Published Opinions
Kentucky Supreme Court
June 2011

I. Criminal Law

A. William Harry Meece V. Commonwealth of Kentucky

2006-SC-000881-MR **June 16, 2011**

Death Penalty. Three counts of murder, two counts first degree robbery, and two counts of first degree burglary. Forty-five issues, with sub-issues. Defendant's post-guilty plea statements were admissible, as they were voluntarily made and not made in the course of plea negotiations.

B. Brian Keith Moore v. Commonwealth of Kentucky

2008-SC-000925-MR **June 16, 2011**
2008-SC-000957-MR **June 16, 2011**
2008-SC-000860-MR **June 16, 2011**

Opinion of the Court by Justice Noble Affirming in Part, Reversing in Part and Remanding. Minton, C.J., and Abramson and Venters, JJ., concur. Cunningham, Scott, and Schroder, JJ., concur in part and dissent in party by separate opinion. Moore was convicted of a 1979 murder and robbery, and sentenced to death. Almost 30 years later, he moved the trial court for post-conviction DNA testing under KRS 422.285. The trial court allowed some testing at the state police lab, but declined a request for further testing at an outside, private lab, claiming it was barred by the statute. Moore also collaterally attacked his conviction on the grounds that the state had lost evidence which might have held exculpatory DNA evidence, and that another person's DNA had been found on some of the remaining evidence. He also asked for a hearing to decide whether the state had acted in bad faith in losing the evidence. The Commonwealth cross-appealed, claiming that the trial court erred in ordering testing in light of the evidence and that Moore's claim should be barred by laches.

The Supreme Court affirmed the trial court except as to its holding that outside testing was not allowed. The Court held instead that KRS 422.285 gives trial courts broad discretion to enter orders they deem "appropriate," which includes ordering testing by an outside lab. The Court did not require the trial court to order the outside testing on remand, however, leaving that decision in the hands of the lower court if supported by the evidence that Moore might offer. The Court also held that the loss of evidence and the presence of another person's DNA were insufficient to require reversal, and that no hearing on the state's alleged

bad faith was required. The Court also held that the trial court did not err in ordering DNA testing under the statute, and that laches could not bar Moore's claim because the statute allows motion "at any time." The dissenters would have affirmed the trial court's denial of outside testing, albeit on different grounds, namely, that any outside DNA testing, while allowed by the statute, would ultimately prove fruitless, making any error harmless.

C. Jason Lee Mullikan v. Commonwealth of Kentucky
2009-SC-000519-MR June 16, 2011

Opinion of the Court by Justice Cunningham. All sitting. The court held: (1) that convictions for first-degree wanton endangerment and third-degree terroristic threatening does not constitute a double jeopardy violation because each conviction requires proof of a fact the other conviction does not; (2) that the trial court did not abuse its discretion in denying Appellant's request for DNA testing and fingerprinting of a water bottle because such testing was not reasonably necessary for Appellant's defense and was unlikely to result in relevant evidence that outweighed prejudicial effect; (3) that the trial court did not abuse its discretion in requiring both the defense and prosecution to remain seated while questioning witnesses because it has the inherent authority to control trial proceedings and specific authority under KRE 611(a) to control the mode of interrogation of witnesses; (4) that no palpable error arose from witnesses' brief references to Appellant's prior incarceration and trial because the references were directly elicited by Appellant himself and they were likely of little effect in the trial; (5) that Appellant was not entitled to a directed verdict on third-degree assault charge because the jury could have reasonably concluded Appellant attempted to cause physical injury by spitting on the officer; (6) that omission from jury instruction on third-degree assault of element of knowledge that officer was acting within official capacity was harmless because Appellant testified he knew who the officer was; (7) that the trial court properly denied Appellant's request for a jury instruction on choice of evils defense because there was insufficient evidence of threat of imminent injury; (8) that the trial court properly refused to give Appellant's tendered instruction on mistake of fact because the elements of the charged offense could have been satisfied even with the alleged mistake of fact; and (9) that testimony in the penalty phase describing facts and circumstances underlying Appellant's prior convictions was unduly prejudicial and merits new penalty phase because the testimony went beyond the scope of "nature of prior offenses," under KRS 532.055(2)(a). Chief Justice Minton concurred by separate opinion. Justice Scott concurred in part and dissented in part by separate opinion.

D. Adam Anthony Barker v. Commonwealth of Kentucky
2009-SC-000794-MR June 16, 2011

Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellant appealed from trial court judgment convicting him of second-degree manslaughter and two counts of tampering with physical evidence, sentencing him to an aggregate term of twenty years' imprisonment. Supreme Court reversed the manslaughter conviction but affirmed the other convictions and remanded for further proceedings. Supreme Court held that the jury instruction on the provocation qualification to self-protection misplaced the intent requirement onto the victims, constituting palpable error where Appellant's intent was a contested issue at trial.

E. Nathan McDaniel Jr. v. Commonwealth of Kentucky
2009-SC-000443-MR June 16, 2011

Opinion of the Court by Justice Scott. All sitting. Minton, C.J.; Abramson, Noble, Schroder, and Venters, JJ., concur. Cunningham, J., dissents by separate opinion. During jury selection, two jurors provided equivocal responses when asked whether they could be fair and impartial in their deliberations. Appellant's challenge for cause as to each juror was denied. The Supreme Court reversed, holding that the trial court abused its discretion when it denied Appellant's motion to strike the jurors for cause. The Supreme Court addressed the remaining issues only to the extent that they were likely to recur remand.

