

**KENTUCKY SUPREME COURT
JUNE 2021**

ADMINISTRATIVE LAW:

Jefferson County Sheriff's Office v. Kentucky Retirement Systems

2019-SC-0315-DG

June 17, 2021

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Conley, Hughes, Keller, Lambert, and VanMeter, JJ., sitting. All concur. Nickell, J., not sitting. Appellant sought review of an order and opinion of the Court of Appeals holding under KRS 61.598 that an assessment imposed on Appellant by Appellee Kentucky Retirement Systems was proper for lack of a showing of a bona fide promotion or career advancement, even though the Appellant's employee simply took bona fide unpaid sick leave then returned to work the next fiscal year to his normal compensation. Appellants claimed on appeal to the Supreme Court (1) that KRS 61.598 should not apply because the employee's compensation did not actually increase, so it was improper for the Retirement Systems to impose an assessment; and (2) that the burden of proving a justification for the pay increase was improperly assigned to the Appellant instead of the Appellee Retirement Systems.

First, the Supreme Court held for the Appellant, that KRS 61.598 contemplates compensation "increases" subject to assessment. Simple comparison of gross compensation in fiscal years may show a positive difference, but the difference might not be a true "increase," for instance where, as here, the employee's pay did not truly increase and they just took time off and later returned to previous pay. Second, the Supreme Court held that where an employee's compensation actually increases, the employer bears the burden of proving a "bona fide promotion or career advancement" to justify the increase, not the Retirement Systems.

The Supreme Court reversed the Court of Appeals, holding the assessment was improper.

Kentucky Retirement Systems v. Jefferson County Sheriff's Office

2019-SC-0476-TG

June 17, 2021

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Conley, Hughes, Keller, Lambert, and VanMeter, JJ., sitting. All concur. Nickell, J., not sitting. Appellant Kentucky Retirement Systems sought review of a trial court's reversal of the Appellant-agency's imposition of an assessment under KRS 61.598 for purported "pension-spiking" by Appellant with respect to two employees. The circuit court held (1) the burden of proof should have been on the Retirement Systems to prove the lack of a "bona fide promotion or career advancement" justifying the pay increase; (2) that KRS 61.598 only applies where more than one pay increase occurs within the five years preceding an employee's retirement; and (3) that overtime work is not subject to assessment by the Retirement Systems where it is bona fide, i.e., compensated in "good faith for a legitimate purpose." Appellant Retirement Systems alleged error as to each one of these conclusions. Appellee-employer then raised several constitutional claims against application of the statute, including that KRS 61.598 violated the prohibition against ex post facto laws, it violated the Contracts Clause, and that it was generally arbitrary and overbroad.

The Supreme Court held first that the hearing officer properly assigned the burden of proof to the employer in justifying an apparent compensation increase with a “bona fide promotion or career advancement.” Second, it held that part of the assessment was improperly applied where an accounting fluke caused a superficial deduction in gross compensation in one fiscal year with a corresponding addition to the next fiscal year, that this was not a true “increase” in the employees’ compensation under KRS 61.598. Third, the Court held that any individual annual increase in compensation in the five years preceding retirement can be subject to assessment, and that the trial court erred in requiring more than one. Fourth, the Court again reversed the trial court, holding that overtime compensation generally is subject to assessment by the Retirement Systems, even if it is worked and compensated in good faith for a legitimate purpose. Fifth, the Appellant-employer’s constitutional claims were without merit, because ex post facto laws are exclusively criminal in nature, the contracts clause was not violated because no contract or contractual relationship of the employer’s was retroactively affected, and the statute was not arbitrary overbroad, having passed rational basis review and since the pension system is within the obvious purview of the legislature to impose such assessments on participant-employers.

The Supreme Court reversed and remanded to the Retirement systems to recalculate any remaining assessment.

