PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
OCTOBER 2009

I. CIVIL PROCEDURE

A. Brian Jaroszewski & Amy Page-Jaroszewski v. Charles F. Flege & Karen Jaroszewski

2008-SC-000112-DG **October 29, 2009**

Opinion by Chief Justice Minton; all sitting. Plaintiffs in a tort action appealed the trial court's grant of defendant's motion to dismiss for lack of prosecution (CR 41.02). The Court of Appeals remanded the case back to the trial court to reconsider the motion in light of the factors set forth in Ward (1: extent of party's personal responsibility for the delay; 2: history of dilatoriness; 3: whether attorney's conduct is willful or in bad faith; 4: merits of plaintiff's claim; 5: lack of availability of alternative sanctions). On remand, the trial court again granted dismissal; the Court of Appeals affirmed. The Supreme Court affirmed, holding that when considering motions to dismiss for lack of prosecution, trial courts must consider the totality of the circumstances, not just the factors listed in Ward, and must make an explicit finding of fact. The Court declined to create a formula to be applied mechanically in all cases. Rather, the Court opted to fashion guidelines for trial courts based on Ward and others circumstances surrounding the case. The Court reviewed the Ward factors as they applied to this dispute, and considered the other relevant factors before affirming. Justice Venters concurred by separate opinion, contending that trial courts should also consider whether the party moving for dismissal has taken steps towards resolving the case prior to moving to dismiss—likening the situation to where criminal defendants must assert their right to a speedy trial before claiming it has been violated.

B. Tim Emberton v. GMRI Inc. (d/b/a Red Lobster Restaurant #349), et al.

2007-SC-000443-DG **October 29, 2009**
2008-SC-000109-DG **October 29, 2009**

Opinion by Justice Scott; all sitting. Emberton sued GMRI after he contracted the hepatitis A virus at one of its Red Lobster restaurants. Following trial, the jury awarded Emberton $8666 in medical expenses, plus $225,000 for pain and suffering. The Court of Appeals reversed on the grounds that Emberton's suit was barred by the one-year statute of limitations. The Court of Appeals ruled Emberton "failed to investigate the source of his illness when reasonable diligence could have revealed the likely tortfeasor within the statutory period." The Supreme Court reversed and reinstated the jury's award, holding that the statute of limitations on

Emberton's claim was tolled under KRS 413.190(2) since GMRI, through its district manager, engaged in conduct that was "intentionally deceptive and designed to prevent public disclosure of [the GMRI employee's] infection though the health department, the restaurant's employees and its patrons." The Court rejected GMRI's challenge to the constitutionality of KRS 360.040—which establishes Kentucky's post-judgment interest rate. The Court also ruled against GMRI's appeals of evidentiary issues, the pain and suffering award and its claim of an inconsistent verdict at trial. Chief Justice Minton and Justice Abramson concurred in result only.

II. CRIMINAL LAW

A. Mark E. Bauder v. Commonwealth of Kentucky

2008-SC-000056-DG **October 29, 2009**

Opinion by Justice Cunningham; all sitting. Bauder entered a conditional plea to DUI charges, reserving his right to appeal the trial court's denial of his motion to suppress evidence from the traffic stop as a violation of his right against unreasonable seizure. Bauder was pulled over after he turned onto a side street in order to bypass a Kentucky State Police DUI roadblock. The trooper admitted that he pulled Bauder over just as he did all motorists who try to evade roadblocks. The trooper also testified that he did not observe Bauder committing an offense prior to stopping him, but based upon his considerable experience, motorists who tried to evade roadblocks were often intoxicated or driving on a suspended license. The Court held that under Terry, the trooper had a reasonable suspicion that criminal activity was afoot to make a stop. The majority relied upon Steinbeck, a 1993 Court of Appeals opinion to uphold the stop and affirm the conviction, holding that under the totality of the circumstances, the traffic stop was justified and that to hold otherwise would entitle motorists to "simply blow through roadblocks with a wave and contemptuous grin." The Court concluded that there "would be no law on our highways." The dissenters (Justice Venters, joined by Chief Justice Minton and Justice Noble) dismissed this conclusion as "absurd hyperbole." The minority contended that the majority had expanded Steinbeck to allow police to "apprehend and detain any person who acts in a manner that suggests an aversion to police contact."

