KENTUCKY SUPREME COURT
SEPTEMBER 2019

CHILD CUSTODY:
Donna Krieger, et al. v. Tamara D. Garvin, et al.
2018-SC-000154-DGE **September 26, 2019**

Opinion of the Court by Justice Wright. Minton, C.J.; Buckingham, Hughes, Keller, VanMeter, and Wright, JJ., sitting. Minton, C.J.; Keller, VanMeter, and Wright, JJ., concur. Hughes, J., concurs in result only without separate opinion. Buckingham, J., dissents with separate opinion. Lambert, J., not sitting. This case involves a minor child, K.R.K., and whether her maternal grandfather and his girlfriend, in whose custody K.R.K. has been since she was eight months old, may be considered her de facto custodians pursuant to KRS 403.270. The trial court had found the two were K.R.K.'s de facto custodians, and that ruling was appealed to the Court of Appeals, which reversed. Terry and Donna filed a motion for discretionary review with the Supreme Court of Kentucky, which was granted. The Court reversed the Court of Appeals. In interpreting the statute at question, the Court stated: "[i]n using the phrase, 'unless the context requires otherwise,' the legislature left room for trial courts to act in the best interests of the child in determining which individual (or individuals in this case) qualify as the child's de facto custodian(s)."

CIVIL PROCEDURE:
Verralab Ja LLC, Etc. v. Dr. Senad Cemerlic, et al.
2017-SC-000675-DG **September 26, 2019**

Opinion of the Court by Justice Wright. All sitting; all concur. Dr. Senad Cemerlic, a Delaware resident, and ABG Pain Management (a Delaware LLC of which Dr. Cemerlic is the sole member) entered into an agreement with VerraLab, a Kentucky LLC. Under the agreement, VerraLab would provide clinical drug testing for Dr. Cemerlic's patients at the ABG pain clinic in exchange for certain fees. VerraLab filed a complaint in Jefferson Circuit Court alleging Cemerlic and ABG failed to pay for services and materials. Because Appellees were outside the Commonwealth of Kentucky, Cemerlic and ABG were served through the Secretary of State pursuant to Kentucky Revised Statutes (KRS) 454.210. However, Cemerlic refused to accept the mail from the Kentucky Secretary of State. After the service was returned, VerraLab filed a motion for default judgment. The circuit court granted the default judgment. VerraLab then sent a notice to Cemerlic (to the same address at which he had refused to accept the certified mail from the Kentucky Secretary of State) to take a deposition. At that point, an attorney entered an appearance for Cemerlic and ABG and filed a motion to set aside the default judgment. At a hearing on the motion, Cemerlic and ABG argued they had not been served, as Cemerlic did not know the contents of the envelopes he refused to accept from the Secretary of State and did not otherwise know of the lawsuit until the deposition notice. The circuit court denied Cemerlic and ABG's motion to set aside and Cemerlic and ABG appealed to the Court of Appeals. The Court of Appeals held that the trial court had abused its discretion in denying Cemerlic and ABG's motion to set aside the default judgment and remanded the matter to the trial court for it to hear the case on the merits. VerraLab sought discretionary review from the Supreme Court of Kentucky, which was granted. The Court reversed the Court of Appeals and reinstated the trial

court's denial of Cemerlic and ABG's motion to set aside the default judgment, stating: "Cemerlic and ABG cannot avoid service, claim it was ineffective and that the opposing party is providing erroneous information to the trial court otherwise, and then succeed in having the trial court's discretionary act in denying its attempt for another bite at the apple overturned on appeal."

CRIMINAL LAW:
Jason Rudd v. Commonwealth of Kentucky
2018-SC-000393-MR **September 26, 2019**

Opinion of the Court by Justice VanMeter. All sitting; all concur. Jason Rudd appealed as a matter of right from a circuit court judgment sentencing him to twenty-years' imprisonment for first-degree sexual abuse and for being a first-degree persistent felony offender. On appeal, the Court held that Rudd waived any unanimous verdict argument because he submitted the jury instructions which he claimed on appeal were erroneous. Further, the Court held that the entire jury pool was not tainted by a social media post distributed within the community, and the Livingston Circuit Court properly conducted voir dire regarding any alleged bias of prospective jurors. Accordingly, the Court affirmed the judgment and sentence imposed by the circuit court.

