PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
MARCH 2016

I. CONTRACT LAW:

A. State Farm Mutual Automobile Insurance Company v. Lonnie Dale Riggs
2013-SC-000555-DG **March 17, 2016**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Cunningham, Hughes, JJ., concur. Noble, J., concurs by separate opinion. Keller, J., dissents by separate opinion in which Venters and Wright, JJ., join. Riggs was injured in an automobile accident and sued the adverse driver for negligence. He settled the claim for the driver's automobile-liability-insurance policy limits. Before dismissing the suit, Riggs asserted a claim against his own automobile liability insurer, State Farm, for underinsured motorist benefits (UIM). Riggs filed his UIM claim three years to the day after the date of the automobile accident. State Farm denied UIM liability because Riggs's insurance policy contained a limitation provision that gave Riggs two years from the date of the accident or date of the last basic reparation benefit (BRB) payment, whichever occurred later, within which to make a UIM claim.

The trial court granted summary judgment for State Farm but the Court of Appeals reversed, holding that the State Farm policy provision limiting the time for making the UIM claim was void because it was unreasonable. The Supreme Court reversed the Court of Appeals and reinstated the judgment of the trial court, holding that State Farm's limitation provision was reasonable. The Court noted that the provision tracked nearly verbatim the two-year statute of limitations for tort claims found in Kentucky's Motor Vehicle Reparations Act (KMVRA) and that two years was not an unreasonable period of time for an insured to discover whether a tortfeasor is underinsured or uninsured.

II. CRIMINAL LAW:

A. Ronald Lynn Craft v. Commonwealth of Kentucky
2014-SC-000386-MR **March 17, 2016**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Craft filed a matter-of-right appeal, contending that the statute authorizing prosecutorial peremptory strikes for potential jurors is unconstitutional and that he was entitled to a directed verdict on his intentional homicide charge. The Court reaffirmed that Section 116 of the Kentucky Constitution declares that the Supreme Court is the final arbiter of court rules and procedure within the Commonwealth. But because Craft failed to notice the Attorney General that he was challenging the constitutionality of a statute, KRS 418.075 comprehensively precluded review of his claim. And he was not entitled to a directed verdict for intentional homicide

because a reasonable jury could conclude his actions intended on causing death or exhibited conduct that created a grave risk under circumstances manifesting extreme indifference to human life. A person's state of mind may be inferred from his actions preceding and following the offense, so the fact that no one actually saw Craft kill the victim does not preclude a reasonable conviction for intentional homicide.

B. Dallis Abney v. Commonwealth of Kentucky
2014-SC-000445-DG **March 17, 2016**

Opinion of the Court by Justice Noble. All sitting; all concur. A warrant to search the Appellant's home, by which police discovered evidence of drug-related crimes, was issued based on a police affidavit recounting observations made by the Appellant's son of drug activity by the Appellant at his home. The affidavit did not state the date and time when the drug activity was observed, which Abney claimed rendered the search warrant invalid, citing the rule in *Henson v. Commonwealth*, 347 S.W.2d 546 (Ky. 1961), that a search-warrant "affidavit is defective unless it discloses the time at which the observation was made … if the affidavit shows on its face that it is based on information or belief," *id*. at 546. After the trial court denied his motion to suppress, Abney entered into a conditional guilty plea, and he appealed the suppression decision to the Court of Appeals, which affirmed. The Supreme Court granted discretionary review to address whether the rule in Henson remained viable, or whether it had been replaced by the totality-of-the-circumstances test of *Illinois v. Gates*, 462 U.S. 213 (1983), and *Beemer v. Commonwealth*, 665 S.W.2d 912 (Ky. 1984). The Court held that Henson's bright-line rule no longer controlled and that the validity of a search-warrant affidavit and the resulting warrant is instead determined under the totality of the circumstances. The Court agreed with the trial court and Court of Appeals that, under that test, the affidavit here was sufficient to support the issuance of the warrant.