B. Steve Burton v. Commonwealth of Kentucky

2006-SC-000784-MR **October 29, 2009**

Opinion by Justice Scott; all sitting. After a head-on collision with another vehicle, Burton was convicted of manslaughter, second-degree assault and operating a motor vehicle on a suspended license. On appeal, Burton argued that he was unduly prejudiced by the introduction of his urinalysis results showing trace amounts of cocaine and marijuana. The

results did not show intoxication or the time of ingestion. The prosecution argued that the results were relevant to show wanton conduct on the part of Burton. The majority distinguished the case from published opinions where after intoxication was established by other means, urinalysis results were then deemed relevant to show the type of intoxicant. The Court ruled that the relevance of the urinalysis results depended upon "the conclusions compelled by supporting evidence" and held that in this instance the prosecution lacked supporting evidence to make the urinalysis results relevant. The Court reversed the manslaughter and assault convictions and affirmed the driving on a suspended license conviction. The Court also warned the trial court on remand to scrutinize under KRE 702 the proposed testimony of a certain prosecution witness—a "drug recognition" instructor. Chief Justice Minton (joined by Justice Abramson and Justice Cunningham) concurred in part and dissented in part, asserting the majority's opinion represented a "startling departure from precedent." The minority contended that Burton's drug use in the recent past was "a relevant and probative factor from which the jury could have reasonably inferred that Burton was impaired at the time of the tragic accident." Justice Abramson (joined by Chief Justice Minton and Justice Cunningham) also concurred in part and dissented in part by separate opinion, arguing that the statement of the paramedic who treated Burton provided "supporting evidence" to make the urinalysis results relevant.

C. Roy Applegate v. Commonwealth of Kentucky
2007-SC-000444-MR October 29, 2009

Opinion by Justice Schroder; all sitting. Applegate was convicted of one count each of first degree rape, first degree sodomy and incest and was sentenced to 30 years imprisonment. On appeal, he argued that the indictment alleged that he raped and sodomized his daughter an unspecified number of times and thus the prosecutor was criminalizing "a pattern of criminal abuse"-- an offense not enacted by the General Assembly. In so doing, Applegate argued, the prosecution had usurped the authority of the legislative branch, in violation of the separation of powers clause. The Court held the indictment was proper, noting that Applegate was not charged with multiple, identical indictments for the same offenses, rather he had only been charged with one count each of rape, sodomy and incest and that it is unreasonable to expect a victim of "tender years" to remember specific dates, given the long period of time over which the abuse occurred. Applegate next argued that the indictment's lack of specificity violated his protection against double jeopardy because he could be arrested, indicted or convicted in the future for crimes against the victim during the same time period. The Court held that since such future jeopardy had not yet occurred, there was no real and justiciable controversy, thus the issue was not ripe for appeal. However, the Court ruled that "a defendant who is charged and convicted of a sexual crime

that occurred during a range of time cannot subsequently be charged with the same crime against the same person during the period stated in the original conviction."

Applegate also argued that since the indictment alleged a range of dates, there was no way to know if the jury agreed on a specific incident of sexual abuse, thus violating his right to a unanimous jury verdict. The Court held that there was no unanimity problem since Applegate was only charged with one count per offense and noted that trial courts are not required to identify evidentiary detail in jury instructions when a defendant is charged with only one count of an offense. Applegate also claimed the trial court erred by not allowing him to personally cross-examine a prosecution expert and the victim. The Court agreed that the trial court's reason for denying the request was unsound (i.e. Applegate was not a trained attorney), but held that Applegate's request, which was made on the second day of trial, was not timely. Further, the Court noted that Applegate had no right to personally cross-examine the victim and that he had no basis for his proposed line of questioning to the prosecutor's expert (that the expert had not really examined the victim and had fabricated medical records). Lastly, Applegate argued it was an error for the trial court to determine, in the presence of the jury, that two of the prosecution's witnesses were experts, thus bolstering the credibility of the witnesses, as well as that of the victim, whose testimony these witnesses corroborated. The Court, relying on Luttrell, observed that such determination should be made outside the presence of the jury. However, in light of the evidence and the fact that Applegate had been able to cross-examine the witnesses, the Court concluded that the error was harmless and the conviction was affirmed. Justice Cunningham concurred in result only by separate opinion, contending that Luttrell does not prohibit informing the jury that a witness is an expert and that the purpose of qualifying witnesses is to enhance their credibility in the eyes of the jury.

