

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
AUGUST 2018**

I. ADMINISTRATIVE LAW:

**A. Kentucky Board of Medical Licensure v. Jon M. Strauss, M.D.
2017-SC-000260-DG August 16, 2018**

Opinion of the Court by Justice Hughes. All sitting; all concur. The Kentucky Board of Medical Licensure adopted the findings and conclusions of the hearing officer in a disciplinary matter and imposed a five-year probation period that allowed Strauss to continue practicing medicine with restrictions. On appeal, the circuit court found the order was supported by substantial evidence, the hearing officer did not err in not recommending a specific penalty to the Board and the Board did not err in not independently reviewing the entire hearing record and exhibits. The Court of Appeals reversed, concluding the hearing officer was statutorily required to recommend a specific penalty to the Board and then the Board was required to independently review the entire record before imposing discipline. Reversing the Court of Appeals, the Supreme Court noted that KRS 13B.110(1) requires the hearing officer's recommended order to include findings of fact, conclusions of law and a "recommended disposition of the hearing, including recommended penalties, if any." Examining the plain language of the statute and rejecting Strauss's alleged ambiguity, the Supreme Court held a hearing officer's order must recommend a disposition of the matter but it need not recommend a penalty. As for the Board's review, the Court held that under KRS 13B.120(1) it was required to "consider the record including the recommended order and any exceptions duly filed" but it was not required to conduct an independent review of the administrative record, in whole or in part. The Supreme Court remanded the case to the Court of Appeals for further review on the issue which it had not reached, the sufficiency of the evidence to support the Board's final order.

II. BOARD OF CLAIMS:

**A. Phyllis Roach v. Kentucky Parole Board, et al.
2017-SC-000250-DG August 16, 2018**

Opinion of the Court by Justice Cunningham. All sitting; all concur. This case concerns whether the Kentucky Parole Board is liable under the Kentucky Board of Claims Act for finding the plaintiff violated post incarceration supervision requirements of her release, which had been wrongfully applied to her by a trial court order. The plaintiff, Phyllis Roach, plead guilty to one count of sodomy in the second degree, for which the Meade Circuit Court sentenced her to a ten-year prison sentence and three years of postincarceration supervision pursuant to Kentucky Revised Statutes ("KRS") 532.043. Roach was charged with violating

her post-incarceration release requirements. The Kentucky Parole Board determined that she had violated those conditions and imposed a thirteen-month penalty, incarcerating her at Kentucky Correctional Institution for Women in Shelby County. Thereafter, Roach petitioned the Shelby Circuit Court for writ of habeas corpus, arguing that the supervision statute did not apply to her because KRS 532.043 did not exist until July 15, 1998, at least seven years after she committed sodomy. The Shelby Circuit Court granted the writ and ordered her release. Following release, Roach brought this claim against the Parole Board in the Franklin Circuit Court for “wrongful incarceration.” The Franklin Circuit Court dismissed her claim and suggested the Board of Claims had proper jurisdiction. As a result, Roach filed a complaint before the Board of Claims. The Board of Claims rejected her claims, asserting: the Board of Claims does not have subject-matter jurisdiction over intentional torts like “false imprisonment”; the Parole Board did not have a duty to question and disobey the Meade Circuit and the ALJ’s facially valid orders; and, even if the Parole Board had a duty to analyze the legality of such court orders, it would be a discretionary act for which liability is not abrogated. Roach appealed the dismissal to the Franklin Circuit, which reversed the Board of Claims. The Parole Board appealed to the Kentucky Court of Appeals. The Court of Appeals reversed, holding that the Parole Board’s revocation hearing was a discretionary act. Roach appealed. The Supreme Court of Kentucky granted discretionary review and held that the Board of Claims had properly dismissed Roach’s suit. The Parole Board’s revocation hearing was an adjudicative function: a discretionary act for which the Parole Board enjoys absolute immunity. Accordingly, the Court affirmed the Court of Appeals for alternative reasoning.

