PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
SEPTEMBER 2018

I. ARBITRATION:

A. Geoffrey T. Grimes v. GHSW Enterprises, LLC

2018-SC-00027-1 **September 27, 2018**

Opinion of the Court by Justice Venters. All sitting; all concur. GSHW and Grimes entered into an employment agreement which included a non-compete provision and an arbitration clause. The agreement also provided that in the event of a dispute, GSHW could seek pre-arbitration judicial remedies such as injunctive relief. The agreement made no express provision for such remedies for Grimes. Grimes left his employment and went to work for a competitor and filed a complaint in circuit court alleging breach of contract and various other claims. GSHW responded with a cross-motion to compel arbitration. The trial court declared the arbitration clause invalid and unenforceable for lack of mutuality because it allowed GSHW but not Grimes to have injunctive remedies. The Court of Appeals granted relief to GHWS compelling arbitration. On discretionary review, the Supreme Court affirmed, holding: (1) parties to an arbitration agreement may seek pre-arbitration injunctive relief in the absence of affirmative language expressly limiting that right. Even though the agreement did not expressly afford that option to Grimes, no lack of mutuality occurred because Grimes had that right anyway; (2) as a matter of first impression, the Court adopted Restatement (Second) of Contracts § 79 (1979): "If the requirement of consideration is met, there is no additional requirement of ... 'mutuality of obligation,'" thereby adopting the majority rule and abolishing the mutuality of obligation requirement in Kentucky, as for example identical rights to seek arbitration; (3) here, the employment agreement was supported by adequate consideration sufficient to meet the consideration element so as to bind Grimes to the agreement; and (4) the arbitration agreement was not unconscionable.

B. Northern Kentucky Area Development District v. Danielle Snyder

2017-SC-000277-DG **September 27, 2018**

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 found that KRS 336.700(2) prevents the Northern Kentucky Area Development District from enforcing an arbitration clause contained in an employment contract, specifically, because the District conditioned the employment of Danielle Snyder on her agreement to the clause. Because KRS 336.700(2) prohibits the exact action that the District took, the Court voided the arbitration agreement as ultra vires. Finally, the Court concluded that the Federal Arbitration Act did not preempt KRS 336.700(2), as KRS 336.700(2) does not

discriminate against arbitration agreements in any way, but rather the conditioning of employment on agreement to them.

II. CRIMINAL LAW:

A. Daymond L. Malone v. Commonwealth of Kentucky
2017-SC-000593-MR **September 27, 2018**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The Court affirmed Daymond Malone's kidnapping with serious physical injury conviction. Malone argued on appeal that the facts of the case did not support the jury's finding that his infliction of serious physical injury upon the victim occurred during the kidnapping, which should have prevented Malone's kidnapping conviction from enhancement from a Class B to a Class A felony. However, the Court found that the jury reasonably inferred that, on the facts of this case, Malone manifested the intent to kidnap before he inflicted serious physical injury upon the victim. Looking to precedent from other jurisdictions that confirmed its holding, the Court found that the infliction of serious physical injury could be said to be the first step of the kidnapping. Thus, enhancement of the charge was proper.

B. Commonwealth of Kentucky v. Terrance Armstrong
2017-SC-000602-DG **September 27, 2018**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The defendant challenged the trial court's refusal to allow a witness to be questioned during cross-examination about his lifetime parole status stemming from a murder conviction that was more than thirty-years old. The Court held, in pertinent part, that a witness's status as a parolee is admissible on cross-examination as impeachment evidence showing bias or motive to lie under Kentucky Rule of Evidence (KRE) 611 despite the provision of KRE 609(b) that would render inadmissible evidence of the conviction upon which the witness's parole was based because it was too remote in time. The trial court's denial of the defendant's opportunity to ask the witness about his lifetime parole status was a violation of the Confrontation Clause but was harmless beyond a reasonable doubt.

