

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
APRIL 1, 2019 to APRIL 30, 2019

I. APPEALS

A. *Energy and Environment Cabinet v. Concerned Citizens of Estill County, Inc.*

[2017-CA-001893](#) 04/26/2019 2019 WL 1873564

Opinion and Order dismissing by Judge Maze; Judges Acree and Combs concurred.

A citizens' group sought review of a decision by the Energy and Environmental Protection Cabinet (EEC) denying its request for records under the Open Records Act regarding a violation issued to a landfill. On cross-motions for summary judgment, the circuit court granted summary judgment in favor of the citizens' group. After EEC filed a motion for clarification, the circuit court ordered that EEC was required to produce the disputed documents by a certain date. The citizens' group filed a motion for attorneys' fees and costs, and EEC filed a notice of appeal the following day. The Court of Appeals concluded that the orders at issue were not final and appealable and, therefore, dismissed the appeal. The Court first noted that the motion for attorneys' fees and costs was timely - even though it wasn't filed until more than ten days had passed from entry of the order granting summary judgment in favor of the citizens' group - since EEC's motion for clarification, which was essentially a motion to alter, amend, or vacate the judgment, stayed finality of the order granting summary judgment until the motion for clarification was ruled upon. The Court then held that the circuit court's summary judgment, as modified by its subsequent order of clarification, was not a final and appealable order because the motion for attorneys' fees and costs remained pending and because the order failed to contain the required recitations under CR 54.02(1). Thus, dismissal was required.

II. ATTORNEY AND CLIENT

A. *Nichols v. Kentucky Unemployment Insurance Commission*

[2017-CA-001156](#) 04/26/2019 2019 WL 1868589

Opinion by Judge Maze; Judge Nickell concurred; Special Judge Henry concurred in part, dissented in part, and filed a separate opinion.

Appellant applied for unemployment insurance benefits after being fired from his position with Norton Healthcare. After the application was denied, appellant appealed this decision to a referee. His supervisor, a non-attorney, appeared for Norton at the proceedings before the referee. Following a hearing, the referee affirmed the Unemployment Division's findings, and the Commission adopted the referee's recommended order. On appeal to circuit court, appellant challenged the sufficiency of the evidence supporting the referee's findings. He further argued that the proceedings before the referee and the Commission were unconstitutional *per se* due to the appearance of a non-attorney representative on behalf of Norton. The circuit court affirmed the Commission in all respects. The Court of Appeals reversed and remanded. In so doing, the Court addressed the constitutionality of KRS 341.470(3)(a), which authorizes a non-attorney to represent "any employer" in a proceeding before the referee or the Commission. The Court noted that in *Turner v. Kentucky Bar Association*, 980 S.W.2d 560 (Ky. 1998), the Supreme Court of Kentucky held that a similar statute authorizing non-attorneys to represent and advise workers' compensation claimants encroached on the exclusive power of the judiciary to establish rules relating to the practice of law. Furthermore, it is well-established that the representation of a corporate or non-natural entity by a non-attorney implicates the unauthorized practice of law. While the Court acknowledged that KRS 341.470(3) has a laudable goal of simplifying unemployment insurance proceedings, it concluded that the statute violates the separation-of-powers provisions of the Kentucky Constitution. However, the majority noted that this ruling would only apply to the parties before the Court and prospectively. In his partial dissent, Special Judge Henry agreed that KRS 341.470(3) is unconstitutional, but he disagreed that the ruling should apply retroactively to the parties before the Court. Rather, he concluded that Norton acted in good faith reliance on the statute in sending a non-attorney representative and that the error did not affect the rights of any party.

III. CHILD CUSTODY AND RESIDENCY

A. *Berzansky v. Parrish*

[2018-CA-001532](#) 04/26/2019 2019 WL 1868210

Opinion by Judge Kramer; Chief Judge Clayton and Judge Combs concurred.

After Mother and Father divorced and entered into an agreed parenting plan, which granted Mother full custody of Child, Father moved to modify the custody arrangement and award the parties joint custody of Child. The family court denied the motion, and the Court of Appeals affirmed. The Court first concluded that the family court did not err when it rejected Father's assertion that there should have been a presumption of joint custody pursuant to KRS 403.340(6) before the family court determined if a custody modification was proper and in the best interest of Child under KRS 403.340(3). The Court then held that modification of the child custody decree so as to grant Father joint custody was not in Child's best interest given the evidence presented of Father's actions and behaviors. The Court also held that the family court did not err in relying on a custodial evaluation performed by a licensed clinical psychologist.

