KENTUCKY LAW UPDATE

2024

ADVANCING THE PROFESSION THROUGH EDUCATION

Kentucky Court of Appeals Update

1 CLE Credit
Sponsor: Kentucky Court of Appeals

Compiled and Edited by:
The Kentucky Bar Association
Office of Continuing Legal Education
for
Kentucky Bar Association
2024 Kentucky Law Update

©2024 All Rights Reserved
Published and Printed by:
Kentucky Bar Association, August 2024

Editor's Note: The materials included in the following Kentucky Bar Association Continuing Legal Education handbook are intended to provide current and accurate information about the subject matter covered as of the original publication date. No representation or warranty is made concerning the application of legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how a particular judge or jury will interpret or apply such principles. The proper interpretation of the principles discussed in a matter for the considered judgment of the individual legal practitioner. The faculty and staff of this Kentucky Bar Association CLE program disclaim liability therefor. Attorneys using these materials, or information otherwise conveyed during these programs, in dealing with a specific legal matter have a duty to research the original and current sources of authority. In addition, opinions expressed by the authors and program presenters in these materials do not reflect the opinions of the Kentucky Bar Association, its Board of Governors, Sections, or Committees.

Note to practitioners: These are the Opinions designated for publication by the Kentucky Court of Appeals for the specified time period. Practitioners should Shephardize all case law for subsequent history prior to citing it.

I. ADMINISTRATIVE LAW

A. *Department of Revenue, Finance and Administration Cabinet v. Carriage Ford, Inc.*, 2022-CA-0231-MR, 683 S.W.3d 659 (Ky. App. 2023). Opinion by Dixon, Donna L.; Acree, J. (concurs) and Jones, J. (concurs).

This involved an appeal of the Franklin Circuit Court's reversal of Kentucky Claims Commission's (KCC) final order affirming the Department of Revenue's (DOR) dismissal of Carriage Ford, Inc.'s refund request. The Court of Appeals affirmed. From 2012-2014, Carriage Ford, an Indiana car dealership, collected and paid Kentucky's motor vehicle usage tax (MVUT) for its Kentucky customers. In 2015, Indiana Department of Revenue audited Carriage Ford and found it owed Indiana sales tax for transactions where Kentucky customers took possession of vehicles in Indiana. Carriage Ford satisfied its Indiana tax bill for $183,003 and requested a refund from DOR for that amount plus interest, submitting evidence that it paid $256,862.16 in MVUT. DOR denied Carriage Ford's refund, Carriage Ford appealed to the KCC, the KCC affirmed DOR's denial, Carriage Ford appealed to the Franklin Circuit Court, and the circuit court reversed. The Court held Carriage Ford was eligible for refund under KRS 134.580(2). ("When money has been paid into the State Treasury in payment of any state taxes . . . the appropriate agency shall authorize refunds to the person who paid the tax . . . of any overpayment of tax and any payment where no tax was due.") Kentucky courts have long denounced interpretations of the MVUT which require payment of two similar taxes on the same purchase. Unfortunately, there is a dearth of law on whether a person who pays the MVUT can receive credit ***after*** registering a motor vehicle in Kentucky. Kentucky's Office of the Attorney General (OAG) opined that those who pay the MVUT "should without exception be credited with the tax paid in the foreign state when registering [a] motor vehicle in Kentucky upon proof that the sales tax was in fact paid in the foreign state." OAG urged when "such a construction of the statute does violence to the legislative intent, [the court should] specifically decline to adopt such an interpretation[.]" The Supreme Court of Kentucky also mandates that courts "should not . . . interpret [a] statute to provide an absurd result." *Commonwealth v. Reynolds*, 136 S.W.3d 442, 445 (Ky. 2004). Carriage Ford provided proof it paid Indiana sales tax; therefore, it "shall be entitled to receive a credit" under KRS 138.460(6)(a).

B. *Hardin v. Jefferson County Board of Education*, 2020-CA-1316-MR, 673 S.W.3d 437 (Ky. App. 2023). Opinion by Lambert, James H.; Caldwell, J. (concurs) and Combs, J. (concurs).

Appellant was demoted from the position of assistant principal to teacher based on the recommendation of Appellant's school principal. This decision was upheld by the Board of Jefferson County Public Schools (JCPS), and Appellant filed suit

arguing his demotion failed to comply with the procedural protections afforded to school administrators by KRS 161.765. Appellant also asserted claims of age discrimination and that JCPS failed to comply with its internal evaluation procedures during the demotion process. JCPS sought a dismissal arguing that Appellant served as an administrator in another school district, and as a result, he was not afforded the protections of KRS 161.765 because it required his service as administrator be for at least three years with JCPS. The Jefferson Circuit Court dismissed the complaint, and Appellant appealed which resulted in a reversal rendered in *Hardin v. Jefferson Cnty. Bd. of Educ.*, 558 S.W.3d 1, 4 (Ky. App. 2018) wherein the Court of Appeals held that the statute did not require the service as administrator to occur within the same school district for the three-year period. The decision additionally held the age discrimination claim was erroneously dismissed without "provid[ing] any legal analysis" because Appellant had "adequately stated a claim for age discrimination . . . ." Lastly, the decision reasoned that, rather than dismissing with prejudice, the circuit court should have stayed Appellant's claims relating to the alleged improper use of internal procedures to allow him an opportunity to exhaust his remedies with the State Evaluation Appeals Panel (SEAP). Upon remand from appeal, the circuit court allowed Appellant to amend his complaint to add SEAP. JCPS and SEAP both filed for dismissal. Among their arguments in support was the asserted basis that SEAP's decision was not subject to judicial review. The motion was granted with no discussion regarding the Court's holding in *Hardin*, 558 S.W.3d 1, and this appeal followed.

On appeal, JCPS and SEAP argued that two unpublished decisions in *Travis v. State Evaluation Appeals Panel*, No. 2017-CA-001018-MR, 2019 WL 2068539 (Ky. App. May 10, 2019) and *Geron v. Jefferson County Board of Education*, No. 2017-CA-000540-MR, 2018 WL 8262575 (Ky. App. Aug. 31, 2018), were rendered after *Hardin*, 558 S.W.3d 1, which provided a basis for the lower court to depart from the holding. The Court of Appeals disagreed and reversed the trial court's dismissal of Appellant's KRS 161.765 and age discrimination claims. In its decision, the Court discussed general principles of the law of the case doctrine which provides that "a court addressing later phases of a lawsuit should not reopen questions decided by that court or by a higher court during earlier phases of the litigation." The Court reasoned that *Travis* and *Geron* did not constitute such an exception because unpublished cases "cannot constitute a change in the law" due to their non-binding status. Furthermore, those decisions were determined to not conflict with the rationale in *Hardin*, 558 S.W.3d 1, and the Court determined nothing in the underlying facts, including the inclusion of SEAP as a party to the litigation, changed the facts between its decision in *Hardin*, 558 S.W.3d 1, and first remand back to the circuit court. However, the Court affirmed the trial court's dismissal of Appellant's request for judicial review of SEAP's decision under KRS Chapter 13B, the statute governing administrative hearings, which was a claim that was not addressed on the merits in *Hardin*, 558 S.W. 3d 1. *Citing Travis*, 2019 WL 2068539, at *3, and *Geron*, 2018 WL 8262575, at *4, as persuasive, the Court determined that SEAP reviews did not involve "a formal adjudication of a teacher's legal rights, duties, privileges, or immunities" and did not provide "for a hearing officer, the presentation or cross-examination of witnesses or any of the traditional hallmarks of an administrative hearing." "SEAP is not empowered to reinstate a teacher to a prior position or provide any other remedy apart from setting aside a

defective evaluation." *Geron*, 2018 WL 8262575, at *4. Thus, KRS Chapter 13B was determined to be inapplicable.

C. *Wilson v. Kentucky Retirement Systems*, 2022-CA-0808-MR, 683 S.W.3d 663 (Ky. App. 2023). Opinion by Taylor, Jeff S.; Combs, J. (concurs) and McNeill, J. (concurs).

Appellant challenged an order of the Franklin Circuit Court upholding the denial of his application for disability retirement benefits by the Board of Directors (the Board) of Kentucky Retirement Systems (KYRS). Appellant was formerly employed as an attorney for the Cabinet for Health and Family Services (CHFS) who terminated him. Before his termination, Appellant was on unpaid leave between April 19, 2012 to May 15, 2012. The termination was appealed to the Kentucky Personnel Board, but a settlement agreement was ultimately reached between Appellant and CHFS in September 2013 stipulating that Appellant agreed to voluntarily retire effective May 16, 2012. However, the settlement agreement did not identify Appellant's last day of paid employment. On May 16, 2014, Appellant applied for retirement benefits with KYRS indicating his last day of paid employment was on May 16, 2012. KYRS rejected the application on the basis Appellant's last day of paid employment was on April 19, 2012, and Appellant failed to file within two years of the last day of paid employment per Kentucky Revised Statute (KRS) 61.600(1)(c). Appellant requested and received an administrative hearing with the Board, which was held on April 29, 2016. Appellant's attorney, John Gray, represented him at the hearing and was also listed as a witness who would testify regarding the discussion surrounding Appellant's settlement agreement with CHFS. Gray was precluded from testifying due to the "complications and opportunities for prejudice" with him acting as both a witness and legal counsel.

On appeal, Appellant argued KYRS erroneously disallowed Gray from testifying at the administrative hearing, which resulted in the hearing officer relying on "misinformation regarding [Appellant's] last date of paid employment." The Court of Appeals affirmed the circuit court's order upholding the denial. At the outset, the Court noted that the video record of the administrative hearing was incomplete, and thus, the relevant omitted records were assumed to support the appealed decision. *Commonwealth v. Thompson*, 697 S.W.2d 143 (Ky. 1985). Citing Kentucky Supreme Court Rule 3.130(3.7), the Court held it was proper to preclude Gray's testimony and that none of the recognized exceptions applied to allow him to serve as legal counsel and testify as a witness. The Court stated that administrative proceedings before the KYRS were pending for two years before the administrative hearing, and Appellant had an opportunity to retain a substitute counsel which would have allowed Gray to testify. Additionally, Appellant was able to testify at the hearing regarding his understanding of the settlement agreement. Lastly, the record demonstrated Appellant's last day of paid employment was on April 19, 2012, and the settlement agreement only designated a retirement date of May 16, 2012. In accordance with KRS 61.510(32), Appellant's last date of paid employment was held to be the proper date for KYRS to calculate the two-year filing limitation under KRS 61.600(1)(c) to apply for disability retirement.

II. ADULT GUARDIANSHIPS AND CONSERVATORSHIPS

Webb v. Commonwealth, 2022-CA-0444-DG, 673 S.W.3d 73 (Ky. App. 2023). Opinion by Karem, Annette; Dixon, J. (concurs) and Goodwine, J. (concurs).

Suzanna Webb argued the Meade District Court erred in determining her to be partially disabled after a jury trial and appointing her daughter-in-law, Amber Betner, as her limited guardian and conservator. Webb argued the court erred in concluding that one member of the interdisciplinary team required under KRS 387.540(1) was adequately qualified to: (1) evaluate Webb pursuant to KRS 335.080(1)(a), (b), and (c) or KRS 335.090(1)(a), (b), and (c); (2) aid in compiling the mandatory reports under KRS 387.540(1) prior to trial; and (3) testify in person at trial under KRS 387.570(6). The Court of Appeals reversed with instructions to remand the case to the trial court for a new trial. The Court determined the statutory requirements of KRS 387.540(1) were straightforward, and the legislature unequivocally required an individual who was a licensed or certified social worker or who had a degree or educational background in social work as determined by the board to be part of the interdisciplinary team compiling the reports. In this case, the Court concluded that the team did not have "a person licensed or certified as a social worker" under KRS 387.540(1) or an employee of the Cabinet for Health and Family Services who met the qualifications of KRS 335.080(1)(a), (b), and (c) or KRS 335.090(1)(a), (b), and (c). While the individual involved on Webb's team held a bachelor's degree in psychology, she had no degree in social work and produced no evidence that she had completed courses equivalent to a social work or social welfare program as determined by the Kentucky Board of Social Work under KRS 335.090(1)(c)(2). Further, the employee's employment experience did not equate to the completion of courses equivalent to those stated in KRS 335.090(1)(c)(2). The Commonwealth and Betner failed to reference the Court to any part of the record indicating the employee's completion of such coursework. Thus, because there was effectively no report from one of the three persons required under the provisions of KRS 387.540(1), the Court held the district court should not have gone forward with the jury trial because it did not follow the instructions set out by the legislature. *See* KRS 387.540(7).

III. ARBITRATION

LP Louisville Lynn Way, LLC v. Woford, 2023-CA-0099-MR, 2024 WL 1686044 (Ky. App. Apr. 19, 2024). Opinion affirming in part, reversing in part, and remanding by Lambert, James H.; Acree, J. (concurs) and Karem, J. (concurs).

Signature Healthcare appealed the denial of its motion to compel arbitration and stay the proceedings in an action brought by the estate of a former resident for negligence and wrongful death, the resident's beneficiaries, including her attorney-in-fact, being the real parties in interest to the latter. The Court of Appeals affirmed as to the claims of the estate and the resident's unnamed beneficiaries, reversed on the attorney-in-fact's individual wrongful death claim, and remanded the issue of a stay to the circuit court. At issue was the validity of a voluntary pre-dispute arbitration agreement signed by the resident's attorney-in-fact. Because the agreement's clear and express terms provide that the signatory was acting in both their representative and individual capacities, the Court rejected the attorney-in-fact's claim that he had not signed in his representative capacity. Given the attorney-in-fact's admission he signed in his individual capacity, the circuit court's denial of arbitration on his wrongful death claim was in error. Regarding the claims of the resident's estate and her unnamed beneficiaries, applying the holdings of *Ping v.*

Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012) and *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 321 (Ky. 2015), *rev'd in part, vacated in part by Kindred Nursing Centers Ltd. Partnership v. Clark*, 581 U.S. 246 (2017), the Court concluded that: (1) Signature Healthcare had the burden of proving that the attorney-in-fact was authorized to agree to arbitration on the resident's behalf; and (2), because the resident's power of attorney instrument authorized only the management of her property and financial affairs, Signature Healthcare had failed to prove the existence of a valid agreement.

IV. AUTOMOTIVE INSURANCE

Erie Insurance Exchange v. Johnson, 2022-CA-1405-MR, 2023 WL 8656205 (Ky. App. Dec. 15, 2023). Opinion by Eckerle, Audra; Cetrulo, J. (concurs in part, dissents in part, and files separate opinion) and Goodwine, J. (concurs). Discretionary review granted March 6, 2024. Not reported in S.W.3d.

Upon remand from the Kentucky Supreme Court in a decision dismissing a prior appeal on the grounds of lack of finality as to the underlying challenged order, the Floyd Circuit Court ruled by summary judgment that the Motor Vehicle Reparations Act (MVRA) allowed a personal injury protection (PIP) insured control over the manner in which medical benefits are paid. Appellees were previously involved in a motor vehicle collision and requested Appellant insurance company to disburse payment to a chiropractor. Appellant refused claiming medical bills had to be paid in the order received, and it had bills from other providers predating this treatment. The trial court reasoned Appellant was not entitled to unilaterally determine the extent, timing, and payment of medical services the Appellees were entitled to receive. Additionally, because Appellant lacked a reasonable foundation to disregard Appellees' payment directions, the trial court ruled, pursuant to KRS 304.39-320, it must pay attorneys' fees and interest at a rate of 18 percent per annum under KRS 304.39-210. On appeal, Appellants argued the MVRA "merely allows an insured to direct payment among the types of losses, such as medical expenses or lost wages, but not within a particular element of loss" and cited the holdings in *Neurodiagnostics, Inc. v. Kentucky Farm Bureau Mutual Insurance Company*, 250 S.W.3d 321 (Ky. 2008), and *Medlin v. Progressive Direct Insurance Company*, 419 S.W.3d 60 (Ky. App. 2013) for support. Appellants also contended that this issue "constituted a justiciable controversy" and "the proper interpretation of the statute [was] reasonably subject to debate" thereby affording it a reasonable basis to dispute the payment directive and avoid paying attorneys' fees and interest.

The Court of Appeals disagreed with both premises and affirmed the circuit court's ruling. The Court reasoned that *Neurodiagnostics* and *Medlin* were not on-point as to the specific issue in this matter, and rather, those opinions "emphasiz[ed] that the MVRA affords the insured control over how his or her benefits are paid." Per *Medlin*, the Court stated that the MVRA only requires two options – "an insurer either reimburse the insured for money spent out of pocket or pay the medical care providers directly" – but the insurer must abide by that choice. As to the award of attorneys' fees, it was held that Appellees presented proof of loss, and Appellant did not dispute the medical services provided or that claims would exceed the PIP limit. The trial court was held to have correctly ruled that nothing in the plain language of the law supported Appellant's position "that chiropractic medical expenses had not 'accrued' until [Appellant] paid the medical bills that had been previously submitted." The Court declared the MVRA's purpose is "to ensure prompt payment of PIP claims with minimal need to resort to court proceedings. Absent assertion of a valid

defense, such as lack of documentation, a bona fide dispute whether the expense was reasonable, or exceeding the PIP limit, [Appellant] has always been obligated to pay the chiropractic expenses." A dispute regarding the timing or priority of payment did not excuse this. Additionally, it was held that a denial and bad faith were not necessary to trigger the award of fees and interest but "only a delay without reasonable foundation must occur." Judge Susanne M. Cetrulo authored a separate opinion concurring in part and dissenting in part. The opinion reasoned that, while the majority's interpretation of the MVRA providing insureds ultimate control over payment of benefits was correct, there was a reasonable dispute over the interpretation of the law which was a matter of first impression. As a result, it was reasoned Appellant presented a "legitimate defense" because the case law did not clearly contradict its position, and the award of fees and interest should have been reversed.

V. CASEY'S LAW

H.N. v. R.H., 2023-CA-1235-DGE, 2024 WL 3210278 (Ky. App. June 28, 2024). Opinion by Lambert, Judge; Easton, J. (concurs) and Eckerle, J. (concurs).

Casey's Law, KRS 222.430-222.437, requires two mental health professionals to provide certified reports to the trial court before an order of involuntary commitment to receive substance abuse treatment may be issued. As a matter of first impression, the Court held that an order of commitment issued pursuant to Casey's Law is fatally flawed if the reports of both mental health professionals are not certified, even if both professionals testify at the commitment hearing. The lack of certification was not a harmless error because Kentucky precedent holds that a court cannot properly grant relief if the statutory prerequisites to doing so have not been met, even if those statutory predicates may make no practical difference in the outcome of the proceedings.

VI. CIVIL PROCEDURE

W.R.G. v. K.C., 2022-CA-1319-ME, 673 S.W.3d 81 (Ky. App. 2023). Opinion by Goodwine, Pamela R.; Dixon, J. (concurs) and Karem, J. (concurs).

The Court of Appeals entered an opinion superseding its prior decision rendered on July 28, 2023, which was subsequently withdrawn. Father challenged the Caldwell Circuit Court's judgment granting Stepmother's petition to adopt his biological minor child. Although Father filed a *pro se* answer to the petition, he did not otherwise participate in the proceedings below. The Court of Appeals reviewed for palpable error and vacated the judgment, remanding the matter for a new hearing because Father was not served with any document requiring service including the trial order. Kentucky Rule of Civil Procedure (CR) 5.02(1) defines service as complete upon mailing "unless the serving party learns or has reason to know that it did not reach the person to be served." Stepmother's counsel admitted all documents he mailed to Father had been returned as undeliverable. The trial order was also returned to the circuit clerk marked as undeliverable. Despite Father's obvious lack of notice, the circuit court proceeded with the hearing because the order was mailed to his last known address. The Court of Appeals held, at the point mail intended for Father was returned, counsel and the circuit court knew it did not reach him under CR 5.02(1). Without service of the trial order, Father did not have notice of the final hearing which amounted to a violation of his due process rights requiring a new hearing on the petition.

VII. COMMERCIAL LAW

Cubby Angel Properties, LLC v. Citizens Bank of Kentucky, Inc., 2023-CA-0025-MR, 681 S.W.3d 167 (Ky. App. 2023). Opinion by Cetrulo, Susanne M.; Combs, J. (concurs) and Thompson, C.J. (concurs).

This case arose from the hiring of a manager, James David Johnson, by a limited liability company, Appellant Cubby Angel Properties, LLC (Cubby Angel). Johnson had Cubby Angel's sole member and manager, Dr. Melissa F. Knuckles, sign a limited power of attorney and a financial power of attorney granting him power to establish bank accounts, manage the day-to-day business, and deposit funds. Johnson opened an account at Citizens Bank, began to deposit rent proceeds from Cubby Angel's properties, and then, over the course of several months, began converting those funds for his personal use. When the conversion was discovered, Cubby Angel sued the bank. Dr. Knuckles admitted that she executed the powers of attorney; however, she claimed that she signed them outside the presence of witnesses or a notary and did not have them reviewed by legal counsel. The complaint alleged that the bank had committed (1) common law conversion; (2) common law negligence; and (3) statutory conversion. The circuit court granted dismissal on all counts, and this appeal followed. The Court of Appeals affirmed and held the circuit court properly found Cubby Angel's common law claims were preempted by the Uniform Commercial Code (UCC). The UCC provides that when a particular provision of the statute addresses an issue, that issue is "displaced" by the UCC and may not be addressed through common law claims. KRS 355.1-103(2); *see also Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Co.*, 434 S.W.3d 489, 506 (Ky. 2014). Using the "comprehensive rights and remedies test," the Court concluded that KRS 355.3-420 plainly provides a cause of action for conversion of an instrument. Second, the Court also found the UCC disposes of Cubby Angel's common law negligence claim because the claim was contingent on Johnson's authority to sign the requisite documents to open the account. The UCC extensively discusses authorization of signatures. *See* KRS 355.1-201(2)(a) (defining "unauthorized signature"); *Dean*, 434 S.W.3d at 498 (*quoting* KRS 355.3-402) ("[i]f a person acting . . . as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature[.]"). Third, Cubby Angel's statutory conversion claim, under KRS 355.3-420, failed as a matter of law because there was no genuine issue of material fact regarding Johnson's power to transact on behalf of Cubby Angel. Dr. Knuckles knowingly executed the documents granting Johnson the power to establish and operate bank accounts, to execute any documents necessary to do so, and specifically authorizing any party dealing with Johnson to rely absolutely on the authority granted in the powers of attorney. As such, there existed no issue of fact regarding whether Johnson was entitled to enforce the instruments under KRS 355.3-420(1).