C. Jason Dickerson v. Commonwealth of Kentucky
2014-SC-000507-MR **March 17, 2016**

Opinion of the Court by Justice Noble. Minton, C.J.; Cunningham, Hughes, Keller and Venters, JJ., concur. Wright, J., not sitting. The Appellant, Jason Dickerson, was convicted of murder and four counts of first-degree criminal abuse, and was sentenced to life in prison. The charges stemmed from his physical abuse of his sister-in-law's young children who had been placed in his and his wife's temporary custody due to their mother's inability to properly care for them; the two-year-old boy died as a result of severe internal injuries from the abuse. In his matter-of-right appeal, the Supreme Court affirmed his convictions and sentence, holding that (1) other-bad-acts evidence of Dickerson's abuse of his wife was admissible to show that she feared him to explain why she had never reported the child abuse and had initially made statements to police attempting to exculpate her husband which contradicted the testimony she gave at trial inculpating him; (2) detective's testimony, that none of the witnesses he

interviewed provided any evidence suggesting there was any truth to Dickerson's story about how the two-year-old sustained his fatal injuries, was inadmissible testimonial hearsay that violated his Sixth Amendment confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004), to the extent it related to out-of-court statements of witnesses who were unavailable at trial and had not been subject to cross-examination—but that constitutional error was harmless beyond a reasonable doubt, where evidence of Dickerson's guilt was overwhelming, the unconstitutional testimony was brief and isolated, some of the witnesses interviewed by the detective testified at trial and fleshed out the basis of the detective's hearsay testimony, and defense counsel at closing argument conceded that the story had been made-up; and (3) any prosecutorial misconduct did not undermine the essential fundamental fairness of the trial and thus did not require reversal.

D. Christopher Gribbins v. Commonwealth of Kentucky
2014-SC-000524-MR March 17, 2016

Opinion of the Court by Justice Hughes. All sitting; all concur. Gribbins was convicted of wanton murder and sentenced to 20 years' imprisonment. On appeal, Gribbins argued that the jury instructions inaccurately presented the law of self-protection and that the combination instruction for intentional and wanton murder resulted in a non-unanimous verdict. However, in affirming his conviction and sentence, the Supreme Court held that the instructions properly instructed the jury on the law of self-protection. Further, the Supreme Court determined that the combination instruction did not deprive Gribbins of a unanimous verdict.

E. Stephen Bartley v. Commonwealth of Kentucky
2015-SC-000105-MR March 17, 2016

Opinion of the Court by Justice Keller. All sitting; all concur. Bartley was convicted of two counts of first-degree sodomy and two counts of first-degree sexual abuse involving his minor daughter. On appeal, Bartley argued that: the indictment was faulty because it did not provide any specifics regarding the charged counts; the trial court erred by permitting the Commonwealth to amend the indictment at the end of proof; the trial court erred by denying his motion for a mistrial when the victim testified about other uncharged acts; and the trial court erred by permitting "habit" testimony. The Supreme Court affirmed. In doing so, the Court noted that Bartley had been provided several copies of the victim's recorded statement to police and that the Commonwealth had supplemented those recordings with a more detailed statement of the charges in correspondence several weeks before trial. That information was sufficient to apprise Bartley of the nature of the charges and to prevent later indictment for the same acts, thus meeting the requirement necessary to support an indictment. As to the amendment of the indictment, the Court noted that amendment of an indictment is permissible at any point before the matter is submitted to the jury. Furthermore, the Court noted that Bartley had failed to specify how he was harmed by the

amendment. As to the victim's testimony about uncharged acts, she made two statements about uncharged sexual acts – one on direct examination and one on cross-examination – and one statement about physical abuse. Bartley did not object to the statement about uncharged sexual abuse on direct examination, and the Court found that any error was not palpable. Bartley did object to the statement about uncharged sexual abuse on direct examination; however, the Court found any error was harmless because the jury had already heard the testimony on direct examination, the testimony was spontaneous, and it was limited because the Commonwealth admonished the victim to refrain from making any additional such statements, which she did. As to the statements about physical abuse, the Court held that this testimony was permissible to explain why the victim had waited years to reveal Bartley's abuse and to rebut his argument that the victim could not be believed because of that delay. Finally, the Court noted that testimony by the victim's foster father that she acted more nervous than other foster children he had cared for was not the equivalent of impermissible Child Sexual Abuse Accommodation Syndrome evidence. The foster father, who was not a physician, therapist, or counselor, did not testify that the victim's behavior was typical of sexually abused children; he did not compare the victim to sexually abused children; and there was ample other evidence – a lengthy and acrimonious custody battle between Bartley and his ex-wife – from which the jury could have concluded that any increased anxiety was related to that battle and not to any sexual abuse.

