PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
MAY 2010

I. CIVIL PROCEDURE

A. Donald E. James v. Thomas L. James

2008-SC-000163-DG **May 20, 2010**

Opinion by Justice Scott; all sitting. After judgment was entered against him in a civil trial, Appellant filed a motion for new trial, or in the alternative a JNOV. For unknown reasons, Appellant never received a copy of the order denying the motion until after the time to file an appeal expired. Appellant filed a notice of appeal and a motion under CR 73.02(1)(d) to extend the time to file an appeal. The trial court granted the extension, but Appellant did not file another notice of appeal. The Court of Appeals dismissed for failure to file a timely notice of appeal. The Supreme Court granted discretionary review. The Appellant argued that his premature notice of appeal should relate forward. The Appellee, on the other hand, argued that the filing of the notice of appeal divested the trial court of jurisdiction to extend the amount of time to file an appeal.

The Supreme Court ruled in favor of the Appellant and remanded to the Court of Appeals for consideration of the merits of the appeal. The Supreme Court held that under CR 73.02(1)(d), the trial court had jurisdiction to consider the request to extend the amount of time to file an appeal, notwithstanding that the notice of appeal was filed prior to the trial court's consideration of the extension. The Court also overruled Rodgers to the extent it requires the trial court to enter a *nunc pro tunc* order to extend the time to appeal under these circumstances. Chief Justice Minton dissented, contending that under Humphrey and other Kentucky precedent, failure to file a timely notice of appeal is fatal to appellate review.

II. CRIMINAL LAW

A. William R. Star v. Commonwealth of Kentucky

2008-SC-000203-MR **May 20, 2010**

Opinion by Justice Cunningham. All sitting; all concur. The Supreme Court affirmed the conviction of a defendant found guilty but mentally ill of two counts of murder, kidnapping and assault. The Court upheld the constitutionality of "guilty but mentally ill" verdicts, rejecting the defendant's argument that such verdicts are "charades" that lead juries to render constitutionally improper "compromise" verdicts. The Court also held that the defendant was denied the right to confront his accused face-to-face due to the layout of the courtroom. The Court determined that

the error in this instance was harmless since the defendant failed to show that his unobstructed observation would have affected the substance and credibility of the witnesses. However, the Court echoed its admonishment from Sparkman, cautioning that "trial judges are courting with danger by tolerating any kind of courtroom arrangement which impedes eye-to-eye contact between the defendant and witnesses."

B. Raymond Harris v. Commonwealth of Kentucky
2008-SC-000363-MR May 20, 2010

Opinion by Justice Abramson. All sitting; all concur. Harris was convicted of murder, complicity to second-degree arson and two counts of complicity to tampering with physical evidence and was sentenced to life without possibility of parole for 25 years. The Supreme Court affirmed the conviction, holding the trial court did not abuse its discretion by refusing to strike potential jurors who expressed "pro death penalty" attitudes. The Court noted that the jurors in question stated numerous times that they would consider the full range of penalties. The Court also held that it was not abuse of discretion to strike for cause three jurors who said that they could not consider the death penalty. The Court held that improper inclusion or exclusion of jurors based on their attitudes towards the death penalty is only an issue where the accused is actually sentenced to death, thus the defendant was not entitled to relief under Witherspoon. The Court also found no abuse of discretion by the trial court in seating a married couple as jurors where there was no showing that either juror lacked independent judgment.

C. James H. Barnett v. Commonwealth of Kentucky
2008-SC-000615-MR May 20, 2010

Opinion by Justice Schroder. All sitting; all concur. The Supreme Court affirmed conviction of defendant found guilty of killing a police chief. On appeal, defendant argued the trial court improperly allowed the jurors to use their notes during deliberations. The Supreme Court noted the tension between RCr 9.72, which explicitly allows jurors to use their notes, and Harper, its 1985 opinion which held it was proper for trial courts to prohibit jurors from taking their notes into deliberations. The Court affirmed the conviction and overruled Harper, holding jurors must be allowed to use their notes during deliberations.

