

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
JUNE 2009**

I. COLLECTIONS

**A. MPM Financial Group, Inc. v. Michael P. Morton
[2007-SC-000652-DG](#) June 25, 2009**

Opinion by Justice Venters. All sitting; all concur. MPM sued Morton for theft and embezzlement and obtained a \$14,000 judgment in its favor. MPM then sought to garnish the benefits Morton received from a disability insurance policy. Morton argued that the benefits were exempt under KRS 427.170 and the trial court ruled in his favor. The Court of Appeals affirmed. The Supreme Court reversed, holding that the exemptions listed in KRS 427.170 were not available to all debtors domiciled in Kentucky—only to those involved in bankruptcy proceedings.

II. CRIMINAL LAW

**A. Frank Rodgers v. Com. of Kentucky
[2007-SC-000040-MR](#) June 25, 2009**

Opinion by Justice Abramson; all sitting. Rodgers was convicted of first-degree manslaughter and PFO second degree. At trial, the prosecution alleged that Rodgers and co-defendant Eddings shot and killed McAfee during the course of an altercation in McAfee's backyard. On appeal, Rodgers argued, *inter alia*, that the trial court abused its discretion by joining his trial with Eddings'. Specifically, Rodgers argued that the introduction of statements by he and Eddings to the police deprived him of a fair trial and denied his right to put on a defense.

The Court held that even assuming *arguendo* that Eddings' statement was not redacted to sufficiently remove all facial implication of Rodgers, it was still harmlessly cumulative of other admissible evidence presented. Rodgers also argued that he should have been allowed to cross-examine the detective about other portions of the statement relating to self-defense. The Court acknowledged that under Chambers, due process can trump mechanical application of the hearsay rule, but held that the trial court did not err by excluding additional portions of Rodgers' statement since they were not critical to his defense and were not made under circumstances giving "considerable assurance of reliability."

Rodgers also argued that the 2006 amendments to the self-defense provisions of KRS Chapter 503 should have been retroactively applied to the charges against him. These amendments included expansion of the justified use of force to prevent the commission of violent felonies and provided that the use of deadly force is not contingent upon a duty to retreat. If applied retroactively, Rodgers contended he was immune from prosecution. The Court held that the amendments, with the exception of the immunity provision, were substantive in nature and thus could only be applied prospectively. The Court agreed with Rodgers' argument that the immunity provision was procedural and must be applied retroactively, but rejected his claim that he should have received a pre-trial evidentiary hearing on the immunity issue. The Court held that a finding in district court that there was probable cause to believe a defendant's use of force was unlawful is sufficient to proceed with trial, and that the issue shall not be revisited by the circuit court.

Rodgers also argued that even if the Chapter 503 amendment could not be applied retroactively, he was still entitled to a jury instruction stating he had no duty to retreat. The majority disagreed, noting that the Court had rejected an identical argument in Hilbert, and affirmed Rodgers' conviction. Justice Scott and Justice Noble both concurred in part and dissented in part by separate opinions. Both asserted that the "no duty to retreat" provision was not a substantive change in the law as the doctrine had long been part of the common law in Kentucky prior to codification by the legislature. Both also asserted that the case should be remanded for a new trial with a "no duty to retreat" jury instruction. Justice Noble also expressed her belief that the immunity provision was substantive rather than procedural since it granted a new status that did not exist prior to the amendment's enactment and thus should be applied prospectively only.

**B. Brent Cantrell v. Com. of Kentucky
2007-SC-000218-MR June 25, 2009**

Opinion by Justice Cunningham. All sitting; all concur. Cantrell appealed his conviction on charges of complicity to manufacture and possess methamphetamine and PFO-2. On appeal, he argued that during the penalty phase the prosecution was allowed, over Cantrell's objection, to make a "send a message" argument to the jury. The Court found no error. The Court noted that both the U.S. Supreme Court and the federal sentencing guidelines include deterrence among the factors to be considered when imposing a

sentence. The Court cited nearly a century of Kentucky case law where prosecutors' comment on the deterrent effect of a sentence has been held proper. "[S]o long as the jury is well aware that it is sentencing the particular defendant before it [...] on the crime for which he or she has been convicted, there is no prejudice in the prosecutor commenting on the deterrent effect of the sentence."