VIII. CONSTITUTIONAL LAW

Cameron v. Jefferson County Board of Education, 2022-CA-0964-MR, 2023 WL 6522192 (Ky. App. Oct. 6, 2023). Opinion by Karem, Annette; Caldwell, J. (concurs) and Combs, J. (concurs). Discretionary review granted March 6, 2024.

The Jefferson County Board of Education filed suit against the Commissioner of Education of Kentucky alleging that several provisions of Senate Bill 1, codified at KRS 160.370(2), violated the prohibition against special and local legislation found in §§59 and 60 of the Kentucky Constitution. The legislation, which gives greater powers to the school

superintendent at the expense of the board of education, applies only "in a county school district in a county with a consolidated local government," a description which currently fits only the Jefferson County school district. The Attorney General intervened to defend the constitutionality of the legislation, arguing the Board lacked standing; failed to name a necessary party, the Jefferson County Public Schools (JCPS) Superintendent; and that the legislation was not special legislation because it applied to a class rather than to a specific individual, object, or locale. The Court of Appeals held the Board had standing because the defendant Commissioner possessed the authority to enforce the legislation and the Board's failure to name the superintendent as a party was not fatal to the action. The Court applied the test in *Calloway County Sheriff's Department v. Woodall*, 607 S.W.3d 557, 571 (Ky. 2020), to conclude that the challenged legislative provisions violate §§59 and 60 because, even though the legislation did not expressly name JCPS, it was intended as a practical matter to apply to one specific locale, the Jefferson County school district.

IX. CONTRACTS

A. *Haney v. Stykes*, 2022-CA-1261-MR, 2022-CA-1335-MR, 688 S.W.3d 561 (Ky. App. 2023). Opinion by Easton, Kelly Mark; Cetrulo, J. (concurs) and Combs, J. (concurs).

Neal A. Haney filed a civil complaint in Pulaski Circuit Court seeking damages arising from a business relationship he had with Jerome Stykes for the purchase and resale of properties. Stykes counterclaimed for unpaid tax preparation work. Haney's claim was dismissed for lack of timeliness, but Stykes' claim was submitted to a jury who awarded damages for a breach of contract although for lower than what Stykes requested. Stykes was additionally awarded attorneys' fees but denied prejudgment interest. Stykes also sought to recover a 2 percent "service fee" along with punitive damages and to assert a claim of theft of services, all of which the trial court did not allow to be submitted to the jury. Haney appealed the award of attorneys' fees while Stykes cross-appealed the denial of his additional claims and prejudgment interest. The Court of Appeals reversed the award of attorneys' fees and affirmed the denial of Stykes' additional claims and prejudgment interest. The Court reasoned the 2 percent service fee constituted an impermissible hidden interest fee. Theft of services was determined not to have been established because failure to immediately pay invoices for tax preparation was not the equivalent of failure to pay a restaurant or hotel bill, which KRS 514.060(2) deems to be "*prima facie* evidence that the services were obtained by deception as to intention to pay." The denial of punitive damages was deemed to be correct because breach of contract does not provide recovery for such damages. Prejudgment interest was held to be unavailable for unliquidated claims, and Stykes' contractual claims contained "no listing of any kind of what charges were to be incurred for any specific service provided. The invoices gave only a total amount without itemization. What services were provided and what a proper charge was for that service were debatable under the unspecific language of the contract." Lastly, the Court concluded the contract did not clearly and expressly communicate recovery of attorneys' fees was available. "[T]he contract use[d] the phrase 'placed in the hands of an attorney' or a collection agency but then mention[ed] only 'all costs of collection.' Fees, much less attorneys' fees, are never mentioned." The case was remanded for a determination if attorneys' fees were available under a non-contractual basis.

B. *Sparks v. Rose*, 2023-CA-0062-MR, 681 S.W.3d 542 (Ky. App. 2023). Opinion by Thompson, Larry E.; Eckerle, J. (concurs) and Taylor, J. (concurs and files separate opinion).

The Court of Appeals reversed and remanded a judgment by the circuit court which granted summary judgment in favor of Michael Rose. The trial court ruled that because the parties did not enter into a written contract, there was no valid contract. On appeal, the Court held that the parties' complaint and answer both state that a contract was entered into, that the terms were discussed over text message, that part of the payment was made, and that the contract was performed, although allegedly performed in a substandard manner. The Court held the parties' words and conduct showed the existence of a valid contract. The Court then discussed the measure of damages for a construction contract and held that, on remand, the trial court should determine the cost of remedying the defect, so long as it is reasonable, in determining damages. The concurring opinion stated that on remand, the trial court should also consider Appellant's substantial performance of the contract, even if the work was not completed to Appellee's satisfaction.

X. CRIMINAL LAW

A. *Shane v. Kentucky Parole Board*, 2022-CA-0135-MR, 2023 WL 4535569 (Ky. App. July 14, 2023). Opinion by McNeill, J. Christopher; Cetrulo, J. (concurs in result only and files separate opinion) and Jones, J. (concurs). Discretionary review granted December 6, 2023.

Appellant's parole was revoked for a violation of consuming alcohol. His final revocation hearing was conducted before an administrative law judge (ALJ) whose findings were adopted by the parole board. Appellant filed a declaratory judgment action in Franklin Circuit Court arguing the parole board improperly delegated the final revocation hearing to an ALJ, the orders were missing the requisite findings pursuant to KRS 439.3106, and there was insufficient evidence to support revocation. Appellant requested an injunction reinstating his parole and filed a motion for summary judgment which was denied. The Court of Appeals reversed. The Court first considered whether the appeal was moot due to Appellant's subsequent release on parole and determined "the public interest" exception applied. The Court then ultimately reasoned the parole board impermissibly delegated the final revocation hearing to an ALJ. The Court interpreted the holding in *Jones v. Bailey*, 576 S.W.3d 128 (Ky. 2019), to require the parole board to conduct the final revocation hearing, and as a result, the Court determined that delegation to an ALJ amounted to a denial of due process. The Court cited language in KRS 439.440, KRS 439.330(1)(e), and KRS 439.320(4) which it interpreted to require the parole board to directly conduct final revocation hearings. The Court reasoned that, while the hearings may be conducted by less than a full panel of the parole board, at least two members must preside. The Court declined to answer the additional claims raised by Appellant due to the underlying mootness and having already reversed the lower court's order.

Judge Susanne M. Cetrulo filed a separate concurring opinion which stated that, while this decision departs from the Court's previous holdings in *Hodge v. Kentucky Parole Board*, No. 2021-CA-1512-MR, ___ S.W.3d ___, 2023 WL 453138 (Ky. App. Jan. 27, 2023), and *Ivy v. Kentucky Parole Board*, No. 2022-CA-

0369-MR, 2023 WL 2439676 (Ky. App. Mar. 10, 2023), the legal analysis citing the language of KRS 439.440 was persuasive. Judge Cetrulo wrote that the panel in *Ivy* relied on language in KRS 439.341 to conclude that the authority to preside over final revocation hearings could be delegated to an ALJ, but Judge Cetrulo concluded the language of KRS 439.440 suggests this was not among the permissible allocations the parole board could impart. The concurring opinion's conclusion noted, "Since a motion for discretionary review is currently pending before our Supreme Court on *Hodge*, further clarity in this matter may thankfully be coming soon."

B. *Canafax v. Commonwealth*, 2022-CA-1035-MR, 2023 WL 4830425 (Ky. App. July 28, 2023). Opinion by Easton, Kelly Mark; Karem, J. (concurs) and Thompson, C.J. (concurs).

In 2011, Appellant entered a guilty plea to an amended charge of first-degree sodomy, which disregarded the age of the victim thereby reducing the charge from a Class A felony to a Class B felony, and three counts of first-degree sexual abuse for a 27-year sentence. In 2014, Appellant filed a motion pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 asserting ineffective assistance of counsel. An agreed order was entered between Appellant and the Commonwealth removing one of the sexual abuse convictions after it was noticed that his indictment failed to list one of the counts he pled to thereby reducing his sentence down to 22 years. In 2019, Appellant filed a motion pursuant to CR 60.02 asserting that the incidents for which he was charged occurred prior to statutory changes that took effect in July 2006, and thus, his sentence and period of post-incarceration supervision should be governed under the lesser penalties of the previous version of the applicable statutes. The Scott Circuit Court denied the motion as untimely filed and reasoned the claim should have been raised in his prior RCr 11.42 motion. The Court of Appeals affirmed and reasoned that, while the sentencing range changed for first-degree sexual abuse, Appellant "was sentenced to the one period (five years) within the law for his crimes both before 2006 and after." While Appellant was subject to two more years of post-incarceration supervision, if he "complied with the terms of his incarceration and eventual release, he would serve no additional time." Otherwise, the changes to the statutes did not have any impact on Appellant's charges, and Appellant was facing a potential life sentence from a Class A felony sodomy charge. The Court additionally reasoned that waiting eight years to bring this claim was unreasonable because Appellant should have been aware of the alleged date errors and could have corrected them earlier or raised them in his RCr 11.42 motion. Furthermore, the Court noted that Appellant's RCr 11.42 motion "affirmatively stated the crimes occurred on or about August 2006." Lastly, the Court held Appellant failed to prove any fraud that the Commonwealth "purposefully chose the date in the Indictment, knowing it was not true."

C. *Lamotte v. Commonwealth*, 2019-CA-0559-MR, 2020-CA-1486-MR, 2023 WL 4982156 (Ky. App. Aug. 4, 2023). Opinion by Acree, Glenn E.; McNeill, J. (dissents and files separate opinion) and Thompson, C.J. (concurs).

The Commonwealth charged Brandon Lamotte with first-degree assault for attacking Kate Sanders. A jury convicted Lamotte of first-degree assault, which requires, among other things, a "serious physical injury to another person." KRS

508.010(1)(b). KRS 500.080(15) defines a "serious physical injury" as a "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." KRS 500.080(15). Lamotte appealed his conviction, arguing the Commonwealth failed to produce evidence Sanders suffered from a serious physical injury. Sanders testified that Lamotte stabbed her on the right side of her body, and that she had cuts around her neck and around her hip – none of which were actively bleeding when first responders arrived at the scene. Her medical records indicated no sutures were necessary to close any of her wounds and none of her injuries appeared to be life threatening. The Court of Appeals reversed the conviction. The Court distinguished the case from *Brown v. Commonwealth* which held it would not be unreasonable to find a serious physical injury where, "[a]s a result of the stabbing," the victim "suffered a punctured lung, creating a hole in the lung and causing a pneumothorax . . . ." 553 S.W.3d 826, 831 (Ky. 2018). In the instant case, the Commonwealth presented evidence of external injuries and pneumothorax but failed to present any evidence that the first caused the second, electing to rely instead on the logical fallacy of *post hoc, ergo propter hoc* – that because effect A happened after alleged cause B, B caused A. The fallacy of such logic, the Court reasoned, is revealed by medical proof in this case that the victim's thoracic pleura (the membrane encapsuling her lungs, heart, and major parts of her circulatory system) was never penetrated, the lung did not collapse until two days later after the attack, and the victim had a history of chronic pneumothorax. Given all the evidence, the Court held it was clearly unreasonable for the jury to have found the victim suffered serious physical injury as the statute and case law defines it because there was no evidence that external injuries caused a collapsed lung, only evidence that it did not. *See Simmons v. Commonwealth*, 576 S.W.2d 253, 254-55 (Ky. App. 1978) (when considering a directed verdict motion "the trial judge has been given an opportunity to pass on the sufficiency of all of the evidence"). Because the Court of Appeals reversed the conviction, there was no need to review Lamotte's second appeal challenging the denial of his CR 60.02 motion based on the victim's frequent public admissions she falsely accused Lamotte. Judge J. Christopher McNeill dissented and filed a separate opinion stating the jury's verdict was not clearly unreasonable in light of the evidence.

D. *Kay v. Commonwealth*, 2022-CA-0870-MR, 2022-CA-0871-MR, 673 S.W.3d 448 (Ky. App. 2023). Opinion by Karem, Annette; Caldwell, J. (concurs) and Combs, J. (concurs).

These appeals were taken from the denial of a motion to suppress evidence recovered in a traffic stop. A state trooper pulled over an RV that was having trouble staying within its lane. After he and another trooper separately questioned the driver and passenger, who gave differing accounts of their travel itinerary, the officers searched the RV and recovered four pounds of marijuana. The trial court held the initial stop was supported by probable cause based on the trooper's testimony that the RV was veering over the center line and the fog line. The police video appeared, however, to show the RV crossing only the fog line. On appeal, the Court of Appeals held the trial court was entitled to rely on the trooper's testimony; that the video was only activated after the trooper had followed the RV for over a mile; and that the driver himself confirmed to the trooper that he was having difficulty keeping the vehicle on course. The Court further held the stop was

not impermissibly extended in violation of *Rodriguez v. U.S.*, 575 U.S. 348 (2015) because the officers had a reasonable and articulable suspicion that criminal activity was afoot based on the driver's uncontrollable nervousness and shaking; the inconsistency between the driver and the passenger's stories of where they were traveling from; the driver's failure to divulge they were coming from Colorado, a "source state" for marijuana; and the driver's admission that he had a small amount of marijuana. The Court held that questioning the driver and passenger about their travel itinerary fell well within the mission of a traffic stop under state and federal precedent and did not unreasonably extend the stop.

E. *Pons v. Commonwealth*, 2021-CA-1392-MR, 673 S.W.3d 813 (Ky. App. 2023). Opinion by Jones, Allison; Acree, J. (concurs) and Dixon, J. (concurs).

In a direct appeal from Appellant's convictions for first-degree manslaughter and first-degree wanton endangerment in a shooting death, the Court of Appeals affirmed the trial court's judgment. The Court considered and rejected Appellant's arguments that (1) the trial court erroneously permitted the Commonwealth to play an "annotated" version of surveillance video footage which showed colored ovals around Appellant and his victim during the shooting; and (2) the trial court erroneously failed to grant his motion for directed verdict on the count of wanton endangerment. With regard to the first issue, Appellant argued the trial court should have disallowed the annotated video because it failed to place a colored oval around a third party, Appellant's wife, who was also present at the scene. However, the Court agreed with the trial court that the colored ovals were helpful in assisting the jury to understand the movements of the individuals on the screen. Furthermore, the colored ovals around Appellant and his victim helped differentiate Appellant's wife as well, because she was the only person without such an oval. Because this issue was not properly preserved, the Court determined there was no manifest injustice requiring reversal. In his second issue, Appellant argued the trial court should have granted a directed verdict for his wanton endangerment count because Appellant shot and killed his intended target, the person he claimed was threatening to kill him. However, the evidence showed that Appellant's wife was present and in the vicinity of the victim when Appellant fired his rifle. Quoting *Hall v. Commonwealth*, 468 S.W.3d 814, 828-29 (Ky. 2015), the Court of Appeals held that "[f]iring a weapon in the immediate vicinity of others is the prototype of first-degree wanton endangerment." Accordingly, the trial court did not err in denying Appellant's directed verdict motion.

F. *Commonwealth v. Blackford*, 2022-CA-0985-DG, 674 S.W.3d 465 (Ky. App. 2023). Opinion by Goodwine, Pamela R.; Taylor, J. (concurs) and Thompson, C.J. (concurs).

The Commonwealth appealed a judgment of the Jefferson Circuit Court affirming a judgment of the Jefferson District Court. Blackford was charged with speeding 26 miles per hour or more over the speed limit and reckless driving. Blackford's counsel reached a settlement agreement with an assistant Jefferson County attorney. The parties agreed Blackford would plead guilty to the speeding charge in exchange for dismissal of the reckless driving charge. When the district court heard Blackford's case, the assistant county attorney assigned to the case was not present. Blackford's counsel asked the court to amend the speeding charge to 25 miles per hour over the posted speed limit. The district court agreed and allowed

him to plead guilty to the lesser charge. The district court denied the county attorney's motion to vacate or set aside the final judgment. The Commonwealth appealed as a matter of right to the Jefferson Circuit Court, and the circuit court affirmed the judgment. The Court of Appeals granted discretionary review. On appeal, the Commonwealth argued the Jefferson Circuit Court erred in affirming the judgment because the Jefferson District Court engaged in illegal *ex parte* communications with Blackford's counsel; lacked the authority to amend the speeding offense; violated the code of judicial conduct; and abused its discretion in denying the county attorney's motion to vacate or set aside the judgment. The Court determined the Jefferson District Court engaged in illegal *ex parte* proceedings with Blackford's counsel and violated the Code of Judicial Conduct. Blackford's counsel was held to have violated the Kentucky Code of Professional Conduct. Additionally, the Court held the district court lacked the authority to amend the speeding offense without the assistant county attorney's consent, and the district court erred in denying the county attorney's motion to alter, amend, vacate, or set aside the judgment. For these reasons, the Jefferson Circuit Court erred in affirming the district court's judgment. This Court reversed the judgment of the Jefferson Circuit Court. It remanded with instructions to enter a new order reversing the judgment of the Jefferson District Court and to instruct the district court to enter a judgment in accordance with the original settlement agreement reached by the assistant county attorney and Blackford's counsel.

G. *Helm v. Commonwealth*, 2022-CA-1232-MR, 2023 WL 5491267 (Ky. App. Aug. 25, 2023). Opinion by Jones, Allison; Caldwell, J. (concurs) and Taylor, J. (concurs).

In a direct appeal from Appellant's 12-month alternate sentence after she absconded from pretrial diversion, the Court of Appeals affirmed the Hardin Circuit Court's judgment. Appellant argued the trial court no longer had the authority to impose a sanction because the diversionary period had expired while she had absconded. Appellant contended the only action the trial court was authorized to take was to enter a final disposition of the charges as dismissed-diverted, because the Commonwealth had not moved to void diversion prior to the expiration of the diversionary period. The Court of Appeals disagreed with Appellant's argument, noting two important points: (1) the trial court did not void her diversion, making the line of cases regarding the voiding of diversion inapplicable; and (2) the trial court issued a bench warrant for her arrest after she had absconded, which tolled the diversionary period. The Court agreed with the trial court that KRS 533.254(1) applies the provisions of KRS 533.020 regarding probation to pretrial diversion "in so far as possible." KRS 533.020(4) specifically states that a pending warrant will prevent the automatic final discharge of probation. Here, given the General Assembly's explicit directive to do so in KRS 533.254(1), the Court held that KRS 533.020(4) prevents the automatic discharge of diversion due to a pending warrant as well.

H. *Raider v. Commonwealth*, 2022-CA-1070-MR, 2023 WL 6521602 (Ky. App. Oct. 6, 2023). Opinion by Jones, Allison; Easton, J. (concurs and files separate opinion) and Lambert, J. (concurs). Discretionary review granted February 7, 2024. Not reported in S.W.3d.

In a direct appeal from the Estill Circuit Court's order revoking Appellant's pretrial diversion, the Court of Appeals reversed. Appellant was required to complete the drug court program as a condition of his diversion; however, Appellant absconded from the program and was terminated from it. For reasons that are not clarified by the record, the Commonwealth did not move to revoke Appellant's diversion. Over four years later, Appellant appeared before the trial court on new charges. The trial court *sua sponte* revoked diversion, despite Appellant's objections that the Commonwealth had not moved to revoke, and the diversionary period had expired. The trial court overruled the objections, stating a motion by the prosecutor was not required. In its majority opinion, the Court of Appeals agreed with Appellant that a trial court's revocation of diversion requires a motion by the prosecutor to revoke, *citing Ballard v. Commonwealth*, 320 S.W.3d 69 (Ky. 2010), and *Tucker v. Commonwealth*, 295 S.W.3d 455 (Ky. App. 2009). Because it is undisputed that the Commonwealth never filed a motion to revoke in this case, prior precedents required reversal of the trial court's order and remand with instructions to dismiss the underlying case as diverted. The concurring opinion agreed with the majority that *Tucker* and *Ballard*, interpreting the language in KRS 533.256(1), compelled the result in this case. However, the concurrence pointed out that KRS 533.258(1) states a diverted case can only be dismissed upon successful completion of the terms of the diversion. Appellant, having absconded for years and abandoning treatment, did not successfully complete the terms of his diversion. The concurrence suggested that legislative action may be necessary to clarify whether KRS 533.256(1) intended the absolute necessity of the prosecutor's motion to void diversion despite the condition of successful completion found in KRS 533.258(1).

I. *Commonwealth v. Letner*, 2022-CA-1054-MR, 678 S.W.3d 101 (Ky. App. 2023). Opinion by McNeill, J. Christopher; Cetrulo, J. (concurs) and Dixon, J. (concurs).

Appellant called 911 for emergency help after a female occupant of an apartment he was staying at overdosed. Appellant was later indicted on two counts of first-degree trafficking in a controlled substance in Pulaski Circuit Court based on methamphetamine and fentanyl later recovered pursuant to a search warrant on the apartment. Appellant moved to dismiss the indictment on the premise he was exempt from prosecution under Kentucky's Medical Amnesty Statute, KRS 218A.133. The trial court granted the motion on the reasoning that since one of the definitions of "trafficking" includes "possession with intent," and since trafficking in a controlled substance necessarily includes possession of the substance, KRS 218A.133 should be construed liberally to include trafficking within the statute's immunity from prosecution for possession of controlled substance crimes. The prosecution appealed, and the Court of Appeals reversed on the basis that KRS 218A.133's plain language only granted immunity from prosecution for criminal offenses prohibiting possession. The Court additionally reasoned that possession and trafficking were separate and distinct crimes, and if the legislature intended to exempt trafficking under the statute, "it could have easily done so." The Court concluded that even if the statute could be read ambiguously, the legislative history

of the law supported the rationale that trafficking was not intended to be included in the exemption.

J. *Burden v. Commonwealth*, 2022-CA-0739-MR, 688 S.W.3d 541 (Ky. App. 2023). Opinion by Caldwell, Jacqueline M.; Combs, J. (concurs) and Karem, J. (concurs).