CONSTITUTIONAL LAW:

Louisville/Jefferson County Metro Government Waste Management District, et al. v. Jefferson County League of Cities, Inc., et al.
[2019-SC-0520-DG](#) **June 17, 2021**

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Conley, Hughes, Lambert, and Nickell, JJ., concur. Keller, J., concurs in result only. In 2017, the legislature amended KRS Chapter 109 to give home rule cities located in a county containing a consolidated local government certain rights with respect to the waste management district in the county. The issue before the Court was whether the amended KRS Chapter 109 complied with the requirements of Kentucky Constitution Section 156a which permits the legislature to classify cities on a number of bases but requires that “[a]ll legislation relating to cities of a certain classification shall apply equally to all cities within the same classification.” The Supreme Court held that the amended statute did not comply and therefore affirmed in part and reversed in part the Court of Appeals’ opinion and remanded the case to the Franklin Circuit Court for the entry of new judgment.

CRIMINAL LAW:

Commonwealth of Kentucky v. Erin Hess
[2019-SC-0130-DG](#) **June 17, 2021**

Opinion of the Court by Justice Conley. All sitting; all concur. The Kentucky Supreme Court granted discretionary review to determine whether the Court of Appeals erred in failing to dismiss Erin Hess’ appeal of her probation revocation under the fugitive disentitlement doctrine (FDD). The Commonwealth of Kentucky, the Appellant, appealed the Court of Appeals’ ruling that Hess had a constitutional right to appeal her probation revocation, which precluded the application of the FDD. The Supreme

Court reversed, holding Hess' right to appeal regarding the revocation of her probation was purely statutory pursuant to KRS 22A.020(1). Hess had no constitutional right to appeal. Consequently, the Court held that the FDD did apply in this case, reasoning that the Court of Appeals' refusal to apply the FDD was inextricably intertwined with its incorrect interpretation of the law. The Court took judicial notice of Hess' continued absconsion pursuant to KRE 201 and remanded the case to the Court of Appeals with instructions to dismiss Hess' appeal.

Ray William Powers v. Commonwealth of Kentucky
2019-SC-0341-DG

June 17, 2021

Opinion of the Court by Justice Nickell. All sitting; all concur. Ray William Powers was indicted for rape and sodomy of his nineteen-year-old niece. Shortly before trial, Powers sought to introduce evidence the victim had engaged in sexual intercourse with her boyfriend after the alleged rape and sodomy but prior to presenting to the emergency room for a rape exam or reporting the incident to police. He asserted the evidence was admissible under KRE 412, the rape shield law. The trial court denied the motion upon determining no exception applied and further, the evidence was wholly irrelevant and thus inadmissible under KRE 401 and 403. Powers was convicted following a jury trial and sentenced to seventeen years' imprisonment. A divided Court of Appeals panel affirmed the conviction and sentence.

On grant of discretionary review, the Supreme Court examined the three listed exceptions to KRE 412 and concluded none were applicable. Further, the relevance of the proffered evidence was dubious at best and admission of testimony regarding a single consensual sexual act would run afoul of the Rule's exclusionary purpose of protecting victims of sex crimes from unfair and unwarranted character assaults. Discerning no abuse of discretion by the trial court, exclusion of the evidence was deemed appropriate. Finally, the Supreme Court disagreed with Powers' assertion exclusion of the proffered evidence constituted a Confrontation Clause violation and deprived him of his right to present a meaningful defense. Accordingly, the decision of the Court of Appeals was affirmed.

Commonwealth of Kentucky v. Alisha Doebler
2020-SC-0025-DG

June 17, 2021

Opinion of the Court by Justice Keller. All sitting; all concur. Alisha Doebler was arrested in a motel room where drugs and drug paraphernalia were also found. Doebler had in her purse \$3,759 that was confiscated. After Doebler pleaded guilty to possessing a syringe, the Commonwealth sought forfeiture of the cash pursuant to KRS 218A.410. The statute states that "currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable." The trial court accepted Doebler's proof that the funds originated from her father's estate but found that she had not, by clear and convincing evidence, rebutted the presumption of forfeiture in that the cash was not intended to facilitate drug trafficking or for the purchase of drugs. Relying on *Osborne v. Commonwealth*, 839 S.W.2d 281 (Ky. 1992), the Court of Appeals reversed, holding that the Commonwealth had not established sufficient traceability of the funds to drug trafficking to invoke the presumption of forfeitability contained in KRS 418A.410.