GOVERNMENTAL IMMUNITY:
Rick Benningfield, Etc. et al. v. Jerry Fields
2018-SC-000292-DG **September 26, 2019**

Opinion of the Court by Justice Keller. All sitting; all concur. In this retaliation and wrongful termination case, the Taylor Circuit Court granted summary judgment in favor of Rick Benningfield, individually and in his official capacity as Taylor County Jailer, Taylor County Fiscal Court, and several other government officials. The Court of Appeals reversed, holding that KRS 342.197 constitutes a waiver of sovereign immunity against a governmental employer and that genuine issues of material fact existed, thereby precluding summary judgment. The Supreme Court affirmed the Court of Appeals' holding that KRS 342.197 constitutes an implied waiver of sovereign immunity and affirmed the holding that disputed issues of material fact existed on Fields's retaliation claim against Taylor County Fiscal Court and Benningfield in his official capacity. However, the Supreme Court concluded that no material facts remained in dispute as to the involvement of the other government officials, and therefore reversed that part of the Court of Appeals' decision that held summary judgment was inappropriate for these individuals. The Supreme Court also held that Benningfield was entitled to qualified official immunity and therefore reversed the Court of Appeals' decision to the extent it held summary judgment was inappropriate for Benningfield in his individual capacity. Accordingly, the Supreme Court reversed in part, affirmed in part, and remanded the matter back to Taylor Circuit Court on the remaining claim against Taylor County Fiscal Court and Rick Benningfield, in his official capacity as the former Taylor County Jailer.

LANDLORD/TENANT ACT:
Suzanne Waugh v. Carol Parker, et al.
2018-SC-000405-DG **September 26, 2019**

Opinion of the Court by Justice Buckingham. All sitting; all concur. Tenant filed a personal injury complaint against landlords after tenant was injured when a porch railing gave way, causing tenant to fall and sustain injuries. The Circuit Court granted landlords summary judgment and the Court of Appeals affirmed. Upon review the Court held: Landlords generally do not owe any duty to a tenant except to warn of any latent dangerous conditions that may exist on the property; Landlords were not liable to tenant for breach of a statutory duty under the Uniform Residential Landlord and Tenant Act, because the statute indicates that the URLTA was intended to supplement, not replace, the common law, and thus tenant's personal injury action was controlled by common law principles. KRS 383.590, 383.595(1)(a), 383.625, 383.635; Landlords were not liable to tenant under the negligence per se statute providing that any person injured by a violation of statute may recover such damages as he sustained by reason of the violation because the URLTA included remedies for a landlord's noncompliance that materially affected health and safety. KRS 446.070; Where the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute; and that the jural rights doctrine did not preclude the General Assembly's limitation of a tenant's common law right to recover for injuries resulting from a violation of safety rules.

TERMINATION OF PARENTAL RIGHTS:
Commonwealth of Kentucky, Cabinet for Health and Family Services, et al. v. K.S., Mother
2018-SC-000523-DGE **September 26, 2019**

Opinion of the Court by Justice Buckingham. All sitting. Minton, C.J.; Hughes, and VanMeter, JJ., concur. Keller, J., concurs in result only by separate opinion in which Minton, C.J., joins. Lambert, J., dissents by separate opinion in which Wright, J., joins. Wright, J., dissents by separate opinion in which Lambert, J., joins. The Family Court found K.S.'s son to be a neglected child and terminated K.S.'s parental rights. K.S. appealed, and the Court of Appeals vacated and remanded. The Cabinet for Health and Family Services petitioned this Court for discretionary review, which we granted.

Upon review the Court held: The testimony of the Cabinet's witnesses and other evidence presented clearly and convincingly supported the trial court's finding that the child was an abused or neglected child as that term is defined in KRS 600.020(1). The testimony of the Cabinet's witnesses and other evidence presented clearly and convincingly supported the trial court's finding that termination was in the best interest of the child. The testimony of the Cabinet's witnesses and other evidence presented clearly and convincingly supported the trial court's finding that grounds listed in KRS 625.090(2) exists: that the parent, for a period of not less than six months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child; that the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical

care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child; and that the child has been in foster care under the responsibility of the cabinet for fifteen cumulative months out of forty-eight months preceding the filing of the petition to terminate parental rights. That KRS 600.020 does not in all cases require that a parent intend to abuse or neglect his or her child for a finding of abuse or neglect to be reached by a trial court; and pursuant to KRS 600.020(1) a child whose health or welfare is threatened with harm, that is, whose health or welfare has not actually been harmed but where there is a clear and convincing threat of harm to a child, a trial court is authorized under this definition to find that the child is an abused or neglected child.

