

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
MARCH 2018**

I. CONTRACT:

**A. Vanhook Enterprises, Inc. v. Kay & Kay Contracting, LLC
2016-SC-000666-DG March 22, 2016**

Opinion of the Court by Justice Cunningham. All sitting. Hughes, Keller, Venters, and Wright, JJ., concur. Minton, C.J., concurs by separate opinion in which VanMeter, J., joins. This case involved a contract dispute between Vanhook Enterprises, Inc. and Kay & Kay Contracting, LLC. The parties had subcontracted for Kay & Kay to provide services for a portion of Vanhook's HUBZone contract with the U.S. Army Corps of Engineers to build the Bridge Street Bridge in Cumberland, Kentucky. Kay & Kay's suit claimed that it had performed services outside of the scope of the Subcontract Agreement and was therefore entitled to 76% of the HUBZone contract price for services rendered, rather than \$459,790.04 under the Subcontract Agreement. The trial court found that the Subcontract Agreement was a wholly integrated contract on the dealings between the parties on the subject matter of bridge construction. Particular emphasis was placed on the clause stating that the price of the Subcontract Agreement included "any other ancillary items required to provide a complete bridge structure." Kay & Kay appealed. The Court of Appeals of Kentucky reversed the trial court's ruling. The Supreme Court of Kentucky granted discretionary review and reversed the Court of Appeals. The Court held that the Subcontract Agreement was a fully integrated agreement between the parties as to bridge construction. Because the Subcontract Agreement was a fully integrated agreement, Kay & Kay was not entitled to contractual or equitable relief for its labor and other costs incurred to complete the bridge.

II. CRIMINAL LAW:

**A. Deveron Shively v. Commonwealth of Kentucky
2016-SC-000256-MR March 22, 2018**

Opinion of the Court by Justice Wright. All sitting; all concur. Appellant, Deveron Shively, was convicted by a Jefferson Circuit Court jury of criminal attempt to commit murder, possession of a handgun by a convicted felon, and tampering with physical evidence, for shooting an acquaintance in an apparent attempt to acquire money and drugs. He was sentenced to twenty years' imprisonment and appealed to the Supreme Court as a matter of right. Ky. Const. § 110(2)(b). He asserted four claims of error in his appeal: (1) the trial court erred in denying his motion to suppress his statement to police, as that statement was coerced; (2) the trial court erred in refusing to allow certain cross-examination of the victim in order to show bias; (3) the trial court erred in

denying Appellant's motion for a mistrial; and (4) the jury instructions on the possession of a handgun by a convicted felon charge deprived Appellant of his right to a unanimous verdict.

Appellant's first argument involves a statement he made to police. He argued that an initial conversation with a police officer (which he requested and did not amount to an interrogation) coerced him into giving a subsequent statement to another officer. The trial court denied the suppression motion and the Supreme Court held the trial court did not abuse its discretion in doing so.

Next, Appellant argued at trial he should be allowed to introduce evidence that, at the time of her testimony, his victim had three pending misdemeanor charges and was on probation. Appellant insisted this would show that she was biased toward and sought to please the Commonwealth. The Court held the trial court did not abuse its discretion, because the testimony was from the shooting victim herself and her statements to police were made before any of the pending misdemeanor charges against her were brought. Further, the victim's counsel in her pending cases assured the trial court that he had no knowledge of any deal between the Commonwealth and his client regarding her testimony in Appellant's trial. Lastly, the pending charges were all misdemeanors—and, therefore, would not be prosecuted by the Commonwealth's Attorney's office, which prosecuted Appellant's case.

Appellant also argued that a detective's testimony during trial amounted to an assertion that Appellant was lying during his interrogation and that the trial court erred in denying his motion for mistrial. However, the Court noted the extreme nature of a mistrial and that whether to grant such a remedy is within the sound discretion of the trial court. In affirming the trial court's denial, the Court pointed out the officer's comments were made in the context of explaining her investigatory techniques and why she shifted her questioning of Appellant from one subject to another during the interview. She made no comment on her opinion as to Appellant's guilt or innocence during the course of her testimony.

Finally, Appellant argued the jury instructions on possession of a handgun by a convicted felon violated his right to a unanimous verdict, as the jury did not indicate on which of his prior felony convictions it based its verdict. The Court noted that after making the determination that Appellant had possessed the handgun, the jury was merely asked to determine his status as a convicted felon. The fact that he had more than one felony conviction does not create a unanimity problem. The jury merely had to determine his status as a convicted felon and it was immaterial on which of his prior felony convictions it based this status determination.

