PUBLISHED OPINIONS KENTUCKY SUPREME COURT OCTOBER 2015

I. <u>CERTIFICATION OF LAW:</u>

A. In re: Nancy J. McCarty, et al. v. Convol Fuels No. 2, LLC, etc. 2014-SC-000589-CL October 29, 2015

Opinion of the Court by Justice Venters. All sitting; all concur. The United States Court of Appeals for the Sixth Circuit requested certification of Kentucky law as to this question: May a subcontractor injured while installing a garage door on an unfinished building at a mine site maintain a claim against a mine operator under a negligence per se theory for alleged violations of Kentucky mine safety statutes, KRS Chapters 351–352, and mining regulations, KAR §§ 805–825? HELD: The traditional concept of negligence per se, codified by KRS 446.070, provides a cause of action to persons injured by the violation of a statute if: 1) the plaintiff comes within the class of persons intended to be protected by the statute; 2) the statute was specifically intended to prevent the type of injury that occurred; and 3) the violation of the statute was a substantial factor in causing the result. Negligence per se extends to violations of an administrative regulation if the enabling statute for the regulation expressly mandate compliance with regulation. Based upon the language of the applicable statutes and regulations, the Court concluded that the legislature intended statutes to impose duties on mine operators to protect miners and other workers routinely associated with the process of extracting coal and to prevent injuries caused by dangers inherent to the mining environment and the extraction of coal. The subcontractor injured while installing a garage door on an unfinished building at a mine site did not suffer the kind of injury addressed by the mining statutes and thus could not rely upon a negligence per se theory to sustain his claim against the mine operator.

II. <u>CONSTITUTIONAL LAW:</u>

A. Greater Cincinnati/Northern Kentucky Apartment Association, Inc., et al. v. Campbell County Fiscal Court, et al.

2014-SC-000383-TG

October 29, 2015

Opinion of the Court by Justice Cunningham. All sitting. Abramson, Barber, Keller, and Noble, JJ., concur. Venters, J., dissents by separate opinion. This case involved the funding of 911 emergency telephone services. In order to pay for these services, the Campbell County Fiscal Court ("County") adopted Ordinance O-04-13 ("Ordinance"). The Ordinance replaced the landline subscriber charge with an annual service fee of \$45.00 levied upon each occupied individual residential and commercial unit within Campbell County. The Greater Cincinnati/Northern Kentucky Apartment Association ("Association") filed a declaratory action in Campbell Circuit Court alleging that the Ordinance was an

unconstitutional and invalid exercise of the County's authority. The trial court disagreed and ruled in favor of the County, thus affirming the Ordinance. The Association appealed that judgment and moved pursuant to CR 74.02 for an order transferring this case from the Court of Appeals to the Supreme Court of Kentucky. The Supreme Court granted transfer and held: 1) the Ordinance provides for a fee, not a tax; 2) fees authorized by KRS 65.760 must bear some reasonable relationship to the benefit received; and 3) the fee imposed by the County to fund this indispensable service is a constitutional and statutorily valid exercise of its authority. Accordingly, the Supreme Court affirmed the trial court's judgment.

III. CRIMINAL LAW:

A. Lennie J. Dillon v. Commonwealth of Kentucky 2013-SC-000696-MR October 29, 2015

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson, and Venters, JJ., concur. Cunningham, J., concurs in result only by separate opinion in which Barber and Keller, JJ.,, concur. Dillon was convicted of murder for shooting and killing his girlfriend and was sentenced to forty years' imprisonment. In affirming his conviction and sentence, the Supreme Court held that (1) Dillon's statements to police while waiting for emergency medical services to respond for a severe gunshot wound to his head should have been suppressed because there was no knowing and intelligent waiver of his Miranda rights, but their erroneous admission was harmless beyond a reasonable doubt because they were not inconsistent with his defense; (2) admission of hearsay testimony of jailhouse informant was harmless error; (3) the prosecutor's impeachment "testimony" during examination of informant was not palpable error; (4) hearsay testimony about victim's statements explaining why she had gotten rid of her gun did not fall under any exception to the rule against hearsay and was thus inadmissible, but its admission was harmless; and (5) hearsay testimony about victim's statements explaining why she was planning to move to Indiana without Dillon were properly admitted under the state-of-mind exception.

