrial was proper exercise of trial court's discretion; (5) did the trial court did not err by (a) failing to conduct a competency evaluation prior to trial, or (b) by failing to send him to KCPC for further medical testing prior to sentencing; (6) the prosecutor's comment on Appellant's failure to inform police of his sexual encounter with the victim was not a comment on defendant's right to remain silent; and (7) the trial court did not err by excusing juror for cause.

6. James Wright v. Commonwealth of Kentucky
2011-SC-000191-MR **October 25, 2012**

Opinion of the Court by Justice Scott. Minton, C.J.; Abramson, Cunningham, Noble, and Venters, JJ., concur. Schroder, J., not sitting. Appellant was convicted of first-degree fleeing or evading police, fourth-degree assault, possession of marijuana, and being a first-degree persistent felony offender (PFO). The Court held that the jury instructions on the fleeing or evading charge were overbroad, in that they merely required the jury to find that Appellant and his victim "shared living quarters" rather than the statutory requirement that they were "members of an unmarried couple." Appellant's convictions for first-degree fleeing or evading and first-degree PFO (which was contingent upon the fleeing or evading conviction) were, therefore, reversed and remanded for a new trial consistent with the opinion. Sample instructions were included for use on retrial. Appellant's convictions for fourth-degree assault and possession of marijuana were affirmed; however, the Court held that the portions of his sentences for those crimes that imposed fines were improper due to Appellant's status as an "indigent person" and vacated those portions of the sentence imposing fines.

7. Harold Buster v. Commonwealth of Kentucky
2011-SC-000257-MR **October 25, 2012**

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson, Cunningham, Scott and Venters, JJ., concur. Schroder, J., not sitting. Appellant was convicted of multiple counts of first-degree sexual abuse and sentenced to twenty-years imprisonment. He appealed on the grounds that he did not receive adequate notice of the charges against him, that he was entitled to a directed verdict, and that the trial court retained jurisdiction until after his release for the purposes of determining court costs and a partial public defender fee.

The Court held that Appellant received adequate notice of the charges against him through various bills of particulars and that he was not entitled to a directed verdict because the witnesses were sufficiently credible.

The Court also held that the trial court erred in retaining jurisdiction until after Appellant's release from prison to determine court costs and a partial public defender fee because those determinations must be made at the time of entry of final judgment.

8. Toby Ray Lasure v. Commonwealth of Kentucky
2011-SC-000220-MR **October 25, 2012**

Opinion of the Court by Justice Cunningham. Minton, C.J.; Abramson, Noble, Scott and Venters, JJ., concur. Schroder, J., not sitting. Reversible error occurred where the trial court ruled that the defendant's testimony was necessary in order to admit psychologist's expert testimony. There was ample evidence already

admitted of the defendant's alleged extreme emotional disturbance at the time of the crime. As such, this Court's ruling in Talbott v. Commonwealth was inapplicable. Furthermore, the psychologist offered his expert opinion of the defendant's general mental condition, not specific testimony concerning the alleged extreme emotional disturbance. For this reason also, the expert's testimony was admissible regardless of whether the defendant testified.

9. Bobby Perry v. Commonwealth of Kentucky
2010-SC-000833-MR **October 25, 2012**

Opinion of the Court by Justice Noble. All sitting. Abramson, Cunningham, Schroder and Scott, JJ., concur. Venters, J., dissents by separate opinion in which Minton, C.J., joins.

Appellant was tried on two counts of first-degree sodomy, and was convicted of one count. Appellant appealed as a matter of right under the Kentucky Constitution on the grounds that the trial court erred in denying an independent evaluation or competency hearing and in disallowing the introduction of impeachment evidence of other claims of sexual conduct, and that there was prosecutorial misconduct.

The victim had alleged numerous instances of previous sexual abuse against him by others, but it appeared that his story changed constantly. The Court determined that the trial court erred in not allowing an independent psychological evaluation of the victim in order to examine the effect his psychological condition might have on his memory or ability to tell the truth, and remanded for the trial court to order such evaluation.

