KENTUCKY SUPREME COURT
JULY 2020

I. CONSTITUTIONAL STANDING

A. Randy Overstreet, et al. v. Jeffrey Mayberry, et al. AND Brent Aldridge, et al. v. Jeffrey Mayberry, et al.

2019-SC-000041-TG
2019-SC-000042-TG **July 9, 2020**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Eight members of Kentucky Retirement Systems' defined-benefit retirement plan sued trustees and officers of the plan and various private hedge fund sellers and actuarial and advisement firms for losses sustained to the plan assets. The Franklin Circuit Court denied defendants' motion to dismiss based on immunity and constitutional standing. Defendants' appealed to the Court of Appeals, and the Kentucky Supreme Court accepted transfer of the case.

The Court held the plaintiffs lacked an injury in fact sufficient to support constitutional standing as plaintiffs suing directly for losses sustained to the plan, as representatives suing on behalf of Kentucky Retirement Systems, and as taxpayers suing on behalf of the Commonwealth. The Court remanded the case to the Franklin Circuit Court with direction to dismiss for lack of constitutional standing.

II. CRIMINAL LAW:

A. Terrence Downs v. Commonwealth of Kentucky

2018-SC-000402-MR **July 9, 2020**

Opinion of the Court by Justice VanMeter. All sitting; all concur. Terrence Downs appeals as a matter of right from his twenty-five-year sentence for convictions of first-degree manslaughter, tampering with physical evidence, possession of a handgun by a convicted felon, and second-degree persistent felony offender. The Supreme Court reversed his convictions and sentence, finding a per se Sixth Amendment violation due to Downs being deprived of his right to counsel at a critical stage of the proceedings – during an in-chambers hearing the trial court conducted on the fitness and ability of his private attorney to try the case. The Court held that the trial court's decision not to inform Downs of the Commonwealth's allegations against defense counsel and not offer him the opportunity to retain independent counsel to represent his interests was error of constitutional magnitude and mandates reversal. Further, regarding jury instructions, the Court directed the trial court on remand to include the necessary element of intent if the evidence supports an instruction on provocation under KRS 503.060(2).

III. FAMILY LAW:

A. Michael Greene v. Elizabeth Boyd, Formerly Greene

2019-SC-000379-DG **July 9, 2020**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Michael Greene moved the Oldham Family Court to modify the parenting schedule of his two minor children with his former wife, Elizabeth Boyd. The family court denied the motion to modify, and Greene appealed. The Court of Appeals found that the family court judge had erroneously admitted and considered hearsay statements and impermissible medical expert testimony in the investigative report and testimony of the court-appointed Friend of the Court ("FOC"). But the Court of Appeals ultimately found those errors to be harmless and affirmed the family court's judgment.

The Kentucky Supreme Court accepted discretionary review and affirmed the Court of Appeals. The Court held that hearsay statements contained in the testimony and report of an FOC are admissible in a contested custody hearing, as long as the notice and procedural requirements contained in KRS 403.300(3) are met or the parties are otherwise given sufficient notice and an opportunity to challenge the sources of the statements when compliance with the notice requirements in KRS 403.300(3) is not feasible. Because Greene had sufficient notice and an opportunity to challenge the sources of the hearsay at issue, there was no error. Additionally, the Court held that an FOC's ability to render opinions is constrained by KRE 701 and 702, so an FOC may not express medical opinions that require qualification as a medical expert witness. Additionally, the court's appointment of an FOC amounts to a determination that the person is qualified to offer opinion evidence concerning the fitness of a parent and child's custody arrangement. Because the FOC's opinions at issue were not medical opinions but were instead opinions concerning the fitness of the parent's ability to care for her children, the family court did not err in admitting and considering them.

IV. WRIT

A. Alexandra Lawson v. Hon. Richard A. Woeste, Judge, Campbell Circuit Court, Family Division, and Jeremy Villarreal

2019-SC-000670-MR **July 9, 2020**

Opinion of the Court by Justice Hughes. All sitting; all concur. Alexandra Lawson sought a writ of prohibition to stay a child custody order entered by the Campbell Circuit Family Court pending her direct appeal. In the underlying action the trial court ordered that Lawson's two minor children relocate from their residence in Mississippi to live with their father in Kentucky. Lawson argued that she is entitled to a first- or second-class writ because the trial court either lacked subject matter jurisdiction to enter the relocation order or had the requisite jurisdiction but acted erroneously. The Court of Appeals denied the writ.

The Supreme Court affirmed the Court of Appeals, determining that Lawson is not entitled to a first-class writ because continuing, exclusive jurisdiction under Kentucky Revised Statute (KRS) 403.824(1) is an issue of particular-case jurisdiction. Under the statute a trial court that has had and exercised subject-matter jurisdiction in a child custody matter must decide whether it should continue to exercise jurisdiction or whether it should "decline jurisdiction" over the case due to a change in circumstances, which is exactly what the trial court did in this case. Even if the trial court misconstrued or misapplied KRS 403.824 – an issue the Court does not and should not reach on a writ petition – it nonetheless maintained subject-matter jurisdiction.

