KENTUCKY SUPREME COURT
JUNE 2023

CONTRACTS:

UNIVERSITY OF KENTUCKY V. PETER REGARD, ET AL.

2022-SC-0129-DG **June 15, 2023**

Opinion of the Court by Justice Conley. All sitting. VanMeter, C.J.; and Lambert, J., concur. Thompson, J., concurs in result only by separate opinion. Bisig, J., dissents by separate opinion in which Nickell, J., joins and Keller, J., joins in result only. Nickell, J., dissents by separate opinion in which Bisig, J., joins and Keller, J., joins in result only.

In March 2020, during the Spring Semester and in response to the COVID-19 pandemic, the University of Kentucky moved all classes to an online-only format and, the Appellees allege, virtually shut down its entire campus. The Students eventually brought a breach of contract claim against the University. The University moved to dismiss based on governmental immunity, arguing it had no written contract with Students to provide in-person classes or provide the services that were supported by the Students' fees. The trial court and Court of Appeals both ruled that the University did have a written contract within the waiver of KRS 45A.245(1) so that governmental immunity did not apply.

The Supreme Court affirmed. Based on the doctrine of incorporation, the Court ruled that the Student Financial Obligation the Students had to sign to register for courses explicitly stated the Students were entering a contractual obligation to pay tuition and fees. The University Bulletin was also provided to the Students during registration and the Bulletin listed the breakdown of tuition based on multiple variables, but chiefly showing that Students who were enrolled exclusively in online courses were charged less tuition than those who had registered for a combination of online and in-person classes. Students who were considered "off-campus" also paid less in fees than those who were "on-campus." The Bulletin also contained definitions of in-person and online classes. Because the Kentucky common law doctrine of incorporation by reference does not require specific language evincing that the incorporated document is to control, decide, or affect the relationship of the parties, it is enough that the two documents share mutuality of subject matter and the document to be incorporated is not in doubt, the incorporation by reference was satisfied here because the SFO specifically mentioned tuition and fees and the Bulletin explicitly identified the tuition and fee amounts. The Court also noted that the Bulletin was delivered simultaneously with the signing of the SFO, therefore it was also a factor supporting incorporation by

reference. Finally, the Court noted that tuition specifically is not set by the University but by the Council of Post-Secondary Education, therefore the contract should be read as expressly incorporating tuition since contracts based on a statute have the statute read into them.

PHOENIX AMERICAN ADMINISTRATORS, LLC, ET AL. V. CURTIS LEE

2022-SC-0133-DG **June 15, 2023**

Opinion of the Court by Chief Justice VanMeter. VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. All concur. Thompson, J., not sitting.

The Supreme Court granted the petition of Phoenix American Administrators, LLC and Phoenix American Warranty Company, Inc. (collectively referred to as "Phoenix") for review of the Court of Appeals' opinion reversing the Jefferson Circuit Court's grant of summary judgment in favor of Phoenix. This case concerns a contract dispute in which a car owner, Plaintiff Curtis Lee, seeks to recover damages from Phoenix, the administrator of a guaranteed asset protection ("GAP") waiver addendum entered into by Lee, the car dealer and the lender during the course of Lee purchasing and financing a motor vehicle. The issues presented include: (1) whether the car owner, Lee, made a timely claim for GAP coverage by informing the GAP contract's third-party administrator, Phoenix, of his accident several weeks after it occurred; (2) whether Lee's failure to provide Phoenix with all the documents listed in the contract's claim procedures bars his claim; and (3) whether Lee could sue Phoenix for breach of contract when Lee, the car dealer, and the lender were the only parties who signed the contract. The Supreme Court affirmed the Court of Appeals' opinion but clarified a few points. First, the Court held that the Court of Appeals erred by not addressing the merits of Phoenix's privity argument. As the prevailing party in the trial court, Phoenix was not required to file a cross-appeal to preserve its alternate arguments. That said, the Supreme Court ruled that the trial court correctly held that privity of contract existed between Phoenix and Lee: because Lee was one of the intended beneficiaries of Phoenix's administrative obligations, Lee had standing to maintain a breach of contract action against Phoenix. Next, the Court affirmed the Court of Appeals' determination that summary judgment was premature since genuine issues of material fact exist as to the date when Lee first contacted Phoenix. Regarding whether Lee's alleged phone call to Phoenix was sufficient for purposes of submitting his claim pursuant to the GAP Waiver's 120-day submission deadline, the Supreme Court agreed with the Court of Appeals that the GAP Waiver's language distinguishing between submitting a claim and providing supporting documentation was ambiguous. Construing the ambiguous contract against Phoenix, the drafter, the Court concluded that a claim was submitted under the GAP Waiver when the car owner notified Phoenix that a total loss had occurred and because a factual dispute existed as to when Lee

first notified Phoenix that his car was totaled, summary judgment was improper. The Court remanded this case to the trial court with instructions to vacate its order granting summary judgment and allow Lee's breach of contract action to proceed.

