PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
SEPTEMBER 2017

I. CONTRACTS:

A. AEP Industries, Inc. v. B.G. Properties, Inc.

2014-SC-000512-DG **September 28, 2017**

Opinion of the Court by Justice Venters. All sitting; all concur. Civil appeal; specific performance; doctrine of merger. The circuit court granted summary judgment on A.E.P.'s demand for specific performance of a real estate option contract between A.E.P. and B.G, directing B.G. to convey real estate to A.E.P. After entry of the judgment but before appealing, B.G. transferred the property to A.E.P. with a conventional general warranty deed without reservation. The Court of Appeals held that summary judgment granting specific performance was improper because disputed issues of fact material to such relief was left unresolved in the circuit court. Upon review, the Supreme Court held: (1) BG's execution and delivery of a general warranty deed conveying the property to AEP in fee simple, without qualification or condition, coupled with its unconditional acceptance of the purchase price rendered the controversy moot. BG did not preserve its objections to the trial court's order of specific performance of the option agreement by posting a supersedeas bond pursuant to CR 62.03, CR 73.04, and CR 73.06. Nor did BG avail itself of an alternative means of staying the order by seeking immediate relief from the Court of Appeals staying the matter pending appellate review. The Court relied upon the merger doctrine holding that the acceptance of a deed tendered in performance of an agreement to convey merges the written or oral agreement to convey in the deed. Any provisions of the underlying contract not cited in the deed are thereby extinguished and the deed regulates the rights and liabilities of the parties. Citing 77 Am. Jur. 2d Vendor and Purchaser § 227 (2017). The Court also relied upon the principle that when a party to a judgment acquiesces to the validity of the judgment or otherwise takes a position inconsistent with any theory other than the validity of the judgment, he has impliedly waived his right to contest the validity of the judgment on appeal.

II. CRIMINAL LAW:

A. Lonnie Conyers v. Commonwealth of Kentucky
AND
Roy Edward Tucker v. Commonwealth of Kentucky
AND
Joseph Hardy v. Commonwealth of Kentucky

2015-SC-000655-MR **September 28, 2017**
2015-SC-000687-MR **September 28, 2017**
2016-SC-000340-MR **September 28, 2017**

Opinion of the Court by Justice Hughes. All sitting; all concur. At a joint trial, the three co-defendants were each convicted of two counts of first-degree burglary upon proof that they broke into two residences and stole various items including firearms. Each was sentenced as a first-degree persistent felon to two concurrent terms of twenty years in prison. Affirming the conviction and sentence in all three cases, the Supreme Court rejected claims that juror and witness misconduct necessitated a mistrial, that proof of first-degree burglary should have been deemed insufficient, that the defendants were entitled to a jury instruction on receiving stolen property, that defendant Hardy was entitled to a jury instruction on voluntary intoxication, and that defendant Conyers was entitled to resentencing in light of statutory changes that allegedly rendered one of his prior felonies a misdemeanor.

B. John Fairley III v. Commonwealth of Kentucky
2016-SC-000021-MR **September 28, 2017**

Opinion of the Court by Justice Hughes. All sitting; all concur. Fairley was convicted for first-degree robbery, receiving stolen property (firearm), first-degree possession of a controlled substance (while armed), and possession of marijuana (while armed). For these crimes, Fairley was sentenced to twenty years' imprisonment. Among his allegations of error, Fairley contended that the trial court erred by permitting the victim to make an in-court identification, despite the fact that he had been unable to identify Fairley prior to trial. Rejecting this argument, the Court explained that the trial court did not abuse its discretion in permitting the victim to make in-court identification of Fairley. The Court declined to extend *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972) to in-court identifications. The Court rejected Fairley's remaining claims of error and affirmed his conviction.