III. CONTRACT:

A. Nami Resources Company, LLC., et al. v. Asher Land and Mineral, LTD., et al.

[2015-SC-000489-DG](#)
[2016-SC-000235-DG](#)

August 16, 2018

Opinion of the Court by Justice Venters. All sitting; all concur. Civil procedure; Fraud and/or breach of contract in underpayment of oil and gas royalties; Punitive damages. NAMI acquired lease rights to extract natural gas from Asher, subject to ordinary obligation to pay royalties. After several years, Asher suspected that NAMI had violated the lease agreements by fraudulently breached the leases by overstating expenses and understating the volume of gas extracted, thereby underpaying royalties. Issues: 1) Whether JNOV motion due on Good Friday was timely filed on the Monday following Good Friday; 2) Whether testimony of Asher’s expert witness was sufficient to avoid directed verdict on underpayment of royalties; 3) whether jury verdict for punitive damages was proper. Held: 1) CR 6.01 provides that pleading due on a “legal holiday” is timely if filed on the “next day which is not a Saturday, Sunday, or legal holiday.” KRS 18A.190 (1)(c) designates Good Friday as a “holiday” upon which state offices may be closed for half a day. Therefore, pleading due on Good Friday was timely filed on the

following Monday; 2) Asher’s expert accounting witness presented evidence sufficient to avert a directed verdict and support the jury verdict; 3) Because Asher’s claim was based upon contract, the economic loss doctrine governed available of punitive damages for breach of contract. Here, breach of contract, even if fraudulent, does not justify award of punitive damages, citing *Superior Steel Inc. v. Ascent at Roebing’s Bridge, LLC*, 2017 WL 6380218 (Ky. 2017) (negligent performance of contract does not support demand for punitive damages.)

IV. **CRIMINAL LAW:**

A. Jack Franklin Elliott, Jr. v. Commonwealth of Kentucky **2016-SC-000350-MR August 16, 2018**

Opinion of the Court by Justice Keller. All sitting; all concur. Elliott pled guilty to two indictments charging manufacturing methamphetamine, first offense, and controlled substance endangerment to a child, fourth degree and manufacturing methamphetamine, first offense; three counts of controlled substance endangerment to a child, fourth degree; and persistent felony offender, second degree. The trial court imposed court costs in the amount of \$151.00 per indictment. Three years after the trial court entered its judgment, Elliott moved to waive and/or convert court costs into a definite jail term, which the trial court denied. Elliott appealed as a matter of right arguing that the court costs must be vacated because the trial court had made a finding of indigency, Elliott was represented by a public defender, and Elliott was granted leave to file his appeal in forma pauperis. The Court held that the imposition of court costs was proper under our precedent distinguishing “indigent” status and “poor person” status. Determining whether a defendant meets “poor person” status requires both a present tense evaluation of the defendant’s ability to pay court costs as well as the defendant’s ability to pay court costs in the future. This Court has previously held that a defendant who does not request such a determination by the trial court at sentencing has waived the right to contest the issue on appeal. Elliott failed to request that the trial court make a finding of “poor person” status at the time of sentencing, and as such, he was precluded from contesting the issue before this Court.

B. Rodney Bowling v. Commonwealth of Kentucky **2016-SC-000548-MR August 16, 2018**

Opinion of the Court by Justice Wright. All sitting; all concur. A Clay Circuit Court jury convicted Appellant, Rodney Bowling, of murder, driving under the influence, and two counts of first-degree assault. Bowling was sentenced to thirty years’ imprisonment and a \$500 fine. Bowling appealed to the Supreme Court of Kentucky, asserting six claims of error: (1) the trial court erred in denying his motion for a directed verdict as to murder, as he alleges the Commonwealth failed to prove aggravated wantonness; (2) the trial court erred in allowing expert testimony exceeding the scope of the Commonwealth’s RCr 7.24(1)(c) disclosure;

