KENTUCKY SUPREME COURT SUMMARIES
JUNE 2021 – APRIL 2022

ADMINISTRATIVE LAW:

***Kentucky Unemployment Ins. Comm'n v. Nichols*, 635 S.W.3d 46 (Ky. 2021)**

Opinion of the Court by Chief Justice Minton. Conley, Hughes, Keller, VanMeter, JJ., and Special Justice Jeffrey Edwards, sitting. All concur. Lambert and Nickell, JJ., not sitting. The Supreme Court granted discretionary review to address whether a non-attorney employee appearing on behalf of a corporation at unemployment insurance (UI) referee hearings as authorized by KRS 341.470(3) was engaging impermissibly in the practice of law. Upon review, the Court found that Nichols lacked standing to contest the validity of KRS 341.470(3). Accordingly, the Court reversed the decision of the Court of Appeals that invalidated KRS 341.470(3) on constitutional grounds. Because Nichols lacked standing, the Court declined to address the merits but did find it useful to future courts to correct the Court of Appeals panel's interpretation of *Turner v. Kentucky Bar Ass'n*, 980 S.W.2d 560 (Ky. 1998).

***Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Appalachian Hospice Care, Inc.*, 642 S.W.3d 693 (Ky. 2022)**

Opinion of the Court by Justice Nickell. All sitting. All concur. In a Medicaid overpayment dispute, Appalachian Hospice Care, Inc.'s CEO—who was not a licensed attorney—sent a two-sentence letter to the Cabinet requesting an administrative hearing. A hearing officer subsequently informed Appalachian Hospice that Kentucky law required corporations to be represented by counsel before administrative tribunals. Counsel was thereafter retained, and the matter proceeded. Some months later, the Cabinet claimed the CEO's request was improper and constituted the unauthorized practice of law. Thus, in the Cabinet's estimation, jurisdiction had not been properly invoked a dismissal was appropriate. The Secretary of the Cabinet agreed and dismissed the administrative appeal.

On appeal, the Franklin Circuit Court reversed the Secretary finding making a request for an administrative hearing was not equivalent to practicing law, the Cabinet should be estopped from seeking dismissal, and taking judicial notice the Cabinet had never before advanced such a position. The Court of Appeals affirmed.

On discretionary review, the Supreme Court affirmed the Court of Appeals. First, it reviewed and distinguished the authorities relied on by the Cabinet. Next, invoking its inherent power to regulate the practice of law and determine what constitutes unauthorized practice, the Supreme Court concluded simply following the directives contained in the Cabinet's correspondence regarding appeal rights required no special skill or legal knowledge. Further, because the CEO had not given legal advice and no legal rights were then being adjudicated, merely penning a simple request to continue proceedings initially instituted by the Cabinet did not constitute the unauthorized practice of law. Finally, to the extent it suggested a non-lawyer could not invoke a corporate entity's right to an administrative hearing, the Supreme Court specifically overruled KBA Unauthorized Practice of Law Opinion KBA U-64.

APPELLATE PROCEDURE:

***M.A.B. v. Commonwealth, Cabinet for Health & Fam. Servs.*, 635 S.W.3d 90 (Ky. 2021)**

Opinion of the Court by Justice Lambert. All sitting. Minton, C.J.; Conley, Hughes, Keller, and VanMeter, JJ., concur. Nickell, J., dissents with separate opinion. M.A.B.'s parental rights were involuntarily terminated, and she appealed. Her notice of appeal failed to name her children in either the caption or the body. However, the children's guardian *ad litem* was served with the notice of appeal. The Court of Appeals dismissed M.A.B.'s appeal for failure to name the children, as they were necessary parties to the appeal. The Kentucky Supreme Court reversed and remanded. The Court held, based in part on *Cates v. Kroger*, 627 S.W.3d 864 (Ky. 2021), that serving the children's guardian *ad litem* was the functional equivalent of naming the children, thereby substantially complying with CR 73.03. In addition, the Court overruled *R.L.W. v. Cabinet for Human Resources*, 756 S.W.2d 148 (Ky. App. 1988), only insofar as it holds that failing to name a child in a termination of parental rights appeal is automatic grounds for dismissal of the appeal.

ARBITRATION:

***Legacy Consulting Grp., LLC v. Gutzman*, 636 S.W.3d 447 (Ky. 2021)**

Opinion of the Court by Justice VanMeter. All sitting; all concur. Presenting as an interlocutory appeal from the Fayette Circuit Court, which denied Money Concepts Capital Corporation and Legacy Consulting Group, LLC's joint motion to enforce arbitration terms in their agreement with Grace McGaughey, the primary issue before the Supreme Court was whether Ms. McGaughey and, by extension, her estate were bound by the arbitration provisions contained within the agreement which she signed with Money Concepts and Legacy Consulting in December 2009 when she purchased a variable annuity with Jackson National Life Insurance Company. The Court held that while under federal and state law, arbitration agreements validly entered into are generally enforceable, arbitration agreements contained within insurance contracts are not enforceable. The Court agreed with the Court of Appeals' finding that "the product at issue is for insurance based on the description of the portfolio as a fixed account and the regular payments of the same amount . . . consistent with an insurance product." Because the investment product was insurance, the arbitration agreement was unenforceable, KRS 417.050(2), and neither Ms. McGaughey nor her estate were bound by its terms.

ATTORNEY DISCIPLINE:

***Deters v. Ky. Bar Ass'n*, 627 S.W.3d 917 (Ky. 2021)**

Opinion and Order of the Court. All sitting. Minton, C.J.; Conley, Hughes, Lambert, Nickell and VanMeter, JJ., concur. Keller, J., concurs in result only without separate opinion. Eric Deters appealed from the Kentucky Office of Bar Admissions' Character and Fitness Committee and the Kentucky Bar Association Board of Governors, the denial of his application for reinstatement as an attorney. In 2013, Deters was suspended for dishonesty/making false statements and violating CR 11. Deters also had a history of professional misconduct. The Supreme Court reasoned that Deters failed to comply with the terms of his suspension by continuing to practice law and representing himself as an attorney in public advertisements, as well as failing to be candid about his taxes, his prior suspensions, and his litigation history. The Supreme Court denied Deters' application for reinstatement and ordered him to cease all activities relating to law and legal advertising.

***Inquiry Comm'n v. Shaughnessy*, 626 S.W.3d 645 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. Pursuant to SCR 3.165(1)(b) and (d), the Inquiry Commission of the Kentucky Bar Association (KBA) petitioned the Supreme Court to temporarily suspend Shaughnessy from the practice of law in the Commonwealth of Kentucky because there was probable cause to believe that the attorney's conduct posed a substantial threat of harm to his clients or the public. In support of its petition, the Inquiry Commission cited to Shaughnessy's involvement in a number of pending criminal matters, including several state felony charges and a federal criminal indictment for firearm-related charges.

After reviewing the pending cases and allegations against Shaughnessy, the Court agreed with the Inquiry Commission that probable cause exited to believe that Shaughnessy's conduct posed a substantial threat of harm to his clients and others. Accordingly, under SCR 3.165(1), the Court temporarily suspended Shaughnessy from the practice of law pending disciplinary proceedings.

***Ky. Bar Ass'n v. Wagenseller*, 626 S.W.3d 649 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. The KBA Inquiry Commission issued a seven-count charge against Wagenseller. Following a hearing, the Trial Commissioner issued a report, containing findings of fact, conclusions of law, and recommendations, which was submitted to the Supreme Court under SCR 2 3.360(4). Neither party appealed the Trial Commissioner's recommendations. In August 2020, the Court gave notice to the KBA and Wagenseller under SCR 3.370(8) of its intention to review this matter. The KBA then submitted its brief asking the Court to adopt the Trial Commissioner's findings of misconduct and impose upon Wagenseller a minimum suspension of 180 days. Wagenseller did not file a response.

Upon reviewing the record, the Court determined that Wagenseller had engaged in multiple acts of conflict of interest, failed fully to disclose material information to his clients, failed to acquire the required informed consent for representation in several matters, and violated the trust of his clients. Specifically, his acts include failing to maintain records of his IOLTA account, accounting for legal funds he was paid, failing to explain critical conflicts of interests to his clients, taking settlement funds from his clients, filing lawsuits against his former clients, and acting in his own self-interest instead of those he represented.

Based on these findings, the Court concluded that Wagenseller was guilty of all professional misconduct as alleged in the Inquiry Commission's charge and determined the Trial Commissioner's recommendation for a 180-day suspension was insufficient to account for Wagenseller's professional misconduct. Rather, upon review of sanctions in similar disciplinary matters, the Court held a one-year suspension was appropriate.

***Ky. Bar Ass'n v. Juanso*, 626 S.W.3d 540 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. The KBA moved the Supreme Court to indefinitely suspend Juanso from the practice of law under Supreme Court Rule 3.380(2) for failure to answer a disciplinary charge. Juanso failed to respond to a bar complaint filed by his client. Thereafter, the Inquiry Commission issued a charge against Juanso for failure to act with diligence; failure to communicate; failure to

return an unearned fee; and failure to respond to a lawful demand from a disciplinary authority. Juanso never responded to the charge. Accordingly, the Court ordered him to be suspended indefinitely under SCR 3.380(2).

***Ky. Bar Ass'n v. Johnson*, 626 S.W.3d 653 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. In a default case under SCR 3.210, the KBA Board of Governor recommended that the Supreme Court find Johnson guilty of violating multiple disciplinary rules arising from three separate files. The Board further recommended that Johnson be suspended from the practice of law for 180 days, with 61 days to be served and the remaining 119 days to be probated for two years on the conditions that Johnson: attend and successfully complete the Ethics and 2 Professionalism Enhancement Program (EPEP); repay fees owed to his clients; and be required to pay the costs in this action.

After reviewing the facts of the underlying disciplinary case and considering Johnson's failure to respond to any of the charges against him, the Court agreed with and adopted the Board's recommendations.

***Adams v. Ky. Bar Ass'n*, 626 S.W.3d 659 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. Adams moved for consensual discipline pursuant to Supreme Court Rule 3.480(2) based on a negotiated sanction agreement with the KBA. Specifically, Adams requested an order imposing a sanction of a three-year suspension from the practice of law on condition she participate in the Kentucky Lawyers Assistance Program (KYLAP) on terms and conditions imposed by KYLAP, receive no new criminal charges during the period of suspension, and pay the costs of this proceeding. The KBA filed a response stating it had no objection to the Motion for Consensual Discipline.

Because Adams and the KBA agreed on the sanction and case law supported the proposed resolution, the Court held the sanction to be the appropriate discipline for Adams's conduct and granted her motion.

***Porter v. Ky. Bar Ass'n*, 628 S.W.3d 81 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. Porter failed to show cause why he should not be suspended from the practice of law for failing to abide by the Supreme Court's August 2018 Opinion and Order, which probated his disciplinary sanction subject to satisfying certain conditions. Specifically, Porter failed to pay any of the $55,613.22 owed to various victims of his professional misconduct, to provide proof of such payments, or to explain adequately why he has not reported having made even a partial payment. Accordingly, the Court granted the KBA's request and suspended Porter from the practice of law for 181 days.

***Ky. Bar Ass'n v. Stith*, 627 S.W.3d 929 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. Stith was charged by the Inquiry Commission with violating the following Supreme Court Rules: SCR 3.130(1.1) for failing to provide competent representation to four of his immigration clients; SCR 3.130(1.3) for failing to perform the work for which he was hired and for failing to file various documents on or before their court ordered deadlines; SCR 3.130(1.4)(a)(3) for failing to keep his clients informed about the status of their immigration cases; and SCR 3.130(8.1)(b) for failing to respond to the bar complaint against him.

Stith had several communications with the Office of Bar Counsel and acknowledged receipt of the Inquiry Commission's charges. But he never filed an answer and failed to contact KYLAP, despite Bar Counsel urging him to do so.

Because of his failure to respond, the Supreme Court entered an order in October 2020 indefinitely suspending him and the matter proceeded to the Board of Governors as a default case under SCR 3.210. The Board recommended that the Court find Stith guilty on all counts and suspend him for a period of 61 days. The Board additionally recommended that Stith be required to enter into and comply with a KYLAP Monitoring Agreement; replay client fees; attend and successfully complete EPEP; and pay the costs associated with this matter. Upon review of the record, the Court adopted the Board's recommendation and sanctioned Stith accordingly.

***Pepper v. Ky. Bar Ass'n*, 632 S.W.3d 312 (Ky. 2021)**
Opinion and Order of the Court. Conley, Hughes, Keller, Lambert, Nickell, and VanMeter, JJ., concur. Minton, C.J., not sitting. Pepper was automatically suspended from the practice of law in February 2020, when he entered a guilty plea in federal court to the charge of conspiracy to commit money laundering. He was sentenced to one year and one day in prison, probated for five years, with conditions, and fined $100,000.

Pepper, who had no prior disciplinary history, moved the Supreme Court under SCR 3.480(2), the reciprocal discipline rule, to impose upon him a suspension for five years or until the time he has satisfied in full the terms and conditions of probation in his federal criminal case, whichever event occurs first. As a condition of his suspension, Pepper would be required to participate in KYLAP. Bar Counsel did not file an objection.

The Court approved the proposed sanction in part, holding that a full, five-year suspension with conditions was appropriate given the severity and nature of Pepper's crime. The Court further noted that the five-year suspension would give Pepper sufficient time to address his addiction and mental health so he could regain the trust of his clients, the public, the courts, and the KBA.

***Murray v. Ky. Bar Ass'n*, 632 S.W.3d 334 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. Murray moved the Court to enter an order resolving the pending disciplinary proceeding against him by imposing a one-year suspension from the practice of law under a negotiated sanction. The disciplinary proceeding at issue arose in connection with Murray's employment as General Counsel and Vice President to Kentucky Community and Technical College System. Although Murray was a licensed attorney in Indiana, he was never admitted to the practice of law in Kentucky. This, Murray admitted, violated SCR 3.130(5.5)(a) and (b), which address the unauthorized practice of law.