CRIMINAL LAW:

COMMONWEALTH OF KENTUCKY V. KAYLA MELTON

2021-SC-0427-DG **June 15, 2023**

Opinion of the Court by Justice Nickell. VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. Bisig, Conley, and Lambert, JJ., concur. VanMeter, C.J., dissents by separate opinion in which Keller, J., joins. Thompson, J., not sitting.

Melton is the unmarried biological mother of a minor child. While Melton believed John Niemeier was the child's biological father, there had been no judicial determination of the child's paternity. However, Niemeier was granted full guardianship over the child by a district court.

Melton was charged with custodial interference and other related charges. The trial court excluded evidence of Niemeier's guardianship under KRE 403 after concluding the evidence would mislead the jury because parental custody is superior to any rights arising from guardianship. The Commonwealth filed an interlocutory appeal. A divided panel of the Court of Appeals affirmed.

On discretionary review, the Supreme Court reversed the decision of the Court of Appeals holding the trial court abused its discretion by excluding the guardianship evidence because such proof was highly probative of the ultimate question of Melton's guilt and was inextricably intertwined with the overall facts of the case. The Supreme Court noted that to hold otherwise would amount to a premature directed verdict on the custodial interference charge and impair the Commonwealth's ability to prosecute the other related charges.

Chief Justice VanMeter dissented, joined by Justice Keller, and would have held the trial court did not abuse its discretion by excluding the guardianship evidence.

MAURICE GASAWAY V. COMMONWEALTH OF KENTUCKY

2021-SC-0457-DG **June 15, 2023**

Opinion of the Court by Justice Nickell. All sitting. Conley, Lambert, and Thompson, JJ., concur. VanMeter, C.J.; Bisig and Keller, JJ., concur in result only.

Gasaway's co-workers suspected him of drug possession after a small bag containing what they believed to be illegal drugs was discovered on the floor of the workplace. The next day a police officer came to the workplace and reviewed surveillance footage, which purported to show Gasaway dropping the bag. Gasaway, who was on active parole, denied possessing the drugs. A search of Gasaway's person did not reveal any incriminating evidence and, when requested, Gasaway denied permission to search his vehicle, which was located in the workplace parking lot. Two parole officers were thereupon summoned, and a warrantless search of the vehicle was commenced. The search revealed a methamphetamine pill, a small quantity of marijuana, and a device commonly used to thwart drug testing.

Gasaway was originally charged with possession of heroin, possession of methamphetamine, and possession of marijuana. The jury hung on the heroin charge, acquitted on the methamphetamine charge, and convicted on the marijuana charge. Gasaway was retried on a single count of heroin possession with the trial court denying his motion to suppress evidence obtained from the warrantless search. In denying the motion, the trial court determined evidence relating to the discovery of methamphetamine and marijuana along with the heroin was admissible because their discovery was inextricably intertwined with the heroin charge and was otherwise admissible to show intent. Gasaway was thereafter convicted of heroin possession.

On direct appeal, the Court of Appeals affirmed based on the decision of the Supreme Court in *Bratcher v. Commonwealth*, 424 S.W.3d 411 (Ky. 2014), which held parolees are subject to warrantless searches despite any conditions of parole to the contrary.

On discretionary review, while affirming the search of the vehicle on other grounds, the Supreme Court overruled *Bratcher*, holding a parolee search is subject to the ordinary Fourth Amendment test which balances the need for the search against the parolee's reasonable expectation of privacy under the totality of the circumstances, including conditions of parole. The Supreme Court also held the trial court erred in determining the evidence of the other drugs which were of a different kind, found in a different location, and discovered on a different day, was inextricably intertwined with the heroin charge. Further, the Supreme Court held evidence of the other drugs was also inadmissible because intent was not at issue due to Gasaway having denied possessing the heroin. Finally, the Supreme Court held a witness is not permitted to interpret video recordings of events he or she did not witness in real time.

TRAY C. SPALDING V. COMMONWEALTH OF KENTUCKY

2021-SC-0503-MR **June 15, 2023**

Opinion of the Court by Justice Conley. All sitting. All concur.

The trial court allowed three witnesses to testify via Zoom regarding the chain of custody over the objections of defense counsel. Spalding argued it was a violation of his rights to confront witnesses under the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution. The jury convicted on two counts of trafficking in a controlled substance in the first-degree, second offense but acquitted on a third count. The jury recommended a sentence of twenty-seven years, but the trial court sentenced him to twenty years in prison.