(3) the trial court erred in the admission of laboratory reports in contravention of his right to confront witnesses against him; (4) the Commonwealth committed prosecutorial misconduct through statements made during its closing argument; (5) the trial court erred in convicting him of both murder and driving under the influence in violation of his right to be free from double jeopardy; and (6) the trial court erred in imposing a fine against him for driving under the influence after determining that he was indigent. The Supreme Court affirmed the trial court, holding: (1) the totality of the facts would allow a reasonable jury to conclude that Appellant was operating his motor vehicle under circumstances manifesting an extreme indifference to human life, and therefore, the trial court did not err in denying Bowling's motion for directed verdict; (2) because defense counsel presented evidence concerning the subjects covered by the Commonwealth's expert witness that were not disclosed, the trial court did not err in allowing the testimony; (3) while the trial court erred in allowing the admission of the laboratory reports without the accompanying testimony of the analyst who prepared the reports in contravention of Bowling's confrontation rights, said error was harmless beyond a reasonable doubt as there was no reasonable possibility it contributed to his conviction; (4) while the Court did not approve some of the prosecutor's statements in closing, they did not amount to palpable error as they were not flagrant; (5) Bowling's right to be free from double jeopardy was not violated through his convictions for both wanton murder and driving under the influence, as each crime requires proof of a fact the other does not; and (6) the trial court did not err in imposing a fine against Bowling for driving under the influence.

C. Dashawn Johnson v. Commonwealth of Kentucky

[2016-SC-000615-MR](#)

[2017-SC-000037-TG](#)

August 16, 2018

Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellant, Dashawn Johnson, was convicted of two counts of first-degree trafficking in a controlled substance (heroin and methamphetamine), one count of felony possession of firearm, and being a first-degree persistent felony offender (PFO). Appellant argued on appeal that reversible error occurred when the trial court instructed the jury on two counts of trafficking instead of one because heroin and meth were listed in the same subsection of the first-degree trafficking statute—KRS 218A.1412. The ultimate question here is whether Appellant's right to be free from double jeopardy was violated. The Supreme Court of Kentucky held, inter alia, that because KRS 218A.1412(1) criminalizes the trafficking of a, singular, controlled substance, the Commonwealth may bring multiple charges under KRS 218A.1412(1) when the defendant is found to have been trafficking multiple substances, regardless of their statutory grouping. In so holding, the Court clarified that Appellant's charges and convictions did not violate *Blockburger v. United States*. The Court concluded that to the extent *Commonwealth v. Grubb*, 862 S.W.2d 883 (Ky. 1993) conflicts with Court's present decision, it is overruled.

D. Commonwealth of Kentucky v. Damion Montrece Lane
2016-SC-000655-DG **August 16, 2018**

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Cunningham, Hughes, and Keller, JJ., concur. VanMeter, J., dissents by separate opinion in which Wright, J., joins. Criminal Appeal; search of vehicle/driver detained for traffic stop. Police officer, operating in tandem with a canine officer in a second vehicle, initiated a proper traffic stop. The officer removed Appellee from the vehicle. Rather than commencing the issuance of a traffic citation, the two officers conducted a canine sniff search of the vehicle. The dog alerted. No drugs were found in the vehicle; but search of Appellee found drugs on his person. The trial court denied Appellee's motion to suppress that evidence. Question Presented: Whether the Court of Appeals erred by concluding that the sniff search unreasonably prolonged the traffic stop. Held: By suspending their attention from the traffic citation and immediately launching the dog's sniff search, the officers did not "diligently" tend to the purpose of the traffic stop as required by *Rodriguez v. United States*, 135 S. Ct. 1609 (2015). The dog sniff search prolonged the stop beyond its original purpose, thus invalidating the search.

E. Donte Little v. Commonwealth of Kentucky
2017-SC-000112-MR **August 16, 2018**

Opinion of the Court by Justice VanMeter. All sitting; all concur. Donte Little appealed as a matter of right his convictions of two counts of trafficking in a controlled substance in the first degree (less than two grams of heroin), two counts of trafficking in a controlled substance in the first degree (more than two grams of heroin), and one count of complicity to trafficking in a controlled substance in the first degree (more than two grams of heroin). He received a 20-year sentence. On appeal, the Court affirmed the trial court's denial of Little's motion to exclude the testimony of the Commonwealth's confidential informant, but emphasized that the trial court's imposition of a 48-hour disclosure period for witness disclosure was too short, and the Commonwealth's withholding of the identity of its confidential informant witness until less than two days before a trial was unacceptable. That said, because Little was unable to articulate any specific prejudice resulting from the late disclosure (though some measure of prejudice could surely be presumed), the Court did not regard the lack of timely disclosure in this instance as substantial enough to compel a new trial. With respect to the one count of complicity to trafficking in a controlled substance in the first degree, the Court held that the failure to name an accomplice in the indictment did not violate Little's right to constitutional presentment and due process. Moreover, no palpable error resulted from the trial court's denial of Little's token motion for a directed verdict on this count. Little argued that the Commonwealth failed to prove his accomplice knowingly trafficked heroin, but, where proof of knowledge is required, the proof can be by circumstantial evidence. Here, the circumstantial evidence of the accomplice's knowledge was sufficient to permit the jury to draw a reasonable conclusion that the accomplice knowingly trafficked heroin. Lastly,