Upon review of the facts, relevant case law, and Murray's lack of disciplinary history, the Court concluded that the proposed sanction was appropriate and ordered Murray suspended from the practice of law for one year.

***Ky. Bar Ass'n v. Weiner*, 630 S.W.3d 722 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. In this default case under Supreme Court Rule (SCR) 3.210, the KBA Board of Governors (the Board) recommended that the Supreme Court find Weiner guilty of violating: four counts of SCR 3.130(1.3); six counts of SCR 3.130(1.4); SCR 3.130(1.5)(f); SCR 3.130(1.16)(d); SCR 3.130(3.4)(c); seven counts of SCR 3.130(8.1)(b); and SCR 3.130(8.4)(c). For these violations, which stem from multiple KBA disciplinary cases, the Board recommended Weiner be suspended from the practice of law for five years, with three years to serve and the remaining two years to be probated on the condition Weiner: enter into and comply with a Kentucky Lawyers Assistance Program (KYLAP) Monitoring Agreement; attend and successfully complete the Ethics and Professionalism Enhancement Program (EPEP); pay restitution; and be required to pay the costs of this action. The Court agreed with and adopted the Board's recommendation and sanctioned Weiner accordingly.

***Ky. Bar Ass'n v. Noe*, 630 S.W.3d 718 (Ky. 2021)**
Opinion and Order of the Court. All sitting. Minton, C.J.; Conley, Hughes, Lambert, Nickell, and VanMeter, JJ., concur. Keller, J., concurs in part and dissents in part by separate opinion. Noe was charged in two separate disciplinary matters, which were consolidated. In the first, the Board of Governors found Noe guilty of violating SCR 3.130(1.30), (1.4)(a)(3), (1.5)(a)(4), and (8.1)(b) and recommended she be suspended from the practice of law for thirty days and ordered to pay all associated costs. In the second case, the Board found that it lacked jurisdiction because Noe had not been properly served. Accordingly, the Board recommended the second case be dismissed with prejudice.

In the first case, the Inquiry Commission sent the Charge by certified mail to Noe's bar roster address. It was returned unserved so, instead, the Commission served Noe through the KBA's Executive Director under SCR 3.035(2). Again, the Charge was returned. Because of this, in the second case, the Inquiry Commission did not attempt to serve Noe directly. Rather, the Commission served the Charge upon Noe through the Executive Director.

Upon review of the record and relevant rules, the Supreme Court adopted the Board's recommendation in the first case and suspended Noe from the practice of law for thirty days. In the second case, the Court agreed that the Charge must be dismissed because it was not properly served. The Court, however, concluded that dismissal without prejudice was more appropriate.

***Jackson v. Ky. Bar Ass'n*, 632 S.W.3d 331 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. Pursuant to SCR1 3.480(2), Jackson moved the Supreme Court to enter an order resolving the pending disciplinary proceeding against him by imposing a 61-day suspension, probated for two years, subject to conditions. His motion was the result of an agreement negotiated between Jackson and the KBA under SCR 3.480(2) to resolve Jackson's admitted violation of SCR 3.130(1.8)(a) (in effect through July 14, 2009), which governed conflicts of interest between attorneys and their clients. Specifically, Jackson admitted he violated the rule by obtaining a loan from his client in 2006.

The Court noted that Jackson had been practicing law in Kentucky for over twenty-seven years and had no history of prior discipline. The Court further cited Jackson's cooperation in resolving this matter and his compliance with making timely restitution to his former client. Given these factors, the Court concluded that the consensual disciplinary sanction was appropriate.

***Fink v. Ky. Bar Ass'n*, 636 S.W.3d 545 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. In February 2019, the Supreme Court accepted Fink's motion for consensual discipline seeking a five-year suspension, retroactive from August 2015. The discipline was based on Fink's conviction for drug-related offenses in Indiana.

In August 2020, Fink filed an application for reinstatement, which was referred to the Character and Fitness Committee under SCR 3.510(3). The Committee determined that Fink had complied with all the requirements of her consensual discipline. Letters and affidavits from attorneys and coworkers were favorable to her character and fitness and supported her application for reinstatement. Accordingly, the Committee concluded that Fink met her burden of proof and unanimously recommended that Fink be reinstated to the practice of law.

The Board of Governors voted unanimously to adopt the Findings of Fact, Conclusions of Law and Recommendation of the Character and Fitness Committee and further recommended that a member of the KBA serve as a mentor to Fink for three years and that Fink continue her involvement with KYLAP for a minimum of five years. Fink objected to the additional requirements.

Upon review, the Court disagreed with the Board's recommendation for a mentor. But given the serious nature of the drug offenses and obvious benefits of maintaining sobriety, the Court agreed with the Board's recommendation to require Fink to continue her involvement with KYLAP for an additional five years.

Accordingly, based upon the record and its finding that Fink had been rehabilitated and completed all terms necessary requirements, the Court agreed with and accepted the Board's recommendation that Fink be reinstated to the practice of law.

***McCarrick v. Ky. Bar Ass'n*, 635 S.W.3d 541 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. McCarrick ceased performing legal work around 2005 when he began working for a software company in a non-attorney role. In 2008, McCarrick was suspended from practicing law in Kentucky for failing to complete his continuing legal education requirements. He did not seek to be restored to practice. Instead, he continued his work in the software industry outside of Kentucky, living in various states and moving frequently.

McCarrick's daughter was charged with a misdemeanor in Jefferson District Court and, despite being suspended from the practice of law, McCarrick knowingly entered an appearance and appeared in court at his daughter's arraignment and during her pretrial conference, holding himself out to the court as the attorney of record.

After a disciplinary complaint was filed, McCarrick admitted to violating four Rules of Professional Conduct: SCR 3.130(5.5)(a) (practicing law in a jurisdiction in violation of

the regulation of the legal profession in that jurisdiction; SCR 3.130(5.5)(b)(2) (holding out to the public or otherwise represent that the lawyer in admitted to practice law in this jurisdiction); SCR 3.130(3.4)(c) (knowingly disobeying an obligation under the rules of a tribunal); and SCR 3.130(8.1)(b) (knowingly failing to respond to a lawful demand for information). He requested a public reprimand as the appropriate sanction and the KBA did not object. After reviewing the facts and relevant case law, the Court agreed that a public reprimand was warranted and sanctioned McCarrick accordingly.

***Sullivan v. Ky. Bar Ass'n*, 635 S.W.3d 543 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. Sullivan moved the Supreme Court under Supreme Court Rule (SCR) 3.480(2) to impose a sanction of a 181-day suspension, with 90 days to serve and 91 days probated for two years with conditions. The Kentucky Bar Association did not object to Sullivan's request.

The case against Sullivan arose from three consolidated disciplinary files. Sullivan admitted that she violated three counts of SCR 3.130(1.3), three counts of SCR 3.130(1.4)(a)(3), one count of SCR 3.130(3.3)(a)(1), one count of SCR 3.130(1.6)(d), and one count of SCR 3.130(3.4)(c). The KBA agreed to dismiss one count of SCR 3.130(1.5)(a), which was disputed by Sullivan.

In reviewing the proposed negotiated sanction, the Court noted that Sullivan previously had received four private admonitions, two disciplinary suspensions, and one administrative suspension. The Court further reviewed the disciplinary allegations against Sullivan and relevant case law before ultimately concluding that the negotiated sanction was appropriate. Accordingly, the Court suspended Sullivan for 181 days, with 90 days to serve and 91 days probated with conditions.

***Rye v. Ky. Bar Ass'n*, 636 S.W.3d 129 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. Under SCR 3.480(2), Rye moved the Supreme Court to enter an Order resolving the pending disciplinary proceeding against him by imposing a 181-day suspension from the practice of law, probated for three years, subject to conditions. Rye's motion was the result of an agreement negotiated between Rye and the Kentucky Bar Association based on his admitted violation of SCR 3.130(1.1); SCR 3.130(1.3); and SCR 3.130(1.4)(a)(2). In negotiating this sanction, the KBA took into account Rye's mitigation efforts, including his acknowledgement of his misconduct and his cooperation during the disciplinary process. The KBA also considered Rye's disciplinary history, which included a number of private admonitions and reprimands and a probated 30-day suspension.

Upon considering the facts of the current disciplinary action, the relevant case law, Rye's disciplinary history and his mitigating behavior, the Court concluded that the proposed discipline was adequate. Accordingly, the Court suspended Rye from the practice of law for 181 days, probated for three years, with conditions.

***Chenault v. Ky. Bar Ass'n*, 636 S.W.3d 127 (Ky. 2021)**
Opinion and Order of the Court. All sitting; all concur. Chenault applied for reinstatement to the practice of law under SCR 3.510(3), following the termination of her four-year suspension. She was suspended for four years for violating SCR 3.130(8.4)(b) and 3.310(8.4)(c) after pleading guilty to one count of violation of public trust stemming from improper payments she made to herself while she was Master Commissioner.

The Character and Fitness Committee reviewed Chenault's application and determined she had complied with all conditions of her suspension. The Committee further found that Chenault had successfully completed her pretrial diversion, her felony conviction had been expunged, and her sentence had been served in the form of diversion with full payment of restitution. Based on these findings, the Committee unanimously recommended that Chenault be reinstated to the practice of law.

Despite an objection from Bar Counsel over the Committee's lack of a formal hearing, the Board of Governors unanimously voted to accept the recommendation of the Committee and approve Chenault's application to practice law. The Court agreed with and accepted the Board's recommendation, ordering Chenault's application for reinstatement to be approved, subject to payment of costs related to the disciplinary proceedings.

***Ky. Bar Ass'n v. Grayson*, 638 S.W.3d 436 (Ky. 2022)**
Opinion and Order of the Court. All sitting. All concur. The Supreme Court consolidated two separate appeals relating to Grayson's disciplinary violations. In the first, the Kentucky Bar Association trial commissioner recommended that Grayson be found guilty of fifty-one counts of violating the Supreme Court Rules across twelve disciplinary cases; that she be suspended from the practice of law in Kentucky for five years; that she be ordered to pay restitution to twelve former clients; and that she submit herself for evaluation and treatment of her alleged mental health conditions. In the second, the KBA Board of Governors (Board) recommended that Grayson be found guilty of twenty counts of violating the Supreme Court Rules across six disciplinary cases; that she be permanently disbarred from the practice of law in Kentucky; and that she be assessed the cost of the disciplinary proceeding.

In reviewing the recommendations of the trial commissioner and the Board, the Supreme Court noted that Grayson had stopped participating in both disciplinary proceedings and did not dispute the facts of the charges against her. Accordingly, the Court adopted the factual findings of both the trial commissioner and the Board and found Grayson guilty of violating twelve counts of SCR 3.130(1.16); fourteen counts of SCR 3.130(1.3); twenty-three counts of SCR 3.130(1.4); one count of SCR 3.130(3.2); nine counts of SCR 3.130(8.1); and twelve counts of SCR 3.130(8.4).

The Court further reviewed Grayson's prior discipline and any mitigating and aggravating circumstances before concluding that she should be permanently disbarred from the practice of law. Accordingly, the Court ordered Grayson permanently disbarred and ordered her to pay all costs associated with these proceedings.

***Ky. Bar Ass'n v. Denton*, 638 S.W.3d 430 (Ky. 2022)**
Opinion and Order of the Court. All sitting. All concur. Denton was served with a Bar Complaint in February 2021. Although he acknowledged receipt of the complaint and requested additional time to respond, he never filed a response. The Inquiry Commission issued a charge against Denton in May 2021, alleging violations of SCR 3.130(1.3); SCR 3.130(1.4)(a); SCR 3.130(1.16)(d); and SCR 3.130(8.10)(b).

The Office of Bar Counsel subsequently attempted serve on Denton in a variety of ways, including by certified mail and through the sheriff's office. However, all attempts were unsuccessful. Under SCR 3.035, the Executive Director also served Denton at both his Bar Roster address and an additional service address listed but Denton failed to respond.

The Court noted that Denton had no prior discipline. But because he failed to actively participate in the Complaint stage or the formal Charge stage and did not reply to any attempts at communication through mail, email, or any other attempts at service, the KBA requested that the Court suspend him under SCR 3.380(2). Upon review of the motion, the Court agreed and indefinitely suspended Denton from the practice of law in the Commonwealth.

***Ousley v. Ky. Bar Ass'n*, 638 S.W.3d 433 (Ky. 2022)**
Opinion and Order of the Court. All sitting. All concur. To resolve his pending disciplinary action, Ousley moved the Supreme Court to impose a sanction of a thirty-day suspension from the practice of law under SCR 3.480(2). The KBA did not object. Ousley's case arose from a single disciplinary file relating to his failure to communicate, failure to act with diligence, and failure to return an unearned fee in a divorce case. All attempts to serve Ousley with the complaint were unsuccessful, leading to an additional charge for violating SCR 3.130(8.1)(b), failure to respond to a lawful demand from a disciplinary authority.

During much of the time of this disciplinary action, Ousley had been incarcerated on criminal charges. He stopped practicing law altogether and began working full-time as a manual laborer. Per the condition of his release on bond in the criminal charges, Ousley was required to live in a sober environment. He also signed an agreement with KYLAP.

Ousley admitted his disciplinary violations and requested a thirty day suspension as an appropriate sanction. The KBA did not object. The Supreme Court considered the facts of this case and relevant case law and concluded the negotiated sanction was appropriate. Accordingly, the Court ordered Ousley suspended from the practice of law for thirty days.

***Ky. Bar Ass'n v. Gardiner*, 638 S.W.3d 415 (Ky. 2022)**
Opinion and Order of the Court. All sitting. All concur. The Bankruptcy Court of the Eastern District of Tennessee suspended Gardiner from practicing law in the Bankruptcy Court of the Eastern District of Tennessee for five years. Following this sanction, the Disciplinary Counsel for the Tennessee Board of Professional Responsibility filed a Petition for Discipline. After investigation and a hearing, the Hearing Panel suspended Gardiner for three years, with four months to be served and the remainder probated.