James Robert Burden, Jr. (Burden) appealed the Daviess Circuit Court's denial of his post-conviction motion seeking DNA testing pursuant to KRS 422.285. In 1986, Burden entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to charges of kidnapping and murder. In 2021, after advancements in DNA testing, Burden petitioned for DNA testing of evidence found at the crime scene of the victim's body. The trial court denied the motion on the basis "there was no 'unresolved' issue which might be resolved by the testing of the evidence" since a rape charge against Burden had been dismissed. The Court of Appeals reversed and remanded on the basis that KRS 422.285(5) compelled Burden's motion be granted if a reasonable probability existed that a defendant would not have been prosecuted if exculpatory results were obtained through DNA testing. Even though ultimately dismissed, Burden was initially charged and prosecuted for rape, and he entered an *Alford* plea to a separate qualifying offense under KRS 422.285(1)(a) thus triggering the statute's mandatory testing requirement. The Court reasoned the statute only required he be prosecuted, not convicted, for the offense related to the DNA testing, and "though perhaps 'resolved' by the plea, [the rape charge] still would have been litigated had Burden not [pled.]" The Court concluded that had exculpatory DNA evidence been available at the time, Burden would not have pled to kidnapping and murder "as he would have had evidence of non-involvement in the rape, which occurred contemporaneously."

K. *Burton v. Commonwealth*, 2022-CA-0436-MR, 678 S.W.3d 926 (Ky. App. 2023). Opinion by Jones, Allison; Combs, J. (concurs) and Thompson, C.J. (concurs).

In a direct appeal from the trial court's second judgment and sentence, the Court of Appeals vacated and remanded with instructions to the trial court. The trial court issued its second judgment and a series of *nunc pro tunc* orders after the Appellant, a youthful offender, was granted parole while at the Department of Juvenile Justice following the trial court's first judgment. The trial court justified its ruling by stating that it had not yet issued a final sentence in the age-18 hearing for a youthful offender and, therefore, the Appellant had been granted an "illegal parole." The Court of Appeals vacated the second judgment, holding the initial judgment and sentence of the then-17-year-old Appellant operated as the final judgment and sentence, *citing Commonwealth v. Carneal*, 274 S.W.3d 420 (Ky. 2008). Next, the Court held the trial court erred when it stated that a youthful offender could not be granted parole prior to the age-18 hearing. "[Kentucky Revised Statute] 640.030(2) indicates that youthful offenders may be paroled prior to their eighteen-year-old hearing." *Edwards v. Harrod*, 391 S.W.3d 755, 762 (Ky. 2013). Finally, the Court of Appeals held the trial court's *nunc pro tunc* orders were improper. Such orders "may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken." *Webster County Bd. of Educ. v. Franklin*, 392 S.W.3d 431, 437 (Ky. App. 2013). The Court of Appeals then vacated the second judgment and sentence and remanded to the trial court with instructions allowing the Appellant to serve his parole.

L. *Buechele v. Commonwealth*, 2023-CA-0113-MR, 2023 WL 8286953 (Ky. App. Dec. 1, 2023). Opinion by Easton, Kelly Mark; Cetrulo, J. (concurs) and Combs, J. (concurs). Not reported in S.W.3d.

Appellant challenged the Nelson Circuit Court's denial of his motion to suppress evidence of drugs seized by police during an investigative stop. Appellant was stopped after he was observed disregarding KRS 189.570(14), the law prohibiting pedestrians from walking down the middle of a street. When Appellant was initially told to come over to the observing police officer, he turned and walked away from the officer's patrol car. After the officer exited his vehicle, Appellant was told to stop, and Appellant stuck his hands in his pockets and began to pick up the pace. The officer caught up to Appellant, grabbed both his arms, and led him back to the patrol car. After reaching the patrol car, Appellant removed his hands from his pockets, and the officer observed drugs scattered underneath his vehicle. On appeal, Appellant argued that based on *Commonwealth v. Wilson*, 625 S.W.3d 252 (Ky. App. 2021), he was improperly seized. In *Wilson*, a prior panel of the Court determined the arrest of a subject based on fleeing or evading police under KRS 431.005(1)(d) was improper because the underlying offense for which the subject was told to stop was a local ordinance violation as opposed to a misdemeanor or a felony required under the statute. The Court of Appeals affirmed the denial and reasoned that Appellant was not placed under arrest when he was told to stop by the officer, but rather was only being detained for purposes of issuing a citation for a pedestrian violation. The drugs were reasoned to have been observed by the officer in plain view while he was still effectuating the detention for purposes of the issuing the citation.

M. *Mills v. Commonwealth*, 2022-CA-1356-MR, 680 S.W.3d 497 (Ky. App. 2023). Opinion by Cetrulo, Susanne; Combs, J. (concurs) and Easton, J. (concurs).

Michael Mills appealed following criminal convictions for second-degree burglary, criminal mischief, and a violation of a domestic violence order. At issue, primarily, was whether jointly owned property that one member of a married couple destroyed – mid-divorce – can serve as a basis for criminal mischief under KRS 512.020(1)(a). Because Mills and his spouse had been ordered by a family court not to destroy marital property, the Court of Appeals concluded that he had no "reasonable ground to believe he had the right to destroy" the marital property.

N. *Commonwealth v. Hartsfield*, 2022-CA-1388-MR, 2024 WL 56917 (Ky. App. Jan. 5, 2024). Opinion by Combs, Sara Walter; Acree, J. (concurs) and Eckerle, J. (concurs). Discretionary review granted June 5, 2024. Not reported in S.W.3d.

In this criminal case of first impression, the Commonwealth challenged the Fayette Circuit Court's denial of a motion *in limine* to exclude a portion of police video camera footage. In that disputed footage, the police officer who responded to a rape investigation was heard to comment that he did not believe the victim's allegations against the defendant. The Court of Appeals reversed and concluded the trial court erred in denying the Commonwealth's motion to exclude and that the testimonial nature of the video improperly infringed upon the province of the jury to determine the victim's credibility.

O. *Clay v. Commonwealth*, 2023-CA-0105-MR, 685 S.W.3d 352 (Ky. App. 2024). Opinion by Karem, Annette; Goodwine, J. (concurs) and McNeill, J. (concurs).

Michael W. Clay appealed from the Fayette Circuit Court's order denying his motion to suppress. Clay argued the circuit court erred by failing to suppress evidence recovered as a result of a drug sniff at a traffic stop. The only issue on appeal was whether the officer had reasonable suspicion to permit the detention of Clay and the vehicle in which he was a passenger to perform a warrantless search. The Court of Appeals affirmed the circuit court. The Court first noted the Court of Appeals had recently decided two unpublished cases on the issue of reasonable, articulable suspicion with differing results – *Jones v. Commonwealth*, No. 2018-CA-001181-MR, 2019 WL 2321654 (Ky. App. May 31, 2019) and *Warfield v. Commonwealth,* No. 2021- CA-1404-MR, 2023 WL 2718970 (Ky. App. Mar. 31, 2023). The Court determined, looking at the totality of the circumstances in this case, the officer's observations formed a basis for reasonable, articulable suspicion to allow a deviation from the original purpose of the traffic stop. Further, the Court noted it was considering the officer's inferences based on objective observations and the criminal's methods of operation. Thus, the Court affirmed the circuit court's denial of Clay's motion to suppress.

P. *Walker v. Commonwealth*, 2022-CA-0368-MR, 2024 WL 874190 (Ky. App. Mar. 1, 2024). Opinion by Lambert, James H.; Caldwell, J. (concurs) and Goodwine, J. (concurs).

Appeal from the denial of an application for expungement pursuant to KRS 431.073(1)(c) following a full pardon. The Court upheld the Adair Circuit Court's determination that the decision whether to grant an application was left to its sound discretion due to the General Assembly's use of the permissive word "may" in the statute. The Court also upheld the circuit court's consideration of the factors and balancing test set forth in KRS 431.073(4) in exercising its discretion, although that section is only applicable to applications filed under KRS 431.073(1)(d). There is nothing in the statute that prohibits the use of those factors in considering applications filed under (1)(a)-(c). Finally, the Court held the circuit court did not abuse its discretion in denying the application based upon the welfare and safety of the public and the interest of justice, as Walker had been convicted of murdering his parents.

Q. *Workman v. Commonwealth*, 2022-CA-1114-MR, 687 S.W.3d 168 (Ky. App. 2024). Opinion by Jones, Allison; Acree, J. (concurs) and Goodwine, J. (concurs).

In a direct appeal from a judgment and conviction following Appellant's jury trial, the Court of Appeals affirmed. The trial court sentenced Appellant to a concurrent term of five years' imprisonment after finding her guilty of operating a motor vehicle under the influence of alcohol (DUI) (fourth or subsequent offense with an aggravator) and driving on a DUI-suspended license (first offense). Appellant refused a breath test requested by the arresting law enforcement officer, but she agreed to a urine screen conducted by the jailer when she was booked into the detention center. At her trial, the trial court ruled that any testimony about the urine screen was disallowed, as it was not probative as to whether she refused the requested breath test pursuant to KRS Chapter 189A. Despite the trial court's ruling, Appellant repeatedly referred to the disallowed subject of the urine screen

while on the stand. The Commonwealth moved for a ruling that Appellant had "opened the door" to questioning her about breath tests she had refused on previous occasions when she was arrested for DUI. The trial court agreed. Appellant then made a number of damaging admissions during the Commonwealth's cross-examination. On appeal, Appellant argued that a recent Supreme Court case, *Hemphill v. New York*, 595 U.S. 140 (2022), "cast serious doubt on the continued viability of the 'opening of the door' doctrine[.]" She also asserted the trial court abused its discretion when it denied her motion for mistrial following the trial court's ruling which allowed the Commonwealth to question her about her previous DUI experiences. The Court of Appeals rejected Appellant's arguments. *Hemphill*'s ruling was grounded in a violation of the Confrontation Clause of the Sixth Amendment of the U.S. Constitution. Here, Workman was directly questioned on cross-examination, and so the Confrontation Clause was not implicated. The Court of Appeals also held the trial court did not abuse its discretion when it denied Workman's motion for mistrial. "Opening the door," *i.e.*, the doctrine of curative admissibility, applies "when one party's use of inadmissible evidence justifies the opposing party's rebuttal of that evidence with equally inadmissible proof." *Fairley v. Commonwealth*, 527 S.W.3d 792, 802 (Ky. 2017) (*quoting Commonwealth v. Stone*, 291 S.W.3d 696, 701-02 (Ky. 2009). The trial court employed curative admissibility in response to Appellant's own improper conduct, and a mistrial was not warranted in this case.

R. *H.M. v. Commonwealth*, 2022-CA-1016-MR, 2022-CA-1195-MR, 2022-CA-1196-MR, 2024 WL 1122572 (Ky. App. Mar. 15, 2024). Opinion by Lambert, James H.; Combs, J. (concurs) and Goodwine, J. (concurs).

These consolidated appeals from an order of involuntary commitment issued pursuant to KRS Chapter 202C presented numerous matters of first impression. The Court explained that KRS Chapter 202C requires a two-step process, a guilt hearing followed by a commitment hearing, but an appeal may be taken only from a final order of commitment issued after the commitment hearing. The Court held a KRS Chapter 202C respondent may raise an insanity defense at the guilt hearing but affirmed the trial court's rejection of that defense here because it was supported by substantial evidence. As to the commitment phase, the Court held the Commonwealth is not required to show that a respondent has previously been convicted of criminal offenses to satisfy KRS 202C.050(1)(c), which requires proof beyond a reasonable doubt that a respondent "has a demonstrated history of criminal behavior that has endangered or caused injury to others . . . ." The Court also rejected the Commonwealth's argument that a finding of guilt in the first stage of the KRS Chapter 202C proceedings is sufficient to satisfy KRS 202C.050(1)(c). Instead, the Commonwealth must present evidence that the respondent engaged in criminal misconduct (which may or may not have resulted in criminal convictions) which injured or endangered others beyond the conduct which led to the filing of charges from which the KRS Chapter 202C petition sprang. Finally, the Court rejected an argument that it is improper to house a person ordered committed under KRS Chapter 202C in the Kentucky Correctional Psychiatric Center instead of a regional mental health facility.

S. *Gist v. Commonwealth*, 2022-CA-1363-MR, 686 S.W.3d 920 (Ky. App. 2024). Opinion by McNeill, J. Christopher; Lambert, J. (concurs) and Taylor, J. (concurs).

Richard Gist ("Gist") was convicted of fourth-degree assault, violation of a protective order, and first-degree PFO and was sentenced to 18 years' imprisonment. On appeal, Gist argued: (1) the trial court erred in admitting evidence of prior domestic violence; (2) the court's fourth-degree assault instruction violated his right to a unanimous verdict; and (3) the trial court violated the "rule of completeness" when it did not play a portion of a phone call between Gist and an unidentified woman. As to his first argument, the Court determined any evidence entered at trial dealing with previous domestic violence was, at least, harmless. Gist's conviction for fourth-degree assault was not substantially influenced by any error in allowing testimony from Gist's previous partner. The only testimony was about previous bouts of aggression from Gist and that his partner had been in a previous abusive relationship. This could all be assumed by the jury due to the domestic violence order in place against Gist. As to Gist's second assignment of error, the Court found no error in the jury instructions because the injuries to Gist's partner occurred on the same night, not during separate instances. KRS 508.030 does not require the jury to determine the precise physical act that caused injury. As to his final argument, the Court found the part of the recording Gist wanted to enter into evidence did not change the fact that Gist intentionally pulled out his partner's hair. The trial court did not abuse its discretion, and the judgment was affirmed.

T. *Smith v. Commonwealth*, 2022-CA-0686-MR, 2022-CA-0687-MR, 687 S.W.3d 914 (Ky. App. 2024). Opinion affirming in part, reversing in part and remanding by Caldwell, Jacqueline M.; Acree, J. (concurs) and Lambert, J. (concurs).

The Court held that if a trial court has a reasonable belief that an accused might not be competent at any time during a probation revocation proceeding, then the court must ensure the accused is competent prior to proceeding further. The U.S. Supreme Court used language in *Gagnon v. Scarpelli*, 411 U.S. 778, 786, (1973), indicating that competency is implicated in revocation proceedings. A criminal defendant must have the ability to assist counsel in preparing a defense, which is the core of a competency determination. Therefore, a trial court has a responsibility to ensure competency before conducting a probation revocation hearing.

U. *Dismore v. Kentucky Parole Board*, 2023-CA-0835-MR, 2024 WL 1945193 (Ky. App. May 3, 2024). Opinion by Cetrulo, Judge; Goodwine, J. (concurs) and A. Jones, J. (concurs).

Dismore appealed the Franklin Circuit Court's order denying his motion for summary judgment challenging the refusal of the Kentucky Parole Board (KPB) to grant him an additional parole hearing. In 1987, Dismore was convicted of murder and sentenced to 99 years' incarceration. Eight years later, at a parole hearing, the KPB gave Dismore a "serve out," which means the KPB intended Dismore to serve his full 99-year sentence, with no possibility for parole. On June 21, 2021, Dismore requested a new parole hearing with the KPB, asserting he was entitled to another hearing under KRS 439.340. The request was denied by the KPB, as their previous "serve out" directive rendered Dismore ineligible for parole. Dismore

argued that under KRS 439.340, the KPB had given him a "deferment," which means an inmate will serve a certain amount of time to be determined by the KPB before parole is considered. The Court affirmed the trial court's order, holding that a "serve out" directive from the KPB is different from a "deferment" directive, as defined in KRS 439.340. The KPB's specific "serve out" directive left no possibility of parole. Therefore, the trial court's order was affirmed.

V. *Bandy v. Commonwealth*, 2023-CA-0251-MR, 2024 WL 2869283 (Ky. App. June 7, 2024). Opinion by Cetrulo, Judge; Caldwell, J. (concurs) and Eckerle, J. (concurs).

This was an appeal from a judgment upon a jury verdict which found appellant guilty of second-degree strangulation as well as assault and criminal mischief charges. On appeal, Bandy argued the trial court had erred in allowing testimony of his previous untruthfulness to police, and in failing to grant a mistrial after the jury inadvertently heard that he had prior similar charges. Bandy further argued it was error to allow evidence of his prior conviction during the penalty phase since the conviction had been pardoned by a prior Governor. He argued he should have been granted a directed verdict on the strangulation charge and imposition of two fines was improper as he was later determined to be indigent. On appeal, the Court affirmed the trial court, finding there was sufficient evidence to proceed to the jury on the strangulation charge and the trial court did not abuse its discretion in ruling on any of the evidentiary rulings below. The conflicting statements on a prior occasion were limited to addressing Bandy's credibility. The prior similar charge came in through inadvertence, and the trial court offered to admonish the jury regarding the same. The defense declined that offer and insisted upon a mistrial. The trial court did not abuse its discretion in denying a mistrial. The Court also held that the evidence of a prior conviction presented during the sentencing phase, even though that conviction had been pardoned, was not an error. The pardon did not erase the fact of the conviction itself, which was admissible under the Truth in Sentencing Act, KRS 532.055.

W. *Commonwealth v. Jones*, 2023-CA-1132-MR, 2024 WL 2982769 (Ky. App. June 14, 2024). Opinion by Thompson, Chief Judge; A. Jones, J. (concurs) and Lambert, J. (concurs).

The Court of Appeals reversed and remanded orders of the Breckinridge Circuit Court which granted bond to a criminal defendant who was accused of murder and kidnapping, both of which are capital offenses. The circuit court held that because the Commonwealth was not seeking the death penalty, bail was an option. The Court of Appeals reversed and held that Section 16 of the Kentucky Constitution states bail is not available for criminal defendants who are accused of capital offenses, such as in this case, and the proof and presumption of guilt is great. The Court also held RCr 4.02(1) also applied to deny bail. RCr 4.02(1) states a defendant is bailable unless the penalty of death is an option, and the proof and presumption of guilt is great. In this case, even though the Commonwealth chose not to seek the death penalty, it was still an option as a possible punishment for these capital offenses. The Court remanded for the circuit court to determine if the proof and presumption of the defendant's guilt was great.

X. *Commonwealth v. Lynch*, 2023-CA-1445-ME, 2024 WL 2982827 (Ky. App. June 14, 2024). Opinion by Easton, Judge; Eckerle, J. (concurs) and Lambert, J. (concurs).

The Court of Appeals reversed and remanded orders of the Gallatin Circuit Court denying the Commonwealth's petition for a writ of prohibition. The circuit court determined the Horizontal Gaze Nystagmus ("HGN") test could not be entered into evidence pursuant to KRE 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The court further determined the Commonwealth would not suffer grave injustice or irreparable injury if evidence of an HGN test was suppressed (blood test results had already been suppressed). The Court of Appeals determined the Commonwealth had shown a sufficient great injustice or irreparable injury to meet the standard for a writ due to the circumstances in which the HGN test was conducted. The Court further determined that KRE 702 and *Daubert* were satisfied because police officers may give both lay and expert opinion in DUI cases. Additionally, the Court held that the HGN testing process does not need a *Daubert* hearing to determine admissibility; the test can be properly admitted through a police officer. The Court remanded to the circuit court with directions to grant the Commonwealth's petition for a writ of prohibition.

XI. DEFAMATION

Ramler v. Birkenhauer, 2022-CA-1283-MR, 684 S.W.3d 708 (Ky. App. 2024). Opinion by Easton, Kelly Mark; Thompson, C.J. (concurs) and Caldwell, J. (concurs).

This is an appeal from a Campbell County jury verdict and the Campbell Circuit Court's order dismissing Ramler's abuse of process counterclaim. While running for mayor of the City of Highland Heights, located within Campbell County, Ramler released a pamphlet that discussed past comments made by Birkenhauer and Franzen ("Appellees"), who are both city officials, and labelled the Appellees as racist and sexist. Appellees filed a complaint against Appellant for defamation and false light based on the contents of the pamphlet. At the end of a three-day trial, Appellant moved for directed verdict and filed a post-trial motion for judgment notwithstanding the verdict. Both were denied. On appeal, Ramler argues his pamphlet is "pure opinion," which is protected speech. *Yancy v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1989). Pure opinion "occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character." *Restatement (Second) of Torts* §566 cmt. b. Statements on matters of public concern must be sufficiently factual so that the statement may be proven false, or the statement must imply underlying facts which are provable as false before there can be liability under state defamation law. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). In *Cromity v. Meiners*, 494 S.W.3d 499 (Ky. App. 2015), the Kentucky Supreme Court found that a radio host's statements concerning a police officer were statements of public concern; since the radio host fully disclosed the facts supporting his opinion, and the facts were not provable as false, his opinions were constitutionally protected. Because Appellant stated the facts upon which he based his statements about the Appellees' in his pamphlet, and those facts were not provable as false, Ramler's speech was constitutionally protected. Therefore, the trial court should have dismissed Appellees' lawsuit as there was no viable claim to be brought. The Court also determined that Ramler's statements labeling Appellees as "racist" or "sexist" are nonactionable rhetorical hyperbole, and the political statements made by Appellant are protected. *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724

(Ky. 1999). Appellees' false light claim also fails because the facts behind Ramler's opinion statements are true. The parties disagree on whether the facts Appellant based his opinions off were defamatory, and not the actual facts. Thus, the Court reversed the jury verdict granting Appellees compensatory and punitive damages. The Court determined the trial court was correct in denying Ramler's abuse of process claim, because Appellees did not have an improper motive and they had responded to Ramler's request for a settlement offer. Thus, the Court affirmed the trial court's summary judgment dismissing Ramler's abuse of process claim.

XII. DOMESTIC VIOLENCE

A. *Strong v. Gary*, 2023-CA-0219-ME, 673 S.W.3d 77 (Ky. App. 2023). Opinion by Karem, Annette; Easton, J. (concurs) and Thompson, C.J. (concurs).

Brian Strong appealed from the Kenton Circuit Court's order denying his petition for an interpersonal protection order (IPO) against Krystalanne Gary under KRS Chapter 456. Specifically, Strong argued that Gary's actions met the statutory definition of "stalking." The Court of Appeals affirmed, determining the circuit court's finding that Gary's conduct did not meet the stalking definition was not clearly erroneous or an abuse of its discretion. The Court noted that Strong was required to prove two separate instances of stalking by a preponderance of the evidence. *See* KRS 508.130(2). However, Strong offered no proof that Gary's second instance of alleged stalking was done with the intent to threaten Strong or that such action would cause a reasonable person to suffer substantial emotional distress. Additionally, Strong failed to provide evidence that he subjectively suffered emotional distress. Thus, the statutory elements of "stalking" under Kentucky law were not satisfied.

