PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
SEPTEMBER 2016

I. BUDGETING & APPROPRIATIONS:

A. Commonwealth of Kentucky, ex rel. Andy Beshear, Attorney General v. Commonwealth of Kentucky Office of the Governor, ex rel. Matthew Bevin, in his Official Capacity as Governor, et al.
AND
Jim Wayne, in his Official Capacity as State Representative, et al. v. Commonwealth of Kentucky Office of the Governor, ex rel. Matthew Bevin, in his Official Capacity as Governor, et al.

2016-SC-000272-TG **September 22, 2016**
2016-SC-000273-TG **September 22, 2016**

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Cunningham, Hughes, and Keller, JJ., concur. Venters, J., dissents by separate opinion. Wright, J., dissents by separate opinion in which Venters, J., joins. The Governor withheld 2% of the public universities' fourth-quarter allotments of their 2015-2016 appropriated funds. The Attorney General sued the Governor and others, alleging this exceeded the Governor's statutory authority and violated the separation-of-powers doctrine. Three individual state representatives were also permitted to intervene in the case to challenge the Governor's actions. The Supreme Court first held that the Attorney General had standing to bring the suit under his common-law powers and duties to protect the public's interests against unlawful or unconstitutional governmental actions; the individual legislators did not have such an interest in the subject matter of the case and, thus, would not have had standing to bring the suit themselves. Second, the Supreme Court held that the Governor's reduction of the universities' allotments exceeded his statutory authority to revise allotments under KRS 48.620(1) or to withhold allotments under KRS 45.253(4). Whatever authority the Governor may have to require budget units not to spend appropriated funds, the Court made clear, does not extend to the universities, whom the legislature has made independent bodies corporate with exclusive control over their own expenditures. Having found that the Governor lacked statutory authority to act as he had proposed, the Court did not reach the question whether his actions were constitutional.

II. CRIMINAL LAW:

A. Commonwealth of Kentucky v. David Tapp

2014-SC-000607-DG **September 22, 2016**

Opinion of the Court by Justice Keller. Minton, C.J.; Hughes, Keller and Noble, JJ., concur. Wright, J., dissents by separate opinion in which Cunningham and

Venters, JJ., join. Tapp pled guilty to several drug related offenses and the court sentenced him to one year in prison, probated for one year. The Commonwealth moved to revoke Tapp's probation five days before its expiration, and the court issued an arrest warrant. Tapp was arrested two days before the expiration of his probation and brought before the court one week later, when the court scheduled a revocation hearing. That hearing took place ten days after the probationary period expired. Following the hearing, the court revoked Tapp's probation, and he appealed arguing that the probationary period had expired prior to the revocation hearing. The Court of Appeals reversed, finding that, while a pending warrant can extend the probationary period, Tapp's warrant was no longer pending when it was served. The Supreme Court took discretionary review to determine when a warrant is no longer pending.

The majority of a divided Court determined that a warrant serves two purposes: arresting a defendant and bringing that defendant before the court. Because there are two purposes, a warrant remains pending until both purposes are fulfilled. In this case, the warrant remained pending until Tapp's first post-arrest court appearance. The majority then held that, under KRS 533.020(4) and 533.050(2), a court may temporarily extend the period of probation until the court's next available criminal docket or as soon thereafter as practical. However, the court must have probable cause to believe a violation has occurred in order to make this extension. Because the trial court did not extend Tapp's probationary period at the initial appearance, it lost the ability to revoke his probation.

The dissent stated that a warrant remains pending until such time as the proceeding in which it is issued has concluded.

B. Mohamud Abukar v. Commonwealth of Kentucky
2014-SC-000417-DG **September 22, 2016**

Opinion by Justice Venters. All sitting. All concur. Appellant, an American citizen and native of Somalia, was convicted of first-degree rape. Despite Appellant's early requests for a Somali-English interpreter to assist at trial, the trial court declined to provide an interpreter. The Court of Appeals reversed the judgment on the basis that the trial court's failure to provide Appellant with an interpreter violated KRS 30A.410. On discretionary review, the Supreme Court reversed the Court of Appeals and held: 1) for purposes of KRS 30A.410(1)(b), a person who "cannot communicate in English" means a person whose deficiency in English language skills of either comprehension or expression is such that he or she is unable to understand the nature and consequences of the court proceeding or is unable to participate rationally and coherently in the proceeding; 2) the trial court properly acted within its discretion when it denied Appellant's request for an interpreter. The trial court's factual finding that Appellant was proficient in English to the extent that he was able to understand the proceedings without substantial prejudice was supported by substantial evidence.