B. Robert Thornton v. Commonwealth of Kentucky 2014-SC-000224-MR October 29, 2015

Opinion of the Court by Justice Barber. All sitting; all concur. A Jefferson Circuit Court jury found Appellant, Robert Thornton, guilty of seven counts of first-degree robbery. The jury recommended a sentence of twenty-four years' imprisonment, and the trial court sentenced Thornton accordingly. Thornton appealed as a matter of right, Ky. Const. § 110(2)(b), arguing the trial court erred in: (1) finding that Appellant lacked standing to challenge the warrantless global positioning system (GPS) tracking of a vehicle he drove, (2) denying Appellant's motion for a directed verdict as to some of his charges, and (3) only partially granting Appellant's motion to sever. The Supreme Court affirmed Thorton's conviction, holding that Thornton's argument regarding the GPS tracking device

was not one of standing, but, rather, whether the GPS tracking device invaded Thornton's legitimate expectation of privacy. The Supreme Court held that police monitoring the GPS signals from the car Thornton was permissively driving (but did not own) did not invade any reasonable expectation of privacy, and therefore, Thornton's Fourth Amendment rights were not violated. The Court also affirmed the trial court's denial of Thornton's motion for a directed verdict, as it was not clearly unreasonable that a juror could have convicted Thornton based on the evidence adduced at trial. Finally, the Supreme Court held that the trial court did not abuse its discretion in failing to fully grant Thornton's motion to sever.

C. Michael E. Simpson v. Commonwealth of Kentucky 2014-SC-000653-MR October 29, 2015

Opinion of the Court by Justice Venters. All sitting; all concur. Police officers entered a house with permission to search for and arrest Adkins. After Adkins was located, police continued with a wider search of the building "as a precautionary matter" to assure their own safety while they completed the arrest of Adkins. In so doing, they found Appellant who identified himself as "Ralph Simpson" although his true name is Michael Simpson. Soon after Appellant left the premises, police discovered his true identity and also that he was wanted on outstanding arrest warrants. They quickly apprehended him, arrested him on the pending warrant, and found a handgun in his pocket. He was then charged as a felon in possession of a handgun. He also spontaneously uttered an incriminating statement which was used as evidence against him. Appellant contends that his arrest and the evidence obtained as a result of his arrest resulted from the extended search of the building, and because that search was unconstitutional, the evidence flowing from it should have been suppressed. Held: 1 As a procedural matter, notwithstanding the replacement of RCr 9.78 (relating to appellate review of a trial court's findings on a suppression motion) by RCr 8.27, by application of CR 52.01 in conjunction with RCr 8.27, the standard of appellate review of suppression motion rulings remains substantively unaffected; 2) Pursuant to Maryland v. Buie 494 U.S. 325 (1990) and Guzman v. Commonwealth, 375 S.W.3d 805, 807 (Ky.2012), and based upon articulable facts drawn from reasonable inferences, the officers arresting Adkins were authorized to conduct a protective sweep of the premises beyond the area of Adkins' arrest into places that may harbor a person that poses a threat to those on the scene. The trial court findings in that regard were supported by substantial evidence which consisted of police officers' observations of a gun and drug paraphernalia in the house, numerous persons on the scene despite the inhabitability of the house, all general indicators that it was a "drug house" which inherently poses dangers to police officers.

