

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
FEBRUARY 2014**

I. ADMINISTRATIVE LAW:

- A. Appalachian Racing, LLC v. The Family Trust Foundation, Inc. et al
2012-SC-000414-DG February 20, 2014
2012-SC-000415-DG February 20, 2014
2012-SC-000416-DG February 20, 2014**

Opinion of the Court by Justice Venters. All sitting. All concur. Administrative Law; Declaratory Judgments. Questions presented: 1) Whether the Kentucky Horse Racing Commission has the statutory authority to license and regulate the operation of and wagering upon pre-recorded video displays of horse races, so called “historic horse racing;” 2) whether the Kentucky Department of Revenue has the statutory authority to tax the wagering pool upon historic horse racing; 3) whether the licensed operation of wagering on historic horse racing violates the gambling provisions of the Kentucky Penal Code; 4) whether a declaratory judgment action brought as an agreed case pursuant to KRS 418.020 presents a justiciable controversy when no adverse or antagonistic interest exists among the parties. Held: 1) The Kentucky Horse Racing Commission has the statutory authority to license and regulate the operation of and wagering upon “historic horse racing;” 2) The Kentucky Department of Revenue lacks the statutory authority to tax the wagering pool upon historic horse racing; 3) Whether the licensed operation of wagering on historic horse racing violates the gambling provisions of the Kentucky Penal Code is an issue that depends upon facts not in the record, and therefore the action must be remanded to the trial court for development of facts material to that issue; and 4) The great public importance in, and the urgency of, having an issue judicially resolved do not suffice to present a justiciable controversy where none of the parties have adverse or antagonistic interests in the subject of the litigation. However, by intervening in the action to challenge the legal positions taken by the joint-petitioners, the Family Trust Foundation supplied the necessary adverse interest to establish a justiciable controversy and vest jurisdiction in the circuit court to decide the issue.

II. ATTORNEY’S FEES:

- A. Mary Bell; Thomas E. Bell, As Next of Friend; and Hon. Richard Dawahare v. Commonwealth of Kentucky, Cabinet for Health and Family Services, Department for Community Based Services
2012-SC-000600-DG February 20, 2014**

Opinion of the Court by Justice Noble Affirming. All sitting. All concur. Appellant Mary Bell participated in a community-based program developed and run by the Cabinet for Health and Family Services known as the Home and Community Based Waiver Program (HCBW) and supervised by the Department

of Community Based Services (DCBS). The underlying dispute in this case arose from the formula used by the Cabinet to calculate the cost of the program to a program participant based on income.

After an administrative hearing officer denied Appellant's challenge to the Cabinet's program cost formula, Mr. Bell, Appellant's father and legal guardian, appealed to the Franklin Circuit Court. In addition to seeking review of the administrative decision, he claimed he was also entitled to attorney's fees and to disclosure of the records of other individuals who were being charged a fee for program participation.

At a hearing on the matter, the Franklin Circuit Court stated that it was reserving judgment on the request for attorney's fees and the requested disclosure until after any appeal was completed. After the hearing, the court ruled on the merits of the case. The decision stated that it was final and appealable. The Cabinet untimely filed a CR 59.05 motion, which the court did not hear. Thereafter, the Cabinet let the time to appeal expire, deciding to abide by the trial court's ruling merits in this case.

Forty-three days after entry of the judgment, Mary's father moved the trial court to award attorney's fees and to order disclosure of the records of every other individual who was being charged a fee for program participation. The trial court, having reserved ruling on those issues and recognizing that no appeal had been taken, determined that the motion was timely and awarded attorney's fees against the Cabinet and ordered the Cabinet to provide Appellant's counsel with the names, addresses, income information and other personal information of all the participants in the program.

The Court granted discretionary review and affirmed the decision of the Court of Appeals. The Court held that the trial court could not order the payment of attorney's fees solely for egregious conduct without statutory authorization or a contract providing for such fees and the trial court could not order the disclosure of records of all persons participating in a federally funded community-based services program after having decided the claim of one person without the other persons having filed claims and no class action being certified.

