PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
JUNE 2012

I. CRIMINAL LAW:

A. Michael Elery v. Commonwealth of Kentucky

2010-SC-000669-MR **June 21, 2012**

Opinion of the Court by Justice Noble. All sitting. The Appellant was convicted of murder, tampering with physical evidence, and violating a protective order. He was sentenced to life in prison with no possibility of probation or parole. Appellant made eight arguments on appeal, none of which required reversal. The most notable holdings are that the results of a preliminary breath test administered at the time of arrest were not excluded under KRS 189A.104(2) because that statute only applies to DUI prosecutions; an erroneous first-degree manslaughter instruction that improperly required the prosecution to prove the existence of extreme emotional disturbance beyond a reasonable doubt was harmless because it only prejudiced the prosecution; and a separate jury instruction explaining the relationship between murder and first-degree manslaughter is appropriate but only if requested by the defendant.

B. Crystal Lynn Guzman v. Commonwealth of Kentucky

2010-SC-000415-DG **June 21, 2012**

Opinion of the Court. All sitting; all concur. Police officers responded to a call alleging that Appellant was dealing drugs and engaging in prostitution and proceeded to Appellant's apartment to conduct a "knock and talk." Although Appellant denied that anyone else was in the apartment, the officers conducted a protective sweep. During the sweep, the officers saw a spoon that appeared to be burned on the bottom and had white residue on it. Appellant consented to a search of her apartment and the officers found cocaine and drug paraphernalia. Appellant was arrested and eventually entered a conditional guilty plea after her motion to suppress the evidence obtained during the search was denied. The Court of Appeals affirmed. On discretionary review, the Supreme Court, for the first time, chose to follow and adopt the U.S. Supreme Court's holding in *Maryland v. Buie*, 494 U.S. 325 (1990), which held that law enforcement officers may conduct a protective sweep for their own safety and that objects found and seized therein are admissible at trial as an exception to the warrant requirement. But because the facts of this case were clearly distinguishable from *Buie*, which dealt with a limited sweep in conjunction with an in-home arrest, the Court reversed the decision of the Court of Appeals and remanded the matter to the trial court for further proceedings.

C. Brian Allen McGuire v. Commonwealth of Kentucky
2011-SC-000040-MR June 21, 2012

Opinion by Justice Venters. All sitting, All Concur, with Justice Cunningham filing a separate concurrence joined by Justice Abramson. Criminal; murder. Questions presented - (1) whether the Fayette County School Board and its General Counsel interfered with Appellant's efforts to interview witnesses employed by the school; (2) whether the trial court erred by permitting the Commonwealth to present evidence through a coworker concerning McGuire's stressful personal life during its case-in-chief; (3) whether the trial court erred by permitting a friend of the victim to present victim impact evidence during the sentencing phase in violation of KRS 421.500; (4) whether the trial court did erred by denying Appellant's request to have his father testify as a mitigation witness during the sentencing phase of the trial; and (5) whether the trial court erred by permitting the jury to rehear a witness's testimony outside of his presence in violation of RCr 9.74. Held – (1) that the Fayette County School Board and its General Counsel may have interfered with Appellant's efforts to interview witnesses employed by the school, but that issue need not be decided because an violation of Appellant's right to interview witnesses was harmless beyond a reasonable doubt (summarizing standards for an employer's control over its witness-employees); (2) that the trial court did not err by permitting the Commonwealth to present evidence through a coworker concerning McGuire's stressful personal life during its case-in-chief; (3) that the trial court erred by permitting a friend of the victim to present victim impact evidence during the sentencing phase in violation of KRS 421.500, but the error was harmless, and that the trial court should give maximum latitude in allowing family members of the victim and defendant to testify in the sentencing phase of the trial even though they were in attendance at the guilt phase of the trial; (4) that the trial court did not err by denying Appellant's request to have his father testify as a mitigation witness during the sentencing phase of the trial, but that court's should apply a lenient standard in future cases in deciding this issue; and (5) that the trial court erred by permitting the jury to rehear a witness's testimony outside of his presence in violation of RCr 9.74, but the error was harmless.

