

**KENTUCKY SUPREME COURT
AUGUST 2019**

I. CERTIFICATION OF LAW:

**A. In re: Kentucky Employees Retirement System and Board of Trustees of
Kentucky Retirement Systems v. Seven Counties Services, Inc.
[2018-SC-000461-CL](#) August 29, 2019**

Opinion of the Court by Justice Hughes. All sitting; all concur. As requested by the United States Court of Appeals for the Sixth Circuit, the Supreme Court granted certification of law on the following issue: Whether Seven Counties Services, Inc.'s participation as a department in and its contributions to the Kentucky Employees Retirement System (KERS) are based on a contractual or a statutory obligation. The case arises from the efforts of Seven Counties, a non-profit mental health services provider, to reorganize and rehabilitate its finances under Chapter 11 of the Bankruptcy Code. Seven Counties paid into KERS to secure retirement benefits for its employees, but because the rate of required employer contributions increased dramatically in recent years, Seven Counties initiated bankruptcy proceedings in 2013 primarily to reject its relationship with KERS as an executory contract. The Supreme Court held that employer participation in KERS is exclusively statutory, following the plain language approach to statutory construction in analyzing the provisions of KRS Chapter 61, which authorizes the Governor to issue an executive order for KERS participation. Additionally, the Court held that neither the facts nor Kentucky law support Seven Counties' position that its relationship with KERS was contractual because the Governor has no authority to contract for entry into KERS. Further, applying the unmistakability doctrine, the Court held that nothing indicates an unmistakable legislative intent to allow employers to contract for participation in KERS. The relationship between KERS and Seven Counties is and always has been purely statutory.

II. CONSTITUTIONAL LAW:

**A. William M. Landrum III, in his Official Capacity as Secretary of the Finance
and Administration Cabinet v. Commonwealth of Kentucky Ex. Rel. Andy
Beshear, Etc., et al.
[2018-SC-000122-TG](#) August 29, 2019**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Buckingham, Lambert, VanMeter, and Wright, JJ., concur. Hughes, J., concurs by separate opinion in which Keller, J., joins. Keller, J., concurs by separate opinion. Office of the Attorney General (OAG) brought declaratory judgment action and sought permanent injunction, asserting that it had the right to contract with outside counsel regarding litigation against opioid manufacturers on a contingency-fee basis free from interference by the Government Contract Review

Committee of the Legislative Research Commission and the Secretary of the Finance and Administration Cabinet. The OAG also argued that, in the alternative, the Committee and Secretary acted arbitrarily and capriciously in deciding to reject and cancel a contingency-fee contract with outside counsel.

The Kentucky Supreme Court first held that any inherent power of the Attorney General to enter into contingency-fee contracts with outside counsel gives way to the overriding authority of the General Assembly. Next, the Court found that the contingency-fee contract at issue constituted an “expenditure of public funds” under KRS 446.101(41) and was therefore subject to the oversight requirements of the Kentucky Model Procurement Code, even though it was possible for the lawsuit to result in no recovery. The Court also determined that the Committee and Secretary’s review of the contract, in which the contract was rejected and cancelled, constituted a non-adjudicatory, quasi-legislative agency determination. The Committee and Secretary’s determination was therefore subject to review for arbitrariness and capriciousness, wherein the court must determine whether the decision was based on a consideration of relevant factors and whether there had been a clear error of judgment. Finally, the Court concluded that the Committee and Secretary did not act arbitrarily or capriciously in deciding to cancel the contract.