The Court repeated its continued disapproval of "send a message arguments" during the guilt phase of a trial, and cautioned that such arguments must be "channeled down the narrow avenue of deterrence." Any argument by the prosecution that a lighter sentence would "send a message to the community" which would hold the jurors accountable or in bad light is inappropriate.

**C. Shannon Gibson v. Commonwealth of Kentucky
2007-SC-000481-DG June 25, 2009**

Opinion by Justice Venters; all sitting. Gibson was charged with theft of services over \$300. On the eve of trial, the circuit court granted the prosecution's motion to dismiss without prejudice, despite the fact that the hearing for the motion had been noticed for the following day. Gibson filed a motion to amend the order of dismissal to "with prejudice." The Commonwealth opposed the amendment and the trial court denied Gibson's motion. Gibson appealed, arguing that the trial court abused its discretion by not converting the dismissal to "with prejudice" and that she was now unable to demand a trial to clear her name or obtain an expungement. The Court of Appeals affirmed, holding no abuse of discretion had occurred because under the separation of power doctrine, the lower court lacked authority to designate a pretrial dismissal by the Commonwealth as "with prejudice."

The Supreme Court affirmed, rejecting Gibson's argument that CR 41.01 applied to criminal cases and thus authorized the relief she sought. The Court observed that under RCr 13.04 civil rules only apply to criminal cases to the extent they are not superseded or inconsistent with the criminal rules. The Court held that RCr 9.64 covered voluntary dismissal of criminal cases and thus superseded CR 41.01.

The Court further held that, unlike civil cases, criminal actions involve all three branches of state government and thus implicate the separation of powers doctrine embodied in Section 27 and 28 of the Kentucky Constitution. The executive branch is vested with the power to charge and prosecute crimes and a judge is without authority to preclude future prosecution in absence of justification

by substantive law. This substantive law consists of either constitutional safeguards (i.e. speedy trial, due process, double jeopardy) or where subsequent prosecution is barred by statute (i.e. KRS 505.030). The Court concluded that the trial court erred by entering the order of dismissal without affording Gibson a hearing, but that Gibson waived the error when she sought amendment of the order without requesting in the alternative that the order be dismissed and a trial on the charges be held. Justice Cunningham and Justice Scott both concurred, writing their own separate opinions. Justice Cunningham suggested Holloway might provide Appellant some “wobble room” for expungement upon the showing of “extraordinary circumstances.” Justice Scott noted that Gibson had not asked the Court to address any questions regarding discretion or due process which could have resulted in reversal or reinstatement of the underlying indictment.

D. Charles Allen v. Commonwealth of Kentucky
2008-SC-000009-MR June 25, 2009

Opinion by Chief Justice Minton. All sitting; all concur. Allen appealed his conviction for wanton murder, claiming he was denied a fair trial after member of the deceased’s family appeared in the courtroom during jury selection wearing t-shirts bearing a photograph of the victim and the words “in loving memory.” The trial court denied Allen’s motion to discharge the entire venire and allowed defense counsel to question potential jurors about what effect, if any, the t-shirts would have upon them. The Supreme Court affirmed the conviction, holding that while the wearing of the t-shirts in the courtroom was improper, Allen did not suffer any demonstrable prejudice from the display. The Court also rejected Allen’s argument that the shirts created a situation of overwhelming inherent prejudice. The Court encouraged all trial courts to prevent trial attendees from conveying any message by clothing or other paraphernalia that could prejudice the rights of the Commonwealth or a defendant.

