KENTUCKY SUPREME COURT
MARCH 2022

ADMINISTRATIVE LAW:
Cabinet for Health and Family Services, Department for Medicaid Services, et al. v. Appalachian Hospice Care, Inc.
2021-SC-0082-DG **March 24, 2022**

Opinion of the Court by Justice Nickell. All sitting. All concur. In a Medicaid overpayment dispute, Appalachian Hospice Care, Inc.'s CEO—who was not a licensed attorney—sent a two-sentence letter to the Cabinet requesting an administrative hearing. A hearing officer subsequently informed Appalachian Hospice that Kentucky law required corporations to be represented by counsel before administrative tribunals. Counsel was thereafter retained, and the matter proceeded. Some months later, the Cabinet claimed the CEO's request was improper and constituted the unauthorized practice of law. Thus, in the Cabinet's estimation, jurisdiction had not been properly invoked a dismissal was appropriate. The Secretary of the Cabinet agreed and dismissed the administrative appeal.

On appeal, the Franklin Circuit Court reversed the Secretary finding making a request for an administrative hearing was not equivalent to practicing law, the Cabinet should be estopped from seeking dismissal, and taking judicial notice the Cabinet had never before advanced such a position. The Court of Appeals affirmed.

On discretionary review, the Supreme Court affirmed the Court of Appeals. First, it reviewed and distinguished the authorities relied on by the Cabinet. Next, invoking its inherent power to regulate the practice of law and determine what constitutes unauthorized practice, the Supreme Court concluded simply following the directives contained in the Cabinet's correspondence regarding appeal rights required no special skill or legal knowledge. Further, because the CEO had not given legal advice and no legal rights were then being adjudicated, merely penning a simple request to continue proceedings initially instituted by the Cabinet did not constitute the unauthorized practice of law. Finally, to the extent it suggested a non-lawyer could not invoke a corporate entity's right to an administrative hearing, the Supreme Court specifically overruled KBA Unauthorized Practice of Law Opinion KBA U-64.

CONTEMPT OF COURT:
Gregory Crandell v. Commonwealth of Kentucky
2021-SC-0103-DG **March 24, 2022**

Opinion of the Court by Justice Keller. All sitting. All concur. Gregory Crandell, the Appellant, was held in contempt of court for failure to pay child support. Crandell was in arrears totaling $115,760.20. Because he failed to appear initially in court on this arrearage, he was arrested and incarcerated pending his contempt hearing. While incarcerated, Crandell moved for work release. At his contempt hearing, he was found in contempt and ordered to pay back $251 monthly. If he were to fail in the future to pay this amount each month, then he would be required to spend 20 days in jail. This sanction had no expiration. Crandell appealed the order and its sanction, arguing that the trial court a) could not find him in contempt due to his inability to pay due to

disability, and b) could not require him to spend 20 days in jail each month he failed to fulfill his child support duty.

On appeal, the Supreme Court held that the trial court's finding of contempt was not erroneous because it had substantial evidence regarding Crandell's ability to pay. However, the Court also held that the sanction imposed by the order was improper because it sought to punish future contempt rather than merely present contempt. The Supreme Court therefore vacated the contempt order in part and remanded the matter for further findings and proceedings consistent with its opinion.

CRIMINAL LAW:
Donald M. Lynch v. Commonwealth of Kentucky
2021-SC-0022-MR **March 24, 2022**

Opinion of the Court by Justice Lambert. All sitting. All concur. Appellant was convicted of murder, first-degree rape, abuse of a corpse, tampering with physical evidence, and first-degree trafficking in a controlled substance. The evidence demonstrated that he and the victim drove to remote location and smoked Appellant's methamphetamine together. The Appellant then raped her, beat her to death, and dumped her body in a nearby body of water.

During the trial, Appellant's counsel requested that his waiver of his right to testify be put on record. During the colloquy, Appellant implied that he was waiving his right to testify due to feared retaliation from the motorcycle club where the victim's boyfriend was a member. The Court held that the trial court did not palpably err by failing to inquire further into the basis for his waiver. There is no constitutional violation when a private actor attempts to impede a defendant's right to testify, and trial courts should follow the "no inquiry" rule unless it believes that a defendant's right to testify is being impeded by either the Commonwealth or defense counsel. In addition, the Court held that the trial court did not err by granting the Appellant's motion for directed verdict on the charges of first-degree rape and tampering. There was sufficient evidence for the jury to conclude that the Appellant raped the victim and then murdered her to prevent her from reporting the rape. And, there was evidence that he threw the victim's purse in a river to delay identification of her body.