D. Kenneth D. Hudson v. Commonwealth of Kentucky
2011-SC-000103-MR June 21, 2012

Opinion by Justice Venters. All sitting, All Concur. Criminal Post; murder. *Question Presented* – (1) Defendant's entitlement to instructions on theories of accomplice liability for first-degree manslaughter, second-degree manslaughter, and reckless homicide; and (2) whether the trial court erred by admitting evidence concerning a prior shooting by one of defendant's accomplices, and evidence of Appellant's gang activity. Held – (1) appellant was not entitled to instruction on first-degree manslaughter because there was no evidence that appellant's intent was to cause serious physical injury; (2) appellant was not entitled to instruction on second-degree manslaughter because there was no evidence that appellant's

mens rea was merely simple wantoness; conduct was necessarily aggravated wantoness; (3) appellant was not entitled to instruction on reckless homicide because no jury could reasonably believe that he failed to have perceive the risk of death inherent in his conduct; and (4) in the trial of an accomplice to the commission of a crime by others, evidence of the principal's prior violent conduct and gang activity was admissible to prove the that the principal committed the crime in which defendant was an accomplice.

E. Travis Smith v. Commonwealth of Kentucky
2011-SC-000154-MR **June 21, 2012**

Opinion by Justice Venters. All sitting, All Concur. Criminal; accomplice to robbery, burglary, and assault. *Questions Presented* – Proper accomplice instructions to robbery, burglary, and assault; assessment of costs on an indigent/poor person. Held – (1) instruction arguments unpreserved pursuant to RCr 9.54(2); (2) for complicity to the act crimes an accomplice who had no knowledge of the aggravating circumstance may still be found guilty of a confederate's aggravated offense, and instructions for accomplice to burglary and robbery properly reflected this; (2) for a complicity to the act crime, such as assault, an accomplice is criminally liable based upon his individual *mens rea*; and thus the proper conviction for the accomplice/defendant may vary from the proper conviction for the principal; accomplice/defendant's criminal liability depends upon whether his *mens rea* was intentional, aggravated wantoness; simple wantoness; or reckless; (3) a poor person may not be assessed court costs; remanded for application of proper standard.

II. FAMILY LAW

A. John David Lee v. Honorable Stephen M. George, Judge, Jefferson Family Court and Jill Leanne Lee (Now Stanley); And Christopher Harrell, Guardian Ad Litem
2011-SC-000265-MR **June 21, 2012**

Opinion of the Court. All sitting. Appellant asked for a writ of mandamus or prohibition requiring the trial judge to disqualify himself from further involvement in the case because of his alleged bias against Appellant. The Appellant also asked that the guardian ad litem and opposing counsel be disqualified because, he claimed, they engaged in fraud and conspiracy against him. The Court of Appeals had denied the writ and the Supreme Court affirmed that decision. The Appellant was not entitled to the writ under either of the two categories for such relief. First, the family court clearly has subject-matter jurisdiction to hear divorce cases and the power to issue and enforce orders related to such cases. Second, Appellant has the right to appeal all final rulings of the trial court, all in the ordinary appellate course. His alleged harm—that he did not have custody of his children and that his visitation time with them was more limited than what he thought he deserved—was not the kind of injury that

justified the issuance of an extraordinary writ. The Supreme Court also concluded that the Appellant was not entitled to a writ barring the trial court from requiring him to post a bond before filing pleadings in the future because he did not request the relief or state the grounds for that relief with sufficient specificity to allow the Court to definitively state its basis for granting or denying. Justice Noble issued a concurring opinion joined by Justice Scott in which she agrees that the Appellant did not request that the bond order being vacated with sufficient particularity but states that it is clear to her that the Appellant did intend for the Court to set aside the bond order.