Additionally, the Court held that Lawson is not entitled to a second-class writ because Lawson has an opportunity for recourse through her direct appeal to the Court of Appeals. The extraordinary relief of a second-class writ is not available when a trial court's alleged error in the exercise of its jurisdiction can be addressed in the normal appellate process.

V. WRONGFUL USE OF CIVIL PROCEEDINGS

A. Seiller Waterman, LLC, et al.; Pamela M. Greenwell; Gordon C. Rose; and Paul J. Hershberg v. RLB Properties, Ltd.

2018-SC-000538-DG **July 9, 2020**

Opinion of the Court by Justice Hughes. All sitting; all concur. Civil Appeal, Discretionary Review Granted. RLB Properties, Ltd. brought an action against Seiller Waterman, LLC and three of its attorneys (collectively "Seiller Waterman"). The action stemmed from Seiller Waterman's prior representation of Skyshield Roof and Restoration, LLC and Jacob Blanton, on whose behalf Seiller Waterman filed a materialman's and mechanic's lien against commercial property owned by RLB Properties, and subsequently filed a third-party complaint against RLB Properties. RLB Properties' complaint against Seiller Waterman alleged wrongful use of civil proceedings(WUCP) and abuse of civil process; civil conspiracy; slander of title; violation of KRS 434.155 by filing an illegal lien; negligence; and negligent supervision. The Jefferson Circuit Court dismissed all claims either for failure to state a claim upon which relief can be granted or for failure to file timely under the applicable statute of limitations. The Court of Appeals affirmed the dismissals, except for the slander of title, civil conspiracy, and KRS 434.155 violation claims, finding that KRS 413.245 would not time bar the claims if malice were proven. Held: The trial court did not err by dismissing the action. Neither the desire to earn attorney fees nor the filing of a claim seeking damages on behalf of a client constitutes an improper purpose sufficient to sustain a WUCP claim. A professional negligence claim may not be brought against an attorney by a party who is neither the client nor an intended third-party beneficiary of the attorney's work. KRS 413.245, the one-year statute of limitations applicable to the rendering of professional services, remains applicable to claims against attorneys when malice is alleged.

VI. ATTORNEY DISCIPLINE:

A. Eric Shane Grinnell v. Kentucky Bar Association
2019-SC-000677-KB **July 9, 2020**

Opinion and Order of the Court. All sitting; all concur. Grinnell moved the Supreme Court to impose upon him a two-year suspension from the practice of law, with one year to serve and one year probated for two years with conditions. The Kentucky Bar Association (KBA) did not object to Grinnell's motion, which was negotiated under SCR 3.480(2). The disciplinary matters pending against Grinnell spanned fourteen consolidated KBA files and fifty-five counts that were based, primarily, on his pattern of accepting payment from clients and subsequently failing to act in their cases. As mitigation, Grinnell stated that he suffered from anxiety and depression because of family matters and agreed, as part of the negotiated discipline, to seek professional help with the Kentucky Lawyers Assistance Program.

Noting that it had previously rejected Grinnell's motion for imposition of a one-year suspension, the Court agreed that the negotiation discipline presented in this case was appropriate to address Grinnell's misconduct. Accordingly, the Court suspended Grinnell from the practice of law for two years with one year to serve and one year probated for two years, on the condition that he attend the next scheduled Ethics and Professionalism Enhancement Program offered by the Office of Bar Counsel; that he not incur any further charges of professional misconduct in the Commonwealth; that he enroll in KYLAP to address his anxiety and depression; that he attend a law office management course; and that, within two years, he back to his clients all of the unearned fees.

B. Carroll Hubbard, Jr. v. Kentucky Bar Association
2020-SC-000148-KB **July 9, 2020**

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Nickel, J., not sitting. Hubbard moved the Supreme Court to impose a sanction of permanent disbarment. The misconduct leading up to Hubbard's motion to resign under terms of permanent disbarment began when the Court suspended him in 2019. In that case, the Court accepted a negotiated sanction and suspended Hubbard for sixty days with conditions. Upon fulfilling the conditions of his suspension, Hubbard would have been eligible for reinstatement pursuant to SCR 3.510(2). However, Hubbard failed to file an affidavit of compliance within 180 days, as required by the Rule.

In December 2019, the Inquiry Commission received information that Hubbard had been representing a client in a felony criminal matter since the summer. Shortly thereafter, Hubbard filed an "Affidavit Toward Compliance," two months after the 180-day period specified by SCR 3.510(2) had expired. However, even if Hubbard had filed the affidavit within the required time period, he had not fulfilled the required Continuing Legal Education credits at the time of his filing.

Accordingly, the Inquiry Commission opened an investigation into Hubbard's unauthorized practice of law. A complaint was issued against Hubbard in March 2020 alleging he had engaged in the practice of law while under a suspension from this Court in violation of SCR 3.130(5.5)(a). Rather than respond to the complaint, Hubbard filed a motion to resign under terms of permanent disbarment.

In his motion, Hubbard acknowledged that the conduct leading to the disciplinary complaint violated the Rules of Professional Conduct and asked the Court to terminate the KBA proceedings against him by granting his motion to resign under terms of permanent disbarment pursuant to SCR 3.480(3). The Court agreed that Hubbard's motion to withdraw his membership was appropriate and ordered him permanently disbarred.