PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
JANUARY 2010

I. CRIMINAL LAW

A. Darryl Gordon Grigsby v. Commonwealth

2009-SC-000171-MR **January 21, 2010**

Opinion by Justice Noble. All sitting; all concur. Grigsby entered an Alford plea to murder and other charges and was sentenced to life without possibility of parole for 20 years. Even though the plea agreement included a waiver of his right to appeal, Grigsby argued that he had not been advised that he could enter a blind guilty plea and be sentenced by a jury. The Court affirmed the conviction, ruling the claim did not constitute a Boykin violation because Boykin does not require "separate enumeration of each right waived."

B. Ralph Baze v. LaDonna Thompson, Commissioner Dept. of Corrections

2009-SC-000188-MR **January 21, 2010**

Opinion by Justice Cunningham. All sitting; all concur. A death row inmate filed a declaratory judgment action in circuit court claiming his due process rights were violated by the Department of Corrections when it denied his counsel the opportunity to interview prison guards, administrators, and inmates in preparation of his clemency petition. The circuit court ruled in favor of the DOC, holding that principles of due process do not apply to clemency proceedings. On appeal, the Kentucky Supreme Court noted that a divided U.S. Supreme Court ruled in Woodard that a "minimal level" of procedural due process applies to clemency proceedings. Subsequent federal cases have interpreted "minimal level" to mean that death row inmates are only entitled to receive the clemency procedures explicitly set forth by state law. In Kentucky, there are no mandated clemency procedures beyond Section 77 of the state constitution which requires that the movant "file an application with the Governor; and that the Governor file with each application a statement of the reasons for his decision." The Court held that since it was not alleged that Baze was being denied his right to file an application for clemency, no procedural due process violation occurred.

C. Charles Brent Beard v. Commonwealth

2008-SC-000079-DG **January 21, 2010**

Opinion by Justice Noble. All sitting; all concur. The Supreme Court reversed Beard's conviction for drug trafficking, holding that his trial counsel's representation of a criminal informant who testified against Beard was an improper conflict of interest. The Court of Appeals affirmed the conviction on the grounds that Beard could point to no actual prejudice suffered as a result of the conflict. The Supreme Court held that under Holloway, the correct inquiry is whether the Appellant raised an actual conflict at trial. The Court ruled that counsel representing both a criminal defendant and a witness against that defendant who had an interest in the defendant being convicted constituted a conflict of interest warranting reversal.

D. Hollis Deshaun King v. Commonwealth
2008-SC-000274-DG **January 21, 2010**

Opinion by Justice Schroder; all sitting. Police followed a suspected drug trafficker after a controlled buy. Police lost sight of the suspect and mistakenly assumed he entered an apartment from which they could detect the odor of marijuana. After police knocked on the door and identified themselves, they heard movements which they believed indicated evidence was about to be destroyed. Police forcibly entered the apartment and found King and others smoking marijuana. They also found cash, drugs and paraphernalia. King entered a conditional guilty plea; reserving his right to appeal denial of his motion to suppress evidence obtained from what he argued was an illegal search. The Court of Appeals affirmed the conviction, holding that exigent circumstances supporting the warrantless search were not of the police's making and that police did not engage in deliberate and intentional conduct to evade the warrant requirement.

The Supreme Court reversed the Court of Appeals, concluding the entry was improper. The Court held that the police were not in pursuit of a fleeing suspect when they entered the apartment, since there was no evidence that the original suspect even knew he was being followed by police. The Court also held that while the mere odor of marijuana can justify a warrantless search of an automobile, the same is not true of a residence. The Court adopted the following two-part test for reviewing searches similar to this one. First, the reviewing court must determine if police have created exigent circumstances in a bad faith attempt to avoid the warrant requirement. If not, then the court must next determine "whether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry." Applying the test to this case, the Court determined the search was improper. Justice Cunningham concurred in result only.

