

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
OCTOBER 2016**

I. CONTRACT:

- A. Philadelphia Indemnity Insurance Company, Inc. v. Richard Tryon, et al.**
[2014-SC-000354-DG](#)
AND
Encompass Indemnity Company v. Richard Tryon, et al.
[2014-SC-000357-DG](#) **October 20, 2016**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Cunningham, Hughes and Keller, JJ., concur. Wright, J., concurs in part and dissents in part by separate opinion in which Noble and Venters, JJ., join. Tryon owned three automobiles and each vehicle was insured by a different policy through a different insurer—and no policy included the other vehicles. He was involved in an accident and sought underinsured motorist (UIM) benefits from all of his insurers. Philadelphia and Encompass did not insure the vehicle, and both companies claimed owned-but-not-scheduled-for-coverage provisions in their respective policies excluded UIM coverage in this context.

Writing for the Court, Chief Justice Minton determined that such provisions are enforceable as a matter of law, overturning the holding of *Allstate Ins. Co. v. Dicke*, 862 S.W.2d 327 (Ky. 1993). Kentucky’s Motor Vehicle Reparations Act makes UIM coverage optional, and allows limitation of coverage so long as any limits are not inconsistent with the Act. The Court saw no reason why insureds should not be expected to read their policies and negotiate coverage with insurers. Such policies are enforceable as a matter of Kentucky public policy so long as they are clear and unambiguous in their intent to exclude coverage. Under this standard, Chief Justice Minton concluded that the Encompass provision clearly excluded UIM coverage in this instance, but the Philadelphia provision did not.

II. CRIMINAL LAW:

- A. Jeffrey W. Murphy v. Commonwealth of Kentucky**
[2015-SC-000235-DG](#) **October 20, 2016**

Opinion of the Court by Justice Noble. All sitting; all concur. The Appellant was adjudicated a juvenile delinquent for a sex offense in Michigan. Under the laws of that state, he was required to register as a sex offender, but he would not have been required to register in Kentucky had the original offense and adjudication occurred here. He later moved to Kentucky and faced criminal charges for failing to register under the Kentucky Sex Offender Registration Act. He entered a conditional guilty plea and appealed whether he was required to register under the Act. The Supreme Court held that he was. The plain language of KRS 17.510(7)

controlled. The Appellant, having been required to register as a sex offender in Michigan under that state's laws, was "a person ... required to register under ... the laws of another state." KRS 17.510(7). Thus, upon relocating to Kentucky, the statute was unambiguous in requiring that he "comply with the registration requirement of [KRS 17.510]." *Id.*

**B. Shawn Pursley v. Commonwealth of Kentucky
2015-SC-000270-MR October 20, 2016**

Opinion of the Court by Justice Venters. All sitting; all concur. After initially waiving formal indictment and agreeing to proceed by information on charges of second degree burglary charges, defendant pled guilty and was convicted of four counts of third degree burglary. Issues presented: Whether the defendant's consent to proceed by information upon charges of second degree burglary deprived the trial court of jurisdiction to amend the charges to third degree burglary without the intervention of a grand jury indictment. Held: (1) a prosecution of a criminal charge cannot proceed by information unless the defendant has waived the right to a grand jury indictment; and (2) a trial court acquiring jurisdiction of case by information has the same authority as when jurisdiction is acquired by indictment. Pursuant to RCr 6.16 ("The court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. . . .") defendant's consent to proceed by information on charges of second degree burglary vested court with jurisdiction to amend the charge to any third degree burglary or any other charge that might reasonably have been derived from the conduct underlying the second degree burglary charges.

**C. Anthony Wayne Crutcher, Jr. v. Commonwealth of Kentucky
2015-SC-000620-MR October 20, 2016**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Cunningham, Hughes, and Noble, JJ., concur. Venters, J., concurs by separate opinion in which Keller and Wright, JJ., join. Anthony Crutcher was convicted on first-degree robbery and PFO-1 and sentenced to thirty-five years' imprisonment. On appeal, Crutcher argued that his right to public trial was violated when the trial court cleared the courtroom during one witness's testimony. He also objected to the use of a photo lineup.

Writing for the Court, Chief Justice Minton concluded that Crutcher's right to public trial under both the United States Constitution and the Kentucky Constitution was not violated because he failed to object to the closing of the courtroom. Relying on Supreme Court and other federal precedent, the Court determined that a defendant may waive his right to public trial under the Sixth Amendment absent knowing and voluntary waiver. The Court also determined that the photo lineup was not unduly suggestive.