IV. CIVIL RIGHTS

A. *Teen Challenge of Kentucky, Inc. v. Kentucky Commission on Human Rights*

[2016-CA-001721](#) 04/26/2019 2019 WL 1868367

Opinion by Judge Jones; Chief Judge Clayton and Judge Kramer concurred.

On January 8, 2015, the Lexington Fair Housing Council filed a complaint with the Kentucky Commission on Human Rights (and on January 13th with the Department of Housing and Urban Development) alleging that Teen Challenge's admission requirements discriminated against individuals on the basis of disability, familial status, and religion. The Commission notified all relevant parties, received pleadings, and conducted an investigation where three of Teen Challenge's employees were interviewed; however, it failed to enter a formal finding of probable cause. On November 10, 2015, HUD notified the Commission that it would be reactivating the complaint. As a result, the Commission's legal staff recommended that the Commission administratively close its action through "dismissal without prejudice." In March 2016, the Commission finally sent Teen Challenge an order inadvertently stating that there had been no finding of probable cause and that the complaint was dismissed. Shortly thereafter, though, they sent a corrected letter stating that the Commission intended to set aside the order and dismiss the complaint without prejudice instead. Teen Challenge objected, but the order finding no probable cause was set aside, and the complaint was dismissed without prejudice in April 2016. Teen Challenge subsequently sought a writ of mandamus to prohibit the Commission from affording any validity to the order dismissing the complaint without prejudice. The circuit court denied the writ and found that the Commission was entitled to correct its own clerical error by setting aside the previous order. The Court of Appeals reversed and remanded. The Court held that the Commission has a mandatory duty to investigate and make a probable cause determination in a timely manner pursuant to KRS 344.635 unless there is a reason as to why conducting a timely investigation is impracticable. In this case, the Commission failed to ever make a finding as to probable cause and instead referred the complaint back to HUD. The Court noted that there is no Kentucky authority that allows the Commission to refer its complaints to HUD. Moreover, while there was nothing to suggest that the Commission was prevented from cooperating with HUD when the complaint was first received, the Commission could not simply transfer the complaint and allow a federal agency to do its work. As to Teen Challenge's second argument, the Court held that while the Commission has the inherent authority to correct a clerical mistake in a timely manner when it is so obviously against the true intent of the Commission, it must still make an actual determination as to probable cause once an investigation is completed. Here, the "corrected" order dismissed the complaint without a determination on probable cause. The

Commission may not refuse to determine probable cause by simply administratively transferring the case to a federal agency.

V. CLASS ACTIONS

A. *Manning v. Liberty Tire Services of Ohio, LLC*

[2016-CA-001719](#) 04/12/2019 2019 WL 1575277

Opinion by Judge Acree; Judges Maze and Nickell concurred.

The Court of Appeals considered an appeal of the circuit court's denial of class certification, applying principles addressed in *Hensley v. Haynes Trucking, LLC*, 549 S.W.3d 430 (Ky. 2018). After the Court determined that the circuit court abused its discretion in finding that the plaintiffs failed to establish each of the four elements of a class under CR 23.01 (numerosity, commonality, typicality, adequacy of representation), it nonetheless affirmed the order denying class certification because the circuit court did not abuse its discretion in concluding that the putative class did not satisfy the predominance requirement of CR 23.02(c).

VI. CORRECTIONS

A. Conover v. Blocker

[2018-CA-000459](#) 04/05/2019 2019 WL 1495180 DR Pending

Opinion by Judge Jones; Judge Taylor concurred; Judge Nickell dissented and filed a separate opinion.