The KBA subsequently moved the Supreme Court of Kentucky to impose reciprocal discipline on Gardner, who agreed to the KBA's motion. The Supreme Court concluded that the Tennessee Rules of Professional Conduct that Gardiner violated were substantially similar to Kentucky's rules and that the exceptions under SCR 3.435 did not apply. Accordingly, the Court ordered Gardiner suspended from the practice of law for three years, with four months to be served and the rest to be probated.

***Ky. Bar Ass'n v. Morburger*, 638 S.W.3d 431 (Ky. 2022)**
Opinion and Order of the Court. All siting. All concur. The Inquiry Commission of the Kentucky Bar Association moved the Supreme Court to temporarily suspend Morburger, asserting there was probable cause to believe he was misappropriating funds for others to his own use or was otherwise improperly dealing with said funds. The Commission further asserted there was probable cause to believe Morburger's conduct posed a substantial threat of harm to his clients or the public. In its motion, the Inquiry Commission noted there was an ongoing disciplinary matter pending against Morburger in Florida for which the Supreme Court of Florida had issued an order of emergency suspension from the practice of law on June 16, 2021.

Morburger did not respond to the Kentucky Supreme Court's December 21, 2021, order to show cause why he should not be subject to the requested temporary suspension. The Court reviewed uncontroverted allegations of the Inquiry Commission and agreed there was probable cause to believe Morburger was misappropriating or otherwise improperly dealing with funds. Accordingly, the Court temporarily suspended Morburger from the practice of law.

***Mohon v. Ky. Bar Ass'n*, 638 S.W.3d 417 (Ky. 2022)**
Opinion and Order of the Court. All sitting. All concur. Mohon moved the Supreme Court to enter an Order resolving the pending disciplinary proceeding against her by imposing a 181-day suspension from the practice of law, with 60 days to serve, and the remaining 121 days probated for 2 years, subject to conditions. The disciplinary proceeding at issue arose out of Mohon's admitted violations of the Rules of Professional Conduct as charged in five separate disciplinary files.

The violations all involved financial or accounting issues, leading Mohon and Bar Counsel to agree to the following conditions: Mohon making a refund or partial refund to two former clients; attending the Office of Bar Counsel's Trust Account Management Program; opening an escrow account with a financial institution that reports overdrafts to the KBA; and providing quarterly reports to the Office of Bar Counsel during the period of probation listing open and closed escrow accounts in Mohon's or her firm's name, and her current employees.

The Court agreed that Mohon's misconduct was severe and not up to the professional standards expected from lawyers practicing in this Commonwealth. But after considering the nature of Mohon's violations along with her lack of any prior disciplinary history, her full participation in these proceedings, and her proactive steps to ensure her misconduct is not repeated, the Court agreed that the proposed discipline was adequate. Accordingly, Mohon was suspended pursuant to the negotiated sanction.

***Kirk v. Ky. Bar Ass'n*, 638 S.W.3d 412 (Ky. 2022)**
Opinion and Order of the Court. All sitting. All concur. Kirk moved the Supreme Court to enter an Order resolving the pending disciplinary proceeding against him by imposing a public reprimand for his admitted violations of SCR 3.130(3.3)(a)(1), (5.7)(b), (8.1)(a), (8.1)(b), and (8.4)(c). Kirk's misconduct involved his submission of false evidence, false statements, and other deceptive practices during a separate, original disciplinary proceedings against a former employee of his law firm.

In considering the proposed sanction, the Court noted that Kirk had no prior discipline, other than a private admonition, was cooperative during the disciplinary proceeding, and admitted his conduct violated the Rules. Given these factors and relevant case law, the Court concluded that the proposed discipline was adequate. Accordingly, Kirk was found guilty of the admitted violations of the Rules of Professional Conduct and publicly reprimanded.

***Inquiry Comm'n v. Dusing*, ___ S.W.3d ___ 2022 WL 575293 (Ky. Feb. 24, 2022)**
Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission filed a petition to temporarily suspend Dusing based on allegations contained in two separate disciplinary files. The petition was based primarily on concerns related to Dusing's lengthy course of abusive and menacing behaviors in two family court cases. The Inquiry Commission specifically raised concerns regarding a video Dusing posted to Facebook that threatened his opposing counsel and a family court staff attorney. The Inquiry Commission further cited a complaint filed by one of Dusing former clients, which contained allegations of prescription drug abuse.

Based on these allegations, the Supreme Court concluded there was probable cause to believe Dusing's conduct posed a substantial threat of harm to his clients or the public. Accordingly, under SCR 3.165, the Court temporarily suspended Dusing from the practice of law and ordered him to submit to a psychological examination.

***Parks v. Ky. Bar Ass'n*, 642 S.W.3d 719 (Ky. 2022)**
Opinion and Order of the Court. All sitting. Minton, C.J.; Conley, Hughes, Lambert, Nickell, and VanMeter, JJ., concur. Keller, J., concurs in result only. In 2014, Parks was suspended for 30 days. The suspension order required him to reimburse his client a $500 unearned fee. After the end of the suspension period, Parks did not file an affidavit demonstrating that he complied with the terms of his suspension under SCR 3.510(2). Accordingly, he remained suspended.

In January 2020, Parks filed an application for reinstatement. An informal hearing was held before the Character and Fitness Committee but a formal record was not created in accordance with SCR 2.300(3). The Committee also failed to advise the parties they could request a formal hearing. Instead, the Committee transmitted its Findings of Fact, Conclusions of Law, and Recommendation, finding that Parks had met his burden of proof and proved that he possessed the requisite characteristics for readmission. The findings made no mention of whether Mr. Parks had complied with the requirement that he reimburse his client the $500 unearned fee.

The matter proceeded to the KBA Board of Governors. Bar Counsel opposed the reinstatement because of insufficient proof that Parks had complied with the

suspension order and for his lack of candor before the Character and Fitness Committee. Parks eventually filed an affidavit from his former client indicating that he had reimbursed her the unearned fee plus interest. But the reimbursement did not occur until September 1, 2021, after the matter was transferred from the Character and Fitness Committee to the Board of Governors. Noting the delay in reimbursement and Parks' false or misleading answers in his application for reinstatement, the Board voted unanimously to recommend denial of Parks' reinstatement application.

In reviewing the record, the Court found "clear issues" with the reinstatement proceedings. Specifically, the Character and Fitness Committee's failure to advise the parties of the opportunity to request a formal hearing raised questions as to the adequacy of the record. Because of this, the Court remanded the matter to the Character and Fitness Committee for a formal hearing under SCR 2.300(4)(a).

***Inquiry Comm'n v. Wheeler*, 642 S.W.3d 706 (Ky. 2022)**
Opinion and Order of the Court. All sitting. All concur. The Inquiry Commission filed a petition for temporary suspension of Joe Stewart Wheeler. The Commission had been notified of an investigation by the Attorney General's office into Wheeler and his law firm. Evidence from a search warrant revealed several suspicious financial transactions involving the Wheeler & Wheeler Law Firm account and J. Stewart Wheeler, Attorney at Law Escrow Account. That evidence was made available to the Commission and forms the nucleus of its petition. The Commission alleges probable cause exists to believe Joe S. Wheeler is or has been misappropriating client funds and putting them to his own personal use.

The Supreme Court granted the petition for temporary suspension. The Inquiry Commission has shown that probable cause exists to believe Joe S. Wheeler is or has been misappropriating client funds. The Commission identified several transactions involving funds from at least three different clients, totaling hundreds of thousands of dollars allegedly misappropriated. Although Wheeler responded to the Commission's petition and offered plausible explanations for some of the expenses, the Supreme Court is not a fact-finding body in this matter. Moreover, the standard for probable cause is something less than more likely than not thus, the Inquiry Commission has met its burden in its petition. Joe S. Wheeler is temporarily suspended from the practice of law and restricted from any handling of client funds in the above-named accounts pending further orders of the Supreme Court.

***Ky. Bar Ass'n v. Schultz*, 642 S.W.3d 709 (Ky. 2022)**
Opinion and Order of the Court. Minton, C.J.; Conley, Hughes, Keller, Lambert, and VanMeter, JJ., sitting. All concur. Nickell, J., not sitting. Under SCR 3.165(1)(a) and (b), the Inquiry Commission of the Kentucky Bar Association petitioned the Supreme Court to enter an order temporarily suspending Schultz from the practice of law. In support of its petition, the Commission asserted there was probable cause to believe Schultz had been misappropriating funds of others to his own use or had been otherwise improperly dealing with said funds. The Commission further asserted there was probable cause to believe Schultz's conduct posed a substantial threat of harm to the public.

The Commission's petition arose from Schultz's representation of a client in a criminal matter. As part of his plea, the client agreed to sell his home and apply the funds from

the sale to his restitution. After the house sold, the client presented a check to Schultz in the amount of $78,609.21. Schultz was to deliver the check to the Livingston County Circuit Clerk's office. But upon review of the restitution payment a month later, the court discovered that the proceeds of the sale had not been deposited with the Clerk. Schultz subsequently failed to appear for a show cause hearing and a bench warrant was issued. He was eventually charged with Theft by Unlawful Taking or Disposition of more than $10,000 but less than $1,000,000 and Promoting Contraband, First Degree.

As a result of these facts, the Inquiry Commission asked the Supreme Court to issue a show cause as to why Schultz should not be temporarily suspended under SCR 3.165(1)(a) and (b). Schultz did not respond to the show cause. Accordingly, the Court agreed with the Commission and temporarily suspended Schultz from the practice of law.

***Ky. Bar Ass'n v. Juanso*, ___ S.W.3d ___, 2022 WL 882755 (Ky., Mar. 24, 2022)**
Opinion and Order of the Court. All sitting. Minton, C.J.; Conley, Hughes, Nickell, and VanMeter, JJ., concur. Keller and Lambert, JJ., dissent and would have accepted the recommendation of the Board of Governors. Following issuance of a notice of review under SCR 3.370(8) and a review of the parties' briefs filed in support of their respective positions, the Supreme Court elected not to adopt the recommendation of the Board of Governors resolving the disciplinary proceedings against Juanso. Rather than imposing on Juanso a 90-day suspension from the practice of law, as recommended by the Board, the Court determined that a 180-day suspension was more fitting. Accordingly, Juanso was suspended for 180 days, with conditions.

***Seadler v. Int'l Brotherhood of Elec. Workers*, Local 369, 642 S.W.3d 712 (Ky. 2022)**
Opinion and Order of the Court. All sitting. All concur. Under Sections 110 and 116 of the Kentucky Constitution and Kentucky Rule of Civil Procedure (CR) 76.36, Seadler moved the Supreme Court for an order prohibiting or delaying the formation of a collective bargaining unit composed of non-supervisory attorneys employed by the Louisville Metro Public Defender's Office ("Public Defender's Office").

Despite its exclusive authority to govern all matters related to the ethical conduct of members of the Bar under Section 116 of the Kentucky Constitution, the Court concluded that a supervisory writ was inappropriate in this case. SCR 3.530 provides the proper procedural mechanism to place before the Supreme Court a question relating to the interpretation of the Kentucky Rules of Professional Conduct. Because Seadler admitted she made no attempt to request an advisory opinion under SCR 3.530, the Court concluded she failed to demonstrate she was entitled to an extraordinary remedy. Accordingly, her petition for a supervisory writ under Section 110 of the Kentucky Constitution was denied.

***Ky. Bar Ass'n v. Meyer*, 642 S.W.3d 715 (Ky. 2022)**
Opinion and Order of the Court. All sitting. All concur. On October 22, 2021, the Indiana Supreme Court entered an order accepting Meyer's resignation from the Indiana Bar and prohibiting him from seeking reinstatement for five years. Thereafter, the Kentucky Bar Association (KBA) filed a petition asking the Supreme Court to impose reciprocal discipline pursuant to SCR 3.435. The Court ordered Meyer to show cause why reciprocal discipline should not be imposed and he agreed to the imposition of the reciprocal discipline. Accordingly, the Court suspended Meyer from the practice of law for five years, consistent with the order of the Indiana Supreme Court.

***Ky. Bar Ass'n v. Gardiner*, ___ S.W.3d ___, 2022 WL 1284034 (Ky. Apr. 28, 2022)**
Opinion and Order of the Court. All sitting; all concur. The Kentucky Bar Association moved to suspend Gardiner's license to practice law in Kentucky as reciprocal discipline for that imposed by the Tennessee Supreme Court. The discipline against Gardiner arose after the Bankruptcy Court for the Eastern District of Tennessee entered an agreed order suspending Gardiner from practicing law in the Bankruptcy Court for the Eastern District of Tennessee for five years. Following this sanction, the Disciplinary counsel for the Tennessee Board of Professional Responsibility filed a Petition for Discipline. After investigation and a hearing, the Hearing Panel suspended Gardiner for three years, with four months to be served and the remainder probated.

Gardiner agreed to the KBA's motion for reciprocal discipline. The Court found that the Tennessee Rules of Professional Conduct violated by Gardiner were substantially similar to Kentucky's rules. Accordingly, under Supreme Court Rule 3.435, the Court suspended Gardiner from the practice of law in Kentucky for a period of three years, with four months to be served and the remainder to be probated, until such time as she is reinstated to the practice of law in Tennessee *and* until she is reinstated to the practice of law in Kentucky by Order of the Supreme Court under SCR 3.501.

***Ky. Bar Ass'n v. Marcum*, ___ S.W.3d ___, 2022 WL 1284031 (Ky. Apr. 28, 2022)**
Opinion and Order of the Court. All sitting; all concur. The Supreme Court of Appeals of West Virginia entered an order suspending Marcum from the practice of law in that state for two years with a stay of the suspension after six months and imposing a period of supervised probation. Thereafter, the Kentucky Bar Association (KBA) filed a petition asking the Kentucky Supreme Court to impose reciprocal discipline pursuant to Supreme Court Rule (SCR) 3.435.

The Court ordered Marcum to show cause why he should not be suspended but he did not respond. Accordingly, the Court suspended Marcum from the practice of law for two years with six months of that suspension to be served and the remainder to be probated until the completion of his contract with the West Virginia Judicial and Lawyer Assistance Program, as consistent with the order of the Supreme Court of Appeals of West Virginia.