D. Paul J. Elam v. Commonwealth of Kentucky

[2015-SC-000700-MR](#)

[2015-SC-000701-MR](#)

October 20, 2016

Opinion of the Court by Justice Venters. All sitting; all concur. Defendant was convicted of 15 counts of first degree sodomy, 13 counts of first degree sexual abuse, and two counts of witness tampering. *Issues presented:* (1) Whether trial court erred when it refused to sever the trial of numerous sexual crimes relating to one victim from two similar charges against a second victim, and whether trial court erred by consolidating the trial of witness tampering charges with the trial of sexual offenses; (2) Whether the multiple jury instructions on similar offenses deprived defendant of a unanimous jury verdict. (3) Whether multiple identical counts of indictment deprived defendant of a fair trial. *Held:* (1) Joinder of all the sexual charges with the tampering with witness charges was proper because a logical nexus existed to link the sexual offenses with the charges of tampering with witnesses; sexual crimes were properly joined in indictment and tried together because the crimes against the two different victims were substantially similar in nature and character to qualify for joinder and joinder of the offenses in this instance was not otherwise unduly prejudicial. (3) Trial court's jury instructions carefully differentiated among multiple charges of sodomy and sexual abuse so as to avoid any possibility that jurors were not unanimous in their convictions.

E. Allen Cunningham v. Commonwealth of Kentucky

[2014-SC-000436-MR](#)

October 20, 2016

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Hughes, Keller, Noble, and Wright, JJ., concur. Cunningham, J., dissents by separate opinion. *Questions presented:* Whether the trial court erred by (1) allowing the prosecutor to impeach defendant with his pre-trial silence about his alibi, (2) denying a directed verdict on the theft and burglary charges, (3) allowing prejudicial victim impact evidence during the guilt phase of the trial, and (4) allowing impermissible hearsay testimony of a detective that an anonymous tip led police to defendant. *Held:* (1) Defendant was improperly impeached about his failure to tell police about his alibi before trial. KRE 801A(b)(2) permits the use of adoptive admissions, a form of inconsistent prior statements, for impeachment purposes. Silence (including the failure to mention an alibi) qualifies as an adoptive admission when the silence manifests one's adoption of, or a belief in, another person's statement. Thus, silence, including the failure to state a fact under circumstances in which one would naturally assert the fact, may be used for impeachment. To apply the rule, the factual predicate for reliance upon KRE 801A(b)(2), and *Jenkins v. Anderson*, 447 U.S. 231(1980), must be present - the witness's silence must be in response to a statement that would naturally motivate the witness to speak. Here, nothing in the record indicates that police made any accusatory or incriminating remarks to defendant that would have naturally motivated him to assert his whereabouts at the time of the crime; (2) Defendant

was not entitled to a directed verdict of acquittal on the theft charge based upon his claim that he owned the allegedly stolen item and could not be found guilty of stealing his own property. Contrary evidence was sufficient for the jury to find that defendant had transferred ownership to the victim of the alleged theft; (3) Victim's lack of insurance to replace stolen property was irrelevant to issue of defendant's guilt, and should not have been admitted; (4) The alleged error of allowing impermissible hearsay testimony of a detective was not preserved. It is an issue for the trial court to address if it should arise at retrial.

F. Commonwealth of Kentucky v. Robert Guernsey

[2015-SC-000259-TG](#)

[2015-SC-000261-TG](#)

AND

Commonwealth of Kentucky v. Trustin Jones

[2015-SC-000260-TG](#)

[2015-SC-000262-TG](#)

October 20, 2016

Opinion of the Court by Justice Hughes. All sitting; all concur. The Fayette Circuit Court issued a pretrial order excluding the death penalty as disproportionate. Subsequently, the Commonwealth filed an interlocutory appeal in the Court of Appeals and the Supreme Court accepted transfer. The Court vacated the circuit court's order after determining that the circuit court erred in excluding the death penalty as a disproportionate penalty prior to trial. First, the circuit court erred in conducting a comparative proportionality review. Based on the clear language of KRS 532.075, comparative proportionality analysis is a statutory function reserved solely to the Supreme Court. Second, while the circuit court has the authority to conduct an inherent proportionality review, the exercise of that authority is only proper once the Commonwealth has had the opportunity to present all of its evidence at trial. Accordingly, the Court vacated the circuit court's order.

III. INTERLOCUTORY RELIEF:

A. SM Newco Paducah, LLC v. Kentucky Oaks Mall Company

[2015-SC-000629-I](#)

October 20, 2016

Opinion and Order of the Court. All sitting; all concur. Motion for Interlocutory Relief. After Movant, Newco, indicated that it would tear down building located on its property in development operated by Mall Company, Mall moved for a restraining order and a temporary injunction. When trial court indicated it would issue a restraining order (which is not appealable, Newco objected but insisted if order was to be issued, it wanted an immediately appealable order. Trial court issued an appealable temporary injunction to challenge perceived procedural and evidentiary basis for order. On appeal, Court Appeals declined to set aside injunction. Question presented: Whether the Court of Appeals abused its discretion in denying motion for interlocutory relief. Held: The Court of Appeals did not abuse its discretion. Trial court had adequate evidentiary record to

support issuance of temporary injunction, and procedural and evidentiary deficiencies can be attributed, at least in part, to Newco insistence upon an appealable order. Newco failed to show the “extraordinary cause” required by CR 65.09 for obtaining interlocutory relief.

