

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
OCTOBER 2013**

I. ADMINISTRATIVE LAW:

- A. Comprehensive Home Health Services, Inc., Etc. v. Professional Home Health Care Agency, Inc., et al.**
[2012-SC-000090-DG](#) **October 24, 2013**

Opinion of the Court by Justice Abramson. All sitting; all concur. Professional Home Health Care Agency and the Whitley County Health Department appealed from an opinion and order of the Franklin Circuit Court remanding a Certificate of Need application for a new hearing based upon a finding that the Commonwealth of Kentucky, Cabinet for Health and Family Services denied them due process in the hearing on their challenge to an application for a Certificate of Need filed by Comprehensive Home Health Services. The Court of Appeals concluded that the Franklin Circuit Court erroneously limited the scope of evidence on remand to the Cabinet to the State Health Plan in effect at the time of the earlier hearing.. The Supreme Court, affirming the Court of Appeals, held that the relevant statutory and regulatory provisions require the use of the State Health Plan currently in effect at the time of the Cabinet’s decision on remand.

II. CRIMINAL LAW:

- A. Arlen Castle v. Commonwealth of Kentucky**
[2011-SC-000717-MR](#) **October 24, 2013**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. After pleading guilty to the commission of four Class B felonies and two Class D felonies, Castle’s sentences were ordered to be served consecutively, not to exceed sixty years. On appeal, Castle argued that the aggregate length of his sentence was in contravention of KRS 532.110. After considering the interplay between KRS 532.110 and 532.080, the Court held that the longest “extended term” sentence available under KRS 532.080 for an offender convicted of a Class A or B felony is life imprisonment. As a result, the Court further held that the only limitation on the aggregate length of consecutive sentences for defendants whose highest class of crime is a Class A or B felony is the seventy-year cap contained in KRS 532.110(1)(c). Because Castle’s sentence did not exceed the seventy-year cap, his sentence was affirmed.

- B. Samantha Mayse v. Commonwealth of Kentucky**
[2012-SC-000015-MR](#) **October 24, 2013**

Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellant was convicted of complicity to murder and first-degree complicity to robbery. Appellant received concurrent sentences of life imprisonment without parole for

whether the contact has prejudiced the defendant to the extent that he did not received a fair trial.

**D. Erick Vega v. Commonwealth of Kentucky
2010-SC-000111-DG October 24, 2013**

Opinion of the Court by Justice Cunningham. Minton, C.J.; Abramson and Noble, JJ., concur. Scott, J., dissents by separate opinion in which Venters, J., joins. Keller, J., not sitting. A police officer had probable cause to arrest appellant and conduct a search incident to that arrest for the crime of carrying a concealed deadly weapon, after another officer noticed the barrel of a gun protruding from underneath a toolbox sitting on the front passenger seat of the appellant's vehicle during a traffic stop.

**E. Commonwealth of Kentucky v. James W. Steadman
2010-SC-000326-DG and 2011-SC-000508-DG October 24, 2013
October 24, 2013**

Opinion of the Court by Justice Noble. All sitting; all concur. Issues reviewed on appeal included: (1) whether a circuit court retains subject-matter jurisdiction to order restitution after entering a final judgment sentencing a defendant to imprisonment, and (2) whether a CR 59.05 motion is timely filed when there is no evidence about when the motion was mailed.

As to the jurisdiction issue, Steadman argued that the trial court's subject-matter jurisdiction disappeared ten days after the entry of the sentencing judgment and that his notice of appeal transferred jurisdiction to the Court of Appeals. The Court rejected this argument noting that Steadman and Court of Appeals' decision confused the concept of general subject-matter jurisdiction and particular-case jurisdiction. The Court held that the trial court had lost its particular-case jurisdiction when it entered its restitution order ten days after the final judgment imposing sentencing, but that it had not lost its subject-matter jurisdiction. Because the error of the trial court was a particular-case jurisdiction error, and not a subject-matter jurisdiction error as Steadman contended, the Court found that he had waived his right to challenge the error on appeal because he did not challenge it at the trial court level and had gone along and agreed with the scheduling of the restitution hearing. The Court's decision reversed the decision of the Court of Appeals and the matter was remanded to the trial court for reinstatement of the restitution order.