The Supreme Court held the trial court erred when it allowed the three witnesses to testify via Zoom but found that error harmless beyond a reasonable doubt and thus affirmed the judgment of the trial court. Analyzing the issue under *Maryland v. Craig*, the Supreme Court found the trial court erred because there was not a sufficient finding of necessity to allow the chain of custody witnesses to testify remotely. 497 U.S. 836, 853 (1990).

MARK JOHNSON V. COMMONWEALTH OF KENTUCKY

2021-SC-0541-MR **June 15, 2023**

Opinion of the Court by Justice Conley. All sitting. VanMeter, C.J.; Bisig, Lambert, and Nickell, JJ., concur. Keller, J., concurs in part and concurs in result only in part by separate opinion in which Thompson, J., joins.

Mark Johnson was convicted of two counts of third-degree burglary; one count of theft by unlawful taking, $500-$1000; and first-degree persistent felony offender. He was sentenced to twenty years in prison. He appealed arguing a juror unanimity error in the instructions for failing to instruct the jury to be unanimous as to which buildings he entered for each count of third-degree burglary, since the evidence supported that Johnson had entered two separate buildings for each count respectively. He also argued he was entitled to a directed verdict on one of the counts for third-degree burglary because the greenhouse he entered did not qualify as a building under the statue. Finally, he argued two errors in the penalty phase. First, that the Commonwealth introduced evidence of amended or dismissed charges, as well as evidence of a misdemeanor conviction inaccurately portrayed as a felony to the jury. Second, that the Commonwealth had elicited misleading testimony regarding his eligibility for parole based on good-time credits should the jury convict him as a persistent felony offender.

The Supreme Court affirmed in part and reversed in part. The convictions for third-degree burglary were affirmed. The Court ruled that there was a juror unanimity error because the evidence did support the belief that Johnson had entered two separate buildings for each count and the instructions failed to distinguish between the buildings. The Court ruled that this was not simply a brute fact which supported an element of third-degree burglary because the statute supported charging Johnson with a separate crime for each building unlawfully entered. But this error was unpreserved at trial; consequently, the Court held there was no palpable error. In reaching this conclusion the Court specifically held "[t]here is no separate category of palpable error review for 'errors so fundamental as to threaten a defendant's entitlement to due process of law.'" The Court specifically overruled *Johnson v. Commonwealth,* 405 S.W.3d 439 (Ky. 2013), *Kingery v. Commonwealth*, 396 S.W.3d 824 (Ky. 2013), *Martin v. Commonwealth*, 456 S.W.3d 1 (Ky. 2015), and *King v. Commonwealth*, 554 S.W.3d 343 (Ky. 2018) to the extent they could be read to the contrary.

The Court reversed the persistent felony offender conviction. The Commonwealth had elicited direct testimony from the Circuit Court Clerk and a parole officer regarding several felony charges that either were amended or dismissed prior to final disposition, as well as mentioning a misdemeanor conviction inaccurately as a felony conviction. The Commonwealth mentioned the latter charge in its closing argument to argue to the jury the "time for mercy is past." Finally, the latter conviction was erroneously included on the instructions as a qualifying felony conviction. Thus, all these factors combined such that the Court ruled there was palpable error. It remanded for a new sentencing phase to be conducted. The Court otherwise affirmed the denial for directed verdict because the greenhouse did qualify as a building under the burglary statute. It declined to address Johnson's argument about improper testimony pertaining to parole eligibility since it reversed the persistent felony conviction as detailed above.

ERIC ALDERSON V. COMMONWEALTH OF KENTUCKY

2022-SC-0071-MR **June 15, 2023**

Opinion of the Court by Justice Thompson. All sitting. All concur.

Alderson was convicted after a jury trial on two counts of first-degree rape and two counts of first-degree sexual abuse based on his conduct toward three of his teenage sister's friends while the girls were having separate sleepovers at the family home. Alderson appealed on the basis that the trial court erred by: (1) allowing the prosecution to solicit victim impact testimony during the guilt phase of the trial; (2) permitting the prosecution to amend one first-degree rape count from "physically helpless" to "forcible compulsion" after dismissing the count for failure of proof that the victim was physically helpless; (3) denying a motion for separate trials despite the crimes being committed separately; (4)

ruling that Alderson could not refresh the girls' memories with prior inconsistent statements without opening the door to the admission of the entirety of their video statements; and (5) permitting imposition of a jail fee without evidence there was an existing jail fee reimbursement policy.