C. William Harry Meece v. Commonwealth of Kentucky
2016-SC-000326-MR **September 28, 2017**

Opinion of the Court by Justice Keller. All sitting; all concur. Appellant was convicted by a Warren County jury of three counts of Murder; first degree Burglary; and first degree Robbery. The jury fixed Appellant's punishment at death, and this Court affirmed on Appellant's direct appeal. Appellant filed a CR 60.02 motion, which was denied by the circuit court. Appellant's motion raised allegations of perjury by several of the Commonwealth's witnesses as well as allegations of fraud by the Commonwealth. Upon review of Appellant's CR 60.02 motion, the Court found Appellant's arguments without merit and that the arguments either should have been brought on direct appeal or through Appellant's currently pending RCr 11.42 motion.. Even if Appellant's allegations were found to be accurate, the Court could not say CR 60.02 relief is appropriate due to the overwhelming amount of evidence presented at trial against the Appellant. The Court affirmed the circuit court's denial of Appellant's CR 60.02 motion.

D. Commonwealth of Kentucky v. Joshua Deante Jackson
AND
Commonwealth of Kentucky v. Telly Savalas Denson
2016-SC-000530-TG **September 28, 2017**
2016-SC-000531-TG **September 28, 2017**

Opinion of the Court by Justice Venters. All sitting; all concur. Criminal law; Plea agreements; Ex post facto law. The 2016 amendment of KRS 189A.010 extended the look-back period for prior DUI offenses available to enhance the penalty for a later DUI offense from five years to ten years. Jackson and Dennison each incurred a new DUI charge after the effective date of the 2016 amendment, and each had at least one prior DUI that was captured by the new look-back period but not the former look-back period.

Each defendant challenged the application of the new law to enhance his current offense. The trial court held that because the guilty pleas to the former charges mentioned the enhancement period of five years, the amended 10-year period could not be used to elevate the current DUI charges. Upon review, the Supreme Court reversed, holding: (1) prior plea agreements had merely informed the defendants of the then-current penalty regimen, and did not transform the statutory look-back period into an enforceable contractual element of the plea agreements. Based upon the texts of the agreements it would not be reasonable for a defendant pleading guilty under the agreement to infer from some combination of the provisions of the agreement that the future ramifications of his conviction would cease after five years. The Court further held that the application of the new look back period did not violate ex post facto principles or the requirements of *Boykin v. Alabama*.

E. Robert Morrison v. Commonwealth of Kentucky
2015-SC-000712-DG **September 28, 2017**

Opinion of the Court by Justice Wright. All sitting; all concur. A Hickman Circuit Court jury found Robert Morrison, guilty of escape and fleeing or evading police and found him to be a first-degree persistent felony offender. The trial court sentenced Morrison to fifteen years' imprisonment. Morrison appealed to the Court of Appeals, arguing the trial court erred in failing to strike a juror for cause, and that court affirmed the trial court. Morrison then sought discretionary review with the Supreme Court, which the Court granted. The juror at issue denied any knowledge of the case, but was the County Attorney's mother. Because the County Attorney had handled the preliminary hearing in Morrison's case (and defense counsel pointed that fact out in front of the juror), the Court held that the trial court abused its discretion by denying Morrison's motion to strike the juror at issue for cause. Therefore, the Court reversed the Court of Appeals and remanded the matter to the trial court for further proceedings.

III. DEFEASIBLE EASEMENTS:

A. Majestic Oaks Homeowners Association, Inc. v. Majestic Oaks Farms, Inc., et al.

2016-SC-000213-DG **September 28, 2017**

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Cunningham, Hughes, Keller, Venters, and Wright, JJ., sitting. All concur. VanMeter, J., not sitting. The Court reversed the Court of Appeals and remanded to the trial court with instructions to enter summary judgment in favor of Majestic Oaks Homeowners Association. The Court officially recognized the concept of a "defeasible easement," which is an easement capable of termination upon the occurrence of a specified event or contingency. Kentucky law only discussed this easement concept in passing in two prior cases; this case officially recognizes this concept as a part of Kentucky law. In a 6-0 decision, the Court found one of the terms for defeating the easement came to fruition and therefore terminated the easement.