The Supreme Court reversed and reinstated the trial court's forfeiture order. The Court said, "whether property is traceable to a drug transaction may be inferred from the totality of the circumstances." The Court stated that some of the same facts establishing proximity may be used to establish the requisite slight traceability required by *Osborne*. Under the totality of the circumstances, the trial court was not clearly erroneous in finding that the Commonwealth had established sufficient proximity and traceability of the currency to the drugs or that Doeblner had failed to rebut the presumption of forfeiture by clear and convincing evidence.

FAMILY LAW:

Heather Lerae Moore v. Eddie Dean Moore

[2020-SC-0553-DGE](#)

June 17, 2021

Opinion of the Court by Justice Nickell. All sitting; all concur. After being acquitted of sexually abusing his daughter from a previous marriage, Father sought increased visitation with minor daughters of his latest marriage which had been curtailed due to his criminal charges. The trial court denied Father's first motion for joint custody and increased, unsupervised visitation upon concluding he had, in fact, sexually abused his daughter, the contrary jury verdict notwithstanding. Approximately six months later, Father again moved for joint custody and increased visitation. The trial court denied the motion for joint custody, slightly increased Father's supervised visitation, and stated further modifications of timesharing would not occur until Father accepted responsibility for his actions and showed genuine remorse. Ten months later, Father filed a third motion for joint custody and increased, unsupervised visitation. After setting forth extensive findings detailing grave concerns with Father's actions and his continued failure to acknowledge any wrongdoing, and with little justification supportive of its decision, the trial court granted Father unsupervised, overnight visitation every other weekend. The trial court's sole focus was whether Father presented a risk of harm to these two children but nowhere mentioned the best interest standard set forth in KRS 403.320.

A divided Court of Appeals panel affirmed, concluding the trial court's ultimate finding was supported by substantial evidence and, although mentioned nowhere in the trial court record, expansion of visitation was in the children's best interests. The majority held the trial court ruled on the best interest factors by implication and discerned no abuse of discretion in the trial court's conclusion Father did not present a risk of harm to the children.

On grant of discretionary review, the Supreme Court disagreed with the Court of Appeals that trial courts may rule by implication, citing CR 52.01 and *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011), and concluded none of the trial court's written findings supported the ordered modification. In addition, it was determined the Court of Appeals erred in focusing on whether the trial court's findings were supported by substantial evidence without considering if the findings were applicable to the issue to be decided and excusing the failure to make the required conclusion of law. Finally, because the trial court utilized an incorrect legal standard—risk of harm instead of best interests of the children—the Supreme Court was constrained to reverse and remand for further proceedings.

INSURANCE LAW:

Crystal Lee Mosley, et al. v. Arch Specialty Insurance Company, et al.

2018-SC-0586-DG

June 17, 2021

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The Kentucky Supreme Court accepted discretionary review in this third-party bad-faith case to determine whether Arch Specialty Insurance Company and National Union Fire Insurance Company acted in bad faith while mediating negligence and wrongful death claims asserted by Crystal Lee Mosley against insureds of Arch and National Union after her husband's death in a coal mining accident. The trial court summarily dismissed bad-faith claims against both companies, finding that the Plaintiffs had failed to state a claim for which relief could be granted, as well as failed to prove a genuine issue of material fact existed. Further, the trial court found that any evidence of National Union's and Arch Specialty's bad faith conduct would be inadmissible under Kentucky Rule of Evidence 408 because it was mediation conduct. The Court of Appeals affirmed.

On discretionary review, the Supreme Court affirmed the decision of the Court of Appeals but found that evidence of bad faith conduct is admissible under KRE 408, but not in this instance because the Plaintiffs had failed to show any evidence would reveal prohibited bad faith conduct.

Julie G. Thomas, Individually, et al. v. State Farm Fire and Casualty Company, et al.

2020-SC-0061-DG

June 17, 2021

Opinion of the Court by Justice VanMeter. All sitting; all concur. While operating a home day care center Bessie Perkins injured two children, S.T. and C.R. The issue before the Court was whether the child care services exclusion in the Perkins's home insurance policy operated to exclude coverage not only for Bessie, but her husband as well. The Supreme Court held that the term "any insured" broadened the exclusion to include injuries triggered by one insured in connection with the activities of another. Consequently, the Supreme Court affirmed the Court of Appeals opinion which affirmed the Madison Circuit Court's grant of summary judgment in favor of State Farm.