III. CRIMINAL LAW:

A. Gregory Q. Posey v. Commonwealth of Kentucky 2018-SC-000085-MR August 29, 2019

Opinion of the Court by Justice Hughes. All sitting; all concur. Posey was sentenced to life in prison for murder and being a convicted felon in possession of a handgun. Posey murdered a man who was in a relationship with the mother of his two children. More than a year before the murder, Posey began making threatening comments to the victim via text message and Facebook. On appeal, Posey argued that the trial court erred by not giving an extreme emotional disturbance (EED) instruction, by not admonishing the jury that prior threats are not substantive evidence that he committed a crime, and by not excluding certain prior convictions. The Supreme Court held that Posey was not entitled to an EED instruction because there was no sudden or shocking triggering event, and Posey’s distraught state of mind was not temporary because he made threats for over a year. Additionally, Posey failed to timely request an admonition regarding the purpose of the threats evidence. Such a request must be made at the time the evidence was admitted and no later than after the direct examination at which the evidence was introduced. As to the prior convictions, the trial court did not err in declining to exclude prior convictions that were provided to the defense before the penalty phase. The Commonwealth received the prior conviction records late, despite attempting to get them sooner. Although not deemed a discovery violation in this case, this Court will not set aside a conviction without reasonable probability that timely disclosure would have changed the result of the trial. The Court affirmed the judgment of the Logan Circuit Court.

B. Trenton Easterling v. Commonwealth of Kentucky
[2018-SC-000184-MR](#)

August 29, 2019

Opinion of the Court by Justice Hughes. All sitting; all concur. When Easterling became a suspect in the murder of a high school classmate, a deputy interviewed Easterling at the sheriff's department with his mother present. Easterling confessed he shot the classmate. Upon hearing her son's confession, Easterling's mother terminated the interview by asking for an attorney. Easterling's grandfather then joined Easterling and his mother in the interview room and Easterling, in response to a question from his grandfather, again acknowledged that he had killed the victim. Unbeknownst to them, the family's conversation was videotaped. The trial court denied suppression of Easterling's incriminating statement made during the conversation with his family members. Questions presented: 1) An issue of first impression, whether the trial court erred by denying the motion in limine to suppress the videotaped statement Easterling made to family members while in the police station interrogation room. 2) Whether the trial court erred denying his motion in limine to prohibit introduction of gruesome photographs from the crime scene and autopsy. Held: 1) Easterling was in custody at the sheriff's department, handcuffed and under arrest, with a camera visible upon the wall of the interrogation room where he was being held. Easterling did not have a reasonable expectation of privacy under these circumstances. Furthermore, when Easterling's mother terminated the interview, the police left the room and the illegal interrogation ceased. The incriminating statements were made as a direct result of a family member's question to Easterling, a situation not subject to police control. The brief videotaped statement used against Easterling was not fruit of the poisonous tree. 2) The challenged photos depicted the victim fully clothed and lying on the ground, the injuries to his mouth and teeth, and the victim's gunshot wounds, lacking any disfigurement or gore. The photos, relevant and highly probative of the commission of the crime by Easterling and the nature and severity of the victim's injuries, were properly admitted.

C. Anthony L. Beard, Jr. v. Commonwealth of Kentucky
[2017-SC-000633-MR](#)

August 29, 2019

Opinion of the Court by Justice Hughes. All sitting; all concur. Criminal Appeal. Beard was arrested for shooting his cousin. While interviewing Beard, the investigating officer identified four witnesses by name who would testify at trial that Beard shot the victim. Only three of those four witnesses testified but the Commonwealth played the videotaped interview which identified the fourth non-testifying witness. A jury convicted Beard of first-degree burglary, second-degree assault, and second-degree wanton endangerment. During the penalty phase, the Commonwealth stated incorrectly to the jury that first-degree burglary is a non-violent offense and that Beard would be eligible for parole after serving twenty percent of his sentence. The Commonwealth urged the jury to recommend the maximum sentence for each crime, stating that Beard would be eligible for parole