C. William Truss v. Commonwealth of Kentucky
2016-SC-000337-MR **September 27, 2018**

Opinion of the Court by Justice Wright. All sitting; all concur. A Jefferson Circuit Court jury convicted Appellant, William Truss, of two counts of murder. In accordance with the jury's recommendation, Truss was sentenced to life without the possibility of parole for twenty-five years. Truss appealed to the Supreme Court of Kentucky as a matter of right. Truss asserted (among other arguments the Supreme Court did not consider): (1) the trial court improperly conducted voir dire when Truss was unable to be present and (2) the trial court erred when it failed to grant immunity pursuant to KRS 503.085(1). The Supreme Court held that Truss's constitutional right

to be present at jury selection was violated when voir dire was commenced in his absence. The Court held this constitutional error was not harmless beyond a reasonable doubt. As to immunity, the Court held the trial court had a substantial basis for finding probable cause to conclude that the Truss's use of force was unlawful.

D. James Lang v. Commonwealth of Kentucky
2017-SC-000286-MR **September 27, 2018**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Cunningham, Hughes, and Venters, JJ., concur. VanMeter, J., dissents by separate opinion in which Keller and Wright, JJ., join. The Court reversed James Ellis Lang's first-degree robbery conviction, finding that the trial court erred when it failed to grant a directed verdict on that charge. The Court compared the facts of the case with that of precedent and specifically found that Lang's actions did not satisfy the elements of KRS 515.020(1)(c). The Court also found no violation of Lang's right to a speedy trial. Finally, the Court noted that the trial court should make further findings as it pertains to Lang's request to conduct opening and closing statements *pro se*.

III. DEPENDENCY, NEGLECT AND ABUSE

A. Cabinet for Health and Family Services, Commonwealth of Kentucky on Behalf of the Minor Child C.R. v. C.B.
2018-SC-000092-DGE **September 27, 2018**

Opinion of the Court by Justice Keller. All sitting; all concur. C.B.'s (Father's) child was found to be neglected by the Clark Circuit Court. The finding was made due to: (1) the child testing positive for controlled substances at birth; (2) C.B.'s and Mother's history of substance abuse; (3) C.B.'s and Mother's prior involvement with the Cabinet relating to other children; and (4) C.B.'s failed drug tests. The circuit court found that the Cabinet had proven the petition by a preponderance of the evidence. The Court of Appeals reversed, holding that the Cabinet's evidence was speculative and holding that KRS 600.020 did not apply to C.B. because C.B. never exercised custodial control or supervision over the child. The Court analyzed KRS 600.020, and, in reversing the Court of Appeals, held that the statute creates distinct classifications of relationships in determining individuals who can be found to have neglected a child. The phrase in the statute, "exercising custodial control or supervision" modifies "other person," not the biological parent; thus, the statute applies to those exercising custody or biological parents. The Court further held that there was sufficient evidence before the trial court to make a

IV. FAMILY LAW:

A. Laura Faye Smith v. Jimmy Howard McGill, Jr.

2017-SC-000395-DGE **September 27, 2018**

Opinion of the Court by Justice Wright. All sitting; all concur. Following the resolution of the parties' custody case, the trial court ordered McGill to pay Smith's attorney's fees. The Court of Appeals reversed, relying on a line of Kentucky cases requiring a trial court to find a financial disparity in order to award attorney's fees under KRS 403.220. Smith filed a motion for discretionary review to the Supreme Court of Kentucky, which that Court granted. The Court overruled the line of cases requiring trial courts to find a financial disparity before awarding attorney's fees under the statute. The Supreme Court held the trial court acted within its discretion when assessing attorney's fees after considering the parties' financial resources (which is all the statute requires), reversed the Court of Appeals, and reinstated the trial court's judgment.

V. INTERLOCUTORY APPEAL:

A. Commonwealth of Kentucky, Cabinet for Health and Family Services, Etc. v. Lettie Sexton, Etc., et al.
AND
Coventry Health and Life Insurance, Etc. v. Lettie Sexton, Etc., et al.
AND
Lettie Sexton, Etc., et al. v. Commonwealth of Kentucky Cabinet for Health and Family Services, Etc.
AND
Coventry Health and Life Insurance v. Lettie Sexton, Etc., et al.

