PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
SEPTEMBER 2012

I. CERTIFICATION OF LAW:

A. Commonwealth of Kentucky v. Michael L. Wilson
2011-SC-000157-CL **September 20, 2012**

Opinion of the Court by Justice Cunningham. All sitting; all concur. A warrant was issued for Defendant's arrest on February 17, 2011 for assault in the fourth degree. The next day, before Defendant was arrested, defense counsel made an ex parte request to the district judge to set aside the warrant and issue a summons instead. The request was granted. The county attorney's later request for the arrest warrant to be reinstated was denied and Defendant eventually pled guilty to the charge. The Supreme Court granted the county attorney's certification request to answer whether Kentucky law authorizes an ex parte motion by a criminal defendant to vacate or set aside a warrant for his or her arrest with no notice or opportunity for the Commonwealth to be heard. The Court held that the answer was an "unequivocal no," holding that SCR 4.300, Canon 3B(7), and SCR 3.130-3.5 prohibit an ex parte motion by a criminal defendant to vacate or set aside a warrant for his or her arrest with no notice or opportunity for the Commonwealth to be heard.

II. CRIMINAL LAW:

A. Darius Harris v. Commonwealth of Kentucky
2011-SC-000001-MR **September 20, 2012**

Opinion of the Court by Justice Abramson. All sitting; all concur. Defendant was convicted of murder and sentenced to forty years in prison. On appeal, he claimed the trial court erred when it allowed into evidence the fact that he owned two guns that were not used to commit the crimes, erred when it admitted hearsay testimony from the victim's wife, and also erred when it refused to allow him to inform the jury he had been tried twice previously for this offense and both prior juries deadlocked. Affirming the trial court, the Supreme Court held that the admission of the hearsay evidence and the admission of the two guns into evidence constituted error, but were harmless error not warranting reversal. While the gun evidence should not have been admitted, it was repeatedly made clear to the jury that the guns were not the murder weapons. As for the hearsay evidence, the Court found that the statement, even if reflective of the victim's state of mind, was not admissible because his state of mind was not an issue in the case. However, the erroneously admitted evidence did not substantially sway the verdict. The Court also held that the Defendant was properly prohibited from informing the jury that he had been tried twice previously and that both juries were deadlocked because such evidence was not relevant.

B. Gerald Barker v. Commonwealth of Kentucky
2010-SC-000116-DG **September 20, 2012**
And
Commonwealth of Kentucky v. Ryan Jones
2011-SC-000123-DG **September 20, 2012**

Opinion of the Court by Chief Justice Minton. All sitting. Abramson, Noble, and Venters, JJ., concur. Cunningham, J., concurs in result only by separate opinion in which Schroder and Scott, JJ., join. Barker and Jones were convicted of various crimes and received probation sentences. Before the expiration of the periods of probation, the Commonwealth moved to revoke probation because Barker and Jones received new criminal charges. On appeal, Barker argued that the trial court improperly considered his arrest on new felony charges as the sole basis for revoking his probation because he had not been convicted on those new felony charges. Jones claimed the trial court erred by failing to postpone his probation revocation hearing until after the resolution of his new charges. Additionally, Jones argued that the timing of his probation revocation hearing erroneously forced him to choose between asserting his right against self-incrimination on the new felony charge and presenting a complete and meaningful defense to probation revocation. On review, the Supreme Court held that (1) the trial court was not required to delay probation revocation or modification hearings awaiting resolution of the criminal charges that arise during the probationary period; (2) when the probationer is faced with probation revocation or modification and a criminal trial based upon the same conduct that forms the basis of new criminal charges, the probationer's testimony at the probation revocation hearing is protected from use at any later criminal trial in the state courts of Kentucky; (3) the trial court must advise the probationer that any testimony the probationer gives in probation revocation hearings that relates to the facts underlying the new charges cannot be used as substantive evidence in the trial of the new charges; and (4) the probationer's testimony at the revocation hearing can be used for impeachment purposes or rebuttal evidence in the trial of the new charges; and the trial court shall so advise the probationer. So, in Barker's case, the Court affirmed the opinion of the Court of Appeals because under the circumstances, the fact that the trial court did not inform Barker that he could testify at his own probation revocation hearing with limited immunity did not affect his substantial rights or result in a manifest injustice. In Jones's case, the Court also affirmed the Court of Appeals on different grounds and remanded Jones's case to the trial court for proceedings consistent with this opinion.