after just six years. However, as sentenced, Beard was only eligible for parole after serving seventeen years. Beard testified during the penalty phase and admitted he shot the victim. Beard was removed from the witness stand when he did not comply with the trial court's admonitions, one being to refrain from testifying about unsubstantiated allegations that the victim sexually abused Beard's daughter. Questions presented: Whether the trial court erred by 1) allowing inadmissible hearsay testimony into evidence, 2) not correcting the Commonwealth's misstatement of Beard's parole eligibility on the first-degree burglary charge, and 3) improperly limiting Beard's testimony during the penalty phase. Held: 1) *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813, 822 (2006), support Beard's argument that in this case the witness identifications of the shooter, information provided to the detective during his investigation of the crime, are testimonial. However, given all the evidence, which included three other witnesses' testimony that Beard shot the victim, palpable error relief was not warranted. 2) The false parole eligibility information had a reasonable likelihood of influencing the jury's decision regarding Beard's sentence. Palpable error relief being warranted, Beard's sentence is reversed, and the case remanded for a new penalty phase. 3) Despite Beard denying during the guilt phase that he shot the victim, once the jury found him guilty of the crimes, hopes of leniency from the jury were tied to reasons he committed the crime. Because the daughter's allegations served as a motive for Beard's commission of the crimes, particularly the assault crime, they are relevant to mitigation and leniency and may be included in Beard's explanation for why he shot the victim.

**D. Commonwealth of Kentucky v. Alger Ferguson
Alger Ferguson v. Commonwealth of Kentucky**

[2017-SC-000651-DG](#)
[2017-SC-000151-DG](#)

August 29, 2019

Opinion of the Court by Justice Wright. All sitting. Buckingham, Hughes, Keller, VanMeter and Wright, JJ., concur. Lambert, J., dissents by separate opinion. After the Supreme Court of Kentucky affirmed Ferguson's conviction and sentence for murdering his nephew, Ferguson filed an RCr 11.42 motion in the trial court asserting that his trial counsel had been ineffective. The trial court denied that motion and Ferguson appealed to the Court of Appeals. That court reversed, holding that Ferguson had been denied effective assistance of counsel. The Commonwealth sought discretionary review to the Supreme Court, which was granted. Applying analysis pursuant to *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Court reversed the Court of Appeals, holding "[t]here is not a reasonable probability that the outcome of the trial would have been different but for any of [Ferguson's counsel's] purported deficiencies."

E. Gary D. Warick v. Commonwealth of Kentucky

2018-SC-000229-DG

August 29, 2019

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Keller, and Lambert, JJ., concur. Buckingham, J., dissents by separate opinion in which VanMeter and Wright, JJ., join. Wright, J., dissents by separate opinion in which Buckingham and VanMeter, JJ., join. Criminal Appeal, Discretionary Review Granted. Warick and his passengers purchased food at a Floyd County restaurant at the drive-thru and then waited in the parking lot for its preparation. A restaurant employee, having noticed an open can of beer in Warick's console, called the police. Warick passed the field sobriety and breathalyzer tests but after a passenger was removed from the vehicle, searched and found to have drug paraphernalia, the K-9 unit was called. The K-9 unit alerted to the grassy area behind Warick's car. The officers discovered a baggie of marijuana and a pill bottle containing seven oxycodone pills about 10-15 feet away from the vehicle. Search warrants were issued for the vehicle and Warick's Johnson County home. After the trial court denied Warick's suppression motion alleging incriminating evidence was discovered because the police unduly prolonged the DUI stop, Warick entered conditional *Alford* pleas. The Court of Appeals concluded Warick lacked "standing" to challenge the dog sniff search because he did not show he had a reasonable expectation of privacy in the grassy area searched. Question presented: Whether Warick properly invoked his right to Fourth Amendment protection. Held: As directed by *Rakas v. Illinois*, 439 U.S. 128 (1978), and previously acknowledged within Kentucky's Fourth Amendment, Fourth Amendment "standing" is subsumed under substantive Fourth Amendment doctrine. Rather than a question of "standing," "the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Id.* at 140. Warick properly asserted that the officers' actions infringed upon his own Fourth Amendment rights. When focusing on the grassy area search as the primary alleged illegality, the Court of Appeals overlooked Warick's argument that the evidence obtained after the officers completed the traffic stop was tainted fruit which could not be used against him.