D. Commonwealth of Kentucky v. Mike Douglas Rieder 2014-SC-000210-DG October 29, 2015

Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellee was charged with murder after shooting and killing a fellow bar patron. The shooting

was a result of a verbal and physical altercation between the two. A Fayette County Circuit Court jury was instructed on murder, first-degree manslaughter, second-degree manslaughter, and reckless homicide. The jury was also instructed on self-protection and extreme emotional distress. The investigating officer, Sergeant Richardson, testified at trial that he believed there was no physical force being used against Appellee at the time of the shooting, and that Appellee did not have the right to use his gun in that instance. Appellee was convicted of seconddegree manslaughter and sentenced to ten years' imprisonment. The Court of Appeals vacated Rieder's conviction and remanded for a new trial after determining that the admission of Sergeant Richardson's trial testimony constituted palpable error. The Supreme Court of Kentucky granted discretionary review and held that the disputed testimony did not rise to the level of palpable error. In support, the Court determined that the Commonwealth's evidence was substantial and that the Sergeant's testimony constituted a discrete and insignificant portion of the trial. Appellee's self-protection claim also involved allegations that the shooting was accidental. Accordingly, the Supreme Court reversed the Court of Appeals and reinstated the trial court's judgment.

E. William R. King v. Commonwealth of Kentucky 2013-SC-000556 October 29, 2015

Opinion of the Court by Justice Venters. Minton, C.J.; Cunningham and Noble, JJ., concur. Abramson, J., dissents by separate opinion in which Barber and Keller, JJ., join. Appellant was sentenced to a total of twenty years' imprisonment for first-degree sodomy and first-degree sexual abuse. Questions presented: 1) Whether palpable error occurred when police detective testified that Appellant's case had been recommended for prosecution by local Task Force on Child Sexual and Physical Abuse, and that the victims' five-day delay in reporting the abuse to his mother was "not unusual" for child sex abuse victims; 2) Whether Appellant should have been granted a directed verdict on the sodomy charge; 3) Whether testimony of child-victim was so internally-inconsistent and incredible as to render it unworthy of belief and, therefore, excluded from evidence. Held: 1) Judgment reversed. In a case in which the verdict was totally dependent upon the credibility of the accuser, informing the jury that the local task force, an esteemed panel of local professionals, had reviewed the matter and recommended prosecution, was palpable error; 2) Appellant was not entitled to a directed verdict on sodomy charge where the victim's testimony adequately described oral contact with Appellant's penis; 3) The jury was capable of fairly weighing any conflicting or inconsistent aspects of the victim's testimony and rendering its verdict accordingly. Witness's credibility and the weight to be given to it are matters solely within the province of the jury. Note: The dissent would affirm the judgment, reasoning that the detective's testimony was not palpable error.

IV. <u>DOMESTIC VIOLENCE</u>:

A. Jeffrey Pettingill v. Sara Yount Pettingill 2014-SC-000456-DG October 29, 2015 Opinion of the Court by Justice Keller. Minton, C.J.; Abramson, Barber, Cunningham, and Keller, JJ., concur. Venters, J., not sitting. Noble, J., concurs but would state that "lethality" factors are merely a series of factors often found to have been present after the fact of domestic violence (and certainly not all of them in every case), and as always, a court must exercise independent judgment as to the weight of the presence of any of the factors in the case before it, as such factors have not been normed nor found to be statistically predictive.

Sarah filed a domestic violence petition against her husband, Jeffrey, and the family court entered a Domestic Violence Order (DVO) against him following a hearing. The Court of Appeals affirmed the DVO. On appeal to the Supreme Court, Jeffrey argued that he was deprived of a full appellate review because the Court of Appeals did not receive the video record of the DVO hearing and because the family court erroneously relied on "lethality factors" when it entered the DVO. The Supreme Court affirmed the Court of Appeals. In doing so, the Court held Jeffrey was foreclosed from assigning error because of the missing video because he was on notice that the record lacked the video before the Court of Appeals rendered its opinion and failed to object. Moreover, the Court concluded that Jeffrey's appeal was not prejudiced by the missing video because it was not necessary to the issues on appeal. As to the "lethality factors" issue, the Court held that the factors were not taken by to judicial notice but rather by judicial knowledge. As such, the Court concluded that the family court made and documented sufficient findings of domestic violence and any reliance on "lethality factors" was not indicative of erroneous reasoning.