The Court also determined that the trial court erred by not holding the type of hearing required by *Dennis v. Commonwealth*, 306 S.W.3d 466 (Ky. 2010), to determine whether allegations of previous sexual abuse by the victim was demonstrably false.
Having reversed and remanded for other reasons, the court did not find specific error as to prosecutorial misconduct.

Venters, J., dissented on the grounds that the trial court had properly determined the victim competent to testify, and that the trial court did not abuse its discretion by denying Appellant's motion to order victim to undergo an independent psychological evaluation.

10. Perry Graves v. Commonwealth of Kentucky
2011-SC-000467-MR **October 25, 2012**

Opinion by Justice Venters. Minton, C.J., Abramson, Cunningham, Noble and Scott, JJ., concur. Schroder, J., not sitting; Criminal, trafficking in a controlled substance; *Questions presented*: (1) Whether evidence of prior acts of drug

trafficking were improperly admitted during trial; (2) Whether the penalty phase jury instruction should require the jury to find Appellant guilty as a first offender before sentencing him as a second or subsequent offender; and (3) Was Appellant entitled to the benefit of being sentenced in accordance with KRS 218A.1412(3)(b), as amended in 2011. *Held*: (1) Evidence relating to a prior undercover drug deal was improperly admitted because it did not fall under the *modus operandi* exception to KRE 404(b); (2) The confidential informant's testimony regarding his prior drug transactions with Appellant was inadmissible because the defense counsel did not open the door to such testimony by asking whether Appellant identified himself on the recording of the undercover drug deal; (3) Right to appellate review was relinquished by accepting the penalty phase instruction, however we have previously held that the existence of a prior conviction is a question of fact for the jury to decide; and (4) This issue is moot because judgment is reversed on other grounds.

C. FAMILY LAW:

1. Rachel Ford v. Keith Perkins

2011-SC-000330-DG **October 25, 2012**

Opinion of the Court by Justice Schroder. Minton, C.J.; Abramson, Cunningham, Noble and Scott, JJ., concur. Venters, J., not sitting. On discretionary review, the issues were whether a finding by the trial court that the parties were married when an individual retirement account (IRA) was acquired was sufficient to support the trial court's equal division of the IRA under *Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009), and whether, on appeal, the Court of Appeals may make a different award of the division of marital property without applying the four factors under KRS 403.190(1) or otherwise identifying the evidence relied on in applying the factors under KRS 403.190(1). The trial court concluded in its order that the entire IRA was marital and must be divided between the parties equally as of the date of the decree. On appeal, the Court of Appeals concluded that "[t]he only evidence presented at trial on the issue of contribution compelled a decision awarding Keith 100% of the IRA," however, the Court of Appeals was silent with respect to the other three factors under KRS 403.190(1). Held: The trial court failed to make sufficient findings under KRS 403.190(1) prior to dividing the IRA, however, on appeal the Court of Appeals erred by awarding the entire IRA to Appellee without remanding back to the trial court for further fact-finding in consideration of all the factors under KRS 403.190(1). The Court vacated in part the opinion of the Court of Appeals allocating one hundred percent of the IRA to Appellee and that part of the Jefferson Circuit Court's judgment allocating fifty percent of the account each to Appellee and Appellant, and remanded to the Jefferson Circuit Court for further proceedings.

