

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
OCTOBER 2015**

I. CERTIFICATION OF LAW:

- A. In re: Nancy J. McCarty, et al. v. Convol Fuels No. 2, LLC, etc.**
[2014-SC-000589-CL](#) October 29, 2015

Opinion of the Court by Justice Venters. All sitting; all concur. The United States Court of Appeals for the Sixth Circuit requested certification of Kentucky law as to this question: May a subcontractor injured while installing a garage door on an unfinished building at a mine site maintain a claim against a mine operator under a negligence per se theory for alleged violations of Kentucky mine safety statutes, KRS Chapters 351–352, and mining regulations, KAR §§ 805–825? HELD: The traditional concept of negligence per se, codified by KRS 446.070, provides a cause of action to persons injured by the violation of a statute if: 1) the plaintiff comes within the class of persons intended to be protected by the statute; 2) the statute was specifically intended to prevent the type of injury that occurred; and 3) the violation of the statute was a substantial factor in causing the result.

Negligence per se extends to violations of an administrative regulation if the enabling statute for the regulation expressly mandate compliance with regulation. Based upon the language of the applicable statutes and regulations, the Court concluded that the legislature intended statutes to impose duties on mine operators to protect miners and other workers routinely associated with the process of extracting coal and to prevent injuries caused by dangers inherent to the mining environment and the extraction of coal. The subcontractor injured while installing a garage door on an unfinished building at a mine site did not suffer the kind of injury addressed by the mining statutes and thus could not rely upon a negligence per se theory to sustain his claim against the mine operator.

II. CONSTITUTIONAL LAW:

- A. Greater Cincinnati/Northern Kentucky Apartment Association, Inc., et al. v. Campbell County Fiscal Court, et al.**
[2014-SC-000383-TG](#) October 29, 2015

Opinion of the Court by Justice Cunningham. All sitting. Abramson, Barber, Keller, and Noble, JJ., concur. Venters, J., dissents by separate opinion. This case involved the funding of 911 emergency telephone services. In order to pay for these services, the Campbell County Fiscal Court (“County”) adopted Ordinance O-04-13 (“Ordinance”). The Ordinance replaced the landline subscriber charge with an annual service fee of \$45.00 levied upon each occupied individual residential and commercial unit within Campbell County. The Greater Cincinnati/Northern Kentucky Apartment Association (“Association”) filed a declaratory action in Campbell Circuit Court alleging that the Ordinance was an

was not one of standing, but, rather, whether the GPS tracking device invaded Thornton's legitimate expectation of privacy. The Supreme Court held that police monitoring the GPS signals from the car Thornton was permissively driving (but did not own) did not invade any reasonable expectation of privacy, and therefore, Thornton's Fourth Amendment rights were not violated. The Court also affirmed the trial court's denial of Thornton's motion for a directed verdict, as it was not clearly unreasonable that a juror could have convicted Thornton based on the evidence adduced at trial. Finally, the Supreme Court held that the trial court did not abuse its discretion in failing to fully grant Thornton's motion to sever.

C. Michael E. Simpson v. Commonwealth of Kentucky
[2014-SC-000653-MR](#) October 29, 2015

Opinion of the Court by Justice Venters. All sitting; all concur. Police officers entered a house with permission to search for and arrest Adkins. After Adkins was located, police continued with a wider search of the building "as a precautionary matter" to assure their own safety while they completed the arrest of Adkins. In so doing, they found Appellant who identified himself as "Ralph Simpson" although his true name is Michael Simpson. Soon after Appellant left the premises, police discovered his true identity and also that he was wanted on outstanding arrest warrants. They quickly apprehended him, arrested him on the pending warrant, and found a handgun in his pocket. He was then charged as a felon in possession of a handgun. He also spontaneously uttered an incriminating statement which was used as evidence against him. Appellant contends that his arrest and the evidence obtained as a result of his arrest resulted from the extended search of the building, and because that search was unconstitutional, the evidence flowing from it should have been suppressed. Held: 1 As a procedural matter, notwithstanding the replacement of RCr 9.78 (relating to appellate review of a trial court's findings on a suppression motion) by RCr 8.27, by application of CR 52.01 in conjunction with RCr 8.27, the standard of appellate review of suppression motion rulings remains substantively unaffected; 2) Pursuant to *Maryland v. Buie* 494 U.S. 325 (1990) and *Guzman v. Commonwealth*, 375 S.W.3d 805, 807 (Ky.2012), and based upon articulable facts drawn from reasonable inferences, the officers arresting Adkins were authorized to conduct a protective sweep of the premises beyond the area of Adkins' arrest into places that may harbor a person that poses a threat to those on the scene. The trial court findings in that regard were supported by substantial evidence which consisted of police officers' observations of a gun and drug paraphernalia in the house, numerous persons on the scene despite the inhabitability of the house, all general indicators that it was a "drug house" which inherently poses dangers to police officers.

D. Commonwealth of Kentucky v. Mike Douglas Rieder
[2014-SC-000210-DG](#) October 29, 2015

Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellee was charged with murder after shooting and killing a fellow bar patron. The shooting

Opinion of the Court by Justice Keller. Minton, C.J.; Abramson, Barber, Cunningham, and Keller, JJ., concur. Venters, J., not sitting. Noble, J., concurs but would state that “lethality” factors are merely a series of factors often found to have been present after the fact of domestic violence (and certainly not all of them in every case), and as always, a court must exercise independent judgment as to the weight of the presence of any of the factors in the case before it, as such factors have not been normed nor found to be statistically predictive.