with respect to the complicity count, no palpable error resulted from the jury instructions, which Little argued resulted in a non-unanimous verdict. The jury was instructed on a single count of complicity, and the proof presented was of a single heroin transaction; thus, the type of unanimity violations delineated in *Harp v. Commonwealth*, 266 S.W.3d 813, 817 (Ky. 2008) and *Johnson v. Commonwealth*, 405 S.W.3d 439, 448 (Ky. 2013) did not occur. In addition, the Court held that no palpable error resulted from the parole officer's "good time" credit testimony during the penalty phase: Little argued that the parole officer's testimony failed to indicate that meritorious "good time" credits were not automatic, and thus led the jury to recommend a longer sentence. However, the record showed that the parole officer correctly explained to the jury the various type of sentence credits an inmate is eligible to receive and conveyed that sentence credits were not guaranteed or automatic and under certain circumstances may with withheld or forfeited. Accordingly, the Court concluded that the jury was sufficiently informed as to the potential effects of sentence credits on any sentence it recommended. Lastly, the Court found that no palpable error resulted from the prosecutor's "send a message" speech during penalty phase closing argument, as it focused on deterrence for Little's crimes and was made in response to Little's plea for leniency during his penalty phase argument.

F. Daniel Cox v. Commonwealth of Kentucky

[2017-SC-000147-MR](#)

August 16, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The defendant challenged the trial court's admission of certain evidence under KRE 404(b)(1) and alleged that the trial court's instructions to the jury contained a fatal unanimity error. The Court found no error on the part of the trial court, in addition to clarifying Kentucky's unanimity law.

G. Mark McCoy v. Commonwealth of Kentucky

[2017-SC-000261-MR](#)

August 16, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The defendant challenged the trial court's denial of his request for a continuance and directed verdict. The Court held, in pertinent part, that a pneumothorax constitutes a "serious physical injury," and found no error on the part of the trial court in denying the defendant's motions for a continuance and directed verdict.

H. Trevor Brown v. Commonwealth of Kentucky

[2017-SC-000289-MR](#)

August 16, 2018

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The defendant challenged: the trial court's denial of his motion for a directed verdict and continuance; that his trial was held in the proper venue; admission of certain evidence and the Commonwealth's use of that evidence in closing statement; and the jury instructions for allegedly containing a fatal unanimity error. The Court found no reversible error on the part of the trial court, holding, in pertinent part,

that a pneumothorax constitutes a “serious physical injury,” in addition to clarifying Kentucky’s unanimity doctrine.

I. Kalief Cummings v. Commonwealth of Kentucky

[2017-SC-000448-MR](#)

August 16, 2018

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J.; Cunningham, Hughes, and VanMeter, JJ., concur. Keller, J., concurs in part and dissents in part by separate opinion in which Venters and Wright, JJ., join. Appellant, Kalief Cummings, stabbed two women in Louisville, Kentucky. He was convicted of two counts of first-degree assault and for being a first-degree persistent felony offender. During trial, one juror served as a member of the jury, even though that juror was peremptorily struck by Appellant. It appears that no one, including the defense, realized that the juror was sitting on the jury. The Supreme Court of Kentucky held that this was not palpable error and affirmed the convictions. The Court specifically reasoned that Appellant failed to demonstrate that the juror at issue was biased, and that the defense should have been aware of the juror’s erroneous presence on the jury due to the fact that counsel discovered a similar error prior to trial (removing a juror who was also not supposed to be on the jury).