D. Harry Finn, Jr. v. Commonwealth of Kentucky
2008-SC-000749-DG May 20, 2010

Opinion by Chief Justice Minton. Justice Scott not sitting; all concur. The Supreme Court affirmed a conviction for possession of a controlled substance based upon microscopic amounts. The Court held that such

convictions are valid so long as there is other evidence that the defendant knowingly and unlawfully possessed the controlled substance. The Court noted that the General Assembly has not seen fit to set a threshold amount for such offenses.

E. Caryn Renee Roach v. Commonwealth of Kentucky
2009-SC-000058-MR May 20, 2010

Opinion by Chief Justice Minton; all sitting. Roach was convicted of adult exploitation, three counts of second-degree criminal possession of a forged instrument and PFO-2 for forging from the account of an elderly victim. On appeal, Roach argued she should have received a directed verdict at trial since there was no evidence to show the victim could not manage her own affairs—a prerequisite for invoking the protections of the Kentucky Adult Protection Act. In a case of first impression, the Supreme Court affirmed the conviction, holding that even though the victim suffered from no mental impairment, the evidence at trial showed that due to physical limitations, she needed assistance in managing her affairs. Justice Noble and Justice Schroder concurred in the result only.

F. Commonwealth of Kentucky v. Wanda Combs
2009-SC-000143-DG May 20, 2010

Opinion by Chief Justice Minton. All sitting; all concur. Defendant was indicted on charges of first-degree trafficking in a controlled substance. On the eve of trial, the trial court granted the Commonwealth's motion to amend the indictment to charge only complicity to trafficking. Nonetheless, at the conclusion of proof, the trial court submitted both principal actor and complicity instructions to the jury. The jury returned a conviction under the principle actor theory. The Court of Appeals reversed, holding that though the amendment of the indictment was proper, the defendant was substantially prejudiced and denied the opportunity to defend herself against charges she was the principal.

The Supreme Court reversed the Court of Appeals, noting Kentucky courts "have abandoned any presumption that a defendant is unduly prejudiced when an indictment is amended to charge guilt by complicity." The Court cited Pate, which held "where evidence is sufficient to support a conviction as either an accomplice or as a principal, an instruction in the alternative is proper." Also, the Court advised that rather than amending the indictment immediately before trial, a better practice would be for the Commonwealth to seek leave to amend the indictment at the close of evidence to conform with the proof presented. In a footnote, the Court acknowledged, without resolving, conflicting precedent on the proper standard of review for jury instruction related issues--comparing Ratliff ("abuse of discretion") and Skaggs ("de novo").

G. Luther Wilbert Sexton v. Commonwealth of Kentucky
2008-SC-000731-DG May 20, 2010

Opinion by Justice Cunningham. All sitting; all concur. Police visited Sexton's home in response to complaints that he was observed videotaping children swimming at a nearby state park. Sexton admitted to being at the park and having a camera in his possession, but denied recording anything. Sexton allowed police to view the video and they saw no footage of children swimming or anything else from the park. An arrest warrant was subsequently issued and Sexton was charged with disorderly conduct. After a search of his house failed to yield the videotape previously viewed by the police, Sexton was also charged with tampering with physical evidence and PFO-1. Sexton was convicted of all counts and sentenced to 12 years. The Supreme Court reversed the tampering with physical evidence and PFO convictions, ruling the Commonwealth had failed to produce any evidence Sexton actually videotaped anyone or anything at the park or that such a videotape even existed.