Appellee, an inmate at the Kentucky Correctional Institution for Women, filed a petition for declaration of rights following a disciplinary action taken against her for removal of a security camera from a prison wall and assaults against employees/non-inmates. In her petition, appellee admitted that she committed the offenses, but asserted that the Adjustment Committee violated her due process rights when it failed to take into account her mental state at the time she committed the acts. She maintained that the Adjustment Committee failed to consider that she was in the midst of a psychotic episode brought on by the prison's failure to administer her bipolar prescription medication in the days leading up to and on the day of the incidents. The warden filed a motion to dismiss, but the circuit court denied the motion and granted appellee's petition. In a 2-1 vote, the Court of Appeals reversed, holding that a lack of intent or capacity due to mental illness is not a defense in the context of a prison disciplinary proceeding. The Court noted that the United States Supreme Court has held time and time again that prison disciplinary proceedings are not criminal proceedings. Consequently, because appellant was not charged with a violation of the penal code, she was not entitled to the full set of rights available to defendants faced with criminal charges - including the right to argue lack of capacity. The Court further noted that there are no statutes or regulations that make lack of capacity a defense in a prison disciplinary proceeding. In dissent, Judge Nickell asserted that if the prison deemed it medically necessary to regularly administer prescribed antipsychotic medication to address appellee's diagnosed mental condition and control her behavior, yet knowingly failed to provide such medication to her on the day in question, thereby causing her to become delusional and misbehave, it was fundamentally unfair to hold her accountable for conduct beyond her control.

VII. CRIMINAL LAW

A. *Barnes v. Commonwealth*

[2018-CA-000570](#) 04/05/2019 2019 WL 1496777 Rehearing Pending

Opinion by Judge Nickell; Judges Combs and K. Thompson concurred.

During a 2011 drug bust, Kentucky State Police seized cash and a vehicle from appellant. A jury ultimately convicted him of first-degree trafficking in a controlled substance, tampering with physical evidence, and being a second-degree persistent felony offender (PFO II), for which Fayette Circuit Court Division Eight sentenced him to serve twenty years. While the drug charges were pending, appellant was arrested for assault. He entered a conditional guilty plea to second-degree assault under extreme emotional disturbance and being a PFO II, for which Fayette Circuit Court Division Nine sentenced him to one year enhanced to seven years. Despite a five-year statute of limitations, the Commonwealth never sought forfeiture of the seized property. KRS 413.120(3). In 2017, appellant filed a motion seeking return of his property. The Commonwealth acknowledged that it never sought forfeiture but opposed Division Eight returning the property, instead urging it to retain and apply it to an order of restitution for medical bills entered by Division Nine in the assault case. After a hearing, Division Eight entered an order on March 7, 2018 partially sustaining appellant's motion, finding an equitable lien, and ordering the property to be applied to the Division Nine restitution order and court costs in the assault case. Any property remaining would be returned to appellant or his designee. Without reaching the issues raised by the parties - mainly whether one circuit court division may enforce an order entered by another division - the Court of Appeals reversed. The Court noted that when Division Eight entered its order on March 7, 2018, Division Nine had not entered a restitution order; it had, however, entered one order saying that appellant owed no restitution and another order saying that he owed no court costs. It was not until May 10, 2018 - two months later - that an agreed order was entered directing that appellant would pay restitution in the amount of \$8,429.62 to the named victims. The Court concluded that because no restitution order was in place on March 7th, the circuit court was required to release and return appellant's property to him.

B. Brinson v. Commonwealth

[2017-CA-000702](#) 11/02/2018 2018 WL 5778795 Released for Publication

Opinion by Judge Acree; Judge Lambert concurred; Chief Judge Clayton concurred in result only.

Appellant was convicted of theft by unlawful taking of property valued over \$500 but less than \$10,000 and was sentenced to one year's imprisonment, diverted for three years, on the condition that she pay restitution. Appellant argued that the circuit court was required to identify the factual basis for its restitution order pursuant to CR 52.01. The Court of Appeals agreed and vacated the order, holding that when ordering criminal restitution following an adversarial hearing, the circuit court must expressly set out its findings either on the record or in its written restitution order. The Court emphasized that its discussion of the applicability of CR 52.01 related only to when an adversarial hearing was held, not when the circuit court summarily resolved the issue of restitution. In this case, the circuit court found that restitution could not be summarily resolved and, instead, held a full adversarial hearing. This involved the presentation of conflicting witness testimony, the taking of documentary evidence, and brief closing arguments by counsel. Because of this, CR 52.01 applied.

C. Cole v. Commonwealth

[2017-CA-001864](#) 04/05/2019 2019 WL 1495704

Opinion by Judge L. Thompson; Chief Judge Clayton and Judge Jones concurred.