B. *Lazar v. Lazar,* 2023-CA-1316-ME, 678 S.W.3d 472 (Ky. App. 2023). Opinion by Jones, Allison; Easton, J. (concurs) and Lambert, J. (concurs).

Appellant directly appealed from the Floyd Family Court's issuance of a domestic violence order (DVO) issued against him. Appellant argued the evidence did not support entry of the DVO, and that principles of laches, waiver, *res judicata*, and election of remedies otherwise barred it. The Court of Appeals disagreed with Appellant's arguments and affirmed. First, despite some trivial inconsistencies, the family court was entitled to consider the testimony of Appellee as substantial evidence to support that domestic violence had occurred and could occur again, consistent with KRS 403.740(1). Second, laches did not apply in this situation because there was no unreasonable delay in seeking relief. Although the incident of domestic violence had occurred eight months previously, Appellant repeatedly drove his vehicle to or near Appellee's home, despite having no legitimate reason for being there, and he did so as recently as the week before the evidentiary hearing in this case. Third, the Court held that the mutual restraining order and no contact order (MRO) the family court issued as part of the parties' divorce proceeding did not preclude issuance of the DVO. The MRO was not issued pursuant to the DVO statutes but was only predicated upon the parties' mutual agreement. Furthermore, the family court found the DVO to be justified in the face of Appellant's continuing conduct. The Court then held the remaining arguments posited by Appellant warranted no consideration.

C. *Hamilton v. Milbry*, 2023-CA-0307-ME, 676 S.W.3d 42 (Ky. App. 2023). Opinion by Cetrulo, Susanne M.; Combs, J. (concurs) and Thompson, C.J. (concurs).

This is an appeal from a DVO granted against Appellant for one year. The petition filed by Appellee sought protection for herself and the parties' minor child. The Scott County Family Court conducted a hearing and made specific findings that domestic violence had occurred and may occur again. The family court restrained Appellant from going within a specified distance of Appellee's residence and the minor child's school and also restricted his visitation with the child. The Court of Appeals found the family court fully complied with the statute and case precedent in regard to the entry of the DVO protecting the Appellee and that there was sufficient evidence to support the findings. However, in the recent opinion of *Smith v. Doe*, 627 S.W.3d 903 (Ky. 2021), the Kentucky Supreme Court ordered that an unrepresented minor who is a party must have a guardian *ad litem* appointed in an IPO proceeding. The Court held the record did not indicate that such an appointment occurred, and that IPO and DVO proceedings have been recognized by the state's appellate courts as being nearly identical. Upon the authority of *Smith*, the Court reversed the granting of the DVO to the extent that it pertained to the minor child and remanded the matter for appointment of a guardian on behalf of the minor and further proceedings consistent with *Smith*.

D. *Allen v. Eder*, 2023-CA-0267-MR, 682 S.W.3d 32 (Ky. App. 2023). Opinion by Combs, Sara Walter; Dixon, J. (concurs) and Eckerle, J. (dissents and files separate opinion).

This case involved the interpretation of Kentucky's stalking statute, KRS 508.140 as applied in conjunction with the issuance of an IPO (KRS 456.010). At issue was the correct application of the term "implicit threat" as construed by the trial judge in light of the menacing circumstances perpetrated upon the petitioner. Where there was no abuse of discretion and substantial evidence supported the ample findings of the trial judge, the Court of Appeals upheld issuance of the IPO even though the perpetrator committed no explicitly violent acts. The perpetrator, who was employed as a police officer, communicated to the petitioner he was actively watching her residence and monitoring her activities as well as demonstrated the capability of using his authority as a police officer to obtain information as to her personal associations. All this together amounted to an implicit threat. The dissenting opinion reasoned that no implicit threat was made because none of the perpetrator's words or actions could be reasonably construed to communicate an intention to threaten violence as defined under the statute.

XIII. EMINENT DOMAIN

Isaac W. Bernheim Foundation v. Louisville Gas and Electric Company, 2023-CA-0458-MR, 2024 WL 1686031 (Ky. App. Apr. 19, 2024). Opinion affirming by McNeill, J. Christopher; Thompson, C.J. (concurs) and Combs, J. (concurs).

Louisville Gas & Electric Company (LG&E) is constructing an underground natural gas pipeline, part of which runs through property owned by Isaac W. Bernheim Foundation (Bernheim). LG&E attempted to purchase an easement from Bernheim but initiated a condemnation proceeding under the Eminent Domain Act of Kentucky (KRS 278.502) when negotiations failed. The land which LG&E condemned was purchased by Bernheim

with grant money from the Kentucky Heritage Land Conservation Fund (Fund) and was conditioned on Bernheim's conveying to the Commonwealth "a conservation easement in perpetuity over all land acquired, in whole or in part, with fund proceeds." 418 KAR 1:050 §6(1). The land was also to be maintained for the conservation purpose for which it was acquired. 418 KAR 1:050 §6(1)(b); KRS 146.560(2). Bernheim challenged LG&E's right to take, arguing it lacked authority to condemn public property subject to public conservation use and encumbered by a government-held conservation easement. The trial court granted LG&E an interlocutory judgment pursuant to KRS 416.610. This case has been on appeal before (*Kentucky Heritage Land Conservation Fund Board v. Louisville Gas and Electric Company*, 648 S.W.3d 76, 78 (Ky. App. 2022)); however, Bernheim was not a party. The Court held in the previous case that "the plain language of KRS 382.850(2) authorizes a statutory right of eminent domain to prevail over a conservation easement because a conservation easement is assumed not to exist upon the exercise of a statutory right of eminent domain. If it is assumed that the Board's conservation easement does not exist, then there is no prior use to impede the exercise of LG&E's right of eminent domain." *Kentucky Heritage*, 648 S.W.3d at 89. In the current appeal, Bernheim first argued this Court "misapprehended th[e] significant distinction" that the prior public use doctrine arises not from KRS 382.850(2), but from KRS 146.560 and 146.570. However, because a conservation easement exists, KRS 382.850(2) applies. Bernheim's argument that LG&E's power to condemn is limited to private property also fails because "KRS 382.850(2) expresses the Legislature's intention that a conservation easement cannot be used to impede the exercise of any statutory power of eminent domain that the Legislature has otherwise conferred by statute. If the existence of the conservation easement is disregarded, as KRS 382.850(2) instructs, then LG&E would undoubtedly have the power to condemn the property at issue." *Kentucky Heritage*, 648 S.W.3d at 88. Essentially, the Court's interpretation of KRS 382.850(2) from *Kentucky Heritage* stands. The full interpretation of KRS 382.850(2) calls for exercising the statutory right of eminent domain as if the conservation easement did not exist. 648 S.W.3d at 86. Therefore, the trial court's interlocutory judgment was affirmed.

XIV. EMPLOYMENT LAW

Miller v. Kentucky Power Company, 2022-CA-1200-MR, 683 S.W.3d 669 (Ky. App. 2023). Opinion by Caldwell, Jacqueline M.; Combs, J. (concurs) and Karem, J. (concurs).

Appellant Delanna Miller appealed from the Breathitt Circuit Court's grant of summary judgment in favor of Kentucky Power Company (Kentucky Power). Appellant is the widow and administrator of the estate of Justin Miller who worked for Asplundh Tree Expert Company (Asplundh) which performed tree trimming right of way maintenance work pursuant to a contract with Kentucky Power. While performing a job, Justin Miller was electrocuted and killed while trimming a tree away from an electric utility's right of way, and Appellant filed suit asserting claims of wrongful death and loss of consortium. Kentucky Power argued it was entitled to up-the-ladder immunity citing undisputed evidence of its own and Asplundh's workers' compensation coverage and of its contract with Asplundh to perform tree trimming right of way maintenance work. Kentucky Power further argued the tree trimming right of way maintenance work performed by Asplundh was a regular or recurrent part of its business. Appellant counterargued that tree trimming was not regular or recurrent work for Kentucky Power as defined by *General Elec. Company v. Cain*, 236 S.W.3d 579 (Ky. 2007), because its employees never performed the work, and there was an industry-wide practice for electric utilities to subcontract out such tree trimming work. Appellant contended that *Cain* modified a prior precedent in

Fireman's Fund Ins. Co. v. Sherman & Fletcher, 705 S.W.2d 459, 462 (Ky. 1986). The Court of Appeals affirmed the summary judgment on the rationale that Kentucky Power enjoyed "exclusive remedy" immunity wherein employers subject to workers' compensation liability who secure payment for workers' compensation are immune from other, non-workers' compensation claims for work injuries. The Court stated that immunity extended up-the-ladder from subcontractors directly employing workers to qualifying contractors. It was reasoned the decision in *Cain* did nothing to alter *Fireman's Fund* because *Cain* quoted from *Fireman's Fund* and "did not expressly state . . . that it was disturbing any holding [therein]." The Court noted that a decision rendered after *Cain* in *Doctors' Associates, Inc. v. Uninsured Employers' Fund*, 364 S.W.3d 88, 92 (Ky. 2011), stated, "'A contractor that never performs a particular job with its own employees can still come within [immunity].'" Additionally, the Court held "the evidence undisputedly showed the work at issue was repeated frequently and required by law."

XV. FAMILY LAW

A. *W.R.G. v. K.C.*, 2022-CA-1319-ME, 673 S.W.3d 81 (Ky. App. 2023). Opinion by Goodwine, Pamela R.; Dixon, J. (concurs) and Karem, J. (concurs).

Father challenged the circuit court's judgment granting Stepmother's petition to adopt his biological minor child. Although Father filed a *pro se* answer to the petition, he did not otherwise participate in the proceedings below. The Court of Appeals reviewed for palpable error and vacated the judgment, remanding the matter for a new hearing because Father was not served with any document requiring service including the trial order. CR 5.02(1) defines service as complete upon mailing "unless the serving party learns or has reason to know that it did not reach the person to be served." Stepmother's counsel admitted all documents he mailed to Father had been returned as undeliverable. The trial order was also returned to the circuit clerk marked as undeliverable. Despite Father's obvious lack of notice, the circuit court proceeded with the hearing because the order was mailed to his last known address. The Court of Appeals held, at the point mail intended for Father was returned, counsel and the circuit court knew it did not reach him under CR 5.02(1). Without service of the trial order, Father did not have notice of the final hearing which amounted to a violation of his due process rights requiring a new hearing on the petition.

B. *Day v. Day*, 2022-CA-1250-MR, 673 S.W.3d 454 (Ky. App. 2023). Opinion by Cetrulo, Susanne M.; Eckerle, J. (concurs) and Goodwine, J. (concurs).

This is an appeal from a decision of the McCracken Family Court, which declined to exercise jurisdiction over a timesharing matter pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The couple had divorced in Kentucky and agreed, by an order approved by the family court, that any future issues would be determined by the McCracken Family Court. However, both parents and the child had relocated to Florida two years prior to this latest motion to modify timesharing. The Court of Appeals affirmed in its opinion discussing the difference between subject matter jurisdiction and particular case jurisdiction, as well as the effect of a forum selection agreement upon the court's authority. Holding that such an agreement cannot deprive a court of its discretion to accept or deny continuing jurisdiction under the UCCJEA, the Court affirmed the family court's decision to decline to exercise its jurisdiction. Under these circumstances,

where all parties had lived in Florida for two years, the forum selection clause was only one of the facts to be determined by a court under KRS 403.834.

C. *D.B. v. T.C.W.*, 2022-CA-1281-ME, 674 S.W.3d 776 (Ky. App. 2023). Opinion by Acree, Glenn E.; Goodwine, J. (concurs) and Lambert, J. (dissents and does not file separate opinion).

The Cabinet for Health and Families Services (the Cabinet) took custody of T.C.W. (Child) immediately after being born. Both parents were incarcerated at that time. Initially, the Cabinet offered placement with Child's biological grandmother, D.B. (Grandmother). She declined custody. With the approval of Child's mother and Grandmother, the Cabinet placed Child with foster parents. Grandmother obtained an order for grandparent visitation, and the foster parents moved to adopt Child. Grandmother sought to intervene in the adoption proceeding via CR 24.01, arguing she needed to protect her visitation rights in the adoption proceeding. The Mercer Circuit Court denied her motion, and this appeal followed. On appeal, Grandmother argued the circuit court committed three errors. First, the circuit court errantly determined Grandmother's CR 24.01 motion was untimely. Second, the circuit court errantly concluded Grandmother failed to present a substantial interest that could not be adequately protected. Lastly, the circuit court errantly found Grandmother failed to meet the requirements of CR 24.03. The Court of Appeals determined Grandmother brought her motion four months after she learned about the adoption proceeding. This delay, given the circumstances in this case, caused the motion to be untimely. On the second argument, Grandmother contended the facts in the case *sub judice* resembled the unique facts of *Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004). The Court rejected this argument because, unlike the family members in *Baker* who the Cabinet ignored when considering placement, the Cabinet in this case timely offered placement of Child with Grandmother. This critical fact was the crux of the errors committed by the Cabinet in *Baker*; and it was absent in this case. To support her third argument that the pleading requirement of CR 24.03 is inapplicable in adoption proceedings, Grandmother relied on Justice James Keller's dissent in *Baker*. The Court concluded neither *Baker* nor Keller's dissent states such a rule. Finding no error, the Court affirmed.

D. *Shelton v. Atkinson*, 2022-CA-1140-MR, 676 S.W.3d 36 (Ky. App. 2023). Opinion by McNeill, J. Christopher; Combs, J. (concurs) and Taylor, J. (concurs).

After the Appellant parents' relationship with the Appellee maternal grandparents deteriorated, the parents forbade the maternal grandparents from seeing their children which prompted the grandparents to file a petition seeking visitation. The Wayne Family Court granted the maternal grandparents hourly monthly visits, but that order was previously reversed by the Court of Appeals in *Shelton v. Atkinson*, No. 2021-CA-0397-MR, 2022 WL 2280225 (Ky. App. Jun. 24, 2022) because "the family court failed to give due consideration to the most relevant factor in this matter – the potential detriments and benefits to the children from granting visitation." The Court remanded for further proceedings during which the family court again awarded the grandparents visitation resulting in this appeal. On appeal, the Court affirmed on the basis "[t]he family court issued an eleven-page judgment addressing the concerns raised in *Shelton*, including – without limitation – the potential detriments and benefits to the children from granting visitation."

E. *S.S. v. Cabinet for Health and Family Services*, 2023-CA-0379-ME, 682 S.W.3d 39 (Ky. App. 2023). Opinion by Thompson, Larry E.; Cetrulo, J. (concurs) and Combs, J. (concurs).

S.S. was accused of medically neglecting her child who had issues gaining weight. The child suffered from a condition which made it hard for him to swallow and caused vomiting. The Cabinet for Health and Family Services and the child's doctors believed the child was not receiving appropriate nutrition and that S.S. was not administering the child's medications as prescribed. During one hospitalization, S.S. refused a medical procedure for the child. Two neglect petitions were filed against S.S., one for the child's failure to gain weight and failure to receive medication and one for S.S.'s refusal to consent to the medical procedure. S.S. testified that she was caring for the child the best she could considering his medical condition. A doctor and two Cabinet workers testified that S.S. did not always follow the doctors' treatment plan and that the child would always improve once he was hospitalized. The trial court held that S.S. neglected the child due to her not always following the doctors' orders. The Court of Appeals affirmed the trial court's judgment holding that, while this case was a close call, the trial court chose to give more weight to the testimony of the Cabinet workers and doctor, and the court's decision was based on substantial evidence.

F. *R.V.K.H. v. S.M.S.*, 2023-CA-0136-ME, 678 S.W.3d 648 (Ky. App. 2023). Opinion by Dixon, Donna L.; Acree, J. (concurs) and McNeill, J. (concurs).

Appellant's biological mother appealed from the order of the Graves Circuit Court granting adoption of her child by a stepparent without her consent. The Court of Appeals affirmed in part, reversed in part, and remanded. Appellant argued the Kentucky courts did not have subject matter jurisdiction to hear the petition for adoption under the UCCJEA. Affirming the circuit court, the Court held the plain language of KRS 403.800(4) and KRS 403.802 provides that the UCCJEA does not apply to adoption proceedings governed by KRS Chapter 199. In reversing the circuit court and remanding for further proceedings, the Court also held that, in contravention of KRS 199.502(3), at no time did the circuit court inquire whether Appellant, who appeared *pro se* for the final hearing, was indigent; nor did it inform of her right to appointment of counsel in the contested adoption proceedings.

G. *Jabrazko v. Kleinman*, 2023-CA-0336-MR, 2023-CA-0353-MR, 2024 WL 1222141 (Ky. App. Mar. 22, 2024). Opinion by McNeill, J. Christopher; Combs, J. (concurs) and Jones, J. (concurs).

This case concerns property division in a divorce. The primary issue on appeal was whether the family court erred in determining Wife's savings account was marital property, and whether it also erred by dividing the account balance evenly between the parties at the time of dissolution. The family court determined that under *Allen v. Allen*, 584 S.W.2d 599 (Ky. App. 1979), it was erroneous for the court to conclude Wife's savings account was "marital as a matter of law" because the end amount at dissolution was lower than the beginning amount. The Court affirmed in part and reversed in part, remanding with instructions that the family court reconsider the classification and division of Wife's savings account funds in light of Wife's tracing evidence, as well as the Husband's savings account, and to

consider other remaining issues concerning the parties' retirement/checking accounts as necessary.

H. *Aldava v. Baum*, 2023-CA-1038-MR, 686 S.W.3d 205 (Ky. App. 2024). Opinion by Acree, Glenn E.; Cetrulo, J. (concurs) and Taylor, J. (concurs).

In November 2020, Baum fled Texas to her parent's home in Kentucky with her child. Once here, she filed for an EPO in Jefferson Circuit Court against her boyfriend and father of her child, Aldava. The circuit court granted Baum the EPO and scheduled a hearing to determine whether a DVO should be issued. Aldava had not been served and did not attend the hearing. Nevertheless, the circuit court granted Baum's petition for a DVO. In addition to prohibitory restrictions (refraining from violence and remaining a distance from Baum and the child), the Jefferson Circuit Court entered affirmative orders awarding sole custody of the child to Baum and denying Aldava's right to possess firearms. Upon learning of the DVO, Aldava filed a CR 60.02 motion to vacate the DVO. The circuit court granted this motion and held a new hearing at which Aldava moved to dismiss the DVO petition for lack of personal jurisdiction over him. The circuit court denied the motion, proceeded with the hearing, and reinstated the DVO against Aldava. On appeal to the Court of Appeals, Aldava argued the circuit court lacked personal jurisdiction over him, and the Court agreed. Aldava had no connections to Kentucky and had never been to Kentucky prior to these proceedings. However, despite lacking personal jurisdiction, Kentucky courts are still empowered to grant DVOs so long as the DVO contains mere prohibitory orders and no affirmative orders, pursuant to the Court's reasoning in *Spencer v. Spencer*, 191 S.W.3d 14 (Ky. App. 2006). The Court determined the DVO's prohibitory orders consisted of the requirement that Aldava stay away from Baum, not steal or destroy her property, and generally not commit acts of violence against her. The Court determined these provisions were prohibitory because every citizen is afforded those protections under the law. Such restrictions differ in kind from affirmative orders restricting or denying constitutional rights such as the right to parent or bear arms. No court can deny the constitutional right of an individual over whom the court lacks personal jurisdiction. This offends the very nature of due process. The Court reversed and remanded.

I. *Lankford v. Lankford*, 2023-CA-1174, 2023-CA-1283, 688 S.W.3d 536 (Ky. App. 2024). Opinion reversing and remanding by Jones, Allison; Cetrulo, J. (concurs) and Karem, J. (concurs).

Nathan Lankford appealed the Jefferson Circuit Court's orders dismissing an EPO on behalf of his child and Nathan's petition for a DVO to protect the child from his mother, Jessica Lankford, after she allegedly kicked the child down the stairs. The incident was reported to the Cabinet. The family court issued an EPO, and after various continuances, the DVO hearing was not scheduled for several more weeks. In the interim, the circuit court *sua sponte* asked the Cabinet about the status of its investigation, and the Cabinet reported it would not be investigating further. Instead of holding an evidentiary hearing, the family court dismissed the petitions stating it was the court's policy to do so when the Cabinet declines to act. The Court held that while the family court can conduct some limited investigation prior to the evidentiary hearing, the DVO statutes do not allow for *ex parte* communications with the Cabinet for purposes of determining whether to move

forward with the petition. The family court was required to hold an evidentiary hearing per *Wright v. Wright*, 181 S.W.3d 49 (Ky. App. 2005). Because the family court determined the petition alleged facts which if true would amount to domestic violence, the family court was obligated to conduct a full hearing and base its decision solely on the evidence before it.

J. *J.P.T. v. Cabinet for Health and Family Services*, 2023-CA-0218-ME, 689 S.W.3d 149 (Ky. App. 2024). Opinion by Acree, Judge; Caldwell, J. (concurs) and Lambert, J. (concurs).

This opinion addresses both procedural and substantive issues in an appeal of a dependency, neglect, or abuse (DNA) adjudication and disposition. Procedurally, the Court indicated Appellant's substantial non-compliance with the Rules of Appellate Procedure (RAP) governing brief-writing justified striking the brief and dismissing the appeal. However, after reviewing Appellant's counsel's history of repetitively violating the same rules in five appeals in the past five years, and documenting that history in the opinion, the Court determined the proper remedy was to fine counsel. Counsel was fined $1,000 by separate order. Substantively, the Court addressed Appellant's arguments: (1) the family court's orders were not supported by substantial evidence; and (2) there was no proof Appellant intended to injure Child. The Court found there was substantial evidence that Child was injured at the hands of Appellant who acknowledged playing with Child by picking him up by the upper arms and tossing him on a bed. Appellant's second argument was not persuasive because the infliction of physical injury under KRS 600.020(1)(a)(1)-(2) does not require intent to injure, only that the injury occurred "by other than accidental means." Elaborating upon the holding in *Cabinet for Health & Family Services v. P.W.* that "a parent need not intend to abuse or neglect a child in order for that child to be adjudged an abused or neglected child[,]" 582 S.W.3d 887, 895 (Ky. 2019), the Court of Appeals distinguished between intentional acts and purposeful acts, as follows:

> For the purposes of this statute, we do not define the adjective "accidental" by the absence of *intent*; we define it by the absence of human agency – *i.e.*, a person's engaging in a *purposeful* act even if the outcome was unintended. [ACCIDENTAL, *Black's Law Dictionary* 18 (11th ed. 2019) (hereinafter "*Black's*") (emphasis added)]. *Black's* defines "purposeful" as something "[d]one with a specific aim in mind; deliberate." PURPOSEFUL, *Black's* 1483. Deliberate action is still purposeful, even if the intended outcome does not come to fruition and, instead, some other consequence results from that deliberate action."