D. Andre Finnell v. Commonwealth of Kentucky
2008-SC-000085-MR October 29, 2009

Opinion by Justice Noble. All sitting; all concur. Finnell was convicted of facilitation of first-degree robbery, reckless homicide and PFO-2 for his role in a homicide that occurred during a narcotics transaction. On appeal, Finnell argued that the trial court should not have permitted testimony from a former cellmate, since the prosecution did not disclose its agreement with the witness until after *voir dire* had begun. The Court held that Finnell had adequate, if not timely, notice and since he was able to cross-examine the witness about the agreement with the prosecution, the delay did not rise to the level of reversible error. The Court also rejected Finnell's argument that the jury should have been given an instruction on facilitation to reckless homicide, noting that facilitation requires

knowledge that a person intends to commit a crime. Since a person cannot "intend" to commit reckless homicide, one cannot facilitate reckless homicide. The Supreme Court affirmed the conviction, but remanded for a new penalty phase, holding that it was improper for the prosecutor to rely upon an unofficial record (CourtNet) to establish Finnell's prior convictions.

E. Michael Cecil v. Commonwealth of Kentucky
2008-SC-000159-MR October 29, 2009
2008-SC-000369-MR October 29, 2009

Opinion by Justice Cunningham; all sitting. Cecil was indicted on two counts of first-degree rape and one count of intimidating a participant in the legal process. The first count of rape involved Cecil's eight year old niece. The rape was witnessed by the victim's brother, whom Cecil threatened to kill—leading to the intimidation charge. The second victim was Cecil's 14 year old sister-in-law. Cecil successfully moved to have the trials severed, and he was convicted in the first and entered a conditional guilty plea in the second. The cases were then consolidated on appeal. The Court affirmed Cecil's conviction in the first case, rejecting his argument that a forensic interviewer's testimony about her interview with the victim improperly bolstered the victim's own testimony. The Court held the testimony was probative and admissible to refute suggestions the interviewer had coached the victim. The Court also held that Cecil was not entitled to a jury instruction on first-degree sexual abuse since there had been no evidence presented at trial that penetration had not occurred.

The Court remanded the case for a new sentencing hearing on the second rape conviction. As amended in 2006, KRS 532.110(d) requires that sentences for felony sex crimes be served consecutively. Since Cecil's crimes were all committed prior to 2004, the Court held that application of the amendment to Cecil was improper under the *ex post facto* clauses of the state and federal constitutions. Justice Schroder (joined by Justice Noble) concurred in result only, contending that the forensic interviewer's testimony had improperly bolstered the victim's testimony—but that the error was harmless.

F. Tommie Brown v. Commonwealth of Kentucky
2008-SC-000281-MR October 29, 2009

Opinion by Justice Noble. All sitting; all concur. Brown was convicted of multiple charges after an incident where he led police on a high-speed chase. On appeal, the Court reversed Brown's convictions of two counts of second-degree wanton endangerment as violative of the prohibition on double jeopardy. Applying the test from Blockburger, the Court held that

second-degree wanton endangerment requires proof of no facts beyond those required to prove first-degree fleeing or evading police, of which Brown had also been convicted. The Court affirmed the rest of Brown's convictions, holding that:

1) Brown was not entitled to a directed verdict due to insufficiency of the evidence.
2) Brown was not denied an impartial tribunal because of approving statements made by the trial court after the jury gave its sentence recommendation.
3) There was no error by the trial court in allowing the jury to hear that Brown's passenger was a 16 year old high school student, since the information was not unduly emphasized or intended to arouse sympathy.
4) It was error for the trial court to instruct the jury that the passenger was a high school student as part of its second-degree wanton endangerment instruction-- but the issue was not properly preserved and did not rise to the level of palpable error.

