

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
APRIL 2018**

I. CONTRACT:

A. Big Sandy Company, L.P. v. EQT Gathering, LLC and EQT Production Company
[2016-SC-000561-DG](#) April 26, 2018

Opinion of the Court by Justice Keller. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter, and Venters, JJ., concur. Wright, J., not sitting. Big Sandy granted an easement and right of way to EQT's predecessor for a pipeline to transport natural gas. The pipeline passed over, through, and across certain surface and mineral tracts owned by Big Sandy. A dispute arose between Big Sandy and EQT regarding the interpretation of the Agreement granting the easement and whether the Agreement applied to every tract owned by Big Sandy and depicted in the Agreement, regardless of whether it was a surface estate or a mineral estate. The circuit court found the Agreement to be unambiguous and applied to every tract depicted in the Agreement. The Court of Appeals also found the Agreement to be unambiguous but held that it did not apply to the tracts of land in which Big Sandy owned only a mineral estate. The Supreme Court granted discretionary review and reversed the Court of Appeals. The Court held that the Agreement unambiguously applied to every tract depicted in the Agreement. The Agreement gave Big Sandy the right to remove all of the coal under the pipeline, regardless of which tract of land was affected.

II. CRIMINAL LAW:

A. Melinda Turner v. Commonwealth of Kentucky
[2016-SC-000367-MR](#) April 26, 2018

Opinion of the Court by Justice Hughes. All sitting; all concur. Melinda Turner appealed as a matter of right from a circuit court judgment sentencing her to thirty years imprisonment for murder and for being a first-degree persistent felony offender. On appeal, the Court determined that the circuit court did not abuse its discretion in: 1) admitting expert testimony regarding the victim's time of death; 2) denying Turner's motion for a continuance as the case had been pending for five years; 3) disqualifying co-counsel from representing Turner due to that counsel's prior representation of the victim and the survival of the attorney-client privilege after death; and 4) not instructing the jury on self-defense or extreme emotional disturbance given Turner's defense theory that someone else committed the murder and the insufficiency of evidence. However, the trial court erred in allowing the Commonwealth to introduce hearsay testimony from the victim's mother and friend about the tumultuous relationship between Turner and the victim because the statements were too far removed from the time of the

murder. While the circuit court erred in admitting the hearsay under the state-of-mind exception, the Court deemed it to be harmless. Accordingly, the Court affirmed the judgement and sentence imposed by the circuit court.

B. Sophal Phon v. Commonwealth of Kentucky
2016-SC-000468-DG April 26, 2018

Opinion of the Court by Justice Keller. Cunningham, Hughes, Keller, Venters, and Wright, JJ., and Kline and Thacker, S.JJ., concur. Thacker, S.J., concurs by separate opinion, which Kline, S.J., joins. Minton, C.J., and VanMeter, J., not sitting. Phon participated in a gang murder of two people and a deadly assault of their twelve-year-old daughter. He entered a guilty plea and was sentenced by a jury to life without possibility of parole (LWOP). He brought this collateral appeal, alleging that LWOP for juveniles was categorically banned under United States Supreme Court precedent. This Court rejected his constitutional claims but determined that his sentence was statutorily prohibited under the juvenile code at the time it was recommended by the jury. Determining that an illegal sentence cannot be condoned by an appellate court, as such affirmation would violate the separation of powers doctrine, this Court remanded the case to the Warren Circuit Court to correct the unlawful sentence and impose the valid sentence of life without possibility of parole for 25 years (LWOP 25).

C. Eugene Baker v. Commonwealth of Kentucky
2016-SC-000234-MR April 26, 2018

Opinion of the Court by Justice Wright. All sitting; all concur. Appellant, Eugene Baker, was convicted by a Jefferson Circuit Court jury of murder, first-degree robbery, tampering with physical evidence, and possession of a handgun by a convicted felon. For these crimes, the jury recommended sentences of thirty years' imprisonment for murder and ten years' imprisonment for robbery, to be run consecutively. The jury also recommended a one-year sentence on the tampering with physical evidence conviction and a five-year sentence for the possession of a handgun by a convicted felon conviction, to be served concurrently with the murder and robbery sentences. The trial court sentenced Baker to forty years' imprisonment in accordance with the jury's recommendation. Baker appealed to the Supreme Court as a matter of right, Ky. Const. § 110(2)(b), and asserted five grounds for reversal of his convictions: (1) the trial court abused its discretion when it did not allow defense counsel to argue in closing that the Commonwealth did not produce any evidence of motive; (2) the trial court abused its discretion when it allowed the Commonwealth to introduce unauthenticated call logs, and when it allowed the Commonwealth to recall a witness to testify as to a phone number appearing in the call logs; (3) the trial court erred in failing to grant a directed verdict on the tampering with physical evidence and possession of a handgun by a convicted felon charges; (4) the trial court erred in refusing to instruct on facilitation to murder and first-degree robbery; and (5) Baker is entitled to reversal of his conviction and a new trial due to cumulative error.