Appellant challenged an order denying his motion to satisfy a DUI service fee with jail credit accumulated under RCr 4.58. That rule allows for a credit of \$5.00 for each day incarcerated prior to conviction to be applied to a fine levied on the conviction of the offense. Appellant argued that RCr 4.58 and KRS 189A.050 did not preclude the applicability of jail credit to the DUI service fee, which he considered a "fine," and that the circuit court erred in failing to so rule. Citing to *Commonwealth v. Moore*, 545 S.W.3d 848 (Ky. 2018), the Court of Appeals affirmed, holding that a DUI service fee is not a "fine" for purposes of RCr 4.58 and, therefore, is not subject to the \$5.00 daily credit for pre-conviction incarceration.

D. Commonwealth v. Reed

[2018-CA-001006](#) 04/26/2019 2019 WL 1868215

Opinion by Judge L. Thompson; Chief Judge Clayton concurred; Judge Jones dissented and filed a separate opinion.

In a 2-1 vote, the Court of Appeals affirmed an order granting appellee shock probation. KRS 439.265(2) states that a court shall consider a motion for shock probation within 60 days of the filing of the motion. The court then has ten days to enter an order. On appeal, the Commonwealth argued that the circuit court lost jurisdiction to enter the order because it entered it more than ten days after the shock probation hearing. The Court held that as long as an order granting shock probation is entered within 70 days after the motion is filed, the order is properly entered. In dissent, Judge Jones argued that the circuit court lost jurisdiction when it did not enter the order granting shock probation within ten days after the hearing, even though the order was entered within the overall 70-day timeframe.

E. *Crumes v. Commonwealth*

[2017-CA-001520](#) 04/26/2019 2019 WL 1868224

Opinion by Judge Combs; Chief Judge Clayton and Judge K. Thompson concurred.

This appeal concerned the denial of post-conviction motions filed in a murder case in which appellant, convicted as a juvenile, received a sentence of 30 years at his sentencing upon becoming an adult. The Kentucky Innocence Project reviewed his case and filed this appeal on his behalf. Appellant contended that his conviction should be set aside because his co-defendant had recanted his trial testimony. In the alternative, he claimed that he was entitled to relief because his trial counsel had been ineffective for failing to obtain an expert on cell tower technology to testify on behalf of the defense. The Court of Appeals vacated and remanded the case for a new trial. The Court noted that the only evidence supporting appellant's conviction was the now-recanted testimony of his co-defendant and cell tower data indicating that appellant was in the vicinity of the murder. In the total absence of any other substantiating evidence in this case, the recantation became much more significant and was entitled to greater consideration. The Court was also persuaded that the truthfulness of the co-defendant's recantation was bolstered by the fact that he faced significant risk of harm to his own self-interest - such as a possible charge of perjury resulting in more time to serve. It was additionally noted that the individual whom the co-defendant accused of committing the murder, of whom he had a mortal fear, had died and could not now retaliate against him for telling the truth. The Court further held that, on remand, appellant was entitled to access to the raw cell phone data used against him in order for his expert to present testimony at his new trial.

F. *Fazzari v. Commonwealth*

[2017-CA-000802](#) 04/26/2019 2019 WL 1868232

Opinion by Judge Acree; Judges Combs and Maze concurred.

Appellant was convicted of felony flagrant non-support and sentenced to five years' imprisonment, conditionally discharged for five years subject to conditions that she remain current on her child support obligations and make specific monthly payments on arrearage. On motion by the Commonwealth, the circuit court revoked appellant's conditional discharge. The Court of Appeals vacated and remanded, holding that the requirements of KRS 439.3106 apply to orders revoking a conditional discharge. Thus, the circuit court's failure to make specific findings in its order as to whether appellant posed significant risk to her prior victims or the community at large and whether she could be appropriately managed in the community constituted palpable error.

G. Giles v. Commonwealth

[2018-CA-000766](#) 04/12/2019 2019 WL 1575387

Opinion by Judge Nickell; Judges Combs and K. Thompson concurred.