WORKERS' COMPENSATION:

James A. Wilkerson v. Kimball International, Inc.
2019-SC-000053-WC **September 26, 2019**

Opinion of the Court by Justice Keller. All sitting; all concur. James A. Wilkerson sustained a back injury while working for Kimball International, Inc. ("Kimball"). Wilkerson filed a claim with the Department of Workers' Claims, and a hearing was held on his claim. The Administrative Law Judge ("ALJ") awarded Wilkerson temporary total disability, permanent partial disability, and medical benefits for a back strain he sustained while working for Kimball. The ALJ denied benefits for a knee injury and two back surgeries, finding they were not causally related to his employment, and therefore not compensable. Wilkerson did not file a petition for reconsideration with the ALJ prior to appealing the denial of benefits to the Workers' Compensation Board ("Board"). The Board affirmed the ALJ, and the Court of Appeals affirmed the Board. The Supreme Court, likewise, affirmed the Court of Appeals. The Supreme Court first made clear that it could always address the issues of whether substantial evidence supported the ALJ's findings and whether the evidence compelled a difference result regardless of whether a petition for reconsideration had been filed. It then reviewed the evidence of record and concluded that the ALJ's finding that Wilkerson's knee injury was not work-related and therefore not compensable was supported by substantial evidence and that the evidence of record did not compel a different result.

Tryon Trucking, Inc. v. Randy Medlin, et al.
2019-SC-000212-WC **September 26, 2019**

Opinion of the Court by Justice Buckingham. All sitting; all concur. The Uninsured Employers' Fund appealed from the ALJ's determination that claimant was an employee of an uninsured employer on the date of motor vehicle accident, and that in the absence of any "up-the-ladder" employer, the Fund would be liable to pay claimant's benefits if his employer did not pay for the benefits or filed for bankruptcy. The Workers' Compensation Board affirmed in part, reversed in part, and remanded to the ALJ for additional findings of fact with regard to possible up-the-ladder liability by transportation broker that had leased the truck claimant was driving at the time of the accident. The Court of Appeals upheld the Board's decision, and transportation broker appealed. Upon review the Court held: If the ALJ has made all necessary findings to resolve the issue at hand and the Workers' Compensation Board has erred in remanding for additional, unneeded findings that would be of no additional value in resolving the issues in the case, if for no other reason than judicial economy alone, that decision, just as any other, is subject to review

and reversal by the appellate courts, overruling Campbell v. Hauler's Inc., 320 S.W.3d 707; remand from the Workers' Compensation Board to the ALJ was warranted to allow the ALJ to reexamine the issue of whether the transportation broker that leased trucks and trailers as part of its business model qualified as an up-the-ladder employer for the claimant because the ALJ made a factual error when he determined the facts of the case were nearly identical to another case in which no up-the-ladder liability was found, but in that case, the transportation broker did not lease the truck and trailer that was involved in the accident. KRS 342.610(2).

WRIT OF PROHIBITION:

Becky Harilson, Etc. et al. v. Hon. Phillip J. Shepherd, Judge, Franklin Circuit Court, et al.
2019-SC-000156-MR **September 26, 2019**

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Buckingham, Lambert, VanMeter, and Wright, JJ., concur. Keller, J., concurs in result only. The Lexington Herald-Leader requested records from the Legislative Research Commission (LRC). LRC ultimately denied the request and the Herald-Leader filed a complaint in Franklin Circuit Court challenging the denial. LRC sought dismissal of the action contending the circuit court lacked subject matter jurisdiction. When the circuit court concluded it had jurisdiction to resolve the dispute, LRC sought a writ of prohibition from the Court of Appeals. The Court of Appeals denied the writ. Question presented: Whether Franklin Circuit Court lacks subject-matter jurisdiction to decide a KRS 7.119 records request dispute. Held: KRS 7.119 provides for the inspection of legislative records by the public. The plain language of KRS 7.119(3), incorporating all provisions of the Open Records Act except KRS 61.880(3), grants the circuit court jurisdiction to review a denial of the records request and does not limit the circuit court's jurisdiction to resolve KRS 7.119 inspection disputes to only those cases where LRC fails to act within thirty (30) days on a matter submitted for review. Furthermore, the trial court does not lack jurisdiction based on the separation of powers doctrine. The circuit court's judicial function in this case, interpreting KRS 7.119(3), is in no way an encroachment on the legislative function.