E. Gregory Woodlee v. Commonwealth
2008-SC-000351-MR **January 21, 2010**

Opinion by Justice Noble; all sitting. After a medical examination of his infant daughter, Woodlee was charged and convicted of two counts of first degree sexual abuse and PFO-2. At trial, Woodlee's daughter from a previous relationship was permitted to testify about her sexual abuse at the hands of Woodlee when she was four or five years old, for which Woodlee had been previously convicted. On appeal, Woodlee claimed that this testimony violated KRE 404(b). The Commonwealth argued that the evidence was admissible under an exception to show a "striking similarity" in *modus operandi*. The Supreme Court concluded that the prior bad act and the current charge were not simultaneously similar and so peculiar or distinct as to be admissible under the *modus operandi* exception to KRE 404(b). In reversing the conviction, the Court noted the difference in the age of the victims and differences in the nature of the abuse alleged to have occurred did not constitute a "strikingly similar" *modus operandi*. Justice Cunningham, joined by Justice Scott, dissented, contending that sexual abuse of one's own young children is so aberrant as to constitute a "signature crime," warranting an exception to KRE 404(b).

F. Commonwealth v. Leslie Pride
2008-SC-000730-DG **January 21, 2010**

Opinion by Justice Venters. All sitting; all concur. Pride entered into a conditional guilty plea to marijuana trafficking charges, preserving his right to challenge the search warrant, which he argued was not supported by probable cause. The Court of Appeals reversed the conviction based on Ornelas, determining probable cause did not exist to justify issuing a search warrant. As a preliminary matter, the Supreme Court held that the Ornelas test only applies to warrantless searches, and that the "totality of the circumstances" test from Gates is the correct standard for reviewing issuance of a search warrant in Kentucky. Based on the record, the Supreme Court held that probable cause existed to support issuance of the search warrant and confirmed the conviction.

G. Commonwealth of Kentucky, Dept. of Corrections v. Hon. William Engle, III (Judge, Perry Circuit Court), et al.
2009-SC-000509-MR **January 21, 2010**

Opinion by Justice Venters. All sitting; all concur. A Perry County circuit judge ordered the Department of Corrections to transport an inmate held in the Shelby County Detention Center to that court for a scheduled pretrial conference and the subsequent trial. The DOC sought a writ of prohibition from the Court of Appeals arguing it is not responsible for transporting inmates under such circumstances. The Court of Appeals

denied the writ. The Supreme Court reversed, determining that KRS 44.510(2) explicitly states that the sheriff of the county where the legal proceedings are to be held is responsible for transporting an inmate from a county detention center. The Court also held that a writ was the appropriate remedy since the circuit court was proceeding erroneously within its jurisdiction and the DOC lacked adequate remedy by appeal.

II. BUDGET

A. Steve Beshear (in his official capacity as Governor), et al. v. Haydon Bridge Co. Inc., et al.

2007-SC-000058-TG **January 21, 2010**

Opinion by Justice Scott; all sitting. A group of employers subject to Kentucky's workers compensation act filed a declaration of rights action challenging certain budgetary acts. These acts included the General Assembly's suspension of a $19 million annual appropriation for the Workers Compensation Funding Commission and the Workers Compensation Benefit Reserve Fund, as well as the General Assembly's transfer of approximately $6.7 million from the Benefit Reserve Fund to the general fund. The Supreme Court held that the latter action was unconstitutional under Armstrong because the General Assembly has no authority to transfer commingled public funds and private employee contributions that cannot be differentiated. However, the Court held that the General Assembly did have authority to suspend the $19 million annual appropriation under KRS 48.130(2) and Section 15 and 51 of the state constitution. Lastly, the Court held that such a suspension did not violate Section 180 of the state constitution. Chief Justice Minton and Justice Abramson concurred in result only.

