PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
APRIL 2009

I. ADMINSTRATIVE LAW

A. Kentucky Retirement Systems v. Sandra Bowens

2007-SC-000509-DG **April 23, 2009**

Opinion by Justice Scott. All sitting; all concur. Kentucky Retirement Systems denied employee's application for disability retirement and she sought judicial review in Franklin Circuit Court—which affirmed the Board's decision. The Court of Appeals affirmed in part and vacated in part. The Supreme Court affirmed the portion of the Court of Appeal's decision that held that KRS 61.600 implicitly requires that the cumulative effect of the claimant's ailments be considered when determining the claimant's "residual functioning capacity." In this case, the Hearing Officer had fragmented claimant's several ailments and determined that no single condition permanently prevented claimant from being able to work. The Supreme Court held that failure to apply the "cumulative effect rule" rendered the Board's decision arbitrary. However, the Supreme Court reversed the Court of Appeals' adoption of the federal "treating physician rule" which states that the opinions of treating physicians should be given greater weight than opinions of non-examining physicians as long as the treating physician's opinions were supported by substantial evidence. The Court held such a rule was not within the state's statutory scheme and infringed upon the well-settled principle that the trier of fact may give evidence the weight it deems appropriate. The case was remanded back to the Board for further review of evidence under the "cumulative effect" standard.

B. Dubin Orthopaedic Center PSC v. State Board of Physical Therapy

2007-SC-000756-DG **April 23, 2009**

Opinion by Justice Abramson. All sitting, all concur. The State Board of Physical therapy sought to enjoin Appellant—an orthopedic surgeon—from using AMA billing codes related to physical therapy, citing KRS 327.020(3) which prohibits anyone other than board-licensed physical therapists from calling themselves physical therapists or billing for physical therapy services. The trial court denied the Board's request for injunctive relief, but the Court of Appeals reversed, holding that while

Appellant was authorized to provide the type of treatment he did, KRS 327.020 still applied to him, precluding Appellant from using the insurance codes or the phrase "physical therapy" when describing his services. The Supreme Court reversed the Court of Appeals, citing the plain language of KRS 327.020(1), which states "nothing contained in this chapter shall prohibit any person licensed in this state under any other law from engaging in the practice for which such person is duly licensed." The Court added that the statute's purpose is to protect the public against unqualified providers, not to protect physical therapists against competition from other qualified health care providers.

II. CRIMINAL LAW

A. Earl Vincent. Jr. v. Commonwealth
2007-SC-000413-MR **April 23, 2009**

Opinion by Chief Justice Minton. All sitting; Justice Schroder concurs in result only. Vincent was indicted on 294 counts of sexual offenses spanning four decades and involving multiple family members. At the close of the Commonwealth's case, the prosecutor amended the indictment to 29 counts. Vincent was convicted on all 29 counts and was sentenced to 50 years imprisonment. On appeal, Vincent argued that he was entitled to relief under RCr 10.26 because the prosecutor stated in opening remarks that "300 counts were not enough." The Court rejected Vincent's argument that the statement was an improper expression of the prosecutor's personal opinion of Vincent's guilt and an insinuation to the jury that the prosecutor knew of facts that could not be presented. The Court held that any error was not palpable, and further ruled that it was not prosecutorial misconduct under the facts and circumstances of this case for the prosecutor to seek a nearly 300 count indictment when only a fraction went to the jury. The Court noted that because of the lapse of time, there was difficulty in proving that some of the offenses had occurred in Edmonson County.

Vincent also argued that the trial court should have granted a mistrial after a police officer mentioned Vincent's refusal to be interviewed. The Supreme Court held that the trial court did not abuse its discretion in refusing to grant a mistrial, noting that the prosecution did not elicit the information from the officer and that the trial court had offered an admonition which would have cured any error. Lastly, the Court held that there was no palpable error for investigative hearsay by an officer who testified that the victims told him they had suffered "years of rape, sodomy and incest,"

where the victims subsequently took the stand and gave graphic, detailed testimony.

B. Michael R. Parrish v. Commonwealth
2007-SC-000782-DG April 23, 2009

Opinion by Justice Cunningham. All sitting; all concur. Parrish entered an Alford plea to one count of cultivating marijuana and was sentenced to one year imprisonment, probated for two years. A year later, Parrish filed CR 60.02 and RCr 11.42 motions to vacate the judgment—claiming police officers gave perjured testimony against him. The trial court denied both motions. The Court of Appeals affirmed denial of the CR 60.02 motion and held that the RCr 11.42 motion was moot since Parrish's probation had expired prior to consideration of the appeal. The Supreme Court affirmed the Court of Appeals, noting that the remedy offered by RCr 11.42 is a right to be released from one's sentence. "It is axiomatic," wrote the Court, "that a person cannot be released from a sentence which has been completed."

The Supreme Court also upheld denial of the CR 60.02 motion, holding that Parrish was, in effect, challenging the sufficiency of the evidence against him. Since Parrish pled guilty, the Court held he had waived all defenses other than that the indictment charged no offense. The Court also noted that the record did not support his claims that his plea was coerced.