The Court of Appeals affirmed the family court's adjudication and disposition orders in this DNA case.

K. *G.M.A. v. Commonwealth*, 2023-CA-0941-ME, 689 S.W.3d 142 (Ky. App. 2024). Opinion by Eckerle, Judge; Karem, J. (concurs) and Lambert, J. (concurs).

In July 2021, G.M.A. (an attorney) filed a dependency/neglect/abuse (DNA) petition on behalf of his newly-born granddaughter. The petition alleged that granddaughter had been living with him and his wife, M.A., since shortly after her

birth, and that her parents were unable to care for granddaughter due to their mental health and substance abuse issues. The family court granted temporary custody to grandparents. Subsequently, grandparents filed a motion for child support and to propound interrogatories to parents. The family court denied the motion, holding grandparents were not parties to the action. Rather, only the Commonwealth, through the county attorney's office or the Cabinet for Health and Family Services, was a party with standing to file such motions. Shortly after this ruling, grandparents entered into an informal adjustment of the DNA petition with parents. Thereafter, grandparents filed motions for permanent custody and for a finding that they were *de facto* custodians. The family court denied the motions, concluding the matters were not ripe in light of the informal adjustment. Later, grandparents filed motions alleging the parents violated the terms of the informal adjustment and asserting rights to intervene as *de facto* custodians. The family court denied the motions, again concluding grandparents were not parties to the case and lacked standing to intervene. While the matter was pending, G.M.A. was elected as county attorney. The family court entered a *sua sponte* order disqualifying his office and directing the appointment of an outside county attorney. The family court also entered orders sealing the record and the proceedings from any participation by non-parties, including G.M.A. and M.A. Eventually, the family court dismissed the DNA petition, concluding parents complied with its terms. The Court of Appeals reversed, noting KRS 620.100(5) allows custodians the rights to notice of, and a right to be heard in, any proceeding held with respect to the child, even when they are not expressly made parties. Furthermore, the Court emphasized that 620.070(1) allows "any interested person" to file a DNA petition. In addition, the Court pointed out that an informal adjustment is necessarily "an agreement reached among the parties," KRS 600.020(36), which is inconsistent with the Commonwealth's current position that custodial grandparents may never be parties to a DNA petition. The Court concluded that, when filed by an "interested person" with proper standing, the petitioner in a DNA action is accorded the status of party plaintiff. Thus, the family court erred by holding grandparents were not parties to the action, sealing the record and closing the proceedings, and refusing to hear their motions regarding parents' noncompliance with the informal adjustment. But since grandparents agreed to the informal adjustment, they were estopped from bringing substantive motions concerning custody and child support while the informal adjustment was in effect. Finally, the Court held the family court properly disqualified G.M.A. after he was elected county attorney.

L. *Kutter v. Kutter*, 2023-CA-1091-MR, 2024 WL 3210398 (Ky. App. June 28, 2024). Opinion by Eckerle, Judge; Easton, J. (concurs) and Lambert, J. (concurs).

In their marital separation agreement, John and Tara Kutter agreed to joint custody of their two children and a step-child. In addition, the parties agreed to send all three children to a private, religious school through Grade 12, with John paying those costs. The family court adopted the agreement as part of the decree. Three years later, Tara obtained a DVO against John on her behalf and on behalf of the children. Based on the same allegations of abuse, the Cabinet instituted a DNA proceeding against John. Under the terms of the DVO, Tara received temporary sole custody of the children, with no contact or visitation by John. The DNA order also included a no-contact provision against John. Tara and the children relocated following entry of these orders. Thereafter, Tara filed a motion to allow her to withdraw the children from private school. The family court granted the motion

without a hearing, holding that Tara's status as temporary sole custodian automatically gave her the right to make educational and religious decisions for the children. The Court of Appeals reversed and remanded for an evidentiary hearing. The Court first held an award of temporary sole custody, particularly under a DVO, does not automatically alter other custodial terms of the decree. The Court next held that, under the terms of the parties' agreement, the educational and religious provisions were part of the joint custody arrangement. Consequently, the Court held they remained subject to modification under KRS 403.180(6). However, the Court further held that such modification was governed by KRS 403.340, which requires an evidentiary hearing and findings showing that modification is warranted. Finally, the Court cautioned that a family court should not rely on evidence heard in separate matters, as that evidence is not part of the record on appeal.

XVI. GOVERNMENT

A. *Coleman v. Beshear*, 2022-CA-0837-MR, 2022-CA-0838-MR, 2022-CA-0991-MR, 2024 WL 875611 (Ky. App. Mar. 1, 2024). Opinion by Eckerle, Audra; Combs, J. (concurs and files separate opinion) and Jones, J. (concurs).

This case follows the General Assembly's reorganization of the membership board of the Executive Branch Ethics Commission ("EBEC"), an inferior state office. At the time of origin, the EBEC's board was composed of five members, all appointed by the Governor to serve four-year, staggered terms. KRS 11A.060. The Governor also had the power to remove any of the members for cause. *Id*. At the core of this appeal was the latest amendment to the statute, via House Bill 334 of the 2022 Regular Session of the General Assembly. HB 334 proposed to terminate the unexpired terms of the current members and changed the composition of the EBEC's board to seven members of which the Governor would only appoint two (other elected executive officers would appoint the remaining five positions). Moreover, the removal for-cause provision was amended such that only the appointing authority had the power to remove the member for cause. For example, the Governor could only remove the two members he appointed for-cause, not all seven members. The Governor filed a declaratory judgment action in Jefferson Circuit Court, believing HB 334 violated multiple provisions of the Kentucky Constitution. The trial court granted summary judgment in favor of the Governor, and found that HB 334 violated §§27, 28, 69, and 81 of the Kentucky Constitution. The trial court also denied a motion to dismiss filed by the Legislative Research Commission ("LRC"). The Court reversed and remanded. First, the Court determined that LRC's motion to dismiss should have been granted on immunity grounds. Second, the Court upheld the legislative action that takes away appointive and removal power from the Governor and distributes that power to other elected executive officers. The Governor argued HB 334 violated the "supreme executive power" and the "Take care" clauses of §§69 and 81 of the Kentucky Constitution. The Governor argued that his take care powers under §81 are akin to the "Take Care" powers of the President under Article II, §3 of the U.S. Constitution. However, the Kentucky executive power differs from the Presidential executive power – Kentucky law allows for the diffusion of executive power. The Court held HB 334 does not infringe on constitutionally derived appointive and removal powers that the Governor possesses. The Governor also argued HB 334 violated §§27 and 28 of the Kentucky Constitution. However, because HB 334 only

disburses the appointment and removal powers of the executive branch among members already in the executive branch, there is no violation of the separation of powers.

B. *Moore v. Commonwealth ex rel. Coleman*, 2023-CA-0039-MR, 2024 WL 1221421 (Ky. App. Mar. 22, 2024). Opinion by McNeill, J. Christopher; Lambert, J. (concurs) and Goodwine, J. (concurs).

Natasha Moore ("Moore") and Thomas Smith ("Smith") appealed from the Franklin Circuit Court, arguing that HB 348's elimination of the Floyd Circuit Court Division II was unconstitutional because no valid certification of necessity existed when HB 348 was passed. The Franklin Circuit Court had ruled Moore and Smith lacked standing to bring their claim. The Court of Appeals affirmed. Moore's purported injury that her pending employment case in Floyd Circuit Court will be delayed by the elimination of Division II is insufficient to confer standing because it is a speculative injury. Furthermore, Smith failed to allege a redressable injury because HB 214 was passed on April 8, 2022. When the General Assembly passed HB 214 with amendments to KRS 23A.040, it also re-enacted the provision allotting two circuit judges to Floyd County. At the time of re-enactment, a previously issued 2018 certification of necessity was still valid. Smith failed to challenge HB 214; thus, he lacked standing to challenge the constitutionality of HB 348.

XVII. IMMUNITY

A. *J.A. on Behalf of Doe v. McCracken County School District and Board of Education*, 2022-CA-1270-MR, 2024 WL 2225400 (Ky. App. May 17, 2024). Opinion by Taylor, Judge; Thompson, C.J. (concurs) and Eckerle, J. (concurs).

J.A. appealed the order of the McCracken Circuit Court granting summary judgment motions submitted by Ceglinski, principal of McCracken County High School, and Harper, superintendent (Appellees), based on qualified official immunity. John Doe was a student at McCracken County High School and was the victim of sexual assault by his fishing coach, John Parks. Parks was subsequently shot by sheriffs during an attempt to serve a bench warrant. The Court affirmed the order granting summary judgment in favor of Appellees based on immunity. A public official is granted qualified official immunity when he engages in a discretionary act, which involves exercising discretion and judgment, or personal deliberation, decision, and judgment. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). Review of the record revealed that Ceglinski did not act in bad faith while conducting his investigation into Doe's allegations against Parks. Harper, as superintendent, had discretionary supervisory authority over the school district and the management of school affairs. There was no bad faith in the actions Harper took while investigating Doe's allegations. Accordingly, both Ceglinski and Harper were correctly afforded qualified official immunity.

B. *Ives v. HMB Professional Engineers, Inc.*, 2021-CA-1187, 2024 WL 2487850 (Ky. App. May 24, 2024). Opinion by Jones, Judge; Acree, J. (concurs) and Lambert, J. (concurs).

In four direct appeals from the trial court's grant of summary judgment to the engineers and engineering firms involved in the case, the Court of Appeals

reversed and remanded for further proceedings. The four appeals stemmed from a catastrophic automobile accident which killed Hiram Ives and seriously injured his business partner, Jennings Copley. The family and estate of Ives filed suit against Copley and the various engineers and engineering firms which oversaw the widening of the portion of Interstate 65 where the accident occurred. Following discovery, the trial court granted summary judgment to the engineer parties on the basis of immunity and that the claims were preempted by federal law. The Court of Appeals reversed. First, it disagreed with the trial court's finding of immunity, holding a private, engineering consultant was not immunized from liability simply because its roadway design plan was approved by a sovereign entity. Here, the mere fact that the engineer parties contracted with the Kentucky Transportation Cabinet did not transform them into state actors or quasi-state actors for purposes of immunity. Second, the Court of Appeals held neither the federal statutes nor the federal regulations pertinent to the National Highway System contain express statements of preemption. Further, Kentucky's common law negligence and wrongful death causes of action appear to be in harmony with federal law, and therefore, the trial court incorrectly concluded that federal preemption barred the state law claims.

C. *Findley v. Western Kentucky University*, 2023-CA-0521-MR, 690 S.W.3d 170 (Ky. App. 2024). Opinion by McNeill, Judge; Thompson, C.J. (concurs) and Easton, J. (concurs).

This was an appeal from the Warren Circuit Court's order affirming the findings of the Board of Claims that Findley suffered a permanent injury resulting in a loss of earning capacity. Findley, a Western Kentucky University student, suffered an injury to his wrist in the course of his internship at a greenhouse. The Board had awarded Findley $250,000 in damages for loss of earning capacity, but the circuit court reversed the damage award by the amount of payments Findley had the right to receive. KRS 49.130(2). Western Kentucky University argued there was no substantial evidence that Findley had suffered a permanent injury. However, findings made by the Board of Claims are conclusive if supported by substantial evidence, even if a reviewing court may reach a different conclusion. Here, there was substantial evidence that Findley suffered a permanent injury, thus, there was no error. Findley argued that, while the Board did err in failing to reduce his damage award, the circuit court reduced his award in excess. The Court determined the legislature intended medical expenses written off by a provider under an agreement with Medicare to be "payments received or the right to receive payment" under KRS 49.130(2). Therefore, the circuit court did not err in reducing Findley's award by $191,486.65.

D. *Commonwealth v. Elmore*, 2023-CA-0845-MR, 2024 WL 3210220 (Ky. App. June 28, 2024).Opinion by Thompson, Chief Judge; Acree, J. (concurs) and L. Jones, J. (concurs).

The Court of Appeals affirmed an order of the Jefferson Circuit Court which held sovereign immunity does not protect the Commonwealth Attorney's Office from having to comply with a subpoena *duces tecum* issued in a case in which the Commonwealth Attorney's Office is not a party. The Court held that sovereign immunity protects the Commonwealth and its agencies from lawsuits and protects

the government coffers, but it does not protect the Commonwealth from all acts of the judiciary, including third-party subpoenas.

XVIII. INSURANCE LAW

A. *City of Newport v. Westport Insurance Company*, 2022-CA-0384-MR, 2022-CA-0415-MR, 2023 WL 6522204 (Ky. App. Oct. 6, 2023). Opinion by Easton, Kelly Mark; Jones, J. (concurs) and Lambert, J. (concurs). Discretionary review granted April 12, 2024. Not reported in S.W.3d.

The City of Newport and the Newport Police Department (collectively the Newport Insureds) were subject to a federal civil rights suit under 42 U.S.C. §1983 relating to a wrongful arrest in 1987, which led to the conviction of an individual who served 28 years in prison. The Newport Insureds tendered a request to Westport Insurance Company (Westport), with whom they enjoyed a policy from July 1, 1997 to July 1, 2000, for defense and indemnification. Westport maintained the policy coverage was not triggered because a personal injury arising from a wrongful prosecution takes place at the time charges were filed, and the policy was not in place at that time. Westport filed a declaratory judgment action in Campbell Circuit Court, and the circuit court entered summary judgment in Westport's favor. On appeal, the Newport Insureds argued Westport's policy was an injury-based occurrence policy, triggered if any injury occurs during the policy period, and because an individual was wrongfully incarcerated during the coverage period, there existed a continuous and ongoing personal injury. At a minimum, the Newport Insureds contended Westport had a duty to defend them in litigation. The Court of Appeals affirmed on the reasoning that, in accordance with the language of Westport's policy, it could only be triggered by the occurrence of an injury while the policy was in effect. In this instance, the injury at issue was the wrongful arrest and charge which occurred in 1987 before the policy was in effect. The Court determined a "civil rights violation for a wrongful prosecution is complete when the charges are brought, even though damages continue to be sustained. . . . Kentucky has long recognized a separation of the injury itself and the damages later sustained." Thus, the Court concluded Westport's policy was "not continuously triggered by damages accumulating over the years" from an event that occurred prior to the implementation of the policy.

B. *Breedlove v. State Farm Fire and Casualty Company*, 2022-CA-1105-MR, 2024 WL 501900 (Ky. App. Feb. 9, 2024). Opinion by Jones, Allison; Combs, J. (concurs) and McNeill, J. (concurs).

In a direct appeal from the trial court's grant of summary judgment to State Farm, as well as from the trial court's dismissal of the case against State Farm's adjuster, Gary Binion, the Court of Appeals affirmed. Appellant sued State Farm and Binion for bad faith under KRS 304.12-230, Kentucky's Unfair Claims Settlement Practices Act (UCSPA), following State Farm's initial denial of coverage for injuries resulting from a motor vehicle collision. State Farm's denial was predicated on its reliance on an erroneous police report which indicated that Appellant caused the collision. State Farm eventually paid Appellant's underlying claim when it recognized the error in the police report. Appellant presented three arguments on appeal. First, he argued the trial court lacked subject-matter jurisdiction because the bad faith claims were unripe when he filed the complaint. Second, he argued

the trial court erroneously dismissed the claim against Binion, State Farm's employee adjuster. Third, he argued the trial court erroneously granted summary judgment to State Farm. The Court of Appeals rejected Appellant's arguments. First, the Court held the trial court did not lack subject-matter jurisdiction based on unripeness when the bad faith claims were filed alongside the underlying negligence claims. The trial court bifurcated and stayed the bad faith claims until the underlying claims were resolved, which has been the Kentucky Supreme Court's preferred method for handling bad faith claims for several decades; *see Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993). Furthermore, Appellant's claimed issue actually appeared to be that of particular-case jurisdiction, which may be waived. Second, in clarifying an unsettled area of law in Kentucky, the Court held the trial court properly dismissed the claim against Binion, as the UCSPA requires contractual privity for bad faith claims. *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 100 (Ky. 2000). Third, and finally, the Court held the trial court properly granted summary judgment to State Farm. After more than three years, and after violating multiple pretrial discovery orders, Appellant had failed to produce any evidence indicating State Farm engaged in outrageous conduct which would be necessary for a finding of bad faith.

XIX. JURY INSTRUCTIONS

Kentucky State Police v. Burton, 2022-CA-1028-MR, 2024 WL 2096885 (Ky. App. May 10, 2024). Opinion by Caldwell, Judge; Cetrulo, J. (concurs) and A. Jones, J. (concurs).

This was an appeal by Kentucky State Police ("KSP") from a jury verdict in favor of the Appellees, who had brought Whistleblower Act claims against KSP. Appellant, KSP, filed a motion for directed verdict/JNOV, which was denied by the trial court. Appellees Burton, Taylor, and Garyante were KSP employees. Appellees alleged they were subjected to retaliation and reprisal for reporting their concerns about "irregularities and thefts of evidence from" their post in Elizabethtown, Kentucky. Specifically, Appellees alleged they were threatened to be quiet or they would be transferred outside of their post, and they were retaliated against for reporting the matter to the Commonwealth's Attorney and KSP officials. KSP argued the trial court erred in admitting certain evidence; the evidence was insufficient to support the jury's verdict; and the trial court gave erroneous jury instructions. The Court determined the evidence submitted to the jury was sufficient to establish a *prima facie* Whistleblower Act claim; the reviewing court must defer to the fact-finder's determinations about the weight and credibility of evidence and must view the evidence in a light most favorable to the Appellees. Therefore, the trial court did not err in denying KSP's motion for directed verdict, and KSP's argument of insufficient evidence failed. However, the Court determined that one of the jury instructions was erroneous. KSP had tendered to the trial court jury instructions requiring the jury to make a finding that KSP took action against each of the Appellees as part of determining whether a *prima facie* case was made. That instruction was not included in the instructions the trial court gave the jury, and thus, the trial court's instructions were materially different from KSP's. Although the specific "material, adverse" language of KSP's proposed instruction was not required to be in the final instructions, the final instructions were required to include a finding of action against each of the Appellees. Because the trial court's final jury instructions did not require the jury to make a finding of action against each of the Appellees individually, the Court reversed and remanded.

XX. LEGAL MALPRACTICE

Millers Lane Center, LLC v. Morgan & Pottinger, P.S.C., 2022-CA-1341-MR, 2024 WL 2096721 (Ky. App. May 10, 2024). Opinion by Easton, Judge; Karem, J. (concurs) and Taylor, J. (concurs).

This was an appeal from two consolidated cases in which the trial court dismissed Millers Kentucky, LLC's 2021 claim for lack of standing; dismissed Millers Florida's claims because it had attempted to assign any proceeds from its malpractice claim, depriving it of standing; and dismissed Mark Brewer's claims of lost value in his membership interest in Millers Florida and emotional distress due to lack of standing. Millers Florida, LLC (which included members Brewer and Harold) operated and leased out a warehouse in Louisville, Kentucky to a recycling company, Blue Skies. Eventually, Blue Skies filed suit against Millers Florida. After the parties failed to settle, a jury awarded Blue Skies upwards of $1.5 million. During that action, Brewer created Millers Kentucky, LLC, which is a totally separate entity to Millers Florida, LLC. Millers Kentucky subsequently filed for bankruptcy even though it does not own the property at issue and was not a party to the action. The bankruptcy court entered an order which directed Millers Kentucky and Millers Florida to consolidate their assets for the purposes of the bankruptcy and to file the correct documents with the Secretary of State to completely merge the two LLCs. Millers Kentucky and Millers Florida failed to submit any merger forms to the Secretary of State. The bankruptcy court also conducted a mediation on December 18, 2020, in which Millers Kentucky reached a global settlement ("Settlement Agreement") with its creditors, including Blue Skies. On December 20, 2021, Millers Kentucky filed suit against Morgan & Pottinger, James McCrocklin, and Mosely & Townes ("Attorneys") for malpractice, as they were the attorneys who represented Millers Florida during various stages of the Blue Skies action. On March 16, 2022, Millers Florida and Brewer filed separate complaints against the Attorneys; Millers Florida alleged the same claims Millers Kentucky did in 2021; and Brewer alleged emotional distress, depreciation of his membership in Millers Florida, and expenses incurred in collateral litigation.

The trial court consolidated the 2021 and 2022 actions and entered its opinion and order on October 14, 2022. The five issues on appeal were: (1) whether Millers Kentucky had standing; (2) whether the bankruptcy court's order merged Millers Kentucky and Millers Florida; (3) whether the trial court erred in holding that Millers Florida had no standing to bring its 2022 action due to its attempt to assign its malpractice claim; (4) whether the trial court erred in determining Brewer had no standing to recover damages for his membership value loss; and (5) whether the trial court erred in not dismissing the actions filed in 2022 by Millers Florida and Brewer because the actions were time-barred. The Court first determined that Millers Kentucky was not a real party in interest pursuant to CR 17.01 because Millers Florida was the true client of the Attorneys in the Blue Skies lawsuit. The Blue Skies lawsuit began in 2015, a year before Millers Kentucky was created, and it was never joined in the lawsuit after creation. Second, the bankruptcy court's decision to consolidate the assets of Millers Kentucky and Millers Florida did not effectively merge the two entities. The consolidation was just for the bankruptcy, and, further, substantive consolidation in bankruptcy is an equitable measure, is punitive in nature, and cannot be used offensively. Lastly, the claims brought by Millers Florida and Brewer were barred by a one-year statute of limitation. While the trial court did err in determining that Millers Florida lacked standing because it attempted to assign its legal malpractice claim, because assignment is prohibited, Millers Florida's claims were nevertheless time-barred, as well as Brewer's claims. The statute of limitations in a legal malpractice action starts

running when damages become "fixed and speculative," which occurred here when the Settlement Agreement with Blue Skies was reached on December 18, 2020, resolving the Blue Skies lawsuit.