V. INSURANCE LAW:

A. Tower Insurance Co. of New York v. Brent Horn, et al. 2014-SC-000015-DG October 29, 2015

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Abramson, Barber, Cunningham, Keller, and Venters, JJ., concur. Noble, J., concurs in result only. B & B Contracting (B & B) permitted Brent Horn, a non-employee, to drive one of its trucks when it was short-staffed. Bradley Stafford, an employee of B & B, fell from the truck Horn was driving and was fatally injured. Stafford's estate brought a wrongful death action against Horn, and Horn sought indemnification and defense from B & B's commercial automobile liability insurer: Tower Insurance Company of New York (Tower). Tower filed an intervening complaint, seeking a declaration of rights. The trial court granted summary judgment in favor of Tower and denied coverage to Horn. The Court of Appeals reversed.

The Supreme Court affirmed the opinion of the Court of Appeals. In doing so, the Court determined that Horn was not an employee of B & B but was a volunteer permissive user. As such, under Tower's policy, Horn was an insured

and entitled to indemnification and defense. Next, the Court considered the applicability of the policy's "Employee Indemnification And Employer's Liability" provision, which excluded any coverage for bodily injury to an employee of the insured. The Court held that this exclusion did not apply to Horn because the policy's severability clause applied coverage separately to each insured. In other words, because the insured, Horn, was not Stafford's employer, the exclusion did not negate Horn's coverage. To arrive at this holding, the Court considered and distinguished case law from this jurisdiction and others.

VI. TRESPASS:

A. Larry Penix v. Barbara Delong 2014-SC-000083-DG October 29, 2015

Opinion of the Court by Justice Cunningham. All sitting. Barber, Keller, and Venters, JJ., concur. Minton, C.J., dissents by separate opinion in which Abramson and Noble, JJ., join. This case involves the unlawful cutting of timber and the application of tremble damages authorized under KRS 364.130. Appellant contracted with a logger to cut timber located on Appellant's land. In the course of cutting Appellant's timber, the logger trespassed on and cut the timber from a neighboring property that was owned by Appellee. Appellee sued Appellant and the logger for trespass, seeking damages for the missing timber and the damage to the land. The case was tried without a jury. The trial court found for Appellee and awarded stumpage value and damages, but declined to award treble damages because it found that Appellant had no intent to remove timber from Appellee's property. A cross-appeal followed. The Court of Appeals vacated the circuit court's ruling on treble damages and costs and remanded for additional findings and further proceedings. The Supreme Court of Kentucky granted discretionary review and affirmed the trial court's determination that Appellant did not intend to convert Appellee's timber. Thus, treble damages were inappropriate here. KRS 364.130. The Supreme Court reinstated the trial court's judgment ordering Appellant to pay Appellee the fair and reasonable market value of the timber at the time it was cut.

VII. WORKERS COMPENSATION:

A. Sheila Woosley Kingery v. Sumitomo Electric Wiring, et al. 2014-SC-000422-WC October 29, 2015

Opinion of the Court by Justice Noble. Abramson, Cunningham, and Venters, JJ., concur. Minton, C.J., dissents by separate opinion in which Barber and Keller, JJ., join. The employer, Sumitomo, moved to reopen Kingery's original award of benefits for a work-related strain injury to her neck in 1989 to dispute current medical treatment on grounds that it was neither reasonable and necessary nor related to the original work injury. Sumitomo supported its motion with a medical

report and deposition testimony of its medical expert. Kingery filed no medical proof in response. The Supreme Court held that the evidence in the case compelled finding the treatment non-compensable and that the ALJ's decision in favor of Kingery was not based on substantial evidence. Because the medical questions in this case fell within the sole province of expert medical opinion, it was error to disregard the uncontradicted medical evidence in favor of Kingery's lay testimony.