JUDICIAL ETHICS:

In re: JE 101

2021-SC-0134-RR

June 17, 2021

Opinion of the Court by Justice VanMeter. All sitting; all concur. Per SCR 4.310, the Court reviewed a judicial ethics opinion of the Ethics Committee of the Kentucky Judiciary, JE-101, in which the Committee addressed two situations implicating an appearance of impropriety and a judge's obligation to recuse: a) the judge's secretary is married to an attorney appearing before the judge, and b) the judge's law clerk is married to a local assistant county attorney. In each instance, and relying upon SCR 4.300, Canon 3(E)(1), the Committee opined that public perception and the appearance of impropriety required disclosure and recusal. Importantly, however, the Committee noted that Canon 3(F) permitted the waiver of disqualification. The Court held that with respect to a trial judge's law clerk's spouse appearing in front of the

judge in an adoption case, when the law clerk had no involvement in the case, the judge's isolation of the law clerk plus disclosure of the marital relationship dictated that a reasonable observer, being aware of all the facts and circumstances, would NOT reasonably question the judge's impartiality. In other words, the trial judge would not be required to recuse. The second inquiry addressed whether isolation plus disclosure would extend to other attorneys working out of the same office as the spouse attorney. The Supreme Court held that the procedure should be followed for the particular Legal Aid of the Bluegrass office in which the spouse attorney works but is not required with respect to the other three Legal Aid of the Bluegrass offices.

LIMITATION OF ACTIONS:

United States Liability Insurance Company v. Jaci Watson, as Administrator of the Estate of William Gerald Watson, Deceased

[2019-SC-0475-DG](#)

June 17, 2021

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Conley, Keller, Nickell, and VanMeter, JJ., concur. Lambert, J., dissents by separate opinion. Civil Appeal, Discretionary Review Granted. After William G. Watson settled his dram shop claim against Pure Country, LLC, an establishment insured by United States Liability Company (USLI), he made a bad faith claim against USLI pursuant to Kentucky's Unfair Claims Settlement Practices Act. The trial court ultimately concluded the claim was barred by the five-year statute of limitations because Watson's claim against Pure Country was settled before August 9, 2012, the date five years before the filing of the bad faith claim. The Court of Appeals reversed the trial court, perceiving the settlement to have occurred in December 2012, making Watson's August 2017 bad faith claim timely. Held: The trial court correctly concluded that Watson's bad faith claim against USLI was barred by the statute of limitations. The facts of the case support the trial court's finding regarding a binding settlement more than five years before the filing of the bad faith claim because the essential elements of an enforceable contract were present no later than July 30, 2012.

MOTOR VEHICLE REPARATIONS ACT:

Linda Davis v. Progressive Direct Insurance Company

[2020-SC-0168-DG](#)

June 17, 2021

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Conley, Hughes, Keller, Nickell and VanMeter, JJ., concur. Lambert, J., dissents without separate opinion. While driving her motorcycle, Linda Davis collided with a horse-drawn wagon. The issue before the Court was whether a horse-drawn wagon qualified as either a "motor vehicle" or a "trailer." The Supreme Court held that horse-drawn wagons failed to meet either definition because the horse and buggy operate as a single integral unit and is muscle powered. Additionally, the Court held that Kentucky's Motorized Vehicle Reparations Act does not include horse-drawn wagons within its definition of "motor vehicle." Consequently, the Supreme Court affirmed the Court of Appeals opinion affirming the Wayne Circuit Court's grant of summary judgment in favor of the insurance company.

REAL ESTATE TRANSACTIONS:

Don Booth of the Breland Group v. Debbie Lawson of Coldwell Bankers/McMahan, et al.

[2020-SC-0023-DG](#)

AND

K&D Builders v. Nicole Ribeiro, et al.

[2020-SC-0026-DG](#)

AND

Debbie Lawson v. Coldwell Banker/McMahan v. Nicole Ribeiro, et al.