IV. FAMILY LAW:

A. Stephen Marchese v. Allison Aebersold

2016-SC-000644-DGE **September 28, 2017**

Opinion of the Court by Justice Venters. All sitting; all concur. Domestic Violence; Judge's Recusal; Judicial Notice. Following a brief recess during a Domestic Violence hearing, the trial judge returned to the bench and announced that she had learned that the respondent, Marchese, had an assault conviction which refuted his claim that he had no history of violent behavior. Instead of allowing Marchese to respond to that information, the trial judge found the facts required for entry of a domestic violence order (DVO) and directed Marchese to leave the courtroom while the order was prepared. The Court of Appeals held the judge's use of extrinsic evidence (the Virginia conviction) presumably under the theory of judicial notice was error but harmless. On discretionary review, the Supreme Court found that the DVO was improperly ordered because the trial judge's extrajudicial investigation to discover incriminating information about a party in litigation disqualified the judge, and require immediate recusal. *Allred v. Judicial Conduct Commission*, 395 S.W.3d 417, 443-44 (Ky. 2012); KRS 26A.015; and Judicial Canon 3E(1)(a). KRS 26A.015(2) requires a judge to "disqualify in any proceeding: (a) Where he has ... personal knowledge of disputed evidentiary facts concerning the proceedings ... [and] (e) Where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned." The failure of the trial judge to rescue, sua sponte, upon acceptance of extrajudicial information was structural error, undermining the integrity of the proceeding. Moreover, KRE 201 governing "Judicial Notice" does not cover the out-of-state criminal judgment used by the judge because KRE 201 admits only facts that are generally known within the county of venue or facts that are capable of accurate and ready determination from an unimpeachable source, and the alleged Virginia conviction fit neither category.

V. GOVERNMENTAL IMMUNITY:

A. Board of Trustees of the Kentucky School Boards Insurance Trust v. Joseph N. Pope, Jr., Etc., et al.

2015-SC-000664-TG **September 28, 2017**

Opinion of the Court by Justice Venters. All sitting; all concur. Civil Appeal, Governmental immunity. Appellee, deputy insurance rehabilitator sued the Appellants for negligent management and breach of fiduciary duties with respect to a self-insured insurance trust fund. Appellants claimed immunity from suit as a governmental entity. *Question presented*: Whether the trial court erred by concluding that the Kentucky School Boards Insurance Trust (KSBIT) Board of Trustees does not qualify for governmental immunity. *Held*: *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009), provides a two-prong test to determine whether an offspring entity is entitled to governmental immunity. The Board does not meet either test. As its parent entity is not the public school boards participating in KSBIT's insurance programs, it was not created by a governmental entity the enjoys the cloak of governmental immunity. As its function is providing insurance coverage, the same business activity ordinarily accomplished by private individuals or business corporations, it is not performing a function integral to state government.

VI. NUISANCE:

A. Brown-Forman Corporation, et al. v. George Miller

2014-SC-000717-DG **September 28, 2017**

Opinion of the Court by Justice Wright. All sitting; all concur. George Miller filed suit in Jefferson County against Brown-Forman and Heaven Hill seeking damages based on several state tort theories and seeking injunctive relief. Brown-Forman and Heaven Hill filed a motion to dismiss for failure to state a claim upon which relief could be granted. The trial court granted the motion to dismiss, as it determined the federal Clean Air Act preempted Miller's claims. Miller appealed and the Court of Appeals reversed and remanded, holding that the Act did not preempt Miller's claims. The Supreme Court granted Brown-Forman and Heaven Hill's motion for discretionary review. The Court affirmed the Court of Appeals insofar as it held that the trial court erred in granting Brown-Forman's motion to dismiss the state tort claims for damages, as these claims are not preempted by the Clean Air Act. However, the Court reversed the Court of Appeals' holding regarding Miller's injunctive relief. While the Court disagreed with the trial court that the Act preempted the injunctive relief, it held that the injunctive relief was inappropriate for other reasons. Namely, the Court held that the requested injunction, which would require implementation of a particular type of pollution-control technology not required under Brown-Forman's and Heaven Hill's permits, conflicts with the Clean Air Act by invading EPA and Metro District's regulatory turf, in a manner that the Kentucky General Assembly has spoken against. Therefore, the Court held that an

injunction to control an alleged nuisance when the state has already specifically balanced those factors is inappropriate.