(1) The Court reversed and remanded on the basis that allowing repeated and extensive victim impact testimony in the guilt phase of the trial (which was only partially preserved) was a serious and glaring error, there was no justifiable basis for admitting such testimony at this phase of the trial, and the error impacted Alderson's substantive rights. (2) The Court upheld the trial court's action allowing an amendment of a rape count after it had already been dismissed to a different method of committing the same crime, acknowledging this was technically improper but harmless as it did not prejudice Alderson. (3) The Court upheld the denial of the motion for separate trials as a joint trial did not violate Alderson's right to due process as the evidence as to each crime would have been properly admissible pursuant to KRE 404(b) because Alderson had a discernable modus operandi in how he assaulted each victim. (4) The Court ruled that the trial court erred by ruling that Alderson's attempts to refresh the witnesses' memories required the admission of their entire video statements and provided that on remand Alderson could properly refresh their memories with this video pursuant to KRE 612 without them becoming admissible evidence and only if he attempted to impeach them with their prior inconsistent statement would another portion of such video potentially need to be admitted into evidence pursuant to KRE 106. (5) The Court ruled that the trial court erred when it imposed jail fees without evidence of a jail fee reimbursement policy when no evidence of its existence was presented during sentencing.

MARTIN ANDREW STIERITZ V. COMMONWEALTH OF KENTUCKY

2022-SC-0085-MR **June 15, 2023**

Opinion of the Court by Justice Nickell. All sitting. VanMeter, C.J.; Bisig, Conley, and Lambert, JJ., concur. Keller and Thompson, JJ., concur in result only.

Stieritz was convicted of complicity to attempted murder, complicity to second-degree assault, and tampering with physical evidence. He received a total sentence of twenty years' imprisonment and appealed to the Supreme Court as a matter of right.

For his first claim of error, Stieritz argued he was entitled to a directed verdict on all charges. However, the Supreme Court held there was sufficient evidence to support the verdict. For his second claim of error, Stieritz argued the trial court erred by denying his motion for mistrial based on the mid-trial revelation that one of the victims had been tested for gunshot residue and the

Commonwealth failed to notify the defense prior to trial. However, the Supreme Court determined that, while the failure to produce the test results was technically a discovery violation, the violation did not rise to level of prejudice necessary to warrant a mistrial. For his third contention of error, Stieritz argued he was entitled to a jury instruction on menacing as a lesser-included offense of attempted murder. However, the Supreme Court held there was no basis to support a menacing instruction in light of evidence that Stieritz drove the car and provided a loaded gun to the shooter in a drive-by shooting, knowing that the shooter intended to fire upon an occupied vehicle. For his final contention of error, Stieritz argued the trial court improperly excluded evidence during the penalty phase establishing he had suffered a traumatic head injury after the events giving rise to his convictions. However, the Supreme Court concluded circumstances arising after the commission of a crime are irrelevant to the issues of mitigation and leniency, and therefore held the trial court had not abused its discretion by excluding the evidence.

ALEX RYAN PAYNE V. COMMONWEALTH OF KENTUCKY

2022-SC-0120-MR **June 15, 2023**

Opinion of the Court by Justice Nickell. All sitting. VanMeter, C.J.; Bisig, Conley, Keller, and Lambert, JJ., concur. Thompson, J., concurs in result only.

Payne used the internet to pose as a high school student to lure five young girls into providing him explicit videos and photographs. He also involved one of the minor victims in an actual sexual relationship.

At trial, Payne was convicted of twelve counts of possession of matter portraying a sexual performance by a minor; six counts of use of a minor in a sexual performance with a victim under age sixteen; and one count of use of minor in a sexual performance with a victim under age eighteen. He was sentenced to a total of seventy years' imprisonment and appealed to the Supreme Court as a matter of right.

On direct appeal, Payne argued the trial court erred by denying his motion to suppress evidence obtained from a warrantless search of his cellphone. However, the Supreme Court held the evidence established Payne consented to the search by voluntarily handing the cellphone over to police.

Payne next argued he was improperly sentenced because the trial court failed to recognize that KRS 532.110(1)(d) allows for multiple sentences involving the same victim to be run concurrently. Specifically, Payne argued his sentences for offenses against the first victim could have been run concurrently to each other, but consecutively to the sentences imposed for offenses against the second victim, the third victim, and so on. However, the Supreme Court held

that KRS 532.110(1)(d) mandates consecutive sentences in this situation. Contrary to Payne's argument, the plain language of the statute does not permit a trial court to order multiple sentences pertaining to the same victim to run concurrently with each other, but consecutive to the sentences pertaining to other victims.

INSURANCE:

KENTUCKY STATE UNIVERSITY V. DARWIN NATIONAL ASSURANCE COMPANY N/K/A ALLIED WORLD SPECIALTY INSURANCE COMPANY

2021-SC-0130-DG **June 15, 2023**

Opinion of the Court by Chief Justice VanMeter. All sitting. Conley, Keller, and Nickell, JJ., concur. Lambert, J., concurs in part and dissents in part by separate opinion in which Bisig and Thompson, JJ., join.