***Gentry v. Ky. Bar Ass'n*, ___ S.W.3d ___, 2022 WL 1284033 (Ky. Apr. 28, 2022)**
Opinion and Order of the Court. All sitting. Minton, C.J.; Keller and Nickell, JJ., concur. Hughes, J., concurs in result only by separate opinion. Lambert, J., dissents by separate opinion in which Conley and VanMeter, JJ., join. Gentry was charged by the Inquiry Commission with violating one count of SCR 3.130(8.2)(b) for failing to comply with the applicable provisions of the Judicial Code of Conduct in the course of

an election, three counts of SCR 3.130(8.4)(c) for engaging in conduct involving dishonesty, one count of SCR 3.130(8.4)(b) for allegedly committing a criminal act that reflects adversely on a lawyer's honesty, and one count of SCR 3.130(3.4)(f) for initiating disciplinary proceedings to obtain an advantage in a civil matter. Gentry admitted to each count except for her alleged violation of SCR 3.130(8.4)(b), which the KBA agreed to dismiss. The charges arose from Gentry's conduct that ultimately led to her removal from the bench as a family court judge.

Gentry petitioned the Supreme Court under Supreme Court Rule (SCR) 3.480(2) to impose a sanction of a four-year suspension from the practice of law. The Kentucky Bar Association did not object to Gentry's request. In reviewing the negotiated sanction, the Court noted the circumstances of the case were unique and there were no cases on-point in Kentucky. Given the distinctive facts of this case and the fact that the KBA and Gentry agreed to the sanction, the Court agreed it was appropriate. Accordingly, the Court suspended Gentry from the practice of law in the Commonwealth for four years.

***Peppers v. Ky. Bar Ass'n*, ___ S.W.3d ___, 2022 WL 1284035 (Ky. Apr. 28, 2022)**
Opinion and Order of the Court. All sitting. Minton, C.J.; Conley, Hughes, Keller, Lambert, and Nickell, JJ., concur. VanMeter, J., dissents by separate opinion. Peppers moved the Supreme Court for consensual discipline under Supreme Court Rules (SCR) 3.480(2) based on a negotiated sanction agreement with the Kentucky Bar Association (KBA). Peppers requested the Court enter an Order resolving the pending disciplinary proceeding against her by imposing a five-year suspension from the practice of law for her admitted violations of SCR 3.130(1.15)(a) relating to safekeeping of client property and SCR 3.130(8.4)(c) relating to professional misconduct. The KBA did not object to Peppers' motion

The disciplinary proceeding arose from Peppers' admitted misappropriation or improper dealings with funds she held as conservator for the estate of a minor. Upon reviewing the facts of the case and relevant caselaw, and because Peppers and the KBA agreed on the sanction, the Court held that a five-year suspension was the appropriate discipline for Peppers' conduct. Accordingly, the motion was granted and Peppers was sanctioned accordingly.

CONSTITUTIONAL LAW:

***Louisville/Jefferson Cnty. Metro Gov't Waste Mgmt. Dist. v. Jefferson Cnty. League of Cities, Inc.*, 626 S.W.3d 623 (Ky. 2021)**
Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Conley, Hughes, Lambert, and Nickell, JJ., concur. Keller, J., concurs in result only. In 2017, the legislature amended KRS Chapter 109 to give home rule cities located in a county containing a consolidated local government certain rights with respect to the waste management district in the county. The issue before the Court was whether the amended KRS Chapter 109 complied with the requirements of Kentucky Constitution Section 156a which permits the legislature to classify cities on a number of bases but requires that "[a]ll legislation relating to cities of a certain classification shall apply equally to all cities within the same classification." The Supreme Court held that the amended statute did not comply and therefore affirmed in part and reversed in part the Court of Appeals' opinion and remanded the case to the Franklin Circuit Court for the entry of new judgment.

CONTEMPT OF COURT:

***Crandell v. Commonwealth*, 642 S.W.3d 686 (Ky. 2022)**

Opinion of the Court by Justice Keller. All sitting. All concur. Gregory Crandell, the Appellant, was held in contempt of court for failure to pay child support. Crandell was in arrears totaling $115,760.20. Because he failed to appear initially in court on this arrearage, he was arrested and incarcerated pending his contempt hearing. While incarcerated, Crandell moved for work release. At his contempt hearing, he was found in contempt and ordered to pay back $251 monthly. If he were to fail in the future to pay this amount each month, then he would be required to spend 20 days in jail. This sanction had no expiration. Crandell appealed the order and its sanction, arguing that the trial court a) could not find him in contempt due to his inability to pay due to disability, and b) could not require him to spend 20 days in jail each month he failed to fulfill his child support duty.

On appeal, the Supreme Court held that the trial court's finding of contempt was not erroneous because it had substantial evidence regarding Crandell's ability to pay. However, the Court also held that the sanction imposed by the order was improper because it sought to punish future contempt rather than merely present contempt. The Supreme Court therefore vacated the contempt order in part and remanded the matter for further findings and proceedings consistent with its opinion.

CRIMINAL LAW:

***Commonwealth v. Hess*, 628 S.W.3d 56 (Ky. 2021)**

Opinion of the Court by Justice Conley. All sitting; all concur. The Kentucky Supreme Court granted discretionary review to determine whether the Court of Appeals erred in failing to dismiss Erin Hess' appeal of her probation revocation under the fugitive disentitlement doctrine (FDD). The Commonwealth of Kentucky, the Appellant, appealed the Court of Appeals' ruling that Hess had a constitutional right to appeal her probation revocation, which precluded the application of the FDD. The Supreme Court reversed, holding Hess' right to appeal regarding the revocation of her probation was purely statutory pursuant to KRS 22A.020(1). Hess had no constitutional right to appeal. Consequently, the Court held that the FDD did apply in this case, reasoning that the Court of Appeals' refusal to apply the FDD was inextricably intertwined with its incorrect interpretation of the law. The Court took judicial notice of Hess' continued absconsion pursuant to KRE 201 and remanded the case to the Court of Appeals with instructions to dismiss Hess' appeal.

***Powers v. Commonwealth*, 626 S.W.3d 563 (Ky. 2021)**

Opinion of the Court by Justice Nickell. All sitting; all concur. Ray William Powers was indicted for rape and sodomy of his nineteen-year-old niece. Shortly before trial, Powers sought to introduce evidence the victim had engaged in sexual intercourse with her boyfriend after the alleged rape and sodomy but prior to presenting to the emergency room for a rape exam or reporting the incident to police. He asserted the evidence was admissible under KRE 412, the rape shield law. The trial court denied the motion upon determining no exception applied and further, the evidence was wholly irrelevant and thus inadmissible under KRE 401 and 403. Powers was convicted following a jury trial and sentenced to seventeen years' imprisonment. A divided Court of Appeals panel affirmed the conviction and sentence.

On grant of discretionary review, the Supreme Court examined the three listed exceptions to KRE 412 and concluded none were applicable. Further, the relevance of the proffered evidence was dubious at best and admission of testimony regarding a single consensual sexual act would run afoul of the Rule's exclusionary purpose of protecting victims of sex crimes from unfair and unwarranted character assaults. Discerning no abuse of discretion by the trial court, exclusion of the evidence was deemed appropriate. Finally, the Supreme Court disagreed with Powers' assertion exclusion of the proffered evidence constituted a Confrontation Clause violation and deprived him of his right to present a meaningful defense. Accordingly, the decision of the Court of Appeals was affirmed.

***Commonwealth v. Doebler*, 626 S.W.3d 611 (Ky. 2021)**
Opinion of the Court by Justice Keller. All sitting; all concur. Alisha Doebler was arrested in a motel room where drugs and drug paraphernalia were also found. Doebler had in her purse $3,759 that was confiscated. After Doebler pleaded guilty to possessing a syringe, the Commonwealth sought forfeiture of the cash pursuant to KRS 218A.410. The statute states that "currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable." The trial court accepted Doebler's proof that the funds originated from her father's estate but found that she had not, by clear and convincing evidence, rebutted the presumption of forfeiture in that the cash was not intended to facilitate drug trafficking or for the purchase of drugs. Relying on *Osborne v. Commonwealth,* 839 S.W.2d 281 (Ky. 1992), the Court of Appeals reversed, holding that the Commonwealth had not established sufficient traceability of the funds to drug trafficking to invoke the presumption of forfeitability contained in KRS 418A.410.

The Supreme Court reversed and reinstated the trial court's forfeiture order. The Court said, "whether property is traceable to a drug transaction may be inferred from the totality of the circumstances." The Court stated that some of the same facts establishing proximity may be used to establish the requisite slight traceability required by *Osborne*. Under the totality of the circumstances, the trial court was not clearly erroneous in finding that the Commonwealth had established sufficient proximity and traceability of the currency to the drugs or that Doebler had failed to rebut the presumption of forfeiture by clear and convincing evidence.

***Commonwealth v. Collinsworth*, 628 S.W.3d 82 (Ky. 2021)**
Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Conley, Keller, Lambert, and Nickell, JJ., concur. Hughes, J., concurs in result only. The Commonwealth of Kentucky appeals from the Court of Appeals' opinion reversing the trial court's imposition of a consecutive sentence for defendant Collinsworth's Kenton and Campbell County felonies pursuant to KRS 533.060(2) and *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996). Collinsworth committed two sets of felonies; the first in Kenton County and the second in Campbell County while she was on probation for the Kenton County offense. Collinsworth argued that because her Kenton County probation was not revoked within ninety days of the Campbell County offenses she was entitled to have the sentences run concurrently pursuant to KRS 533.040(3). The Commonwealth countered, arguing that *Brewer v. Commonwealth* controlled and mandated the imposition of consecutive sentences pursuant to KRS 533.060(2). The Supreme Court held that *Brewer* controlled and vacated the Court of

Appeals' opinion. The Supreme Court declined, however, to revisit *Brewer* because the case had become moot when Collinsworth satisfied all her obligations to the Commonwealth. Further, the Supreme Court held that the capable of repetition but evading review exception to mootness did not apply because *Brewer* and KRS 533.060(2) explicitly contemplate felony sentences which are generally lengthy and likely to be litigated by interested parties. Neither did the public interest exception to mootness apply because Collinsworth's case did not present a matter of first impression.

***Wilson v. Commonwealth*, 628 S.W.3d 132 (Ky. 2021)**

Opinion of the Court by Justice Lambert. All sitting; all concur. In this consolidated appeal from two separate underlying criminal proceedings, the Kentucky Supreme Court interpreted the definition of "overdose" under Kentucky's Medical Amnesty Statute, KRS 218A.133, as a matter of first impression. The Medical Amnesty Statute offers immunity from prosecution for the crimes of possession of a controlled substance and possession of drug paraphernalia if, *inter alia*, medical assistance with an overdose is sought. The issue in the case was whether the Appellants' respective 911 callers were seeking assistance with an overdose, as that term is defined under the statute. The statutory definition of overdose, in turn, has three components; (1) there must be an acute condition of physical illness, coma, mania, hysteria, seizure, cardiac arrest, cessation of breathing, or death; (2) the physical condition must reasonably appear to be the result of consumption or use of a controlled substance, or another substance with which a controlled substance was combined; and (3) a layperson would reasonably believe the physical condition requires medical assistance. In this case, the second component—that the physical condition appeared to be the result of the consumption of a controlled substance—was dispositive. The Court held that when a trial court addresses a motion to dismiss an indictment under the Medical Amnesty Statute, its analysis should be twofold. First, the court should determine the facts and circumstances of the alleged overdose from the viewpoint of the caller. Next, the trial court should determine whether, under the facts and circumstances the caller observed, it was objectively reasonable for the caller to conclude that the individual's condition was the result of the use of a controlled substance. Under the facts before it the Court held that neither Appellant was entitled to immunity from prosecution because it was not objectively reasonable for either caller to suspect a drug overdose, nor did it appear that either caller had the subjective intent of seeking medical assistance for the Appellants.

***Hayes v. Commonwealth*, 627 S.W.3d 857 (Ky. 2021)**

Opinion of the Court by Justice Hughes. All sitting; all concur. Criminal Appeal. Michael V. Hayes entered an unconditional guilty plea to murder, robbery in the first degree, and tampering with physical evidence. Entering into a plea agreement with the Commonwealth, Hayes agreed that he was subject to the entire penalty range for capital murder set out in Kentucky Revised Statute (KRS) 532.025(2)(a)(2) and the trial court would have sentencing discretion for the entire range of penalties. At the sentencing hearing, Hays presented a Sentencing Report and a mitigation consultant's report describing reasons he should be afforded mitigation. He requested a sentence of twenty years for the murder, ten years for the robbery, and one year for the tampering with physical evidence, with the sentences to run concurrently. Considering the circumstances of the crime and the mitigation evidence, the trial court sentenced Hayes so that his three concurrent sentences totaled a sentence of life

without possibility of parole. Hayes sought review, complaining the trial court did not adequately consider the mitigation offered. *Held*: An appealable sentencing issue does not arise when the trial court, without dispute, acknowledges the sentencing range available, and then, after hearing the evidence offered in mitigation, imposes upon the defendant a punishment within that statutory range. Nevertheless, even if Hayes' complaint survived his express waiver of the right to appeal, the trial court did not abuse its discretion when imposing upon Hayes a sentence of life without possibility of parole.

***Ford v. Commonwealth*, 627 S.W.3d 147 (Ky. 2021)**
Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Hughes, Lambert, Nickell, and VanMeter, JJ., concur. Conley, J., concurs in result only. Tonya Ford (Ford) was convicted of the murder of her husband, David Ford (David). Her conviction was affirmed by this Court on direct appeal. She filed a motion with the trial court to vacate the judgment pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 arguing, among other issues, ineffective assistance of counsel due to her trial counsel's failure to object to erroneous jury instructions. The trial court denied Ford's RCr 11.42 motion. The Court of Appeals affirmed the trial court utilizing a manifest injustice standard of review because Ford's counsel filed a brief with smaller font and margins than those required by the civil rules.