[2020-SC-0028-DG](#)

Opinion of the Court by Justice Keller. All sitting; all concur. Nicole Ribiero sued K&D, Booth, and Lawson seeking rescission or damages resulting from the purchase of a home where the seller and real estate agents failed to fully comply with the statutory disclosure requirements of KRS 324.360. Ribeiro purchased a home in 2016 and claimed to have not received the seller's disclosure mandated by statute. Testimony conflicted as to whether she received the disclosure, but it was acknowledged she did not receive the disclosure in the timeframe required under KRS 324.360. Ribiero's purchase contract permitted Ribiero to rescind the contract based on a failure to receive the disclosure and allowed her to complete an inspection by an inspector of Ribeiro's choice. In addition, the contract provided Ribiero could rescind the contract based on the results of the inspection. Ribeiro's inspection identified a number of deficiencies, including the deficiencies that would later be the basis of her claim. After negotiations with K&D regarding the deficiencies discovered, Ribiero completed the closing on the home. Some months later, Ribiero made a claim under the arbitration clause of her purchase contract for rescission of the purchase or damages as a result of deficiencies in the home based on the seller's failure to disclose. She named as defendants in the action: K&D as the seller; Booth as the listing agent; and Lawson as her agent.

In a comprehensive review, the arbitrator found the merger doctrine extinguished Ribeiro's right to rescind the contract at closing based on a failure to receive a seller's disclosure. Second, Ribiero failed to show evidence of fraud or misrepresentation as required to invoke an exception to the merger doctrine. Third, Ribiero failed to show the necessary elements of negligence in seeking statutory damages from Booth or K&D for their failure to comply with KRS 324.360. Lastly, she failed to offer evidence that her agent breached her fiduciary duty or fell below the applicable standard of care regarding the purchase of the home. Ribiero sought review of the arbitrator's award, arguing the arbitrator exceeded his authority in applying the merger doctrine, KRS 417.160(1)(c), and refused to hear evidence material to the controversy when he excluded the testimony of one of Ribiero's experts as irrelevant to the issue before him. KRS 417.160(1)(d). The circuit court upheld the arbitrator's award, and Ribiero appealed.

The Court of Appeals held that the adoption of KRS 324.360 superseded the merger doctrine as articulated in *Borden v. Litchford*, 619 S.W.2d 715 (Ky. App. 1981). Therefore, the arbitrator exceeded his powers when he relied on *Borden* to invalidate the statute. The Court of Appeals also held that Ribeiro was entitled to present her expert's testimony and that the arbitrator's refusal to allow it was an error. Based on

these two issues, the Court of Appeals vacated the circuit court's order upholding the arbitration award and remanded for a new order directing a new arbitration to be granted. The defendants appealed.

The Supreme Court reversed, holding the Court of Appeals exceeded the statutory basis for vacating an arbitration award. KRS 417.160 delineates the limited basis under which a court may vacate an arbitration award. The Court held that the arbitrator did not exceed his authority in applying the merger doctrine to Ribiero's claim. Furthermore, based on Kentucky precedent, even if the arbitrator erred in applying the merger doctrine, a reviewing court may not set aside an award that is fairly and honestly made on an issue within the arbitrator's scope of authority because of a misinterpretation of the law. The Court also held that the arbitrator's exclusion of Ribiero's expert was not a failure to hear evidence for purposes of KRS 417.160(1)(d); rather, it was an evidentiary ruling on the relevance of the evidence offered. Arbitrators are empowered to determine the admissibility, relevance, and materiality of the evidence offered. The Court said that in the absence of a record of the proceedings below, a court is required to assume the evidence supported the arbitrator's decision. For these reasons, the Supreme Court reversed the Court of Appeals and ordered the reinstatement of the Jefferson Circuit Court's order upholding the arbitration award.

REAL PROPERTY:

Eugene Phillips, et al. v. John Rosquist, et al.

2018-SC-0671-DG

June 17, 2021

Opinion of the Court by Chief Justice Minton. All sitting; all concur. sitting; all concur. Appellants sought review of an order and opinion of the Court of Appeals reversing a trial court's injunction award to restore land Appellants claimed was adversely possessed, where Appellee years before Appellants bought the land had excavated part of it, causing water to flow over to fill a small area bordering a lake. In addition to the substantive property issue, the Appellants appealed the denial of a motion for a judge on the Court of Appeals panel to recuse.