F. Curtis Howard v. Commonwealth of Kentucky
2015-SC-000359-MR **March 17, 2016**

Opinion of the Court by Justice Keller. All sitting; all concur. Curtis Howard entered a conditional guilty plea to three counts of incest and other charges and was sentenced to 20 years' imprisonment. On a matter of right appeal to the Supreme Court, Howard argued that Kentucky's incest statute did not criminalize consensual sexual intercourse between a stepparent and an adult stepdaughter, who are not related by blood. The Court disagreed and held that Kentucky Revised Statute (KRS) 530.020 criminalizes sexual intercourse between a stepparent and a stepchild, regardless of age and consent. In so doing, the Court reasoned that the definition of the word "child" is not limited to a minor, rather, the term applies to an offspring of a parent at any age. Thus, in the context of KRS 530.020(1), "stepchild" refers to the son or daughter of one's spouse by a former partner of the spouse, regardless of age. Furthermore, the Court considered subsection (2)(a) of the incest statute, which explicitly characterizes incest between consenting adults as a Class C felony, as evidence that the General Assembly intended to prohibit sexual intercourse between a stepparent and an adult stepchild. Finally, the Court found that its interpretation of the incest statute was supported by the reasoning of two Court of Appeals decisions: *Dennis v. Commonwealth*, 156 S.W.3d 759, 762 (Ky. Ct. App. 2004), in which the Court concluded that KRS 530.020 prohibits sexual intercourse between a stepparent and stepchild, and *Raines v. Commonwealth*, 379 S.W.3d 152 (Ky. Ct. App. 2012), where, on nearly identical facts, the Court found that age is not an element

of the crime of incest, and thus the statute prohibits consensual sexual intercourse between a stepparent and an adult stepchild. Therefore, the Court affirmed the trial court's judgment.

G. Anthony Maloney v. Commonwealth of Kentucky
2014-SC-000339-DG **March 17, 2016**

Opinion of the Court by Justice Venters. All sitting; all concur. Criminal Appeal, Discretionary Review Granted. Questions presented: Whether the Appellant's arrest under KRS 222.202(1) for the misdemeanor offense of alcohol intoxication and the subsequent search incident to his arrest were valid. Held: Appellant's conduct in the officer's presence which consisted of lying "passed out" or "asleep" on his front porch, did not manifest a state of intoxication "to the degree that he may endanger himself or other persons or property, or unreasonably annoy persons in his vicinity," and thus did not constitute the crime of alcohol intoxication under KRS 222.202(1). Consequently, the officer acting without a warrant did not have the authority to arrest Appellant. The search incident to the arrest was not valid.

H. Thomas J. Davis v. Commonwealth of Kentucky
2014-SC-000405-MR **March 17, 2016**

Opinion of the Court by Justice Venters. All sitting; all concur. Criminal Appeal, Discretionary Review Granted. Questions presented: Whether evidence discovered as the result of a sniff search by a narcotics-detection dog minutes after the completion of a routine traffic stop should have been suppressed. After entering a conditional guilty plea to charges of first-degree trafficking in a controlled substance, first-degree possession of drug paraphernalia, and being a first-degree persistent felony offender, Appellant challenged on appeal the trial court's refusal to suppress evidence obtained following a sniff search by a narcotics-detection dog. The search was conducted after officers had completed the original purpose of a routine traffic stop for suspected DUI/reckless driving, but briefly extended the stop so as to enable the sniff search. Held: Following *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), the Kentucky Supreme Court held that police may not even for a de minimus amount of time, prolong a traffic stop beyond its original purpose for the sole purpose of conducting a sniff search. The Court held that without additional articulable suspicion to authorize the extended detention to search for drugs, the arresting officer prolonged the seizure and conducted the search in violation of Appellant's Fourth Amendment protections, and thus the trial court erred by failing to suppress the evidence. The Court further held that the inevitable discovery doctrine did not cure the Fourth Amendment violation because, in light of Appellant's passing the field sobriety tests, his arrest and a subsequent search of his car and his person were not inevitable.