DISMISSAL OF CLAIMS:
Aaron Jones v. Ray Pinter D/B/A/ Ray Pinter Construction
2021-SC-0138-DG **March 24, 2022**

Opinion of the Court by Chief Justice Minton. All sitting. All concur. Civil appeal. Discretionary review granted. The Court of Appeals affirmed the trial court's dismissal with prejudice under Kentucky Rule of Civil Procedure ("CR") 41.02(1) for noncompliance with the court's orders and for failure to prosecute.

On discretionary review, the Supreme Court reversed the judgment of the Court of Appeals and remanded the action to the Jefferson Circuit Court for further proceedings. The Court held that the trial court abused its discretion by dismissing the action with prejudice under CR 41.02(1). Consideration of a motion to dismiss under CR 41.02(1) requires fact-specific determinations that are left to the sound discretion of the trial court. The Court explained, however, that a trial court's

discretion is not unfettered and that CR 41.02(1) dismissal with prejudice is an extreme remedy.

First, the Court explained that Jones did not violate any court orders to warrant the extreme remedy of dismissal with prejudice. Specifically, it was undisputed that Jones failed to attend the first mediation that was scheduled by the parties. Still, Jones was sanctioned for that misconduct and ultimately attended a rescheduled mediation before the pretrial conference, as ordered by the trial court. Moreover, while Jones failed to attend an independent medical examination ("IME") scheduled by the parties, he was never ordered by the trial court to attend an IME.

Second, the Court concluded that two discrete incidents of pretrial misconduct, occurring close in time and delaying the litigation for a period of months, did not support dismissal with prejudice for want of prosecution. The Court noted, however, that although the record before the Court did not support the extreme sanction of dismissal with prejudice, parties who disregard deadlines or their obligation of good faith participation in the pretrial process do so at their own peril.

MEDICAL NEGLIGENCE:
Charmin Watson, et al. v. Landmark Urology, P.S.C., et al.
2020-SC-0587-DG **March 24, 2022**

Opinion of the Court by Justice VanMeter. All sitting. All concur. The issue presented is whether the Scott Circuit Court erred, as subsequently affirmed by the Court of Appeals, in dismissing Charmin Watson's action alleging Dr. Amberly Kay Windisch failed to obtain Ms. Watson's informed consent prior to surgical placement of a mid-urethral sling to address complaints of stress urinary incontinence. The Supreme Court affirmed, noting that prior to performing a medical procedure, a health care provider is generally required to obtain the patient's informed consent, the requirements of which are set forth in KRS 304.40-320. And, as in any medical malpractice claim, the plaintiff bears the burden of proof. In this case, competing medical evidence was presented as to whether Dr. Windisch's actions and disclosures complied with the applicable standard of care in obtaining Ms. Watson's informed consent, and whether they satisfied the objective standard concerning the information that a reasonable individual must be provided. Because Ms. Watson's medical expert did not render an opinion of the standard of care concerning informed consent, or specifically opine that Dr. Windisch's actions for obtaining consent fell outside the accepted standard of medical practice, the Court held that the trial court properly granted summary judgment in favor of Dr. Windisch on the issue of informed consent. Lastly, the Court addressed Dr. Windisch's argument that Ms. Watson failed to adequately plead failure of informed consent. Considering that the first notice regarding lack of informed consent arose in Dr. Wilson's October 2018 deposition, almost six years following the November 2012 surgery and the filing of the complaint in 2014, Dr. Windisch reasonably believed the medical negligence alleged only regarded the surgical implanting of the urethral sling. The Court held that a general claim of medical malpractice without specific mention of informed consent fails to give adequate notice of the essential nature of the claim. Because identifying which professional standard the doctor is alleged to have violated is essential to a medical malpractice claim, a medical malpractice claim based upon lack of informed consent must be specifically pled since a generalized claim of medical malpractice fails to give

fair notice to the defendant that informed consent will be at issue. The Court encouraged trial courts to allow plaintiffs to freely amend their complaints in appropriate situations, as the information necessary to plead informed consent may not always be available immediately to plaintiffs.

