PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
OCTOBER 2008

I. ADMINISTRATIVE LAW

A. Elmer C. Maggard (PhD) v. Board of Examiners of Psychology
2006-SC-000355-DG **10/23/2008**

Opinion by Justice Scott; all concur; Justice Schroder not sitting. Psychologist appealed one-year suspension claiming administrative agency lacked subject matter jurisdiction, entitlement to immunity, trial by jury, and discovery. The Supreme Court affirmed all but the discovery issue, holding that the CR 9.02 requirement that fraud must be pled with particularity applies to common law fraud actions, not to appeals for judicial review of a final decision of an administrative agency. The Court also held that KRS 13B.150 does not provide a right to a jury trial on review of an administrative action, even when claims of fraud and misconduct are raised. The Court rejected Appellant's argument that the trial court lacked jurisdiction because the psychological evaluation that gave rise to the disciplinary action had been conducted in preparation for a judicial proceeding and did not constitute the "practice of psychology." Similarly, the Court rejected Appellant's argument he was entitled to immunity since the charges arose out of his participation in a judicial proceeding. The Court noted that the immunity granted to witnesses is from liability for civil damages, not liability from administrative disciplinary proceedings.

II. CHILD CUSTODY

A. Maria Regina Frances v. Bobby Gene Frances
2007-SC-000076-DGE **10/23/2008**

Christopher Pennington v. Heather M. Marcum (f/k/a Miles)
2006-SC-000642-DG **10/23/2008**

In these two separate opinions by Justice Noble, the Court takes up the issue of relocation of a custodial parent and the standard of review to be applied when reviewing custody decrees and orders. These opinions partially overrule Fenwick v. Fenwick, 114 S.W.3d 767 (Ky. 2003).

In Pennington, the Supreme Court affirmed the circuit court's finding in favor of the primary residential custodian who relocated the child to West Virginia. The Supreme Court held that a preliminary question when dealing with issues of relocation is whether the motion is seeking a modification of custody or merely a modification of timesharing? If a party is seeking a genuine change of custody, then the court must determine if the motion is being filed within two years of the date of the discovery decree. If the motion seeks to amend custody and is filed within two years of the decree, then, pursuant to KRS 403.340, the moving party must establish that the child is seriously endangered or that the child has been abandoned to a de facto custodian. However, if the moving party is objecting to relocation, and is not seeking to amend joint-decision making, then the action is only a modification of timesharing/visitation, and is determined by a lower standard-- analysis of the best interests of the child-- pursuant to KRS 403.320(3). Justice Cunningham and Justice Venters filed separate dissenting opinions, wherein they stated their belief that the circuit court did not give adequate consideration to the impact of the relocation upon the child.

In Frances (all concurring; Justice Cunningham not sitting), the parties divorced but the decree was silent as to child custody. The parties had worked out an informal arrangement wherein mother (Appellant) had primary residential custody but father (Appellee) had nearly equal timesharing with the child. When the mother unilaterally relocated the child to Iowa, the father filed an emergency motion for temporary custody. The circuit award initially entered an order granting temporary joint custody. But after holding hearings, the circuit court entered a final decree awarding primary physical custody to father and determining that the mother had not acted in the child's best interest when deciding to relocate. On appeal, the mother argued that the father had failed to establish that relocation seriously endangered the child and cited Fenwick as authority. In affirming the circuit court's decision, the Supreme Court held that where a party objects to relocation prior to entry of a final decree, KRS 403.340 which concerns modification of a final decree is not applicable and the court must apply the best interests standard of KRS 403.270. The Court noted that any rule which appears to give a preference on relocation to a primary residential parent must be disregarded.

III. CRIMINAL LAW

A. Eric Quintana v. Commonwealth
2006-SC-000629-DG 10/23/2008

Brian Bottom & Melissa Bottom v. Commonwealth
2006-SC-000823-DG 10/23/2008

Opinion by Justice Noble; all concur. Court holds that the "knock and talk" is a proper police procedure and "may be used to investigate the resident of the property, provided the officer goes only where he has a legal right to be." The knock and talk procedure occurs where police officers approach a home for the purpose of obtaining information about a criminal investigation or matters of public welfare. In Quintana, an officer approached the Appellant's house to conduct a knock and talk, but no one answered the door. Suspecting someone was home nonetheless, the officer went to the back of the house where he claimed to have detected the odor of marijuana emanating from the Appellant's window air-conditioning unit. The Court reversed the conviction, holding that if a law-enforcement officer leaves the approach to the main entrance to the house, a "separate and distinct" curtilage analysis is required. The Court noted that once the officer went to the back of the house he was in violation of the Appellant's expectation of privacy in his curtilage. In affirming the convictions in Bottom, the court found that officers properly used the information they obtained from the knock and talk as basis for probable cause to obtain a search warrant.