IV. DEPENDENCY, NEGLECT, OR ABUSE

A. Commonwealth of Kentucky, Cabinet for Health and Family Services v. H.C.; and L.E., a Child

2018-SC-000534-DGE

August 29, 2019

Opinion of the Court by Justice Keller. All sitting; all concur. In a Dependency, Neglect, and Abuse proceeding, the Harrison Family Court denied the indigent mother's request for expert funding. The mother missed the deadline to file her notice of appeal of that decision, but the family court permitted a belated appeal. The Court of Appeals then reversed the family court's expert funding decision,

finding that the mother’s constitutional due process rights were impacted. The Supreme Court found that the Court of Appeals lacked jurisdiction because the mother had failed to timely file her notice of appeal and had failed to demonstrate excusable neglect for doing so as required by Kentucky Rule of Civil Procedure 73.02(1)(d). Accordingly, the Supreme Court vacated the Court of Appeals’ order and reinstated the order of the Harrison Family Court.

V. MEDICAL NEGLIGENCE:

A. Ashland Hospital Corporation d/b/a King’s Daughters Medical Center v. Paul Wesley Lewis, M.D., et al.

AND

Paul Wesley Lewis, M.D. v. David Shackelford, et al.

[2018-SC-000276-DG](#)

August 29, 2019

[2018-SC-000279-DG](#)

August 29, 2019

Opinion of the Court by Justice Keller. Minton, C.J.; Buckingham, Hughes, Keller, VanMeter, and Wright, JJ., sitting. All concur. Lambert, J., not sitting. The Boyd Circuit Court granted summary judgment in favor of Dr. Paul Wesley Lewis and Ashland Hospital Corporation d/b/a King’s Daughters Medical Center (“KDMC”) after finding that the complainant, David Shackelford, could not establish a prima facie case of negligence. Shackelford had alleged that the failure to diagnose his stroke, which arose after an angiogram, was negligent and caused injury greater than that which the stroke would have caused with earlier intervention. The trial court found that the proffered expert testimony failed to establish that any negligence on the part of the doctor or hospital was a substantial factor in causing injury to Shackelford. The Court of Appeals reversed, finding that expert testimony was not required to establish causation in this case. The Supreme Court reversed the Court of Appeals, holding that the complex medical evidence in this case was beyond the common knowledge of a layperson, and, as a result, expert opinion evidence was required to establish causation. The proffered expert opinion evidence failed to raise a genuine issue of material fact on the issue of causation and therefore, summary judgment was appropriate. Accordingly, the Court reversed the Court of Appeals and reinstated the trial court’s judgment.

VI. REAL PROPERTY:

A. Steve Melton, et al. v. Donnie S. Cross, et al.

[2018-SC-000336-DG](#)

August 29, 2019

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The Crosses brought suit against the Meltons in Clinton Circuit Court claiming a vested right to use a private road across the Melton’s land as an easement acquired by prescription. The Meltons asserted that their predecessor-in-interest gave the Crosses permission to use the road. The Kentucky Supreme Court determined that a jury instruction stating that continuous, uninterrupted use of a passway without interference by the landowner for a period of more than 15 years gives rise to a

presumption that the use was under a claim of right was warranted. The effect of that instruction would have been to shift the burden to the Meltons to offer evidence that the Crosses' use was permissive. The Court found the trial court's refusal to give this instruction was an abuse of discretion and was not harmless error. Accordingly, the case was reversed and remanded to the Clinton Circuit Court. The Court also determined that KRE 801A(c)(2), the admission-by-privy, predecessors-in-interest hearsay exception, allows statements by a predecessor in interest to be used only against a predecessor-in-interest's successor. As such, on remand, the Meltons could not use that rule to admit a witness's testimony that the Melton's predecessor in interest had told the witness that he gave the Crosses permission to use the road. The Melton's use of the testimony would have been in support of their position, not against it.

VII. SUMMARY JUDGMENT:

A. Meredith L. Lawrence, et al. v. Bingham Greenebaum Doll, LLP
[2018-SC-000344-TG](#) August 29, 2019

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Bingham Greenebaum Doll, L.L.P., sued Meredith Lawrence in Gallatin Circuit Court to foreclose on property Lawrence had agreed to mortgage as security on his debt for services rendered by one of Bingham's attorneys, Richard Kiefer. Lawrence counterclaimed for legal malpractice. The trial court granted summary judgment in favor of Bingham.