The Supreme Court affirmed the trial court's decision to disallow the defense to argue in closing that the Commonwealth failed to present any evidence of motive, though for other reasons than those relied upon by the trial court. While the Court held the call logs were admitted in violation of the general prohibition against hearsay (particularly since the logs were not certified pursuant to KRE 902(11)'s self-authentication procedures), it held that said error was harmless due to the other evidence adduced at trial. Furthermore, testimony concerning information derived from the call logs was also error, but harmless for the same reasons. The Court held the trial court committed palpable error by improperly denying Baker's motion for mistrial on the tampering with physical evidence charge, and reversed the related conviction and sentence. The Court held the trial court did not abuse its discretion in failing to direct a verdict as to Baker's possession of a handgun by a convicted felon charge. As to Baker's allegation that the trial court erred in refusing to instruct the jury on facilitation to murder and robbery, the Court affirmed—holding a reasonable juror could not have found Baker guilty of facilitating, but not committing, these crimes. Finally, the Court declined to reverse Baker's remaining convictions and sentences due to cumulative error. While the Court had found the trial court erred as to its admission of the call logs, it stated that error did not “border on the prejudicial.” Furthermore, the only other error the Court found was regarding Baker's tampering with physical evidence charge. Given the gravity of the other charges against him, the Court did not believe that error—which was entirely limited to the tampering charge—impacted Baker's other convictions or rendered his trial fundamentally unfair.

D. Rakim Moberly v. Commonwealth of Kentucky
[2016-SC-000429-DG](#) April 26, 2018

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, Wright, JJ., concur. VanMeter, J., dissents by separate opinion. A police officer, upon stopping Appellant for a traffic violation at 3:00 a.m., described him as very nervous, sweating, blowing cigarette smoke into the interior of his car, and constantly looking over his right shoulder. The officer then conducted a database search which revealed that Appellant had prior criminal charges, not convictions. The officer then conducted a canine sniff search of the vehicle, and subsequently a search of the vehicle which resulted in finding a quantity of an illegal controlled substance. The trial court denied Appellee's suppression motion and the Court of Appeals affirmed the denial. Question Presented: Whether the officer had a reasonable articulable suspicion of other ongoing illegal activity when he prolonged the stop for the time needed to retrieve the dog and conduct the sniff search. Held: Appellant's odd behavior during the traffic stop and the prior charge information obtained from the database did not create a reasonable suspicion that Appellant was then and there engaged in illegal behavior. Prolonging the traffic stop in order to conduct the dog sniff and complete the search of the vehicle was, therefore, unreasonable and constitutionally impermissible.

E. Commonwealth of Kentucky v. David J. Moore
2016-SC-000275-DG **April 26, 2018**

Memorandum Opinion of the Court. All sitting; all concur. Appellee Moore, although indigent and receiving the benefit of appointed counsel, was fined \$200.00 for first offense Driving Under the Influence (DUI), pursuant to KRS 189A.010 and was assessed an additional \$375.00 service fee required by KRS 189A.050. On direct appeal, the circuit court rejected Moore's claim that KRS 534.040(4) exempted him from the fine and service fees because of his indigence. On discretionary review, the Court of Appeals concluded that Moore was entitled to the exemption because of his indigency status. On discretionary review sought by the Commonwealth, the Supreme Court reversed. The Court reasoned from explicit statutory language that the exemption from fines provided for indigents by KRS 534.040(4) pertains only to fines established within the Kentucky Penal Code, KRS Chapters 500 through 534. Moore's fine for a DUI first offense is specifically established outside the penal code in 189A.010, and thus is not subject to the penal code exemption.

The Court abrogated the holding of *Beane v. Commonwealth*, 736 S.W.2d 317 (Ky. 1987) that the service fee was, in effect, a "fine." Instead, the Court concluded that the statutory service fee was neither a fine nor a court cost. However, because the statutes include no express provision for waiver of the service fee for indigents, and they expressly provide generous installment payment terms which in this case the district court adopted, the indigency waiver provision does not apply to the DUI service fee.