The primary issue before the Court was whether the Darwin National Assurance Company, now known as Allied World Specialty Insurance Company ("Allied World"), claims-made-and-reported management liability policy ("Policy") issued to Kentucky State University ("KSU") provided coverage when KSU did not comply with the Policy's notice provisions. The Franklin Circuit Court, finding ambiguity in the notice provisions, applied the notice-prejudice rule adopted in *Jones v. Bituminous Casualty Corp.,* 821 S.W.2d 798 (Ky. 1991), and granted summary judgment in favor of KSU. The Court of Appeals reversed, concluding that the notice-prejudice rule did not apply to the Policy and that summary judgment in favor of Allied World was warranted. The Supreme Court granted discretionary review and affirmed the Court of Appeals. The Supreme Court held that the rationale for applying the notice-prejudice rule in *Bituminous Casualty* does not exist in this case and remanded the case to the Franklin Circuit Court with directions to enter a judgment in favor of Allied World. The Supreme Court further clarified that, generally, the notice-prejudice rule shall not apply to a claims-made-and-reported policy that contains unambiguous notice requirements as a condition precedent to coverage.

DAVID MEGRONIGLE D/B/A ACCIDENT/INJURY CHIROPRACTIC, ET AL. V. ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY

2021-SC-0196-DG **June 15, 2023**

Opinion of the Court by Chief Justice VanMeter. VanMeter, C.J.; Conley, Keller, Lambert, and Nickell, JJ., and Chadwick A. McTighe, S.J., and C.

Michael Reynolds, S.J., sitting. All concur. Bisig and Thompson, JJ. Not sitting.

On review from the Court of Appeals' affirmation of the trial court's order directing Dr. Megronigle to pay attorney's fees to Allstate pursuant to CR 37.02(3). The Supreme Court reversed and remanded. Dr. Megronigle was a non-party participant in an automobile negligence case involving Allstate. Dr. Megronigle took MRIs of and performed chiropractic treatment on the plaintiffs in the negligence action. Allstate disputed the amounts charged by Dr. Megronigle and served Dr. Megronigle with subpoenas directing him to turn over a variety of documents related to his business practices. Megronigle objected to the subpoenas and the trial court entered a limited protective order. After Dr. Megronigle unsuccessfully sought a writ of prohibition from the Court of Appeals, Allstate moved to compel and for an award of costs and fees pursuant to CR 37.02(3). A divided Court of Appeals affirmed. The Supreme Court reversed the Court of Appeals, finding the express language of CR 37.02(3) allows for sanctions only against another party. As Dr. Megronigle was brought into the case solely by virtue of a subpoena, he was not a "party" as contemplated by CR 37.02(3) and accordingly not subject to its provisions. The Supreme Court further explained that other mechanisms for sanctioning non-parties exists within the Civil Rules such that expansion of CR 37.02(3) beyond its language was unnecessary.

VIVIANE RENOT V. SECURA SUPREME INSURANCE COMPANY

2021-SC-0281-DG **June 15, 2023**

Opinion of the Court by Justice Nickell. Bisig, Conley, Keller, Lambert, Nickell, and Thompson, JJ, sitting. Bisig, Conley, Keller, and Lambert, JJ., concur. Thompson, J., dissents by separate opinion. VanMeter, C.J., not sitting.

Renot was injured in a motor vehicle collision and filed suit against the other driver. She also instituted a direct action against her underinsured motorists' (UIM) carrier, Secura Supreme Insurance Company. Renot settled her claims against the other driver and a jury trial was held on her UIM claim. The jury returned a verdict in favor of Secura and Renot appealed. The Court of Appeals affirmed.

On discretionary review, the Supreme Court affirmed in part and reversed in part. The primary issue presented was whether David Porta, Ph.D., Secura's biomechanical expert, who was not a medical doctor, was qualified to testify that Renot's preexisting knee degeneration was not exacerbated by the collision. The Supreme Court held the trial court had appropriately concluded in pretrial rulings that Dr. Porta was qualified to offer testimony relative to his field of expertise and the generalized forces and mechanics of injury typically associated with collisions similar to the one at issue. The Supreme Court

further held the trial court had correctly determined in pretrial rulings that Dr. Porta was unqualified to provide expert opinions on medical diagnoses or causation and had appropriately prohibited him from offering such testimony. However, the Supreme Court held the trial court thereafter erred in allowing Dr. Porta's trial testimony to cross its well-demarcated evidentiary line to offer testimony regarding medical causation, and to thereby invade the exclusive province of medical doctors. The trial court's failure to disallow such testimony was held to have constituted reversible error and the Court of Appeals was deemed to have erred in not so finding. Thus, reversal and remand for a new trial was required.