2. Michelle L. Walker v. Donna S. Blair
2012-SC-000004-DGE October 25, 2012

Opinion of the Court by Chief Justice Minton. All sitting. Abramson, Cunningham, Noble, Schroder and Venters, J.J., concur. Scott, J., dissents by separate opinion. Michelle Walker and Steve Blair had one child in common, B.B. Steve committed suicide. And a few months later, Steve's mother, Donna Blair, filed a petition under KRS 405.021(1) to establish grandparent visitation with five-year-old B.B. The trial court found that it was in B.B.'s best interests to grant visitation to Blair. The Court accepted discretionary review of the case to consider how to interpret Kentucky's grandparent-visitation statute, Kentucky Revised Statute (KRS) 405.021(1), consistently with the constitutional principles articulated in *Troxel v. Granville*, 530 U.S. 57 (2000), and whether the trial court appropriately interceded to grant the grandmother visitation with the child despite the objection of the child's mother. The Court held that a fit parent is presumed to act in the best interests of the child. A grandparent petitioning for child visitation contrary to the wishes of the child's parent can overcome this presumption of validity only with clear and convincing evidence that granting visitation to the grandparent is in the child's best interests. In determining the child's best interests, the trial court can turn to the following factors in the modified best interests analysis: (1) the nature and stability of the relationship between the child and the grandparent seeking visitation; (2) the amount of time spent together; (3) the potential detriments and benefits to the child from granting visitation; (4) the effect granting visitation would have on the child's relationship with the parents; (5) the physical and emotional health of all the adults involved, parents and grandparents alike; (6) the stability of the child's living and schooling arrangements; (7) the wishes and preferences of the child; and (8) the motivation of the adults participating in the grandparent visitation proceedings. In this case, the trial court in granting visitation to the grandmother and the Court of Appeals in affirming the trial court's grant relied on pre-*Troxel* case law that inappropriately placed grandparents on equal footing with parents when determining visitation. So the Court reversed the decision of the Court of Appeals and remanded the case to the trial court with directions to conduct a new evidentiary hearing and apply the legal standards consistently with this opinion.

D. INSURANCE:

1. In re: Wehr Constructors Inc. v. Assurance Company of America
2012-SC-000221-CL October 25, 2012

Opinion by Justice Venters. All sitting; all concur, with J. Noble concurring by separate opinion. The United States District Courts for the Western District of Kentucky sought certification to the following question of Kentucky law: Whether an anti-assignment clause in an insurance policy that requires an insured to obtain the insurer's prior written consent before assigning the claim under the policy is enforceable or applicable when the claimed loss occurs before the

assignment, or whether such a clause would, under those circumstances, be void as against public policy? Under Kentucky law, an anti-assignment clause in an insurance policy that requires an insured to obtain the insurer's prior written consent before assigning the claim under the policy is not enforceable or applicable when the claimed loss occurs prior to the assignment, and that such a clause would, under those circumstances, be void as against public policy.

E. MALPRACTICE:

1. Christopher Tucker, as Administrator of the Estate of Mindi Tucker, Deceased Etc., et al. v. Women's Care Physicians of Louisville, P.S.C.; And Susan Bunch, M.D.

2010-SC-000466-DG **October 25, 2012**

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Abramson and Cunningham, JJ., concur. Venters, J., dissents by separate opinion in which Schroder and Scott, JJ., join.

Trial court in medical malpractice case denied Estate's request to introduce expert testimony that a standing order from a doctor to a nurse was ambiguous on the grounds that it was not relevant. Court of Appeals held that trial court did not abuse its discretion, and affirmed.
In affirming the Court of Appeals, the Court held that, based on her trial and deposition testimony, the nurse did not believe that the standing order was ambiguous, and therefore any expert testimony that the order was ambiguous was not relevant.

Venters, J., dissented on the ground that the trial court abused its discretion because the proffered expert testimony was relevant and admissible.

