

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
FEBRUARY 2019**

I. CRIMINAL LAW:

**A. Robbie Whaley v. Commonwealth of Kentucky
2017-SC-000439-MR February 14, 2019**

Opinion of the Court by Justice Wright. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. A Kenton Circuit Court jury convicted appellant, Robbie Whaley, of seventeen counts: six counts of third-degree sodomy; criminal attempt to commit third-degree sodomy; six counts of first-degree sexual abuse; three counts of first-degree sodomy; and, in the final count, found him to be a first-degree persistent felony offender. In accordance with the jury's recommendation, the trial court fixed sentences totaling life without the possibility of parole for twenty-five years. Whaley appealed to the Supreme Court as a matter of right, Ky. Const. § 110(2)(b), and asserted several grounds for reversal of his convictions. The Supreme Court affirmed the trial court, holding: (1) the trial court did not err in denying Whaley's motion to sever the indictment; (2) the trial court did not err in allowing evidence of other crimes, wrongs, or acts (specifically, allowing evidence of drugs or alcohol, pornographic images and an act of uncharged sodomy); (3) the trial court did not abuse its discretion in disallowing cross-examination regarding pornographic evidence; (4) the trial court did not abuse its discretion in allowing expert testimony pertaining to evidence of anal sodomy; (5) the trial court did not abuse its discretion in denying the motion in limine and allowing the children to be referred to as victims; and (6) the trial court did not abuse its discretion by denying Whaley's motion for mistrial.

**B. John Daniel Clark v. Commonwealth of Kentucky
2017-SC-000567-MR February 14, 2019**

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. The defendant, John Daniel Clark, appealed his convictions and sentences to the Court as a matter of right. Clark alleged three errors on the part of the trial court: 1) the trial court should have granted Clark's motion for a directed verdict on his tampering with physical evidence charges; 2) the trial court incorrectly instructed the jury on the perfect and imperfect protection-of-another defenses; and 3) the trial court erred in allowing the Commonwealth to introduce photographs of the victim's body.

The Court rejected Clark's first allegation of error, finding sufficient evidence to support Clark's tampering with physical evidence charges. The Court also rejected Clark's argument that the trial court provided the jury with erroneous jury instructions on perfect and imperfect protection-of-another, finding that the trial

court's instructions conformed to the law and the trial court's arrangement of the order of instructions did not prejudice Clark. Finally, the Court applied the Kentucky Rules of Evidence regarding relevancy to hold that the trial court did not abuse its discretion in admitting into evidence photographs of the victim's body.

C. Perry Jack Probus, Jr. v. Commonwealth of Kentucky
[2018-SC-000019-MR](#) February 14, 2019

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. The defendant, Perry Jack Probus Jr., appealed his convictions and sentences to the Court as a matter of right, raising several issues for review. The Court affirmed the entirety of the trial court's judgment, finding no reversible error. The Court recognized the principle of law that a complicitor to a crime may still be charged with a greater offense even though the principal to that crime pled guilty to a lesser-included offense. The Court also rejected Probus's evidentiary challenges. Finally, the Court rejected Probus's jury verdict challenge, finding that Probus did not allege a reviewable error.

D. Commonwealth of Kentucky v. John P. Roth, Jr.
[2018-SC-000095-DG](#) February 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. Keller, J., dissents by separate opinion in which Wright, J., joins. The Court granted discretionary review in this criminal case to determine whether sufficient evidence existed to uphold the jury's finding of guilt on the part of John Roth Jr. in committing second-degree cruelty to animals. Roth, however, moved for this Court to strike the Commonwealth's brief and dismiss the Commonwealth's appeal for failing to comply with rules of appellate practice. Specifically, the Commonwealth failed to cite to the record when making factual assertions. Noting the Commonwealth's numerous deficiencies in this case, in addition to noting that the Commonwealth could have filed a reply brief to address Roth's assertion and correct its deficiencies but failed to do so, the Court found merit in Roth's contention. As such, the Court struck the Commonwealth's brief and dismissed the Commonwealth's appeal for failing to follow the rules of appellate practice.