Based on a tip from a confidential informant, police conducted surveillance on appellant's apartment. A detective observed an unknown black male leave the rear door of the apartment and walk down the street. Approximately one block away, the detective and other officers approached the subject and engaged him in conversation, first verifying his identity as the person they were looking for in connection with the informant's tip and information gleaned in their subsequent investigation. Appellant admitted possessing marijuana upon questioning related to an odor thereof emanating from his person. The detective ascertained the existence of an outstanding arrest warrant and placed appellant in handcuffs. Officers escorted appellant back to his apartment, entered using a key obtained from him, and conducted a protective sweep. No noises or movement had been observed nor had officers previously seen anyone else enter or leave the apartment during their surveillance. During the sweep, officers observed crack cocaine and a small marijuana grow operation. They secured the apartment and applied for a search warrant. The application included all pre-arrest information known to the officers and referenced items seen inside the apartment. Following the execution of the search warrant and the seizure of incriminating items, appellant was indicted on multiple charges. His motion to suppress was denied, and he entered a conditional guilty plea. The Court of Appeals reversed and remanded, concluding that the officers unlawfully entered appellant's apartment without a warrant and without proof of exigent circumstances. The Court noted that no reasonable indicia of criminal activity or criminal activity preceded the officers' entry, and that they were not entitled to conduct a protective sweep of the apartment because it was not incident to an in-home arrest, they were in no imminent danger of attack from within the apartment, and their safety was not in peril. Finally, any observations of illegal items occurred only when the officers were in a place that they had no legal right or justification to be. The Court further held that the inclusion of references to those illegal items in the search warrant application tainted the ensuing warrant, thereby negating the Commonwealth's assertion of inevitable discovery. Based on these holdings, the Court concluded that suppression was warranted and that the circuit court erred in not so finding.

H. *Hammond v. Commonwealth*

[2017-CA-001119](#) 04/12/2019 2019 WL 1575271

Opinion by Judge K. Thompson; Judges Dixon and Nickell concurred.

Appellant was convicted of unlawful use of electronic means to induce a minor to engage in sexual or other prohibited activities. On appeal, he argued that the circuit court abused its discretion by excluding his expert witness and by admitting a prejudicial photograph of his genitals. The Court of Appeals reversed and remanded for a new *Daubert* hearing to determine whether an expert witness should be allowed to testify regarding appellant's "sexual role-playing" defense. The Court determined that a full hearing needed to be held to consider whether the expert's testimony, which appeared likely to assist the jury in understanding and weighing appellant's defense that he believed the victim was only pretending to be a child, was relevant and reliable. The Court also reversed and remanded as to the circuit court's decision to admit a photograph of appellant's genitals. The Court held that the circuit court abused its discretion in admitting the photograph where identity was not at issue and where there was overwhelming evidence that appellant's messages were being used to induce a minor victim to engage in sexual activities, rendering the photograph's probative value low when compared with the potential that it had to prejudice the jury.

I. *Jennings v. Commonwealth*

[2018-CA-000061](#) 04/12/2019 2019 WL 1575570 DR Pending

Opinion by Judge Kramer; Judges Acree and L. Thompson concurred.

Appellant challenged the denial of his request to modify his probation to strike the condition restricting his access to the internet as unconstitutional, as held in *Packingham v. North Carolina*, - U.S. -, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017). Appellant became a convicted sex offender in 2004. In 2015, he was convicted for failure to comply with sex offender registration requirements and as a persistent felony offender, second degree. The circuit court probated his sentence for five years, with one of the imposed conditions being “no access to internet.” The Commonwealth eventually moved to revoke appellant’s probation, alleging that he had violated the internet probation condition. Citing *Packingham*, appellant argued that the probation condition was impermissible as a violation of the First Amendment to the United States Constitution. The Commonwealth argued that *Packingham* was distinguishable because the decision concerned a statute that restricted internet access for offenders who had served out their sentences, and appellant was on probation. The circuit court did not revoke appellant’s probation, but declined to remove the condition of “no access to internet.” The Court of Appeals vacated and remanded, holding that as applied here, the probation condition of “no access to internet” was not narrowly tailored to serve a legitimate interest and was also unconstitutionally vague. The Court declined to establish a bright-line rule and noted that its holding should not be construed to mean that an internet ban for a defendant on probation would never be reasonably necessary to ensure that the defendant will lead a law-abiding life or to assist him to do so.