ATTORNEY DISCIPLINE:

Rachelle Nichole Howell v. Kentucky Bar Association
2019-SC-000089-KB **September 26, 2019**

Opinion and Order of the Court. All sitting; all concur. Howell moved the Supreme Court to enter a negotiated sanction resolving her pending disciplinary proceeding by imposing a thirty-day suspension. Howell's disciplinary history included three private admonitions for failing to act with reasonable diligence and promptness in representing several clients. Additionally, the Supreme Court rendered an opinion in March 2019 finding Howell guilty of violating numerous Supreme Court Rules and suspending her from the practice of law for 181 days.

In the present case, the Inquiry Commission issued a five-count charge against Howell alleging violations of SCR 3.130(1.3); (1.5)(a); (1.15)(e); (1.5)(f); and (1.16)(d). Howell admitted she violated these rules and requested, with the agreement of the Office of Bar Counsel, for a negotiated sanction that would result in her suspension from the practice of law for thirty days, effective March 14, 2019, the date her 181-day suspension began.

After reviewing the record and several similar cases, the Court agreed to the negotiated sanction and ordered Howell suspended for 30 days, retroactive to March 14, 2019.

Michele McReynolds Bradley v. Kentucky Bar Association
2019-SC-000287-KB **September 26, 2019**

Opinion and Order of the Court. All sitting; all concur. Bradley was admitted to the practice of law in Kentucky in 1994. She was also admitted to the practice of law in Ohio in 1993 and Georgia in 1998. In 2000, Bradley filed a motion to withdraw from membership in the KBA pursuant to SCR 3.480(1). Because she was an active member in good standing, that motion was granted. Bradley continued to practice law in Georgia until 2006 and remains an active member of the Ohio Bar in good standing. She filed this action to seek restoration to the practice of law in Kentucky.

Upon consideration of the findings of the Character and Fitness Committee's investigation and proof that Bradley had complied with all other requirements of restoration, the Supreme Court granted her application and restored Bradley to the practice of law in Kentucky.

Kentucky Bar Association v. Rodger William Moore
2019-SC-000305-KB **September 26, 2019**

Opinion and Order of the Court. All sitting; all concur. The Supreme Court of Ohio permanently disbarred Moore from the practice of law and the Kentucky Bar Association filed a petition with the Supreme Court asking that reciprocal discipline be imposed under SCR 3.435(4). The Court ordered Moore to show cause why reciprocal discipline should not be imposed but he failed to response. Accordingly, the Court disbarred him from the practice of law in the Commonwealth, consistent with the order of the Supreme Court of Ohio.

Inquiry Commission v. Timothy D. Belcher
2019-SC-000382-KB **September 26, 2019**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission alleged violations of SCR 3.165(1)(b) (probable cause exists to believe that an attorney's conduct poses a substantial threat of harm to his clients or to the public); and SCR 3.165(d) (probable cause exists to believe the attorney does not have the physical or mental fitness to continue to practice law). The assertions stem from raised concerns due to alleged misappropriation of client funds. The Court agreed with the Commission's findings and entered an order temporarily suspending Belcher under SCR 3.165(1).

Michael Benjamin Shields v. Kentucky Bar Association
2019-SC-000421-KB **September 26, 2019**

Opinion and Order of the Court. All sitting; all concur. Shields moved the Supreme Court to enter a negotiated sanction imposing a thirty-day suspension from the practice of law, to be probated for one year subject to conditions. The KBA did not object.

The charges against Shields arose out of his representation of a client in a criminal matter. Shields admitted his actions constituted violations of SCR 3.130(1.16)(b) and (1.16)(d). After reviewing the facts, the Court agreed that the proper discipline was a thirty-day suspension from the practice of law, probated for one year with conditions.