II. MEDICAL MALPRACTICE:

A. Richard C. Oliphant, M.D., et al. v. Billie Jo Ries, et al.
[2017-SC-000208-DG](#) February 14, 2019

Opinion of the Court by Justice Hughes. Minton, C.J.; Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. The Rieses' initiated the underlying litigation in this case after their daughter was born with severe disabilities as the result of losing much of her fetal blood volume, which stemmed

from the mother's rare and dangerous medical conditions. After a 2010 jury verdict in favor of Oliphant, the Rieses appealed and the Court of Appeals reversed on a Daubert issue, but this Court unanimously reversed and remanded to the Court of Appeals for consideration of the Rieses' second claim of error. On remand, a divided appellate panel reversed again, holding that the trial court erred in limiting the testimony of one of the Reises' experts. On discretionary review, the Supreme Court again reversed the Court of Appeals and, accordingly, reinstated the jury verdict.

The central issue in the litigation was the timing of the fetal bleed. The expert witnesses had several theories about the timing, relying on a variety of factors, such as red blood cell counts, heart rate, and equilibration. Five days before trial, the Rieses, with the trial court's permission, disclosed a new expert to testify in rebuttal to one of Oliphant's witnesses who planned to testify regarding red blood cells. Oliphant also had an expert that developed a mathematical formula to time the fetal bleed (the equilibration testimony), which the Rieses were aware of approximately four months before trial. The Rieses sought to allow their newly-named expert to testify about both red blood cells and the mathematical formula. The sole issue on this appeal is whether the trial court erred in limiting the new expert's testimony strictly to red blood cells, thereby precluding him from testifying about the mathematical formula and equilibration. Because the Rieses knew about the formula approximately four months before trial, had previously disclosed expert witnesses that were capable of and expected to testify to rebut the calculations, and had an abundance of evidence regarding the timing of the fetal bleed, the trial court did not abuse its discretion in limiting the new expert's testimony. Further, contrary to the appellate court's holding, the parties were not required to supplement expert witness disclosures with every detail included in an expert's deposition.

III. WRIT OF PROHIBITION:

A. Allstate Property & Casualty Insurance Company v. Robert Kleinfeld, DC, Etc., et al.

[2018-SC-000417-MR](#)

February 14, 2019

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. Lambert, J., dissents. The Court of Appeals granted Dr. Robert Kleinfeld's petition for a writ of prohibition, preventing Allstate Property & Casualty Insurance Co. from seeking discovery from Dr. Kleinfeld in Allstate's reparation benefits action against Jeffery Streeval. The Court reversed the Court of Appeals, finding that the Court of Appeals did not properly apply the extraordinary standard needed to be met for the granting of a writ.

Allstate served Dr. Kleinfeld a subpoena duces tecum and deposition duces tecum, seeking information relating to the conducting of an MRI on Streeval. Dr. Kleinfeld challenged the discovery requests on relevancy and trade secret

grounds. The Court rejected both arguments, finding that the discovery requests fell within the ambit of relevant discoverable information, in addition to finding that Dr. Kleinfeld’s assertion of the trade secret privilege lacked a factual basis. Finally, the Court, sua sponte, acknowledged Kentucky precedent supporting the existence of a rule of law allowing a nonparty an immediate right of appeal following an adverse discovery order.

IV. ATTORNEY DISCIPLINE:

A. Inquiry Commission v. Joseph W. Bolin

[2018-SC-000448-KB](#)

February 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. The Inquiry Commission petitioned the Supreme Court to temporarily suspend Bolin under Supreme Court Rule (SCR) 3.165(1)(a), because there was probable cause to believe that Bolin had misappropriated almost \$1 million in client funds. In its petition, the Commission noted that Bolin had been indicted on criminal charges related to the misappropriation and likely had violated the Rules of Professional Conduct. In response to the Supreme Court’s Order to Show Cause, counsel for Bolin stated that Bolin had no objection to the entry of an order temporarily suspending him from the practice of law. Counsel stated that Bolin had closed his law practice and closed his office.