J. Prescott v. Commonwealth

[2018-CA-000233](#) 04/05/2019 2019 WL 1496779

Opinion by Judge Dixon; Chief Judge Clayton and Judge Lambert concurred.

Appellant challenged an order denying his RCr 11.42 post-conviction motions. The Court of Appeals affirmed, rejecting appellant's unsupported arguments that his trial and appellate counsel were ineffective for a myriad of reasons, based largely upon appellant's own mischaracterizations of the record. The Court divided appellant's arguments into three categories: (1) issues presented on direct appeal or raised and rejected on appeal; (2) issues analyzed using the standard of prejudice required under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); and (3) issues raised in his motions that were summarily denied without providing a hearing. Concerning the first category, the Court held that the issues raised were improper for collateral attack. Concerning the second category, the Court held that the circuit court had used the correct standard required by *Strickland* - not an impermissibly elevated standard of its own invention. Appellant also used the second category to present a series of arguments regarding the circuit court's findings of fact and conclusions of law pertaining to various issues raised in his RCr 11.42 motions. These issues concerned: the exclusion of text messages not provided in discovery from being admitted as evidence at trial; an incomplete record on direct appeal (an affidavit supporting a search warrant allegedly was missing); an alleged violation of 18 U.S.C. § 1385; hybrid representation; the content of jury instructions; a witness's narration of videos; objection to testimony about uncharged criminal conduct; a conflict in appellant acting *pro se* - particularly with respect to plea advice; suppression of evidence; and *voir dire* and jury strikes. The Court reviewed each argument and, finding no error, affirmed the circuit court's denial of relief. Concerning the third category, the Court affirmed the circuit court's treatment of these "arguments" as being vague, conclusory, and unsupported allegations.

K. Williamson v. Commonwealth

[2017-CA-000832](#) 04/26/2019 2019 WL 1868227

Opinion by Judge K. Thompson; Judges Combs and Lambert concurred.

Following a jury trial, appellant was found guilty of rape in the second degree, sodomy in the second degree, and sexual abuse in the first degree. The Court of Appeals affirmed. During trial, following the conclusion of the case but before closing arguments, one of the jurors stopped the bailiff in the hall and told him that she knew that appellant was lying because she had seen him with the victim (thus contradicting his defense that he was seldom around the victim). Once it was learned that the juror had “insider information,” she was designated as an alternate and then dismissed after closing arguments. The Court held that by doing so, the circuit court properly excused her for cause. The Court noted that the better practice would have been to excuse the juror immediately, but this error was unpreserved and there was no evidence that she tainted the jury. Appellant’s other claim of error concerned another juror who had served in more than one jury panel term in a 24-month period. Again, the Court found no error. Although a juror is disqualified by serving on a jury for more than 30 days in a 24-month period pursuant to KRS 29A.080(2)(g) and KRS 29A.130(1)(a), this does not necessarily prohibit a juror from serving on more than one jury panel term in a 24-month period. The statutes do not address whether a juror can serve those 30 days during multiple jury panel terms or not. Moreover, even if the juror had served more than 30 court days in a 24-month period, such error was waived by appellant failing to make proper inquiries during *voir dire* that would have revealed such a problem. He also could not thereby be harmed as there was no showing that the extension of the juror’s service resulted in bias.

VIII. DAMAGES

A. University of Louisville v. Harper

[2014-CA-000668](#) 04/12/2019 2019 WL 1575390 Rehearing Pending

Opinion by Judge Acree; Judges Nickell and Taylor concurred.

After the Supreme Court of Kentucky reversed the Court of Appeals and reinstated the jury verdict and judgment on a Whistleblower Act/gender discrimination claim brought by a University of Louisville employee, the case was remanded so that the Court could address other issues identified by the Supreme Court as having need of review. Considering those issues, the Court held that the jury's award of damages for mental anguish must be reversed because, although such damages are recoverable pursuant to KRS 344.450 for gender discrimination (for which the University was not found liable), they are not recoverable damages under the Whistleblower Act, KRS 61.101, *et seq.* Additionally, despite the University's failure to preserve its challenge to the award of post-judgment interest, the Court recognized that interest is not among the remedies made available to Whistleblower Act claimants. KRS 61.990(4). In light of this, the Court concluded that "[t]he money at stake derives from the Commonwealth's taxpayers and we cannot allow them to become innocent victims of unforced error by a branch or agency of the government that serves them. That would be a manifest injustice." Consequently, the Court reversed the award of post-judgment interest against the University.