The Supreme Court held that the manifest injustice standard of review is reserved only for errors in appellate briefing related to the statement of preservation. The Court then reviewed Ford's claim of ineffective assistance of counsel related to her trial court's failure to object to erroneous jury instructions under the standard found in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court held that Ford's trial counsel's performance was deficient but that his deficient performance did not prejudice Ford. In doing so, it held that jurors' testimony at Ford's RCr 11.42 hearing regarding why they voted to convict Ford was inadmissible to impeach the verdict. The Court held that its holding on direct appeal that the error in jury instructions did not amount to palpable error was not the law of the case for the RCr 11.42 action.

The Supreme Court affirmed the Court of Appeals for different reasons on Ford's ineffective assistance of counsel claim relating to her trial counsel's failure to object to the erroneous jury instructions. It reversed the Court of Appeals on all other issues and remanded to that court to undertake a review of Ford's remaining claims utilizing the proper standard of review.

***Sutton v. Commonwealth*, 627 S.W.3d 836 (Ky. 2021)**
Opinion of the Court by Justice Keller. All sitting; all concur. Shawn Sutton was convicted of first-degree assault, attempted murder, first-degree wanton endangerment, two counts of first-degree burglary, theft by unlawful taking of firearms, theft by unlawful taking of property valued in excess of $500 but less than $10,000, and four misdemeanor offenses after invading the home of his ex-girlfriend. At the end of trial, defense counsel requested that the jury be given a mistake of fact instruction because Sutton did not know whether he had a right to be in his ex-girlfriend's house, which would negate the "knowing" element of the burglary charge. The court denied this request.

The issues before the Supreme Court included whether the trial court erred by (1) not granting a directed verdict on the burglary charge, (2) not providing the jury a mistake of fact instruction on the burglary charge, (3) failing to grant a self-protection instruction, (4) permitting the jury to view an officer's body camera footage, and (5) denying a motion for a mistrial on sentencing. The Supreme Court affirmed the McCracken Circuit Court on all issues. Specifically, the Court also held that because Kentucky is a "bare bones" jury instruction state, a mistake of fact instruction on the burglary charge would have been duplicative of the "knowing" element included in instruction for the crime itself.

***Chadwell v. Commonwealth*, 627 S.W.3d 899 (Ky. 2021)**
Opinion of the Court by Justice Nickell. All sitting. Minton, C.J.; Conley, Hughes, Lambert, and VanMeter, JJ., concur. Keller, J., concurs in result only. Chadwell was convicted of two counts of trafficking in a controlled substance in the first degree and being a persistent felony offender in the second degree. He was sentenced to fourteen years' imprisonment and ordered to pay $165 in court costs. The conviction and sentence were affirmed on direct appeal.

On grant of discretionary review, the Supreme Court examined whether the trial court erred in imposing court costs in spite of Chadwell's indigency and whether the order mandating the costs be paid within six months of release from custody violated the requirement that costs be paid within one year of sentencing set forth in KRS 23A.205(3) and KRS 534.020. In affirming, the Supreme Court determined KRS 534.020 was inapplicable and the provisions of KRS 23A.205 controlled. Pursuant to that statute as written at the time Chadwell was sentenced, trial courts were required to impose court costs unless a defendant qualified as a "poor person" as defined in KRS 453.190(2). Here, the trial court did not and was not requested to assess Chadwell's financial status or determine whether he qualified as a "poor person." Differentiating a "poor person" from a "needy person" as defined in KRS 31.100, and noting Chadwell's failure to request a ruling from the trial court, the Court held imposition of court costs was not inconsistent with the facts in the record, and, citing *Spicer v. Commonwealth*, 442 S.W.3d 26 (Ky. 2014), no error—sentencing or otherwise—occurred warranting correction. As the trial court had not erred, the Court found Chadwell's alternative argument regarding the timing of paying his court costs need not be addressed.

***Commonwealth v. Crumes*, 630 S.W.3d 630 (Ky. 2021)**
Opinion of the Court by Justice Hughes. All sitting; all concur. Criminal Appeal, Discretionary Review Granted. Mikel Crumes was convicted of robbing and being complicit in the 2011 murder of Dre'Shawn Hammond. After his co-defendant recanted his testimony incriminating Crumes, Crumes moved the trial court to grant a new trial under Kentucky Rule of Civil Procedure (CR) 60.02, the grounds being that the newly discovered evidence warranted a reversal of his conviction. Crumes also sought a new trial under Kentucky Rule of Criminal Procedure (RCr) 11.42, alleging he received ineffective assistance of counsel because his trial counsel did not request a *Daubert* hearing to challenge the admissibility of the cell phone evidence indicating the location of Crumes's phone at the time of the robbery and murder. The trial court denied both motions. In particular, the trial court denied the CR 60.02 motion, finding the co-defendant's new testimony declaring Crumes's innocence not credible and the other evidence at trial sufficient to support the jury's verdict even without the

co-defendant's testimony. In contrast to the trial court, the Court of Appeals concluded that the co-defendant's recantation was credible and was persuaded that absent the co-defendant's original testimony, a different verdict could have reasonably resulted. The Court of Appeals vacated Crumes's conviction and remanded the case for a new trial based upon Crumes's CR 60.02 motion. *Held*: The trial court properly denied Crumes's RCr 11.42 and CR 60.02 motions for a new trial. As to the RCr 11.42 motion, Crumes failed to show he was prejudiced by a lack of a *Daubert* hearing. As to the CR 60.02 motion, because the trial court's credibility assessment was supported by competent, substantial evidence, an appellate court must afford deference to the trial court's determination. In this case, the Court of Appeals improperly substituted its own finding that the co-defendant's original trial testimony was false and his post-conviction testimony was truthful.

***Ortiz v. Commonwealth*, 630 S.W.3d 714 (Ky. 2021)**
Opinion of the Court by Justice Conley. Minton, C.J.; Conley, Hughes, Keller, Lambert, and VanMeter, JJ., sitting. All concur. Nickell, J., not sitting. The Kentucky Supreme Court granted discretionary review to determine whether the Court of Appeals made the right decision in reversing Logan Circuit Court's denial of a writ of prohibition filed by the Commonwealth. The underlying issue of the writ was whether the Logan District Court properly suppressed a blood alcohol concentration result collected from Jose Eladio Ortiz. Mr. Ortiz is a Spanish-speaking person suspected of drunk driving. Mr. Ortiz was read Kentucky's implied consent law by his arresting officer in English, not Spanish, before submitting to a blood draw. This created an issue about whether Mr. Ortiz had been sufficiently informed before giving his consent to the blood draw. The Court of Appeals reversed the lower court's denial, granting the Commonwealth's writ of prohibition. The Court was asked to address the substantive issue concerning informed consent underlying the writ. However, the Court did not need to weigh in on the substantive issue because the Commonwealth did not meet one of the threshold requirements for a second-class writ. The Supreme Court reversed and remanded the issue to the Logan Circuit Court for the reinstatement of the writ.

***Epperson v. Commonwealth*, ___ S.W.3d ___, 2021 WL 8314636 (Ky. Sept. 30, 2021)**
Opinion of the Court by Justice Conley. All sitting. Hughes, Lambert, and VanMeter, JJ., concur. Minton, C.J., Keller and Nickell, JJ., concur in result only. Roger Epperson filed a second RCr. 11.42 motion arguing a structural error occurred during his trial when his attorneys conceded guilt contrary to his express desire to maintain actual innocence. He argued he was entitled to a new trial per *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). The trial court refused to conduct a hearing and denied the motion. Its conclusion was that the opinion of *Epperson v. Commonwealth*, No. 2017-SC-000044-MR, 2018 WL 3920226 (Ky. Aug. 16, 2018) controlled as it had already considered *McCoy*'s application. As such, ruled the trial court, Epperson's motion was also an improper successive collateral attack.

The Kentucky Supreme Court affirmed the trial court's decision. It concluded that *McCoy* holds defense counsel "may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." *McCoy*, 138 S.Ct. at 1510. Epperson's case is not governed by *McCoy* since he cannot show in the record where at trial he made "vociferous," "adamant," or "intransigent" objections to his attorney's conduct. The Court further clarified that such objections must be made on the record

to the trial court. Finally, the Court held *McCoy* intended to distinguish between strategic disputes conceding elements of a crime and conceding guilt to the crime charged *in toto*. The Court briefly reviewed its prior ruling from 2018 and determined Epperson's case was not governed by *McCoy* for the above-stated reasons.

***Commonwealth v. Clayborne*, 635 S.W.3d 818 (Ky. 2021)**
Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Hughes, and Nickell, JJ., concur. Conley, J., dissents by separate opinion in which Lambert and VanMeter, JJ., join. Ikea Clayborne was convicted of first-degree possession of cocaine following an investigation at a traffic stop. At the stop, Clayborne was a passenger in the vehicle. The traffic stop was lawfully initiated. Before the officer had completed writing the driver a citation for driving with a suspended license, a K-9 investigative unit arrived, conducted a canine sniff search around the exterior, and alerted to the presence of cocaine at the passenger side of the vehicle. Clayborne moved to suppress the evidence, claiming that the stop was unlawfully extended and that the officer has no reasonable, articulable suspicion to call the K-9 unit and conduct the search. The trial court denied Clayborne's motion to suppress.

The issues before the Supreme Court included whether the trial court erred by failing to suppress the evidence acquired pursuant to the K-9 unit's search. The Supreme Court reversed the trial court's ruling. Specifically, the Court held that the stop was extended because the officer abandoned the purpose of the stop (addressing a suspended license) to run a criminal investigation, and that investigation was not simultaneous to the execution of the initial purpose of the stop. The Court also held that the Commonwealth failed to meet its burden to establish reasonable, articulable suspicion.

***Commonwealth v. Perry*, 630 S.W.3d 671 (Ky. 2021)**
Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Keller and Nickell, JJ., concur. Lambert, J., dissents by separate opinion, in which Conley and VanMeter, JJ., join. Criminal Appeal, Discretionary Review Granted. James Perry and a friend were walking down Lawrenceburg's main street on their way to an area nursing home when Officer Doty, on patrol that morning, saw them. Officer Doty pulled into the nursing home parking lot, exited his vehicle, and approached them because Perry usually had outstanding arrest warrants and narcotics on his person and his companion also was known to possess and traffic narcotics. Perry consented to a search. Perry was subsequently indicted on two counts of first-degree possession of a controlled substance (heroin and methamphetamine), possession of drug paraphernalia, and possession of a legend drug (gabapentin) which had not been prescribed for him. The trial court granted Perry's suppression motion, concluding that Officer Doty lacked the prerequisite reasonable suspicion that Perry was involved in criminal activity in order to conduct a lawful Terry stop. The Court of Appeals affirmed that decision. Held: Despite the Commonwealth's arguments otherwise, substantial evidence supported the trial court's findings of fact that Officer Doty stopped Perry without reasonable suspicion and Perry, in view of all of the circumstances surrounding the incident, would not have believed that he was free to leave. Given these findings, the trial court's legal conclusions that the evidence against Perry was the result of an illegal search and must be suppressed were legally sound. Even if it were erroneous for the trial court and the Court of Appeals to consider Officer Doty's mindset when he decided to stop Perry and his companion, the

trial court could infer from the officers' collective testimony that a reasonable person would have believed he was not free to leave when encountering first Officer Doty and then Officer King who arrived in his vehicle shortly after Officer Doty had exited his own patrol car.

***Minch v. Commonwealth*, 630 S.W.3d 660 (Ky. 2021)**
Opinion of the Court by Chief Justice Minton. All sitting; all concur. Dylan Tyler Minch appealed as a matter of right a judgment imposing a seventy-year sentence for convictions on forty counts of possession or viewing of a matter depicting a sexual performance by a minor, seven counts of the use of a minor under sixteen in a sexual performance, and one count of sexual abuse of a minor under twelve. He argued on appeal that 1) he was denied a fair trial on the sexual abuse and sexual performance charges because they were tried jointly with the possession charges, 2) pornographic images that were not connected to the indicted charges were used improperly as Kentucky Rule of Evidence (KRE) 404(b) evidence against him and rendered his trial unfair, 3) the trial court erred in denying his motion for a continuance because he needed to review the KRE 404(b) evidence used against him, and 4) the cumulative effect of these errors compels reversal. After review, we found it necessary to reverse Minch's convictions because the trial court erred in allowing the Commonwealth to use a voluminous number of unindicted images as KRE 404(b) evidence. Further, because we reversed, we declined to address Minch's arguments that his conviction should be reversed on the bases of cumulative error and the trial court's failure to grant his motion to continue.

***Bounds v. Commonwealth*, 630 S.W.3d 651 (Ky. 2021)**
Opinion of the Court by Justice VanMeter. All sitting; all concur. Darren Bounds appeals as a matter of right his convictions on twenty counts of possession of matter portraying a sexual act of a minor, KRS 531.355. The primary issue presented was whether the Campbell Circuit Court erred in denying Bounds' motion for directed verdict on the grounds that the Commonwealth failed to prove Bounds knowingly possessed child pornography. The Supreme Court held that the trial court did not err on that basis, but that one of Bounds' convictions violated double jeopardy since two offenses related to a single downloaded video depicting different individuals and minors engaging in discrete acts of sexual conduct; but which had the same computer file name and hash value. The Court held that the one video constituted a continuing course of conduct which may only be punished once. Ky. Const. § 13; KRS 505.020(1)(c). Accordingly, the Court vacated one of the convictions as violative of double jeopardy and remanded to the trial court for the entry of a new judgment.

***Jones v. Clark Cnty.*, 635 S.W.3d 54 (Ky. 2021)**
Opinion of the Court by Justice Conley. All sitting; all concur. The Clark County Detention Center, the Appellee, presented David Jones, the Appellant, with a bill for his incarceration fees after fourteen months in a county jail. Shortly after his release, Jones was cleared of all charges. The Kentucky Supreme Court granted discretionary review to determine whether KRS 441.265 permits a county jail to both retain the monies collected from a prisoner and further bill the same prisoner for the cost of his confinement after the charges against him were dropped. The trial court granted summary judgment to the Clark County Detention Center, finding KRS 441.265 permitted the collection, assessment, and billing of incarceration fees by the county jail. The Court of Appeals affirmed. The Supreme Court reversed, holding the lower

courts erred in their analysis of KRS 441.265 by ignoring the role a sentencing court plays in the statute. County jails do not have the statutory right to bill a former prisoner for the cost of their incarceration without an order from a sentencing court. While a county jail does have the right to automatically deduct fees from a prisoner's canteen account, a county jail must return the automatically deducted fees if no order from a sentencing court comes into existence. Accordingly, the Court remanded the case to the Clark Circuit Court.