XXI. LEGISLATION

Davenport Extreme Pools and Spas, Inc. v. Mulflur, 2023-CA-0313-MR, 2024 WL 2982718 (Ky. App. June 14, 2024). Opinion by Eckerle, Judge; Caldwell, J. (concurs) and McNeill, J. (concurs).

The central issue in this case involves whether Kentucky's Uniform Public Expression Protection Act ("UPEPA") applies retroactively or violates the jural rights doctrine. The case stemmed from a lawsuit instituted by Davenport Extreme Pools and Spas, Inc. and Tracy Davenport (collectively "Davenport") against the Appellees alleging the Appellees committed acts of tortious interference and made defamatory statements. Prior to suit, Davenport had contracted to construct a pool for certain of the Appellees, and it does not appear the pool was ever constructed, though substantial sums of money were deposited for its construction. The Appellees then made several social media posts and exchanged text messages with various parties indicating they had poor experiences with Davenport, ostensibly encouraging other parties either to refrain from contracting with Davenport or to cancel their current contracts.

Shortly after the lawsuit was initiated, Kentucky's UPEPA statutes went into effect. These statutes permit parties who believe they are being targeted by businesses with Strategic Lawsuits Against Public Participation ("SLAPP") to utilize expedited dismissal procedures. These proceedings are expedited and include limited discovery and require the party who initiated the suit to present *prima facie* evidence of its claims. Failure to do so results in dismissal of the action. The prevailing party on any dismissal motion may then seek attorney's fees and costs related to the motion. The Appellees sought to utilize this expedited dismissal procedure under the UPEPA, and Davenport claimed it was inapplicable because the statutes contain no express retroactivity language; they are substantive in nature; and they violate the jural rights doctrine. The trial court rejected these arguments and dismissed the case, finding there was no *prima facie* evidence to support the underlying tort claims. The trial court then granted attorney's fees and costs to the Appellees. One of the Appellees only requested an amount limited to costs and fees incurred while preparing the motion itself, while the other Appellees requested additional sums related to the whole litigation, reasoning that these activities also related to the ultimate dismissal of the case. The trial court granted each party's request, finding the statute permits recovery of all fees and costs related to the motion, and each party had met that showing.

On appeal, a panel of the Court of Appeals resolved the central issues in Appellees' favor. While the statutory language does not mention retroactivity, the UPEPA is a procedural change that involves no substantive changes to any of the tort claims. Its mechanisms can be likened to a party utilizing existing motions to dismiss and motions for summary judgment. Indeed, many federal courts sitting in diversity jurisdiction, which must apply state substantive law and federal procedural law, have reached similar conclusions that most other states' Anti-SLAPP laws are wholly procedural and inapplicable in federal court. Moreover, these procedural changes do not alter, abolish, or impair any common-law right of recovery. Thus, they do not violate the jural rights doctrine. The Court also held the trial court's rulings on the fees and costs were neither constitutionally infirm

(because the fee provision was not void for vagueness) nor an abuse of discretion. Trial courts are frequently vested with the authority to determine appropriate fee awards for prevailing parties, and this statute reads similarly to other provisions. The two different awards in this case were due to two different requests, not two different interpretations of the statute. The trial court properly applied one standard to grant both fee awards. No abuse of discretion occurred.

Finally, Davenport's other claims regarding whether they had made a *prima facie* case for tortious interference or defamation were meritless. As regards the tortious interference claims, at best Davenport could show that certain of the Appellees wanted another party to cancel a contract with Davenport. But the *prima facie* evidence ended there. The other party who ultimately did lawfully cancel the contract had a logical and entirely independent reason – unexpected NICU charges for their new baby – and forfeited a five-figure deposit with Davenport to cancel the contract without having any work done. Additionally, Davenport could not show the Appellees had any malicious intent in wanting another person to cancel the contract – the Appellees received no value, business or otherwise, from the party canceling the contract, and the stated reasons for warning the other parties were that the Appellees had allegedly not received the benefit of their bargain during their contract with Davenport. In other words, Appellees were solely engaging in public speech and warning others about their bad experiences with a company. Likewise, the various terms used by the Appellees about Davenport, including "thugs," did not rise to the level of defamatory language. The statements were opinion and at worst showed exaggerated hyperbole based on expressed facts or underlying facts that were not provable as false. Either way, the Appellees' public and private discussions about their experiences with Davenport did not give rise to any actionable defamation. Accordingly, the Court affirmed the trial court's orders.

XXII. MALPRACTICE

Kaisi v. Isaacs, 2023-CA-0511-MR, 2024 WL 3075431 (Ky. App. June 21, 2024). Opinion by Easton, Judge; Acree, J. (concurs) and Goodwine, J. (concurs).

Kaisi hired Isaacs to create a scheme in which Kaisi would avoid paying federal taxes. Kaisi was subsequently indicted by the federal government and pled guilty to tax evasion and falsely claiming low-income eligibility for Medicaid medical coverage. Kaisi filed a complaint with the trial court against Isaacs, alleging breach of contract, negligence, emotional distress, and loss of reputation. The trial court dismissed Kaisi's complaint for failure to state a claim upon which relief may be granted. The Court affirmed the trial court because Kaisi's claim was barred by collateral estoppel and public policy. Because Kaisi pled guilty to a crime with a "wilful" mental state, issue preclusion supports collateral estoppel. Public policy also supported the trial court's decision. Therefore, the Court affirmed.

XXIII. OPEN RECORDS

A. *Kentucky Open Government Coalition, Inc. v. Kentucky Department of Fish and Wildlife Resources Commission*, 2022-CA-0170-MR, 2022-CA-0192-MR, 2023 WL 7095744 (Ky. App. Oct. 27, 2023). Opinion by Taylor, Jeff S.; Combs, J. (concurs) and McNeill, J. (concurs and files separate opinion). Not reported in S.W.3d.

On August 10, 2021, the Kentucky Open Government Coalition (Coalition) filed an open records request with the Kentucky Department of Fish and Wildlife seeking all emails and text messages sent between certain present and past members of the Kentucky Department of Fish and Wildlife Resources Commission (Commission) from June 1, 2020 to August 10, 2021. The request was specifically "not limited to communications that took place on government-owned email accounts and cell phones[,]" expressly requested "public records . . . generated on private cell phones [and] on private email services[,]" and excluded any "[c]ommunications of a purely personal nature unrelated to any governmental function." In the last of three responses to the request, the Commission indicated that documents in possession of individuals on their personal devices and communications made outside of a quorum during a public meeting did not constitute public records subject to open records requests. The Coalition filed suit in Franklin Circuit Court to compel the production of the aforementioned private communications. The complaint alleged the "Commissioners are not provided with government devices or email addresses to conduct official Commission business[,]" and "the Commission's website lists each Commissioner's personal contact information, including non-governmental street and e-mail addresses and phone numbers." The complaint further alleged that "[e]mails and text messages between Commissioners about the agency's business are public records within the meaning of [KRS] 61.870(2) because they were 'prepared' and 'used' by the members of the Commission, regardless of where they are stored." Agreeing with the Coalition's argument regarding the Commission members' private email accounts, the circuit court ruled they were public records subject to disclosure while the requested communications sent to or received on the Commission members' private cell phones were not subject to disclosure because their production would be unreasonably burdensome or raise privacy concerns. The circuit court concluded there was no willful withholding of public documents warranting statutory penalties. The Coalition filed an appeal while the Commission filed a cross-appeal.

In the appeal filed by the Coalition, the Court of Appeals reversed the circuit court's order in part. The Court held the requested text messages qualified as public records because members of the Commission are bound by the Open Records Act, and "such messages [were] prepared by or used by the members of the Commission and relat[ed] to or concern[ed] Commission business." The Court reasoned that "to hold otherwise" would allow public officials to evade disclosure by using their personal devices and further determined the Commission failed to demonstrate "that the text messages sought in the open records request contained personal information" thus exempting them from disclosure due to privacy concerns. The Court remanded with instructions for the circuit court to reconsider the particular facts of the underlying case for a determination of whether the request would create an unreasonable burden. The Court affirmed the circuit court's finding as to no willful violation on the part of the Commission because the law relating to requests in connection with personal email accounts and text messages "was unsettled." As a result, the Commission's actions could not be demonstrated to be "'without plausible justification and with conscious disregard of the requester's rights.'" *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013). In the Commission's cross-appeal, the Court affirmed the circuit court's ruling relating to the disclosure of the requested emails based upon the same rationale. The Court rejected the Commission's argument that official

documents could only be generated during public meetings with a quorum because the Open Records Act did not define public records "so narrowly[.]"

The concurring opinion stated the majority opinion's analysis of the private text messages was correctly limited to the exceptions of unreasonable burden and privacy due to those being the only exceptions invoked by the Commission. However, the concurrence noted there are other statutory exemptions that could be considered in the context of private emails and text messages such as exemptions relating to "[p]reliminary drafts, notes, correspondence with private individuals . . ." and "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]"

B. *Williams v. Cabinet for Health and Family Services*, 2022-CA-0935-MR, 2022-CA-1360-MR, 2024 WL 294346 (Ky. App. Jan. 26, 2024). Opinion by Goodwine, Pamela R.; Caldwell, J. (concurs) and Lambert, J. (concurs).

In appeal 2022-CA-0935-MR, Timothy Williams challenged the Boone Circuit Court's judgment denying his claims under the Kentucky Open Records Act ("KORA"). Williams raised several arguments including that the trial court erred in finding that the Cabinet for Health and Family Services ("Cabinet") did not willfully withhold records under KRS 61.882(5). The Court of Appeals affirmed the trial court's judgment, holding its decision was not clearly erroneous. In appeal 2022-CA-1360-MR, the Cabinet appealed from orders including the judgment awarding Williams $2,000,000 in punitive damages for violations of the Kentucky Whistleblower Act ("KWA"). Williams, an employee of the Cabinet, sent a letter to the Office of the Inspector General alleging the Cabinet failed to initiate or follow up on 93 reports of child abuse or neglect. After his report, Williams claims to have experienced various personnel actions as retaliation for his letter. A jury awarded him $2,000,000 in punitive damages, and the Cabinet appealed. The Court of Appeals construed "personnel action," as used in KRS 61.103(3), to mean "any act relating to a state employee which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against an employee who has made a good faith report under the KWA." Relying on the requirements for claims of retaliation under the Kentucky Civil Rights Act ("KCRA"), the Court also held such a personnel action must constitute a materially adverse change in the terms and conditions of the person's employment to meet the plaintiff's burden in KRS 61.103(3). The Court affirmed the trial court's order denying summary judgment on this issue, holding there had been genuine issues of material fact as to whether any of the personnel actions alleged by Williams were materially adverse. However, the Court reversed the judgment awarding punitive damages because (1) at trial, Williams was permitted to present evidence of personnel actions which occurred outside the 90-day limitation in KRS 61.103(2); (2) the trial court failed to use the statutory language from KRS 61.103(3) in the jury instructions; and (3) the punitive damages award was grossly excessive under the due process clause of the Fourteenth Amendment. The Court remanded the matter for a new trial on Williams' KWA claims.

XXIV. PLANNING AND ZONING

A. *Richardson v. Georgetown-Scott County Planning Commission*, 2021-CA-1163-MR, 688 S.W.3d 548 (Ky. App. 2023). Opinion by Lambert, James H.; Easton, J. (concurs) and McNeill, J. (concurs).

This matter involved an appeal from the Scott Circuit Court's opinion affirming a planning commission's approval of Verizon Wireless' application for the construction of a new cellular antenna tower. The Court of Appeals affirmed, holding the circuit court properly limited the record in the KRS 100.347 statutory appeal to the administrative record, the appropriate standard of review was whether the decision was arbitrary, and Appellant William Richardson's procedural due process rights were not violated. It was held there was no issue with the naming of the proposed site; KRS 100.987(4)(a) provides for a review of a uniform application, not a trial-type hearing as Richardson argued; and KRS 100.987 only requires findings of fact when an application is denied, not granted. Finally, Richardson was determined to have failed to establish the approval was arbitrary, as the record reflected the planning commission did not act in excess of its granted powers, Richardson was afforded due process, and substantial evidence supported the approval.

B. *Frederic v. City of Park Hills Board of Adjustment*, 2022-CA-0867-MR, 2023 WL 8286391 (Ky. App. Dec. 1, 2023). Opinion by Acree, Glenn E.; Dixon, J. (concurs) and Taylor, J. (concurs). Discretionary review granted June 5, 2024. Not reported in S.W.3d.

Appellee, Saint John the Baptist, Inc. (Saint John), owns and operates the Our Lady of Lourdes church in Park Hills, Kentucky. Appellees Sheila Burke and the Sheila Burke Trust owned land adjacent to the church. Saint John wanted to construct a grotto behind the church, a portion of which would sit on the Sheila Burke Trust land. The Sheila Burke Trust and Saint John applied for a conditional use permit to construct the grotto behind Our Lady of Lourdes. They also requested a variance for rear and side yard setbacks. The City of Park Hills Board of Adjustment (the Board) approved both the variance request and conditional use permit upon the condition the adjacent land would be deeded to Saint John. Appellants, nearby property owners, appealed the Board's decision to the circuit court. The circuit court affirmed the Board's decision, concluding Appellants had not met their burden of demonstrating the Board acted arbitrarily or outside its regulatory authority. The Court of Appeals reversed the circuit court. First, it determined the Board acted in excess of its statutory authority by granting the conditional use and variances. While the church did not align with applicable provisions of Park Hills' Zoning Ordinance, it existed prior to its adoption and thus constituted a preexisting nonconforming use. The construction of the grotto would constitute an expansion of the church's nonconforming use. The Board is prohibited by both statute and Park Hills' Zoning Ordinance from enlarging or expanding a nonconforming use that would run afoul of applicable zoning regulations. While Appellees argued minor or modest expansions of preexisting nonconforming uses had been upheld by reviewing courts, Appellees' requested expansion is different in kind and larger in scale than those permissible modest expansions. Because the Court determined the Board acted in excess of its statutory authority, the Court did not need to reach Appellants' argument that the

Board's decision was arbitrary. However, the Court disagreed with Appellants that they were denied due process; Appellant Joel Frederic attended the hearing on the proposed conditional use and setback variance, and he did not demonstrate he was denied the opportunity for cross examination. Further, the Court disagreed with Appellees that preventing construction of the grotto would constitute a violation of the Religious Land Use and Institutionalized Persons Act because such prevention would not constitute a substantial burden upon the Appellees' free exercise of religion. Judge Donna Dixon concurred in the opinion prior to her retirement effective November 20, 2023. Release of this opinion was delayed by administrative handling.

C. *Calhoun v. Tall Oak, LLC*, 2022-CA-0144-MR, 2024 WL 1222076 (Ky. App. Mar. 22, 2024). Opinion by Acree, Glenn E.; Combs, J. (concurs) and Eckerle, J. (concurs).

Appellants are a group of residents adjacent to a former country club in Nicholasville, Kentucky. Tall Oak, LLC, the owner of the former club, sought to develop its land into a residential subdivision. However, the land was zoned as agricultural. Tall Oak applied to the Nicholasville City Commission for a zone amendment. At a Planning Commission hearing on the application, Tall Oak presented evidence of the need for the zoning change and of compliance with Nicholasville's Comprehensive Plan and Code of Ordinances. Appellants objected based on inadequate sanitary sewer and road infrastructure to accommodate the additional homes. The Planning Commission denied the application, and Tall Oak appealed to the City Commission. The City Commission adopted an ordinance rezoning Tall Oak's land from agricultural to residential. Appellants filed a complaint with the Jessamine Circuit Court, appealing the decision to rezone the land and seeking a declaratory judgment. The circuit court affirmed the City Commission's adoption of the ordinance, and Appellants appealed. The Court of Appeals affirmed. First, the Court of Appeals determined the zoning amendment was processed in accordance with KRS Chapter 100, despite Appellants' waiver of this argument by failing to raise it before the Planning Commission. KRS 100.209 permits cities to amend a comprehensive plan and official zoning map if the city annexes territory, so long as the city follows the statute's provided procedure. Appellants argued the city was required to amend its comprehensive plan; however, the Court held the statute does not require amendment to a comprehensive plan where such amendment is already in conformity. Second, the Court of Appeals rejected Appellants' argument that the Nicholasville Code of Ordinances requires developers to submit a storm water management plan before real estate development can be approved. Upon close reading of the applicable chapter of the City's ordinances, the Court of Appeals determined the circuit court had not erred in determining the storm water management plan was not required until a later stage in the development process; rather than requiring a storm water management plan prior to rezoning, the storm water management plan is a prerequisite to land disturbance activities.

XXV. PROFESSIONAL LICENSURE

Williams v. Public Protection Cabinet, 2022-CA-1298-MR, 679 S.W.3d 458 (Ky. App. 2023). Opinion by Acree, Glenn E.; Dixon, J. (concurs) and McNeill, J. (concurs).

The Board of Examiners of Psychology (the Board) initiated a disciplinary action against Dr. Monnica T. Williams for alleged misconduct that occurred during her supervision of a doctoral candidate's limited practice of psychology. Those proceedings against Dr. Williams began in October 2019 despite her choosing not to renew her license in June 2018. In sum, the Board sought to impose discipline on a person who no longer held a license to practice psychology. To prevent this, Dr. Williams filed for a writ of prohibition against the Board in the Franklin Circuit Court, but the circuit court denied her this writ. Dr. Williams appealed, and the Court of Appeals considered whether the Board had jurisdiction to impose discipline upon an individual who no longer held credentials to practice psychology. The Board argued KRS 319.118(3) gives it authority to pursue disciplinary action against someone who chooses not to renew their license. Dr. Williams argued, on the other hand, that KRS 319.118(3) only gives the Board the power to pursue disciplinary action against someone who surrenders his/her license for the purpose of avoiding discipline after initiation of disciplinary proceedings. The Court of Appeals determined that Dr. Williams did not belong to any category of individuals that KRS Chapter 319 gives the Board power over as she was no longer a license holder as defined by statute. *See* KRS 319.082. The Court did not fully subscribe to Dr. Williams' interpretation as it would yield to circumstances in which license holders could commit misconduct and voluntarily surrender their license before the Board's awareness thereby escaping punishment. Instead, by KRS 319.118(3)'s plain meaning, the Court determined Dr. Williams never surrendered her license at all, and by operation of KRS 319.071, the Board canceled her license when it was not renewed. *See* KRS 319.071. Being a creature of statutes, the Court proclaimed the Board is strictly confined to those statutes which created it and must derive all authority to act from those originating statutes. The Board could not provide a statute that gives it authority to impose sanctions against Dr. Williams, and for these reasons, the Court reversed the circuit court's denial of Dr. Williams writ of prohibition

XXVI. PROPERTY LAW

A. *Cypress Flats Land Company, LLC v. River View Coal, LLC*, 2022-CA-0095-MR, 2022-CA-0145-MR, 2023 WL 4982065 (Ky. App. Aug. 4, 2023). Opinion by Eckerle, Audra; Caldwell, J. (concurs) and Dixon, J. (concurs). Review denied and ordered depublished on June 5, 2024. Not reported in S.W.3d.

The seminal issue of this appeal was whether a coal lessee is liable for trespass or unjust enrichment when it is conducting lawful activities including the injection of coal slurry into mine voids under surface properties where no mining is actively occurring, but coal remains to be harvested. A jury considering the issue answered in the negative. River View Coal, LLC ("River View") leased mineral rights to coal located underneath numerous contiguous surface properties, including Appellants' ("Cypress Flats") properties. There are three seams of coal under the properties, one of which had never been mined. The other two seams were mined using the room-and-pillar method, whereby rooms or voids are left after the coal is removed and pillars of coal remain to support the surface properties. During the mining process the coal must be cleaned, and one of the byproducts of the cleaning

process is coal slurry, which contains coal fines, rocks, water, and other items. The coal slurry is a valuable product, and it is stored in various ways, including surface impoundments and underground impoundments. River View sought and obtained permits to inject coal slurry into the mine voids under certain of Cypress Flats' properties. They also negotiated and paid for surface easements before injecting the coal slurry. River View injected the slurry for a few years before Cypress Flats, through counsel, sent a cease-and-desist letter. River View continued injecting slurry pursuant to its permit and easements, eventually ceasing for reasons unrelated to the cease-and-desist letter. A resulting complaint was filed in Union Circuit Court, seeking damages for trespass and unjust enrichment. The parties agreed that the principal case regarding the ownership and use of mine voids was *Middleton v. Harlan-Wallins Coal Corp*., 252 Ky. 29, 66 S.W.2d 30 (1933). There, a coal owner who possessed mineral estates under a large boundary of surface properties was transporting in the tunnels and voids of property coal mined from under other surface properties. The Kentucky Supreme Court held no claim for trespass could be sustained by the surface owners because "so long as there is any of the immediate mineral in place, the owner of it, or the one who has the right to extract it, may use the tunnels and other necessary subterranean passages and openings, not only for the removal of the mineral taken therefrom and embedded under the same surface rights, but also for all other lawful purposes so long as it is necessary to maintain such openings to extract and remove the mineral under the particular surface[.]" *Middleton*, 66 S.W.2d at 31. The jury in the instant case was presented with the legal test from *Middleton* and made factual findings consistent with River View having the right to use the tunnels and voids. On appeal, Cypress Flats principally argued the trial court erred by not directing a verdict or by erroneously instructing the jury because Cypress Flats claimed that an active mining requirement should be read into *Middleton*. The Court of Appeals held that nothing in *Middleton* suggested such an outcome, and Kentucky law regarding mineral estates in coal granted such owners and lessees strong rights to access and extract the coal including the right to use the voids and tunnels for lawful purposes. The Court stated *Middleton* suggested the opposite of what Cypress Flats proffered – that is, the surface owner's rights are *not affected at all* by the mineral owner using the tunnels and voids. Accordingly, as the evidence was that there was coal remaining under the surface properties and the tunnels and voids were necessary to extract the same, the Court deemed that no error occurred. The remaining evidentiary claims were held to have either had no basis in fact or were harmless in light of the jury's finding in favor of River View on the principal issue.