VII. OPEN MEETINGS:

A. Board of Commissioners of the City of Danville, Kentucky v. Advocate Communications, Inc., Etc.

2016-SC-000280-DG **September 28, 2017**

Opinion of the Court by Justice VanMeter. All sitting; all concur. The Board of Commissioners of the City of Danville sought to find additional space for its Public Works Department. The property already occupied by Public Works then became available for sale at an absolute public auction. At the next regularly scheduled meeting, the Board went into a closed session to discuss the auction advertisement, and authorized bidding at the auction up to $1,500,000, the appraised value of the property. The Board also discussed using a bidding agent to conceal the City's interest and participation in the auction to avoid affecting the price. At the auction, the City, through its agent, was the successful bidder at a total price, including buyer's premium, of $1,237,500. The City signed the auction purchase contract agreeing to buy the property at a closing to be held within 30 days, subject only to a standard contingency that the City receive merchantable title via a general warranty deed, free and clear of all liens and encumbrances, except easements, covenants and restrictions of record. The mayor tendered the requisite 10% deposit check of $123,750 for the buyer's premium. Significantly, the contract contained no contingency of Board approval. At the next meeting, the Board again went into closed session to discuss the property's purchase. At the adjournment of the closed session, the Board openly and unanimously approved the purchase of the property. At its following meeting, the Board, for the first time, publicly discussed the purchase in open session. The Advocate-Messenger filed a complaint alleging that the Board had violated the Open Meetings Act, which the Board failed to answer. The Attorney General issued a decision that the Board had committed both a violation of the Open Meetings Act and in not responding to the complaint. Boyle Circuit Court then upheld the Attorney General's determination but denied The Advocate-Messenger's claim for attorney's fees and costs on the grounds that the violation was not willful. The parties filed cross appeals to the Court of Appeals, which affirmed the Open Meetings violation but reversed on the willfulness finding and remanded to the Circuit Court for imposition of costs and attorneys' fees.

The Supreme Court held in this context of an absolute auction, the Board impermissibly went into closed session and no exception permitted the Board's action. Since in an absolute auction, each bid is an acceptance and thereby forming a contract, once the bid was issued, the City was already obligated to purchase the property and thus took action not open to deliberation. The Open Meetings Act was violated since the decision to bid on and to buy the property was made in closed session. Second, this Court vacated that portion of the Court of Appeals' opinion remanding to the Boyle Circuit Court for an assessment of fees and costs because the Board's action was not willful.

VIII. WORKERS COMPENSATION:

A. Uninsured Employers Fund v. Jose Acahua, et al.

2016-SC-000252-WC **September 28, 2017**

Opinion of the Court by Justice Keller. Minton, C.J.; Cunningham, Hughes, Keller, and Venters, J., concur. Wright, J., dissents by separate opinion. VanMeter, J., not sitting. Silva Lamas was injured when he fell from a ladder working as a brick mason's helper. He brought an application for resolution of injury claim against his employer, Acahua, and later joined Lopez as a defendant/employer. The employers did not have workers' compensation insurance and the Chief ALJ joined the UEF as a party. The ALJ sent a copy of the joinder order to Lopez by first-class mail. Silva-Lamas filed a second application for resolution of injury claim and the Commissioner of the Department of Workers' Claims sent a copy of the application to Lopez via first-class mail. The mailing was returned stamped undeliverable. The ALJ found that Silva-Lamas was permanently and totally disabled. The UEF contested whether Lopez was properly notified of the claim and asserted the DWC lacked jurisdiction to proceed against him. The Workers' Compensation Board and the Court of Appeals affirmed the ALJ.

The issue presented by this case was whether the DWC was required to notify Lopez of the claim by registered mail under KRS 342.135, or whether notice by first-class mail was sufficient. The Court held that the first-class mailing was sufficient to provide notice. KRS 342.135 states that notice is considered properly given if sent by registered mail or if the notice is given and served like notices in civil actions. The Court analyzed the statute as providing that notice by registered mail is adequate, but nothing in the statute requires notice be given solely by registered mail. In construing the statute as a whole, two methods of giving notice were acceptable. The first-class mailing in this case complied with giving notice pursuant to CR 5.01 and 5.02. The Court affirmed the Court of Appeals.