Appellants claimed on appeal to the Supreme Court (1) that they were entitled to an injunction to refill the land to its original contours because they filed their action to recover land within 15 years of the excavation, satisfying the statute of limitations; (2) alternately, they were entitled to enforce a mutually restrictive covenant against building and excavation; and (3) that the judge on the Court of Appeals was required to recuse when he and his wife were good friends of the defendant, the judge's wife apparently suggested the Appellee contact the judge about the case, the judge had recused from other cases in light of his wife's executive role in the local HOA governing the properties, and when a very similar canoe as Appellee's appeared to be stored on the judge's nearby property soon after it was ordered removed from the land in question.

First, the Supreme Court held that because the deed spoke at the time of delivery, the deed description established the land terminated at the edge of the body of water, and that because the allegedly infringing condition existed at the time of delivery, the deed excluded Appellant's title to the land in question. Since Appellants lacked ownership of the land, they lacked standing to bring a claim either for trespass or to recover land. Second, the Appellant did have standing under mutually restrictive covenants to bring

a claim to restore the land, but because several years had passed before Appellants bought the land and several more before they brought suit, because the alleged breaching condition was open and visible to them when purchased, and because injunction would inure very little if any benefit to the Appellant but would incur great cost to the Appellee, it was held equity could not support the injunction, so the trial court abused its discretion in issuing it. Finally, the Supreme Court held in light of *Abbott Inc. v. Guirguis* that the Court of Appeals judge abused his discretion by not recusing, where the totality of the circumstances supported a reasonable question as to his impartiality, notwithstanding his assertion and subjective belief that he could remain fair and impartial.

The Supreme Court affirmed the Court of Appeals in part and reversed in part.

STATUTORY PRIVILEGE:

Jewish Hospital, an Assumed Name of Jewish Hospital & St. Mary’s Healthcare, Inc., et al. v. Honorable Mitch Perry, Judge, Jefferson Circuit Court, Div. Three, at al.

[2020-SC-0011-MR](#)

June 17, 2021

Opinion of the Court by Justice Lambert. All sitting; all concur. Appellant, Jewish Hospital, argued that KRS 311.377, as amended in 2018, rendered a root cause analysis report privileged. After the circuit court denied the hospital’s motion in limine, it sought a writ of prohibition from the Court of Appeals. The Court of Appeals denied the writ, holding that the report was not created pursuant to a “designated professional review function” as required by statute.

The Supreme Court reversed and granted the writ of prohibition. The Court held: (1) the amendments to KRS 311.377 applied retroactively to this case because the amendments were procedural in nature and (2) the plain language of the statutory, alongside the context in which it was passed, demonstrates that the root cause report was created pursuant to a “professional review function” because it was the product of the retrospective review of the competency of medical professionals.

WORKERS COMPENSATION:

Clara Susan Sheets, Executrix of the Estate of Steven Ray Sheets v. Ford Motor Company

[2019-SC-0208-DG](#)

June 17, 2021

Opinion of the Court by Justice Keller. All sitting; all concur. VanMeter, J., concurs by separate opinion in which Nickell, J., joins. Steven Ray Sheets filed suit against Ford Motor Company alleging Ford was one of multiple parties responsible for causing his malignant mesothelioma. Ford filed a motion for summary judgment arguing, among other things, that it was immune from tort liability as an “up-the-ladder,” or statutory employer, under Kentucky Revised Statute (KRS) 342.610(2)(b) of the Kentucky Workers’ Compensation Act (Act). The trial court denied its motion for summary judgment in a one-sentence order. Ford appealed arguing it had a matter of right appeal on this issue under *Ervin Cable Construction, LLC v. Lay*, 461 S.W.3d 422 (Ky. App. 2015). Sheets argued that the trial court’s order denying summary judgment was interlocutory and not appealable.

The Supreme Court held that all three elements of the collateral order doctrine must be met before an appellate court has jurisdiction to review an interlocutory order. The three elements are as follows: the interlocutory order must (1) conclusively decide an important issue separate from the merits of the case; (2) be effectively unreviewable following final judgment; and (3) involve a substantial public interest that would be imperiled absent an immediate appeal. The Court went on to hold that the trial court's denial of up-the-ladder immunity in this case did not involve a substantial public interest that would be imperiled absent an immediate appeal. Accordingly, the Court lacked jurisdiction to hear the appeal. The Court expressly overruled *Ervin Cable*'s holding that under the collateral order doctrine, an appellate court has jurisdiction to review a trial court's denial of a motion for summary judgment based on up-the-ladder immunity.