C. Commonwealth v. Kenneth McBride
2005-SC-000539-DG April 23, 2009
2005-SC-000930-DG April 23, 2009

Opinion by Special Justice Whitlow. Justice Cunningham and Justice Schroder not sitting. In 1999, McBride was convicted of sexual battery in Tennessee and sentenced to two years imprisonment. In January 2001, McBride moved to Mt. Sterling, Kentucky. In May 2001, McBride was indicted for failing to register as a sexual offender as required by KRS 17.510(7). McBride was found guilty and sentenced to four years imprisonment. The Court of Appeals reversed the conviction because McBride was not given notice of the duty to register in Kentucky, holding that such notice was required by due process, as well as KRS 17.510(6). The Court of Appeals also held that there was an implicit mens rea element to the statute, requiring that defendants must knowingly refuse to register before they can be convicted. In reaching its decision, the Court of Appeals relied upon Lambert, a United States Supreme Court case which held those charged under a California municipal

ordinance requiring registration by felons remaining more than five days must have notice of the duty to register.

The Kentucky Supreme Court reversed the Court of Appeals and reinstated the conviction, distinguishing this case from the facts of Lambert. The Court acknowledged "pervasive presence and age" of sexual offender registration statutes, noting that since 1996, all 50 states have such laws. The Court also noted that in Lambert, registration was required for the convenience of law enforcement in compiling a list, whereas Kentucky's sexual offender registration statute was created out of public safety concerns and is aimed at only a narrow class of offenders. Lastly, the Court observed that sexual offenders have actual notice of their lifetime obligation to register in the state of their original conviction. The Court also held that the notice requirement of KRS 17.510(6) did not require notice be given to those charged and convicted under KRS 17.510(7), since the primary purpose of the section [6] was to require effective administration of the statute by the interstate compact officer—not to create a right of notice for sex offenders.

Justice Noble wrote for the minority (joined by Justice Abramson and Special Justice Mando) and concurred with reinstatement of McBride's conviction, but felt that, consistent with Petersen, he should be convicted of a misdemeanor under an earlier version of the statute that was in effect when McBride originally registered in Tennessee.

III. TORTS

A. Gregory B. Nazar, MD, et al. v. Sheila Branham, Executrix of the Estate of Roe Branham

2004-SC-001015-DG **April 23, 2009**
2005-SC-000834-DG **April 23, 2009**

Opinion by Special Justice Mando; Chief Justice Minton and Justice Schroder not sitting. During surgery to remove a brain tumor, a small metal "Durahook" was left in the patient's scalp, necessitating a second surgery months later to remove the item. The patient brought a medical malpractice suit against the surgeon. The jury returned a defense verdict after the trial court refused to instruct the jury on the patient's theory that the surgeon was vicariously liable for the nurses' failure to remove the item. The Court of Appeals reversed, holding that under Laws v. Harter, leaving a foreign object inside a patient is negligence per se, and that the patient should have been awarded summary judgment on the issue of liability.

The Supreme Court reversed the Court of Appeals and overruled Laws, holding that the res ipsa loquitur standard was more appropriate than the stringent negligence per se standard for foreign object cases because it allows juries to determine the individual healthcare professional's level of liability in a situation where any number of people may be responsible for leaving the object inside the patient. Having determined the issue of the surgeon's personal liability was properly sent to the jury, the Court then took up the issue of the surgeon's vicarious liability. The Court held that in order for vicarious liability to exist, it must be established that the nurses were the surgeon's agents. The Court found the patient had presented no evidence of an agency relationship and noted the surgeon's evidence showing that he did not control the nurses' training, terms of employment or details of their work. As such, the Court held that the trial court was correct in its refusal to instruct the jury on vicarious liability. Justice Venters (joined by Justice Cunningham and Justice Noble) concurred but disagreed with the majority's conclusion that the nurses were not agents of the surgeon. The minority wrote that because the surgeon did not order or instruct nursing staff in how to assist him did not necessarily negate the supervisor/agent relationship but might instead indicate that the surgeon was deficient in his supervision of the nurses.

B. William Mattingly, et al. v. William E. Stinson, et al.
Kentucky Farm Bureau Mutual Insurance Company v. William E. Stinson, et al.