IX. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. Delbert Keith Pruitt

2017-SC-000141-KB **September 28, 2017**

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, VanMeter, Venters, and Wright, JJ., concur. Cunningham, J., not sitting. The Board of Governors found Pruitt guilty of violating SCR 3.130-1.4(a)(3) (two counts), -1.4(a)(4), -3.4(c), and -8.1(b) and unanimously recommended that he be suspended from the practice of law for 181 days and be referred to the Kentucky Lawyer Assistance Program. After considering the significance of Pruitt's violations, his failure to respond to any correspondence relating to the complaints, and his disciplinary history, the Court adopted the Board's recommendations and sanctioned Pruitt accordingly.

B. Kentucky Bar Association v. James Grant King
AND
James Grant King v. Kentucky Bar Association
2017-SC-000142-KB **September 28, 2017**
2017-SC-000245-KB **September 28, 2017**

Opinion and Order of the Court. All sitting; all concur. King moved the Court to resign under terms of permanent disbarment based on his admitted disciplinary violations. The misconduct leading up to King's motion spanned six KBA files and occurred over the course of more than a decade. King acknowledged that sufficient facts existed to justify the issuance of charges and sought to resign under the terms of permanent disbarment in order to terminate all KBA proceedings against him.

The Supreme Court reviewed the "disconcerting" facts underlying King's violations, including the use of clients' funds for his personal use, and noted that King had been indicted on three felony charges related to fraud he perpetrated after defaulting on a loan. Based on these facts, the Court granted King's motion and permanently disbarred him from the practice of law.

C. Kentucky Bar Association v. Kenneth Joseph Bader
2017-SC-000204-KB **September 28, 2017**

Opinion and Order of the Court. All sitting; all concur. The disciplinary proceedings against Bader arose from orders entered by the Bullitt Circuit Court finding him to be in contempt of court on three separate occasions for failing to appear to represent the interests of his client. Bader did not file a response to the initial complaint but eventually responded after the Inquiry Commission issued a two-count charge against him. Bader's letter indicated he was suffering from health and personal issues but did not include any documentation to support his claims. Furthermore, Bader filed nothing else of record throughout the remainder of the proceeding, nor did he participate in any other way.

Following a disciplinary hearing, the Trial Commissioner concluded that Bader violated SCR 3.130(3.4)(c) by engaging in conduct that resulted in the three contempt orders. The Trial Commissioner also found that Bader violated SCR 3.130(8.1)(b) by failing to respond to additional requests for information during the disciplinary hearing. After considering Bader's past discipline, the Trial Commissioner that Bader be suspended from the practice of law for 30 days. The Supreme Court agreed with the Trial Commissioner's recommendation and found that the proposed sanction was appropriate and supported by prior decisions. Accordingly, the Court suspended Bader from the practice of law for 30 days.

D. Kentucky Bar Association v. Christy Smith Grayson
2017-SC-000240-KB **September 28, 2017**

Opinion and Order of the Court. All sitting; all concur. The KBA moved under SCR 3.380(2) to indefinitely suspend Grayson from the practice of law for failing to respond to charges initiated by the Inquiry Commission. The charges, both of which involved Grayson's misconduct relating to adoption cases, alleged violations of SCR 3.130(1.3) (failure to perform work for which the attorney was hired; SCR 3.130(1.4)(a)(3) (failure to communicate with client); SCR 3.130(1.4)(a)(4) (failure to respond to requests for information); SCR 3.130(1.16)(d) (failure to refund unearned fee); SCR 3.130(8.1)(b) (failure to respond to a lawful demand for information from an admissions or disciplinary authority) and SCR 3.130(8.4)(c) (misrepresentation and providing a fraudulent document).

Grayson was personally served by the Martin County Sheriff's Office but failed to respond to the charges. Because of this failure, the KBA moved for indefinite suspension. The Court granted the motion and suspended Grayson indefinitely.