II. Negligent Supervision

A. Dianne Turner v. Brooke Nelson, et al.
2010-SC-000356-DG June 16, 2011

Opinion of the Court by Justice Scott. All sitting; all concur. This case arose from alleged incidents of inappropriate touching between two five-year old children. Rather than report these incidents to authorities, the kindergarten teacher here separated the children and explained why such touching was inappropriate. The Supreme Court reinstated the summary judgment originally granted by the trial court in favor of the teacher because the teacher's duties (and decision making) were discretionary in nature, thereby entitling her to the defense of qualified official immunity. Importantly, the Supreme Court considered her duties to be discretionary primarily because the mandatory reporting obligation of KRS 620.030(1) did not apply in this case.

III. Product's Liability

A. Giddings & Lewis, Inc. et al. v. Industrial Risk Insurers et al.

2009-SC-000485-DG **June 16, 2011**
2009-SC-000825-DG **June 16, 2011**

Opinion by Justice Abramson, affirming in part, reversing in part. All sitting; all concur.
The Court affirms in part and reverses in part the opinion of the Court of Appeals, rendering final the trial court's grant of summary judgment to Giddings & Lewis, the manufacturer.
Appellee Ingersoll Rand purchased from Appellant Giddings & Lewis, Inc. a Diffuser Cell System (System), which consisted of several components designed to perform separate functions. After seven years of operation, the System malfunctioned, damaging the entire System. Giddings & Lewis rebuilt the System and Ingersoll Rand's insurer, Industrial Risk Insurers, paid $2,798,742.00 for repairs, overtime pay and related expenses.
Industrial Risk Insurers sued Giddings & Lewis to recover the amount paid, claiming breach of implied warranty, breach of contract, negligence, strict liability, negligent misrepresentation and fraud by omission. The trial court granted summary judgment to Giddings & Lewis, holding the insurers' implied warranty claim was barred by the statute of limitations and, further, the economic loss rule barred the tort claims, including those for fraud and negligent misrepresentation. The trial court also declined to adopt the "calamitous event" exception to the economic loss rule and held the components of the System constituted one product. The Court of Appeals affirmed the adoption of the economic loss rule and agreed the calamitous event exception should be rejected, but held the economic loss rule did not bar the negligent misrepresentation and fraud claims. The Court of Appeals also found the question of whether the components of the System constituted one product was a question of fact for the jury.
The "economic loss rule" prevents the commercial purchaser of a product from suing in tort to recover for economic losses arising from the malfunction of the product itself, recognizing that such damages must be recovered, if at all, pursuant to contract law. Faced squarely with a classic case for application of the economic loss rule, the Court held for the first time that, in Kentucky, the economic loss rule applies to negligence, strict liability and negligent misrepresentation claims arising from a defective product sold in a commercial transaction, and that the relevant product is the entire item bargained for by the parties and placed in the stream of commerce by the manufacturer. Further, the economic loss rule applies regardless of whether the product fails over a period of time or destroys itself in a calamitous event, and the rule's application is not limited to negligence and strict liability claims but also encompasses negligent misrepresentation claims. The Court did not decide the impact of the economic loss rule on

fraud claims because the plaintiffs' fraud by omission claim was unsustainable on the record, irrespective of the economic loss rule.

IV. WORKERS' COMPENSATION

A. Anthony Traugott v. Virginia Transportation
2010-SC-000696-WC **June 16, 2011**

Opinion of the Court. All sitting; all concur. Traugott was a Kentucky resident whose work required him to travel throughout the lower 48 states, spending a majority of his time in no one state. His employer was headquartered in Rhode Island and had no Kentucky office. He sought workers' compensation benefits in Kentucky for an injury that occurred while he was working in Missouri. The ALJ dismissed the claim, having found that Kentucky lacked extraterritorial jurisdiction under KRS 342.670(1) and (5) because Traugott's employment was not principally localized in Kentucky and his contract for hire was not made in Kentucky. The ALJ reasoned with respect to the latter finding that Traugott offered his services to the defendant by telephone from his home in Kentucky; received and returned an employment application by fax; and was advised by telephone from Rhode Island that he was accepted if he completed certain requirements. Final acceptance occurred in Rhode Island where he did so. The Workers' Compensation Board and Court of Appeals affirmed, with the court noting that no evidence showed the defendant's acceptance to be contingent upon Traugott's completing certain tasks in Rhode Island. Also affirming, the Supreme Court determined that substantial evidence supported the legal conclusion that the contract for hire was made in Rhode Island. The contract was formed when the defendant accepted Traugott's offer of his services for hire by telephone in Rhode Island. No evidence compelled the parties' roles to be viewed differently.

V. ATTORNEY DISCIPLINE

A. Roger P. Elliott v. Kentucky Bar Association
2011-SC-000205-KB **June 16, 2011**

Roger P. Elliott moved the Court to impose a two-year suspension with one year probated and one year to serve, subject to conditions, for his violation of then SCR 3.130-8.3(b)(now SCR 3.130-8.4(b)). The Court opined that the sanction was appropriate and imposed it.