III. CRIMINAL LAW:

A. Michael Helphenstine v. Commonwealth of Kentucky 2012-SC-000251-TG February 20, 2014

Opinion of the Court by Chief Justice Minton. All sitting. All concur. Michael Helphenstine entered a conditional guilty plea to one count of manufacturing methamphetamine, first offense, and being a second-degree PFO. Helphenstine's charges stemmed from a search of his residence by his parole officers and local sheriff's deputies. The Court was presented with three main issues: whether Helphenstine's conditional guilty plea properly preserved Helphenstine's argument that it was error for the trial court to fail to hold an evidentiary hearing

under RCr 9.78; whether Helphenstine gave consent for the search to not only the parole officers, but also the sheriff's deputies; and whether the trial court properly denied Helphenstine's motion to suppress lab results. The Court held Helphenstine's conditional guilty plea did not properly preserve his argument regarding the trial court's failure to hold an evidentiary hearing. The Court found Helphenstine stipulated to bypass the hearing and then, on appeal, attempted to argue the trial court's factual findings were erroneous. Proper appellate procedure, according to the Court, would instead be to challenge the trial court's factual findings under CR 52.02 within then days of the entry of the order. It is incumbent upon a defendant to bring to the trial court's attention the failure to make a finding of fact on an issue essential to the judgment. In Helphenstine's case, the Court found not only did Helphenstine fail to raise any errors with the trial court, he affirmatively indicated to the trial court that an evidentiary hearing was unnecessary and stipulated to the facts. The Court noted there was no adverse determination for which RCr 8.09 permits preservation in a conditional guilty plea. Additionally, the Court held Helphenstine's motion to suppress the products of the search of his residence was properly denied by the trial court. Helphenstine, as a parolee, signed an agreement permitting parole officers to visit his residence at any time. Furthermore, Helphenstine gave consent for parole officers and such other officers as may assist them. The Court found it clear that the sheriff's deputies, called in to help with the disposal of methamphetamine, were included in the consent form signed by Helphenstine. Finally, the Court held the Commonwealth's lab results were properly admitted over Helphenstine's objection on chain of custody grounds. The Court reaffirmed the principle that perfect chain of custody is not required and further noted the Commonwealth averred that proper chain of custody would be presented at trial. Helphenstine, with counsel, made a strategic decision to forego trial, but according to the Court that decision did not render the lab results inadmissible. In the Court's view, the trial court possessed adequate remedies to remedy any error if the chain of custody was not adequately proven at trial.

**B. Tara Lynn Whitcomb v. Commonwealth of Kentucky
2012-SC-000376-DG February 20, 2014**

Opinion of the Court by Justice Cunningham. All sitting. All concur. The defendant was sentenced to one year imprisonment, probated for a period of five years. Within the five-year probationary period, the trial court issued a warrant for the defendant's arrest due to an alleged probation violation. The arrest warrant was served upon the defendant eleven years later. The trial court dismissed the case on belief that it no longer retained jurisdiction due to the defendant's five-year probationary period expiring. A reversal of the trial court's dismissal was ordered. Since an arrest warrant was issued within the defendant's five-year probationary period, the automatic discharge found in KRS 533.020(4) did not automatically release the defendant from her probation. Therefore, the trial court had jurisdiction to conduct a probation revocation hearing.

**C. Robert Bratcher v. Commonwealth of Kentucky
2012-SC-000627-MR February 20, 2014**

Opinion by Justice Venters. All sitting. Minton, C.J., Abramson, Cunningham, Keller and Scott, JJ., concur. Noble, J., dissents by separate opinion. Criminal; Fourth Amendment rights of Parolee. The issue presented was whether the trial court erred by denying Appellant's motion to suppress a search of his residence by the state police and his parole officer based upon information that appellant was engaged in drug related activities based upon the Fourth Amendment. The Court specifically declined to examine the issue under the Kentucky Constitution because Appellant had not asserted rights under the Kentucky Constitution, and pursuant to the Supreme Court's opinion in *Samson v. California*, 547 U.S. 843 (2006), held that parolees may be subjected to search or seizure by a parole officer or other peace office at any time with or without a search warrant and with or without cause under the Fourth Amendment of the United State Constitution; and noted that the Kentucky Department of Corrections had adopted a rule permitting its parole officers to search a parolee only if there was reasonable suspicion to do so.