III. TORTS:

A. Tanya A. Childers; Jeffrey J. Childers v. Sandra F. Geile, M.D.; Marshall Emergency Services Associates, P.S.C.

2009-SC-000790-DG **June 21, 2012**

Opinion of the Court by Justice Noble. All sitting. Tanya and Jeffrey Childers filed suit claiming intentional infliction of severe emotional distress from a physician's alleged mishandling of a pregnancy. Specifically, the physician was alleged to have told the woman she had miscarried when she had not yet done so and to have prescribed drugs that could have a negative effect on the fetus. The woman miscarried a few days later. The trial court granted summary judgment for the physician. The Supreme Court held that the facts establish that summary judgment is proper because the doctor's conduct was properly the subject of a traditional tort claim, namely, medical malpractice. Because the tort of outrage, also known as intentional infliction of emotional distress, was meant only to be a gap-filler, it cannot be maintained when such a traditional claim is available for the same set of facts.

B. Brandon Benningfield v. Helen Zinsmeister, Deceased; And Wade Zinsmeister

2009-SC-000660-DG **June 21, 2012**

Opinion of the Court by Justice Noble. All sitting. Laurie Benningfield filed suit on behalf of her son, Brandon Benningfield, for injuries sustained by a dog attack against the landlords of the dog's owners. The suit alleged that the landlords were statutory owners under KRS 258.095(5) and thus were strictly liable for the attack under KRS 258.234(4). The trial court granted summary judgment for the landlords. The Supreme Court held that a landlord can be the statutory owner of a tenant's dog for the purposes of liability under certain circumstances, but that any such liability extends only to injuries caused on or immediately adjacent to the premises. For that reason, the landlord in this case was liable under the statutes because the attack occurred off the premises. Justice Schroder issued a dissenting opinion but concurred in the result, in which Justice Scott joined, stating that Kentucky's dog bite statutes have never considered the landlord an "owner" of a tenant's dog. Justice Minton issued an opinion that concurs in part but dissents as

to the result, in which Justice Venters joined, stating that a landlord whose tenant's dog injures a third party can be held liable under general negligence principles even when the injury occurs off the leased property. Justice Venters issued an opinion concurring in part but dissenting as to the result, in which Justice Minton joined, stating that he disagrees with the conclusion to confine the area "about" the property to the land "so close [to the subject property] as to be within [a person's] immediate physical reach" of the property.

C. Garry Hall, et al. v. Mortgage Electronic Registration Systems, Inc., et al.
2010-SC-000559-DG June 21, 2012

Opinion of the Court by Justice Scott, in which Minton, C.J.; Abramson, and Cunningham, JJ., concur. Schroder, J., dissents by separate opinion in which Noble and Venters, JJ., join. Appellant owned a tract of property on which he executed a mortgage with Appellee. After Appellant satisfied the mortgage in full, Appellee attempted to release the mortgage in the county clerk's office, but failed to do so effectively due to a simple scrivener's error, of which Appellant was aware. Appellant subsequently secured another mortgage on the property with a different financial institution which notified Appellee that the original mortgage had not been released. Five months later, Appellant filed a civil action to obtain a release of the original mortgage, also claiming statutory damages pursuant to KRS 382.365. The trial court found that Appellant's notice to Appellee was misleading, that Appellee therefore had "good cause" under the statute not to file a new release, and concluded that Appellant was therefore not entitled to statutory damages. The Court of Appeals affirmed. The Supreme Court likewise affirmed, holding that, in certain circumstances, human error can form the basis upon which "good cause" exists for failure to timely release a lien under KRS 382.365, and under the totality of the circumstances, Appellee had established this "good cause" requirement.

D. Rodger W. Lofton v. Fairmont Specialty Insurance Managers, Inc., D/B/A Fairmont Specialty Group and D/B/A Fairmont Specialty P&C; Denise Maxey and Delbert K. Pruitt
2010-SC-000749-DG June 21, 2012

Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellant was an attorney who represented a plaintiff in a personal injury action under a contingency fee agreement. Appellant withdrew from representation after the plaintiff client refused to accept a pre-trial settlement offer. Appellant cited the extreme differences of opinion regarding the value of the case as the reason for his withdrawal. The plaintiff then obtained new counsel and accepted a settlement offer for the same amount as the previous offer she had rejected. Appellant filed an attorney's lien for the hours he had worked on the case and a complaint in McCracken Circuit Court seeking recovery of his attorney fees under *quantum meruit*. The trial court declined to award attorney fees, finding that Appellant had breached his contract with the client, but awarded him funds to

cover his expenses from the representation. The Court of Appeals affirmed the trial court.