E. Larry McCloud v. Commonwealth of Kentucky
2008-SC-000263-MR June 25, 2009

Opinion by Chief Justice Minton. All sitting; all concur. McCloud was arrested after a police officer conducting undercover surveillance observed him holding a rock of crack cocaine while sitting in the driver seat of a parked automobile. The officer conducted warrantless searches of McCloud’s person and the vehicle. The search of McCloud uncovered crack and powder cocaine. The search of the vehicle yielded a loaded handgun,

powder cocaine, marijuana, a safe containing \$6,450 and scales. McCloud was convicted of multiple charges. On appeal, McCloud argued that the trial court erred by denying his motions to suppress both searches. The Court affirmed the conviction, holding that the search of McCloud's person was proper under the exception for searches incident to a lawful arrest. The arrest was lawful since the officer had probable cause to believe McCloud had committed a felony in his presence. The Court discussed the recent U.S. Supreme Court decision in Gant, where the exception for warrantless vehicle searches incident to a recent occupant's arrest was narrowed to instances where the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of the arrest. The Court held that the search was lawful under Gant since under the circumstances it was reasonable to believe the vehicle contained evidence relating to McCloud's arrest for possession or trafficking in drugs.

The Court also concluded that McCloud's claims that he was not adequately advised of his Miranda rights were not supported by the evidence in record. The Court rejected McCloud's claim that the trial court abused its discretion by permitting opinion testimony from a police detective regarding details of the drug trade, noting that it had approved of similar testimony both before and after Daubert. Lastly, the Court rejected McCloud's argument that he was entitled to a directed verdict on the firearms possession enhancements because there was no evidence of a nexus between the firearm found beneath the seat and the drug charges against him. The Court cited case law stating that constructive possession of a firearm in close proximity to possession of narcotics is sufficient to create a jury question on whether the firearm was possessed in furtherance of drug dealing.

**F. Victor Dewayne Taylor v. Commonwealth of Kentucky
2008-SC-000273-MR June 25, 2009**

Opinion by Justice Noble. All sitting; all concur. Taylor, a death row inmate, filed for DNA testing on crime scene evidence pursuant to KRS 422.285. The Commonwealth produced an inventory which erroneously stated that there was a swab taken from one of the victims—later explaining that the swab had been consumed during preparation of two sample slides. The Commonwealth also informed Taylor and the trial court that, contrary to the previously entered preservation of evidence order, it had tested one of the slides prior to Taylor's request and were able to find no DNA profile. The trial court subsequently dismissed Taylor's petition without a

hearing. The Supreme Court affirmed, holding that the record showed Taylor had been aware of the nonexistence of the swab prior to his request. Furthermore, the Court held that even if there had been evidence sufficient for a DNA profile, Taylor could only establish a “mere possibility” of exculpatory evidence—not a “reasonable certainty” as required by KRS 422.285. Lastly, the Court held that the Commonwealth’s “technical disobedience” of the preservation of evidence order did not rise to the level of misconduct needed to warrant a new trial.

**G. Dayron Castellanos Hidalgo, Real Party in Interest v. Commonwealth of Kentucky, et al.
Hon. A.C. McCay Chavin, Judge Jefferson Circuit Court v. Commonwealth of Kentucky, et al.**

[2008-SC-000429-MR](#)

June 25, 2009

[2008-SC-000518-MR](#)

June 25, 2009

Opinion by Justice Cunningham. All sitting; all concur. The Supreme Court holds that circuit court has no authority to conduct a *sua sponte* shock probation hearing. As part of a court-approved plea deal, the defendant agreed not to seek shock probation. The circuit court subsequently scheduled a shock probation hearing. The Commonwealth petitioned the Court of Appeals for a writ of prohibition, which was granted. The Court of Appeals ruled the writ was warranted since the judge was proceeding outside his jurisdiction and there was no adequate remedy on appeal. The Supreme Court affirmed the Court of Appeals, holding that shock probation is wholly a creation of statute which requires a defendant’s motion for shock probation as a condition precedent for establishing jurisdiction for the circuit court.

H. James Darnell Graves v. Commonwealth of Kentucky

[2008-SC-000580-MR](#)

June 25, 2009

Opinion by Justice Noble. All sitting; all concur. Graves appealed his burglary conviction claiming he was entitled to a mistrial because during *voir dire* the prosecutor improperly bolstered a prosecution witness by referring to him as “a neutral individual.” The Court held that the trial court did not abuse its discretion in denying the mistrial, and noted that defense counsel did not request an admonition to the jury after his objection was sustained and also agreed to allow the Commonwealth to cure the error by emphasizing to the panel that the jury had the duty to determine credibility and motive.