2007-SC-000221-DG	**April 23, 2009**
2007-SC-000222-DG	**April 23, 2009**

Opinion by Justice Cunningham. Justice Abramson not sitting. Stinson sued Mattingly and Stinson's underinsured motorist carrier (KFB) for injuries suffered in a motor vehicle accident. Before trial, Mattingly's motion to prohibit reference to UIM coverage was granted. The jury returned a verdict in Mattingly's favor—finding Stinson 100% at fault. The Court of Appeals reversed and remanded for a new trial, holding that prohibiting reference to UIM coverage violated the rule set forth in Earle v. Cobb. In Earle, the Court held that a UIM carrier must be identified at trial when it had chosen to preserve its subrogation rights by means of the procedure set forth in Coots v. Allstate. The purpose of Earle was to eliminate the "legal fiction" that occurs when the name of the tortfeasor is substituted for the UIM carrier for trial purposes. The Court noted that in this case, KFB did not enter into a Coots settlement and therefore did not substitute its own liability for

Mattingly's—thus there was no legal fiction presented to the jury. The Supreme Court reversed the Court of Appeals and reinstated the jury verdict, declining to extend Earle to trials where the UIM carrier has not availed itself of the Coots procedure to subrogate its rights. Justice Scott concurred in result only, disagreeing with the majority's suggestion that both a Coots settlement and participation at trial are needed to trigger identification of the UIM carrier as a party at trial.

C. George Miller, et al. v. Donna Hutson (d/b/a Scott Partin Builders)

2007-SC-000317-DG **April 23, 2009**

Opinion by Justice Schroder; all sitting. Miller, buyer of a new residence, brought an action against Hutson, a subdivision developer, and her builder over defects with the house. The trial court granted Hutson's motion for partial summary judgment dismissing the claims against her since she was not the builder of the house. The Court of Appeals affirmed, declining to extend the builder's exception to the rule of caveat emptor found in Crawley to developers of residential subdivisions. The Supreme Court held that summary judgment in Hutson's favor was inappropriate since there were issues of fact as to whether Hutson was the builder as well as the developer. The Court cited a V.A. loan form where Hutson identified herself as the builder of the residence. Furthermore, the Court held that Hutson's possible status as builder was irrelevant since she signed a one-year home warranty in a personal capacity as warrantor. Thus the Court held that the trial court should have entered a partial summary judgment against Hutson on the issue of liability. The Court remanded for further proceedings on the issue of damages. Justice Venters (joined by Justice Scott) concurred by separate opinion, writing that the Court should have expanded Crawley to hold developer-sellers of residential subdivisions to the same implied warranties as the builder—an issue the majority declined to consider.

IV. WORKERS' COMPENSATION

A. Tokico (USA), Inc. v. Krystal Kelly; Hon. Chris Davis, ALJ; and Workers' Compensation Board

2008-SC-000480-WC **April 23, 2009**

Opinion of the Court. All sitting; all concur. Employer argued on appeal that doctor's diagnosis of complex regional pain syndrome (CRPS) did not conform to standards of the AMA's Guides to the Evaluation of Permanent Impairment (the Guides). The Supreme

Court held that while diagnostic criteria stated in the Guides have relevance in judging the credibility of a diagnosis, there was no statutory requirement that a diagnosis must conform to the criteria listed in the Guides. The doctor in this case made a diagnosis of CRPS even though the claimant met only 7 of 11 diagnostic criteria —while the Guides require 8 for a diagnosis of CRPS. The Court also rejected the employer's argument that the ALJ erred by relying on the doctor's impairment rating for a psychological condition even though the doctor stated the claimant still needed treatment. The Court held that the need for additional treatment does not preclude a finding that the claimant has reached maximum medical improvement.

V. ATTORNEY DISCIPLINE

A. Ky. Bar Assn. v. William A. Nisbet, III

2008-SC-000929-KB **April 23, 2009**

The Supreme Court adopts KBA's recommendation to suspend attorney from practice of law for five years. In 2006, the attorney entered an Alford plea to charges of cocaine trafficking and participating in a criminal syndicate.

B. Ky. Bar Assn. v. John Grant Cook

2008-SC-000937-KB **April 23, 2009**

The Supreme Court approves two-year suspension from the practice of law conditionally probated for two years. The attorney had been charged with not communicating with or acting on behalf of two clients. In mitigation, the attorney established he was suffering from severe depression at the time the violation occurred.

C. Rebecca Frazier v. Ky. Bar Assn.

2008-SC-000953-KB **April 23, 2009**

Supreme Court reinstated attorney to membership in the KBA. Attorney had been previously suspended for nonpayment of bar dues.

D. Ky. Bar Assn. v. R. Allen McCartney

2009-SC-000016-KB **April 23, 2009**

Supreme Court entered order permanently disbarring attorney from the practice of law. Attorney was found guilty by KBA Board of Governors of multiple violations arising from three separate

disciplinary files. In all three cases, the attorney was found to have refused to return unearned fees or otherwise communicate with his clients. The attorney abandoned his office without informing his clients and did not participate in the disciplinary proceedings against him.

E. Travis O. Myles v. Ky. Bar Assn.
2009-SC-000139-KB **April 23, 2009**

Supreme Court granted attorney's motion for 181-day suspension with 30 days to serve and the remainder probated for five years. The suspension was the result of four different disciplinary files against the attorney. Two of these files concerned civil cases in which the attorney did not perform services for clients as agreed, another involved a client proceeds check that returned unpaid due to insufficient funds. The final case concerned funds owed to the widow of the attorney's law partner—the Court also ordered that the attorney pay her $53,220.31 plus interest.