TORTS:
Seiller Waterman, LLC, et al. v. Bardstown Capital Corporation, et al.
2020-SC-0312-DG **March 24, 2022**

Opinion of the Court by Justice Hughes. Minton, C.J.; Conley, Lambert, and VanMeter, concur. Keller, J., concurs in result only. Nickell, J., not sitting. Bardstown Capital Corporation sought to develop Jefferson County residential property into a commercial center. Neighboring homeowners opposed the development, expressing concerns with respect to noise, drainage, and increased automobile traffic. The proposed development was ultimately approved, and the homeowners initiated an appeal of the rezoning ordinance in Jefferson Circuit Court pursuant to Kentucky Revised Statute (KRS) 100.347(3), contesting it on several grounds including the adequacy of notice of the various zoning hearings. After the neighboring homeowners' unsuccessful zoning appeal, Bardstown Capital filed a complaint against them and their attorneys for wrongful use of civil proceedings and abuse of process. In granting the homeowners' motion for summary judgment, the Jefferson Circuit Court determined that the homeowners were entitled to immunity under the *Noerr-Pennington* doctrine, which protects an individual's right to petition the government for grievances. The Court of Appeals agreed the *Noerr-Pennington* doctrine applied but applied the "sham" exception to that doctrine to reverse the trial court, holding that a fact-finder must determine the legitimacy of the homeowners' underlying appeal.

On discretionary review, the Supreme Court reversed the Court of Appeals' holding that summary judgment was improper. The Court held that the *Noerr-Pennington* affords the neighboring homeowners and Seiller Waterman immunity from wrongful use of civil proceedings claims and therefore the doctrine bars Bardstown Capital's claim. Based on the statutory right to appeal zoning decisions and the importance of the First Amendment right to petition, the Court expressly applied the *Noerr-Pennington* doctrine to zoning litigation in the context of appeals pursuant to KRS 100.347. The Court remanded the case to the trial court for reinstatement of summary judgment in favor of the homeowners and their attorneys.

WORKERS' COMPENSATION:
Kindred Healthcare v. Carlye Harper, et al.
2020-SC-0200-WC **March 24, 2022**

Opinion of the Court by Justice Nickell. All sitting. All concur. Harper suffered a work-related lifting injury while employed by Kindred Healthcare. ALJ ultimately determined she had sustained an eight percent whole person impairment, lacked physical capability of returning to work for which she had training and experience at time of injury, and was entitled to an award of permanent partial disability income benefits enhanced by the three multiplier. Though Harper requested vocational evaluation in hearing testimony, ALJ refused to address request due to her failure to specifically list vocational rehabilitation services as a contested issue in benefit review

conference memorandum or at hearing. ALJ's award was not appealed and became final.

Sixteen months later, after unsuccessfully attempting a return to suitable gainful employment and having independently obtained a vocational evaluation, Harper sought to file an application for vocational rehabilitation services and acceleration of income benefits. Because no official template exists for filing motions to reopen seeking vocational rehabilitation services under KRS 342.710, she utilized a form setting forth the four grounds for reopening compensation claims under KRS 342.125, but attached a separate motion setting out her claim for the former under KRS 324.710. CALJ overruled motion to reopen, holding Harper had failed to preserve and contest issue in original proceeding or demonstrate authorization to seek such services post-award under one of the four grounds listed for reopening in KRS 342.125.

Board reversed CALJ's decision, holding KRS 342.710 contemplates independent ground for reopening to seek vocational rehabilitation services separate to four grounds listed in KRS. 342.125. The Court of Appeals agreed, holding KRS 342.710 mandates ALJ inquiry upon finding claimant incapable of performing previous employment and Harper's failure to appeal ALJ's original refusal to address vocational rehabilitation services did not preclude a post-award motion to reopen to seek such services once requirements were established.