J. Commonwealth of Kentucky v. Johnnie Douglas

[2017-SC-000024-DG](#)

August 16, 2018

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter, and Venters, JJ., concur. Wright, J., concurs in result only. This is a robbery case concerning whether a new trial is warranted where an impartial juror during the guilt phase later discovers his partiality during the penalty phase. During the penalty phase consideration whether Johnnie Douglas was a Persistent Felony Offender (“PFO”), the juror at issue discovered that he was Johnnie Douglas’ victim from a prior robbery. After the juror told the trial judge of his recollection, the judge informed Douglas, defense counsel, and the Commonwealth. The judge instructed counsel to address the issue at the sentencing hearing, but defense counsel stated during the hearing that Douglas decided to appeal his conviction rather than ask for a new trial based upon the potential bias of the juror at issue. Douglas appealed as a matter of right and the Supreme Court of Kentucky upheld his conviction, citing the juror’s impartiality in the guilt phase of the trial, the overwhelming evidence against Douglas, and his failure to preserve the issue by moving for a mistrial. Prior to the Court rendering its opinion on his matter of right appeal, Douglas filed an RCr 11.42 motion pro se for ineffective assistance of counsel and requested appointment of new counsel. The trial court appointed new counsel, but denied Douglas’ RCr 11.42 motion, finding that trial counsel’s actions were a matter of trial strategy and did not amount to ineffective assistance. On appeal, the Kentucky Court of Appeals reversed the trial court and remanded Douglas’ case for a new trial. The Supreme Court of Kentucky granted discretionary review and held that prejudice could not be presumed from the juror’s presence on the jury

because all parties—especially the juror himself—were unaware of the juror’s relationship to Douglas during voir dire or the guilt phase of the trial. Additionally, trial counsel’s decision to follow Douglas’ instruction during the sentencing hearing and forego moving for a new trial was not ineffective assistance. The Court upheld Douglas’s conviction but reversed his sentence and remanded it to the trial court for a new PFO and sentencing trial because those proceedings were fundamentally unfair due to the juror’s revelation of his bias toward Douglas.

K. Ronald Lee King v. Commonwealth of Kentucky

2016-SC-000414-MR

August 16, 2018

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Hughes, VanMeter, Venters, JJ., concur. Keller, J., concurs in part and dissents in part by separate opinion, in which Cunningham and Wright, JJ., join. Ronald King appealed as a matter of right his convictions of two counts of first-degree sodomy, sentenced to life, and two counts of first-degree sexual abuse, sentenced to ten years for each count. The charges arose from the systemic abuse of his minor step-granddaughter. The Court held that the jury instructions on the sexual abuse counts violated the unanimity requirement since the jury was presented with multiple instances of sexual abuse for each instruction, identical except as to the address of the location of the abuse, yet King was charged with only one count for each residence. Accordingly, the Court reversed and remanded King’s sexual abuse convictions. On remand, the trial court was also directed to address the sentencing error in running a term of years consecutively with a life sentence. The Court further held that the trial court erred in admitting a recorded phone call between King and his wife, Hope, during which Hope told King of the minor child’s accusations of sexual abuse, as an adoptive admission, but found such error to be harmless given the breadth of evidence against King. The Court otherwise affirmed King’s sodomy conviction, thus the life sentence remained.

L. Jeremy Kelly v. Commonwealth of Kentucky

2017-SC-000265-MR

August 16, 2018

Opinion of the Court by Justice Keller. All sitting; all concur. Kelly was indicted for first-degree rape, incest (victim under 18), first-degree sexual abuse, and unlawful imprisonment for the abuse of sixteen-year-old daughter, J.K. Kelly fled the state and, in his absence, the indictment was dismissed by the trial court to be “reinstated” upon Kelly’s capture. After he was found, the trial court appointed defense counsel and the indictment was “reinstated” without objection. The jury found Kelly guilty of first-degree rape, incest, first-degree sexual abuse, and second-degree fleeing or evading. Kelly appealed as a matter of right on five allegations of error: (1) the prosecution, absent a new indictment after dismissal, violated his due process rights; (2) no evidence substantiated the conviction for second-degree fleeing or evading; (3) he should have been granted a mistrial due to the introduction of 404(b) testimony; (4) the verdicts were non-unanimous; and (5) the fine against Kelly, an indigent, was improper. The Commonwealth

conceded the second-degree fleeing or evading conviction and the fine were both improper. The Court vacated that portion of the lower court's judgment. However, the Court affirmed on all other matters holding that: Kelly's due process rights were protected by the indictment despite the flawed process; Kelly failed to request a mistrial and it was, thus, not warranted; and Kelly's verdicts were unanimous.