IX. HEALTH

A. *Cabinet for Health and Family Services v. Estate of Cooper*

[2017-CA-001663](#) 04/12/2019 2019 WL 1575418

Opinion by Judge K. Thompson; Judges Jones and Kramer concurred.

The estate of a Medicaid benefit applicant appealed an administrative order denying the reduction of the applicant's disqualification period based on payments made to a nursing home from non-Medicaid funds. The circuit court reversed and remanded for a recalculation of benefits after ruling that 907 KAR 1:005 did not preclude a reduction in the applicant's period of disqualification from Medicaid benefits. The Court of Appeals affirmed the circuit court, holding that 907 KAR 1:005, which prohibits reimbursement after a recipient makes payment for a covered service, does not apply to a Medicaid benefit applicant. Because the applicant here was not a recipient of Medicaid benefits at the time the payments were made to the nursing home on her behalf, her estate was entitled to include those payments in partially curing the disqualification period.

X. IMMUNITY

A. *D. W. Wilburn, Inc. v. Painting Company*

[2017-CA-000968](#) 04/12/2019 2019 WL 1575273

Opinion by Judge Lambert; Chief Judge Clayton and Judge Maze concurred.

Wilburn was the general contractor and construction manager for the Eastern Kentucky State Hospital project in Lexington. Continental Casualty was its surety. Construction began in 2009 and was substantially completed in 2013. In 2014, The Painting Company (TPC), a subcontractor on the project, sued Wilburn for the remainder of the contract price plus costs for extra work incurred. Wilburn and its surety brought third-party plaintiff actions against the Commonwealth (for indemnity for extra work caused by the Commonwealth's architect) and OK Interiors (OKI) (the subcontractor in charge of insulation, drywall, and interior framing), also for extra work caused to be performed by The Painting Company. OKI filed a cross-claim against Wilburn and its surety for payments due. The circuit court granted the Commonwealth's motion for summary judgment, ruling that it was protected by sovereign immunity. A bench trial was held on the remaining claims, after which the circuit court ruled in the subcontractors' favors. A later ruling granted attorneys' fees and costs to the subcontractors under the Kentucky Fairness in Construction Act because of Wilburn's bad faith in withholding payments. Wilburn appealed, as did The Painting Company, with the latter seeking pre-judgment interest on all fees and costs, rather than on just the contractual costs. The Court of Appeals affirmed in all respects, holding that: (1) the Commonwealth was protected by sovereign immunity from an indemnity claim; (2) the record supported the finding of bad faith upon which the award of attorneys' fees and costs was based; and (3) pre-judgment interest was not mandatory as to The Painting Company's unliquidated claims.

XI. MORTGAGES

A. *Clay v. WesBanco Bank, Inc.*

[2017-CA-000481](#) 04/05/2019 2019 WL 1496780

Opinion by Judge Acree; Judges Combs and Maze concurred.

In this appeal from a judgment in foreclosure, the Court of Appeals held that KRS 355.1-309 does not require a mortgagee to demand payment before accelerating the payment requirements of the mortgage note when the mortgagor agrees to specific borrower/mortgagor requirements that will prevent triggering acceleration. The Court also reiterated that CR 40, regarding notices of trial date, limits a trial court's discretion only to assigning a trial date after proper notice, giving both sides an opportunity to be heard and to state their reasons for or against. The Court then held that before a trial date is set, it is not necessary that litigants be allowed to complete discovery, but only that they be granted sufficient time to do so. The Court also determined that while it is not always impermissible in a foreclosure action to sell the property before determining validity and priority of claims, validity and priority were not in dispute in this case. The Court also held that a judge contemplating his own disqualification must consider the competing obligations of his duty to preside in a case and his duty to disqualify himself for bias or its reasonable perception, and that such a decision is reviewable for abuse of discretion. Finally, the Court held that a challenge to the sufficiency of a supersedeas bond should be granted when the original bond amount fails to include any amount other than the principal and interest owed on the date of judgment.