The Court also rejected Graves' argument that he was entitled to a directed verdict on the possession of burglary tools charge since there was not even a scintilla of evidence to support a conviction (Sawhill). The Court noted that the elements of the offense are possession of the tool under circumstances which leave no reasonable doubt of the person's knowledge or intent. Further the Court held that since Graves had been apprehended near the scene of the robbery in possession of stolen goods and a screwdriver, and since numerous parts of the premises had been pried open, sufficient evidence existed for the question to go to the jury.

**I. Christian Omar Walker v. Commonwealth of Kentucky
2007-SC-000568-MR June 25, 2009**

Opinion by Justice Scott. All sitting; all concur. Walker appealed his conviction on charges of complicity to murder, complicity to first-degree robbery, complicity to second-degree assault and complicity to tampering with physical evidence. Walker argued that his conviction must be reversed since the trial court refused to strike a potential juror for cause after he stated he would not consider the full range of penalties or all types of mitigating evidence. The Court disagreed, noting that the juror's statement was made in response to a "worst-case" hypothetical question—the type disapproved of by the Court in Mabe—and that the potential juror had even qualified his response as pertaining only to the hypothetical question. The Court also upheld the trial court's exclusion of a statement made by Walker's co-defendant to the police—holding the statement was admissible neither under any of the hearsay exceptions proffered by Walker nor for the due process reasons articulated in Chambers.

However, the Court reversed Walker's conviction on tampering with physical evidence. At the close of the Commonwealth's proof, Walker moved for a directed verdict on the charge on the grounds that it was not supported by the evidence presented. The trial court sustained the motion, but at the close of all proof, the Commonwealth asked the trial court to reconsider, and the charge was reinstated. Walker argued that reinstatement of the charges amounted to double jeopardy. The Court agreed, citing the rule in Smith that an "acquittal must be treated as final if, after a facially unqualified mid-trial dismissal of one count, the trial has proceeded to the defendant's introduction of evidence."

**J. William Sanders v. Commonwealth of Kentucky
2008-SC-000118-MR June 25, 2009**

Opinion by Justice Venters; all sitting. Sanders appealed his convictions for first-degree robbery and PFO-1, arguing, in part, that his PFO conviction was based on a prior conviction for possession of drug paraphernalia which is forbidden by KRS 532.080(8). The Commonwealth acknowledged the error, but argued it was harmless because evidence was presented at trial that Sanders had four other felony convictions—any of which they claimed would have supported PFO status. The Supreme Court ordered a new sentencing phase trial on the grounds that it could not be presumed that the specific prior offense listed in the instruction made no difference, since under Adkins, a jury is entitled to disbelieve evidence of prior convictions. The Court declined to review under the palpable or harmless error standards since the conviction directly violated the statute which defines the crime.

The Court also noted that the verdict form for the PFO charge did not conform to the standards of Reneer. Under Reneer, a jury must first be instructed to fix the penalty on the underlying charge, then be instructed to determine if the defendant is guilty of being a PFO, and, if so, the jury must then set the enhanced penalty to be served in lieu of the sentence for the underlying offense. The Court stated that the model verdict form in Cooper's Kentucky Instructions to Juries, Criminal §§ 12.41-12.43 is adequate only if it is made clear to the jury that a sentence for the underlying offense must be fixed in every case. Justice Scott concurred in part and dissented in part, contending that the erroneous use of the possession of drug paraphernalia conviction as a basis for the PFO was harmless, and the sentence should have been affirmed.

K. David Morrow v. Commonwealth of Kentucky
2007-SC-000505-DG June 25, 2009

Opinion by Justice Scott. All sitting; all concur. Morrow was convicted of drug trafficking—on appeal he argued the trial court erred by refusing to give a jury instruction on entrapment. The Commonwealth had opposed granting such an instruction because Morrow's alternative defense theory was that he was a participant in an "independent drug investigation" scheme and had, in fact, been trying to set up a police informant when he was arrested. The Court of Appeals affirmed, holding that allowing a defendant to argue two defenses that cannot both be true amounted to court-sanctioned perjury. The Supreme Court reversed and remanded for a new trial, adopting the U.S. Supreme Court's rule from Mathews that a defendant may properly deny one or more elements of a criminal offense and alternatively claim the

affirmative defense of entrapment if sufficient evidence is introduced at trial to warrant instructing the jury as to the defense.