Considering the Commission’s petition and Bolin’s response, the Court agreed there was a reasonable basis to believe that Bolin misappropriated funds he held for others or had otherwise been improperly dealing with client funds. Accordingly, the Court granted the petition and temporarily suspended Bolin from the practice of law.

B. An Unnamed Attorney v. Kentucky Bar Association

[2018-SC-000575-KB](#)

February 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. The Movant, an Unnamed Attorney, moved the Supreme Court under SCR 3.480(2) to accept his negotiated sanction with the Kentucky Bar Association of a Private Reprimand with Conditions for violations of SCR 3.130(1.9)(c) and SCR 3.130(1.11)(a). The Court approved the negotiated sanction. But the parties and the Court believed other members of the Bar would benefit from a published, redacted opinion addressing application of SCR 3.130(1.9) and SCR 3.130(1.11) due to the lack of existing precedent. The name of the Movant was omitted to protect the anonymity of the attorney being privately reprimanded.

Unnamed Attorney worked for several years in various legal capacities for a city government (“City”). Unnamed Attorney left the full-time employment of City for private practice but still contractually represented City in some matters. A

client retained Unnamed Attorney to represent her in a civil claim involving City. Thereafter, Unnamed Attorney reached out to his former employer in an attempt to gain written consent to represent the woman in a dispute over a zoning permit in which City could potentially be sued. City originally consented to Unnamed Attorney's representation but withdrew its consent and filed a motion to disqualify Unnamed Attorney. The trial court disqualified Unnamed Attorney, holding that he "substantially and personally participated" on behalf of City in matters substantially similar to those he was now litigating for his private client. Subsequently, the Inquiry Commission issued charges against Unnamed Attorney for violating SCR 3.130(1.9)(c) and SCR 3.130(1.11)(a).

In analyzing the allegations against Unnamed Attorney, the Court noted there was little precedent on either of the rules he was alleged to have violated, but particularly SCR 3.130(1.11)(a). In this case, the Court determined that Unnamed Attorney did not received proper informed consent when, after his former employer consented to allow him to represent his client in a simple zoning permit dispute with the potential for a lawsuit, he filed a thirty-seven-page complaint alleging City violated the Americans with Disabilities Act, the Fair Housing Act, and several other non-zoning issues. Prior to filing his consent, Unnamed Attorney should have contacted City and again requested informed consent, confirmed in writing, to represent his client in this new endeavor. Ultimately, City would have denied his request, and Unnamed Attorney would have needed to withdraw as counsel for the client. However, he would have been in compliance with the Rules in that scenario.

Because Unnamed Attorney had no prior discipline and admitted to the violations, the Court determined that the negotiated sanction for a private reprimand was appropriate and sanctioned Unnamed Attorney accordingly.

C. Fred Garland Greene v. Kentucky Bar Association
2018-SC-000600-KB February 14, 2019

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ, sitting. All concur. Greene moved the Court to enter a negotiated sanction imposing a three-year suspension. The Supreme Court noted that Greene had a history of prior discipline, including seven private admonitions; one public reprimand and a thirty-day suspension; and a 181-day suspension with 61-days probated for one year upon conditions. The present matter involved three consolidated KBA disciplinary files that arose from a period of time when Greene was suspended from the practice of law. In each instance, Greene continued to represent a client despite his suspension.

After reviewing the facts of the disciplinary files and relevant case law involving similar disciplinary violations, the Supreme Court agreed with the terms of the negotiation sanction and ordered Greene suspended from the practice of law in the Commonwealth for three years, retroactive to March 1, 2017.

