

**PUBLISHED OPINIONS  
KENTUCKY SUPREME COURT  
DECEMBER 2012**

**I. ADMINISTRATIVE LAW:**

- A. W.B., An Adult Citizen of Jefferson County, Kentucky v. Commonwealth of Kentucky Cabinet for Health and Family Services, Dept. For Community Based Services, A Kentucky Administrative Agency**  
**2011-SC-000202-DG December 20, 2012**

Opinion of the Court by Justice Venters. Abramson, Cunningham, Minton, Noble, Scott, JJ. concur. Schroder, J. not sitting. Appellant, the subject of an investigation by the Cabinet for Health and Family Services for alleged child abuse, brought a declaratory judgment action to challenge the constitutionality of the several statutes and administrative regulations that provide the process by which the Cabinet investigates and substantiates allegations of child abuse and maintains a registry of “substantiated” child abusers. He also challenged the process for an alleged abuser to contest and appeal that substantiation. The administrative process was held in abeyance pending adjudication of the constitutionality challenge. Held: Although the Court had the authority to resolve the constitutional issues presented, without the record of an actual administrative case to contextualize the operations of the statutory and regulatory process as it routinely functions, cautiously-weighted prudential considerations compelled the Court to defer ruling on the constitutional issues until after completion of the administrative process, applying the doctrine of prudential ripeness.

**II. CERTIFICATION OF LAW:**

- A. Commonwealth of Kentucky v. Richard Eugene Derringer**  
**2010-SC-000685-CL December 20, 2012**

Certification of Law by Chief Justice Minton. Abramson, Cunningham, Noble, Scott and Venters, J.J., concur. Schroder, J., not sitting. The Commonwealth moved the Court to certify the law on the question of whether a conviction for which a defendant is currently on felony pretrial diversion can be used as a qualifier to indict that defendant as a second-degree persistent felony offender (PFO 2) when he commits a later felony offense. The Court held that it cannot. A prior felony conviction cannot form the basis of a PFO 2 charge unless a sentence for that conviction has been imposed at the time the defendant commits the present crime. When a defendant is granted pretrial diversion on a felony conviction, a sentence for that conviction is not imposed until after the pretrial diversion agreement is voided. So a conviction for which a defendant is currently on diversion cannot be used to indict that defendant as a PFO 2 when he commits a subsequent felony offense. And the Court held that the sentence for the prior felony must have been imposed at the time the defendant commits the later crime in order for the conviction to support a PFO 2 charge.

### III. CRIMINAL:

A. **Christopher Steward v. Commonwealth of Kentucky**  
**2011-SC-000393-MR** **December 20, 2012**

Opinion of the Court by Justice Scott. Minton, C.J.; Abramson, Cunningham, Noble, and Venters, JJ., concur. Schroder, J., not sitting. This case required the Supreme Court to decide two main issues: 1) whether counsel's representation of Appellant at his remanded sentencing phase violated the Sixth Amendment's mandate of conflict-free counsel and 2) whether the use of videotaped witness testimony from the guilt phase of Appellant's trial during Appellant's remanded sentencing phase violated the Sixth Amendment's Confrontation Clause. As to the first issue, the court held that there was no Sixth Amendment violation arising out of counsel's successive representation of Appellant because even if it was established that counsel's representation fell below an objective standard of reasonableness, there was no reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Appellant's argument arising under the Sixth Amendment's Confrontation Clause was also found to be without merit, as the court held that because the witnesses testified at the guilt phase of Appellant's trial and were available for cross-examination, the clause was not violated.

### IV. CRIMINAL CONTEMPT:

A. **Stephen Poindexter v. Commonwealth of Kentucky**  
**2011-SC-000275-DG** **December 20, 2012**

Opinion of the Court by Justice Scott. Minton, C.J., Abramson, Cunningham, and Venters, JJ., concur. Noble, J., dissents by separate opinion. Schroder, J., not sitting. The Adair Circuit Court found Appellant in criminal contempt of court for failing to appear at his client's arraignment and the Court of Appeals affirmed. On discretionary review, Appellant argued that he had withdrawn from the case and therefore had no duty to appear, and even if he did have a duty to appear there were insufficient grounds upon which to find him in criminal contempt. The Supreme Court first held that by filing a Notice of Entry of Appearance, Appellant had "appeared" for his client and therefore was required to follow the local court rules for withdrawal, which he did not. Additionally, the Court found that Appellant had an independent duty to appear pursuant to an order of the trial court. Second, the Court held that Appellant willfully disobeyed his order to appear, and therefore that the circuit court did not abuse its discretion by finding him in criminal contempt.