V. FARM ANIMALS ACTIVITY ACT:

A. Joe Daugherty, et al. v. Bobbi Tabor

[2017-SC-000374-DG](#)

August 16, 2018

Opinion of the Court by Justice Cunningham. All sitting; all concur. This is a personal injury case where a prospective horse buyer lost control of and was thrown from a horse she was test-riding and sustained injury. The plaintiff, Bobbi Tabor, presented herself as an experienced horse rider and requested to test-ride several horses. The issue presented concerned whether the stable owners and the stable were liable for her injuries under the Farm Animal Activities Act ("FAAA"). The trial court granted summary judgment in the defendants' favor under the FAAA. The plaintiff appealed. The Court of Appeals of Kentucky reversed the trial court's ruling and remanded for further findings of fact. The court found that issues of fact existed regarding defendants' reasonable inquiry into Tabor's riding ability and whether defendant Joe Daugherty or his farm hands contributed to Tabor's injuries in their attempt to halt the out-of-control horse. The Supreme Court of Kentucky granted discretionary review and held that the FAAA abrogated defendants' liability due to the inherent risks of farm animal activities. Defendants post the appropriate warning signs and conducted prudent inquiry into Tabor's self-proclaimed riding ability before allowing her to test-ride any horses. Accordingly, the Court reversed the Court of Appeals and reinstated the trial court's grant of summary judgment.

VI. INSURANCE:

A. American Mining Insurance Company v. Peters Farms, LLC.

[2017-SC-000066-DG](#)

August 16, 2018

Opinion of the Court by Justice Cunningham. Minton, C.J.; Cunningham, Hughes, Keller, Venters, and Wright, JJ., sitting. Minton, C.J.; Cunningham, Hughes, and Venters, JJ., concur. Wright, J., concurs in part and dissents in part by separate opinion, in which Keller, J., joins. VanMeter, J., not sitting. This is a mineral trespass case concerning whether a mining insurance policy covers liability for the unauthorized removal of minerals from an innocent party not privy to the mining contract. Ikerd Mining, LLC wrongfully removed 20,212 tons of coal from land belonging to the plaintiff, Peters Farms, LLC. 19,012 tons were mined under Ikerd's mistaken belief as to the correct location of Peters' boundary lines. 1,200 tons were mined pursuant to a disputed oral lease agreement; Peters claimed that the lease was an ongoing negotiation that was never finalized. The

trial court found that both incidents qualified as “accidents” constituting “occurrences” within the meaning of Ikerd Mining’s Commercial General Liability (“CGL”) policy coverage provided by American Mining Insurance Company (“AMIC”). The plaintiff appealed. The Court of Appeals of Kentucky affirmed the trial court’s ruling. The Supreme Court of Kentucky granted discretionary review and held that Ikerd’s actions were not “accidents” constituting “occurrences” under the CGL policy. The Court emphasized that Kentucky insurance law is governed by the fortuity doctrine, which was not satisfied here because of Ikerd’s intent to mine the coal and its control over the mining operation. Accordingly, the Court reversed the Court of Appeals and remanded to the trial court for entry of a judgment consistent with this ruling.

VII. LEGAL MALPRACTICE:

A. Steven M. Jacobi v. F. Larry Holbert

[2017-SC-000092-DG](#)

August 16, 2018

Opinion of the Court by Justice Keller. All sitting; all concur. Jacobi filed a legal malpractice claim against his appointed public defender, Holbert. The circuit court and Court of Appeals both held that public defenders, as state employees, are entitled to qualified immunity. The Court affirmed holding that the Department of Public Advocacy (DPA) is a state agency, performing an essential governmental function. As such, it is clothed in immunity and that immunity extends to employees performing discretionary functions, in good faith, and within the scope of employment. Jacobi’s claim of negligence stemmed from improper legal advice. Counsel to a client is an inherently discretionary task; although there may be ministerial tasks by DPA employees, entitling a defendant to bring a claim through the Board of Claims, Jacobi’s case was not. Holbert’s task was discretionary and Jacobi did not allege that his advice was in bad faith or outside the scope of employment. The lower courts properly dismissed on the basis of qualified immunity.