C. Terry W. Roach v. Commonwealth of Kentucky
2011-SC-000141-DG **September 20, 2012**

Opinion of the Court by Justice Abramson. All sitting; all concur. Defendant sought relief from his convictions for murder and robbery in a timely motion pursuant to RCr 11.42. He also sought to amend his motion outside the RCr

11.42 limitations period. Denying relief, the trial court ruled that the proffered amendment was barred by limitations and that the original motion was meritless. The Court of Appeals affirmed. Upholding the denial of relief, the Supreme Court held that while RCr 11.42 motions are subject to amendment pursuant to CR 15, to the extent that defendant's proffered amendment attempted to raise factually distinct claims outside the limitations period, it did not relate back to the original motion and so was properly dismissed as untimely. Otherwise, defendant's motion was properly denied, since it failed to allege specific facts amounting to an RCr 11.42 claim.

D. Commonwealth of Kentucky v. Shawn A. Morseman
2011-SC-000167-DG September 20, 2012

Opinion of the Court by Justice Scott. All sitting; all concur. Pursuant to a plea agreement, Appellee pled guilty to Fraudulent Insurance Acts by Complicity (over $300) and was sentenced to a five-year probated sentence and ordered to pay restitution to his insurance company in the amount of $48,597.02—the full amount distributed by the insurance company after Appellee's house burned down. In return, the Commonwealth dropped a Second-Degree Arson charge. The Court of Appeals vacated the restitution order, holding that KRS 532.350 and KRS 533.030 only authorized trial courts to award restitution for losses incurred as a result of illegal conduct for which a defendant has been convicted; because Appellee had not been adjudged guilty of arson, he could not be ordered to reimburse the insurance company for amounts distributed for property damage. The Supreme Court reversed, holding that that a trial court is authorized to order restitution for damages not suffered as a direct result of the criminal act(s) for which the defendant has been convicted when, as part of a plea agreement, the defendant freely and voluntarily agrees to the restitution condition.

E. Ross Brandon Sluss v. Commonwealth of Kentucky
2011-SC-000318-MR September 20, 2012

Opinion of the Court by Justice Noble. All sitting; all concur. Trial court convicted Appellant of murder, assault in the first degree, two counts of assault in the fourth degree, driving under the influence of intoxicants, and tampering. Appellant was sentenced to life imprisonment and appealed on sixteen separate grounds.

The Court affirmed the trial court's denial of a directed verdict on Appellant's murder count because there was sufficient evidence to allow a reasonable jury to find Appellant guilty of murder.

The Court also examined an issue with two jurors who rendered the guilty verdict. During voir dire, the jurors denied knowing anyone involved in the case. One of the jurors denied being a member of the social networking website Facebook. Appellant discovered after trial that each juror was "friends" on the Facebook site

with the mother of the murder victim.

The Court concluded that merely being "friends" on a social networking website is not sufficient, by itself, to require a juror to be struck for cause. Rather, the Court remanded the case to the trial court for the sole purpose of conducting a hearing concerning the issue of the two jurors' involvement with the victim's mother on Facebook.

Additionally, the Court described what measures counsel may use for investigating jurors and potential jurors during each phase of trial and the process for reporting juror misconduct on social media. The remaining issues were abated pending the result of the trial court hearing.

IV. EASEMENT USE AND ACCESS:

A. John Sawyers, et al. v. Arthur Beller, et al.

2010-SC-000678-DG **September 20, 2012**

Opinion of the Court by Justice Schroder. All sitting. Abramson, Noble, Scott, and Venters, JJ., concur. Minton, C.J., concurs in part and dissents in part by separate opinion in which Cunningham, J., joins. On discretionary review, the single issue was the extent of an easement owner's right to maintain his right-of-way and the scope of the limitations that may be imposed thereon. Appellants were the owners of an unrestricted express easement to a right-of-way across the Appellees' property. Held: Because the Appellants had an express easement to the right-of-way, without any reservations or restrictions, the circuit court's order imposing restrictions as to the use of the road and prohibiting the Appellants from maintaining the road by paving or rocking it was improper. The Court reversed in part the opinion of the Court of Appeals and that part of the Allen Circuit Court's judgment that restricted the Appellants' rights to the use and maintenance of the right of way.