G. Richard Gabbard v. Commonwealth of Kentucky
2008-SC-000062-MR October 29, 2009

Opinion by Justice Noble. All sitting; all concur. Gabbard argued his murder conviction must be reversed under Shane since he was forced to use two peremptory strikes to remove two jurors who should have been struck for cause. The Supreme Court held that the trial court should have struck one of the jurors for cause after admitting she had already formed an opinion that Gabbard was guilty. The Court admitted the issue was a "tough call," but held that the trial court relied too much on the juror's statements that she could set aside her personal views and base her decision solely on the evidence. The Court noted that under Montgomery, pervasive bias or prejudice cannot be rehabilitated by using "magic questions." On the strike sheet, Gabbard's defense counsel identified the jurors he would have struck if he had not been required to use his peremptory challenges on the jurors that he believed should have been struck for cause. One of the jurors identified in this manner actually sat on the jury-- thus the exception to Shane did not apply and the conviction was reversed. Further, the Court formally adopted this practice as a requirement, holding that henceforth "in order to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck."

III. INSURANCE

A. Kentucky Associated General Contractors Self-Insurance Fund (KAGC) v. Music Construction, Inc.

2008-SC-000795-DG **October 29, 2009**

Opinion of the Court. All sitting; all concur. Employee suffered permanent and total disability from a trench collapse. KOSHA subsequently cited the employer for intentional safety violations. Because of these violations, employee sought and received a 30% enhancement to his disability award, as allowed under KRS 342.165(1). KAGC, the employer's workers' compensation insurance carrier (the Appellant), sued the employer for reimbursement of the amount of the increase in benefits, citing a specific exclusion in the contract of insurance. The trial court dismissed the suit for failure to state a claim. The Court of Appeals affirmed the dismissal, holding that under AIG/AIU v. South Akers Mining, the claim was barred. The Supreme Court reversed, noting that AIG/AIU did not apply since it was a workers' compensation case involving a statutory requirement that carriers promptly pay all benefits. By contrast, the Court held this case was centered on a contract dispute where the injured worker has no stake or interest in the outcome. The Court remanded the case back to the circuit court.

IV. LEGAL NEGLIGENCE/MALPRACTICE

A. Stephen R. Chappell, Individually and as partners and/or employees of Landrum & Shouse, et al. v. Kuhlman Electric Corp. AND Kuhlman Electric Corp. v. Stephen R. Chappell, Individually and as partners and/or employees of Landrum & Shouse, et al.

2006-SC-000140-DG **October 29, 2009**
2006-SC-000144-DG **October 29, 2009**

Opinion by Special Justice Crittenden; Justice Noble and Justice Schroder not sitting. From 1977 until 1988 Kuhlman Electric was covered under a workers' compensation insurance policy issued by Amerisure. Among other things, the insurer agreed to provide legal representation to Kuhlman against workers' compensation claims. In 1977, Burgess, a Kuhlman employee, was injured on the job and filed for benefits. Amerisure retained the firm of Landrum & Shouse to defend Kuhlman. In 1988, Kuhlman ended its relationship with Amerisure and opted to become self-insured. Amerisure remained obligated to Kuhlman for future claims that arose from the period of coverage.

In 1991, Burgess sought to reopen his award and Amerisure again retained Landrum & Shouse to defend Kuhlman. Landrum & Shouse filed a motion on Kuhlman's behalf to add Kuhlman as a party, suggesting that Burgess may have actually suffered a new injury rather than reaggravating

the one from 1977. The ALJ granted the motion and Burgess subsequently filed a motion of his own claiming he had suffered a new injury. Since Kuhlman was now a self-insured entity, it, and not Amerisure, would be liable for a new injury, Kuhlman objected to Burgess' new injury theory. However, the ALJ held that Kuhlman was estopped from raising a defense on that point since the motion to join Kuhlmann as a party had originally suggested the 1991 injury was new. The ALJ subsequently ruled Burgess had incurred a new injury and Kuhlman was ordered to pay him benefits.