The Kentucky Supreme Court concluded that the trial court erroneously granted summary judgment. Kiefer was not engaged in the unauthorized practice of law when representing Lawrence in the Eastern District of Kentucky even though Kiefer was not admitted to practice law in Kentucky because he had been duly admitted pro hac vice. Lawrence waived any allegation of improper service by filing answer and counterclaim in foreclosure action. Lawrence's failure to sign one part of a total agreement for Bingham to continue rendering services to Lawrence did not discharge Lawrence's obligations under the agreement, particularly where Bingham continued to render services to Lawrence. Kiefer's alleged representation that he was licensed to practice law in Kentucky was not material to agreement for representation of Lawrence and therefore did not render the agreement unenforceable. Lawrence was precluded from asserting an ineffective-assistance-of-counsel claim and from challenging the amount of legal fees owed to Bingham and Kiefer by issue preclusion and claim preclusion, respectively. Finally, Lawrence's breach of fiduciary duty claim was not barred by res judicata, and genuine issues of material fact with respect to that claim remained.

VIII. TERMINATION OF PARENTAL RIGHTS

A. Cabinet for Health and Family Services, Commonwealth of Kentucky, and K.L.W.W., a Child v. P.W.

AND

Cabinet for Health and Family Services, Commonwealth of Kentucky, and K.N.W.W., a Child v. P.W.

[2019-SC-000020-DGE](#)

August 29, 2019

[2019-SC-000021-DGE](#)

August 29, 2019

Memorandum Opinion of the Court. All sitting; all concur. The Fayette County Family Court terminated P.W.'s parental rights to K.N.W.W. and K.L.W.W. P.W. appealed to the Court of Appeals. The Court of Appeals reversed P.W.'s termination of parental rights, holding that "for a person to abuse or neglect a child, she must intend to do so" and finding that sufficient evidence did not support the trial court's finding that P.W. intended to abuse or neglect the children. The Cabinet for Health and Family Services petitioned the Supreme Court for discretionary review, which it granted. The Supreme Court reversed the Court of Appeals, explicitly overruling its holding that a parent must intend that the result of their actions be that the child is abused or neglected. The Court further found that substantial evidence supported the family court's finding of neglect and remanded the case to the Court of Appeals to determine whether sufficient evidence supported the trial court's finding that the remaining requirements of Kentucky Revised Statute (KRS) 625.090 were met.

IX. TRUSTS & ESTATES:

A. Richard A. Getty, et al. v. Brenda Sue Bridges Getty, et al.

[2018-SC-000111-DG](#)

August 29, 2019

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Buckingham, Hughes, Keller, Lambert and Wright, JJ., sitting. VanMeter, J., not sitting. Minton, C.J.; Buckingham, Hughes, Keller, and Lambert, JJ., concur. Wright, J., concurs by separate opinion. Upon Richard J. Getty's ("Dick") death, his son, Richard A. Getty ("Rich") and granddaughter, Sesamie Bradshaw, brought suit against Dick's widow, Sue Getty, seeking to invalidate Dick's estate plan and alleging that Sue misappropriated funds from an income stream of property placed in trust. The Bourbon Circuit Court entered judgment upon a jury verdict for plaintiffs and the Court of Appeals reversed in part.

The Kentucky Supreme Court first determined the issues of whether Dick lacked testamentary capacity to execute his estate plan, and whether Sue exercised undue influence over Dick in executing the estate plan were for the jury, and the trial court did not err in denying Sue's motion for a directed verdict on those issues. The Court next held that Dick and Sesamie could not maintain an action against Sue based on wrongful use of income derived from property placed into a living trust because the income was earned by both Sue and Dick. Both Sue and Dick

contributed to the earnings derived from the property, and it therefore could not be considered separate property owned solely by Dick. Finally, the Court held that Sue and her attorneys did not improperly seek to have Dick's body cremated in violation of a trial court stay or order and, as such, were not liable to Rich and Sesamie for attorney fees and costs.