The Supreme Court held that in cases where an attorney has withdrawn from representing a client under a contingency fee contract, recovery under *quantum meruit* may be permitted only where there is "good cause." The Court further held that "good cause" to recover a *quantum meruit* fee is a high standard and requires a showing greater than the "good cause" necessary to withdraw from representation of a client. Whether there is "good cause" to justify the award of a *quantum meruit* recovery is to be determined on a case-by-case basis. The Supreme Court affirmed the Court of Appeals decision, holding that a disagreement with a client over whether to accept a settlement offer was not sufficient "good cause."

E. Kenton Smith, et al. v. Richard Williams, et al.
2010-SC-000332-DG **June 21, 2012**

Opinion of the Court by Justice Schroder, reversing and remanding. All sitting; all concur. Partition action for sale of jointly held real estate. Parties opposing sale raised as defense existence of an oral buy/sell agreement between the co-tenants. Held: Statute of frauds, KRS 371.010(6), prevented enforcement of alleged oral buy/sell agreement in the absence of fraud or an equitable claim, neither of which existed in this case.

F. Hon. Annette Karem, Judge v. Justin Bryant
2010-SC-000375-DG **June 21, 2012**

Opinion of the Court, reversing and remanding. All sitting; all concur. Held: District court acted within its jurisdiction, pursuant to KRS 387.520 and KRS 24A.120, when it issued an order requiring a guardian to provide all financial records related to a court-ordered accounting and to make restitution to a guardianship account.

G. Danielle N. Bidwell v. Shelter Mutual Insurance Company
2010-SC-000560-DG **June 21, 2012**

Opinion of the Court by Justice Scott. All sitting. All concur. Appellant was seriously injured when the automobile in which she was riding as a passenger was in an accident. The car's driver was not its owner, but a permissive user. Appellant submitted her claim to Appellee, the car owner's insurance company, for $250,000—the amount listed on the policy's Declarations page as the limit for bodily injury liability. Appellee claimed that the permissive user step-down provision located within the policy, but not on the Declarations page, limited her claim to $25,000. Appellant filed for a declaratory judgment, asking the circuit court to declare the step-down provision unenforceable. The circuit court entered

summary judgment for Appellee, and the Court of Appeals affirmed. The Supreme Court reversed and remanded, holding that the specific provision at issue violated the doctrine of reasonable expectations.

IV. WORKERS' COMPENSATION:

A. Audi of Lexington v. Colin Elam; Honorable Marc Christopher Davis, Administrative Law Judge; and Workers' Compensation Board

2011-SC-000449-WC **June 21, 2012**

Opinion of the Court. All sitting. All concur. Elam worked as a car salesman. He sustained a work-related back injury in 2005 when the vehicle in which he accompanied a customer on a test drive was rear-ended while traveling at approximately 50 miles per hour on an interstate highway. His prior medical history included longstanding treatment for a herniated disc and degenerative disc disease. Drs. Kriss and Lockstadt agreed that he had a 5% permanent impairment rating immediately before the injury. In 2007 Dr. Kriss apportioned "63% of the total lumbar causation" to pre-existing degenerative disc disease and the remaining 37% to the accident. He assigned an 8% impairment rating in 2008, attributing a 3% impairment rating to the effects of the accident. Dr. Lockstadt performed lumbar fusion surgery for the injury's effects in 2009 and assigned a 21% impairment rating when Elam reached maximum medical improvement. The ALJ found the surgery to be work-related; relied on Dr. Lockstadt with respect to Elam's present impairment rating; and relied on Dr. Kriss to apportion 37% of the 21% impairment rating, *i.e.*, 7.77%, to the injury. The Workers' Compensation Board reversed, convinced that the ALJ erred by basing Elam's income benefits on a permanent impairment rating that no medical expert assigned using the AMA *Guides*. The Court of Appeals and Supreme Court affirmed, rejecting the employer's argument that the ALJ exercised a fact-finder's discretion to infer reasonably that a progression of the pre-existing degenerative condition contributed in the same proportion to causing Elam's present impairment rating as it did to causing the impairment rating that Dr. Kriss assigned in 2008. The Supreme Court noted the absence of any medical testimony to support such an inference after the fusion surgery and the absence of any medical testimony that the *Guides* authorize the apportionment of an impairment rating in the manner employed by Dr. Kriss.