F. STATUTORY IMMUNITY:

1. Norton Hospitals, Inc. (D/B/A Norton Suburban Hospital) v. Brandi Peyton

2010-SC-000818-DG **October 25, 2012**
And
Neonatal Intensive Care Experts II, PLLC, et al. v. Brandi Peyton
2010-SC-000819-DG **October 25, 2012**

Opinion of the Court by Justice Schroder. Minton, C.J.; Abramson, Cunningham, Noble and Venters, JJ., concur. Scott, J., dissents by separate opinion. The primary issue was whether a hospital and its employees have statutory immunity under KRS 620.030 and 620.050 where a mother's blood alcohol level may have been misreported to Child Protective Services. KRS 620.050(1) provides immunity from civil and criminal liability for anyone "acting upon reasonable cause in the making of a report or acting under KRS 620.030 to 620.050 in good faith . . ." Therefore, a reporter's good faith belief that he or she is discharging

the lawful duty to report under KRS 620.030, even if such a belief is ultimately determined to be erroneous, is all that is required under KRS 620.050(1). Where the evidence does not establish an issue of material fact as to whether the Appellants acted in good faith under KRS 620.030 in making a report to the Cabinet, the Appellants were entitled to immunity under KRS 620.050(1) as a matter of law. Reversing the decision of the Court of Appeals, the Court concluded that the trial court properly granted summary judgment in favor of the Appellants.

G. TORT:

1. Sophia Savage, et al. v. Three Rivers Medical Center

2010-SC-000478-DG **October 25, 2012**

And

Three Rivers Medical Center v. Sophia Savage, et al.

2011-SC-000348-DG **October 25, 2012**

Opinion by Justice Venters. Minton, C.J., Cunningham, Noble and Scott, JJ., concur. Abramson, J., concurs in result only. Schroder, J., not sitting; Civil, Procedure, Evidence; *Questions presented* 1) Whether, after return of verdict tainted by evidentiary error, trial court had discretion to grant a new trial rather than judgment notwithstanding the verdict; 2) Were duplicate copies of X-rays retained by patient rather than hospital medical record custodian properly admitted into evidence; 3) Was nurse with military training and experience reading x-rays qualified to give expert opinion testimony regarding what is shown on x-ray film; 4) Whether defendant was entitled to jury instruction apportioning fault to settling non-party; and 5) whether damages awarded totaling over $2.5 million were excessive. *Held:* 1) While, ordinarily a verdict based upon insufficient evidence justifies the entry of a judgment notwithstanding the verdict, trial judge has broad discretion under CR 50.02 to grant a new trial instead; 2) Duplicate x-ray was properly admitted into evidence pursuant to KRE 1003; Patient who had retained possession of X-ray film was competent to authenticate it under KRE 901(b)(1); 3) Nurse, with wartime experience reading x-rays to locate shrapnel and bullets in wounded soldiers, had the "knowledge, skill, experience, training" to satisfy requirements of KRE 702 to testify as an expert in reading x-ray to locate metal object left in patient during surgical procedure; 4) In a medical negligence case, to have an apportionment instruction that permits allocation of fault to non-party medical provider, the defendant must put forth sufficient testimony to show that the medical provider failed to conform to the appropriate standard of care; 5) despite trial court's conclusory statement that damage award was the result of jury passion and prejudice, the evidence explicitly established that removal of sponge negligently left in patient's body resulted in substantial pain, discomfort, and disability, as well as emotional anguish, distress, and loss of consortium, so that jury award exceeding $2.5 million was not excessive.

H. UNEMPLOYMENT:

1. Tony C. Taylor v. Kentucky Unemployment Insurance Commission and River Metals Recycling, LLC

2011-SC-000346-DG **October 25, 2012**

Opinion by Justice Venters. All sitting; all concur. Civil, Administrative Law, Statutory Construction; (1) Does failure to include a verification clause in the original complaint petitioning for review of a decision by the Kentucky Unemployment Insurance Commission deprive the circuit court of jurisdiction; (2) Was the verification requirements of KRS 341.450 substantially complied with; (3) Can the verification requirements of KRS 341.450 be met with an attorney's signature pursuant to CR 11; and (4) Does KRS 13B.140, granting the circuit court subject matter jurisdiction, supersede KRS 341.450. *Held:* (1) A verification clause was required for the circuit court to have jurisdiction because it is a condition precedent to the circuit court's ability to exercise judicial power; (2) Appellant did not substantially comply with the verification requirements of KRS 341.450 because he did not prove a deliberate and good faith effort at verification; (3) The attorney's signature does not constitute a verification, pursuant to CR 11, because CR 11 provides that an attorney's signature constitutes a certification and a certification is not a verification; and (4) This issue was not considered on its merits because Appellant failed to raise it in his filings to the circuit court or the Court of Appeals.