***Fields v. Commonwealth*, ___ S.W.3d ___, 2021 WL 5050252 (Ky. Oct. 28, 2021)**
Opinion of the Court by Justice Hughes. All sitting; all concur. An investigation by the Office of the Attorney General cybercrimes unit led investigators to discover child pornography files on Michael Fields's desktop computer and external hard drive. After a jury trial he was convicted of four counts of possession of matter portraying a sexual performance by a minor, Kentucky Revised Statute (KRS) 531.335, and sentenced to ten years in prison by the Scott Circuit Court. On appeal, Fields argued that the trial court (1) improperly denied a directed verdict; (2) erred in excluding Matthew Considine as an expert witness; (3) improperly admitted various exhibits, and (4) improperly admitted the ten images and videos that formed the basis of the ten-count indictment. The Court of Appeals found no error and affirmed.

On discretionary review, the Supreme Court determined that the trial court committed no reversible error and affirmed the Court of Appeals. The Commonwealth's computer forensics expert testified that Fields previewed the four pornographic images on which he was ultimately convicted, which satisfied the "knowing" possession requirement of KRS 531.335. Because there was direct evidence that the four files had been viewed, in addition to circumstantial evidence, the jury had sufficient evidence to infer that Fields knew the files were on his computer and knew what the files contained. Further, the trial court did not abuse its discretion in declining to qualify Fields's computer forensics expert because the expert lacked knowledge and experience. Even if the trial court's refusal to allow the expert to testify was error, it was harmless because the avowal testimony contained no information that would have successfully countered the Commonwealth's expert's testimony that Fields viewed the four files. Further, the trial court properly admitted various exhibits regarding Fields's computer activity, which demonstrated that other files with pornography-suggestive names were opened on Fields's computer. Finally, the trial court properly admitted the images and videos that formed the basis for the indictment because the images constitute physical evidence of the crime itself and while the photos were undoubtedly prejudicial, the prejudice did not outweigh their probative value.

***McRae v. Commonwealth*, 635 S.W.3d 60 (Ky. 2021)**
Opinion of the Court by Justice Hughes. All sitting; all concur. Criminal Appeal. Martice McRae was tried and convicted by a Jefferson County jury for the murder of Justin Hague. McRae was arrested after investigators received a lead from Deonta Thorn. Thorn, arrested in an unrelated case, provided information in a police interview about a murder McRae committed in the summer of 2017. Thorn also made statements during the interview about possessing a gun that he transferred to McRae, statements that incriminated Thorn since he was a convicted felon. Thorn told police he provided a .40 caliber Smith and Wesson to McRae, the same gun McRae used to shoot the victim. Before Thorn was called as a witness at trial and after a "dry run" hearing of the Commonwealth's and McRae's questions and Thorn's answers, the trial

court determined that Thorn could not be asked questions related to his personal possession of firearms, granting Thorn a partial Fifth Amendment privilege. Held: The trial court did not abuse its discretion by compelling Thorn to testify to his knowledge of the crime, while prohibiting potentially incriminating questions about his gun possession. Further, the trial court did not abuse its discretion in denying McRae's request for recross-examination of a detective when the redirect testimony did not involve new matter and was only an amplification of previous testimony elicited during cross-examination; did not commit palpable error by allowing the detective to answer the Commonwealth's questions about surveillance videos; and committed only harmless error, if any, by overruling McRae's objection to the Commonwealth's closing argument.

***Jones v. Commonwealth*, 636 S.W.3d 503 (Ky. 2021)**
Opinion of the Court by Justice Keller. All sitting; all concur. Frederick Jones filed an application for expungement in Jefferson Circuit Court. As part of his application, he also filed a motion to proceed in forma pauperis (IFP), which would allow him to proceed without paying the required filing fee. The Jefferson Circuit Court denied his motion to proceed IFP, concluding that the legislature did not intend KRS 453.190, the IFP statute, to apply to applications for expungements. The Court of Appeals affirmed the Jefferson Circuit Court.

The Supreme Court determined that the IFP statute applies to "any action" and that "action," as defined in KRS 446.010(1), includes "all proceedings." The Court further concluded that an expungement is a separate proceeding from the underlying criminal case, and thus the IFP statute applies to an application for expungement. The Court further held that the IFP statute applies to both the filing fee and the expungement fee, as both fees are required to complete the expungement process and obtain all of its benefits.

Accordingly, the Supreme Court reversed the Court of Appeals and remanded to the Jefferson Circuit Court for proceedings consistent with its Opinion.

***Commonwealth v. Roark*, 641 S.W.3d 94 (Ky. 2021)**
Opinion of the Court by Justice Conley. All sitting; all concur. The Court of Appeals reversed the conviction of Steven Roark, holding the trial court erred when it excluded an exculpatory video recording of Alvin Couch during his guilty plea allocution, by ruling Couch was available for trial pursuant to KRE 804(a)(5). Roark's attorney had told the trial court he had a subpoena delivered to the Leslie County Detention Center where Couch was incarcerated, and the Court of Appeals concluded that was enough to demonstrate a good faith attempt had been made to secure Couch's presence at trial. The Supreme Court reversed and reinstated Roark's conviction.

The Supreme Court held KRE 804(a)(5) imposes an equal burden on any proponent of a witness to demonstrate a good faith attempt was made to secure their presence at trial, either by procedure or other reasonable means. The mere verbal representations of the proponent are insufficient for a trial court to predicate a finding of unavailability, since the rule is meant to preclude self-serving fabrications of unavailability. As such, the verbal representations of Roark's attorney that a subpoena had been delivered was insufficient to demonstrate a good faith attempt. Moreover, being in the custody of the Commonwealth, a subpoena would not have been enough

to secure Couch's presence at trial; there needed to be a transport order as well. Thus, transport orders are within the "other reasonable means" contemplated by KRE 804(a)(5). Since there is no record of a returned subpoena or a signed transport order, it was not an abuse of discretion for the trial court to conclude Couch was available for trial. Finally, the Supreme Court rejected the Court of Appeals' conclusion that application of KRE 804(a)(5) had harmed Roark's due process rights to present a defense. The trial court's application of the rule was not mechanistic, nor did it place an impossible bar on Roark's presentation of a defense therefore, there was no due process violation in excluding video evidence from trial.

***Commonwealth v. Conner*, 636 S.W.3d 464 (Ky. 2021)**
Opinion of the Court by Chief Justice Minton. All sitting. Hughes, Keller, and Nickell, JJ., concur. Conley, Lambert, and VanMeter, JJ., concur in result only. Criminal Appeal. Discretionary Review Granted. Shuntrell D. Conner was convicted of trafficking in marijuana, tampering with physical evidence, possession of drug paraphernalia, and being a first-degree persistent felony offender following an investigation at a traffic stop for erratic driving. After recognizing Conner as a passenger in the vehicle, the officer remembered a tip that Conner was dealing methamphetamine. Instead of investigating the driver's erratic driving, the officer questioned Conner about his potential drug dealing, threatened the use of a drug dog if Conner did not consent to a search of the vehicle, and made multiple calls to locate a canine investigation unit. The canine unit arrived, conducted a canine sniff search around the vehicle, and alerted to the presence of drugs. A search of the vehicle revealed 6.5 ounces of marijuana. Conner moved to suppress the evidence obtained as a result of the search, and the trial court denied the motion. Conner appealed the trial court's denial, and the Court of Appeals reversed.

The Kentucky Supreme Court granted discretionary review and affirmed the Court of Appeals. Specifically, the Court held that the stop was extended because the officer abandoned the purpose of the stop (investigating the driver's erratic driving) to investigate Conner's potential drug trafficking, which included taking time to locate a canine investigation unit. The Court also held that the Commonwealth failed to meet its burden to establish that the extended duration was supported by reasonable, articulable suspicion.

***Wahl v. Commonwealth*, 636 S.W.3d 484 (Ky. 2021)**
Opinion of the Court by Justice Lambert. All sitting; all concur. Gregory Wahl was convicted of one count of first-degree assault and one count of being a second-degree persistent felony offender. He was thereafter sentenced to forty-five years and appealed his convictions to the Kentucky Supreme Court as a matter of right. First, Wahl asserted that the trial court erred by denying his motion to dismiss the indictment on the basis of immunity. Second, Wahl argued that the trial court erred by allowing the Commonwealth to introduce the hearsay statement of his girlfriend through the testimony and written report of an EMS worker to whom the statements were made. Third, Wahl argued that the trial court erred by not granting his motion for a mistrial after the Commonwealth questioned a witness about whether Wahl had been violent toward her during cross examination. Fourth, and finally, Wahl contended that the trial court exceeded the scope of KRS 532.055 when copies of documents related to his prior convictions were introduced and sent into deliberations with the jury. After review, the Supreme Court held that the trial court had a substantial basis to

conclude there was probable cause that the force used by the defendant was not fully justified under the controlling provision or provisions of KRS Chapter 503. Second, the Court held that statements made for medical treatment or diagnosis to EMS workers and included in an EMS pre-hospital care report were admissible pursuant to KRE 803(4). Third, the Court held that the trial court did not err by denying Wahl's motion for a mistrial, because the Commonwealth was not permitted to ask about domestic violence, and, by extension, did not violate KRE 404. Lastly, the Court held that the trial court did not commit palpable error by admitting proof of Wahl's prior convictions that contained identifiers of past victims.

***Smith v. Commonwealth*, 636 S.W.3d 421 (Ky. 2021)**
Opinion of the Court by Justice Keller. All sitting; all concur. Brett A. Smith was convicted of one count of sodomy in the first degree, victim under 12 years old, and three counts of sexual abuse in the first degree, victim under 12 years old, by a Henry County jury. He alleged multiple errors, but the Supreme Court found none. First, the Court held that the trial court did not err in denying Smith's motion for a directed verdict where the evidence presented distinguished between counts of sexual abuse even though they were different than the counts described in the jury instructions. Second, the Court held that the trial court did not err in admitting testimony regarding actions and statements by Smith's co-defendant. Third, the Court held that the trial court did not err in concluding the victim's psychotherapy records did not contain exculpatory evidence. Fourth, the Court held that Smith's speedy trial right was not violated by the Commonwealth's interlocutory appeal of the trial court's exclusion of KRE 404(b) evidence. Finally, the Court held that the trial court did not err in denying Smith's motion for a reduced sentence.

***Justice v. Commonwealth*, 636 S.W.3d 407 (Ky. 2021)**
Opinion of the Court by Chief Justice Minton. All sitting. Conley, Hughes, Lambert, Nickell, and VanMeter, JJ., concur. Keller, J., concurs in part and dissents in part by separate opinion. This matter was before the Supreme Court as a matter of right appeal after a circuit court jury convicted Justice of four counts of first-degree sexual abuse, incest, attempted first-degree rape, attempted promotion of a sexual performance by a minor, distribution of matter portraying a sexual performance by a minor, promotion of a sexual performance by a minor, and being a first-degree persistent felony offender. The trial court imposed the 220 years' imprisonment sentence fixed by the jury. Justice appealed the resulting judgment arguing the trial court made several errors.

While the Court did not agree with all the errors raised, it found reversal was warranted for Justice's convictions for attempted rape and sexual abuse because the jury instructions were duplicitous. Further, the Court found Justice's 220-year sentence to be illegal under *Stambaugh v. Commonwealth*. Accordingly, the Court affirmed in part and reversed in part and remanded the case to the trial court.

***Robinson v. Commonwealth*, ___ S.W.3d ___, 2022 WL 243939 (Ky. Jan. 20, 2022)**
Opinion of the Court by Justice Conley. All sitting. All concur. Robinson was convicted of first-degree sodomy and sentenced to twenty years in prison. He appealed alleging the trial court abused its discretion by failing to strike two jurors for cause pursuant to RCr. 9.36(1). He also claimed prosecutorial misconduct when the Commonwealth's attorney called him a pedophile during closing arguments.

The Supreme Court held the trial court did not abuse its discretion by failing to strike the two jurors at issue. Although the trial court verbally articulated the standard for striking a juror incorrectly, the court's conduct and reasoning comported with the correct standard. The first juror at issue, argued Robinson, gave a reasonable basis to believe she required both sides to testify to be impartial. This argument is negated, however, by the specific juror's statements explaining why Robinson would not want to testify, evidencing her understanding that testifying is a strategic decision. The totality of circumstances did not justify her being struck. As to the second juror, Robinson alleged a reasonable belief as to her impartiality due to her history of sexual assault thirty years ago. Robinson, however, never questioned the juror on this issue and the juror had affirmed her history would not affect her impartiality at trial. Finally, the Court concluded the Commonwealth committed error by calling Robinson a pedophile at closing argument. Because juries face tremendous societal pressure to convict in child sexual abuse cases, the label of pedophile only serves to inflame the passions of the jury. In this case, however, Robinson had confessed to sodomizing the victim on three different occasions and each time blamed the victim as the initiator of the sexual conduct. Therefore, evidence of Robinson's guilt was overwhelming, and the error was harmless.

***Lewis v. Commonwealth*, 642 S.W.3d 640 (Ky. 2022)**
Opinion of the Court by Chief Justice Minton. All sitting. All concur. Lewis appealed as a matter of right his conviction on three counts of first-degree, second-offense, trafficking in a controlled substance and sentence to 32 years in prison. Lewis contended that the trial court reversibly erred on two grounds. First, he claimed that the trial court's inadvertent reading of the "second offense" portion of his indictment to the venire constituted reversible error. Second, he claimed that the trial court's admission into evidence of photos of his tattoos constituted reversible error. Upon review, the Supreme Court concluded that any error committed in reading Lewis' indictment to the venire was corrected by the trial court's provision of an admonishment to the jury, which is presumptively curative. The Court also concluded that the photos of Lewis' tattoos shown to the jury for identification purposes did not contain "badges of custody" such that their admission into evidence violated his right to a fair trial. Accordingly, the Supreme Court affirmed Lewis' conviction.