H. Brandi Chipman v. Commonwealth of Kentucky
2008-SC-000895-DG May 20, 2010

Opinion by Justice Noble; all sitting. A juvenile defendant, charged with first-degree burglary, first-degree robbery and second-degree assault, entered into an agreement to plead guilty to second-degree robbery, and the other charges were dismissed. At sentencing, the defense and prosecution agreed that the accused should be sentenced as a juvenile. The trial court, however, disagreed and sentenced her as a youthful offender. The Court of Appeals affirmed. The Supreme Court reversed, holding that the juvenile was not eligible for sentencing as a youthful offender under KRS 635.020(4) since there was no evidence of record that she personally used a firearm during commission of the felony for which she was convicted. The Court noted that the prosecution could have made the defendant stipulate to use of the firearm in the plea agreement, but did not elect to do so. The Court remanded for re-sentencing as a juvenile. Justice Venters, joined by Justice Schroder, dissented, contending that sentencing was proper since there was no question that one of the defendant's co-conspirators used a firearm, to force the victim to surrender property, that the defendant claimed belonged to her.

III. DISCOVERY

A. Michael J. O'Connell, in his official capacity as Jefferson County Attorney & Shelly Santry, in her official capacity as an Asst. Jefferson County Attorney
v.
Hon. Frederic J. Cowan, in this official capacity as Judge of the Jefferson Circuit Court, Div. 13; and Bruce Alan Brightwell; and The City of Jeffersontown, Ky.; and Detective Roscoe Scott
2009-SC-000596-MR **May 20, 2010**

Opinion by Justice Schroder. All concur; Justice Abramson not sitting. Brightwell sued police for abuse of process, malicious prosecution, intentional infliction of emotional distress and civil rights violations. The trial court ordered a former assistant county attorney to produce her litigation file and submit to a deposition. The Court of Appeals denied the County Attorney's petition for a writ prohibiting enforcement of the discovery order. In a case of first impression, the Supreme Court held that "when discovery is sought of opinion work product of a prosecutor relative to a prior criminal prosecution, there is a heightened standard of compelling need that must be met by the party seeking discovery." The Supreme Court remanded to the Court of Appeals to enter a writ instructing the trial court to reevaluate the discovery request under the "heightened compelling need" standard and to conduct an *in camera* review of material before allowing discovery.

IV. DOMESTIC RELATIONS

A. Steve Lichtenstein v. Roberta J. Barbanel
2008-SC-000661-DG **May 20, 2010**

Opinion by Justice Scott. All sitting; all concur. The Supreme Court held that a family court cannot enter an Income Withholding Order requiring garnishment without first calculating the support arrearage owed and offsetting that amount by the amount of support owed by the ex-spouse. The Court also held that the awards of marital property could not be garnished via a support order, since such amounts are consider collateral issues not within the scope of the Uniform Interstate Family Support Act.

B. Cabinet for Health & Family Services v. L.J.P.; M.J.P.; and D.J.P., a child
2008-SC-000950-DGE **May 20, 2010**

Opinion by Justice Noble. All sitting; all concur. The CHFS filed a petition to involuntarily terminate parental rights. In response, the parents filed a voluntary petition in which they conditioned termination on

custody being granted to the child's paternal grandparents. The grandparents filed a motion to intervene in the voluntary termination matter. The trial court denied the motion, holding the parents' voluntary termination petition was invalid since the CHFS had already filed an involuntary termination petition. The Court of Appeals reversed, holding the grandparents could intervene as a matter of right based on the "elevated status" afforded to grandparents.

As a preliminary matter, the Supreme Court held that the mere filing of a petition for involuntary termination of parental rights has no effect on the rights of the parents and does not prevent them from filing a voluntary petition. Nonetheless, the Supreme Court reversed the Court of Appeals, holding that the conditional language of the voluntary petition was such that it attempted to use the proceedings as an "end-run" on the Commonwealth's adoption statutes. Since the grandparents could not meet the 90-day residency requirement, they were not eligible to adopt the child at the time the petition was filed, and thus had no standing to proceed forward with adoption. Furthermore, the Court held that since non-parental relatives or potential custodians are not mentioned or considered in the termination statutes, they do not have an unconditional right to intervene.