III. INSURANCE:

A. Martin/Elias Properties, LLC v. Acuity, a Mutual Insurance Company
2016-SC-000195-DG **April 26, 2018**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, and VanMeter, JJ., concur. Wright, J., concurs in result only by separate opinion in which Venters, J., joins. The Court applied the doctrine of fortuity to define accident for the purpose of CGL policy coverage. The Court held that if the insured did not intend the event or result to occur and if the event or result that occurred was a chance event beyond the control of the insured, then CGL coverage covering accidents will apply to the benefit of the insured. Applying this rule, the Court held that on the facts of this case, no accident occurred so as to afford the insured CGL policy coverage.

IV. WORKERS' COMPENSATION:

A. **Ford Motor Company v. Donald Jobe, et al.**

[2017-SC-000010-WC](#)

April 26, 2018

Opinion of the Court by Justice Wright. Minton, C.J.; Cunningham, Hughes, Keller, Venters, Wright, JJ., concur. VanMeter, J., not sitting. Donald Jobe was injured while working at Ford Motor Company when he tripped while working on Ford's assembly line. The administrative law judge (ALJ) determined that both Jobe's hip injury and back impairment were work-related. Specifically, the ALJ found that Jobe's back impairment was the result of surgery performed in an attempt to alleviate his hip pain. The ALJ awarded Jobe temporary total disability benefits, permanent partial disability benefits, and medical benefits.

Ford appealed to the Workers' Compensation Board, arguing that Jobe failed to meet his burden of proof that the back impairment was work-related. The Board held that the ALJ's decision was based on substantial evidence. Ford appealed the Board's decision to the Court of Appeals, which affirmed. Ford appealed to the Supreme Court.

The Supreme Court affirmed, holding there was substantial evidence that Jobe's back impairment had a causal connection to his work-related hip injury.

B. **Michael R. Plumley v. Kroger, Inc., et al.**

[2017-SC-000083-WC](#)

April 26, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The Court found no reversible error in this workers' compensation case where the plaintiff alleged three types of error. Before addressing the merits of the plaintiff's claim, the Court addressed preservation of the issues before it, holding that a plaintiff is required to raise an objection if that plaintiff believes a doctor's impairment rating to be non-compliant with the American Medical Association's Guides to Permanent Impairment to warrant appellate review.

The Court then held that the doctor's medical findings in this case were grounded in the *Guides*, which is all that is required under the law, and therefore the ALJ did not commit reversible error by relying upon the doctor's findings. Second, the plaintiff alleged that the Court committed reversible error by not awarding three separate awards for the three injuries the plaintiff suffered. The Court rejected this argument based on precedent and interpreted KRS 342.0011(1)'s definition of *injury* to preclude separate and successive injuries to the same body part from being considered as one, total injury for the purpose of calculating an award. Lastly, the Court upheld the ALJ's correct application of KRS 342.730(1)(c)(1)'s award multiplier modifiers.

V. WRIT OF PROHIBITION:

- A. Miki Thompson, Administratrix of the Estate of Kara Vance and Darby Jane Vance, etc., v. Hon. Eddy Coleman, Judge, Pike Circuit Court, et al.**
[2017-SC-000580-MR](#) April 26, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The plaintiff filed a writ of prohibition seeking to prevent the defendant from accessing certain information during discovery in this case. The Court upheld the trial court's order and the Court of Appeals' affirmance of that order, finding that the plaintiff could satisfy neither the "irreparable injury" requirement nor the "certain special cases" exception to afford a remedy by writ.

- B. Miki Thompson, Administratrix of the Estate of Kara Vance and Darby Jane Vance, etc. v. Hon. Eddy Coleman, Judge, Pike Circuit Court, et al.**
[2017-SC-000640-MR](#) April 26, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The plaintiff filed a writ of prohibition seeking to prevent the defendant from accessing certain information during discovery in this case. The plaintiff challenged the propriety of the order, in addition to arguing that the trial court applied the wrong jurisdiction's law in concluding the information to be discoverable. The Court upheld the trial court's order and the Court of Appeals' affirmance of that order, finding that under a conflicts of law analysis, the trial court appropriately used Kentucky law to determine that the information was discoverable. The Court also upheld the trial court's order allowing for discovery of the information, denying the plaintiff's writ.