X. WORKERS' COMPENSATION:

A. Samuel Wetherby v. Amazon.com, et al.

[2018-SC-000542-WC](#)

August 29, 2019

Opinion of the Court by Justice Hughes. Minton, C.J.; Buckingham, Keller, VanMeter, and Wright, JJ., sitting. All concur. Lambert, J., not sitting. Samuel Wetherby suffered a work-related back injury and was awarded 6% permanent partial disability benefits. Wetherby suffered an unrelated back injury to a different part of his spine 30 years prior. The ALJ found a 31% whole person impairment but deducted 25% as attributable to Wetherby's prior injury. On appeal, Wetherby argued that the Administrative Law Judge (ALJ) failed to make sufficient findings to exclude a pre-existing condition pursuant to *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007). A pre-existing active condition must be symptomatic and impairment ratable immediately prior to the work injury. While Wetherby's condition was impairment ratable, it was not symptomatic, thereby not qualifying as an active or dormant condition. Therefore, the ALJ did not need to apply *Finley*. The deduction of 25% for the prior injury was not a "carve out" in the sense of a pre-existing active condition, but rather a requirement of the AMA Guides regarding spinal impairment. Because substantial medical evidence supported the 6% impairment rating, the Court of Appeals decision reinstating the ALJ's award and order was affirmed.

B. Geoffrey Hampton v. Intech Contracting, LLC, et al.

[2018-SC-000611-DG](#)

August 29, 2019

Opinion of the Court by Justice Buckingham. All sitting; all concur. Employee filed a workers' compensation enforcement action against his employer. The Circuit Court granted partial summary judgment in favor of the employee. The Court of Appeals dismissed the subsequent appeal in part because the appeal was from an interlocutory order, but considered the appeal insofar as the Employer argued that the circuit court was without jurisdiction because the Employer's challenge to jurisdiction was the functional equivalent of a challenge based upon immunity from lawsuit. Upon review the Court held:

The Circuit court's order granting employee award for payment of a wheelchair and award for reimbursement of expenses for medically-related trip to Oklahoma, was nonappealable interlocutory order because employee's complaint included a request for attorney fees, and the circuit court's order did not resolve the employee's request for attorney fees, so that attorney fee issue remained pending at time appeal was filed, and, further, the order did not include any finality

language. CR 54.01, 54.02; the Court of Appeals erred by treating the employers challenge to jurisdiction as the equivalent of a claim of immunity from lawsuit because the issue did not constitute a substantial public interest, and thus order was not immediately appealable under collateral order doctrine, even assuming circuit court lacked subject matter jurisdiction and this equated to absolute immunity of employer from suit, in employee's workers' compensation enforcement action against employer; the collateral order doctrine, under which orders may be immediately appealable when they implicate a right that cannot be effectively vindicated after the trial occurs, requires that an order (1) conclusively decides an important issue separate from the merits of the case, (2) is effectively unreviewable following final judgment, and (3) involves a substantial public interest that would be imperiled absent an immediate appeal; and all elements of the collateral order doctrine must be met before there will be jurisdiction to consider an interlocutory appeal based on a denial of immunity.

C. LaFarge Holcim v. James Swinford, et al.

[2018-SC-000627-WC](#)

August 29, 2019

Opinion of the Court by Justice Wright. All sitting; all concur. James Swinford had worked for his employer, Lafarge Holcim, or its predecessor entity, for more than four decades when he sustained a work-related injury at seventy-five years of age. The Administrative Law Judge (ALJ) awarded Swinford permanent partial disability (PPD) benefits based on his treating doctor's impairment rating of 15%. That award and the duration of Swinford's benefits were appealed to the Workers' Compensation Board and then the Court of Appeals. They were also the subject of this appeal to the Supreme Court of Kentucky. The Court first held that the ALJ relied upon substantial evidence in finding Swinford's work injury to be the combination of the exacerbation of a dormant pre-existing condition and a new injury and also relied upon substantial evidence in determining that Swinford has a whole-body impairment resulting from his work-related injury. The Court then reversed the Court of Appeals' on the issue of the retroactivity of KRS 342.730(4), holding the new amendments to the statute are retroactive. The Court held that the statute was exempt from normal codification requirements, as it is temporary in nature. Therefore, the legislature had made a declaration concerning retroactivity in this case through the Legislative Research Commission's note following the statute. Therefore, the Court reversed the Court of Appeals on these grounds and remanded the case to the ALJ to determine the amount of Swinford's benefits under the amendment.