V. FINANCIAL INSTITUTIONS

A. Members Choice Credit Union, et al. v. Home Federal Savings & Loan Assn.

2008-SC-000877-DG **May 20, 2010**

Opinion by Justice Noble; all sitting. Home Federal filed a declaratory judgment action against the Department of Financial Institutions, seeking to enjoin the DFI from chartering credit unions that grant membership based upon a geographic connection. The circuit court granted summary judgment in favor of Home Federal, and the Court of Appeals affirmed. On appeal to the Supreme Court, Home Federal argued that geographic fields of membership were no longer permissible after the General Assembly removed that category from the language of KRS 286.6-107 in 1984. Presently the statute limits credit union membership to persons having "a common bond or similar occupation, association or interest." The Supreme Court reversed, holding that the phrase "interest" included geographic connection. Justice Abramson and Justice Cunningham concurred in the result only.

VI. TORTS

A. CSX Transportation v. Troy Moody

2007-SC-00548-DG **May 20, 2010**
2009-SC-000048-DG **May 20, 2010**

Opinion of the court. All sitting; all concur. Former employee brought a Federal Employers Liability Act ("FELA") suit against CSX, claiming he suffered from toxic encephalopathy as a result of exposure to solvent fumes during his employment. The jury returned a verdict in the employee's favor. The Court of Appeals mostly affirmed the verdict. The Supreme Court affirmed, the Court of Appeal's ruling. Holding that the appeal was timely the Court found that CSX's motion to reconsider the judgment tolled the time for taking the appeal until 30 days after service of the order denying a new trial. The Court also held that CSX could not claim that the trial court erred in allowing the employee's expert to testify when CSX failed to make an objection at trial. Lastly, the Supreme Court upheld the sufficiency of the jury instructions.

B. CSX Transportation v. John X. Begley

2008-SC-000643-DG **May 20, 2010**

Opinion of the court. All sitting; all concur. A former employee brought a FELA suit against CSX, alleging he developed osteoarthritis as a result of his years of work for the railroad. The jury returned a verdict in the employees' favor and the Court of Appeals affirmed. On appeal to the Supreme Court, CSX raised a number of claims of error regarding the jury instructions that were refused by the trial court. The Supreme Court affirmed, holding that consistent with Rogers and Hamilton, the trial court was not required to instruct the jury on proximate causation. The Court also held that under the circumstances, the trial court's refusal to instruct the jury on the non-taxation of any damages awarded was harmless error. Finally, the Court held that the foreseeability instruction used by the trial court was adequate under the United States Supreme Court's decision in Gallick, since the jury was instructed that CSX's duty is measured by what a reasonably prudent person would anticipate under the same or similar circumstances.

C. Sunbeam Corp. v. Hon Ronnie C. Dortch, Judge, Hancock Circuit Court & Sherry J. McGlenon and Terry L. Parker, co-executors of the Estate of Leon J. Fischer

2009-SC-000501-MR **May 20, 2010**

Opinion by Justice Abramson. All sitting; all concur. An estate brought suit against Sunbeam alleging it exposed decedent to asbestos fibers during his employment. Sunbeam moved to dismiss on the grounds that

the claims were discharged in its 2002 bankruptcy. The motion to dismiss was denied and Sunbeam sought a writ from the Court of Appeals, arguing that claims bearing upon its bankruptcy discharge were in the sole jurisdiction of the bankruptcy court. The Court of Appeals denied the writ. The Supreme Court affirmed the Court of Appeals, holding that it is well settled that state courts have concurrent jurisdiction under 28 USC 1334(b) to construe the discharge and determine whether or not a particular debt is within the discharge.