B. Little v. Commonwealth
2005-SC-000578-MR 10/23/2008

Memorandum opinion of the Court; all concur. Appellant was arrested after three videotapes were discovered containing child pornography. The videos showed Appellant exploiting his daughter and another minor female. Appellant was convicted of two counts of using a minor in a sexual performance and two counts of promoting a sexual performance by a minor and was sentenced to 70 years imprisonment. On appeal, he argued that since the prosecution relied on the same facts to establish the elements of both offenses, his conviction violated double jeopardy. The Court affirmed the conviction, noting that Appellant was convicted for distinct actions upon different victims. The Court cited separate

and distinct actions on the videotapes to independently support each charge involving each victim.

C. Marcus Benjamin v. Commonwealth
2006-SC-000620-MR 10/23/2008

Opinion by Justice Scott; all concur (Justice Cunningham, concurring in result only). Appellant was convicted of murder and sentenced to life imprisonment. The Supreme Court reversed his conviction and ordered a new trial based on the trial court's refusal to provide an extreme emotional disturbance instruction to the jury. The Court held that where evidence of extreme emotion disturbance is presented it creates an issue of fact for the jury and must be included in the jury's instructions. The Court also repeated its disfavor for "combination jury instructions" wherein a jury is asked to find that the defendant "intentionally or wantonly" caused the death of the victim without requiring the jury to state which of the two theories is the basis for the jury's determination of guilt. The Court noted such instructions can bring into question the unanimity of a verdict. The Court stated a better practice is to put the separate theories on separate verdict forms; or when a combination instruction is given, to require the jury to specify on the verdict which theory—intentionally or wantonly-- under which they are convicting.

D. Samuel Steven Fields v. Commonwealth
2004-SC-000091-MR 10/23/2008

Opinion by Justice Cunningham; all concur; Justice Scott not sitting. Upon reversal of his death sentence, Appellant was retried and again sentenced to death. Appellant claimed 49 allegation of error on appeal. In affirming, the Supreme Court held that Appellant was not entitled to a first-degree manslaughter instruction since he had not presented evidence of an extreme emotional disturbance. The Supreme Court also rejected challenges to the *voir dire* process and numerous evidentiary issues.

IV. ELECTIONS

A. Beverly McClendon v. Jerry R. Hodges
2007-SC-000559-DGE 10/23/2008

Opinion by Justice Cunningham; all concur. Justice Abramson not sitting. After losing the Tompkinsville mayoral race to McClendon

by one vote, Hodges contested the election in circuit court pursuant to KRS 120.165. The circuit court determined pervasive fraud occurred regarding walk-in absentee ballots in one of the voting districts and set aside the entire election. KRS 120.165(4) permits voiding of an election only upon "inspection of the whole record." Since the trial court determined fraud was limited to a single election district, the Court of Appeals held that the "whole record" did not reflect fraud. Instead of voiding the entire election, the Court of Appeals directed the circuit court to deduct all the walk-in absentee votes from the district where fraud occurred. The Supreme Court reinstated the trial court's decision holding that "inspection of the whole record" did not require that fraud be found "throughout the entire record." While noting the longstanding reluctance of Kentucky courts to declare elections void, the Court held that under the circumstances—particularly the narrowest possible margin of victory-- the true winner of the election could not be determined by merely discounting the walk-in absentee votes from a single district.

V. EVIDENCE

A. David Ray Burton v. CSX Transportation, Inc.

2006-SC-000695-DG **10/23/2008**

Opinion by Chief Justice Minton; all concurring. Former railroad worker appealed Court of Appeals decision affirming defense verdict in favor of former employer in suit claiming permanent brain damage as a result of exposure to toxic fumes contained in industrial solvents. At trial, much of the testimony centered on whether the worker's condition was caused by toxic encephalopathy from exposure to fumes or by multiple sclerosis. On appeal, former worker argued trial judge improperly allowed testimony from CSX expert which was critical of studies linking solvent exposure to brain damage. The expert's testimony was not based upon independent research, but rather was based on a "literature review" of existing studies. In affirming, the Supreme Court held where an expert witness is not testifying from their own independent research, their testimony is admissible provided the expert a) is highly qualified in a relevant specialized field; and b) their conclusions are supported by objective sources showing compliance with the scientific method, as practiced by at least a recognized minority of scientists in that field.

VI. WORKERS COMPENSATION

A. Hitachi Automotive Products USA, Inc. v. Chester R. Craig, Jr.; Hon. James L. Kerr, ALJ; and Worker's Compensation Board

2007-SC-000631-WC **10/23/2008**

All concur; Justice Abramson not sitting. Where employer's insurance carrier violates KRS 342.267 and 803 KAR 25:240 such that these violations reasonably induce a late filing by the insured, the employer is estopped from asserting a limitations defense. The employer initially argued that since it had been more than two years since the claimant's last temporary total disability payment, the action was time-barred. However, the adjuster had a) failed to timely advise claimant whether claim was accepted or denied; b) failed to provide specific reasons in writing for denying permanent income; and c) failed to inform the claimant if more information was needed from him before a decision to accept the claim could be made—all of which is required by 803 KAR 25:240. KRS 342.267 sets penalties for unfair worker's compensation claims settlement practices but does not include an explicit remedy for claimants. However, the Court concluded that equity requires that a claimant induced into filing a tardy claim by the insurer's dilatory practices be given an opportunity to present the case on its merits.