D. Samuel Morgan v. Commonwealth of Kentucky
[2013-SC-000070-MR](#) February 20, 2014

Opinion of the Court by Justice Cunningham. All sitting. All concur. Criminal Direct Appeal. A McCracken Circuit Court jury found Appellant guilty of robbery in the first degree and of being a persistent felony offender ("PFO") in the first degree. Appellant received a total sentence of twenty-five years imprisonment. The Supreme Court of Kentucky held: 1) the trial court properly allowed the three lay witnesses to identify Appellant at trial as the man present in a surveillance video and still photos. This testimony was rationally based on the witnesses' personal knowledge and satisfied KRE 602 and KRE 701; 2) trial court did not abuse its discretion by denying Appellant's motion for a continuance of trial after a witness scheduled to testify for the defense changed her mind and the day of trial, resulting in her testifying for the Commonwealth; and 3) trial court's denial of Appellant's motion for a directed verdict of acquittal was not clearly erroneous.

E. James Prater v. Commonwealth of Kentucky
[2013-SC-000115-MR](#) February 20, 2014

Opinion of the Court by Justice Scott. All sitting. All concur. Appellant, James Prater, entered a plea of guilty to two counts of manufacturing methamphetamine, one count of first-degree possession of a controlled substance, and one count of promoting contraband, for which he was sentenced to thirty-eight years' imprisonment. He appealed his sentence to the Supreme Court of Kentucky as a matter of right, Ky. Const. § 110(2)(b), asserting that the trial court erred by not allowing him to withdraw his guilty plea. The Supreme Court affirmed Appellant's conviction, holding that: (1) the Commonwealth may include a provision in a plea agreement that prohibits a defendant from withdrawing a guilty plea if the defendant violates the conditions of his parole; however,

although a plea agreement may contain such a provision, the trial court may not abdicate its discretion in a decision of whether to allow the withdrawal of a guilty plea; and (2) a trial court's enforcement of a contractually agreed-upon hammer clause does not amount to a rejection of a plea agreement under RCr 8.10.

F. Commonwealth of Kentucky v. Ronnie Lamont Searight
[2012-SC-000007-DG](#) February 20, 2014

Opinion of the Court by Chief Justice Minton. All sitting. All concur. After a criminal conviction by a circuit court jury, Searight moved the trial court for relief from the judgment under Kentucky Rule of Criminal Procedure (RCr) 11.42 for ineffective assistance of trial counsel. In denying the motion, the trial court found an evidentiary hearing was unnecessary and held that Searight's RCr 11.42 motion failed the two-pronged Strickland test because he was not prejudiced as a result of the alleged errors by his trial counsel. The Court of Appeals reversed, holding that the trial court erred by not holding an evidentiary hearing because there were material issues of fact regarding the other prong of the Strickland test. In reversing the Court of Appeals, the Court held that when a trial court properly determines, without hearing, that an RCr 11.42 motion cannot meet one of the Strickland prongs, it is not error to deny the motion without a hearing regarding the merits of the other prong.

G. Commonwealth of Kentucky v. Floyd Grover Johnson
[2012-SC-000402-DG](#) February 20, 2014

Opinion of the Court by Justice Cunningham. All sitting. All concur. The Powell Circuit Court denied Appellant's motion to dismiss the multiple indictments against him and concluded that the language of KRS 218A.240(1) provided the Office of Attorney General ("OAG") with clear authority to make arrests regarding controlled substances. Appellant conditionally pled guilty and was sentenced to a total of ten years imprisonment. A unanimous Court of Appeals panel reversed the trial court. The Supreme Court of Kentucky held that the OAG's jurisdiction referenced in KRS 218A.240(1) refers to the territorial boundaries of the Commonwealth of Kentucky. Therefore, KRS 218A.240(1) specifically vests the OAG with the authority to enforce and investigate drug crimes under that chapter throughout the Commonwealth.

H. Richard Yates v. Commonwealth of Kentucky
[2012-SC-000275-MR](#) February 20, 2014

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Abramson, Keller, Scott, and Venters, JJ., concur. Cunningham, J., concurs in result only by separate opinion. Richard Yates was convicted of first-degree rape and first-degree sexual abuse and sentenced to twenty-five years' imprisonment. On appeal, Yates's convictions and sentence were reversed.