D. Kentucky Farm Bureau Mutual Insurance Co. v. James O. Young, et al.
2008-SC-000333-DG May 20, 2010

Opinion by Justice Venters. All sitting; all concur. The trial court granted summary judgment in favor of an underinsured motorist insurance carrier, holding the policyholder failed to satisfy KRS 304.39-320(3) because the Coots notice contained inaccurate settlement information. The Court of Appeals reversed, holding that the insurer had adequate notice of the proposed settlement. The Supreme Court reversed the Court of Appeals, holding that Coots notices must contain accurate information about the amount of the settlement. The Court cautioned that its ruling was not to be used by insurers as a weapon to deny benefits, holding that where an insurer has reason to doubt the accuracy of the settlement information in the Coots notice, it has a duty to take steps to resolve the doubt—as the insurer did in this case.

VII. ATTORNEY DISCIPLINE

A. John Shannon Bouchillon v. Kentucky Bar Association
2009-SC-000585-KB May 20, 2010

The Supreme Court reinstated attorney to the practice of law. The attorney had voluntarily withdrawn from membership in the KBA in 2003 while in good standing.

B. Kentucky Bar Association v. Jennifer Sue Whitlock
2010-SC-000027-KB May 20, 2010

The Supreme Court suspended attorney from the practice of law for one year. The attorney accepted a fee of $2,500 from a client to bring a civil suit but then failed to communicate with the client in any fashion. The Court noted the attorney's failure to file a timely response and her previous suspensions.

C. Kentucky Bar Association v. Stephen C. Kessen
2010-SC-000083-KB May 20, 2010

The Supreme Court ordered attorney permanently disbarred from the practice of law. The attorney was found to have converted checks intended for the law firm where he was employed for his own personal use.

D. Kentucky Bar Association v. Jamal A. Koury
2010-SC-000119-KB May 20, 2010

The Supreme Court suspended attorney from the practice of law for one year. The attorney was found to have accepted $1,500 to represent a client in a speeding ticket case and then failed to appear in court or issue a refund. The Court made the suspension run concurrent to a 181-day suspension the attorney is currently serving for other ethic violations.

E. Kentucky Bar Association v. Mark Cameron Chesnut
2010-SC-000129-KB May 20, 2010

Chief Justice Minton not sitting. The Supreme Court ordered attorney permanently disbarred from the practice of law. In 2009, the attorney pled guilty to felony theft and forgery charges related to allegations he accepted money from clients to prepare income tax return and then converted the funds for his own use.

F. Kentucky Bar Association v. Melbourne Mills
2010-SC-000148-KB May 20, 2010

The Supreme Court ordered attorney permanently disbarred from the practice of law. The attorney was found to have violated 17 ethical rules, largely stemming from his role in the settlement of a class action lawsuit. The attorney deceived clients into accepting smaller payments so that the attorney and his co-counsel could keep fees far beyond the amount permitted by their fee agreements. Attorney also misled the trial court about the settlement and delegated responsibility for dealing with clients to non-lawyer employees.

G. Robert N. Trainor v. Kentucky Bar Association
2010-SC-000201-KB May 20, 2010

The Supreme Court granted attorney's motion for a 30-day suspension, to be probated for one year. Attorney admitted causing a client to miss a statute of limitation in a personal injury case by failing to act with reasonable diligence and promptness. Attorney also admitted to violating CR 11 by knowingly bringing a medical malpractice suit significantly

beyond the statute of limitations. The attorney's participation in remedial CLE was made a condition of the probated suspension. Justice Schroder dissented.

H. Kentucky Bar Association v. William Otto Ayers
2010-SC-000220-KB May 20, 2010

The Supreme Court suspended attorney from the practice of law for 30 days. The attorney was found to have violated SCR 3.130-1.16(d) by refusing to return a portion of his fee after a client terminated his representation, despite his agreement to do so. The trial commissioner rejected the attorney's argument that SCR 3.130-1.16(d) applies only when the attorney terminates the representation. The Court noted that the attorney is already serving an automatic suspension following his felony conviction earlier this year.

I. Kentucky Bar Association v. Cletus Maricle
2010-SC-000219-KB May 20, 2010

The Supreme Court entered an order of automatic suspension pursuant to SCR 3.166. The attorney—a former circuit judge—was convicted of five felony counts in federal court earlier this year.