The Supreme Court also rejected Renot's assertion that she should have been permitted to present testimony regarding coverage or payments of personal injury protection (PIP) or basic reparations benefits as evidence of Secura's admission or concession a causal connection existed between the collision and her subsequent medical bills. The Supreme Court held PIP and UIM benefits are separate and independent, do not overlap, and do not provide duplicative coverage for the same loss. The Supreme Court held PIP benefits are paid without regard to fault, and thus cannot serve as an admission of a causal link between an automobile collision and a claimed injury.

Thompson, J., dissented, concluding Dr. Porta's testimony did not influence the verdict and thus, any error related to his testimony was harmless.

ESTATE OF LAHOMA SALYER BRAMBLE, ET AL. V. GREENWICH INSURANCE COMPANY

2022-SC-0043-DG **June 15, 2023**

Opinion of the Court by Chief Justice VanMeter. VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. All concur. Thompson, J., not sitting.

On review from the Court of Appeals' reversal of judgment in favor of the heirs of Ben and Lillian Salyer ("the Heirs") based on the Estate's failure to establish insurance coverage before filing a third-party bad faith complaint. The Supreme Court reversed and remanded. In early 2007, the Heirs brought this action against J.D. Carty Resources for trespass to natural gas wells owned by the Heirs. Carty was insured by Greenwich and defended Carty under a reservation of rights. Carty ultimately settled the matter but defaulted almost immediately after judgment was entered. The Heirs then sought and were granted leave to amend their complaint to assert claims against Greenwich for violation of the UCSPA and bad faith. The Heirs obtained partial summary judgment against Greenwich establishing the Heirs had established the first element of *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993) that the Greenwich policies covered Carty's actions. This order was made final and appealable.

Greenwich timely appealed, but the appeal was dismissed as interlocutory. On remand, litigation resumed and the parties went to trial in April 2018. The Heirs were awarded $15,134,000 in compensatory and punitive damages. The judgment was appealed and in a plurality decision the Court of Appeals reversed the judgment, finding the Heirs were improperly permitted to pursue their claims in violation of *Pryor v. Colony Ins. Co.*, 414 S.W.3d 424 (Ky. App. 2013), as coverage had not been conclusively established. The Supreme Court reversed the Court of Appeals finding that nothing in our jurisprudence on third-party bad faith claims required a claimant to seek a final and conclusive judicial determination of coverage prior to filing such a claim. Here, the first step in satisfying the first prong of *Wittmer* was the trial court's finding that Greenwich's policies covered Carty's actions. To the extent the language in *Pryor* suggests otherwise, such language was in error.

PROPERTY:

GUY FERRILL, III, AS EXECUTOR OF THE ESTATE OF WILLENA T. FERRILL, ET AL. V. STOCK YARDS BANK & TRUST COMPANY, TRUSTEE UNDER THE WILL OF MAY T. DOTY, DECEASED, ET AL.

2022-SC-0056-DG **June 15, 2023**

Opinion of the Court by Chief Justice VanMeter. All sitting. All concur.

On review from the Court of Appeals' reversal of the trial court's grant of judgment in favor of Estate for Bank's failure to timely file their claims for voluntary waste. The Supreme Court affirmed in part and reversed in part. This matter arose from a life estate granted to Willena and Guy Ferrill. Shortly after the grant of the life estate, the Ferrills began acting in a manner that invaded and depleted the corpus of the estate. The Bank, acting as trustee, became aware of the wasteful transactions not long after their occurrence but elected to not immediately bring an action against the Ferrills for waste. The final wasteful transaction occurred in 2011 and in 2013 the Bank brought an action for voluntary waste under KRS 381.350 against Willena Ferrill, then still living. The action lingered for a lengthy period until Ferrill moved for summary judgment on statute of limitations grounds, arguing many of the transactions occurred more than five years prior to the institution of the action and any counts based on those transactions were time-barred. The trial court agreed and granted judgment for Ferrill on most of the Bank's waste claims. The dismissed claims were subsequently appealed to the Court of Appeals which reversed the trial court's ruling as to the dismissed waste claims, the appellate court finding the statute of limitations for the waste claims did not begin to run until Willena Ferrill's death in 2021. The Supreme Court reversed the Court of Appeals insofar as it found the statute of limitations for voluntary waste commenced upon the death of the life tenant, but otherwise affirmed on the various other claims. The Court recognized Kentucky's longstanding

distinction between voluntary and permissive waste and reaffirmed that the five-year statute of limitations for voluntary waste begins when the waste is committed. The Court did not address application of the discovery rule. Because many of the Bank's waste claims were brought more than five years after the waste was committed, the trial court was correct in granting summary judgment for the estate as to those claims.

WORKERS' COMPENSATION:

LETCHER COUNTY BOARD OF EDUCATION V. ROGER HALL, ET AL.