Glenn Davis v. Blendex Company, et al.
[2020-SC-0171-WC](#)

June 17, 2021

Opinion of the Court by Justice Lambert. All sitting; all concur. The employee's right foot was injured after being sprayed with a heated pressure washer. The employee missed a total of five days of work. Then, the employee, who previously worked full-time, was medically released to return to part-time work with limited duties. The employee elected to use his previously accrued paid time off and vacation hours to supplement his part-time income in lieu of seeking workers' compensation benefits and receiving only a portion of his salary. The employer presented a settlement offer to the employee based on an impairment rating from one of his treating physicians one year and five months prior to the expiration of the statute of limitations. The employee rejected this offer. The employer later gave the employee a weeks' notice that his statute of limitations was about to expire. The employee did not file his claim until four months after the statute of limitations expired.

The Court held that the employee "returned to work" as that phrase is used in KRS 342.0011(11)(a) and interpreted in *Trane Commercial Systems v. Tipton*, 481 S.W.3d 800 (Ky. 2016). As a matter of first impression, the Court held that a full-time employee who returns to part-time work due to a work-related injury, alone, does not constitute an "extraordinary circumstance" that warrants an award of temporary total disability benefits under *Tipton*. The Court also held that the employee's use of previously accrued paid time off and vacation hours to supplement his income did not entitle him to temporary total disability benefits. The Court reasoned that the employee chose to use those hours instead of taking a reduction in salary, and that there was no evidence that the employer, for example, fraudulently induced or coerced him into doing so. Finally, the Court held that equitable principles did not otherwise require the statute of limitations to be tolled. The Court explained that the employer did not fail to meet its notification requirements under KRS 342.040(1), as the employee did not miss seven days of work. And, the employee was apprised of both his right to file a claim and the date that his statute of limitations would run.

WRIT OF MANDAMUS:

Kimberly Johnson v. Honorable Stockton B. Wood, et al.

[2020-SC-0588-MR](#)

June 17, 2021

Opinion of the Court by Justice Keller. All sitting; all concur. After being diagnosed with breast cancer, Kimberly Johnson filed suit against various medical providers alleging medical negligence. The issues before the Supreme Court involved the propriety of the entry of a writ of mandamus to address the trial court's: (1) failure to award sanctions and attorneys' fees in relation to allegedly contemptuous conduct; (2) failure to recognize a new tort claim; (3) failure to invoke the crime-fraud exception to overcome the attorney-client privilege and require certain discovery; and (4) denial of a motion precluding bifurcation of Johnson's malpractice claims from her claims of fraud by the defendants. The Court held that the trial court's denial of Johnson's various motions could all be adequately remedied by appeal. Accordingly, Johnson was not entitled to a writ of mandamus.

ATTORNEY DISCIPLINE:

Eric C. Deters v. Kentucky Bar Association

[2019-SC-0334-KB](#)

June 17, 2021

Opinion and Order of the Court. All sitting. Minton, C.J.; Conley, Hughes, Lambert, Nickell and VanMeter, JJ., concur. Keller, J., concurs in result only without separate opinion.

Inquiry Commission v. John James Shaughnessy III

[2020-SC-0217-KB](#)

June 17, 2021

Opinion and Order of the Court. All sitting; all concur. Pursuant to SCR 3.165(1)(b) and (d), the Inquiry Commission of the Kentucky Bar Association (KBA) petitioned the Supreme Court to temporarily suspend Shaughnessy from the practice of law in the Commonwealth of Kentucky because there was probable cause to believe that the attorney's conduct posed a substantial threat of harm to his clients or the public. In support of its petition, the Inquiry Commission cited to Shaughnessy's involvement in a number of pending criminal matters, including several state felony charges and a federal criminal indictment for firearm-related charges.