B. *Combs v. Reneer*, 2022-CA-0362-MR, 673 S.W.3d 809 (Ky. App. 2023). Opinion by Easton, Kelly Mark; Acree, J. (concurs) and Jones, J. (concur).

Appellant challenged an order of the Grayson Circuit Court approving a master commissioner's sale of jointly owned real property. Appellant and Appellee shared a joint tenancy with right of survivorship of a home surrounded by five acres. Appellant filed for a partition sale pursuant KRS 389A.030 and requested the circuit court grant her share of the proceeds. The circuit court referred the property to the master commissioner for a partition sale later held in July 2021 at which Appellee was the only bidder and purchased the property with a bid of $1. Appellant motioned the circuit court to set aside the sale as unconscionable and presume fraud. After an unsuccessful resolution at an ordered mediation, the circuit court denied the motion and confirmed the sale. Quoting *U.S. Bank National Association*

as Trustees for Registered Holders of Banc of America Merrill Lynch Commercial Mortgage, Inc. v. Courtyards University of Kentucky, LLC, 594 S.W.3d 205, 209 (Ky. App. 2019), the Court of Appeals affirmed and noted "'that mere inadequacy of price [was] an insufficient ground for setting aside a judicial sale.'" The Court also cited *Gross v. Gross*, 350 S.W.2d 470 (Ky. 1961), for analogous support which involved a successful bid in the amount of $500 for real property valued at $10,500 by an individual who already enjoyed a 5/7th ownership stake in the property. Additionally, the bidder in *Gross* had "provided for the prior owner" and made improvements to the property. Similarly, the underlying facts of this appeal demonstrated Appellant, as a joint owner, had resided at and possessed the property since 2012 and was solely responsible for daily maintenance. The Court further affirmed the refusal to presume fraud because it would be improper to "conjecture some collusion or other irregularity explaining the lack of another bid," and there was otherwise no evidence produced by Appellant demonstrating such.

C. *McCahren v. Matrix Financial Service Corporation*, 2021-CA-1518-MR, 676 S.W.3d 38 (Ky. App. 2023). Opinion by Acree, Glenn E.; Caldwell, J. (concurs) and Lambert, J. (concurs).

In a case of competing claims of lien priority relative to Fayette County real property, Appellant claimed an equitable or vendor's lien dating from July 27, 2011, based on a contract for deed to a separate, Bourbon County property. Appellee claimed its lien relative to the Fayette County property based on a mortgage recorded on October 6, 2016. The Court of Appeals concluded Appellant's equitable lien was limited to the Bourbon County property based on *Ford v. Ford's Ex'r*, 26 S.W.2d 551, 552 (Ky. 1930), which holds "the vendor's lien for purchase money extended only to the particular estate or interest conveyed and for which the price was to be paid[.]" The Court thus affirmed the Fayette Circuit Court's summary judgment recognizing Appellee's lien as superior.

D. *Marcum v. U.S. Bank, National Association as Trustee for CIM Trust 2019-R3 Mortgage Backed Notes, Series 2019-R3*, 2022-CA-1416-MR, 2023 WL 6773941 (Ky. App. Oct. 13, 2023). Opinion by Cetrulo, Susanne M.; Karem, J. (concurs) and McNeill, J. (concurs).

This is an appeal from the denial of a motion pursuant to CR 60.02. Appellee U.S. Bank foreclosed upon a certain piece of property, and in its complaint, incorrectly listed the property address. Appellants purchased the auctioned property at a courthouse sale conducted by the master commissioner, and an order of sale was entered without any exceptions within the 10-day period. Distributions were made, and Appellants then realized they had purchased an adjoining lot valued at far less than the property they had believed they were purchasing. They sought to be awarded excess funds, advising the court of the error resulting from the error in the bank's foreclosure complaint. The trial court awarded them the excess funds. Appellants later filed a CR 60.02 motion arguing the entire sale should be set aside due to the bank's mistake. The trial court denied that relief, finding Appellants could have requested a title search, and they bought the property at their peril by proceeding without the same. Additionally, they could have filed exceptions within 10 days, and they could have elected to move to set aside the sale sooner, rather than simply seeking reimbursement of the excess funds. The Court of Appeals affirmed, finding the trial court did not abuse its discretion. CR 60.02 did not provide

relief because the information Appellants relied upon to bring the motion was readily available to them in the public records before entry of the order confirming the sale.

E. *Burch v. Thomas*, 2023-CA-0005-MR, 677 S.W.3d 827 (Ky. App. 2023). Opinion by Karem, Annette; Cetrulo, J. (concurs) and McNeill, J. (concurs).

This opinion addresses whether a provision in a sales agreement governing the future sale of property was extinguished upon the release of the underlying mortgage. Two sisters, Elizabeth Burch and Mary Ellen Thomas, received equal shares in a tract of real estate as a gift from their mother. The property had a fair market value of $80,600. Burch agreed to sell her share to Thomas for $40,300. Thomas executed a promissory note and mortgage in that amount. The agreement of sale of the property contained an article (Article III) which provided the purchaser would fully account to the seller as to any future sale of the property: If the net proceeds of any future sale exceeded $80,600, the purchaser would receive 50 percent of this excess amount; if the future sale was less than $80,600, the seller agreed to reduce the purchase price proportionately. The note was paid in full 11 years later, and Burch executed a release of the mortgage. Twenty-five years later, Thomas's heirs sought a declaratory judgment to determine whether the article governing future sales of the property was still effective. The trial court entered a declaratory judgment ruling any obligation in the agreement regarding future sales was extinguished upon the release of the mortgage. The Court of Appeals agreed, holding the doctrine of merger applied, and Article III was not a collateral agreement separate and distinct from the agreement for the purchase of the property. It held the exceptions to the merger doctrine of fraud, mistake, or contractual agreement did not apply, and Article III was an integral part of the sale agreement which had no reason to exist once the sale took place.

F. *Ferguson Enterprises, Inc. v. Dreamland Hospitality, LLC*, 2022-CA-0361-MR, 677 S.W.3d 503 (Ky. App. 2023). Opinion by Dixon, Donna L.; Cetrulo, J. (concurs) and Easton, J. (concurs in result and files separate opinion).

Ferguson Enterprises, Inc. (Ferguson) appealed from the Jefferson Circuit Court's grant of summary judgment to Dreamland Hospitality, LLC (Dreamland). Dreamland hired Huhn Plumbing Co., LLC (Huhn) for construction work on its real estate. Huhn contracted with Ferguson to provide materials. Dreamland paid Huhn for materials, but Huhn failed to pay Ferguson. Ferguson notified Dreamland of its intent to file a lien against real estate for its construction materials. Ferguson then filed a lien. Ferguson tried to reach a settlement with Dreamland but was never paid, so Ferguson sued Dreamland. Ferguson moved the trial court to enforce the settlement agreement, but the trial court denied the motion finding no valid settlement agreement existed. Ferguson moved the trial court for summary judgment, and Dreamland moved to dismiss the case, which was treated as a cross-motion for summary judgment. The trial court granted summary judgment to Dreamland, finding the materialman's lien was not perfected because it "was not the correct amount." An appeal followed in which the Court of Appeals affirmed in part and reversed in part the summary judgment and remanded. The Court held the trial court erred because there was a factual dispute concerning whether the amount of the lien was correct at time it was filed. KRS 376.080(1) requires a lien statement to include, "the amount due [the provider of the materials], with all just

credits and set-offs known to [the provider.]" Kentucky law requires strict compliance with this statute. The key issue herein was whether credit that was given on the date the lien was filed was known to Ferguson prior to filing its lien. Because this was disputed, the trial court could not grant summary judgment to either party. The Court further held the trial court did not err in its determination that no settlement agreement had been created because the person with whom Ferguson negotiated a settlement had no authority to bind Dreamland. The Court also held because there was no settlement agreement, Ferguson was not entitled to attorney fees. The concurring opinion concurred in result "[b]ecause the amount of 'just credits and set-offs known to' Ferguson when it filed its lien was a disputed fact" and further noted there was a lack of Kentucky precedents applying KRS 376.080's "all just credits and set-offs" language. The opinion cited the Missouri case of *Almat Builders and Remodeling, Inc. v. Midwest Lodging LLC*, 615 S.W.3d 70, 79 (Mo. App. 2020) for guidance which addresses liens containing incorrect amounts due to mistake or error.

G. *Molinar v. Giese*, 2022-CA-1349-MR, 678 S.W.3d 923 (Ky. App. 2023). Opinion by Thompson, Larry; Cetrulo, J. (concurs) and Combs, J. (concurs).

The Court of Appeals reversed and remanded an order of the circuit court which confirmed a master commissioner's sale of property. The property for sale was listed as "surface property" only, meaning the oil and mineral rights had been reserved and excluded from the sale. After the Appellants purchased the property, it was discovered the timber rights had also been previously excluded from the property and were not included in the sale. The lack of timber rights was not disclosed to the court prior to the commissioner's sale and was not disclosed by the commissioner to the potential buyers. The trial court ruled that the commissioner sold the surface property as required, and the sale was not flawed. The Court of Appeals held the lack of notice to the potential buyers that the timber rights were not included in the sale caused the commissioner's sale to be fatally flawed and necessitated the sale be vacated. The Court held that timber rights are part of the surface property unless specifically excluded. While the timber rights had been excluded in this case, there was no notice of this fact.

XXVII. QUALIFIED IMMUNITY

A. *Carpenter v. Goodall*, 2021-CA-1311-MR, 686 S.W.3d 251 (Ky. App. 2024). Opinion by Acree, Glenn E.; Cetrulo, J. (concurs) and Goodwine, J. (concurs).

When a teacher suspected a student was inebriated in class, he called security to escort the student to the principal's office. Because the student suffered from ADHD and PTSD, he had an Individualized Education Program that allowed him, when feeling stress, to go to the principal's office as his safe space to "cool down." Upon reaching the area near the principal's office, accompanied by two security officers at this point, the student resisted entering and tried to leave the school to get to his car in the school parking lot. After verbal commands failed, the security officers used incremental physical assists to obtain his compliance. The student resisted each of these assists until the three fell to the floor and the student was immobilized, after which he voluntarily entered the principal's office. Local police officers soon arrived to conduct breathalyzer tests that showed the student well above the legal limit for blood alcohol content. Charges originally brought against

the student for assaulting and injuring one of the security officers were dropped. The student then brought a civil suit for assault against that security officer; the assault claim was combined with student's administrative appeal of the school board's suspension of the student from school. The trial court found qualified official immunity defeated the student's assault claim against the security officer and affirmed the school board's decision to suspend student. On appeal, the Court of Appeals affirmed.

B. *Portwood v. Hoskins-Squier*, 2023-CA-0439-MR, 689 S.W.3d 728 (Ky. App. 2024). Opinion by Cetrulo, Susanne; Acree, J. (concurs) and Taylor, J. (concurs).

In this appeal from a summary judgment in favor of local government employees, the Court again addressed the issue of qualified immunity. It affirmed a judgment of the Fayette Circuit Court entitling local government employees to immunity because failure to install crosswalks before an unfortunate pedestrian accident was a discretionary decision and is viewed differently than a failure to maintain such installations. Further, there was ample discovery and no showing of bad faith in this matter.

XXVIII. SOVEREIGN IMMUNITY

Burns v. Aistrop, 2023-CA-0110-MR, 2024 WL 501830 (Ky. App. Feb. 9, 2024). Opinion by McNeill, J. Christopher; Combs, J. (concurs) and Jones, J. (concurs).

Appellee tripped and fell on a Louisville, Kentucky public sidewalk. She filed suit seeking damages against the City of Louisville and Appellant. Appellant is the Director of Louisville Metro Public Works, which has many responsibilities, including road and sidewalk maintenance. The Jefferson County Attorney filed a motion to dismiss the City of Louisville and Appellant in her official capacity, based on sovereign immunity. The trial court granted the motion. Appellant filed a motion for summary judgment based on her qualified immunity, which the trial court denied. The Court reversed the trial court. The Court determined Appellant's actions were discretionary. Immunity applies to a public official who was negligent when the negligent action was discretionary (those acts which involve an exercise of judgment, personal deliberation, discretion, etc.). *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). Appellant's deposition indicated that no individual was specifically tasked with assessing the quality of the sidewalks within the city. Further, once a complaint was filed, an assessment of the deficiency would be completed by a city employee with the correct skills. There was no indication Appellant was in any way connected to the city division tasked with sidewalk repair. *See Wales v. Pullen*, 390 S.W.3d 160 (Ky. App. 2012) (granting the Director of the Louisville Metro Department of Public Works' motion for summary judgment because none of his duties involved executing orders or specific acts; therefore, his duties were discretionary.) Thus, the Court reversed the trial court's denial of Appellant's motion for summary judgment.

XXIX. TORTS

A. *Williams v. Schneider Electric USA, Inc.*, 2022-CA-0184-MR, 2022-CA-0190-MR, 2023 WL 4374514 (Ky. App. July 7, 2023). Opinion by Jones, Allison; Combs, J. (concurs) and Thompson, C.J. (concurs). Discretionary review granted April 12, 2024. Not reported in S.W.3d.

Vickie Williams contracted mesothelioma, which she alleged was the result of her childhood exposure to her father's dusty work clothing. Williams's father worked at Schneider Electric (f/k/a Square D) beginning in the late 1960s and continuing until approximately 2003. While at Square D, Williams's father was allegedly exposed to molding compounds manufactured by Union Carbide which contained asbestos fibers. Roughly one year after filing her complaint, Williams died from the disease, and her personal representative/executor was substituted. After a period of discovery, as well as a prior appeal to the Court of Appeals by Square D which the Supreme Court of Kentucky ruled was improperly interlocutory, the trial court granted summary judgment to the Appellees, ruling that Appellees owed no duty to Williams as she was a "bystander of a bystander," and there was no foreseeable risk of harm to her through household exposure to her father's clothing. In a direct appeal from the trial court's denial of the Appellees' motion, the Court of Appeals reversed in part, vacated in part, affirmed in part, and remanded. The Court held the trial court erred when it granted summary judgment to Appellees, ruling that the Appellees owed a duty to Williams because the risk of household exposure was foreseeable. Next, the Court considered a ruling of the trial court which excluded certain opinions proffered by one of Williams's experts, based on a purported late disclosure under CR 26.02. The Court reversed this order, as the trial court had not found that the late disclosure prejudiced Appellees. Without a showing of prejudice, "there is no valid basis to exclude or limit testimony." *Equitania Ins. Co. v. Slone & Garrett, P.S.C.*, 191 S.W.3d 552, 556 (Ky. 2006). Finally, the Court considered Square D's cross-appeal in 2022-CA-0190-MR. Square D asserted the trial court had incorrectly determined that worker's compensation exclusivity did not apply. Williams's original complaint asserted she was also exposed to asbestos when she worked at Square D herself one summer as a teenager. Nonetheless, the trial court's order determined there was no reason to grant summary judgment on the basis of workers' compensation exclusivity because there was no proof that Williams was exposed to asbestos during her brief employment. The Court affirmed the trial court on this point, noting the medical and expert proof obtained during discovery attributed her asbestos exposure to her household exposure to her father's clothing and not to her employment at Square D. The Court then remanded the case to the trial court for further proceedings.

B. *Cantrell v. Conley*, 2023-CA-0044-MR, 679 S.W.3d 1 (Ky. App. 2023). Opinion by Jones, Allison; Combs, J. (concurs) and McNeill, J. (concurs).

Melinda Cantrell appealed the Johnson Circuit Court's (1) order of summary judgment dismissing a premises liability negligence claim she asserted against her former landlord, Kelly Conley; and (2) order denying her subsequent CR 60.02 motion to alter, amend, or vacate. Cantrell sued Conley for compensation related to injuries sustained from a fall caused by the collapse of concrete steps providing entry into her rented dwelling in Oil Springs, Kentucky. Cantrell ultimately

abandoned any common law premises liability claim and instead claimed Conley's failure to maintain the stairs violated the Kentucky Uniform Residential Landlord Tenant Act (URLTA), and thus established negligence *per se*. The circuit court summarily dismissed Cantrell's action on the basis that Conley violated no common law duty owed to Cantrell under the evidence presented, and that URLTA – even if it applied – did not authorize damages for personal injuries. Cantrell filed a CR 60.02 motion to vacate the dismissal on the basis it was premature due to a pending motion to compel discovery which had not yet been ruled on. The Court of Appeals affirmed. The Court stated landlords do not owe tenants the requisite duty that premises owners owe invitees. While "*a possessor of property* owes a duty to an invitee to discover unreasonably dangerous conditions on the land and either eliminate or warn of them. . . . [an] occupying tenant is expected to be aware of property defects" aside from "latent or unknown defects" because "the landlord has surrendered exclusive possession and control of the leased premises to the tenant." The Court further indicated that under common law, the remedy was limited to cost of repair for any breach of a landlord's covenant to make repairs. Additionally, it was reasoned URLTA is applicable only to the cities, counties, and urban-county governments which elect to enact it, and Cantrell did not identify any ordinance by which Johnson County or the City of Oil Springs have adopted URLTA. Furthermore, when enacting URLTA, there was no "clear intention on the part of the legislature to depart from the common-law standard for landlord liability." *Miller v. Cundiff*, 245 S.W.3d 786, 789 (Ky. App. 2007). Lastly, the Court held dismissal of the CR 60.02 motion was proper because the actual discovery materials requested in the motion to compel were not relevant to the claims at issue.

C. *Boston v. Commonwealth Health Corporation, Inc.*, 2023-CA-0583-MR, 687 S.W.3d 409 (Ky. App. 2024). Opinion by Caldwell, Jacqueline; Cetrulo, J. (concurs) and Jones, J. (concurs).

Boston tripped and fell outside of a hospital owned and operated by Appellees. Boston suffered injuries which were treated at the hospital. A complaint was then filed, alleging Appellees owned, occupied, and maintained the hospital; thus, they had a duty to regularly inspect the property for defects and correct them. Boston alleged in his complaint that Appellees breached that duty. However, Boston did not file a certificate of merit (or a declaration or affidavit stating the certificate was not required). Appellees argued Boston's failure to file a certificate of merit deprived the circuit court of subject matter jurisdiction. The circuit court agreed and granted Appellee's motion to dismiss. The Court reversed and remanded the circuit court's judgment. This case revolved around the interpretation of KRS 411.167. The statute states "any action identified in KRS 413.140(1)(e) requires a certificate of merit to be filed." KRS 413.140(1)(e) provides: "The following actions shall be commenced within one (1) year after the cause of action accrued:… An action against a physician, surgeon, dentist, or hospital licensed pursuant to KRS Chapter 216, for negligence or malpractice." The circuit court determined that "negligence" as used in KRS 413.140(1)(e) meant any type of negligence (including premises liability negligence). However, the Court determined that negligence as used in KRS 413.140(1)(e) meant medical malpractice negligence. There is a difference between medical malpractice claims and premises liability negligence claims, and the circuit court's interpretation would be at odds with KRS 411.167(5), which provides that a certificate of merit is not immediately required if there has been a

request by the claimant for records of the claimant's medical treatment by the defendants and those documents have not been produced. Furthermore, the title of the legislation from which KRS 411.167 is derived from is "AN ACT relating to medical malpractice." There is a legal difference between medical malpractice and premises liability negligence. Therefore, the Court reversed and remanded.

D. *Lloyd v. Norton Hospitals, Inc.*, 2023-CA-0748-MR, 2024 WL 1685440 (Ky. App. Apr. 19, 2024). Opinion affirming in part and reversing in part by Cetrulo, Susanne; Goodwine, J. (concurs) and Jones, J. (concurs).

This is an appeal from summary judgments granted in favor of three defendants in a medical malpractice action. The injured party underwent surgery for a knee replacement in 2019 and after surgery, a suture needle was missing. The radiologists did not observe the needle on x-ray, and the surgical technician was unable to locate it. The surgical team elected not to reopen the patient's knee to look for the missing needle. Weeks later, it was confirmed the needle had remained in the patient's body and needed to be removed, requiring a further surgery. The matter was litigated against several entities, and the trial court ultimately granted summary judgment to Norton Hospital, the radiologists and the surgical technician, for various reasons. On appeal, the Court reversed the summary judgment in favor of the radiologists as it was based upon plaintiff's expert testimony from an orthopedic surgeon, rather than a radiologist. The trial court erred in finding plaintiff could not proceed against the radiologists without testimony from an expert of the same specialty. The Court also reversed a summary judgment in favor of the surgical technician. The plaintiff did not produce expert testimony as to her negligence. However, this case presented the classic example for application of the *res ipsa loquitor* doctrine, which allows a jury to infer negligence from the mere fact of the retained foreign object which caused the need for the subsequent surgery. Thus, summary judgment as to that defendant was premature. The summary judgment in favor of Norton was affirmed.

E. *Rogers v. Erie Insurance Exchange*, 2023-CA-0447-MR, 688 S.W.3d 527 (Ky. App. 2024). Opinion affirming by Taylor, Jeff S.; Cetrulo, J. (concurs) and Lambert, J. (concurs).