On the second issue, the Court held that although Steadman was correct that the timeliness of a CR 59.05 motion turns on when the motion is served and that "service is complete on mailing" he had failed to adequately prove the time of the mailing. In reaching its conclusion, the Court noted that the Appellant had failed to date his certificate of service and that the Department of Corrections mail policy did not support Steadman's claims that he had mailed his motion within the proper time period. The Court also found Steadman's argument that CR 6.05 added three additional days to the ten day period allowed under CR 59.05

unpersuasive. The Court affirmed the part of the Court of Appeals' decision dismissing Steadman's argument.

F. Commonwealth of Kentucky v. Frank D. Hamilton, et al.
2011-SC-000227-DG October 24, 2013

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Frank D. Hamilton and Heather Cole entered conditional guilty pleas to trafficking in a controlled substance—specifically, buprenorphine. In 2002, as a result of a change in federal law, the Cabinet for Health and Family Services reclassified buprenorphine from a Schedule V to a Schedule III drug. The General Assembly has granted the Cabinet such authority under KRS 218A.020(3). Hamilton attempted to challenge this classification. The trial court found the classification proper, but ruled jurisdiction was lacking to the extent Hamilton wished to challenge the methods used by the federal Drug Enforcement Administration in classifying buprenorphine. The Court held the trial court had subject matter jurisdiction to review the sufficiency of the findings involved in the Cabinet's classification because KRS 218A.020(3) simply allows the Cabinet to adopt the procedures and findings made by the federal government. A challenge to a classification under KRS 218A.020(3) does not involve the invalidation of federal action. Furthermore, the Court held the trial court could take judicial notice of the federal regulation as a determination that the findings required of the Cabinet exist. The Cabinet is not required to make independent findings under KRS 218A.020(3). According to the Court, this process is no different than if the Cabinet had contracted with a third-party laboratory to perform testing on the Cabinet's behalf or relied upon published testing by a third-party laboratory. Finally, the Court held the Attorney General and Cabinet are not necessary parties on remand. Specifically, the Court held the Attorney General is required to be notified of a constitutional challenge to a statute but the Attorney General's participation is not required. The Court noted it is unclear how the Cabinet and Attorney General would be added to a criminal prosecution.

III. LEGAL MALPRACTICE:

A. Barbara A. Abel, et al. v. J. Brent Austin, et al.
2010-SC-000426-DG October 24, 2013

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Abramson, Cunningham and Keller, JJ., concur. Scott, J., dissents by separate opinion in which Noble, J., joins. Civil Action, Legal Malpractice, Statute of Limitations. Appellants were 49 of the plaintiffs participating in mass tort litigation brought in Kentucky against the manufacturer of the popular diet drug known as "fen-phen." Ultimately, their claims were transferred to similar litigation pending in an Alabama court, where they were settled. Five years later, after discovering that they had not received the full compensation for which their claims were settled, Appellants brought suit alleging legal malpractice was committed by the lawyers in Alabama and Kentucky that settled their claims and distributed the settlement proceeds. The defendants asserted that Appellants' action was barred by

Alabama's statute of repose on legal malpractice claims, which was applicable in the Kentucky lawsuit by virtue of Kentucky's borrowing statute, KRS 413.320. Appellants asserted that Kentucky's more lenient statute of limitations on professional negligence claims, KRS 413.245, applied. Held: Because Appellant's claims accrued in Kentucky where the settlement funds were distributed, rather than Alabama where the litigation was settled, the borrowing statute did not permit the application of Alabama law. Kentucky's statute of limitations applied. Nevertheless, Appellants' claims were barred because the evidence unequivocally established that for more than a year before filing suit, Appellants knew or should have known that they had a claim against their lawyers.