B. Commonwealth of Kentucky v. John E. Smith, Jr.
[2016-SC-000558-DG](#) March 22, 2018

Opinion of the Court by Justice Venters. All sitting; all concur. Cunningham, J., also concurs by separate opinion in which Keller and Venters, JJ., join. Criminal Appeal, Discretionary Review Granted. A police officer pulled Appellee over for a traffic stop and conducted a canine sniff search of the vehicle. Cocaine was found. The trial court granted Appellee's suppression motion. Questions Presented: Whether the Court of Appeals erred by concluding (1) the dog sniff search unlawfully prolonged the stop; (2) aside from the traffic violation, a reasonable, articulable suspicion of criminal activity did not exist to justify the stop; and (3) the Commonwealth's claim that Appellee's status as parolee was sufficient to subject him to a warrantless and suspicionless search and seizure was not reviewable. Held: (1) Instead of diligently pursuing the purpose of the traffic stop, citing Appellee for making an improper turn, the officer immediately asked Appellee about drugs and launched the dog's sniff search. The search, conducted before the purpose of the stop was addressed, prolonged the stop beyond the time reasonably required to complete the stop's mission. (2) Although a police officer may rely on the collective knowledge doctrine when initiating an investigative stop, knowledge that Appellee's criminal history included trafficking charges and that confidential informants reported Appellee selling cocaine at a local bar did not create a reasonable belief that Appellee had cocaine in his car when he was stopped. (3) Although Appellee's parole status was part of the evidentiary record before the trial court, the Commonwealth did not argue that his status as a parolee made him subject to a warrantless and suspicionless search and seizure. An appellate court may decide only those issues which were fully presented to the trial court.

C. Carlis Hall v. Commonwealth of Kentucky
[2016-SC-000660-MR](#) March 22, 2018

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Hughes, Venters, and VanMeter, JJ., join. Wright, J., concurs in part and dissents in part by separate opinion in which Cunningham and Keller, JJ., join. The Court in this case provided a thorough interpretation of KRS 514.030(1)(a) and 514.010(1), specifically, what constitutes a defendant's intent to deprive to justify a theft by unlawful taking conviction. Finding that the factual circumstances in this case did not warrant a theft by unlawful taking conviction, the Court reversed the jury's conviction on this charge. The Court also reversed the jury's resisting-arrest conviction, finding that the instruction given by the trial court violated Kentucky's unanimous jury instruction rule. The Court additionally reversed the trial court's imposition of a \$50 fine on the defendant, as the defendant was found to be indigent. Lastly, the Court affirmed on all other issues: 1) that the trial court properly denied the defendant's motion for directed verdict on the charge of first-degree wanton endangerment; 2) that no prosecutorial misconduct occurred; 3) that the trial court properly considered a probation violation during the sentencing

phase of the defendant's trial; and 4) that the trial court properly imposed court costs, court facilities fees, and a bond on the defendant.

D. Commonwealth of Kentucky v. William Roy Helm, Jr. AND William Roy Helm, Jr. v. Commonwealth of Kentucky

[2016-SC-000370-DG](#)

[2017-SC-000084-DG](#)

March 22, 2018

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Cunningham, Hughes, VanMeter, Venters, and Wright, JJ., concur. Keller, J., concurs in result only. The Court reversed the Court of Appeals' determination that the defendant's trial and appellate counsel provided ineffective assistance. The Court found no deficient representation on the part of either trial or appellate counsel, nor any prejudice suffered by the defendant as a result of either counsel's representation.

E. Commonwealth of Kentucky v. Brian Muchrison

[2016-SC-000378-DG](#)

March 22, 2018

Opinion of the Court by Justice Cunningham. Minton, C.J.; Cunningham, Hughes, Keller, Venters, and Wright, JJ., sitting. Cunningham, Keller, Venters, and Wright, JJ., concur. Minton, C.J.; and Hughes, J., concur in result only. VanMeter, J., not sitting. In 2014, Appellee, Brian Muchrison, was tried and convicted of first-degree trafficking in a controlled substance and of being a first-degree persistent felony offender. He was sentenced to ten years' imprisonment. However, the issue in this case arose prior to trial when Appellee's public defender filed a motion to withdraw. In support, counsel cited a conflict of interest under Supreme Court Rule ("SCR") 3.130(1.7) and an opinion from the Kentucky Bar Association's Ethics Hotline. After a hearing on the motion to withdraw, the trial court denied the motion and ordered Appellee's counsel to continue representing Appellee. In a split decision, the Court of Appeals held, inter alia, that the trial court erred by failing to grant counsel's motion to withdraw. The Supreme Court of Kentucky granted discretionary review. The Court reversed the Court of Appeals and held that when reviewing the totality of the circumstances, it was clear Appellee had failed to demonstrate that his lawyer was burdened by an actual conflict of interest during his representation of Appellee. Accordingly, the Supreme Court reinstated Appellee's conviction and sentence.