2022-SC-0313-WC **June 15, 2023**

Opinion of the Court by Justice Bisig. VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. All concur. Thompson, J., not sitting.

Roger Hall suffered a work-related injury after being exposed to asbestos-containing material while working for the Letcher County Board of Education (Letcher County). An Administrative Law Judge (ALJ) determined that the Department of Workers' Claims has jurisdiction to hear Hall's claim, and that Hall is permanently and totally disabled and is entitled to medical benefits. As to jurisdiction, the Workers' Compensation Board (Board) and the Court of Appeals affirmed the ALJ. On appeal, the Supreme Court affirmed the Court of Appeals.

Letcher County argued that Hall should have brought his claim before the Board of Claims, which is part of the Public Protection Cabinet and has authority to compensate persons for damages sustained as a proximate result of negligence on the part of the Commonwealth, including school district boards of education. Under the facts of Hall's case, a workers' compensation action and a Board of Claims claim are two different types of proceedings with two different avenues of redressability. Simply put, Hall's request for a workers' compensation remedy requires no showing of negligence and in no way constitutes a claim for "damages sustained . . . as a proximate result of negligence on the part of the Commonwealth . . . ." KRS 49.020(5). Workers' Compensation was specifically designed to compensate injured employees, regardless of fault, and requiring an injured employee to initiate and prove a negligence claim before the Board of Claims directly contradicts the Act and its purpose. His workers' compensation claim therefore does not fall within the exclusive jurisdiction of the Board of Claims.

WRITS:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY V. HONORABLE BRIAN C. EDWARDS, ET AL.

2022-SC-0145-MR **June 15, 2023**

Opinion of the Court by Justice Keller. All sitting. All concur.

Betty Irvin was involved in an automobile collision with Deborah Combs. Combs was insured by State Farm. The day after the accident, a State Farm Claim Specialist contacted Irvin by phone and attempted to settle the claim. State Farm asserts that during this phone conversation, State Farm and Irvin reached an oral agreement whereby Irvin accepted $1,530.00 to settle the claim.

Subsequently, Irvin filed suit in Jefferson Circuit Court against Combs and State Farm. She asserted a negligence claim against Combs and a third-party statutory bad faith claim against State Farm. Both Combs and State Farm asserted the oral settlement agreement as a defense to the negligence claim. State Farm filed a motion to bifurcate for trial the bad faith claim from the negligence claim and to stay discovery on the bad faith claim until the negligence claim was resolved. The trial court denied this motion. It eventually entered an order compelling State Farm to provide the claims file to Irvin and to respond to all discovery requests. State Farm then filed a petition for a writ of prohibition in the Court of Appeals to prevent the trial court from enforcing its discovery orders. The Court of Appeals denied that petition, and State Farm appealed to the Supreme Court.

State Farm argued that by denying its writ petition, the Court of Appeals erroneously allowed discovery on a bad faith claim that had not accrued and was not yet ripe; discovery that was unrelated to the pending tort claim; and discovery that depended on legal theories Kentucky law does not recognize. State Farm also argued that the Court of Appeals erroneously allowed discovery of materials that were protected by the attorney-client privilege and the work-product doctrine.

The Supreme Court held that there was no adequate remedy by appeal for either of these alleged errors. The Court further held that because State Farm's defense to the tort claim was, in large part, the basis for Irvin's bad faith claim, the administration of justice would not suffer a great and irreparable injury if the Court failed to grant the writ petition on the basis that the bad faith claim was not yet ripe. Regarding State Farm's argument that the ordered discovery would violate the attorney-client privilege and the work-product doctrine, the Supreme Court held that State Farm's privilege log was insufficient to establish a privilege and that the trial court did not err in ordering the discovery. Accordingly, the Supreme Court affirmed the Court of Appeals.

ATTORNEY DISCIPLINE:

INQUIRY COMMISSION V. RONNIE LEE GOLDY, JR.

2022-SC-0289-KB **June 15, 2023**

All sitting. Conley, Keller, Lambert, Nickell, and Thompson, JJ., concur. VanMeter, C.J., and Bisig, J., dissent without separate opinion.

This Court had temporarily suspended Ronnie L. Goldy, Jr., for ethical violations centering around his relationship with a female inmate during his tenure as Commonwealth's Attorney. Goldy filed a motion to terminate the temporary suspension, which the Court granted. Goldy was impeached as Commonwealth's Attorney and is, therefore, no longer in that position. The Court looked to SCR 3.165(4), which states "[T]he Respondent may for good cause request dissolution or amendment of any such temporary order by petition filed with the Court . . . ." The Court then defined "good cause" as a "legally sufficient reason." Here, after Goldy lost his position as Commonwealth's Attorney on which the Court's original probable cause determination was based. The Court held "there was no longer probable cause to believe he poses a substantial threat to the public by abusing the power of an office he no longer holds." The Court dissolved Goldy's temporary suspension.