Yates coerced his fourteen year-old stepdaughter to have sex with him after he threatened to tell her mother that she was in a relationship with an eighteen year-

old boy. Specifically, Yates threatened that his stepdaughter's boyfriend would go to jail and get hurt for being in a relationship with a minor.

Yates was convicted under the "forcible compulsion" prong of KRS 510.040. The Court overruled Yates's conviction finding that no physical force had been used to secure sexual intercourse from the victim and that Yates's threat that his stepdaughter's boyfriend would go to jail and get hurt was not sufficiently immediate and too tenuous to be classified as a threat of physical force under the definition of forcible compulsion. The Court also held that the trial court erred when Yates was not permitted to ask the victim about a prior inconsistent statement. The admission of Yates's computer password was permissible.

**I. Kyrus Lee Cawl v. Commonwealth of Kentucky
2013-SC-000030-DG February 20, 2014**

Opinion by Justice Venters. Minton, C.J., Abramson, Cunningham, Noble and Scott, JJ., concur. Keller, J., not sitting. Criminal; Direct Appeal. The issue presented was whether, upon summary denial by the trial court of an RCr 11.42-motion, he waived his right to appeal by failing to request specific findings of fact pursuant to RCr 11.42(6) and CR 52.02. Held: The movant does not forfeit his right to appeal by failing to request specific findings by the trial court unless he seeks to reverse the trial court's order upon the grounds that the trial court failed to make a finding of fact on an issue essential to the order. In this case, Appellant sought reversal upon the grounds that the trial court erroneously failed to conduct an evidentiary hearing on his RCr 11.42 motion, not because the trial court failed to make specific fact findings. Therefore, the Court of Appeals erred in dismissing the appeal.

**J. Dwayne Mitchell (aka David Butin) v. Commonwealth of Kentucky
2012-SC-000697-MR February 20, 2014**

Opinion of the Court by Justice Scott. All sitting. All concur. A Jefferson Circuit Court Jury found Appellant, Dwayne Mitchell, guilty of two counts of first-degree robbery, two counts of first-degree burglary, two counts of first-degree unlawful imprisonment, one count of receiving stolen property, and being a second-degree persistent felony offender (PFO). As a result, Appellant was sentenced to thirty years' imprisonment. He appealed his sentence to the Supreme Court of Kentucky as a matter of right, Ky. Const. § 110(2)(b), asserting that: (1) the trial court erred by failing to dismiss his indictment, (2) the trial court violated his right to hybrid representation, (3) the trial court erred by allowing the prosecution to introduce misleading photographs, (4) the trial court erred by denying his motions for directed verdict on both counts of first-degree robbery, (5) the trial court's jury instructions omitted an essential element of first-degree robbery, (6) the trial court erred by denying his motion for directed verdict on both counts of unlawful imprisonment, (7) the trial court failed to inquire into standby counsel's admission that he discussed the case in front of a juror, and (8) he was improperly

indicted as a PFO. The Supreme Court reversed Appellant's convictions and remanded the case to the trial court, holding that: (1) the trial court did not err by finding that defects in grand jury procedure were insubstantial and did not warrant dismissal of Appellant's indictment, (2) the trial court erred by denying Appellant his right to hybrid representation; therefore, the Supreme Court remanded the case and continued with consideration of those issues likely to recur on remand, (3) the trial court erred by admitting photographs in which the scene had been materially altered in violation of KRE 901, (4) the trial court did not err by concluding that evidence was sufficient to justify finding of guilt on both first-degree robbery charges, (5) the trial court erred in its use of jury instructions that did not comport with statutory language, and (6) the trial court did not err by not applying the kidnapping exemption to dismiss both counts of first-degree unlawful imprisonment against Appellant.

K. Commonwealth of Kentucky v. Charles P. Farmer
[2013-SC-000120-DGE](#) February 20, 2014

Opinion of the Court by Justice Abramson. All sitting. All concur. Appellee Charles Farmer moved the Russell Circuit Court to dismiss an indictment charging him with one count of murder, contending that he was legally justified to act in self-defense and therefore immune from prosecution under Kentucky Revised Statute ("KRS") 503.085. Following the denial of that motion, Farmer filed a notice of appeal to the Court of Appeals which held that it had jurisdiction to consider the appeal despite it being interlocutory. The Commonwealth sought discretionary review, arguing that the Court of Appeals lacked jurisdiction to consider Farmer's appeal from an interlocutory order denying him immunity in a criminal prosecution. The Supreme Court held that the Court of Appeals is not authorized by our Constitution or statute to consider an appeal from an interlocutory order denying immunity pursuant to KRS 503.085, and furthermore, the collateral order exception to the finality doctrine did not apply in this circumstance.