B. Anthony Durham v. Peabody Coal

2007-SC-000792-WC **10/23/2008**

Glen Lutz v. Energy Conversion Corp.,

2007-SC-000793-WC **10/23/2008**

Gary Middleton v. Centennial Resources, Inc.

2007-SC-00794-WC **10/23/2008**

Opinion of the court; Justice Scott dissents. Each of the appellants in these cases challenged the constitutionality of KRS 342.316. That statute governs workers' compensation claims for coal workers' pneumoconiosis (a.k.a. "black lung"). Where the workers' and employers' expert reports are not in consensus, the statute requires that the x-rays be referred to a panel of three "B readers" whose determination may only be rebutted upon clear and convincing evidence. Appellants herein all had their cases dismissed by the ALJ when they did not rebut the panel's consensus. On appeal, Appellants argue the statute was unconstitutional since workers claiming pneumoconiosis were

required to submit clear and convincing evidence to rebut the panel's consensus, while other workers have only to prove their injury by a preponderance of the evidence. Further, Appellants claimed the statute's requirement that pneumoconiosis may only be proved by x-ray evidence, to the exclusion of worker's "credible testimony regarding breathing difficulties and the length and nature of the exposure to coal dust" was also unconstitutional since workers claiming traumatic injuries bore no such limitation. The Supreme Court upheld dismissal of the claims and upheld the constitutionality of KRS 342.316. The Court noted that the Commonwealth has a legitimate interest in treating workers differently since pneumoconiosis claims are diagnosed and categorized by use of x-ray while the existence and extent of traumatic injuries vary with the type of injury.

VII. WRITS

A. William Clyde Cox; and Joyce Cox v. Hon. Paul Braden, Circuit Judge; and Freida Joan Loving (Real Party in Interest)

2008-SC-000376-MR **10/23/2008**

Opinion by Justice Noble; Justices Abramson, Cunningham, Schroder, Scott and Venters concur; Chief Justice Minton concurs in result only. In the midst of a series of changes on the bench of Whitney Circuit Court, Division 1, a suit was reassigned to Division 2 due to a conflict on interests involving the judge at the time. Rather than proceed with trial in front of a special judge in Division 2, Appellant petitioned the Court of Appeals for a writ of mandamus requiring the circuit court to 1) transfer underlying case back to Division 1; and 2) to insure all cases filed in the 34th Judicial Circuit be assigned on a random basis in accordance with SCR 1.040. The Court of Appeals denied the petition, holding Appellants had not satisfied the requirements to obtain a writ. The Supreme Court affirmed denial of the writ, holding that Appellants had not satisfied the test for writs as established in Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004). The Court noted that they are beset by "unnecessary and ill-advised" petitions for writs and that Hoskins' message about the extraordinary nature of writs "is not getting through." The Court went on to state "[r]emedy by way of extraordinary writ is disfavored, applications for such relief are discouraged, and the test articulated in Hoskins will be used to effectuate these preferences and to limit such writs to truly extraordinary cases."

VIII. ATTORNEY DISCIPLINE

A. Inquiry Commission (KBA) v. Glenn L. Greene, Jr.
2008-SC-000520-KB **10/23/2008**

Orders the temporary suspension of Respondent from the practice of law and restricts his access to client funds during pendency of disciplinary proceeding against him for misappropriating funds held in trust.

B. David M. Coorsen v. KBA
2008-SC-000490-KB **10/23/2008**

Grants motion suspending Movant's license to practice law for one-year, with 181 days to be served and the balance probated for two years. Movant admitted to violations in his handling of a criminal matter and a divorce action.

C. Steve P. Robey v. KBA
2007-SC-000951-KB **10/23/2008**

Grants request by attorney to resign under terms of permanent disbarment. The Court noted ten disciplinary matters pending against Movant, ranging from felony drug convictions to misuse of client funds.

D. KBA v. David S. O'Brien
2008-SC-000550-KB **10/23/2008**

Orders Respondent be suspended from the practice of law for 30 days for failing to respond to inquiries from his client or demands for information from the Office of Bar Counsel.

E. Shirley A. Cunningham, Jr. v. KBA
2008-SC-000630-KB **10/23/2008**
William J. Gallion v. KBA
2008-SC-000629-KB **10/23/2008**

Court allowed Movants to withdraw from state bar under terms of permanent disbarment. Charges against Movants stem from settlement and contingency fee in mass tort class action (Northern Kentucky Fen-Phen case). Movants admitted to not disclosing to

clients material information about class settlements and fees. Movants also admitted to failing to inform clients that $20 million of settlement was to be withheld from clients in order to fund charitable corporation for which Movants would serve as compensated directors.