IV. ORDINANCES:

- A. Kentucky Restaurant Association, et al. v. Louisville/Jefferson Metro Government**
[2015-SC-000371-TG](#) October 20, 2016

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J.; Keller, Noble, and Venters, JJ., concur. Hughes, J., concurs in result only by separate opinion. Wright, J., dissents by separate opinion. In 2015, The Louisville/Jefferson County Metro Government (“Louisville Metro”) enacted its own minimum wage ordinance for all employers within the Louisville Metro boundary, to be effective July 1, of that year. Louisville Metro Ordinance No. 216, Series 2014 (the “Ordinance”). The minimum wage set by the ordinances were higher than the \$7.25 minimum wage presented in KRS 337.275. Appellants, the Kentucky Restaurant Association, Inc., et al., filed an action in the Jefferson Circuit Court against Louisville Metro, attempting to void the ordinance as being outside the authority of Louisville Metro to enact. The trial court ruled in favor of Louisville Metro and denied the relief sought by Appellants. This Court accepted transfer, reversed the trial court, and held the following: 1) what KRS 337.275 makes legal, the Ordinance makes illegal and, thus, prohibits what the statute expressly permits. This is precisely the type of “conflict” that is forbidden under Section 156b of our Constitution and KRS 82.082(2); 2) KRS Chapter 337 provides a comprehensive statutory scheme on the issue of wages; and 3) federal law permits state preemption of local law.

V. TORTS:

- A. Ralph M. Goodwin v. Al J. Schneider Company D/B/A Galt House & Galt House East**
[2015-SC-000380-DG](#) October 20, 2016

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Hughes, Noble, and Wright, JJ., concur. Venters, J., concurs in result only. Cunningham, J., dissents without opinion. Mr. Goodwin, who was staying with his wife at the Galt House, slipped and fell while getting into the shower. Goodwin filed suit alleging that the Galt House failed to warn of the dangerously slippery condition and/or to take reasonable care to eliminate the condition by, in pertinent part, providing a bathmat. The Galt House moved for summary judgment arguing that it was not an insurer of Goodwin’s safety and that he had failed to exercise ordinary care to prevent his injury from an open and obvious condition. The circuit court granted

the Galt House's motion and Goodwin appealed to the Court of Appeals, which affirmed.

The Supreme Court reversed the Court of Appeals. In doing so, the Court noted the evolution of the law regarding the "open and obvious" affirmative defense that began with *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010) and continued through *Shelton v. Kentucky Easter Seals Society, Inc.*, 43 S.W.3d 901 (Ky. 2013) and *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015). After summarizing the preceding cases, the Court held that "a landowner has a duty to take reasonable steps to eliminate unreasonably dangerous conditions on its land. The question for the court on summary judgment is whether the landowner breached that duty, a duty that exists whether the conditions are open and obvious or hidden. Thus, in determining whether the landowner has breached that duty, the court does not look to whether the conditions were open and obvious but to whether the landowner took reasonable steps to eliminate the risks created by the conditions." Applying the preceding to the Galt House, the Court noted that the circuit court, in granting summary judgment, and Court of Appeals, in affirming, focused on a lack of industry standards setting forth a duty to provide bathmats. The Court held that the issue was not whether the Galt House had a duty to provide bathmats but whether the failure to provide bathmats breached the Galt House's duty of care.

VI. ATTORNEY DISCIPLINE:

A. Fred G. Greene v. Kentucky Bar Association 2015-SC-000363-KB **October 202, 2016**

Opinion and Order of the Court. All sitting; all concur. Greene admitted to violating SCR 3.130(1.15)(a) and SCR 3.130(1.8)(a). He moved the Court under the negotiated sanction rule, SCR 3.480(2), to impose a 181-day suspension with 61 days of the suspension to be probated for one year, conditioned upon Greene incurring no further disciplinary charges within one year from the date of the Court's order, maintaining his continuing legal education requirements, and paying his membership dues. The KBA did not object to Greene's motion.

The Court noted that it had rejected a prior negotiated sanction proposed by Greene and agreed to by the KBA in this same disciplinary action and had remanded the case for further consideration. The Court reviewed the underlying facts leading to the disciplinary charges, which involved Greene's failure to properly maintain his escrow account and borrowing \$50,000 from a client, ostensibly to cover the deficiency in his escrow account. Greene admitted to violating both SCR 3.130(1.15)(a) and SCR 3.130(1.8)(a).