Concerning a matter of first impression, Supreme Court held KRS 342.710 separately governs vocational rehabilitation services and authorizes raising of disputes relating to such services at any time by any mechanism, whether during original claim or post-award reopening. Statute provides independent ground for reopening apart from grounds enumerated in KRS 342.125 relating to motions to reopen to end, diminish, or increase compensation. As used in the workers' compensation statute, "compensation" does not encompass vocational rehabilitation services. Upon factual finding claimant incapable of performing previous work, ALJ is statutorily mandated to inquire regarding voluntary evaluation and reasonable provision or rejection of vocational rehabilitation services and may exercise discretion in assessing merits of an award of vocational rehabilitation services. Statutorily mandated administrative procedure need not be preserved by a request or by listing as a contested issue. Harper implicitly raised issue of vocational rehabilitation benefits when she identified "[a]bility to return to work performed at time of injury" as contested issue, and because ALJ refused to address the merits, claim preclusion doctrine was inapplicable.

ATTORNEY DISCIPLINE:
D. Steven Parks v. Kentucky Bar Association
2021-SC-0475-KB **March 24, 2022**

Opinion and Order of the Court. All sitting. Minton, C.J.; Conley, Hughes, Lambert, Nickell, and VanMeter, JJ., concur. Keller, J., concurs in result only. In 2014, Parks was suspended for 30 days. The suspension order required him to reimburse his client a $500 unearned fee. After the end of the suspension period, Parks did not file an affidavit demonstrating that he complied with the terms of his suspension under SCR 3.510(2). Accordingly, he remained suspended.

In January 2020, Parks filed an application for reinstatement. An informal hearing was held before the Character and Fitness Committee but a formal record was not created in accordance with SCR 2.300(3). The Committee also failed to advise the parties they could request a formal hearing. Instead, the Committee transmitted its Findings of Fact, Conclusions of Law, and Recommendation, finding that Parks had met his burden of proof and proved that he possessed the requisite characteristics for readmission. The findings made no mention of whether Mr. Parks had complied with the requirement that he reimburse his client the $500 unearned fee.

The matter proceeded to the KBA Board of Governors. Bar Counsel opposed the reinstatement because of insufficient proof that Parks had complied with the suspension order and for his lack of candor before the Character and Fitness Committee. Parks eventually filed an affidavit from his former client indicating that he had reimbursed her the unearned fee plus interest. But the reimbursement did not occur until September 1, 2021, after the matter was transferred from the Character and Fitness Committee to the Board of Governors. Noting the delay in reimbursement and Parks' false or misleading answers in his application for reinstatement, the Board voted unanimously to recommend denial of Parks' reinstatement application.

In reviewing the record, the Court found "clear issues" with the reinstatement proceedings. Specifically, the Character and Fitness Committee's failure to advise the parties of the opportunity to request a formal hearing raised questions as to the adequacy of the record. Because of this, the Court remanded the matter to the Character and Fitness Committee for a formal hearing under SCR 2.300(4)(a).

Inquiry Commission v. Joe Stewart Wheeler
2021-SC-0488-KB **March 24, 2022**

Opinion and Order of the Court. All sitting. All concur. The Inquiry Commission filed a petition for temporary suspension of Joe Stewart Wheeler. The Commission had been notified of an investigation by the Attorney General's office into Wheeler and his law firm. Evidence from a search warrant revealed several suspicious financial transactions involving the Wheeler & Wheeler Law Firm account and J. Stewart Wheeler, Attorney at Law Escrow Account. That evidence was made available to the Commission and forms the nucleus of its petition. The Commission alleges probable cause exists to believe Joe S. Wheeler is or has been misappropriating client funds and putting them to his own personal use.

The Supreme Court granted the petition for temporary suspension. The Inquiry Commission has shown that probable cause exists to believe Joe S. Wheeler is or has been misappropriating client funds. The Commission identified several transactions involving funds from at least three different clients, totaling hundreds of thousands of dollars allegedly misappropriated. Although Wheeler responded to the Commission's petition and offered plausible explanations for some of the expenses, the Supreme Court is not a fact-finding body in this matter. Moreover, the standard for probable cause is something less than more likely than not thus, the Inquiry Commission has met its burden in its petition. Joe S. Wheeler is temporarily suspended from the practice of law and restricted from any handling of client funds in the above-named accounts pending further orders of the Supreme Court.