KENTUCKY BAR ASSOCIATION V. RICHARD BOLING

2023-SC-0104-KB **June 15, 2023**

All sitting. VanMeter, C.J.; Bisig, Conley, Keller, and Lambert, and Nickell, JJ., concur. Thompson, J., concurs in part and dissents in part by separate opinion.

The Kentucky Bar Association initiated disciplinary proceedings against Richard Boling in February 2020. The Trial Commissioner rendered his findings and the parties agreed to submit them to the Court pursuant to SCR 3.370. The Trial Commissioner recommended Boling be suspended from the practice of law for five years for committing various ethical violations and the Court agreed with the recommended discipline. Boling was previously a Commonwealth's Attorney. After his term in that office, he went back into private practice for a time before being re-elected as the Commonwealth's Attorney. Boling wrote a letter to then-Governor Matt Bevin urging Bevin to commute the sentence of an individual convicted of sexual assault in the community during the time Boling was out of the Commonwealth's Attorney's office. He indicated in his letter to Bevin the prosecution had been politically motivated. Boling subsequently publicly apologized for the letter and apologized to the circuit court judges in person. The judges indicated they were going to file KBA complaints and did not feel comfortable with Boling practicing in their courtrooms in the interim.

The Inquiry Commission issued a complaint alleging Boling violated SCR 3.130(3.3)(a)(1) (false statement to tribunal) and SCR 3.130(8.2)(a) (false statements about a judge, adjudicatory officer, public legal officer, or candidate

for election or appointment to judicial or legal office). Boling filed a motion for consensual discipline pursuant to SCR 3.480(2). This Court rejected that motion, finding Boling's conduct was particularly egregious because of Boling's position as the Commonwealth's Attorney at the time of the conduct.

In another disciplinary filed against Boling, he was accused of prosecutorial misconduct. A woman who had been mentally ill since her childhood stood accused of two counts of arson and six counts of attempted murder. The complaint alleged the woman had been harassing her neighbors, an interracial couple and their four interracial children, by threatening them and yelling racial slurs at them. Boling avoided eliciting evidence from a state police detective concerning the woman's intoxication. During a lunch break, Boling and the officer discussed her intoxication at the counsel table, not realizing the court's video system was still recording them. Boling said to the officer "I thought about putting you back on and saying did she look like she was high." The officer responded "[w]ell she was out of her fricking mind." Boling laughed and responded, "[t]hat's why I didn't ask that question. The discussion continued about how nothing about the woman being "methed-out" was on the record.

The defense later requested a voluntary intoxication defense and Boling opposed that motion, stating he did not believe there had been sufficient evidence she was so intoxicated that she didn't know what she was doing. In closing, Boling relied on the fact that "not one single witness testified to you that she appeared under the influence . . . ." The defendant was convicted and received a life sentence.

Boling was charged with violating SCR 3.130(3.3)(a)(1) and SCR 3.130(8.4)(c) for knowingly making false statement to the tribunal and failing to correct them and for engaging in dishonest conduct. This Court ultimately reversed the underlying criminal case and remanded for a new trial. The Court held reversal was warranted because Boling's alleged misconduct was flagrant. Again, Boling sought consensual discipline and this Court rejected his motion. The Court noted Boling had misused his position of trust and committed flagrant misconduct.

The disciplinary case proceeded to the KBA Trial Commissioner, who recommended a five-year suspension. The Court agreed and adopted that sanction.

KENTUCKY BAR ASSOCIATION V. KAREEM SHAHIR HAMDIYAH

2023-SC-0206-KB **June 15, 2023**

AND

KENTUCKY BAR ASSOCIATION V. KAREEM SHAHIR HAMDIYAH

2023-SC-0207-KB **June 15, 2023**

AND

KENTUCKY BAR ASSOCIATION V. KAREEM SHAHIR HAMDIYAH

2023-SC-0208-KB **June 15, 2023**

All sitting. All concur.

Kareem Shahir Hamdiyah has failed to answer charges in three separate disciplinary matters before the KBA. The KBA moved the Court to indefinitely suspend him from the practice of law pursuant to SCR 3.167(1). In addition to failing to respond to the KBA charges, Hamdiyah had also been arrested in Laurel County on several criminal offenses including: Trafficking in a Controlled Substance, 1st degree, 1st offense (opiates); Possession of a Controlled Substance,1st degree, 1st offense (methamphetamine); Resisting Arrest; Fleeing or Evading Police, 2nd Degree (on foot); and Tampering with Physical Evidence. The Court indefinitely suspended Hamdiyah for his failure to participate in the disciplinary process.