2016-SC-000529-DG
2016-SC-000534-DG
2016-SC-000540-DG
2016-SC-000095-DG **September 27, 2018**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter and Veters, JJ., concur. Wright, J., dissents by separate opinion. The Court recognized the principle of constitutional standing in Kentucky law, adopting the U.S. Supreme Court's test as espoused in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), and holding that the plaintiff in this case did not possess the requisite constitutional standing to bring suit. The Court also made clear that a party cannot challenge constitutional standing in and of itself on interlocutory appeal, but that this issue is not waivable and always present when a case is otherwise properly brought before a court, and that a court can raise the issue sua sponte.

VI. PERSONAL INJURY:

A. Sameena Asmat, etc. v. George W. Bauer, M.D., III, et al.

2016-SC-000560-DG September 27, 2018

Opinion of the Court by Justice Keller. All sitting; all concur. Sameena Azmat brought a medical malpractice action on behalf of her son, Nausher Azmat. Counsel proceeded with the case for several years before Azmat's attorney was permitted to withdraw from the case, less than six months before trial. The trial court ordered, upon defense counsel's request, that if Sameena did not secure replacement counsel she would be deemed to proceed in the action pro se. Unable to find counsel to take the case, Sameena filed motions and appeared before the court pro se. Defense counsel then argued that Sameena could not proceed pro se as a next friend because to do so would constitute the unauthorized practice of law. Defense counsel moved for summary judgment. The trial court agreed and dismissed the case with prejudice. The Court of Appeals affirmed. On discretionary review, this Court held that the trial court erred in permitting Azmat's counsel to withdraw. The Court further held that Sameena did not engage in the unauthorized practice of law because: (1) the Supreme Court has not previously held that such actions constitute unauthorized practice and (2) Sameena was under a court order to proceed as she did, thus her actions were expressly authorized. The Court reversed the Court of Appeals and remanded the case for further proceedings.

VII. WORKERS COMPENSATION:

A. Active Care Chiropractic, Inc. v. Katherine Rudd, et al.

2017-SC-000377-WC September 27, 2018

Opinion of the Court by Justice VanMeter. All sitting. Cunningham, Hughes, Keller, VanMeter, Venters, and Wright, JJ., concur. Minton, C.J., dissented with opinion. The sole issue in dispute is the correct multiplier to be applied to Katherine Rudd's workers' compensation benefits. Active Care Chiropractic, Inc. employed Rudd part-time. While taking out the trash one day at work, Rudd slipped and fell, injuring her shoulder. After three shoulder surgeries, she returned to work. About a year after her return to work, Rudd voluntarily retired, for reasons not solely related to the work-related injury. The Administrative Law Judge determined that Rudd qualified for the two-multiplier under the plain wording of KRS 342.730(1)(c)2 and because Rudd's cessation from work was not due to intentional or reckless misconduct, per this Court's holding in *Livingood v. Transfreight, LLC*, 467 S.W.3d 249 (Ky. 2015). The Workers' Compensation Board affirmed. On appeal, the Supreme Court likewise affirmed, concluding that under the plain language of KRS 342.730(1)(c)2, voluntary retirement and removal from the workforce for reasons not related to the workplace injury qualifies as "cessation of . . . employment . . for any reason" and affords the application of the two-multiplier to benefits received. In so ruling, the Court emphasized its duty to accord to words of a statute their literal meaning and not

breathe into the statute that which the Legislature has not put there. Further, the Court held that pursuant to Livingood, the only purported restriction on application of the two-multiplier is an employee's intentional or reckless misconduct, which was nonexistent in this case. Thus, no exception to the unambiguous language of KRS 342.730(1)(c)2 precludes Rudd's recovery of the two-multiplier.