L. Raymond Kreps v. Commonwealth of Kentucky
2007-SC-00814-MR June 25, 2009

Opinion by Justice Abramson. All sitting; all concur. Kreps appealed his conviction on multiple counts of rape of a 14-year-old girl, arguing the trial court committed reversible error by permitting the prosecution to introduce statements made to police during the course of plea negotiations. The Court agreed and reversed for a new trial, noting that even though the Commonwealth's Attorney was not physically present when the statements were made, police were in contact with him during the interview with Kreps. The Court concluded that in light of the circumstances, Kreps' expectation that he and the Commonwealth were engaged in negotiations was reasonable. The Court also held that upon remand, it was not abuse of discretion for the trial court to exclude questions by Kreps to the alleged victim about prior allegation of abuse she made against other persons when she was six years old.

III. INSURANCE

A. James Malone v. Kentucky Farm Bureau Mutual Insurance Company
2007-SC-000468-DG June 25, 2009

Opinion by Justice Abramson; all sitting. After sustaining injuries in a car accident, Malone sued the other driver and Malone's under-insured motorist carrier (KFB). The tortfeasor's insurer offered to settle for the policy limits and Malone's counsel sent a certified letter to KFB indicating Malone was "considering whether to accept" the offer and demanding that, consistent with KRS 304.39-320 and Coots, that KFB either consent to the settlement or preserve its subrogation rights by advancing a check for the amount equivalent to the tortfeasor's policy limits. KFB responded to the letter, advising Malone's counsel to notify KFB when his client had made a final decision on the settlement offer from the tortfeasor's insurer. Malone subsequently accepted the settlement offer and executed a release. KFB then filed a motion for summary judgment which the trial court granted on the grounds that Malone's UIM claim was extinguished for lack of proper notice to KFB of the settlement. The Court of Appeals affirmed.

The Supreme Court affirmed, holding that KRS 304.39-320 requires notice to the UIM carrier when the injured party "agrees to settle."

Since Malone’s letter merely stated the offer was being considered, there was no agreement in place and notice to KFB was insufficient. The Court rejected Malone’s argument that he had substantially complied with the intent of the statute, noting that the central underpinning of the statute was the existence of a binding agreement to settle between the injured party, the under-insured motorist and the under-insured motorist’s liability carrier. Justice Cunningham (joined by Justice Schroder and Justice Scott) dissented, asserting that the letter satisfied the notice requirements and that the majority was, in effect, adopting a “magic phrase” component. The dissent contended that the majority was focusing solely on the “considering whether to accept” phrase while ignoring the plain meaning of the overall letter. The minority discounted KFB’s response to Malone’s letter saying objective analysis trumped KFB’s subjective interpretation.

IV. SOVEREIGN IMMUNITY / JURAL RIGHTS DOCTRINE

A. Caneyville Volunteer Fire Department, et al v. Green’s Motorcycle Salvage, Inc., et al
[2007-SC-000517-DG](#) June 25, 2009

Opinion by Justice Scott; all sitting. The Greens sued the Caneyville Volunteer Fire Department (CVFD) and its chief in tort, alleging negligence in failing to timely extinguish a fire, causing damage to their property. They also argued that KRS 75.070 and 95.830(2), which purport to provide firefighters and fire departments with immunity from civil liability are unconstitutional. The Circuit Court dismissed the complaint. The Court of Appeals reversed, holding the statutes unconstitutional for violating the jural rights doctrine. The Court of Appeals ruled that by enacting the statutes, the legislature impermissibly extended sovereign immunity. The majority opinion analyzed the roots of the jural rights doctrine and the historic relationship between civil governance and firefighting. Applying the test from Autry, the Court concluded that the CVFD was an agent of the Commonwealth, engaged in the Commonwealth’s work and thus entitled to sovereign immunity. The majority also concluded that the fire chief was afforded qualified official immunity from liability under Autry, since his acts were discretionary in nature, not ministerial.