Kentucky Bar Association v. Matthew Paul Schultz
2021-SC-0515-KB **March 24, 2022**

Opinion and Order of the Court. Minton, C.J.; Conley, Hughes, Keller, Lambert, and VanMeter, JJ., sitting. All concur. Nickell, J., not sitting. Under SCR 3.165(1)(a) and (b), the Inquiry Commission of the Kentucky Bar Association petitioned the Supreme Court to enter an order temporarily suspending Schultz from the practice of law. In support of its petition, the Commission asserted there was probable cause to believe Schultz had been misappropriating funds of others to his own use or had been otherwise improperly dealing with said funds. The Commission further asserted there was probable cause to believe Schultz's conduct posed a substantial threat of harm to the public.

The Commission's petition arose from Schultz's representation of a client in a criminal matter. As part of his plea, the client agreed to sell his home and apply the funds from the sale to his restitution. After the house sold, the client presented a check to Schultz in the amount of $78,609.21. Schultz was to deliver the check to the Livingston County Circuit Clerk's office. But upon review of the restitution payment a month later, the court discovered that the proceeds of the sale had not been deposited with the Clerk. Schultz subsequently failed to appear for a show cause hearing and a bench warrant was issued. He was eventually charged with Theft by Unlawful Taking or Disposition of more than $10,000 but less than $1,000,000 and Promoting Contraband, First Degree.

As a result of these facts, the Inquiry Commission asked the Supreme Court to issue a show cause as to why Schultz should not be temporarily suspended under SCR 3.165(1)(a) and (b). Schultz did not respond to the show cause. Accordingly, the Court agreed with the Commission and temporarily suspended Schultz from the practice of law.

Kentucky Bar Association v. Thomas Duane Juanso
2021-SC-0517-KB **March 24, 2022**

Opinion and Order of the Court. All sitting. Minton, C.J.; Conley, Hughes, Nickell, and VanMeter, JJ., concur. Keller and Lambert, JJ., dissent and would have accepted the recommendation of the Board of Governors. Following issuance of a notice of review under SCR 3.370(8) and a review of the parties' briefs filed in support of their respective positions, the Supreme Court elected not to adopt the recommendation of the Board of Governors resolving the disciplinary proceedings against Juanso. Rather than imposing on Juanso a 90-day suspension from the practice of law, as recommended by the Board, the Court determined that a 180-day suspension was more fitting. Accordingly, Juanso was suspended for 180 days, with conditions.

Sheila Seadler v. International Brotherhood of Electrical Workers, Local 369
2021-SC-0544-OA **March 24, 2022**

Opinion and Order of the Court. All sitting. All concur. Under Sections 110 and 116 of the Kentucky Constitution and Kentucky Rule of Civil Procedure (CR) 76.36, Seadler moved the Supreme Court for an order prohibiting or delaying the formation of a

collective bargaining unit composed of non-supervisory attorneys employed by the Louisville Metro Public Defender's Office ("Public Defender's Office").

Despite its exclusive authority to govern all matters related to the ethical conduct of members of the Bar under Section 116 of the Kentucky Constitution, the Court concluded that a supervisory writ was inappropriate in this case. SCR 3.530 provides the proper procedural mechanism to place before the Supreme Court a question relating to the interpretation of the Kentucky Rules of Professional Conduct. Because Seadler admitted she made no attempt to request an advisory opinion under SCR 3.530, the Court concluded she failed to demonstrate she was entitled to an extraordinary remedy. Accordingly, her petition for a supervisory writ under Section 110 of the Kentucky Constitution was denied.

Kentucky Bar Association v. Michael Lee Meyer
2022-SC-0035-KB **March 24, 2022**

Opinion and Order of the Court. All sitting. All concur. On October 22, 2021, the Indiana Supreme Court entered an order accepting Meyer's resignation from the Indiana Bar and prohibiting him from seeking reinstatement for five years. Thereafter, the Kentucky Bar Association (KBA) filed a petition asking the Supreme Court to impose reciprocal discipline pursuant to SCR 3.435. The Court ordered Meyer to show cause why reciprocal discipline should not be imposed and he agreed to the imposition of the reciprocal discipline. Accordingly, the Court suspended Meyer from the practice of law for five years, consistent with the order of the Indiana Supreme Court.