III. TORTS

A. Associated Insurance Service, Inc. & AON Risk Services, Inc. of Ohio v. Daniel Garcia, MD & Rita Garcia

2008-SC-000037-DG **January 21, 2010**
2008-SC-000044-DG **January 21, 2010**

Opinion by Justice Cunningham; all sitting. The Garcias suffered serious injuries aboard "The Star of Louisville," an Ohio River based pleasure craft, and subsequently filed a personal injury suit. The Star was insured by HIH; the Star was referred to HIH by the Star's insurance agency, Associated Insurance, who, in turn, had solicited a quote from AON Risk Services—an insurance broker. While the suit was pending, HIH because insolvent and unable to satisfy any judgment that might be obtained. The Garcias and the Star agreed to arbitration and in their subsequent agreement: 1) the Star admitted liability for $742,193.10 in damages 2) the

Garcias agreed to dismiss their civil suit without prejudice and to forebear collection of the arbitration award; and 3) the Star assigned its claims against Associated Insurance and AON to the Garcias. The Garcias then filed suit against Associated Insurance and AON. The circuit court granted summary judgment to the defendants, holding that tort action are generally not assignable in Kentucky and that public policy disfavors assignment of professional negligence claims. The Court of Appeals reversed summary judgment, but held that the arbitration award was not binding upon Associated Insurance and AON since they were not parties to the arbitration.

In a case of first impression, the Supreme Court held that professional negligence claims against insurance agents and brokers are assignable and do not violate public policy. The Court noted that under Kentucky law, tort claims arising from contractual relationships are generally assignable. The Court recognized that professional negligence claims against attorneys are not assignable, but distinguished between the natures of the attorney-client relationship and the relationship between insurance agent and its customer. The Court further held that upon remand the Garcias should bear the burden of presenting *prima facie* evidence of the reasonableness of the arbitration award which Associated Insurance and AON would be afforded an opportunity to rebut. Justice Noble concurred by separate opinion. Justice Schroder would have affirmed the Court of Appeals.

B. Robert M. Blankenship, MD & Caritas Health Services Inc., dba Caritas Medical Center v. Horace Collier
2007-SC-000916-DG January 21, 2010
2007-SC-000921-DG January 21, 2010

Opinion by Justice Abramson; all sitting. Collier filed a medical malpractice lawsuit, alleging negligence in the diagnosis and treatment of his appendicitis. Over a year after the suit was filed, Collier still had not identified an expert witness to establish causation even after being granted extra time to do. The trial court subsequently granted the defendants' request for summary judgment as a matter of law under CR 56. The Court of Appeals reversed, holding that the trial court must first make a separate ruling on the necessity of such expert testimony.

The Supreme Court held that where a plaintiff creates a legitimate dispute about the need for an expert witness, the trial court must make a separate finding regarding the need for such testimony. However, where the need is never disputed by the plaintiff, no separate ruling must be made by the trial court before considering defendant's motion for summary judgment. The Court concluded that since Collier had never disputed the need for expert testimony, the trial court did not abuse its discretion in granting

summary judgment. Chief Justice Minton dissented contending that the CR 56 motions in this case were not "adequately particularized and supported" to justify an award of summary judgment. Justice Scott, joined by Justice Venters, also dissented, asserting that the majority's opinion represented a shift towards the federal summary judgment standard and away from the standard adopted by the Court in Steelvest. Justice Venters also dissented, contending that the majority had shifted the burden for summary judgment in medical malpractice actions from the movant onto the respondent.

IV. INSURANCE

A. Veronica Jewell v. Kentucky School Board Association

2008-SC-000244-DG **January 21, 2010**

Opinion by Justice Venters; all sitting. Jewell was injured in a motor vehicle accident while working as a school bus monitor. After settling with the tortfeasor, Jewell filed suit against the school board's self-insurance trust for the under-insured motorist coverage. The jury awarded Jewell $101,000 from which the trial court deducted $25,000 representing the amount paid by the tortfeasor's liability carrier and $333.45 for basic reparation benefits (BRB) already paid by the Appellee. The Court of Appeals increased the BRB deduction to $20,000, reflecting the amount available, rather than the amount actually paid. The Supreme Court reversed, holding that under CR 52.04, that issue was not properly appealed to or reviewable by the Court of Appeals. However, the Supreme Court affirmed the Court of Appeals decision that the UIM carrier was entitled to an offset for workers compensation benefits paid on Jewell's behalf. It also affirmed the Court of Appeals' ruling that Jewell's attorney's fees and expenses could not be credited against the deductions made from the damages award. Justice Scott concurred in result only, asserting that the legislature did not intend for BRB payments that were never paid to be offset against damage awards.