V. ATTORNEY DISCIPLINE:

A. Eric C. Deters v. Kentucky Bar Association

2012-SC-000344-KB **June 15, 2012**

Opinion and Order. All sitting; all concur. Deters applied for reinstatement following a sixty-one day suspension from the practice of law. The Character and Fitness Committee of the Kentucky Office of Bar Admissions recommended approval of the application, subject to certain conditions. The Board of Governors recommended disapproval of the application, noting that Deters failed to prove his conduct while under suspension showed him to be worthy of the trust and confidence of the public or that he appreciated the wrongfulness of his misconduct. The Court agreed with the recommendation of the Character and Fitness Committee and reinstated Deters to the practice of law.

B. Travis O. Myles v. Kentucky Bar Association

2009-SC-000139-KB **June 21, 2012**

Opinion and Order. All sitting; all concur. In 2009, Myles admitted to violating several ethical provisions and was suspended from the practice of law for 181 days, with thirty days to serve and the remaining 151 days probated for a period of five years, on condition that he receive no other disciplinary charges during the period of his probation. Approximately three years into his probation, the KBA moved the Court to issue a show cause order after Myles failed to respond to a bar complaint and the Inquiry Commission filed a disciplinary charge against Myles. Myles failed to respond to the Court's show cause order. Accordingly, the Court granted the KBA's motion and imposed the remainder of Myles' probated suspension.

C. Kentucky Bar Association v. Juliette Alane House

2012-SC-000183-KB **June 21, 2012**

Opinion and Order. All sitting; all concur. House was charged with violating seven different ethical rules in the course of representing a client. After a disciplinary hearing, the trial commissioner recommended that House be permanently disbarred. House did not file a notice of appeal, and the Court adopted the order and recommendation of the trial commissioner, permanently disbarring House from the practice of law.

D. Kentucky Bar Association v. Michael R. McDonner

2012-SC-000196-KB **June 21, 2012**

Opinion and Order. All sitting; all concur. McDonner was under a 60 day suspension but continued to represent clients, then failed to contact said clients. A complaint was filed and McDonner failed to respond. The Board

recommended a 181 day suspension and the court adopted the order and recommendation of the Board.

E. Kentucky Bar Association v. Mark Patrick Niemi
2012-SC-000226-KB June 21, 2012

Opinion and Order. All sitting; all concur. Respondent agreed to represent client in worker's compensation claim then failed to communicate with client. Client filed a complaint with Bar office. Respondent failed to reply to inquiries from the Bar Counsel's office and a default order was entered recommending suspension for 30 days, attend the EHEP, and pay costs. The Court adopts the recommendations of the Board.

F. Kentucky Bar Association v. James M. Cawood, III
2012-SC-000237-KB June 21, 2012

Opinion and Order, suspending Respondent from the practice of law for 181 days. All sitting; all concur. Held: Attorney's failure to maintain client funds and failure to respond to the KBA's requests for information warranted a suspension from the practice of law for 181 days and payment of costs.

G. Glenn L. Greene, Jr. v. Kentucky Bar Association
2012-SC-000283-KB June 21, 2012

Opinion and Order, Greene pled guilty to a class D felony and admitted to ethical violations stemming from the charges. He requested to resign under terms of permanent disbarment, the court granted Greene's motion and he is ordered disbarred.

H. Louis Milton Smith, Jr. v. Kentucky Bar Association
2012-SC-000301-KB June 21, 2012

Opinion and Order, Smith admitted to ethical violations relating to three different bar complaints filed against him. He requested to resign under terms of permanent disbarment and the court granted Smith's motion and he is ordered disbarred.