The Court also reviewed Greene's multiple prior disciplinary sanctions for unprofessional conduct, including six separate private admonitions, a public reprimand and a thirty-day suspension. The Court ultimately concluded that the sanction proposed by Greene and agreed to by the KBA was adequate, noting that

the sanction period will amount to an actual suspension of 120 days or 4 months. Accordingly, the Court granted Greene’s motion to impose a 180-day suspension with 61 days probated, conditioned upon Greene incurring no further disciplinary charges, maintaining his continuing legal education requirements and paying his membership dues.

B. Kentucky Bar Association v. John Elias Dutra
2016-SC-000386-KB October 20, 2016

Opinion and Order of the Court. All sitting; all concur. Dutra was charged with two disciplinary violations for failing to deposit an advance fee payment into an escrow account and abandoning his client, failing to return the client’s paperwork, and failing to properly withdraw from a case upon termination of representation. The Inquiry Commission’s charge was sent to Dutra by certified mail but acknowledgement of receipt was never returned. The following month, Dutra moved for a 21-day extension of time to respond to the Commission’s inquiry. His request was granted but no responsive pleading was ever filed.

The Commission ultimately submitted the matter to the Board of Governors as a default case. The Board unanimously found Dutra guilty of each charge and, after considering his prior disciplinary history, recommended that Dutra be suspended from the practice of law for thirty days and that he be required to repay his former client the sum of \$1,550. The Board further recommended that Dutra’s suspension be probated for one year if he reimbursed the client within sixty days. The Supreme Court agreed with the Board’s recommendation and sanctioned Dutra accordingly.

C. Kentucky Bar Association v. Jeffrey Owens Moore
2016-SC-000387-KB October 20, 2016

Opinion and Order of the Court. All sitting; all concur. The Board of Governors considered two separate files against Moore, one containing a two-count charge and the other a three-count charge. The cases came before the Board as default cases under SCR 3.210 after Moore failed to respond to the charges. The Board unanimously found Moore guilty of all five counts and recommended that he be suspended from the practice of law for one year, to be served consecutively to his suspensions; that he be ordered to repay a loan to a client; that he be ordered to participate and comply with the Kentucky Lawyers Assistance Program; and that he be ordered to pay the costs of this action.

Neither the Office of Bar Counsel or Moore filed a notice of review so the Supreme Court exercised its authority under SCR 3.370(9) and adopted the recommendation of the Board.

**D. Maureen Ann Sullivan v. Kentucky Bar Association
2016-SC-000467-KB **October 20, 2016****

Opinion and Order of the Court. All sitting; all concur. Sullivan moved the Court to impose a thirty day suspension from the practice of law, to be probated for two years on the condition that she not receive any new charges from the Inquiry Commission during the probationary period. She admitted violating the Rules of Professional Conduct, including SCR 3.130(1.4)(a)(5); SCR 3.130(1.15)(a); SCR 3.130(1.16)(d); SCR 3.130(5.5); and SCR 3.130(8.1)(b).

The KBA did not object to the proposed sanction, which was negotiated under SCR 3.480(2). Upon review of the facts and the relevant case law, the Supreme Court found the proposed discipline appropriate and sanctioned Sullivan accordingly.

**E. Justin Neal O'Malley v. Kentucky Bar Association
2016-SC-000483-KB **October 20, 2016****

Opinion and Order of the Court. All sitting; all concur. The charges against O'Malley arose from his failure to repay fees to two clients after he failed to appear for their hearings in U.S. Bankruptcy Court. He later admitted that he lacked sufficient funds to repay his clients. He further admitted that he lacked sufficient knowledge in the practice of bankruptcy law and agreed not to file any bankruptcy cases for five years. As a result, he was charged with violating SCR 3.130(1.1) (competency); SCR 3.130(1.16)(d) (duties upon termination of representation); SCR 3.130(3.4)(c) (disobeying an obligation to a tribunal); and SCR 3.130(8.4)(c) (dishonesty).

O'Malley was suspended from the practice of law in Marcy 2015 for thirty days and has not been reinstated. He moved the Supreme Court to impose a 181-day suspension from the practice of law for his admitted violations of the Rules of Professional Conduct. The KBA did not object to the proposed discipline, which was negotiated under SCR 3.480(2). In agreeing to the sanction, the KBA cited O'Malley's extensive mitigating evidence, including physical and mental impairments and his cooperation with the Kentucky Lawyers Assistance Program.

Upon review of the facts and the relevant case law, the Court found the proposed discipline to be appropriate and suspended O'Malley from the practice of law for 181 days.