VIII. WRIT OF PROHIBITION:

A. Presbyterian Church (U.S.A) v. Hon. Brian C. Edwards, Judge, Jefferson Circuit Court, et al.

2016-SC-000699-MR **September 27, 2018**

Opinion of the Court by Justice Wright. All sitting. Minton, C.J.; Hughes, and Keller, JJ., concur. Venters, J., dissents by separate opinion which Cunningham and VanMeter, JJ., join. Appellant, the Presbyterian Church, petitioned the Court of Appeals for a writ to prohibit the trial court from lifting its stay of discovery. The Court of Appeals granted the writ to the extent the trial court should limit discovery to that which was necessary to determine whether the church was entitled to ecclesiastical immunity. The church appealed to the Supreme Court of Kentucky, which affirmed the Court of Appeals' order. The Supreme Court held that the church satisfied the "certain special cases" writ criteria as to broad-reaching discovery. However, it failed to meet this standard as to limited discovery the trial court may deem necessary in order to determine whether the church is immune from the present suit. The Court further instructed the trial court that "[t]he case should not proceed—whether with additional discovery (apart from that the trial court deems necessary in making the immunity determination) or otherwise—until the trial court rules on the threshold immunity issue."

XI. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. Christina Rose Edmondson

2017-SC-000650-KB **September 27, 2018**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission charged Edmonson in three separate matters, each of which proceeded as a default case under SCR 3.210. The Board of Governors found Edmonson guilty in all three cases and recommended that she be suspended from the practice of law for two years, with the suspension running consecutively to her current suspension. Under 3.370(9), the Court adopted the Board's recommendation and sanctioned Edmonson accordingly.

B. Kentucky Bar Association v. Matthew Ryan Malone
2018-SC-000246-KB **September 27, 2018**

Opinion and Order of the court. All sitting; all concur. Malone signed his client's signature on eight documents, all with his client's permission. The signatures on six of the documents were notarized by employees of Malone's law firm as though his client had signed the documents in the presence of a notary. On the other two documents, the notary's signature and number were executed and affixed by Malone. Malone failed to inform the court or opposing counsel that he had signed his client's name with permission on the pleadings, that the pleadings were notarized by employees of his law firm, or that two of the eight pleadings contained false notary signatures.

After opposing counsel questioned him about one of the documents, Malone self-reported to the Kentucky Bar Association. The Inquiry Commission eventually filed a two-count charge against Malone alleging violations of SCR 3.130(3.3)(a)(1) (making a false statement of fact or law to a tribunal) and SCR 3.130(8.4)(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). The Trial Commissioner recommended that Malone be suspended from the practice of law for sixty days, with thirty days suspended for a period of one year on the condition that he receives no further disciplinary charges during that period.

Malone appealed from the Trial Commissioner's report and the case proceeded to the Board of Governors. The Board unanimously voted to reject the Trial Commissioner's report and considered the matter *de novo*. The Board agreed that Malone was guilty of the allegations in the charge. But the Board determined that Malone had permission to sign his client's name to the documents and that there was no harm or prejudice to anyone. Additionally, the Board noted that Malone did not financially profit from his actions and that Malone reported the violations to the KBA in a timely manner. Accordingly, the Board unanimously voted that Malone should receive a public reprimand.

After reviewing the record and factually similar cases, the Court agreed with the Board's recommendation and publicly reprimanded Malone for his conduct.

C. Kentucky Bar Association v. Robert Good Lohman, III
2018-SC-000334-KB **September 27, 2018**

Opinion and Order of the Court. All sitting; all concur. The Kentucky Bar Association petitioned the Court to impose reciprocal discipline against Lohman under SCR 3.455. In May 2018, the Supreme Court of the State of Illinois entered an order suspending Lohman from the practice of law for one year. The Supreme Court of Kentucky ordered Lohman to show cause why reciprocal discipline should not be imposed. Lohman failed to respond, so the Court granted the KBA's motion and imposed reciprocal discipline, suspending Lohman from the practice of law in the Commonwealth for a period of one year.