F. Michael Donnell Maupin v. Commonwealth of Kentucky

[2016-SC-000448-DG](#)

March 22, 2018

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Keller, Venters and Wright, JJ., concur. Cunningham, J., concurs by separate opinion in which Hughes and VanMeter, JJ., join. In this case, the trial court granted the defendant's motion for a judgment notwithstanding the verdict after finding insufficient evidence to justify the jury's conviction. Noting that a judgment

notwithstanding the verdict essentially functions as a judgment of acquittal, the Court held that the express language of Section 115 of the Kentucky Constitution bars the Commonwealth from appealing such a judgment. The Court also overruled the Kentucky Supreme Court case of Commonwealth v. Brindley, 724 S.W.2d 214 (Ky. 1986), which held that the Commonwealth could appeal a jury's guilty verdict set aside by a ruling of law to a post-verdict motion, recognizing that such a holding directly conflicts with Section 115.

III. PATERNITY:

A. Harry L. Seeger v. Sharon Lanham AND Sharon Lanham v. Harry L. Seeger
[2016-SC-000677-DG](#) **March 22, 2018**
[2016-SC-000146-DG](#)

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter and Venters, JJ., concur. Wright, J., concurs in part and dissents in part by separate opinion. Seeger and Lanham had a child, leading to a paternity action initiated by Lanham. Paternity was established and the parties initiated an action to resolve child support and other issues. During the pendency of the claim, Seeger retired and began receiving Social Security Retirement income; the child also began receiving monthly dependent benefits. The trial court set child support and pre-petition liabilities and determined that the child's dependent benefits *above* current support owed would be credited to the pre-petition liability amount Seeger owed to Lanham. The trial court also found it lacked the ability to award attorneys' fees as Lanham had requested. After a subsequent appeal in the Court of Appeals, both parties cross-appealed separate issues and this Court granted discretionary review.

First, this Court held that paternity actions can be brought by private attorneys. Second, attorneys' fees are not recoverable in paternity actions. Although KRS 403 and 407 provide for recovery of attorneys' fees, there is no similar provision in the statutes governing paternity actions. As the trial court does not have equitable power to award attorneys' fees, there is no statutory avenue for such recovery in paternity actions. Third, a trial court must make equitable findings in order to determine the appropriateness of crediting dependent benefit payments towards pre-petition liabilities, such as in this case. Affirmed in part, reversed in part, and remanded to the trial court for further findings.

IV. QUALIFIED IMMUNITY:

A. Kamryn Baker v. Lynn Fields and Bo Rains
[2017-SC-000144-DG](#) **March 22, 2018**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Hughes, Keller, VanMeter, Venters, and Wright, JJ., concur. Cunningham, J., concurs in part and dissents in part by separate opinion. This case came before the Court of Appeals on an interlocutory appeal of the trial court's determination regarding the

applicability of the qualified official immunity defense. Finding that the Court of Appeals exceeded the scope of its appellate review, the Court held that the scope of appellate review of an interlocutory appeal of the trial court's determination of the application of qualified official immunity is limited to the specific issue of whether the immunity was properly denied and nothing more.

V. **TAX:**

A. **Commonwealth of Kentucky, Finance and Administration Cabinet, et al. v. Interstate Gas Supply, Inc., For the Use and Benefit of Tri-State Healthcare Laundry, Inc.**

[2016-SC-000281-DG](#)

March 22, 2018

Opinion of the Court by Justice Hughes. All sitting; all concur. Opinion of the Court by Justice Hughes. All sitting. All concur. Interstate Gas Supply, acting on behalf of its customer, Tri-State Healthcare Laundry, Inc. sought a use tax refund based on Section 170 of the Ky. Const. which exempts "from taxation... institutions of purely public charity." Tri-State provides laundry services to three charitable hospitals which are federally tax-exempt but Tri-State itself is not designated as a tax exempt institution federally nor does it qualify for a statutory exemption from the Kentucky use tax. Tri-State does receive an exemption from property taxes pursuant to Section 170 and sought to extend that exemption to use taxes on its out-of-state natural gas purchases from Interstate Gas Supply. The Department, Board of Tax Appeals and circuit court concluded that Section 170 applies only to exempt charitable institutions from property taxes but the Court of Appeals, relying on Commonwealth ex rel. *Lockett v. City of Elizabethtown*, 435 S.W.2d 78 (Ky. 1968), held Tri-State was exempt from use tax. Reversing, the Supreme Court examined the language and history of Section 170 and concluded that the section was limited to ad valorem taxes, reaffirming *Children's Psych. Hosp. of N. Ky., Inc. v. Revenue Cabinet*, 989 S.W.2d 583 (Ky. 1999). The two early twentieth-century cases that had expanded the exemption for charitable institutions beyond property taxes were in error as was City of Elizabethtown to the extent it held a use tax was sufficiently like a property tax to satisfy Section 170. A use tax is not a property tax. The Court reinstated the circuit court judgment finding Tri-State was not entitled to a use tax exemption under Section 170.