B. Ronnie Hale v. CDR Operations, Inc., et al. 2014-SC-000062 October 29, 2015

Opinion of the Court by Justice Barber. All sitting. Cunningham, Keller, Noble, and Venters, JJ., concur. Minton, C.J., concurs in result only by separate opinion in which Abramson, J., joins. Appellant/Cross-Appellee, Ronnie Hale was employed by Appellee/Cross-Appellant, CDR Operations, Inc., for approximately three months as a bulldozer operator. Before that, Hale had worked as a bulldozer operator for various other employers for approximately 30 years. Hale filed a workers' compensation claim against CDR alleging cumulative trauma and an injury date of February 7, 2012. The administrative law judge ("ALJ") concluded that Hale sustained cumulative trauma injuries which became manifest on February 7, 2012, while he was employed at CDR, and that he was permanently and totally disabled. The Workers' Compensation Board ("Board") vacated and remanded, concluding that February 7, 2012, could not be the date of manifestation and that Southern Kentucky Concrete Contractors, Inc. v. Horace W. Campbell, 662 S.W.2d 221 (Ky.App.1983), required apportionment of liability based upon the percentage of Hale's impairment attributable to the three months he worked at CDR. The Court of Appeals affirmed. Hale appealed to the Kentucky Supreme Court contending that Southern Kentucky Concrete was inapplicable. CDR cross-appealed, contending that the evidence failed to establish that Hale sustained a cumulative trauma injury during his three-month employment there. The Court refused to resurrect the apportionment scheme of Southern Kentucky Concrete, holding that it has no application under the current statutory scheme. Furthermore, the Court held that the parties had stipulated the date of manifestation of Hale's injuries, and, even if the ALJ's decision were vacated, the stipulation would still be binding. Finally, the Court held that the evidence presented to the ALJ was sufficient to support his decision. Therefore, the Court affirmed the Court of Appeals in part and reversed in part and reinstated the ALJ's decision.

VIII. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. Rebecca Cox Venter 2015-SC-000405-KB October 29, 2015

Opinion of the Court by Justice Noble. All sitting; all concur. Venter was prepaid fees to represent a client in a divorce action. She filed a petition for dissolution but thereafter failed to prosecute the matter, and the client's case was dismissed

for lack of prosecution. Venter never informed her client of the dismissal. Her client unsuccessfully attempted to contact her after learning from a friend who checked for him that his divorce was not final, and she has not returned any fees paid to her. The client filed a bar complaint, which Venter never responded to. The Inquiry Commission issued a five-count charge alleging violations of (1) SCR 3.130-1.3 by failing to act with reasonable diligence in her representation in the divorce action; (2) SCR 3.130-1.4(a)(3) by failing to tell the client the case was dismissed; (3) SCR 3.130-1.4(a)(4) by failing to respond to the client's requests for information and attempts to contact her; (4) SCR 3.130-1.5(a) by charging an unreasonable fee because she failed to prosecute the divorce action and did not refund any prepaid fee; and (5) SCR 3.130-8.1(b) by failing to respond to the Office of Bar Counsel's requests for information. Venter did not answer the charge, and the matter was submitted to the Board of Governors as a default case under SCR 3.210(1). The Board found her guilty of counts 1,2,3, and 5, and not guilty of count 4. The Board considered her disciplinary history, which included Kentucky Bar Association v. Venter, 463 S.W.3d 343 (Ky. 2015) (ordering 181-day suspension for multiple criminal charges and failures to carry through on client matters, apparently related to substance-abuse problem), and recommended Venter be suspended for 60 days to be served consecutively to that previously ordered suspension. Because neither the Office of Bar Counsel nor Venter sought review by the Supreme Court under SCR 3.370(7), and the Court declined review under SCR 3.370(8), the Board's decision was adopted in full under SCR 3.370(9).