I. Commonwealth of Kentucky v. Christopher J. McGorman, Jr.
AND
Christopher J. McGorman, Jr. v. Commonwealth of Kentucky
2013-SC-000149-DG March 17, 2016
2013-SC-000818-DG March 17, 2016

Opinion of the Court by Justice Hughes. Minton, C.J.; Cunningham, Venters, and Wright, JJ., concur. Noble, J., concurring in part and dissenting in part by separate opinion. Keller, J., not sitting. In 2001, McGorman was found guilty of murder, first-degree burglary, and defacing a firearm. For those offenses he was sentenced to life in prison. Subsequently, McGorman brought an RCr 11.42 action alleging ineffective assistance of counsel. After the circuit court denied McGorman's request for relief, the Court of Appeals reversed finding that McGorman had been denied effective assistance of counsel. In particular, the Court of Appeals concluded that it was error for counsel to permit McGorman to be interviewed by police and confess before counsel had him evaluated by a mental health professional or had spoken to a prosecutor about the effect of the statement. The Supreme Court granted discretionary review of the case and determined that the strategy employed by McGorman's counsel was reasonable. However, the case was remanded to the circuit court for an evidentiary hearing to explore the alleged offer by the Commonwealth of a twenty-year plea agreement.

J. Jeffrey Sasser v. Commonwealth of Kentucky
2013-SC-000697-MR March 17, 2016

Memorandum Opinion of the Court. All sitting. Cunningham, Hughes, Noble, Venters and Wright, JJ, concur. Wright, J., concurs with separate opinion in which Noble, J., joins. Minton, C.J., concurs in part and dissents in part by separate opinion in which Keller, J., joins. Criminal Direct Appeal. Questions presented: Whether the trial court erred by (1) not granting directed verdicts on the (a) first-degree robbery and (b) first-degree burglary charges; (2) admitting improper character evidence; and (3) not providing a third-degree terroristic threatening instruction as a lesser-included offense of the first-degree robbery charge. Held: 1a) Sasser was not entitled to a directed verdict on the first-degree robbery charge arising from his conduct at the Duke residence. It was reasonable for a jury to find his admitted intent to commit theft combined with the threat of deadly force amounted to an attempted theft. 1b) Sasser was entitled to a directed verdict on the first-degree burglary charge arising from his conduct at the Frye residence. Although evidence showed that Sasser had a gun sometime after the completion of the burglary, there was no evidence to show that he was armed while "in the immediate flight" from the residence. 2) Improper character evidence was not introduced against Sasser in violation of KRE 404(b). The detective's testimony that Sasser stated that he intentionally left his firearm outside the Frye residence to avoid a first-degree burglary charge was evidence of purposeful conduct, not evidence of Sasser's prior bad acts. 3) Sasser was not entitled to an instruction for third-degree terroristic threatening. Third-degree

terroristic threatening is not a lesser-included offense of the first-degree robbery charge, it is instead a lesser, uncharged offense.