After reviewing the pending cases and allegations against Shaughnessy, the Court agreed with the Inquiry Commission that probable cause existed to believe that Shaughnessy's conduct posed a substantial threat of harm to his clients and others. Accordingly, under SCR 3.165(1), the Court temporarily suspended Shaughnessy from the practice of law pending disciplinary proceedings.

Kentucky Bar Association v. Judson Bayard Wagenseller

[2020-SC-0294-KB](#)

June 17, 2021

Opinion and Order of the Court. All sitting; all concur. The KBA Inquiry Commission issued a seven-count charge against Wagenseller. Following a hearing, the Trial Commissioner issued a report, containing findings of fact, conclusions of law, and recommendations, which was submitted to the Supreme Court under SCR 2 3.360(4). Neither party appealed the Trial Commissioner's recommendations. In August 2020,

the Court gave notice to the KBA and Wagenseller under SCR 3.370(8) of its intention to review this matter. The KBA then submitted its brief asking the Court to adopt the Trial Commissioner's findings of misconduct and impose upon Wagenseller a minimum suspension of 180 days. Wagenseller did not file a response.

Upon reviewing the record, the Court determined that Wagenseller had engaged in multiple acts of conflict of interest, failed fully to disclose material information to his clients, failed to acquire the required informed consent for representation in several matters, and violated the trust of his clients. Specifically, his acts include failing to maintain records of his IOLTA account, accounting for legal funds he was paid, failing to explain critical conflicts of interests to his clients, taking settlement funds from his clients, filing lawsuits against his former clients, and acting in his own self-interest instead of those he represented.

Based on these findings, the Court concluded that Wagenseller was guilty of all professional misconduct as alleged in the Inquiry Commission's charge and determined the Trial Commissioner's recommendation for a 180-day suspension was insufficient to account for Wagenseller's professional misconduct. Rather, upon review of sanctions in similar disciplinary matters, the Court held a one-year suspension was appropriate.

Kentucky Bar Association v. Thomas Duane Juanso
[2021-SC-0059-KB](#)

June 17, 2021

Opinion and Order of the Court. All sitting; all concur. The KBA moved the Supreme Court to indefinitely suspend Juanso from the practice of law under Supreme Court Rule 3.380(2) for failure to answer a disciplinary charge. Juanso failed to respond to a bar complaint filed by his client. Thereafter, the Inquiry Commission issued a charge against Juanso for failure to act with diligence; failure to communicate; failure to return an unearned fee; and failure to respond to a lawful demand from a disciplinary authority. Juanso never responded to the charge. Accordingly, the Court ordered him to be suspended indefinitely under SCR 3.380(2).

Kentucky Bar Association v. Charles Edwin Johnson
[2021-SC-0099-KB](#)

June 17, 2021

Opinion and Order of the Court. All sitting; all concur. In a default case under SCR 3.210, the KBA Board of Governor recommended that the Supreme Court find Johnson guilty of violating multiple disciplinary rules arising from three separate files. The Board further recommended that Johnson be suspended from the practice of law for 180 days, with 61 days to be served and the remaining 119 days to be probated for two years on the conditions that Johnson: attend and successfully complete the Ethics and 2 Professionalism Enhancement Program (EPEP); repay fees owed to his clients; and be required to pay the costs in this action.

After reviewing the facts of the underlying disciplinary case and considering Johnson's failure to respond to any of the charges against him, the Court agreed with and adopted the Board's recommendations.

Kathi Michelle Adams v. Kentucky Bar Association
[2021-SC-0150-KB](#)

June 17, 2021

Opinion and Order of the Court. All sitting; all concur. Adams moved for consensual discipline pursuant to Supreme Court Rule 3.480(2) based on a negotiated sanction agreement with the KBA. Specifically, Adams requested an order imposing a sanction of a three-year suspension from the practice of law on condition she participate in the Kentucky Lawyers Assistance Program (KYLAP) on terms and conditions imposed by KYLAP, receive no new criminal charges during the period of suspension, and pay the costs of this proceeding. The KBA filed a response stating it had no objection to the Motion for Consensual Discipline.

Because Adams and the KBA agreed on the sanction and case law supported the proposed resolution, the Court held the sanction to be the appropriate discipline for Adams's conduct and granted her motion.