IV. DOMESTIC RELATIONS:

A. Michael S. Bell v. Mary H. Bell
[2012-SC-000026-DG](#) February 20, 2014

Opinion of the Court by Chief Justice Minton. All sitting. All concur. During the Bells' divorce action, the trial court, in calculating the appropriate amount of Michael's child support obligation, deducted unreimbursed business expenses from Michael's gross income, effectively lowering Michael's obligation. Michael worked as a sales representative and was required to incur expenses in the course of his employment. Mary challenged the trial court's action, arguing that Michael was not "self-employed," as required under KRS 403.212, and as a result, was not entitled to a deduction of unreimbursed business expenses from his gross income. The Court held that KRS 403.212 does require proof of self-employment before a trial court, when calculating child support obligations, may deduct unreimbursed

business expenses from a noncustodial parent's gross income. According to the Court, Michael did not present sufficient proof of self-employment to entitle him to a deduction under KRS 403.212. The Court went on to hold that a trial court may, in its discretion under KRS 403.211, factor in any unreimbursed business expenses when considering the amount of gross income that is actually available to the noncustodial parent to achieve an equitable result for the obligation. The trial court simply does not have statutory authority, absent proof of self-employment, to deduct unreimbursed business expenses from a noncustodial parent's gross income.

**B. Scott Coffey, et al. v. James M. Wethington
2012-SC-000721-DGE February 20, 2014**

Opinion of the Court by Justice Scott. Minton, C.J.; Abramson, Cunningham, Noble and Venters, JJ., concur. Keller, J., not sitting. Appellants, Scott and Melissa Coffey, were awarded custody of two minor children after their mother's death. Appellee, James Wethington, the children's biological father, appealed the court's decision. The Court of Appeals of Kentucky vacated the trial court's judgment with instructions to dismiss Appellants' custody petition on the grounds they lacked standing according to KRS 403.800, et seq. Appellants petitioned the Supreme Court of Kentucky for discretionary review on the issue of standing, and the Supreme Court granted their petition. The Supreme Court reversed the decision of the Court of Appeals, holding that the Court of Appeals misinterpreted the statute and Appellants did, indeed, have standing.

V. INSURANCE:

**A. James D. Nichols v. Zurich American Insurance Company
2012-SC-000317-DG February 20, 2014**

Opinion of the Court by Justice Venters. All sitting. All concur. Insurance; Contract reformation; Mutual mistake. Questions presented: 1) Was the insurance company, Zurich, entitled to reformation of insurance policy based upon the doctrine of mutual mistake when it issued a policy that provided uninsured and underinsured motorist coverages (UIM) that its policy-holder intended to reject; 2) Whether a mutual mistake in the formation of an insurance contract authorized the equitable reformation of the policy to eliminate the unwanted coverage after a covered individual, Nichols, incurred loss and detrimentally relied upon the existence of unintended coverage; 3) whether the trial court abused its discretion in failing to grant Nichols leave to file an amended complaint asserting a claim against Zurich for bad faith. Reformation of a contract under the equitable doctrine of mutual mistake requires that both parties share the same misunderstanding and both execute a contract that, in fact, reflects what neither party intended. Here, the insured party, Miller Pipeline Corporation, intended to procure policy of fleet automobile liability insurance that rejected Kentucky UIM coverage. Zurich, however, was not informed of Miller's intent, and therefore issued a policy that included such coverage. Before the error was discovered and corrected, Nichols was injured by an underinsured motorist. Nichols followed the

procedure required by *Coots v. Allstate Insurance Co.* and, after he accepted a settlement that released the tortfeasor, he asserted a claim for UIM coverage which Zurich denied upon grounds of mutual mistake. Held: 1) the facts before the court establish a unilateral mistake, not a mutual mistake, because Zurich intended to issue the policy that it issued. It was simply unaware that Miller did not want that policy. Therefore, the doctrine of mutual mistake is not available; 2) Nichols's detrimental reliance upon the availability of UIM coverage precluded reformation of the policy; 3) upon remand, the trial court shall reevaluate Nichols's motion to amend his complaint, and determine upon current circumstances whether, pursuant to CR 15.02, justice requires the amendment.