III. EMPLOYMENT LAW:

A. Asbury University v. Deborah Powell, et al.

2014-SC-000095-DG **March 17, 2016**

Opinion of the Court by Justice Noble. All sitting; all concur. The Appellee, Deborah Powell, was formerly employed by the Appellant, Asbury University, as head women's basketball coach. Her employment was terminated, which Asbury claimed was required after some of her players reported observing her conduct with a female assistant coach that they perceived to be of an intimate or romantic nature; Powell denied the allegations. Separately, there was evidence that Powell had repeatedly complained about what she perceived as gender-based discrimination in the treatment of her and the women's basketball team, including submitting a written complaint to the university several years before she was terminated and, over the intervening years, informally raising ongoing concerns about sex discrimination with her supervisors. After her termination, she brought suit against Asbury under the Kentucky Civil Rights Act, claiming both gender discrimination under KRS 344.040 and retaliation under KRS 344.280(1). Following a four-day trial, the jury found that Asbury had not discriminated against Powell on the basis of her sex but had unlawfully retaliated against her because of her complaining about alleged discrimination, which is protected under the Act; the jury awarded damages both for lost wages and for humiliation, embarrassment, and emotional distress. Asbury appealed to the Court of Appeals, which affirmed.

The Supreme Court granted discretionary review and affirmed, holding that (1) an employee's complaints need only be based on a reasonable, good-faith belief that the challenged employment practice violated the KCRA, rather than an actual underlying violation, to sustain a retaliation claim under KRS 344.280; (2) but-for causation is the required standard for proving an employer unlawfully retaliated against an employee for engaging in protected activity under the KCRA; (3) jury instructions should direct the jury to find only whether the employee's engaging in protected activity was a but-for cause of the adverse employment action; (4) the jury made the required but-for causation finding under the trial court's instructions here, and the inclusion of the surplusage "substantial and motivating factor" language was not prejudicial to Asbury; (5) there was sufficient evidence to find unlawful retaliation; (6) Asbury was not entitled to an employment-at-will instruction; (7) the jury's damages award was neither a "quotient verdict" nor the result of improper passion or prejudice; and (8) the award of attorney fees and costs was reasonable.

B. The Board of Regents of Northern Kentucky University v. Andrea Weckgenannt
2013-SC-000820-DG **March 17, 2016**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Weickgenannt was an Associate Accounting Professor at NKU on tenure track. NKU ultimately denied her tenure, citing inadequate scholarship. Weickgenannt sued, alleging gender discrimination. The trial court granted summary judgment in NKU's favor, but the Court of Appeals reversed its ruling.

This Court reversed and affirmed the trial court's summary judgment because Weickgenannt failed to state a prima facie claim for gender discrimination. Specifically, she failed to offer proof of a similarly-situated male candidate of similar credentials, reviewed by substantially the same reviewers, around the same period she sought promotion. Contrary to the Court of Appeals' decision, this proof is required at the prima facie stage to trigger the burden-shifting analysis of a fully-pleaded gender discrimination claim.

IV. JUVENILE LAW:

A. B.H., a Child Under Eighteen v. Commonwealth of Kentucky
2013-SC-000254-DG **March 17, 2016**

Opinion of the Court by Justice Noble. All sitting. All concur. Cunningham, J., also concurs by separate opinion in which Minton, C.J., and Venters, J., join. The juvenile Appellant was charged with public offenses based on his sexual conduct with his also-underage girlfriend, who was not charged. He entered an unconditional admission, and the district court disposed of his case by entering an adjudication finding that he committed the charged conduct. He then appealed to the circuit court, which affirmed, and the Court of Appeals denied his motion for discretionary review. The Supreme Court granted discretionary review, and held that the circuit court should have dismissed the appeal, without considering the merits of the substantive issues raised, because the Appellant entered an unconditional admission to the charged offenses and thereby waived the right to appeal.

V. TORTS:

A. Sheila Patton, as Administratrix of the Estate of Stephen Lawrence Patton v. David Bickford, et al.
2013-SC-000560-DG **March 17, 2016**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Hughes, Keller, Noble, Venters, and Wright, JJ., concur. Cunningham, J., concurs in result only. Stephen Patton was an eighth-grader at Allen Central Middle School (ACMS) when he committed suicide, allegedly because he was bullied at school. His estate filed suit against various teachers and administrators claiming they

knew, or should have known, that Stephen was being bullied. The trial court granted summary judgment in favor of the defendants, ruling that they were entitled to the protection of qualified official immunity and that Patton's suicide was an intervening cause interrupting any potential liability by the teachers and administrators.