V. EDUCATION/STATUTORY RIGHT:

A. Jefferson County Board of Education, et al. v. Chris Fell, as Father and Next Friend of L.F., et al.

2011-SC-000658-DGE **September 20, 2012**

Opinion of the Court by Justice Abramson. All sitting. Minton, C.J.; Noble, Schroder, and Scott, JJ., concur. Cunningham, J., dissents by separate opinion in which Venters, J., joins. Venters, J., dissents by separate opinion in which Cunningham, J., joins. Parents of fourteen Jefferson County schoolchildren brought suit alleging that KRS 159.070 gave all Kentucky schoolchildren a statutory right to attend the school nearest their home. The circuit court granted summary judgment in favor of the Jefferson County Board of Education and other

associated defendants (collectively JCPS), finding that the right "to enroll" in the nearest school did not include the right to attend that school given the distinctive meanings of the two words and the particular history of KRS 159.070 – the statute had included language to the effect that students could "enroll for attendance" until 1990 when "for attendance" was omitted. The Court of Appeals reversed and JCPS sought discretionary review. The Supreme Court focused on the language of KRS 159.070, the differing usage of "enroll" and "attend" in other parts of KRS Chapter 159, the legislative history of KRS 159.070 and harmony with other statutes as well as consistency with prior law in concluding that there was no statutory right to attend the school nearest a student's home. Student assignment is a matter that the General Assembly has long delegated to the sound discretion of local school boards and KRS 159.070 cannot be read as a statutory limitation on that broad discretion.

VI. EMPOLYMENT LAW:

A. Department of Revenue, Finance and Administration Cabinet, et al. v. Wanda Faye Wade, et al.

2011-SC-000095-DG **September 20, 2012**

Opinion of the Court by Justice Scott. All sitting; all concur. Appellee, a state employee, was terminated from her employment after a series of events in which her pre-termination hearing was continually postponed. Her employer alleged that she had waived her right to a pre-termination hearing by virtue of her conduct. The Kentucky Personnel Board, the Franklin Circuit Court, and the Court of Appeals all concluded that Appellee had not waived her right to a pre-termination hearing, and that her dismissal therefore violated her right to due process. The Supreme Court reversed, holding that Appellee was provided with notice of her employer's intent to terminate her and an opportunity to be heard; however, she waived that opportunity by deliberately engaging in conduct designed to delay the hearing as long as possible.

VII. ESTATE LAW:

A. Jackie Griffin, Individually and as Administratrix of the Estate of Curtis W. Rice v. Kathy Rice

2011-SC-000250-DG **September 20, 2012**

Opinion of the Court by Justice Abramson. Minton, C.J.; Schroder and Venters, JJ. concur. Cunningham, J., Dissents by separate opinion. Noble, J., dissents by separate opinion in which Cunningham and Scott, J., join. Kathy and Curtis Rice were married approximately four months before separating and filing for divorce. While they were separated but still married, Curtis died in a work-related accident. Jackie Griffin, Curtis's mother and administratrix of his estate, claimed that Kathy was barred by Kentucky Revised Statutes (KRS) 392.090(2) from

receiving an interest in Curtis's estate. The statute provides that a spouse who voluntarily leaves the other and "lives in adultery" forfeits his or her right to and interest in the other's estate and property. Based on Griffin's proof at trial that Kathy had sexual intercourse with another man the night prior to Curtis's death, the trial court held that Kathy forfeited her interest in Curtis's estate pursuant to KRS 392.090(2). The Court of Appeals reversed, holding the single act of adultery engaged in by Kathy prior to Curtis's death was insufficient to constitute "liv[ing] in adultery" under the statute. The Supreme Court affirmed the Court of Appeals decision, holding that the statutory language "lives in adultery" requires more than a single instance of adultery. The Court held that while the adulterous activity need not be with the same man or woman, it must be periodic or recurring, a sustained or notorious activity to constitute ""liv[ing] in adultery" under the statute.