V. CHILD CUSTODY

A. Arminta Jane Mullins v. Phyllis Dianne Picklesimer

2008-SC-000484-DGE **January 21, 2010**

Opinion by Justice Schroder; all sitting. A same sex couple entered into an "agreed judgment of custody" which purported to confer *de facto* custodian status upon the non-biological parent. The relationship ended shortly thereafter and the non-biological parent sued for joint care, custody and control of the child. The biological parent filed a CR 60.02 motion to have the custody agreement set aside for reasons of fraud or mistake. The trial court awarded joint custody, adopting the domestic trial

commissioner's findings that even though the non-biological parent did not meet the statutory definition of a *de facto* custodian, the biological parent had waived her superior right to custody. The Court of Appeals reversed, holding that the non-biological parent lacked standing to pursue custody.

The Supreme Court reversed the Court of Appeals, holding that the non-biological parent had standing to purse custody under KRS 403.822 since she met the definition of "a person acting as parent." Next the Court affirmed the trial court's determination that the biological parent had waived her superior right to sole custody. The majority noted that while previous waiver cases in Kentucky involved the total surrender of the child to a non-parent, they could find no reason why it should not recognize waiver of "some part of the superior parental right, which would essentially give the child another parent in addition to the natural parent." Justice Cunningham, joined by Chief Justice Minton and Justice Scott, concurred in part and dissented in part, criticizing the adoption of the concept of "partial-waiver" and noted that all the Vinson factors previously used to establish waiver are predicated upon the separation of the child from its parent—something that never occurred in this case. Justice Scott also concurred in part and dissented in part, warning that the majority's decision would "ultimately enable step-parents to contest for custody of their step-children, even in short term marriages."

B. Commonwealth of Kentucky, Cabinet for Health & Family Services; & J.L.H., a child v. T.N.H, mother & P.N.Y. father
2008-SC-000318-DGE January 21, 2010

Opinion by Justice Schroder. All sitting; all concur. The family court involuntarily terminated the parental rights of a minor parent. The Court of Appeals reversed the termination, holding that when the Cabinet seeks to terminate the parental rights of a minor mother, it must present the family court with testimony—preferably expert in nature—as to the likelihood that the minor would still not be an effective parent once she reaches adulthood. The Supreme Court reversed the Court of Appeals and reinstated the family court's termination of parental rights, holding that the Court of Appeals opinion had enhanced the standard from terminating the parental right of minors beyond those required by statute. The Court noted that KRS 625.090 requires that the court assess the minor's parenting for the "immediate foreseeable future" not when the minor reaches the age of adulthood. The Court emphasized the stated legislative purpose of preventing such children from lingering in the foster care system.

VI. RETROACTIVE DISQUALIFICATION

A. Adolph Petzhold v. Kessler Homes, Inc.

2008-SC-000106-DG **January 21, 2010**

Opinion by Justice Venters. All sitting; all concur. Kessler Homes, a builder, sued the Petzholds over disputes concerning the construction of a house. The Petzholds prevailed on their counterclaims and were awarded $30,000 after a bench trial. While an appeal was pending, Kessler learned that the Petzholds were the parents of the trial judge's campaign treasurer. There was no dispute that the judge was unaware of this relationship during the trial. The Court of Appeals ruled that the trial judge was retroactively disqualified from presiding over the case by SCR 4.300E(1). The Supreme Court reversed, holding that SCR 4.300E(1) applies only to prospective disqualifications, while Liljeberg addresses retroactive disqualifications. Applying the test from Liljeberg, the Court concluded that a reasonable person with knowledge of all relevant circumstances of the unknown conflict would not expect the judge to have actual knowledge of the claimed conflict. The Court also held that Kessler's failure to file a protective cross-petition for discretionary review did not bar the Court of Appeals from reconsideration of other issues presented but not addressed in the Court of Appeals' opinion.