III. INSURANCE LAW:

A. Samantha G. Hollway v. Direct General Insurance Company of Mississippi, Inc.

2014-SC-000758-DG September 22, 2016

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Hollaway was involved in a low speed collision in a parking lot with Direct General's insured. Direct General arguably assumed liability for causing the accident, but later recanted and disputed liability. Hollaway filed a multitude of claims, including a bad faith claim against Direct General for failing to fairly negotiate her claim. The trial court awarded Direct General summary judgment and the Court of Appeals affirmed.

A unanimous court affirmed the Court of Appeals. Though it is debatable whether the insurance company admitted causing the accident, it never conceded liability for the injuries she claims she sustained from the accident—Hollaway's profession rendered itself to injuries of this type. But even if Direct General conceded liability, Hollaway failed to establish that the insurer acted with the level of intent necessary to prove a bad-faith claim. Notably, the Court removed the word "evil" from consideration in this aspect of the analysis.

IV. MALICIOUS PROSECUTION:

A. Gary Martin v. Stephen O'Daniel

2014-SC-000373-DG
AND
Mike Sapp v. Stephen O'Daniel
2014-SC-000389-DG
AND
Bobby Motley v. Stephen O'Daniel
2014-SC-000394-DG September 22, 2016

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Hughes, Noble, and Wright, JJ., concur. Cunningham, J., dissents by separate opinion in which Keller, J., joins. Police officers sued for malicious prosecution arising from their investigatory activities which led to the indictment and trial of the plaintiff for forgery, arising from his effort to obtain legal title to a stolen vehicle. Issues presented: 1) Whether police officers have governmental immunity from suit for malicious prosecution; 2) whether officers who turned over evidence to the prosecutor, who in turn made the prosecutorial decision to seek indictment, could be liable for malicious prosecution upon plaintiff's acquittal. Held: 1) the doctrine of governmental immunity does not protect government employees for malicious conduct. Plaintiff asserting claim of malicious prosecution must prove malice, which if proven, negates the defense of governmental immunity; 2) "procuring" a criminal or civil judicial proceeding is synonymous with being the proximate and efficient cause of putting the law in motion against another person; 3) abrogating

Raine v. Drasin, 621 S.W.2d 895, 899 (Ky.1981), the Supreme Court restated the elements of malicious prosecution action as follows: 1) the defendant initiated, continued, or procured a criminal or civil judicial proceeding, or an administrative disciplinary proceeding against the plaintiff; 2) the defendant acted without probable cause; 3) the defendant acted with malice, which, in the criminal context, means seeking to achieve a purpose other than bringing an offender to justice; and in the civil context, means seeking to achieve a purpose other than the proper adjudication of the claim upon which the underlying proceeding was based; 4) the proceeding, except in ex parte civil actions, terminated in favor of the person against whom it was brought; and 5) the plaintiff suffered damages as a result of the proceeding.

V. PROPERTY LAW:

A. Kentucky Properties Holding LLC v. Donald Sproul

2014-SC-000368-DG **September 22, 2016**

Opinion of the Court by Justice Hughes. All sitting; all concur. Kentucky Properties Holdings, LLC argued that Church Lane in Gallatin County is the private property of the Hornsbys, the sole owners of Kentucky Properties, while a neighboring landowner, Sproul, contended that the road is owned by the county or alternatively, is a public road. After a bench trial, the circuit court determined that Church Lane is a private road, but on appeal, the Court of Appeals reversed that judgment, finding that Church Lane is a public road. The Supreme Court reversed the decision of the Court of Appeals and reinstated the order of the Gallatin Circuit Court. The Court determined that Church Lane did not provide necessary access to Sproul's property and that the trial court correctly determined that while Church Lane had been maintained by the county at one time, it had reverted back to Kentucky Properties after having been discontinued as a public road under KRS 178.116(1).

VI. WRIT OF PROHIBITION:

A. John Doe No. 1, et al. v. Hon. Eddy Coleman, Judge, Pike Circuit Court, et al.

2015-SC-000408-MR **September 22, 2016**

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Hughes, and Keller, JJ., concur. Venters, J., concurs in result by separate opinion. Cunningham, J., dissents by separate opinion in which Wright, J., joins. William Hickman, III, sued the John Does for libel for allegedly defamatory anonymous postings they made on an internet website related to his tenure on the local airport board. Hickman attempted to subpoena their identifying information from the company on whose website the posts were published. The John Does, through their attorney, moved to quash the subpoena, asserting their right to anonymous speech under the First Amendment. The trial court denied the motion to quash, and the John Does petitioned for a writ of prohibition from the Court of Appeals,