Sarah filed a domestic violence petition against her husband, Jeffrey, and the family court entered a Domestic Violence Order (DVO) against him following a hearing. The Court of Appeals affirmed the DVO. On appeal to the Supreme Court, Jeffrey argued that he was deprived of a full appellate review because the Court of Appeals did not receive the video record of the DVO hearing and because the family court erroneously relied on “lethality factors” when it entered the DVO. The Supreme Court affirmed the Court of Appeals. In doing so, the Court held Jeffrey was foreclosed from assigning error because of the missing video because he was on notice that the record lacked the video before the Court of Appeals rendered its opinion and failed to object. Moreover, the Court concluded that Jeffrey’s appeal was not prejudiced by the missing video because it was not necessary to the issues on appeal. As to the “lethality factors” issue, the Court held that the factors were not taken by to judicial notice but rather by judicial knowledge. As such, the Court concluded that the family court made and documented sufficient findings of domestic violence and any reliance on “lethality factors” was not indicative of erroneous reasoning.

V. INSURANCE LAW:

**A. Tower Insurance Co. of New York v. Brent Horn, et al.
2014-SC-000015-DG **October 29, 2015****

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Abramson, Barber, Cunningham, Keller, and Venters, JJ., concur. Noble, J., concurs in result only. B & B Contracting (B & B) permitted Brent Horn, a non-employee, to drive one of its trucks when it was short-staffed. Bradley Stafford, an employee of B & B, fell from the truck Horn was driving and was fatally injured. Stafford’s estate brought a wrongful death action against Horn, and Horn sought indemnification and defense from B & B’s commercial automobile liability insurer: Tower Insurance Company of New York (Tower). Tower filed an intervening complaint, seeking a declaration of rights. The trial court granted summary judgment in favor of Tower and denied coverage to Horn. The Court of Appeals reversed.

The Supreme Court affirmed the opinion of the Court of Appeals. In doing so, the Court determined that Horn was not an employee of B & B but was a volunteer permissive user. As such, under Tower’s policy, Horn was an insured

and entitled to indemnification and defense. Next, the Court considered the applicability of the policy's "Employee Indemnification And Employer's Liability" provision, which excluded any coverage for bodily injury to an employee of the insured. The Court held that this exclusion did not apply to Horn because the policy's severability clause applied coverage separately to each insured. In other words, because the insured, Horn, was not Stafford's employer, the exclusion did not negate Horn's coverage. To arrive at this holding, the Court considered and distinguished case law from this jurisdiction and others.

VI. TRESPASS:

A. Larry Penix v. Barbara Delong 2014-SC-000083-DG **October 29, 2015**

Opinion of the Court by Justice Cunningham. All sitting. Barber, Keller, and Venters, JJ., concur. Minton, C.J., dissents by separate opinion in which Abramson and Noble, JJ., join. This case involves the unlawful cutting of timber and the application of tremble damages authorized under KRS 364.130. Appellant contracted with a logger to cut timber located on Appellant's land. In the course of cutting Appellant's timber, the logger trespassed on and cut the timber from a neighboring property that was owned by Appellee. Appellee sued Appellant and the logger for trespass, seeking damages for the missing timber and the damage to the land. The case was tried without a jury. The trial court found for Appellee and awarded stumpage value and damages, but declined to award treble damages because it found that Appellant had no intent to remove timber from Appellee's property. A cross-appeal followed. The Court of Appeals vacated the circuit court's ruling on treble damages and costs and remanded for additional findings and further proceedings. The Supreme Court of Kentucky granted discretionary review and affirmed the trial court's determination that Appellant did not intend to convert Appellee's timber. Thus, treble damages were inappropriate here. KRS 364.130. The Supreme Court reinstated the trial court's judgment ordering Appellant to pay Appellee the fair and reasonable market value of the timber at the time it was cut.

VII. WORKERS COMPENSATION:

A. Sheila Woosley Kingery v. Sumitomo Electric Wiring, et al. 2014-SC-000422-WC **October 29, 2015**

Opinion of the Court by Justice Noble. Abramson, Cunningham, and Venters, JJ., concur. Minton, C.J., dissents by separate opinion in which Barber and Keller, JJ., join. The employer, Sumitomo, moved to reopen Kingery's original award of benefits for a work-related strain injury to her neck in 1989 to dispute current medical treatment on grounds that it was neither reasonable and necessary nor related to the original work injury. Sumitomo supported its motion with a medical

for lack of prosecution. Venter never informed her client of the dismissal. Her client unsuccessfully attempted to contact her after learning from a friend who checked for him that his divorce was not final, and she has not returned any fees paid to her. The client filed a bar complaint, which Venter never responded to. The Inquiry Commission issued a five-count charge alleging violations of (1) SCR 3.130-1.3 by failing to act with reasonable diligence in her representation in the divorce action; (2) SCR 3.130-1.4(a)(3) by failing to tell the client the case was dismissed; (3) SCR 3.130-1.4(a)(4) by failing to respond to the client's requests for information and attempts to contact her; (4) SCR 3.130-1.5(a) by charging an unreasonable fee because she failed to prosecute the divorce action and did not refund any prepaid fee; and (5) SCR 3.130-8.1(b) by failing to respond to the Office of Bar Counsel's requests for information. Venter did not answer the charge, and the matter was submitted to the Board of Governors as a default case under SCR 3.210(1). The Board found her guilty of counts 1,2,3, and 5, and not guilty of count 4. The Board considered her disciplinary history, which included *Kentucky Bar Association v. Venter*, 463 S.W.3d 343 (Ky. 2015) (ordering 181-day suspension for multiple criminal charges and failures to carry through on client matters, apparently related to substance-abuse problem), and recommended Venter be suspended for 60 days to be served consecutively to that previously ordered suspension. Because neither the Office of Bar Counsel nor Venter sought review by the Supreme Court under SCR 3.370(7), and the Court declined review under SCR 3.370(8), the Board's decision was adopted in full under SCR 3.370(9).