XII. NEGLIGENCE

A. *Richmond v. Hunt*

[2018-CA-000182](#) 04/05/2019 2019 WL 1496951 DR Pending

Opinion by Judge Combs; Judges Acree and Maze concurred.

Appellant brought a medical malpractice action against his treating doctors and the medical practices where they worked, alleging that their failure to timely diagnose a blood clot deprived him of the opportunity to receive treatment that could have saved his hand from amputation. The circuit court granted summary judgment in favor of the doctors. Although the court acknowledged that genuine issues of material fact existed as to the doctors' deviation from the standard of care, it nonetheless granted their motions for summary judgment based on causation alone - namely, that causation could not be established with certainty as a result of the testimony of appellant's medical expert. The Court of Appeals vacated and remanded, holding that a genuine issue of material fact existed regarding whether the doctors' failure to timely diagnose the blood clot caused appellant to eventually require amputation of his hand. The Court noted that there was "unquestioned deviation by the doctors from the proper standard of care" and concluded that the testimony and medical report from appellant's expert demonstrated enough of a causal nexus between this deviation and appellant's injuries to allow the case to survive summary judgment. In reaching this conclusion, the Court emphasized that while evidence of causation must be in terms of probability rather than mere possibility, substance should prevail over form and the total meaning - rather than a word-by-word construction - of the evidence should be the focus of the inquiry. Here, both appellant and appellees picked and chose language from the expert's deposition utilizing "probability" and "possibility" almost interchangeably. The fact that emerged, however, was that the doctor opined that time was of the essence in saving appellant's fingers. In light of this, summary judgment was inappropriate.

XIII. TORTS

A. *McMahon v. F & C Material Handling, Inc.*

[2017-CA-000430](#) 04/05/2019 2019 WL 1496154

Opinion by Judge Lambert; Judge Dixon and Special Judge Henry concurred.

Appellant was injured at work when a loading dock leveler malfunctioned, causing his leg to be amputated above the knee. He filed suit against the manufacturer of the dock leveler (under a product liability theory) and against appellee, which specialized in the service and repair of loading docks and doors, for negligent repair of the leveler; his employer intervened as a subrogee and included the dispatch company as a defendant. Settlements were reached in all but the claim against appellee. The circuit court granted appellee's motion for summary judgment, ruling that there was no privity of contract between appellant and appellee. The Court of Appeals reversed and remanded for trial, holding that there was a duty owed appellant as an expected user of the repaired dock leveling equipment and that there were genuine issues of material fact as to whether appellee was negligent and whether its negligence, if any, was a substantial factor in causing appellant's injuries.

XIV. TRUSTS

A. *Vander Boegh v. Bank of Oklahoma, N.A.*

[2016-CA-001307](#) 04/05/2019 2019 WL 1495712 Rehearing Pending

Opinion by Judge K. Thompson; Chief Judge Clayton and Judge Maze concurred.

Several minority beneficiaries of two trusts (the Vander Boeghs) appealed from the dismissal of their claims against the Bank of Oklahoma, in which they alleged that the Bank performed deficiently as trustee, and from the decision to award over \$2,000,000 in attorneys' fees and costs to the Bank. In appeal No. 2016-CA-001307-MR, the Court of Appeals held that the circuit court did not err in striking the Vander Boeghs' jury demand because they had waived a jury trial on their original claims and their amended claims added only factual amplification without raising new issues or adding new parties. The Court also held that beneficiaries generally could not maintain breach of contract or negligence claims against trustees since such claims are actions at law whereas a beneficiary's rights against a trustee sound in equity. In appeal No. 2017-CA-000294-MR, the Court held, as a matter of first impression, that KRS 386B.10-040, which permits an award of costs and attorneys' fees to a party in a judicial proceeding involving the administration of a trust, is a remedial statute that could be applied to litigation already pending when it became effective in 2014. To reach that conclusion, the Court relied upon Kentucky precedent holding that statutes authorizing attorneys' fees are deemed remedial, as well as the conclusions of courts in other states that have adopted the Uniform Trust Code. However, the Court vacated and remanded the attorneys' fee award because the invoices and privilege log submitted by the Bank's attorneys were insufficiently detailed. Stressing that a trial court must closely examine any request for attorneys' fees, the Court remanded the matter with instructions to examine unredacted copies of the attorneys' fee invoices *in camera*.