2. Kentucky Unemployment Insurance Commission, et al. v. Diana Cecil

2010-SC-000349-DG **October 25, 2012**

Opinion of the Court by Justice Schroder. All sitting; all concur. Appellee was repeatedly tardy to work in violation of employer's policy. Appellee was given the opportunity to sign a "last chance agreement" admitting to her conduct and agreeing to remedy such, or resign. Appellee refused to sign (or resign) and her employment was terminated. The Commission denied unemployment benefits on grounds that Appellee was fired for misconduct, "refusing to obey reasonable instructions", per KRS 341.370(6) (for not signing the agreement). The Jefferson Circuit Court affirmed and the Court of Appeals reversed. Held: (1) The Commission erred in holding that Appellee was discharged for "refusing to obey reasonable instructions" – not signing the agreement. Rather, the record showed that Appellee was discharged for tardiness. Because tardiness is also disqualifying misconduct under KRS 341.370(6), the denial of benefits was nevertheless proper. (2) A willful or wanton, or bad faith, finding, is not an additional requirement when the employee is discharged for misconduct specifically identified in KRS 341.370(6).

I. WRIT:

1. Fred M. Jones, Jr. v. Hon. Robert Costanzo (Bell Circuit Court Judge), et al.

2012-SC-000054-MR **October 25, 2012**

Opinion of the Court by Justice Scott. Minton, C.J.; Abramson, Cunningham, Noble, and Venters, JJ., concur. Schroder, J., not sitting.
The Court affirmed the Court of Appeals' denial of Appellant's petition for writ of mandamus requesting the release of expert funds to evaluate him and testify regarding his competency to plead guilty. In doing so, the Court resolved an apparent discrepancy between three previous cases. *Hodge v. Coleman*, 244 S.W.3d 102 (Ky. 2008) and *Mills v. Messer*, 254 S.W.3d 814 (Ky. 2008) had addressed a virtually identical issue and did not analyze the threshold inquiry to issuance of a writ of proving lack of an adequate remedy by appeal, and suggested that in this narrow set of circumstances concerns of judicial economy outweighed a showing of lack of an adequate remedy by appeal. On the other hand, *Fields v. Caudill*, No. 2011-SC-000252-OA (Ky. Aug. 25, 2011) held, under the exact same factual scenario as *Hodge* and *Mills*: "Not only has the Petitioner not alleged or proved that he lacks an adequate remedy by appeal, this Court is quite sure that an appeal is exactly the appropriate remedy for the errors alleged in this case." The Court approved the *Fields* holding and concluded that Appellant had neither alleged nor proven lack of adequate remedy by appeal, which is an absolute prerequisite to the issuance of this type of writ.

2. Vanda Collins (Individually and as Executrix of the Estate of Roy Collins) v. Honorable Paul Braden (Now Deceased) and Baptist Regional Medical Center, Etc., et al.

2011-SC-000770-MR **October 25, 2012**

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson, Cunningham, Scott and Venters, JJ., concur. Schroder, J., not sitting.

Court of Appeals granted a writ of prohibition stopping the Whitley Circuit Court from ordering disclosure of various documents that Baptist Regional Medical Center claims are protected by attorney-client privilege. The Court of Appeals found that the documents were privileged. This Court reversed.