VII. ATTORNEY DISCIPLINE

A. Paul Henry Riley, Jr. v. Kentucky Bar Association

2008-SC-000554-KB **January 21, 2010**

The Supreme Court suspended attorney from the practice of law for 30 days. In 2008, the Court ordered attorney to reimburse a former client $250 and attend a remedial CLE program. The attorney did not respond to the Office of Bar Counsel's attempts to verify compliance with the order. Further, he failed to register or attend the CLE.

B. Kentucky Bar Association v. Eric Lamar Emerson

2009-SC-000508-KB **January 21, 2010**

The Supreme Court imposed reciprocal discipline on an attorney indefinitely suspended and barred from applying for reinstatement for two years by the Ohio Supreme Court. That court ruled that the attorney had abandoned multiple clients and ignored court deadlines to his clients' detriment. In imposing a reciprocal suspension, the Kentucky Supreme Court noted the attorney's prior disciplinary history in both Kentucky and Ohio.

C. Kentucky Bar Association v. Kenneth J. Whitehead
2009-SC-000541-KB January 21, 2010

The Supreme Court imposed reciprocal discipline on an attorney suspended by the Supreme Court of Arizona in 2005 for four years for numerous ethical violations that arose from the closing of his law office. The attorney did not provide accountings or refunds to 28 clients. The Arizona Supreme Court made reinstatement conditioned upon reimbursing his former clients a total of $122, 484.80. The Kentucky Supreme Court noted the lapse in time between the attorney's Arizona suspension in 2005 and the KBA's 2009 motion to imposing reciprocal discipline. However, since the attorney did not respond to its show cause order or otherwise request that his suspension in Kentucky run concurrent to its Arizona counterpart, the Court made the suspension effective from the date of its order.

D. Kentucky Bar Association v. Rodney S. Justice
2009-SC-000689-KB January 21, 2010

The Supreme Court suspended attorney for 30 days and ordered him to pay former client $4,000. Attorney was determined to have failed to return an unearned fee in a probate case. In reaching its decision, the Court noted the attorney's prior disciplinary history.

E. Kentucky Bar Association v. Darren Burton Ellis
2009-SC-000708-KB January 21, 2010

The Supreme Court suspended attorney for 90 days and ordered reimbursement of two former clients totaling $640. In one case, attorney billed an appointed client for payment actually owed by the Commonwealth. In the second, attorney accepted money from a divorce client and then failed to file a petition or otherwise communicate with the client. The attorney did not respond to the KBA's charge until he filed a motion to file a late answer. The motion was denied and the case was handled as a default.

F. Kentucky Bar Association v. Charles Leadingham
2009-SC-000765-KB January 21, 2010

The Supreme Court suspended attorney for 120 days retroactive to May 2, 2009 for charges arising out of two separate disciplinary files. In the first, attorney was found to have failed to keep a divorce client reasonably informed about the status of the case and failed to return an unearned fee. In the second, attorney failed to act with reasonable diligence in his handling of a bankruptcy case, failed to keep his client informed and failed

to return an unearned fee. The attorney was further ordered to reimburse his former clients a total of $650.

G. Oliver H. Barber v. Kentucky Bar Association
2009-SC-000805-KB January 21, 2010

The Supreme Court issued a public reprimand and 30-day suspension conditionally probated for one year to an attorney to resolve two separate disciplinary files against him. In one, the attorney admitted to violating SCR 3.210-7.09(1) by improperly soliciting, in person or via telephone, a prospective client with whom he had no prior professional relationship. In the other, the attorney admitted to violating SCR 3.130-8.1(b) by failing to respond to a bar complaint.