V. **MALPRACTICE:**

- A. **Brenda C. Osborne v. Steven H. Keeney, et al.**  
**[2010-SC-000397-DG](#)** **December 20, 2012**  
**And**  
**Steven H. Keeney v. Brenda C. Osborne, et al.**  
**[2010-SC-000430-DG](#)** **December 20, 2012**

Opinion of the Court by Chief Justice Minton. Abramson, Cunningham, Noble, J.J., concur. Venters, Scott, J.J., concurs in part and dissents in part by separate opinion. Schroder, J., not sitting. A small plane crashed into Brenda Osborne's home, causing significant property damage and mental distress. Osborne hired Steven Keeney to represent her in a claim against the pilot of the aircraft but Keeney failed to timely file the lawsuit against the pilot of the aircraft before the expiration of the applicable statute of limitations. Osborne then brought a legal malpractice claim against Keeney seeking to recover potential insurance proceeds, lost punitive damages, mental anguish, and punitive damages for Keeney's conduct. Both parties appealed the decision of the Court of Appeals. The Court reaffirmed precedent holding the proper method for trying legal malpractice claims is the suit-within-a-suit, which requires the trial court to instruct the jury as if it were trying the underlying tort case before instructing the same jury on the legal malpractice claim. The trial court properly tried the case using the suit-within-a-suit method but erred when it simply instructed the jury on the legal malpractice claim and failed to instruct on the underlying negligence claim against the aircraft pilot. As a result, the Court reversed the Court of Appeals and remanded the case to the trial court for further proceedings. The Court also held that the "impact rule," the longstanding guidepost to recovery for claims involving emotional distress, is no longer the law in Kentucky. Claims involving emotional distress are to be governed by general negligence principles. A plaintiff seeking damages for emotional distress must prove the commonly recognized elements of a general negligence claim and distress that does not significantly affect the plaintiff's everyday life or require significant treatment will not suffice. Finally, the Court held that lost punitive damages are not recoverable in a legal malpractice action. The Court noted that Osborne could seek punitive damages from Keeney for Keeney's own conduct in the handling of her case.

VI. **STATUTE OF LIMITATIONS:**

- A. **David Wade v. Poma Glass & Specialty Windows, Inc., Etc.**  
**[2010-SC-000572-DG](#)** **December 20, 2012**

Opinion of the Court by Chief Justice Minton. Abramson, Cunningham, Noble and Venters, J.J., concur. Scott, J., dissents by separate opinion. Schroder, J., not sitting. Poma Glass & Specialty Windows, Inc. ("Poma") was trying to collect on a civil judgment obtained against Wade in 1991. To collect on the judgment, Poma caused a writ of execution to issue against Wade in April 1991. This was

the only writ of execution issued on the judgment. But Poma sought to collect on the judgment through other enforcement actions. Poma filed judgment liens on Wade's real estate in 1992 and 2000; initiated garnishment proceedings, most recently in March 2005; and undertook post-judgment discovery examinations. The statute of limitations for an action upon a judgment or decree of a court is 15 years, "to be computed from the date of the last execution thereon." The Court held that the term *execution* in the statute of limitations for actions on judgments is defined as an act of enforcing, carrying out, or putting into effect the judgment; including, garnishments and judgment liens. The 15-year statute of limitations for an action upon a judgment is computed from the date of the last act enforcing, carrying out, or putting the judgment into effect, including garnishment proceedings and judgment liens. So Poma could still seek to recover on its 1991 judgment against Wade because it had repeatedly taken actions to execute the judgment.

## VII. TORT:

### A. **Fort Mitchill Country Club v. Timothy Lamarre, et al.** **[2011-SC-000665-DG](#) December 20, 2012**

Opinion of the Court by Justice Cunningham. Minton, C.J.; Abramson, Noble, and Venters, JJ., concur. Scott, J., dissents by separate opinion. Schroder, J., not sitting. Summary judgment as to Country Club's liability under the Dram Shop Act was proper where there was a complete absence of proof that defendant appeared intoxicated prior to accident involving motorized golf cart. Further, whether or not Country Club served defendant in violation of its liquor license is immaterial to its liability under the Dram Shop Act, as the General Assembly has not expressly carved out such an exception.

## IX. ATTORNEY DISCIPLINE:

### A. **Rocky McClintock v. Kentucky Bar Association** **[2012-SC-000688-KB](#) December 20, 2012**

Opinion and Order. Minton, C.J., Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J., not sitting. McClintock, who was facing nine formal charges from the Inquiry Commission including over thirty counts alleging violations of the Rules of Professional Conduct, moved the Court to resign from the KBA under terms of permanent disbarment. The Court granted the motion, ordering McClintock permanently disbarred from the practice of law in Kentucky.

### B. **Daniel Brown v. Kentucky Bar Association** **[2012-SC-000759-KB](#) December 20, 2012**

Opinion and Order. Minton, C.J., Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J., not sitting. Brown issued six (6) separate checks totaling \$738.11 that were to be drawn out of her IOLTA trust account.

When each of these checks was presented for payment there were insufficient funds for the transactions, however all of the checks were paid pursuant to overdraft protection on the account. The Office of Bar Counsel (OBC) made several attempts to contact Brown regarding notices they had received of insufficient funds in her account, to which they received no response. Finally, the OBC issued a subpoena duces tecum directing Brown to produce records that were material to the investigation of this matter. Brown also failed to comply with or respond to the subpoena. The Charge against Brown alleged three counts: (1) violation of SCR 3.130-1.15(a), (2) violation of SCR 3.130 -8.1(b), and (3) violation of SCR 3.130-3.4(c). In light of Brown's admission that she engaged in said misconduct, she and the KBA agreed to a negotiated sanction pursuant to SCR 3.480(2) which would impose a public reprimand with conditions. The Court held that the negotiated sanction was consistent with discipline imposed in similar cases and ordered Brown be publicly reprimanded with conditions.