VII. MEDICAL MALPRACTICE:

A. Raza Hashmi, M.D. v. Linda Kelly, Administratrix of the Estate of Rosalie Stamper

2009-000843-DG **September 20, 2012**

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Abramson, Cunningham, Schroder, and Venters, JJ. concur. Scott, J., concurs in part and dissents in part by separate opinion. At issue was a discovery violation question about the use of deposition testimony of a treating physician, Dr. Johnstone. At trial, Dr. Johnstone's deposition testimony was being offered by Appellant Hashmi as expert testimony about the standard of care. Appellee asked Dr. Johnstone whether Appellant violated the standard of care and he responded, "I think it was fine," but his deposition indicated that he had never seen Appellant's actual, detailed medical records and did not have them in his possession. Instead, he had only reviewed a summary of Appellant's medical records prepared by his attorney. Appellee asked to review what the treating physician had reviewed, which was refused as work-product, and thus had no basis to cross-examine the doctor.

However, Dr. Johnstone was never specifically identified as an expert witness by Appellant going into trial, but had been identified as a trial witness. Appellee filed a motion to exclude the standard of care testimony portion of Dr. Johnstone's deposition because he had not been identified as an expert witness and the testimony was not admissible because it was not based on decedent's records.

The trial court overruled the motion and allowed Dr. Johnstone's deposition to be played in its entirety. The jury found for the Appellant. The Court of Appeals reversed, simply finding that Appellant had not complied with the language or spirit of CR 26, Kentucky's discovery rules.

This Court reversed. Although the Court found that the trial court erred in

allowing that portion of Dr. Johnstone's deposition to be played to the jury without providing Appellee notice, such error was deemed to be harmless because it amounted to five words uttered in an eight day trial.

Scott, J., agreed with the Court that the trial court erred in allowing Dr. Johnstone's deposition to be played, but dissented on the ground that the testimony may have swayed the jury's verdict, and was therefore not harmless.

IX. NEGLIGENCE:

A. Benjamin Wright, Jr. v. House of Imports, INC. D/B/A In Style
2011-SC-000264-DG **September 20, 2012**

Opinion of the Court by Justice Scott. All sitting; Minton, C.J.; Cunningham, Noble, Schroder and Venters, JJ., concur. Schroder, J., also concurs by separate opinion. Abramson, J., concurs in result only. A jury awarded Appellant $120,863.75 in his common-law negligence action after he fell down a set of stairs at Appellee's retail business establishment. The Court of Appeals reversed and remanded for a new trial, holding that the trial court committed palpable error in permitting expert testimony of building code violations without instructing the jury as to the applicability of the code. The Supreme Court reversed the Court of Appeals' judgment and reinstated that of the trial court. First, it held that because this was a common-law negligence cause of action, and not a negligence per se claim, testimony concerning the building codes was irrelevant and therefore erroneously admitted. However, the trial court's failure to instruct the jury on the applicability of the building code did not constitute *palpable* error because the allegedly fatal instructions were tendered by the defendant/Appellee. The Court held that "[w]hen a trial court adopts a party's proposed jury instructions, that party cannot be heard to complain that its 'substantial rights' have been affected by said instructions, nor that a 'manifest injustice has resulted from the error.'"

X. TAX LIENS:

A. Tax Ease Lien Investments 1 LLC v. Commonwealth Bank & Trust et al.
2011-SC-000277-DG **September 20, 2012**

Opinion of the Court by Justice Scott. All sitting; all concur. At issue was whether a mortgage lienholder has standing to object to an agreed judgment between the mortgagor and the purchaser of the mortgagor's delinquent property tax liens. The Court of Appeals determined that the mortgage lienholder has standing to contest the Agreed Judgment, and the Supreme Court affirmed, holding that the mortgage lienholder has standing for two reasons. First, KRS 426.006 confers standing upon the mortgage lienholder to challenge the agreed judgment. Second, the mortgage lienholder has suffered a direct financial injury as a result of the agreed judgment.

XI. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. Terry Ray Edwards
2012-SC-000142-KB **September 20, 2012**

Opinion and Order. All sitting; all concur. While acting as co-curator managing the financial affairs of his disabled ward, Edwards wrote checks to himself totaling $78,000 from his ward's funds; sold his ward's home without court approval; failed to file the required accountings with the court; and paid himself $20,810 in fees from the ward's funds. The Court held that permanent disbarment was the appropriate sanction for Edwards, whose actions were "not only a breach of duty to his ward, but also his duty to the court and the public." The Court further held that Edward "committed 'an offense greater and broader than a mere injury to his client,'" which brought the entire bar into disrepute and severely damaged the public trust.