VIII. REAL PROPERTY:

A. C.W. Hoskins Heirs, a General Partnership Comprised of Greg Hoskins, et al. v. Ruth Farmer Wells, et al.

[2017-SC-000004-DG](#)

August 16, 2018

Opinion of the Court by Justice Hughes. All sitting; all concur. C.W. Hoskins Heirs and Phillip and Robin Lewis (Hoskins-Lewis) sought review of the Court of Appeals decision reversing the trial court judgment in a boundary dispute affecting coal royalties. After assessing evidence presented by professional land surveyors, considering the testimony of several witnesses, and walking the disputed property himself, the trial judge determined that Hoskins-Lewis’s proposed boundary line was the correct location. The Court of Appeals reversed in a 2-1 decision, finding the evidence relied upon by the trial court to be lacking in quality and substantiality, and then holding the boundary line was as proposed

by the Wellses. However, assessing the credibility of witnesses and making findings of fact are tasks exclusively within the province of the trial court. The Court of Appeals exceeded its scope of review by substituting its own opinion for that of the trial court. It is immaterial that the Court of Appeals' majority would have decided the case differently because the trial court's determination was supported by substantial evidence. Further, where both parties are asserting specific locations of a boundary line, each party bears the burden of proof to establish that location. Hoskins-Lewis met the burden of proof and the trial court's reliance on the evidence in support of their location was not erroneous. As such, the Supreme Court reversed the decision of the Court of Appeals and reinstated the Leslie Circuit Court's judgment in favor of Hoskins-Lewis.

XI. TORTS:

A. Norfolk Southern Railway Company v. Sharon Johnson [2016-SC-000248-DG](#) August 16, 2018

Opinion of the Court by Justice Wright. All sitting. Cunningham, Hughes, Keller, VanMeter, Venters, and Wright, JJ., concur. Minton, C.J., concurs in result only. Sharon Johnson, a patrol officer, was injured during her foot pursuit of a suspect when she fell down an embankment on Norfolk Southern's property. The circuit court granted a directed verdict in favor of Norfolk Southern. Specifically, the circuit court found that the Fireman's Rule barred Johnson's recovery as a matter of law. Johnson appealed to the Court of Appeals, which reversed and remanded to the circuit court, holding that the Fireman's Rule did not bar Johnson's claim. Norfolk Southern filed a motion for discretionary review to the Supreme Court, which the Court granted. The Supreme Court reversed the Court of Appeals, holding that Johnson was barred from recovery pursuant to the Firefighter's Rule and reinstated the circuit court's ruling directing a verdict in favor of Norfolk Southern.

X. WORKERS COMPENSATION:

A. McCoy Elkhorn Coal Corp. – Insolvent Employer, et al. v. Jeannie Sargent, Etc., et al. [2017-SC-000616-WC](#) August 16, 2018

Opinion of the Court by Justice Hughes. All sitting; all concur. The Administrative Law Judge held statutory beneficiaries of deceased mine worker were entitled to workers' compensation benefits enhanced by 30% pursuant to KRS 342.165 due to employer's failure to comply with workplace safety regulations, and that the Kentucky Coal Employers' Self-Insurers Guaranty Fund, which stepped into the shoes of the insolvent employer, was liable for the 30% enhancement. The Workers' Compensation Board affirmed. On appeal to the Court of Appeals, the Guaranty Fund did not challenge the applicability of the enhancement on the facts presented but did argue that it could not be liable for any enhancement based on the employer's intentional safety violations or interest.

The Court of Appeals affirmed the Board. Affirming in a case of first impression, the Supreme Court held that the statutes creating the Guaranty Fund reflected a legislative intent that the Fund step in and fully meet all obligations of the insolvent employer, including the 30% enhancement and interest. The Court specifically rejected the Fund’s argument that the 30% enhancement was a “penalty” which the Fund could not be required to pay under KRS 342.910(2).