E. Kentucky Bar Association v. Lauren M. Thompson
2017-SC-000255-KB **September 28, 2017**

Opinion and Order of the Court. All sitting; all concur. The West Virginia Supreme Court of Appeals suspended Thompson from the practice of law for three (3) months; ordered Thompson to complete an additional twelve (12) hours of continuing legal education; and required Thompson to pay the costs of the disciplinary proceedings. Subsequently, the KBA moved for the Supreme Court of Kentucky to order Thompson to show cause why she should not be subject to reciprocal discipline. Thompson responded by requesting reciprocal discipline not be imposed. The Court concluded that Thompson failed to provide a legally sufficient reason why the Court should not impose reciprocal discipline. The Court found that Thompson's conduct, in failing to respond to orders of the Supreme Court of Appeals of West Virginia, did not "warrant substantially different discipline" in Kentucky under SCR 3.435(4)(b). Accordingly, the Court ordered Thompson suspended from the practice of law in the Commonwealth for three months; ordered Thompson to complete an additional twelve hours of continuing legal education; and ordered Thompson to pay all costs of the disciplinary proceeding.

F. Kentucky Bar Association v. Robert Hansford Hoskins
2017-SC-000266-KB **September 28, 2017**

Opinion and Order of the Court. All sitting; all concur. The Supreme Court of Ohio entered an order in May 2017 permanently disbarring Hoskins from the practice of law. As a consequence of the Ohio disbarment, the KBA moved for the Supreme Court of Kentucky to order Hoskins to show cause why he should not face identical punishment in Kentucky. Hoskins failed to respond to the Show

Cause Order and presented no evidence to support an alternative disposition. Accordingly, the Court granted the KBA's petition and permanently disbarred Hoskins from the practice of law in Kentucky.

G. Kentucky Bar Association v. Alan Richard Stewart
2017-SC-000297-KB **September 28, 2017**

Opinion and Order of the Court. All sitting; all concur. In April 2017, the Wisconsin Supreme Court suspended Stewart for nine months. Thereafter, the KBA filed a petition with the Supreme Court of Kentucky to impose reciprocal discipline under SCR 3.435(4). Stewart did not show cause as to why the Court should not impose reciprocal discipline. Accordingly, the Court suspended Stewart from the practice of law for nine months, consistent with the order of the Wisconsin Supreme Court.

H. Kentucky Bar Association v. Jerry L. Ulrich
2017-SC-000365-KB **September 28, 2017**

Opinion and Order of the Court. All sitting; all concur. In March 2017, the Indiana Supreme Court suspended Ulrich from the practice of law for six months, to be probated for two years. The KBA filed a petition with the Supreme Court of Kentucky to impose reciprocal discipline under SCR 3.435(4). Ulrich failed to show cause as to why the Court should not impose reciprocal discipline. Accordingly, the Court suspended Ulrich from the practice of law for six months, probated for two years, consistent with the order of the Indiana Supreme Court.

I. Joseph Delano Wibbels, Jr. v. Kentucky Bar Association
2017-SC-000387-KB **September 28, 2017**

Opinion and Order of the Court. All sitting; all concur. Wibbles moved the Supreme Court for suspension from the practice of law under SCR 3.480(2) as part of a negotiated sanction with the Office of Bar Counsel. The charges against Wibbels arose from five separate disciplinary files and all related to failure to return unearned fees and failure to communicate with his clients.

In reviewing the allegations against Wibbels and the proposed negotiated sanction, the Court noted that all the instances of misconduct occurred during a time when Wibbels was experiencing a manic episode caused by bi-polar disorder. Wibbels then experienced a period of depression before seeking professional help. Since seeking treatment, Wibbels had gone nearly six years without a manic episode; regularly took his medication; and participated in counseling sessions. These strategies allowed Wibbels to practice law without incident and he had received no new disciplinary complaints during the pendency of this matter.

Taking these mitigating factors into consideration, the Court agreed that the negotiated sanction was appropriate. Accordingly, the Court ordered Wibbels

suspended from the practice of law for 181 days, with 30 days to serve and the remainder probated for a period of 5 years, subject to certain conditions, including the requirement that he repay his clients in full; enter into a Supervision Agreement with KYLAP; attend and successfully complete the Ethics and Professionalism Enhancement Program; and receive no further disciplinary complaints during his period of probation.