In 2001, Kuhlman filed suit claiming legal malpractice against Landrum & Shouse and bad faith against Amerisure. The trial court awarded summary judgment to Landrum & Shouse and Amerisure. On appeal, the Supreme Court rejected Landrum & Shouse's argument that Kuhlman Electric / Self-Insured was somehow a different entity from Kuhlman Electric—one to whom Landrum & Shouse owed no duty. The Court held that the fact that Kuhlman Electric was Landrum & Shouse's client did not change once Kuhlman's interests became adverse to Amerisure's. However, the Court held that even if Landrum & Shouse had withdrawn from representing Kuhlman once the conflict of interest became apparent, it would not have changed the outcome of the case since the medical evidence that the injury was new would not have changed. To prevail on a legal negligence claim, a party must show that but for the attorney's negligence the result of the case would have been different. Since Kuhlman could not meet that standard, the Court held that summary judgment had been proper. Special Justice Vesper (joined by Justice Scott) concurred in part and dissented in part, contending that if Landrum & Shouse had shared its conclusions about the "new injury theory" with Kuhlman, it might not have been estopped from later defending that point, thus possibly avoiding the adverse ruling. The minority would have remanded back to the trial court for further consideration of the motion for summary judgment.

V. WORKERS' COMPENSATION

A. Betty J. Sweasy v. Wal-Mart; ALJ; & Workers' Compensation Board

2009-SC-000219-WC **October 29, 2009**

Opinion of the Court. All sitting; all concur. The Supreme Court reversed the Court of Appeals, holding that the compensable period for permanent partial workers' compensation begins on the date the impairment arises. The Court of Appeals had previously ruled that KRS 347.730(1)(d) gave the ALJ discretion to award benefits beginning with the date the claimant reached maximum medical improvement (MMI). The Supreme Court held that neither the Court of Appeals nor the employer (the Appellee)

could point to a reasonable basis for benefits to commence on any date other than when the impairment or disability arose.

VI. ATTORNEY DISCIPLINE

A. Kentucky Bar Association v. Roger P. Elliott

2009-SC-000549-KB **October 29, 2009**

The Supreme Court entered an order confirming attorney's automatic suspension pursuant to SCR 3.166(1). The rule mandates an automatic suspension from the practice of law for any attorney that pleads guilty to a felony, effective the day following the plea. The attorney had pled guilt to theft of services already rendered, in violation of KRS 514.090.

B. Kentucky Bar Association v. David R. Steele

2009-SC-000246-KB **October 29, 2009**

The attorney was publicly censured by the Supreme Court of Tennessee for his handling of two personal injury claims. The Supreme Court of Tennessee determined that the attorney had 1) accepted a referral from an unregistered intermediary, 2) prospectively limited his malpractice liability, 3) represented both clients despite a conflict of interest between the clients; and 4) distributed the settlement proceeds from both cases in a single check with the required letter of explanation. In response to the Kentucky Supreme Court's show cause order, the attorney argued that he should not be subject to reciprocal discipline since the same clients had also filed a bar complaint against him in Kentucky and the matter had been dismissed for adjudication in Tennessee, where the alleged misconduct occurred. The Court rejected this argument, noting that the attorney had not alleged fraud or lack of jurisdiction in Tennessee or that his misconduct warranted a different discipline in Kentucky. Accordingly, the Court issued a public reprimand to the attorney.

C. Kentucky Bar Association v. Luann C. Glidewell

2009-SC-000462-KB **October 29, 2009**

The Supreme Court ordered attorney suspended from the practice of law for 181 days. In one case, the attorney failed to respond to a show cause order, causing her client's case to be dismissed. In the other, the attorney failed to file a timely answer resulting in a default judgment against her client. The attorney represented to the client's new legal counsel that she would file a motion to set aside the default judgment-- even though her license was suspended at the time.

D. Kentucky Bar Association v. Gregory Curtis Menefee

2009-SC-000467-KB **October 29, 2009**

Ordered attorney permanently disbarred as a result of ten separate disciplinary files against him. Attorney was found to have repeatedly accepted funds from his bankruptcy clients intended for creditors and then failed to make the payments, refund the money or offer an accounting. The Court held that in light of the attorney's failure to respond to disciplinary authorities and the potential criminal nature of his actions, permanent disbarment was the appropriate sanction.

E. Kentucky Bar Association v. Bruce D. Atherton
2009-SC-000560-KB October 29, 2009

The Supreme Court entered an order confirming attorney's automatic suspension pursuant to SCR 3.166(1). The rule mandates an automatic suspension from the practice of law for any attorney that pleads guilty to a felony, effective the day following the plea. The attorney pled guilty to federal charges of accessory after the fact to a conspiracy to commit mail and wire fraud.