The Court of Appeals upheld the summary judgment solely on the intervening-cause issue. But the Court of Appeals disagreed with the trial court's ruling on qualified official immunity, holding that neither the administrators nor the teachers were immune from liability because their duties were ministerial in nature.

The Supreme Court affirmed the Court of Appeals' result on different grounds. The Court agreed that the trial court erred when it ruled that the teachers were cloaked with qualified immunity but disagreed with the Court of Appeals regarding the administrators, holding that they were protected by qualified immunity and entitled to summary judgment on those grounds. Despite finding that the teachers were not immune from suit, the Court ultimately concluded that the trial court did not err by granting summary judgment because the Estate presented no credible evidence that Patton was bullied because the teachers were negligent either in their duty to supervise their pupils or their duty to handle bullying reports appropriately. As a result, the Court found no reason to address the issue of whether Patton's act of suicide was an intervening cause.

VI. WORKERS' COMPENSATION:

A. Michelle Rahla v. Medical Center at Bowling Green, et al.

2014-SC-000236-WC **March 17, 2016**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Rahla sought workers' compensation benefits from injuries she allegedly sustained during the course of a pre-employment medical screening. As condition precedent to finalizing her employment with the Medical Center, Rahla submitted to a physical examination where she was asked to lift small to moderate amounts of weight. She experienced neck pain after the evaluation, and missed a considerable amount of work receiving treatment. Ultimately, the Medical Center terminated her employment.

The Court held that her claim could not proceed because she was not considered "employed" under the statutory scheme at the time of the injury. The workers' compensation statute and Kentucky precedent unambiguously define "employed" for purposes of coverage under the statute. Because Rahla did not materially contribute to the Medical Center's business at the time of the examination and she could not reasonably expect compensation for undergoing the examination, she cannot be considered "employed" by the Medical Center at the time of her injury.

VII. WRITS:

A. James L. Sneed, Jr. v. Honorable Rodney Burress, Judge, Bullitt Circuit Court, et al.

2015-SC-000169-MR March 17, 2016

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J.; Hughes, Keller, and Wright, JJ., concur. Hughes, J., concurs with separate opinion in which Minton, C.J., joins. Venters, J., dissents by separate opinion in which Noble, J., joins. In 2014, Appellant, James L. Sneed, Jr., was tried for first-degree rape, first-degree sodomy, and first-degree incest. During her opening statement, Sneed's attorney commented that the victim's father—a scheduled witness for the Commonwealth—used untruthfulness as a mechanism for revenge. The Commonwealth objected and moved for a mistrial on the basis that defense counsel had characterized the witness as a liar. The court denied the mistrial motion and admonished the jury. Despite the court's admonition, defense counsel continued, stating that the victim had trouble with lying and that this information was based on notes from the victim's therapist. The Commonwealth again requested a mistrial, which the court granted. Sneed filed a writ of prohibition with the Court of Appeals requesting an order prohibiting the trial court from retrying him. The Court of Appeals denied the writ and Sneed appealed to the Supreme Court of Kentucky. The Court held that defense counsel's statements concerning the victim's history of lying were based on evidence that was inadmissible, highly prejudicial, and in direct contradiction to the court's previous admonition not to characterize any witness as a liar. Therefore, the Supreme Court affirmed the Court of Appeals' denial of the writ of prohibition and remanded this case to the trial court for retrial.

B. Michael A. Dunn v. Honorable Beth Lewis Maze, Judge, Montgomery County Court, et al.

2015-SC-000437-MR March 17, 2016

Opinion of the Court by Justice Noble. Minton, C.J.; Hughes, Venters, and Wright, JJ., concur. Keller, J., concurs in result only. Cunningham, J., not sitting. The Appellant was previously prosecuted for seven identically worded counts of first-degree sodomy. He was acquitted on two of the counts and convicted on the other five. His convictions were later vacated, and a new trial was ordered. On remand to the trial court, Dunn claimed double jeopardy barred re-prosecution on any of the charges. The trial court denied that claim, and the Court of Appeals declined to grant a writ of prohibition barring the impending retrial. On appeal of that denial, the Supreme Court held that a new trial on the vacated counts raises a substantial risk that he will be tried for crimes for which he has already been acquitted, thereby violating his double-jeopardy rights. For that reason, the Court reversed the order of the Court of Appeals denying Dunn's petition for a writ of prohibition barring retrial on the vacated counts.