VI. JUVENILE CODE:

A. R.S., a child under eighteen v. Commonwealth of Kentucky 2012-SC-000116-DG February 20, 2014

Opinion of the Court by Chief Justice Minton. All sitting. Abramson, Cunningham, Keller, Scott and Venters, J.J., concur. Noble, J., concurs in result only. R.S. was adjudicated a juvenile public offender, guilty of second-degree criminal mischief by complicity, following a night of teenage shenanigans. A group of teens, including R.S., vandalized parked cars. One car in particular, however, sustained over \$1,600 in damage as a result of numerous scratches on the hood and doors. R.S. acknowledged he was at the scene, but denied any knowledge of how the scratches occurred. At the end of the disciplinary hearing, R.S. moved for directed verdict, which the trial court denied. The trial court ordered R.S., solely, to pay full restitution. Before the Court, R.S. challenged the lower court's denial of his directed verdict and the order to pay full restitution despite the involvement of others. The Court held there was sufficient evidence to support R.S.'s adjudication as a juvenile public offender. Importantly, the Court also held that a motion for directed verdict is inappropriate in juvenile cases tried without a jury. The Court, instead, held the appropriate procedural mechanism for early dismissal is found in CR 41.02(2), which allows dismissal on the ground that the Commonwealth has not met its burden. A trial court, the Court went on to note, when considering a motion under CR 41.02(2), should not indulge ever inference in favor of the Commonwealth, but should, instead, weigh and evaluate the evidence. An appellate court may overturn the trial court's ruling only for an abuse of discretion. Finally, the Court held a trial court, during juvenile session, has discretion to order restitution be paid by a single juvenile accomplice. Under KRS 635.060, a trial court is vested with broad discretion and may set restitution to the extent, in the sum and upon the conditions as the court determines. The trial court must, according to both the Court and statute, make a finding of why restitution would be in the best interest of the child before ordering such. Further, the Court recommended trial courts, in reaching the decision to order restitution, consider various factors, including but not limited to: the age of the child, the earning ability of the child or ability to pay, the employment status of the child, the ability of the child's parents or guardians to pay, the amount of damage to the victim, and any legal remedies available to the victim.

VII. MEDICAL MALPRACTICE:

- A. C. Lance Love, M.D. and C. Lance Love, M.D., PLLC v. Lisa Walker and Larry Walker**
[2012-SC-000602-DG](#) February 20, 2014

Opinion of the Court by Justice Keller. All sitting. All concur. Dr. Love performed a thyroidectomy on Ms. Walker, following which she developed vocal cord paralysis and breathing difficulties. She and her husband filed a medical malpractice suit against Dr. Love. More than three years after filing suit, the Walkers had not produced an expert who could testify that Dr. Love's surgery and post-surgery care violated the standard of care. Therefore, Dr. Love moved for summary judgment. The trial court granted the motion and dismissed the Walkers' claims.

Before the Court of Appeals, the Walkers argued, among other things, that there were two issues - whether Dr. Love's surgery and post-surgery care violated the standard of care and whether Dr. Love violated the standard of care by performing the surgery. The Walkers pointed out that they did have testimony from Ms. Walker's other treating physicians that surgery was not indicated for her condition. The Court of Appeals reversed the trial court's summary judgment finding that there was a legitimate dispute regarding the necessity for an expert as to all issues.

The Supreme Court, affirming in part and reversing in part, held that the Walkers were required to produce an expert as to the standard of care regarding Dr. Love's surgery and post-surgery care. Because the Walkers had more than three years to produce such an expert and failed to do so, the trial court did not prematurely grant summary judgment. However, the Walkers had produced sufficient expert evidence to support their claim that Dr. Love should not have performed the surgery. Therefore, the Supreme Court reversed the trial court's summary judgment on that issue.