IV. WORKERS COMPENSATION:

**A. Patricia Hornback v. Hardin Memorial Hospital, et al.
2012-SC-000195-WC **October 24, 2013****

Opinion of the Court. All sitting; all concur. Opinion of the Court. All sitting; all concur. Hornback was severely injured during an attempted elevator rescue conducted by her employer. The rescue was not conducted using safety protocols which were provided by the elevator manufacturer. The Court applied the four part test provided in *Lexington-Fayette Urban County Government v. Offutt*, 11 S.W.3d 598 (Ky. App. 2000), and determined that: 1) a stalled elevator created a condition or activity in the workplace presented a hazard to employees; 2) that employer or employer's industry recognized the hazard of negligent elevator rescues; 3) that a negligently conducted elevator rescue could lead to serious injury or death; and 4) that reasonable means existed to eliminate the potential injury to the employee. Upon determining that the employer violated the general duty provision in KRS 338.031 under the test set forth in *Offutt*, the Court further found that Hornback was entitled to an enhancement of her workers' compensation award pursuant to KRS 342.165(1) because her employer's actions in breaching the general duty provision constituted an intentional disregard of a safety hazard that "even a lay person would obviously recognize as likely to cause death or serious physical harm."

V. ATTORNEY DISCIPLINE:

**A. Philip R. Combs v. Kentucky Bar Association
2013-SC-000238-KB **October 24, 2013****

Opinion of the Court. All sitting; all concur. Combs asked the Supreme Court to impose a 30-day suspension from the practice of law, probated for one year with certain conditions, to resolve his pending disciplinary matter relating to his failure to make certain disclosures in a client's bankruptcy petition. The KBA had no objection, having reached an agreement with Combs for a negotiated sanction. Accordingly, the Court granted the motion and suspended Combs from the practice of law for 30 days, probated for one year with certain conditions.

**B. Kentucky Bar Association v. Thomas E. Roberts
2013-SC-000615-KB **October 24, 2013****

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Keller, Noble, Scott and Venters, JJ., concur. Cunningham, J., concurs in part and dissents in part. The Inquiry Commission issued a four-count charge against Roberts. Roberts filed no answer to the charge and neither he nor his counsel ever contacted the Office of Bar Counsel. However, a relative of Roberts informed Bar Counsel that Roberts suffered emotional, mental, and substance-abuse problems, and that those problems were active at the time of the conduct in question. The Board of Governors voted to find Roberts guilty of all four counts and recommended a 30-day suspension, conditionally discharged on the conditions that Roberts complete a KYLAP referral and assessment and complete the Office of Bar Counsel's Ethics Professionalism Enhancement Program. Neither Roberts nor Bar Counsel filed a notice of review with the Court. Because the Board's findings were supported by the record and the law, and because the sanction recommended by the Board was appropriate in light of Roberts' disciplinary history and the seriousness of the charges, the Court adopted the decision of the Board under SCR 3.370(10).

**C. Timothy Crawford v. Kentucky Bar Association
2013-SC-000669-KB **October 24, 2013****

Opinion of the Court. All sitting; all occur. Crawford was suspended from the practice of law for a period of sixty-one days, with thirty-one days probated for two years, effective April 26, 2012. Prior to this suspension, Crawford was suspended for a period of thirty days on March 24, 2011. Crawford maintained that he was unaware of the thirty-day suspension because disciplinary actions against him were deliberately concealed by his assistants. Although a thirty-day suspension typically expires on its own terms under SCR 3.510(2), Bar Counsel filed an objection to Crawford's automatic reinstatement because there were four separate disciplinary actions pending against him. The disciplinary investigations resulted in charge and were consolidated. Crawford eventually reached a negotiated sanction with the KBA, resulting in the April 26, 2012 suspension.

Because Bar Counsel objected to Crawford's automatic reinstatement after his original thirty-day suspension, he was required to submit an application for reinstatement pursuant to SCR 3.510(3). The Character and Fitness Committee of the Kentucky Office of Bar Admissions conducted a thorough investigation and issued Findings of Fact, Conclusions of Law and Recommendations indicating that Crawford had complied with every term of the order of suspension; that his conduct while under suspension showed that he was worthy of the trust and confidence of the public; that he possessed sufficient professional capabilities to serve the public as a lawyer; that he exhibited good moral character; and that he appreciated the wrongfulness of his prior misconduct, expressed contrition, and took steps to ensure similar conduct would not occur. The Committee recommended reinstatement and the Board of Governors agreed. The Court

adopted the Board's recommendation and reinstated Crawford to the practice of law in the Commonwealth.