VI. **WORKERS' COMPENSATION:**

A. **Jeff Miller v. Tema Isenmann, Inc., et al.**

[2016-SC-000449-WC](#)

March 22, 2018

Opinion of the Court by Justice Wright. All sitting; all concur. Appellant, Jeff Miller, worked for Appellee, TEMA Isenmann, Inc., for fifteen years. Miller was diagnosed with and treated for bladder cancer, which he asserts stemmed from exposure to a workplace carcinogen. He sought permanent total disability

benefits based upon his assertion that his bladder cancer amounted to an occupational disease. The administrative law judge (ALJ) awarded the benefits Miller sought. TEMA appealed to the Workers' Compensation Board, which vacated and remanded back to the ALJ. On remand, the ALJ awarded the same benefits and the Board vacated and remanded yet again. On TEMA's third appeal, however, the Board affirmed the ALJ. TEMA appealed the Board's decision to the Court of Appeals, which reversed. Miller appealed that decision to the Supreme Court as a matter of right.

The Court of Appeals based its holding on its interpretation of KRS 342.315, which it held required a university evaluation. Without such an evaluation, it held Miller could not prevail. The Supreme Court reversed, as the commissioner had attempted to obtain a university evaluation, but no evaluators chose to review Miller's case. Therefore, the Court declined to punish Miller for the fact that it was impossible for him to obtain such an evaluation.

VII. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. Philip Martin Kleinsmith 2018-SC-000026-KB March 22, 2018

Opinion and Order of the Court. All sitting; all concur. The Colorado Supreme Court disbarred Kleinsmith in December 2016 for failing to transfer client funds to a third-party title company, resulting in a judgment against his firm. Thereafter, the KBA filed a petition asked the Supreme Court to impose reciprocal discipline under SCR 3.435. The Court ordered Kleinsmith to show cause why reciprocal discipline should not be imposed but he failed to respond to that order. Accordingly, the Court ordered Kleinsmith permanently disbarred from the practice of law in Kentucky.

B. Melanie A.F. Horton v. Kentucky Bar Association 2018-SC-000042-KB March 22, 2018

Opinion and Order of the Court. All sitting; all concur. Horton moved the Supreme Court for an order permanently disbarring her from the practice of law. Her request was based on her acknowledgement of professional misconduct contained in eight separate KBA disciplinary files, including a guilty plea to three charges of theft by deception of more than \$500 but less than \$10,000. The Office of Bar Counsel did not object to Horton's petition, and the Court agreed that Horton's motion to withdraw her membership was appropriate under SCR 3.480(3). Accordingly, the Court ordered Horton permanently disbarred from the practice of law in Kentucky.

C. Inquiry Commission v. David B. Gray

2018-SC-000047-KB

March 22, 2018

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission petitioned the Supreme Court for an order temporarily suspending Gray from the practice of law under SCR 3.165(1). A disciplinary complaint was filed against Gray after a trial judge asked him to submit to a breathalyzer test based on his concerning demeanor and performance during the closing argument of a civil jury trial. Gray agreed and blew a .337 on the breathalyzer. Emergency medical services were called, and Gray was taken to a local hospital by ambulance.

In its petition, the Inquiry Commission asserted there was probable cause and a reasonable basis to believe Gray posed a substantial threat of harm to his clients or the public and that he does not have the physical or mental fitness to continue to practice law. In his response, Gray's counsel acknowledged that he had an alcohol problem and had entered a rehabilitation program to address it.

Gray's counsel also asserted that an agreement had been reached with Bar Counsel to resolve the pending disciplinary charges. But the case had not come before the Court as a negotiated sanction under SCR 3.480(2) and the Inquiry Commission had not indicated its agreement to the terms set forth by Gray. Because the Commission showed probable cause that a substantial harm existed, the Court temporarily suspended Gray from the practice of law in the Commonwealth, pending further orders from the Court.