Rogers was involved in a vehicle accident while working as a driver for Lyft, Inc. The other driver involved in the accident was insured by State Farm, which paid the policy's liability coverage limits. Rogers' vehicle was insured by Erie Insurance Exchange, and Lyft carried insurance with Allstate. Erie and Allstate denied Rogers uninsured motorist (UIM) benefits. The trial court granted Erie's motion for judgment on the pleadings, Allstate's motion for summary judgment, and Lyft's motion for summary judgment. Under KRS 281.010(6), Lyft is considered a transportation network company (TNC). A prearranged ride is defined as beginning when a TNC driver accepts a requested ride via a mobile application and continues with the transportation of the rider, according to KRS 281.010(42). Rogers was engaged in a prearranged ride at the time of the accident per KRS 281.010(42) because she was logged into her Lyft mobile application, had accepted a ride, and was on the way to pick up her passenger. 601 KAR 1:113 is triggered when a TNC driver is engaged in a prearranged ride. Under 601 KAR 1:113 §3(4)(d), "[u]nderinsured vehicle coverage" is required "in accordance with KRS 304.39-320." UIM coverage is only mandated upon the request of the insured under KRS

304.39-320; UIM coverage is not compulsory. Lyft never requested UIM coverage and was not required to provide UIM coverage for Rogers. A motorist is only entitled to UIM coverage when a policy's UIM coverage exclusion is so ambiguous and unclear that the insured's reasonable expectation of coverage defeats the UIM exclusion. *Philadelphia Indemnity Insurance Company, Inc. v. Tryon*, 502 S.W.3d 585, 593-94 (Ky. 2016). Because Erie's UIM exclusion was applicable and unambiguous, Rogers could not have reasonably expected UIM coverage at the time of her accident. Furthermore, public policy does not require Lyft or Erie to provide UIM coverage, as UIM exclusions do not offend the public policy of the Commonwealth. *Id*. at 592. Therefore, the circuit court property rendered judgment in favor of Lyft, Allstate, and Erie.

F. *LP Louisville Herr Lane, LLC v. Buckaway*, 2023-CA-0582-MR, 2024 WL 2481056 (Ky. App. May 24, 2024). Opinion by Combs, Judge; Easton, J. (concurs) and Taylor, J. (concurs).

Appeal from denial of a motion for summary judgment. Nursing home sought to avoid liability for allegedly negligent care of a patient due to blanket blame based on Covid restrictions. There existed numerous material facts to be fleshed out precluding entry of summary judgement. Therefore, the Court upheld its denial by the trial court.

G. *Brown v. Funk*, 2023-CA-0576-MR, 2024 WL 2096892 (Ky. App. May 10, 2024). Opinion by Lambert, Judge; Combs, J. (concurs) and Goodwine, J. (concurs).

The Court held the plaintiff's voluntary decision to file an amended complaint which did not incorporate the original complaint effectively started the case anew, so the trial court did not err by setting aside a default judgment based on the superseded initial complaint. The Court also held the trial court properly granted summary judgment because the plaintiff had not shown the defendant had a duty to repair or maintain the sidewalk upon which the plaintiff had tripped and fallen.

H. *Northern-Allison v. Seymour*, 2022-CA-0379-MR, 2024 WL 2982469 (Ky. App. June 14, 2024). Opinion by Acree, Judge; Easton, J. (dissents) and Eckerle, J. (concurs).

Appellant pleaded guilty to resisting arrest. He subsequently sued the arresting officers for assault and related torts. The Jefferson Circuit Court originally granted summary judgment in favor of Appellees by interpreting *Heck v. Humphrey*, 512 U.S. 477 (1994) as holding his plea of guilty to resisting arrest barred his civil claims. *Northern-Allison v. Seymour*, 2020-CA-0637-MR, 2021 WL 1164438, at *2 (Ky. App. Mar. 26, 2021) ("*Northern-Allison I*"). The Court of Appeals in *Northern-Allison I* reversed the summary judgment holding the circuit court misapplied *Heck*. However, the Court further held Appellees were entitled to qualified official immunity and remanded with instructions to determine only whether Appellees should be deprived of such immunity by having performed their discretionary duty in bad faith. On remand and after a hearing, the circuit court held that by pleading guilty to resisting arrest, Appellant waived his defense under KRS 503.060(1) that the police officers used excessive force to effect the arrest, thereby barring Appellant's subsequent civil claim. The circuit court also held Appellees were entitled to qualified official immunity because Appellant "has been unable to

demonstrate that the officers acted in bad faith" and that Appellant's "pleading guilty to Resisting Arrest demonstrates that the officers were acting reasonably and in good faith." The Court of Appeals affirmed by applying the doctrine of issue preclusion after finding each of the doctrine's five elements were present, namely: (1) Appellant was a party to his criminal proceeding and a final judgment in the instant civil case will bind him; (2) the issue in Appellant's criminal case – whether the officers acted in bad faith by using excessive force – is a decisive issue in the civil claim; (3) the issue was actually litigated by the criminal adjudication based on his guilty plea that waived the defense of Appellees' use of excessive force; (4) the issue was actually decided against Appellant in the prior action by Appellant himself; and (5) it was necessary to decide the issue in the prior criminal action consistently with the circuit court's duty under *Boykin v. Alabama*, the purpose of which includes "forestall[ing] the spin-off of collateral proceedings[.]" 395 U.S. 238, 244 (1969). Judge Easton dissented and filed a separate opinion, unable to agree "with the conclusion on one element of issue preclusion – the identity of the issue addressed in the prior adjudication."

I. *Alvarez v. Allstate Property and Casualty Insurance Company*, 2023-CA-0013-MR, 2024 WL 3210270 (Ky. App. June 28, 2024). Opinion by Karem, Judge; Caldwell, J. (dissents) and A. Jones, J. (concurs).

Alvarez appealed from the Jefferson Circuit Court's order granting Allstate's petition under KRS 304.39-280(3) to conduct a second examination under oath. The Court of Appeals affirmed the circuit court. The Court first noted that, to expedite fraud investigations, the Motor Vehicle Reparations Act provides for the disclosure of certain information by basic reparations benefits claimants. If a dispute arises between the claimant and the reparation obligor regarding "information required to be disclosed, the claimant or reparation obligor may petition the Circuit Court ... for an order for discovery including the right to take written or oral depositions." KRS 304.39-280(3). Moreover, the Court saw no abuse of discretion in the circuit court's good-cause determination in this case. As in *State Farm Mutual Automobile Insurance Company v. Adams*, 526 S.W.3d 63 (Ky. 2017), some of the issues listed by Allstate pertained to the acquisition of accident-related information. Moreover, Allstate's claim investigation deemed Alvarez's claim suspicious and suggestive of solicitation. Indeed, the day after the subject automobile collision, Alvarez went to a medical provider known by Allstate to solicit in violation of Kentucky law. Further, the medical provider billed Alvarez for an "extensive amount of chiropractic treatment" resulting from a "non-injury collision" with "minor" damage to both vehicles. Allstate further expressed concerns that the medical provider billed for services not rendered and that an unlicensed individual performed the treatments allegedly rendered to Alvarez. Thus, the Court saw nothing "arbitrary, unreasonable, unfair, or unsupported by sound legal principles" in the circuit court's good-cause determination. *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citation omitted). The dissent held the trial court abused its discretion in that Allstate had already examined Alvarez under oath concerning the circumstances of the accident itself in the first EUO. Allstate also had not requested records related to Alvarez's medical care through the means specifically provided for in the MVRA. *See* KRS 304.39-280(1)(b)-(c). Therefore, not having been denied this information to which it was entitled on request, Allstate was not entitled to depose Alvarez about any issues related to her medical treatment pursuant to KRS 304.39-280(3). Thus, there was no good

cause to order a deposition about medical treatment issues regardless of Allstate's expressing concerns about possible solicitation.

XXX. WAGE AND HOUR

Meier v. Jeff Wyler Alexandria, Inc., 2022-CA-1371-MR, 685 S.W.3d 9 (Ky. App. 2024). Opinion by Caldwell, Jacqueline; Jones, J. (concurs) and Taylor, J. (concurs).

Meier appealed from the Boone Circuit Court's summary judgment dismissing his claims alleging illegal wage deductions. Meier was a car salesman at Jeff Wyler. He was paid a set amount twice a month, and he could earn additional income in commissions and bonuses under a written pay plan. The pay plan made it so additional payments for commissions and bonuses could be reduced for certain negative factors, such as imperfect customer service surveys, failed mystery shopper assessments, and low conversation rates on potential trade-in deals. Meier and his manager would sign off on a sheet which contained the calculations for his payment after adding commissions and bonuses and subtracting amounts for negative factors. Meier believed the reductions in his earnings violated Kentucky law. He filed suit, claiming Jeff Wyler's reductions in his earnings were "fines" prohibited by law. The trial court granted summary judgment in Jeff Wyler's favor and dismissed Meier's lawsuit. At the heart of this issue is the interpretation and application of KRS Chapter 337, Kentucky's wages and hour statutes. The trial court interpreted KRS 337.060 to prohibit deductions only from agreed-upon wages, and that under the undisputed facts, there was no deduction from the wages agreed upon between Meier and Jeff Wyler. There was only a dispute about how the calculations were done to get to the wages. The Court determined the trial court may have erred by interpreting KRS 337.060 in such a way, but the interpretation was harmless under the undisputed facts. The Court did not entirely agree with the trial court's interpretation of the term "notwithstanding" in KRS 337.060(2) as to mean "exceptions" stated in KRS 337.060(1). However, the Court ultimately agreed with the trial court that the deductions Meier complained of are not fines because the word "fine" has a particular meaning in the law which does not include deductions from wage bonuses like the ones in this case. Thus, the Court affirmed the trial court's summary judgment.

XXXI. WILLS, TRUSTS AND ESTATES

A. *Popplewell v. Corner*, 2022-CA-0844-MR, 2023 WL 4982155 (Ky. App. Aug. 4, 2023). Opinion by Karem, Annette; Dixon, J. (concurs) and Goodwine, J. (concurs). Discretionary review granted January 10, 2024. Not reported in S.W.3d.

Appellants appealed from the Russell Circuit Court's order dismissing Appellant Tyler Popplewell's complaint with prejudice for lack of standing. Appellant's complaint requested the circuit court declare his great-uncle's will null and void and grant fraud damages. On appeal, Appellant argued the circuit court erred in ruling he did not have standing to bring the claims asserted in his complaint and pointed out that Appellee Connie Corner's answer to his complaint contained no affirmative defenses. Instead, Appellee raised the lack of standing defense for the first time in a motion to dismiss for failure to state a claim under CR 12.02. The Court of Appeals reversed and remanded for further proceedings. The Court first noted the Kentucky Supreme Court has held "lack of standing is a defense which must be timely raised or else will be deemed waived." *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010). The Court determined that because it was undisputed the lack of

standing defense was available to Appellee after Appellant filed his complaint, that Corner should have timely raised such defense in her answer. Thus, the Court held the circuit court committed reversible error by determining Appellant lacked standing to challenge the will.

B. *Day v. Filip*, 2023-CA-0664-MR, 676 S.W.3d 422 (Ky. App. 2023). Opinion by Lambert, James H.; Caldwell, J. (concurs) and Combs, J. (concurs).

Appellant filed a notice of appeal from an opinion and order of the Grayson Circuit Court dismissing an appeal from the Grayson District Court's order granting the final settlement of an estate and denying Appellant's claim against the estate. The Court of Appeals dismissed the appeal for failure to file a motion for discretionary review pursuant to RAP 44. The Court noted it exercised discretionary jurisdiction over cases originating in district court and appealed to circuit court. Quoting *Beard v. Commonwealth ex rel Shaw*, 891 S.W.2d 382, 383 (Ky. 1994), the Court stated, "Because the filing of a motion for discretionary review is jurisdictional, 'a notice of appeal may not serve to transfer jurisdiction to an appellate court, when a motion for discretionary review is called for by the [Rules of Appellate Procedure].'" The Court reasoned that because the defect was jurisdictional, the doctrine of substantial compliance could not be applied. Further quoting *Beard*, 891 S.W.2d at 383, the Court explained notices of appeal and motions for discretionary review serve different functions: "A notice of appeal gives notice that a litigant seeks an appeal as a matter of right whereas a motion for discretionary review requests an appellate court to exercise its appellate jurisdiction as a matter of judicial discretion."

XXXII. WORKERS' COMPENSATION

A. *Lee v. W.G. Yates & Sons Construction Co.*, 2023-CA-0695-MR, 2023 WL 7095038 (Ky. App. Oct. 27, 2023). Opinion by Karem, Annette; Cetrulo, J. (dissents and files separate opinion) and McNeill, J. (concurs).

Appellee employer, Yates & Sons, is a construction company based in Mississippi, which performs jobs all over the country and hires workers on a per-job basis. Appellant Joseph Lee is a permanent legal resident of Louisiana. In accordance with company practice, Lee was contacted via telephone by a representative of Yates about working as a foreman on a project in Maysville, Kentucky. Accordingly, Lee traveled to Kentucky in his pickup truck, towing his travel trailer and motorcycle, and was formally hired at the job site. He lived in the trailer at a nearby campsite in Ohio for the entirety of his employment on the job. Yates provided him with a $100 daily *per diem* in addition to his pay. Lee's family remained at his residence in Louisiana, and he maintained his Louisiana driver's license. Lee was seriously injured while driving his motorcycle to a restaurant for dinner, about two hours before the beginning of his evening shift. The ALJ found that Lee had relocated to Ohio and consequently his injury was not compensable under the "going and coming rule." The Workers' Compensation Board affirmed. Relying on *Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano*, 366 S.W.3d 456 (Ky. 2012), and *Standard Oil Co. (Ky.) v. Witt*, 283 Ky. 327, 141 S.W.2d 271 (1940), the Court of Appeals reversed and remanded for further proceedings. The Court applied the "traveling employee" exception, which allows recovery of workers' compensation benefits if the employee is injured while traveling as required by his

employment unless the travel is a significant departure from the purpose of the trip. The Court's majority found no legal basis that would allow Lee to be recruited as out-of- state talent, to work at a job hundreds of miles from his home that made commuting impossible and be paid a *per diem* for food and lodging, and then be denied workers' compensation benefits because he lodged in one location for eight months of work. The majority further held Lee's injury was work-related under the "service to the employer" exception because he was acting in service to his employer throughout the time he was in Kentucky and Ohio, and eating dinner in a restaurant was a necessity of his employment because he was away from home. The Court's dissent stated the Board did not overlook or misconstrue controlling precedent. The dissent agreed with the ALJ and the Board that Lee was not required to travel in order to do the job he was hired to perform, and he was not coming or going to work when the accident occurred. The dissent also held Lee was not providing a service to his employer and at the time of the injury was engaged in an activity that was a distinct departure from work-related travel.

B. *General Motors v. Payne*, 2023-CA-0722-MR, 2023 WL 8287133 (Ky. App. Dec. 1, 2023). Opinion by Dixon, Donna L.; Combs, J. (concurs) and Eckerle, J. (concurs).

Thomas Payne worked for General Motors (GM) when he fell and injured his legs and sought workers' compensation benefits. One doctor noted Payne walked with an antalgic gait, used an assistive device, and assigned a 20 percent whole person permanent partial impairment rating using the gait derangement table in the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). Payne walked in and out of the office of another doctor without using his assistive device, accidentally left it behind, and was called to retrieve it. That doctor found no deficits in Payne's range of motion and declined to use the gait derangement table in AMA *Guides*. That doctor filed two reports and assigned a 2 percent whole person impairment rating. The ALJ adopted the findings and impairment rating assigned to Payne by the first doctor and awarded 6 percent interest on past due benefits under KRS 342.040. GM's petition for reconsideration was denied and appealed to the Board, which affirmed the ALJ. GM argued on appeal the ALJ erred in adopting the doctor's opinion that Payne qualified for a 20 percent impairment rating under the gait derangement table in the AMA *Guides*, claiming there was no substantial evidence Payne routinely used an assistive device. The Court of Appeals affirmed and held the testimonies of Payne, the treating physician, and the doctor constituted substantial evidence. The fact that substantial evidence, such as testimony of another doctor, may also support a contrary conclusion is immaterial. The Court further reinforced that it could not say the ALJ erred in choosing to rely on the first doctor's impairment rating, based on the AMA *Guides*, even if not followed to the letter. GM also argued imposing prejudgment interest on the past-due award under KRS 342.040 is an unconstitutionally vague civil penalty. KRS 418.075 requires notice to Kentucky's Attorney General in proceedings involving constitutionality of a statute. Because GM failed to comply with the notice requirement, the Court declined to address the issue. Judge Donna Dixon authored the opinion before her tenure with the Kentucky Court of Appeals expired on November 20, 2023. Release of this opinion was delayed by administrative handling.

FOR YOUR INFORMATION …

The Kentucky Law Update: Continuing Legal Education for All Kentucky Lawyers

The Supreme Court of Kentucky established the Kentucky Law Update Program as an element of the minimum continuing legal education system adopted by Kentucky attorneys in 1984. The KLU program is now offered in a hybrid format. The 2024 Kentucky Law Update is offered as a one-day, in-person program at nine different locations across the state. The 2024 On-Demand Kentucky Law Update is offered virtually on the Kentucky Bar Association website from September 1st until December 31st. These two programs offer every Kentucky attorney the opportunity to meet the 12 credit CLE requirement, including the 2 ethics credit requirement, ***close to home and at no cost!*** Judges can also earn continuing judicial education credits at the Kentucky Law Update.

This program was designed as a service to all Kentucky attorneys regardless of level of experience. This service is supported by membership dues and is, therefore, each member's program. The program is a survey of current issues, court decisions, ethical opinions, legislative and rule changes, and other legal topics of general interest that are faced by the Kentucky practitioner on a daily basis. As such, the program serves both the general practitioner and the practitioner who limits his or her practice to a particular field of the law. The Kentucky Law Update program is not intended, nor designed, to be an in-depth analysis of a particular topic. It is designed to alert the lawyers of Kentucky to changes in the law and rules of practice that impact the daily practice of law.

About the Handbooks and Presentations

Handbook materials are the result of the combined efforts of numerous dedicated professionals from around Kentucky and elsewhere. The KBA gratefully acknowledges the following individuals who graciously contributed to this publication:

Nicole S. Bearse
Robbie O. Clements
Don H. Combs, III
Larry C. Deener
Laura Day DelCotto
Haley Dennis
Sean Dennis
Laurel S. Doheny
Angela Logan Edwards
Stephen Embry
Yvette Hourigan
James K. Murphy
Mary Ellis Patton
Damon Preston
Shari Polur
Lou Anna Red Corn
Lori J. Reed
Jeffery L. Sallee
Bruce Simpson
Rebecca Adams Simpson
Jordyn Smith
Henry L. Stephens, Jr.
Robert P. Stith
Eleanore Stoess
Judge Thomas Lee Travis
B. Scott West

Special Acknowledgments

Special thanks to the following KBA Sections, Committees, and other organizations whose participation and assistance with the 2024 Kentucky Law Update programs have been invaluable:

KBA AI Task Force
KBA Alternative Dispute Resolution Section
KBA Criminal Law Section
KBA Elder Law Section
KBA Ethics Committee
KBA Family Law Section
KBA Law Practice Committee
KBA Military Law Committee
KBA Office of Bar Counsel
KBA Well Being Committee
Kentucky Court of Appeals
Kentucky Lawyer Assistance Program
Lawyers Mutual of Kentucky
Legislative Research Commission
NAELA – Kentucky Chapter
Supreme Court of Kentucky

Presentations are also made on a voluntary basis. To the individuals who volunteer in this capacity, special gratitude is owed. Individuals contributing to this program are contributing to the professional development of all members of the Kentucky Bar Association. We wish to express our gratitude in advance to these individuals.

A special thank you to all of the organizations, authors, presenters, moderators, and other 2024 Kentucky Law Update program volunteers will appear in the January 2025 issue of the *Bench & Bar*.

CLE and Ethics Credit

The one-day, in-person 2024 Kentucky Law Update Program is accredited for 7 CLE credits, including 2 ethics credits. The 2024 On-Demand Kentucky Law Update is accredited for 7.75 CLE credits, including 3 ethics credits. One credit is awarded for each 60 minutes of actual instruction as noted on the agendas provided on the KBA website.

The Kentucky Bar Association 2024 Kentucky Law Update programs are accredited CLE activities in numerous other jurisdictions. Credit categories and credit calculations vary from state-to-state. CLE reporting information for other states will be provided at the registration desk at the in-person programs. The out of state information for the on-demand sessions will be available on the program website.

Kentucky Judges, don't forget you can claim CJE credit for attending this program.

REMEMBER! Reporting attendance credits is now online. Reporting information and activity numbers will be available at each respective in-person event. The on-demand reporting information and activity number will be located on the program website.

Evaluations

The 2024 Kentucky Law Update is *your* program and your input *is* valued and needed. Links to the program evaluations for the live, in-person programs and the on-demand program will be provided to all registrants via email. PLEASE take a few minutes to complete the evaluation questionnaire upon receipt. We appreciate your assistance in improving this service.

Kentucky Bar Association
2024-2025 Board of Governors

Rhonda Jennings Blackburn
President
Pikeville

Todd V. McMurtry
President-Elect
Ft. Mitchell

Matthew P. Cook
Vice President
Bowling Green

W. Fletcher McMurry Schrock
Immediate Past President
Paducah

Don H. Combs III
Chair, Young Lawyers Division
Pikeville

Amelia M. Adams
Lexington

Douglas G. Benge
London

Miranda D. Click
Pikeville

LaToi D. Mayo
Lexington

Ryan C. Reed
Bowling Green

Jennifer M. Gatherwright
Crescent Springs

William M. "Mitch" Hall, Jr.
Ashland

Stephanie McGehee-Shacklette
Bowling Green

Susan Montalvo-Gesser
Owensboro

Susan D. Phillips
Louisville

James M. Ridings
London

James A. Sigler
Paducah

Catherine D. Stavros
Ft. Mitchell

J. Tanner Watkins
Louisville

2024-2025 Continuing Legal Education Commission

Jennifer S. Nelson
First Supreme Court District

Colton W. Givens
Second Supreme Court District

Kelly K. Ridings
Third Supreme Court District

Eric M. Weihe, Chair
Fourth Supreme Court District

Nealy R. Williams
Fifth Supreme Court District

Frank K. Tremper
Sixth Supreme Court District

Robert Stephen McGinnis
Seventh Supreme Court District

Justice Robert B. Conley
Supreme Court Liaison

Cassie H. Cooper
Director for CLE

Kentucky Bar Association CLE Staff

John D. Meyers
Executive Director

Cassie H. Cooper
Director for CLE

Lori J. Reed
CLE Attorney Editor &
Section/Division Program
Coordinator

Caroline J. Carter
CLE Lead Program Coordinator
– Annual Convention & Virtual
Education

Laura Cole
CLE Program Coordinator –
Kentucky Law Update & New Lawyer
Program

Coleen Kilgore
CLE Compliance
Coordinator

Terri Marksbury
CLE Regulatory Coordinator

Clifford D. Timberlake
CLE Accreditation
Coordinator