XI. ATTORNEY DISCIPLINE:

A. David Joe Porter v. Kentucky Bar Association

[2018-SC-000115-KB](#)

August 16, 2018

Opinion and Order of the Court. All sitting; all concur. Porter moved the Court to enter an Order resolving the pending disciplinary proceedings against him by imposing a Public Reprimand and a 181-day suspension, probated subject to conditions. The motion was the result of an agreement negotiated with Bar Counsel, pursuant to SCR 3.480(2).

The disciplinary proceedings at issue involved identity theft of Porter’s status as an attorney by another attorney, John Brady, and a staff person, Charles Mills, who operated out of Porter’s Lexington satellite office while Porter operated primarily out of Paintsville. Unbeknownst to Porter, Brady and Mills deliberately withheld information from him, including mail, and held themselves out to prospective clients as Porter. This intentional misconduct was undertaken in such a way as to disguise what was occurring and led to numerous bar complaints being filed against Porter. Brady and Mills were charged criminally, and Porter acknowledged lack of appropriate oversight regarding the operation and supervision of the Lexington office.

The Inquiry Commission ultimately charged Porter with numerous violations of the Rules of Professional Conduct, which led to the agreed sanction and Porter’s motion. Upon review of the facts of this case, the relevant case law, and Porter’s disciplinary history, the Supreme Court concluded that the proposed discipline was adequate and sanctioned Porter accordingly.

B. Kentucky Bar Association v. Jason Thomas Butler

[2018-SC-000149-KB](#)

August 16, 2018

Opinion and Order of the Court. All sitting; all concur. Butler failed to timely respond to a client complaint. The Inquiry Commission resolved the complaint in Butler’s favor but charged him with the failure to timely respond to the allegation. The failure to respond charge was resolved by the issuance of an Order of Private Admonition with Conditions in July 2016. Among the conditions was the requirement that Butler provide the medical records documenting the health issues that allegedly prevented him from responding to the client complaint and completing the Ethics and Professionalism Enhancement Program. Butler again failed to respond. So the Inquiry Commission withdrew the Private Admonition

and issued a new charged for violating SCR 3.130(3.4)(c) for knowingly disobeying an obligation to the KBA.

The Board of Governors again issued its disciplinary recommendation requiring the filing of Butler's medical records. After five more months passed without compliance, the Supreme Court concluded that Butler had been given a reasonable time to comply with the obligation to file his medical records. Based on Butler's failure to comply and his previous suspension for nonpayment of dues, the Court found him guilty of violating SCR 3.130(3.4)(c) and suspended him from the practice of law for 30 days.

C. Kentucky Bar Association v. James Willis Harris

[2018-SC-000209-KB](#)

August 16, 2018

Opinion and Order of the Court. All sitting; all concur. The Board of Governors recommended that the Supreme Court find Harris guilty of violating SCR 3.130-1.4(a)(3) and 8.1(b). The Board also recommended that Harris be publicly reprimanded for these infractions. Harris did not participate in the proceedings, and the Court noted that he recently had been publicly reprimanded in a separate disciplinary proceeding and was under suspension for failing to pay his bar dues and failing to complete continuing legal education requirements. Because the case proceeded as a default case, the Court adopted the recommendation of the Board under SCR 3.370(9) and publicly reprimanded Harris.

D. Inquiry Commission v. Richard Graham Kenniston

[2018-SC-000230-KB](#)

August 16, 2018

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission petitioned the Supreme Court to temporarily suspend Kenniston for intentional misappropriation of client funds. Based on the claims and documentation provided by the Inquiry Commission, the Court found probable cause to believe Kenniston posed a substantial threat of harm to his clients or the public. Accordingly, the Court temporarily suspended Kenniston and restricted him from dealing with client funds held in any bank account.

E. Bethany L. Stanziano-Sparks v. Kentucky Bar Association

[2018-SC-000259-KB](#)

August 16, 2018

Opinion and Order of the Court. All sitting; all concur. Stanziano-Sparks moved the Supreme Court to impose a public reprimand with conditions that she successfully complete the next Ethics and Professionalism Enhancement Program and return money to her clients. The motion was the result of a negotiated sanction with the Office of Bar Counsel and the KBA did not object. Finding this sanction to be the appropriate discipline for the misconduct, the Court granted Stanziano-Sparks's motion and sanctioned her accordingly.