B. Kentucky Bar Association v. Ronald E. Thornsberry
2012-SC-000380-KB **September 20, 2012**

Opinion and Order, suspending Respondent from the practice of law for 181 days. All sitting; all concur. Held: Respondent's failure to communicate with client and failure to respond to the KBA's requests for information warranted, considering Respondent's previous discipline, a suspension from the practice of law for 181 days.

C. Kentucky Bar Association v. D. Anthony Brinker
2012-SC-000386-KB **September 20, 2012**

Opinion and Order. All sitting; all concur. Brinker was charged with violating SCR 3.130-3.4(c), SCR 3.130-8.1(b), and SCR 3.130-8.4(c). After Brinker failed to respond to the charges, the matter came before the Board of Governors by default. The Board voted unanimously to recommend a one-year suspension, based on the current charges and previous disciplinary actions for which Brinker's license remains suspended. The Court held that the Board's recommendation was consistent with discipline imposed in similar cases and suspended Brinker from the practice of law in Kentucky for one year.

D. Kentucky Bar Association v. Ronnie Wayne Reynolds
2012-SC-000400-KB **September 20, 2012**

Opinion and Order. All sitting; all concur. Reynolds pleaded guilty in federal court to felony charges arising out of an extortion scheme in which he charged exorbitant legal fees to clients facing criminal charges and then split the fees with the Whitley County Sheriff, who had procured the clients for Reynolds. Reynolds

was immediately suspended from the practice of law upon his conviction. The Board of Governors then moved for permanent disbarment from the practice of law in Kentucky. The court adopted the Board's recommendation and permanently disbarred Reynolds and ordered him to pay the cost of the proceeding.

E. Kentucky Bar Association v. Leo Marcum
2012-SC-000411-KB **September 20, 2012**

Opinion and Order. All sitting; all concur. Held: Respondent's guilty plea to six felony counts for failure to file Kentucky income taxes warranted permanent disbarment.

F. Matthew Scott Finley v. Kentucky Bar Association
2012-SC-000465-KB **September 20, 2012**

Opinion and Order. All sitting; all concur. Finley, a lawyer for Kentucky State Government, admitted to breaching the Executive Branch Code of Ethics and agreed to pay a $2,000 civil penalty after an administrative proceeding before the Executive Branch Ethics Commission. The KBA subsequently charged Finley with violating SCR 3.130-8.4(c) for using his official position for financial gain. Finley admitted that he violated the ethics rule and moved for a public reprimand, without objection from the KBA. The Court agreed that a public reprimand was the appropriate sanction and granted Finley's motion.

G. John D.T. Brady v. Kentucky Bar Association
2012-SC-000478-KB **September 20, 2012**

Opinion and Order. All sitting; all concur. The Inquiry Commission issued a four-count charge against Brady alleging violations of several ethics rules. Brady admitted to all alleged violations and to another Bar Complaint filed against him and moved the Court to impose a 181-day sentence with 121 days probated for two years and the remaining 60 days suspended from the practice of law, on the condition that he continue his monitoring agreement with KYLAP and that he agree to attend the next scheduled Ethics and Professionalism Enhancement Program. The KBA did not object to Brady's motion. The Court granted Brady's motion and imposed the requested discipline.

H. Danielle Brown v. Kentucky Bar Association
2012-SC-000480-KB **September 20, 2012**

Opinion and Order. All sitting; all concur. Judgment was entered against Brown in Fayette District Court. After she failed to appear for post-judgment depositions on two occasions and failed to appear for a hearing, the court required her to show cause why she should not be held in contempt. Brown failed to appear for the show cause hearing and was subsequently arrested and ordered to post bond. The court ordered her to appear and show cause as to why it should not order the bond money to be paid to satisfy the judgment against her and Brown again failed to appear. The Office of Bar Counsel wrote to Brown several times asking for an explanation for her failure to follow court orders. Brown failed to respond and was served with an Inquiry Commission complaint. She again failed to respond, eventually leading the Inquiry Commission to formally charge her. Brown admitted to the charges and agreed to a negotiated sanction of thirty days suspension. The Court agreed that the negotiated sanction was appropriate and imposed the suspension against Brown.