C. Norton Hospitals, Inc., D/B/A Norton Hospitals v. Honorable Barry L. Willett, Judge, Jefferson Circuit Court, Division 1, et al.
2015-SC-000606-MR **March 17, 2016**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. During the course of routine discovery in a medical negligence action, the plaintiff requested production from Norton of various hospital documents relating to patient safety. Norton argued the documents were protected under federal law but the trial court granted the plaintiff's motion to compel Norton to produce the documents. The trial court then conducted an in-camera review of the documents and determined they were not privileged. Norton filed a petition for a writ of prohibition and a request for emergency relief in the Court of Appeals. The plaintiff then sought and received an emergency hearing with the trial court before the emergency hearing before the Court of Appeals could be scheduled. After hearing arguments, the trial court ruled that the disputed documents should be provided to the Estate and handed the copies of the disputed documents Norton had submitted for in-camera review directly to counsel for the plaintiff, in open court and on the record. The Court of Appeals later dismissed Norton's writ petition as moot and Norton sought discretionary review before the Supreme Court.

Noting that it had never dealt with similar conduct by a trial court, the Supreme Court held that the responsibility to produce documents lies with the parties and the parties alone. A trial court cannot itself participate in discovery and produce documents that a party alleges are privileged, especially in the face of a writ challenging the trial court's determination that they are not privileged. The Court further held that Norton's writ was not moot because relief could still be afforded, even if the disputed documents had been provided to the plaintiff.

VIII. ATTORNEY DISCIPLINE:

A. Eric Charles Deters v. Kentucky Bar Association
2015-SC-000719-KB **March 17, 2016**

Opinion and Order of the Court. All sitting; all concur. Deters moved the Supreme Court to impose a 60 day suspension from the practice of law. Deters sought a negotiated sanction with the KBA, in response to a former client filing a bar complaint and the inquiry commission issuing a four-count disciplinary charge against him. In addition to the 60 day suspension, Deters agreed to refund $1,000 to a former client. After reviewing the facts of the case and relevant case law, the Supreme Court found that the proposed discipline was appropriate.

B. Justin Neal O'Malley v. Kentucky Bar Association
2016-SC-000084-KB **March 17, 2016**

Opinion and Order of the Court. All sitting; all concur. O'Malley was charged with violating SCR 3.130(1.3) for failing to represent his client with reasonable diligence and promptness; SCR 3.130(1.4)(a)(3) for failing to keep his client

reasonably informed about the status of her case; SCR 3.130(3.2) for failing to expedite his client's litigation consistent with her best interests; and SCR 3.130(8.4)(c) for being dishonest with his client by misrepresenting the actual status of her case. O'Malley admitted that he committed all four violations and, pursuant to a negotiated sanction with the KBA, asked the Court to suspend him for the practice of law for thirty days, with the condition that he attend the KBA's Ethics and Professional Enhancement Program (EPEP). Upon considering prior sanctions in comparable cases and considering the mitigating factors presented by O'Malley, the Court agreed that the proposed negotiated sanction was appropriate. Accordingly, O'Malley was suspended from the practice of law for thirty days and ordered to attend EPEP.

C. Kentucky Bar Association v. Edmund V. Smith
2015-SC-000600-KB **March 17, 2016**

Opinion and Order of the Court. All sitting; all concur. Upon the motion of the Kentucky Bar Association, the Supreme Court issued an ordering directing Smith to show cause why he should not be subject to reciprocal discipline after being publicly reprimanded by the Supreme Court of Tennessee. The KBA also requested that, if cause was lacking, that the Court enter an order in accordance with SCR 3.435(4) publicly reprimanding Respondent and requiring the repayment of an unearned fee to a client involved in the Tennessee proceedings. Smith did not respond to the show cause order. Accordingly, the Court granted the KBA's motion and ordered the recommended disciplinary sanction.