The Court held that Baptist Regional Medical Center failed to show that the privilege applied to various documents. The documents were contained in various reports prepared by attorneys, but the hospital failed to demonstrate that the reports contained only privileged statements. Thus, the Court held that writ of prohibition was improper.

J. ATTORNEY DISCIPLINE:

1. Michael W. Lyons v. Kentucky Bar Association
2011-SC-000514-KB **October 25, 2012**

Opinion and Order. All sitting; all concur. Lyons was privately reprimanded in October 2011 after pleading guilty to an aggravated DUI, second offense. Less than seven months later, Lyons was arrested and pleaded guilty to a third-offense DUI. The KBA moved the Court to convert the private reprimand into an order of public reprimand, which the Court granted.

2. Kentucky Bar Association v. William L. Summers
2012-SC-000254-KB **October 25, 2012**

Opinion and Order. All sitting; all concur. The Ohio Supreme Court suspended Respondent from the practice of law for six months and ordered that he repay $15,000 to his client's family. The issue before the Court was whether Respondent had properly demonstrated that identical reciprocal discipline should not be imposed in Kentucky.

The Court held and ordered that, under Kentucky Supreme Court Rule 3.435(4), identical reciprocal discipline should be imposed and thus suspended Respondent from the practice of law for 180 days.

3. Kentucky Bar Association v. Bradley Kraemer
2012-SC-000379-KB **October 25, 2012**

Opinion and Order. All sitting; all concur. The Supreme Court imposed reciprocal discipline on an attorney who had been suspended for two years, with one year probated, by the Supreme Court of Ohio. The attorney pled guilty to one count of theft for failing to remit 60% of a $12,000 attorney's fee to his law firm, as required by an agreement between the attorney and his law firm. The Supreme Court of Kentucky imposed a two-year suspension, with the last year probated on the condition that he continue to participate in mental-health counseling.

4. Steven E. Wides v. Kentucky Bar Association
2011-SC-000574-KB **October 25, 2012**

Opinion and Order. All sitting; all concur. Pursuant to a negotiated sanction, the Supreme Court publicly reprimanded an attorney for violating SCR 3.130-1.3 (diligence), -1.4(a)(4) (communication), -1.16(d) (terminating representation), and -8.1(b) (failing to respond to disciplinary authority), subject to certain conditions. After paying the attorney $1,500 to assist him in joining a lawsuit against a corporation, a client attempted to contact the attorney on several occasions but received no response. The attorney was served with a bar complaint and a follow-up letter, but the attorney responded to neither. The attorney and the KBA

negotiated a sanction whereby he would receive a public reprimand and (1) attend the Ethics and Professionalism Enhancement Program and (2) receive no new charges of unethical conduct from the Inquiry Commission for one year. If these conditions are not met, the attorney agreed that the public reprimand will become a thirty-day suspension.

5. Robert Steven Jaffe v. Kentucky Bar Association
2012-SC-000575-KB October 25, 2012

Opinion and Order. All sitting; all concur. Jaffe was suspended from the practice of law in February 2012 for non-payment of bar dues. Prior to that, in June 2011, Jaffe had filed a motion to withdraw from the KBA. However, due to pending bar complaints related to Jaffe's misappropriation of funds from his firm, Jaffe was precluded from withdrawing under SCR 3.480(1). The Inquiry Commission charged with violating SCR 3.130-8.4(c) after an investigation determined that Jaffe had misappropriated funds from one or more of the firm's accounts.

Jaffe filed a motion to resign under terms of permanent disbarment, in which he admitted to making transfers and withdrawal from the firm's accounts for his own personal benefit. The KBA did not object to the motion and the Court agreed that permanent disbarment was the appropriate sanction.

5. Wayne w. Fitzgerald v. Kentucky Bar Association
2012-SC-000576-KB October 25, 2012

Opinion and Order. All sitting; all concur. Held: Respondent's guilty plea to Theft by Failure to Make Disposition of an amount between $500.00 and $10,000.00 warranted permanent disbarment.