XI. WRIT OF PROHIBITION:

A. University of Louisville and Ruby D. Fenton v Hon. Audra J. Eckerle, Judge, Etc., et al.

[2018-SC-000651-MR](#)

August 29, 2019

Opinion of the Court by Justice Buckingham. All sitting; all concur. University and supervisors' attorney filed petition for writ of prohibition and mandamus,

seeking to prohibit enforcement of order entered by Circuit Court, compelling University and attorney to provide to former associate professor communications relating to faculty grievance proceedings initiated by the professor. The Court of Appeals denied the writ. Upon review the Court held: If a trial court orders the production of communications protected by the attorney-client privilege, the aggrieved party is entitled to a writ of prohibition or mandamus halting the production of such communications. KRE 503;

not all communications between an attorney and a client are privileged, and the burden is on the party claiming the privilege to prove that it exists as to the communications so claimed; the trial court did not clearly err in finding that the attorney represented only the supervisors in the faculty grievance proceedings, such that attorney client privilege did not protect communications between attorney and University employees other than the supervisors relating to the proceedings; and, although University allegedly paid attorney's legal fees, University was not party to grievance proceedings, University had role of neutral arbiter, and University's assistant legal counsel was available to advise University in proceedings in which it was not party.

B. Jackie Lucas v. Hon. Judith E. McDonald-Burkman, Judge, Jefferson Circuit Court, et al.

[2018-SC-000176-MR](#)

August 29, 2019

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Hughes, Keller, Lambert, and VanMeter, JJ., concur. Wright, J., dissents by separate opinion in which Buckingham, J., joins. After her employment was terminated, Jackie Lucas filed suit against Baptist Hospital and Stephen Hanson alleging gender discrimination and retaliation, identity theft, and invasion of privacy. During the discovery process, Lucas identified Dr. Gregory K. Collins, her husband, as her treating physician and an employer. Baptist sought to depose Dr. Collins, but Lucas objected to his deposition, asserting the husband-wife privilege found in Kentucky Rule of Evidence (KRE) 504. The trial court granted in part and denied in part Baptist's Motion to Compel. The trial court ordered that Baptist could not depose Dr. Collins regarding Lucas's "private conversations and observations," but that Baptist could depose him on the following three topics: (1) Lucas's public manifestations of her emotional health, (2) the medical treatment he provided her, and (3) employment issues he observed as her employer.

Lucas filed a petition in the Court of Appeals for a writ to prohibit the trial court from allowing Baptist to depose Dr. Collins at all, based on the spousal testimony privilege found in KRE 504(a). The Court of Appeals granted the writ in part and denied the writ in part. Lucas appealed to the Supreme Court which affirmed in part and reversed in part. The Court pointed to the limitation contained in KRE 504(a) that testimony must be "against" the party-spouse to be subject to the privilege. The Court denied the writ in total, allowing the deposition to proceed and the parties to assert the privilege on a question-by-question basis.

XII. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. William O. Ayers

2010-SC-000064-KB

August 29, 2019

Opinion and Order of the Court. All sitting; all concur. In May of 2019, the Supreme Court of Ohio permanently disbarred Rodger William Moore from the practice of law, prompting the KBA to seek reciprocal discipline under SCR 3.435(4). The Ohio decision was based upon Moore's conduct in agreeing to represent a client for free and then demanding the client sign a promissory note, using a "bait and switch" tactic, and knowingly making false allegations in a breach of contract claim against the client. Kentucky Supreme Court ordered Moore to show cause why reciprocal discipline should not be imposed, but he failed to respond. Accordingly, the Court ordered Moore permanently disbarred from the practice of law in the Commonwealth.