***Welsh v. Commonwealth*, 641 S.W.3d 132 (Ky. 2022)**
Opinion of the Court by Justice Hughes. All sitting; all concur. Criminal Appeal. Shawn Welsh led three law enforcement agencies on a high-speed pursuit. The pursuit began in Meade County and ended in Hardin County when Welsh crashed the vehicle he was driving into a vehicle occupied by four teens. The driver and the front passenger died at the scene and the other two passengers suffered serious physical injuries. In preparation of trial, believing Welsh intended to introduce evidence that either the police officers violated their pursuit policies or that they in some way contributed to Welsh's wanton conduct, the Commonwealth filed a motion to preclude

admission of the various law enforcement agencies' policies and procedures regarding pursuits. The trial court granted the motion. Welsh was convicted as charged by a Hardin County jury of two counts of wanton murder and two counts of assault in the first degree. On appeal, Welsh claims that due to the trial court excluding the police pursuit policies and procedures he was not able to give the jury all the facts and expose especially the pursuit-initiating officer's blameworthiness in the deaths and injuries, and thus was denied the right to present a full defense. *Held*: The trial court did not abuse its discretion by excluding the pursuit policies from evidence. Applying Kentucky Rules of Evidence and general principles of criminal responsibility, the Supreme Court determined that any negligence on the part of the officers was not relevant to the jury's determination of whether Welsh was guilty of the criminal offenses charged. Whatever role failure to abide by a law enforcement agency's pursuit policy may play in civil litigation, it has no bearing on a criminal prosecution where the focus is on the defendant, his state of mind and his actions.

***Shields v. Commonwealth*, ___ S.W.3d ___, 2022 WL 575214 (Ky. Feb. 24, 2022)**
Opinion of the Court by Justice Hughes. All sitting. Lambert and VanMeter, JJ., concur. Minton, C.J., concurs in result only. Keller, J., dissents by separate opinion, in which Conley and Nickell, JJ., join. Criminal Appeal. Gregory Shields, Sr., the caretaker for his uncle and aunt, Samuel and Maude Murrell, was arrested for the murder of his uncle. Mrs. Murrell, the eighty-two-year-old eyewitness to the crime, testified at the preliminary hearing, detailing the events which led to Mr. Murrell's death. A Warren County grand jury indicted Shields for murder. Mrs. Murrell died before Shields's trial. Defense counsel moved the trial court to exclude from evidence Mrs. Murrell's videotaped preliminary hearing testimony and the motion was denied. *Held*: The trial court did not abuse its discretion by denying Shields's motion. Under the facts of this case, Shields's Sixth Amendment right to confront the witness was not violated because he had an adequate opportunity to cross-examine the witness at the hearing and in fact did so, asking several questions without any limitation by the presiding judge.

***Capstraw v. Commonwealth*, 641 S.W.3d 148 (Ky. 2022)**
Opinion of the Court by Justice Lambert. All sitting; all concur. Capstraw was convicted of the murder of his girlfriend by both blunt force trauma and strangulation. The Court held: (1) The trial court did not abuse its discretion by admitting eight post-mortem photographs of the victim. (2) The Defendant's right to a unanimous jury verdict was not violated. The United States Supreme Court's recent holding in *Ramos v. Louisiana*, __ U.S. __ 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) did not compel a change in Kentucky precedent regarding the allowance of "combination" jury instructions that allow a jury to find a defendant guilty of murder even though some jurors may have believed the killing intentional and others wanton as long as the evidence reasonably supported both theories. (3) The Defendant's Confrontation Clause rights were not violated because the results of a blood alcohol test introduced through the testimony of the lead detective was created for the purposes of medical treatment and was accordingly not testimonial in nature. (4) The trial court's requirement that the Defendant reimburse the county jail for the costs of his incarceration as part of his sentencing was vacated. Before a trial court may order a defendant to reimburse a jailer for the costs and fees of his or her incarceration, there must be sufficient evidence of record that a jail fee reimbursement policy has been

adopted by the jailer with the approval of the county's governing body in accordance with KRS 441.265(2)(a).

***Cox v. Commonwealth*, 641 S.W.3d 101 (Ky. 2022)**
Opinion of the Court by Justice Lambert. All sitting. Minton, C.J.; Hughes, Keller, and Nickell, JJ., concur. Conley, J., concurs in part and dissents in part by separate opinion in which VanMeter, J., joins. Cox was arrested after two witnesses accused him of touching his nine-year-old niece's vagina while giving her a hug. On the day of his arrest, he agreed to speak to a detective at the police station regarding the allegations. Prior to the interview, the detective mirandized the Defendant. Cox stated that he understood his rights and eventually confessed. Defense counsel later filed two motions to suppress the Defendant's interview with the detective. The defense argued, first, that the interview should be suppressed because the Defendant's intellectual disability and long history of mental illness prevented him from providing an adequate waiver of his Miranda rights. Following a suppression hearing, the trial court found that the Defendant provided an adequate waiver. Second, the defense asserted that the interview should be suppressed because the Defendant invoked his right to counsel during the interview, but the detective did not stop the interview immediately thereafter. The detective testified during the suppression hearing that he did not hear the Defendant invoke his right to counsel. The trial court found that, even if the Defendant did ask to speak to a lawyer, it was not unreasonable for the Detective to have misunderstood or misheard the invocation. Therefore, the trial court reasoned, the Defendant did not invoke his right to counsel. The Defendant later entered a conditional guilty plea and appealed both rulings to the Court of Appeals, which affirmed.

The Supreme Court held: (1) Based on the totality of the circumstances, the Defendant gave a voluntary, knowing, and intelligent waiver of his Miranda rights before speaking to the detective. (2) The trial court's factual finding that the Defendant said to the Detective, "So when they try to accuse me of doing something [inaudible] talk to a goddamn lawyer. I'm serious, man" was not clearly erroneous. And, that statement was unambiguous and unequivocal. Further, the trial court erred by applying a subjective standard to determine whether it was reasonable for the detective not to hear the Defendant's unambiguous and unequivocal statement that he wanted to speak with an attorney. As a matter of first impression, the Court held that when an officer claims to have either misheard or misunderstood a suspect's alleged invocation of counsel, the trial court must determine whether a reasonable officer under the circumstances would have heard or understood the alleged invocation. A "reasonable officer" in those circumstances is an officer with ordinary hearing abilities who has taken steps to ensure that clear communication can occur between the officer and the suspect. Further, a reasonable officer is attentive to the suspect's answers to questions. The Court vacated the Defendant's conviction and remanded the case to allow the trial court to address the Defendant's motion to suppress on invocation of counsel grounds under this newly adopted standard.

***Jones v. Commonwealth*, 641 S.W.3d 162 (Ky. 2022)**
Opinion of the Court by Justice Keller. Minton, C.J.; Conley, Hughes, Lambert, and Nickell, JJ., sitting. VanMeter, J., not sitting. Deverious Dajewon Jones, the Appellant, and his co-defendant, Tahjee Winters, were indicted for a string of robberies that occurred in Lexington between September 7, 2016 and September 17, 2016. Five

separate incidents gave rise to Jones being found guilty of one count of complicity to assault in the first degree, one count of burglary in the first degree, six counts of robbery in the first degree, three counts of complicity to robbery in the first degree, and four counts of principal or complicitor to robbery in the first degree. He was sentenced to twenty-four years' imprisonment. He appeals his conviction claiming he did not have conflict-free representation and that his *Miranda* rights were violated.

On review, the Court first held that Jones's counsel did not have a conflict. A witness who had been called to testify against Jones was previously represented by Jones's counsel in an unrelated matter. However, the witness never testified, and so no actual successive conflict existed at trial. Second, the Court held that several of the questions asked of Jones at arrest did not fall under the booking exception to *Miranda*. However, the prejudice resulting from the error was harmless beyond a reasonable doubt. Therefore, the Court affirmed the conviction.

***Lynch v. Commonwealth*, 642 S.W.3d 647 (Ky. 2022)**
Opinion of the Court by Justice Lambert. All sitting. All concur. Appellant was convicted of murder, first-degree rape, abuse of a corpse, tampering with physical evidence, and first-degree trafficking in a controlled substance. The evidence demonstrated that he and the victim drove to remote location and smoked Appellant's methamphetamine together. The Appellant then raped her, beat her to death, and dumped her body in a nearby body of water.

During the trial, Appellant's counsel requested that his waiver of his right to testify be put on record. During the colloquy, Appellant implied that he was waiving his right to testify due to feared retaliation from the motorcycle club where the victim's boyfriend was a member. The Court held that the trial court did not palpably err by failing to inquire further into the basis for his waiver. There is no constitutional violation when a private actor attempts to impede a defendant's right to testify, and trial courts should follow the "no inquiry" rule unless it believes that a defendant's right to testify is being impeded by either the Commonwealth or defense counsel. In addition, the Court held that the trial court did not err by granting the Appellant's motion for directed verdict on the charges of first-degree rape and tampering. There was sufficient evidence for the jury to conclude that the Appellant raped the victim and then murdered her to prevent her from reporting the rape. And, there was evidence that he threw the victim's purse in a river to delay identification of her body.

***Richardson v. Commonwealth*, ___ S.W.3d ___, 2022 WL 1284037 (Ky. Apr. 28, 2022)**
Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Conley, Keller, Nickell, and VanMeter, JJ., concur. Lambert, J., concurs in part and dissents in part without separate opinion. Lawrence Richardson entered an Alford plea to two counts of criminal attempt to commit first-degree unlawful transaction with a minor and one count of third-degree terroristic threatening after his grandson reported various instances of Richardson's sexual misconduct. Pursuant to the plea agreement, the Commonwealth recommended a ten-year prison sentence, which the trial court imposed. The trial court also ordered Richardson to complete the Sex Offender Treatment Program (SOTP) but determined that Richardson was not subject to post-incarceration supervision pursuant to Kentucky Revised Statute (KRS) 532.043. On appeal, the Court of Appeals upheld the SOTP requirement but concluded that the

trial court wrongly determined that Richardson was not subject to post-incarceration supervision. Richardson petitioned this Court for discretionary review.

The Supreme Court held that the trial court did not abuse its discretion in holding that Richardson is an eligible offender for the SOTP. For its consideration of whether Richardson suffered an intellectual disability, which would render him ineligible for the SOTP, the trial court was presented with competing expert testimony as to Richardson's mental capabilities and deficits. The trial court was free to believe the expert evaluation that concluded Richardson does not suffer from an intellectual disability and thereby conclude that he is eligible for the SOTP. Additionally, Richardson could address potential learning problems with the Department of Corrections, consistent with KRS 197.420(1). The trial court also did not err in determining that Richardson is not subject to post-incarceration supervision. KRS 532.043 does not explicitly state that attempt offenders are subject to post-incarceration supervision. Notably, another statute pertaining to sexual offenders, the Sex Offender Registration Act, expressly includes attempt crimes in its registration requirements. The omission of attempt crimes from the post-incarceration supervision statute must be viewed as purposeful legislative action. The Court affirmed in part, reversed in part, and remanded the case to the trial court.

***Hall v. Commonwealth*, ___ S.W.3d ___, 2022 WL 1282680 (Ky. Apr. 28, 2022)**
Opinion of the Court by Justice Keller. All sitting; all concur. Berry Hall was found guilty of two counts of intentional murder and four counts of wanton endangerment in the first degree. He was sentenced to life in prison without the possibility of parole. On appeal, he alleged multiple errors by the trial court including the erroneous admission of certain pieces of evidence, the erroneous denial of his motion for a directed verdict, improper closing argument by the Commonwealth, and the erroneous refusal of the trial court to instruct the jury on the shifting burden and standard of proof as to the defense of insanity. The Supreme Court found no errors and affirmed Hall's convictions.

Specifically, the Court held that the trial court did not err in denying Hall's motion for a directed verdict because Hall's shooting with a scoped high-power deer rifle toward a home within which four young children were located put the children in substantial danger of death or serious physical injury. The Court also held that the trial court did not err in instructing the jury, as the instructions appropriately incorporated the preponderance of the evidence standard for the defense of insanity with the phrase "if you believe from the evidence," and because Hall's trial counsel was fully able to articulate the shifting burden and standard of proof to the jury.

DISMISSAL OF CLAIMS:
***Jones v. Pinter*, 642 S.W.3d 698 (Ky. 2022)**
Opinion of the Court by Chief Justice Minton. All sitting. All concur. Civil appeal. Discretionary review granted. The Court of Appeals affirmed the trial court's dismissal with prejudice under Kentucky Rule of Civil Procedure ("CR") 41.02(1) for noncompliance with the court's orders and for failure to prosecute.

On discretionary review, the Supreme Court reversed the judgment of the Court of Appeals and remanded the action to the Jefferson Circuit Court for further proceedings. The Court held that the trial court abused its discretion by dismissing

the action with prejudice under CR 41.02(1). Consideration of a motion to dismiss under CR 41.02(1) requires fact-specific determinations that are left to the sound discretion of the trial court. The Court explained, however, that a trial court's discretion is not unfettered and that CR 41.02(1) dismissal with prejudice is an extreme remedy.

First, the Court explained that Jones did not violate any court orders to warrant the extreme remedy of dismissal with prejudice. Specifically, it was undisputed that Jones failed to attend the first mediation that was scheduled by the parties. Still, Jones was sanctioned for that misconduct and ultimately attended a rescheduled mediation before the pretrial conference, as ordered by the trial court. Moreover, while Jones failed to attend an independent medical examination ("IME") scheduled by the parties, he was never ordered by the trial court to attend an IME.

Second, the Court concluded that two discrete incidents of pretrial misconduct, occurring close in time and delaying the litigation for a period of months, did not support dismissal with prejudice for want of prosecution. The Court noted, however, that although the record before the Court did not support the extreme sanction of dismissal with prejudice, parties who disregard deadlines or their obligation of good faith participation in the pretrial process do so at their own peril.