which was granted. The case was sent back to the trial court to apply the rule for compelling the identity of anonymous speakers in defamation cases laid out in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), which was a modified version of the rule announced in *Dendrite International, Inc. v. Doe No. 3*, 775 A2d 756 (N.J. Supp. Ct. App. Div. 2001). Under that rule, for defamation plaintiffs to be able to obtain the identities of anonymous speakers, they must attempt to notify the speakers and give them an opportunity to respond and then make a prima facie showing of defamation sufficient to defeat summary judgment to the extent possible without knowing the speakers' identities. Applying that rule, the circuit court again ordered the identities be disclosed and, in addition to the serving of the subpoenas, ordered the John Does' counsel to do so. The John Does again petitioned for a writ of prohibition from the Court of Appeals, which was denied. The John Does appealed that denial to the Supreme Court.

In reversing the Court of Appeals, the Supreme Court held that the four-step process laid out in *Dendrite*, and supported by the analysis in *Cahill*, was the appropriate means for striking the necessary balance between the First Amendment right to speak anonymously and the right of those harmed by anonymous speech to obtain legal redress. But the Court held that Hickman had not yet made an adequate showing to satisfy that test—specifically, he had not yet made a factually based averment of falsity necessary to meet his prima-facie burden.

B. Baptist Health Richmond, Inc. v. Hon. William G. Clouse, Jr., Judge, Madison Circuit Court, Division 1, et al.
2015-SC-000657-MR **September 22, 2016**

Opinion of the Court by Justice Keller. All sitting. Keller, Cunningham, Noble and Venters, JJ., concur. Hughes, J., concurs by separate opinion in which Minton, C.J., and Wright, J., join. The issue before the court involved the interaction of Kentucky's discovery rules in medical malpractice cases and the federal Patient Safety and Quality Improvement Act (the Act). Note that the Court had previously addressed this interaction in *Tibbs v. Bunnell*, 448 S.W. 3d 796 (Ky. 2014), a plurality opinion.

Congress enacted the Act to encourage hospitals to engage in self-analysis. It therefore provides that certain information obtained during that self-analysis and contained in the hospital's safety evaluation system is protected from discovery. However, the Act also states that its intent was not to interfere with existing state reporting requirements and discovery rules. Thus, information mandated by state requirements and otherwise discoverable would not be protected by the Act. The plaintiff in this case requested a number of documents which Baptist Health refused to produce claiming protection under the Act.

The Court, based on recently generated guidance from the Department of Health and Human Services, noted that the Commonwealth requires hospitals to collect certain information which has traditionally been discoverable. A hospital cannot,

based on the Act, claim that such otherwise discoverable information is protected by the Act. Furthermore, a hospital cannot take otherwise discoverable information, place it in a protected safety evaluation system, and claim that the information is not discoverable. As long as a hospital is complying with its state mandated reporting requirements, the trial court has no reason to examine the information in the protected safety evaluation system. However, if a hospital is not complying with state mandates, the court can conduct an in camera review of the information in the protected safety evaluation system to determine if any state mandated information is contained therein.

In her concurring opinion, Justice Hughes further delineates the procedure a court should undertake in determining whether and to what extent contested information is discoverable.

VII. ATTORNEY DISCIPLINE:

A. Cabell D. Francis, II v. Kentucky Bar Association
2016-SC-000331-KB **September 22, 2016**

Opinion and Order of the Court. All sitting; all concur. Francis was indicted for theft by unlawful taking and knowing exploitation of an adult. He negotiated a plea agreement with the Commonwealth that required him to plead guilty to amended charges, pay restitution and resign his license to practice law. In accordance with that agreement, Francis moved to resign under terms of permanent disbarment pursuant to SCR 3.480(3). The KBA had no objection. The Court granted the motion and permanently disbarred Francis from the practice of law in the Commonwealth.

B. Kentucky Bar Association v. Jeffrey Owens Moore
2016-SC-000335-KB **September 22, 2016**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission issued a four-count charge against Moore. He failed to respond and the matter proceeded to the Board of Governors as a default case. The Board found Moore guilty of all four counts and recommended that he be suspended from the practice of law for one year, with sixty-one days to serve and the remainder probated for one year with conditions. Neither Moore nor Bar Counsel filed a notice of review. So the Court exercised its authority under SCR 3.370(9) and adopted the recommendation of the Board.

The Court further noted that it had recently indefinitely suspended Moore for his failure to respond to the charges in this case. However, the indefinite suspension had not been issued before the KBA submitted the current matter to the Court. Therefore, the Board did not take the indefinite suspension into account in its recommendation. For that reason, the Court adopted the Board's recommended sanction and imposed it concurrently with his current indefinite suspension.