Justice Venters concurred, contending reevaluation of the jural rights doctrine and sovereign immunity was unnecessary since the original complaint failed to state a claim for which relief could be granted since the fire department owed no duty to the Greens to save their property. Justice Abramson concurred in result only,

writing that the city of Caneyville was not a proper party to the case since the fire department was a county-authorized taxing district immune from suit under KRS 75.070. Chief Justice Minton (joined by Justice Schroder and Justice Cunningham) concurred in result only, arguing that the jural rights doctrine is a legal fiction without basis in Kentucky law or history. This minority agreed that the fire chief enjoyed immunity for actions performed within the scope of his employment, regardless of whether the action were mistrial or discretionary—rejecting these distinctions as a “judicial amendment” to the immunity statute. Justice Noble concurred in result only.

V. STATUTE OF LIMITATIONS—CERTIFICATION OF LAW

- A. John R. Wilson, Trustee for Franklin Career Services, LLC v. David B. Paine & John Newton**
2008-SC-000905-CL June 25, 2009

Opinion by Justice Cunningham. All sitting; all concur. The U.S. Bankruptcy Court for the Western District of Ky. certified the following question to the Kentucky Supreme Court: Does the equitable doctrine of adverse domination apply to toll the statute of limitation on lawsuits against corporate directors for unlawful distributions (KRS 271B.8-330)? The Court answered this question in the affirmative. The doctrine of adverse domination provides that a cause of action by a corporate plaintiff against the board of directors will be tolled during the period that the corporation is under the control of wrongdoers.

Equitable tolling is based upon a lack of knowledge of an injury. Accordingly, a corporate plaintiff cannot be deemed to have knowledge until such time that the individuals who control the corporation are aware of the injury and are willing to act upon the knowledge. The Court adopted the “disinterested majority” test for adverse domination, wherein the plaintiff is required to show that a majority (not all) of the board members engaged in intentional wrongdoing (not mere negligence) in order to toll the statute of limitation.

VI. TAXATION

- A. Directv, Inc. and Echostar Satellite, LLC v. Commissioner, Dept. of Revenue and Frankfort Independent School District**
2007-SC-000714-DG June 25, 2009

Opinion by Justice Abramson. All sitting; all concur. Direct broadcast satellite (DBS) television providers brought an action seeking to have KRS 160.140, which imposes a gross receipts tax declared preempted under the federal Telecommunications Act of 1996. The circuit court awarded summary judgment to the DBS providers. The Court of Appeals reversed, holding that because the tax was levied to fund schools, it was, in effect, a state tax, not local, and thus was not preempted by the Act. The Supreme Court reversed the Court of Appeals and reinstated the circuit court's summary judgment in favor of the DBS providers. The Court held that the tax was of the type expressly prohibited by the Act because the taxes were imposed on a district-by-district basis. The Court noted that the Act's legislative history buttressed this conclusion.

VII. TORTS

A. Labor Ready, Inc. and Sylvann C. Hudson III v. Wanda Sue Johnston
2007-SC-000419-DG June 25, 2009

Opinion of the Court; Justice Abramson not sitting. Mid-America Auto Auction routinely supplemented its permanent workforce during auctions by ordering temporary employees from Labor Ready, a temporary labor service. During one such auction, Johnston, a permanent employee of Mid-America, was struck by a vehicle operated by Hudson, a temporary employee. Johnston settled her claim for workers' compensation benefits with Mid-America and then filed suit in tort against Labor Ready and Hudson.

The defendants moved for summary judgment arguing that Hudson was Johnston's coworker at the time of the accident—thus her sole remedy was workers' compensation. The trial court granted summary judgment, reasoning that allowing a permanent employee to receive workers' compensation benefits and to sue a subcontractor in tort would unconstitutionally grant the permanent employee greater rights than a similarly situated temporary employee even though they would both be performing the exact same work. The Court of Appeals reversed.