VIII. TERMINATION OF PARENTAL RIGHTS:

- A. Cabinet for Health and Family Services, Commonwealth of Kentucky v. K.H., SR.**
[2013-SC-000127-DGE](#) February 20, 2014

In an action seeking to terminate the parental rights of both parents, the family court concluded that the tripartite test found in KRS 625.090 was satisfied. The Court of Appeals reversed the family court's findings as it related to the termination of the father's parental rights. Specifically, the Court of Appeals held that the father was entitled to an independent finding, not based on the mother's actions, that the child was abused or neglected. The Kentucky Supreme Court agreed that KRS 625.090 required the family court to make a specific finding of abuse or neglect in regards to each parent. However, the Kentucky Supreme

Court believed that the family court made sufficient individualized findings that the father neglected or abused the child. as defined by KRS 600.020(1). The family court's best interest findings were also adequately supported by substantial evidence. As a result, the opinion of the Court of Appeals was reversed and the family court's termination order reinstated.

IX. TORT:

- A. Dr. Philip C. Trover v. Estate of Judith Burton and Trover Clinic Foundation, Inc.**
And
The Trover Clinic Foundation, Inc., d/b/a Regional Medical Center of Hopkins County v. Estate of Judith Burton and Philip C. Trover, M.D.
[2011-SC-000580-DG](#) February 20, 2014

Opinion of the Court by Justice Abramson. All sitting. All concur. The estate of a deceased cancer patient brought a medical negligence action against a radiologist, claiming that he had misread CT scans and delayed diagnosis, and also brought a negligent credentialing claim against the hospital which employed him. The defendant radiologist testified as both a fact witness and as an expert. The trial court excluded proffered impeachment evidence that the radiologist's medical license had been temporarily suspended and, after a full investigation, reinstated with some restrictions under an agreed order of informal resolution. Exclusion of this license evidence was based on the collateral nature of the evidence and the prejudice outweighing probative value. The Court of Appeals, reversing the judgment, held that the license restriction evidence was admissible to impeach the radiologist, an expert witness, and outlined what was necessary for a negligent credentialing claim. Reversing and reinstating the trial court judgment, the Supreme Court held that in light of the fact that the expert was also the defendant and the license restriction evidence was collateral and of limited probative value, the trial court had appropriately applied KRE 404 and 403's probative worth/prejudicial effect balancing test.

X. WRITS:

- A. Amy Jerrine Mischler v. Honorable Larry Thompson, Pike County Family Court Judge; David Deskins, Pike County Circuit Court Clerk; and Fred Hatfield, Pike County Trial Commissioner, and Jonah Lee Stevens**
[2013-SC-000030-MR](#) February 20, 2014

Opinion of the Court. Abramson, Cunningham, Noble, Keller, and Venters, JJ. and Paul W. Blair, S.J., concur. Norman E. Harned, S.J., concurs by separate opinion. Minton, C.J. and Scott, J., recused. Writs of Mandamus/prohibition. Appellant filed motions for a writ of mandamus by which she sought to challenge the legality of various procedures relating to the filing and dismissal of two domestic violence petitions originally filed in 2002. Held: Appellant failed to

establish grounds for writ because the conduct of the Respondent Clerk of the Pike Circuit Court was not erroneous, and because the Respondent Circuit Judge and the Respondent Trial Commissioner were not “acting, or about to act, erroneously” in any manner relating to Appellant’s domestic violence orders that had been issued years before.

XI. ATTORNEY DISCIPLINE:

**A. David William Doan v. Kentucky Bar Association
2013-SC-000561-KB February 20, 2014**

Opinion of the Court. All sitting. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., concur. Keller, J., concurs in result only. Doan was admitted to the bar in October 1986. He moved to resign under terms of disbarment in 1992. The Supreme Court granted his motion and ordered him disbarred until such time as an order granting his reinstatement was entered. Doan later applied for reinstatement under SCR 3.510. The Character and Fitness Committee recommended approval of his application for reinstatement, but the Board of Governors recommended disapproval. Doan moved the Court to adopt the recommendation of the Character and Fitness Committee. After reviewing the record and the recommendations, the Court agreed with the Board of Governors that Doan failed to meet his burden of proof. The Court further noted that the record indicated that Doan had failed to acknowledge publicly his role in the misconduct, which has been held sufficient to bar reinstatement. Accordingly, the motion for reinstatement was denied.