C. Kentucky Bar Association v. Douglas C. Brandon
2016-SC-000336-KB **September 22, 2016**

Opinion and Order of the Court. All sitting; all concur. In 2002, Brandon was indicted in federal court for his participation in an international Ponzi scheme. He was later convicted of securities fraud, wire fraud, and conspiracy to commit securities fraud and wire fraud.

Following his sentencing in 2005, the Supreme Court suspended Brandon from the practice of law. Brandon's counsel then asked the Inquiry Commission to place the matter in abeyance under SCR 3.180(2). The matter remained in abeyance awaiting Brandon's appeal of his judgment and sentence in the United States District Court, with counsel providing regular status updates. In May 2015, Bar Counsel moved the Commission to remove the matter from abeyance due to a lack of updates from Brandon's counsel and information that Brandon had been released from incarceration. Subsequently, Bar Counsel served Brandon's attorneys of record and sent a courtesy copy to Brandon's bar roster address. The attempts were unsuccessful and the matter was removed from abeyance and a charge was filed against him. Brandon never answered the charge and the matter was submitted to the Board of Governors as a default case under SCR 3.210(1).

The Board ultimately found Brandon guilty of the charges and recommended that he be permanently disbarred. Upon review of the record, the Supreme Court agreed with the Board's decision and adopted its recommendation to permanently disbar Brandon from the practice of law in the Commonwealth.

D. Kentucky Bar Association v. David Thomas Sparks
2016-SC-000338-KB **September 22, 2016**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission issued a three-count charge against Sparks for failing to respond to his clients' request for information; failing to return the clients' paperwork, abandoning the clients, and failing to properly withdraw from a case upon termination of the representation; and failing to respond to a lawful demand for information from an admissions or disciplinary authority. Sparks acknowledged receipt of the charge via certified mail but declined to respond. So the Commission submitted the matter to the Board of Governors as a default case under SCR 3.210. The Board found Sparks guilty of each charge and recommended that he be suspended for 181 days and be referred to KYLAP. The Board also noted that in February 2016, Sparks had been suspended from the practice of law for 181 days, with 61 days to serve and the balance probated for two years with conditions, and recommended that his new suspension run consecutive to his current suspension. The Supreme Court reviewed the record and agreed that the Board reached the appropriation conclusions as to Sparks's guilt and adopted the recommendation that he be suspended from the practice of law for 181 days, to run consecutive with the 181-day suspension ordered by the Court in February 2016.

E. Michael Stephen Wade v. Kentucky Bar Association
2016-SC-000373-KB **September 22, 2016**

Opinion and Order of the Court. All sitting; all concur. Wade moved the Supreme Court to accept his motion for consensual discipline for his admitted violations of the Kentucky Rules of Professional Conduct. Wade, who has been under temporary suspension from the practice of law since October 2012, received two charges from the Inquiry Commission relating to two separate criminal proceedings against him in Jefferson and Bullitt counties. The Court acknowledged that since his convictions, Wade had taken a number of steps to treat his drug and alcohol addiction, including extensive inpatient treatment, entering a supervision agreement with KYLAP, and regularly attending twelve-step support meetings. Wade urged the Court to enter an Order suspending his license to practice law for a period of four years and six months, retroactive from October 26, 2012, or until such time as he has satisfied the full terms and conditions of pretrial diversion in the Jefferson and Bullitt Circuit Court proceedings, whichever event last occurs. The KBA, after a thorough review of his motion and analogous case law, did not object to Wade's proposed discipline. The Court agreed it was similarly satisfied with the negotiated sanction and agreed to grant the motion, suspending Wade from the practice of law until April 26, 2017, or until he satisfies the full terms and conditions of his two criminal proceedings and conditions upon his continued participation in KYLAP.

F. Kentucky Bar Association v. George Keith Wells
2016-SC-000379-KB **September 22, 2016**

Opinion and Order of the Court. All sitting; all concur. Wells was charged with violating several provisions of the Kentucky Rules of Professional Conduct relating to his failure to provide competent representation in a case involving mineral title examination and oil leases. In addition to these grievances, Wells was suspended from practicing law in Kentucky in January 2016 for his failure to comply with continuing legal education requirements and failure to pay bar dues. Following the filing of the complaint and charges, Wells failed to respond in any manner.

After considering the charges alleged in the present case, the Board recommended that Wells be suspended from the practice of law for 61 days and repay the unearned fee he received from his client. The Court agreed with the Board's recommendation and suspended Wells for 61 days, ordering him to repay his client $10,000 within twenty days of the date of its order.