The Supreme Court affirmed the Court of Appeals and remanded the case back to the trial court, holding that a contractor's permanent employee may maintain a tort action against a temporary labor service and its employee for an injury that occurred while working for the contractor. The Court concluded that the exclusive remedy provision of KRS 342.690(1) did not legislatively

overrule the holding in Dillman that a subcontractor's employee was not immune from a tort claim by the principal contractor's employee. The Court also rejected Labor Ready's argument that Hudson was a loaned employee, since KRS 342.615(4) states that temporary help service workers are deemed to be employees of the temporary agency. Therefore, Johnston and Hudson were not coworkers.

VIII. UMEMPLOYMENT INSURANCE

- A. **Les Brownlee, Acting Secretary, U.S. Dept. of the Army; and United States of America v. Commonwealth of Kentucky, Unemployment Insurance Commission; et al.**
2007-SC-000126-DG June 25, 2009

Opinion by Justice Noble. All sitting; all concur. In 2002, the Army decided to hire a private contractor to perform the job functions of 160 civilian employees. These employees were offered continued employment for the following year and a half with no guarantees after that. Alternatively, employees were offered an early retirement package, which included a \$25,000 incentive payment. The Appellees in this case were all employees who accepted early retirement and then sought unemployment benefits. The benefits were initially denied, but the employees prevailed on appeal before the KUIC, Circuit Court and Court of Appeals.

The Supreme Court reversed, noting the general rule that employees who leave employment voluntarily cannot receive unemployment benefits except upon "good cause attributable to the employment." In Murphy, the Court defined the phrase to mean "circumstances so compelling as to leave no reasonable alternative but loss of employment." The Court observed that Murphy had been applied inconsistently in the past and held that a showing of "good cause attributable to the employment" must amount to constructive discharge for the claimant to prevail. The Court held Appellees' voluntary decision to leave employment with the Army did not amount to "good cause attributable to the employment," therefore they were not entitled to unemployment benefits.

IX. WORKERS' COMPENSATION

- A. **Vacuum Depositing, Inc. v. Tamatha Dever; ALJ; and Workers' Compensation Board**
2008-SC-000853-WC June 25, 2009

Opinion of the Court. All sitting; all concur. ALJ dismissed claimant's application for benefits concluding that the claimant's

workplace fall was idiopathic and thus non-compensable because the evidence showed claimant was wearing high heel and admitted she was “clumsy.” The Board reversed on the grounds that the ALJ misapplied the law and the Court of Appeal affirmed. The Supreme Court affirmed the Court of Appeals, noting that under Workman, unexplained falls were presumed to be work-related. Further, the Court held that the record contained (a) no evidence that the claimant suffered from any preexisting condition that caused the fall and (b) no evidence that claimant was engaged in conduct that would take her injury out of the workers’ compensation scheme or (c) no evidence that claimant’s footwear was inherently dangerous or inappropriate for her workplace. Since the evidence did not overcome the presumption that the fall was unexplained, it was work-related.

B. Speedway / Super America v. Mazen Elias; ALJ; and Workers’ Compensation Board
2008-SC-000873-WC June 25, 2009

Opinion of the Court. All sitting; all concur. ALJ awarded claimant workers’ compensation benefits for home healthcare services provided by claimant’s spouse. The employer appealed, arguing the ALJ should have dismissed the claim since claimant had not submitted a “fully completed” Form 114 as required by 803 KAR 25:09 § 11(1). Further, the employer argued that the claim for the period before August 2003 should have been dismissed since it was not filed timely under 803 KAR 25:09 § 11(3). The Court affirmed the decisions of the Board and Court of Appeals, holding that while failure to include detailed information or failing to respond to requests for additional information may justify an employer’s refusal to pay a claim, it did not preclude an ALJ from deciding the extent to which the services covered by a disputed form are compensable. The Court noted the permissive nature of the timeliness component of § 11(3), and held that there was no authority requiring dismissal of claim because of an untimely form. The Court further held that sufficient compliance with § 11(1) depends on the facts and circumstances and that the ALJ’s decision was reasonable under the circumstances at hand.

X. ATTORNEY DISCIPLINE

A. Randall V. Head v. Kentucky Bar Association
2002-SC-000164-KB June 25, 2009

The Supreme Court reinstated attorney to the KBA. Attorney was suspended in 1997 and satisfied all requirements for reinstatement,

including CLE, reinstatement bar exam and approval by the Character and Fitness Committee.