DEPENDENCY, NEGLECT AND ABUSE:

***Commonwealth, Cabinet for Health & Fam. Servs. v. Baker*, ___ S.W.3d ___, 2022 WL 1284027 (Ky. Apr. 28, 2022)**

Opinion of the Court by Justice Hughes. All sitting; all concur. Civil Appeal, Discretionary Review Granted. The Cabinet for Health and Family Services (CHFS) filed dependency/neglect/abuse (DNA) petitions in June 2020 in the Bullitt County Family Court alleging, collectively, that three siblings were being abused or neglected by their mother. The CHFS, awarded temporary custody of the children, placed them with a paternal aunt. Although the CHFS had begun evaluating the father for placement, on July 1, 2020, the CHFS learned that the father, without permission, had taken the children to his residence in Florida; the children's mother also accompanied them. The CHFS began working to get the children back to Kentucky. On July 6, 2020, the CHFS communicated the children's status to the Bullitt County Family Court, the guardian ad litem (GAL), and the Bullitt County Attorney. At the emergency hearing that same day, held upon the GAL's motion, the Family Court ordered the CHFS to return the children to Kentucky withing twenty-four hours. Under the supervision of CHFS employees, the children were returned within forty-eight hours and placed in foster care. The GAL then filed DNA petitions against the CHFS alleging that inaction by the CHFS placed the children at great risk of harm, however, the GAL did not petition to remove the children from the CHFS's temporary custody. The CHFS filed a motion to dismiss the petitions, claiming governmental immunity. The Family Court overruled the motion and the Court of Appeals, while recognizing DNA petitions against the CHFS are unusual, affirmed that decision. *Held*: The CHFS's governmental immunity claim was not properly before the Court. At the point the GAL filed the petitions, the GAL's concerns for the children's safety as a result of being with their parents, and criticisms of the CHFS's manner of effectuating their return from Florida without police involvement, even if deemed an appropriate basis for a DNA petition, were largely moot. If the CHFS was irresponsibly lax in reporting the children's absence or securing their return, if deferring to Florida Child

Protective Services' judgment regarding the children's safety instead of involving Florida police or any other aspect of this incident was problematic, those issues were properly addressed in the existing DNA cases.

DOMESTIC RELATIONS:

***Moore v. Moore*, 626 S.W.3d 535 (Ky. 2021)**

Opinion of the Court by Justice Nickell. All sitting; all concur. After being acquitted of sexually abusing his daughter from a previous marriage, Father sought increased visitation with minor daughters of his latest marriage which had been curtailed due to his criminal charges. The trial court denied Father's first motion for joint custody and increased, unsupervised visitation upon concluding he had, in fact, sexually abused his daughter, the contrary jury verdict notwithstanding. Approximately six months later, Father again moved for joint custody and increased visitation. The trial court denied the motion for joint custody, slightly increased Father's supervised visitation, and stated further modifications of timesharing would not occur until Father accepted responsibility for his actions and showed genuine remorse. Ten months later, Father filed a third motion for joint custody and increased, unsupervised visitation. After setting forth extensive findings detailing grave concerns with Father's actions and his continued failure to acknowledge any wrongdoing, and with little justification supportive of its decision, the trial court granted Father unsupervised, overnight visitation every other weekend. The trial court's sole focus was whether Father presented a risk of harm to these two children but nowhere mentioned the best interest standard set forth in KRS 403.320.

A divided Court of Appeals panel affirmed, concluding the trial court's ultimate finding was supported by substantial evidence and, although mentioned nowhere in the trial court record, expansion of visitation was in the children's best interests. The majority held the trial court ruled on the best interest factors by implication and discerned no abuse of discretion in the trial court's conclusion Father did not present a risk of harm to the children.

On grant of discretionary review, the Supreme Court disagreed with the Court of Appeals that trial courts may rule by implication, citing CR 52.01 and *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011), and concluded none of the trial court's written findings supported the ordered modification. In addition, it was determined the Court of Appeals erred in focusing on whether the trial court's findings were supported by substantial evidence without considering if the findings were applicable to the issue to be decided and excusing the failure to make the required conclusion of law. Finally, because the trial court utilized an incorrect legal standard—risk of harm instead of best interests of the children—the Supreme Court was constrained to reverse and remand for further proceedings.

***B.B. v. Commonwealth, Cabinet for Health & Fam. Servs.*, 635 S.W.3d 802 (Ky. 2021)**

Opinion of the Court by Justice Conley. All sitting; all concur. The Kentucky Supreme Court granted discretionary review to determine whether the trial court erred in admitting part of the testimony of the minor child's therapist, which described alleged abuse and named the father as the perpetrator. Secondarily, the Court was asked to review whether the trial court erred in not giving greater weight to the grand jury findings of "no true bill" when they were submitted as evidence at an adjudication hearing. B.B., the Appellant, appealed the Court of Appeals' decision to affirm the trial court's orders arguing the therapist's testimony did not meet hearsay exception KRE 803(4)—the so called "medical treatment" exception. While the Supreme Court did conclude the therapist's testimony identifying B.B. as the child's abuser was harmless error, the Court held the remainder of the therapist's testimony was admissible and the trial court properly relied upon it. Additionally, the Court concluded the trial court did not abuse its discretion in failing to give more weight to B.B.'s "no true bills" during the adjudication hearing. The Supreme Court affirmed the orders of the Court of Appeals and the Franklin Circuit Court.

***J.S.B. v. S.R.V.*, 630 S.W.3d 693 (Ky. 2021)**

Opinion of the Court by Justice Lambert. All sitting; all concur. A family law case involving adoption and custody issues. J.S.B. and S.R.V. were married for nearly six years; the marriage produced no children. Eventually, they divorced. During a period of reconciliation, they had two children. S.R.V. led J.S.B. to believe the children were his: he was present for their births, he is listed as the father on both of their birth certificates, and both children carry his surname. Less than two years after the birth of the youngest child, the parties permanently separated. After the separation, they agreed to a non-court ordered timesharing arrangement wherein J.S.B. was the primary caregiver, and S.R.V. was the primary financial provider. Later, S.R.V. filed for a petition for sole custody of the children wherein she alleged that J.S.B. was not the biological father of either child. Genetic testing proved that J.S.B. was not the father of either child. S.R.V. never identified the natural father of either child. In response to S.R.V.'s petition for sole custody, J.S.B. filed petitions to adopt both children and petitions for custody. J.S.B.'s adoption petitions did not request that S.R.V.'s parental rights be terminated; he only sought to have the putative natural fathers' rights terminated. The circuit court ruled on the adoption petitions first: it allowed J.S.B. to adopt both children by terminating the children's punitive fathers' rights while leaving S.R.V.'s parental rights intact. The court then awarded joint custody to the parties and made J.S.B. the primary residential custodian of both children.

The Kentucky Supreme Court held: (1) KRS 199.520 requires that an adoption terminate the rights of both biological parents, with the single exception of a stepparent adoption. Therefore, the adoption orders must be vacated because they terminated the biological fathers' rights, but not the biological mother's rights. (2) *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), which held that a biological parent can partially waive their superior custodial rights to a non-biological parent, was not contingent upon the fact that the case involved a same-sex couple. Therefore, the legalization of same-sex marriage in *Obergefell v. Hodges*, 576 U.S. 644 (2015), did not affect the doctrine of partial waiver established in *Picklesimer* in any way. The Court

therefore remanded to the circuit court for further custody proceedings to determine whether S.R.V. waived her superior custodial rights to J.S.B.

***M.S.S. v. J.E.B.*, 638 S.W.3d 354 (Ky. 2022)**
Opinion of the Court by Chief Justice Minton. All sitting. Hughes, Keller, Nickell, and VanMeter, JJ., concur. Lambert, J., dissents by separate opinion in which Conley, J., joins. J.E.B. and his wife, D.J.B., filed in Warren Family Court a petition to adopt a minor child (Child) without the consent of Child's biological living parents under KRS 199.502. After a hearing, the family court found that Child's biological mother, M.S.S., had abandoned Child for a period of not less than ninety days under KRS 199.502(1)(a). As such, the family court granted J.E.B. and D.J.B.'s petition for adoption, which terminated M.S.S.'s parental rights to Child. M.S.S. appealed to the Court of Appeals, which affirmed the family court's judgment.

The Kentucky Supreme Court granted discretionary review to consider, among other things, whether the Cabinet for Health and Family Services was required to initiate an action to involuntarily terminate Child's biological living parents' parental rights under KRS Chapter 625 before J.E.B. and D.J.B. could file a petition for adoption without the consent of the biological living parents under KRS Chapter 199. The Court held that the Cabinet, or any other entity, is not required to initiate an action for involuntary termination of parental rights under KRS Chapter 625 before the filing of a petition to adopt a child without the consent of the biological parents under KRS 199.502. KRS 199.502 makes clear that an adoption under that statute itself terminates the biological parents' parental rights. As such, it was not error for the family court to grant the adoption of Child under KRS 199.502 without the biological parents' parental rights first having been terminated under KRS Chapter 625. Additionally, the Court concluded that the family court's determination under KRS 199.502(1)(a) was supported by substantial evidence. Accordingly, the Court affirmed the decision of the Court of Appeals.

***Commonwealth, Cabinet for Health & Fam. Servs., ex rel. Child Support Enforcement v. B.N.T.*, ___ S.W.3d ___, 2022 WL 1284026 (Ky. Apr. 28, 2022)**
Opinion of the Court by Justice Lambert. All sitting; all concur. A married man, B.N.T., had an affair with K.S. K.S. became pregnant during their affair, and B.N.T. sought to establish the paternity of the child. At B.N.T.'s request, the Cabinet filed a paternity complaint asserting that B.N.T. was the child's father. In response, K.S. alleged that her fiancé was the father, though she never disclosed the identity of her fiancé. B.N.T. and K.S. entered into an agreed order which stated that B.N.T. was not the child's father, that K.S.'s anonymous fiancé was the father, and that both parties waived any genetic testing to determine the child's paternity. Nearly three and a half years after the agreed order was entered, K.S. (who was receiving public benefits for the child) filed an application for Child Support Services alleging that B.N.T. was the child's father. The Cabinet then initiated child support and paternity actions against him. The Cabinet also filed a CR 60.02 motion to set aside the agreed order based on its belief that it was fraudulent. The family court found that the Cabinet's motion was untimely under CR 60.02 and denied it. The Cabinet appealed, and the Court of Appeals affirmed.

The Supreme Court reversed. It held that the family court lacked subject matter jurisdiction under KRS 406.021 to enter the agreed order and it was therefore void ab

initio. The Court reasoned that KRS 406.021 allows the court to determine paternity, but that it does not allow for a determination of non-paternity without a corollary determination of actual paternity. Accordingly, because the agreed order established the non-paternity of B.N.T. without any further fact finding that affirmatively established the child's actual paternity, the family court lacked the inherent power to enter it. The Court vacated the order and remanded for further proceedings.

EMINENT DOMAIN:

***Borders Self-Storage & Rentals, LLC v. Commonwealth, Transp. Cabinet, Dep't of Highways*, 636 S.W.3d 452 (Ky. 2021)**

Opinion of the Court by Justice Nickell. All sitting; all concur. The Transportation Cabinet instituted a condemnation action against Borders Self-Storage & Rentals, LLC, to obtain a right-of-way for highway construction. At a jury trial, Borders sought to introduce the assessed tax value of the real property as reflected in the records of the Property Valuation Administrator which was approximately $62,500 more than the value established by the trial court's appointed commissioners. The circuit court ruled Borders was not entitled to introduce the PVA assessment. The jury's verdict was in line with the testimony provided by the commissioners' valuation.

On appeal, the Court of Appeals concluded existing precedent permitted admission of a PVA's tax assessed value only if the value was established by the landowner and the evidence was proffered by the *Commonwealth* as a statement against interest of the landowner. Although Borders had established the value, the Court of Appeals found the trial court correctly ruled *landowners* may not introduce PVA values. The Court of Appeals expressed disagreement with the rule and urged the Supreme Court to reconsider prior precedents.

On discretionary review, after acknowledging prior precedents applying the rule date back over sixty years, predating the Kentucky Rules of Evidence by nearly three decades, and no opportunity had arisen to examine the ancient rule following the adoption of these evidentiary rules, the Supreme Court reversed the Court of Appeals. The Supreme Court examined the evidentiary rules and held PVA tax records constitute public records not excluded by the hearsay rule under KRE 803(8). It concluded PVA tax values are relevant to establishing the fair market value of property sought to be condemned and should not be excluded from admission regardless of which side seeks introduction, thereby overruling the ancient rule discussed in *Culver v. Commonwealth, Department of Highways*, 459 S.W.2d 595 (Ky. 1970), and *Commonwealth, Department of Highways v. Brooks*, 436 S.W.2d 499 (Ky. 1969).

EMPLOYMENT LAW:

***Kearney, v. Univ. of Ky.*, 638 S.W.3d 385 (Ky. 2022)**

Opinion of the Court by Justice Hughes. Minton, C.J.; Conley, Keller, Nickell, and VanMeter, JJ., not sitting. All concur. Lambert, J., not sitting. Dr. Paul Kearney, a trauma surgeon and tenured professor of surgery at the University of Kentucky (UK or University), initiated an action against UK under the Kentucky Whistleblower Act (KWA). Dr. Kearney claimed that the University retaliated against him, including suspending his clinical privileges to practice medicine at the University's hospital and clinics, because he brought to light the University administration's non-compliance with an internal administrative regulation, mismanagement, waste, fraud or abuse of authority. UK countered that the acts which Dr. Kearney complained about were

disciplinary-related acts only and were the result of Dr. Kearney's improper, unprofessional behavior over many years when interacting with staff and students, and more recently, a patient. UK moved for summary judgement asserting the Dr. Kearney could not establish a prima facie case of whistleblower retaliation. The trial court granted summary judgment and the Court of Appeals affirmed that decision. This Court granted discretionary review to determine if any of Dr. Kearney's statements at issue are protected disclosures under the KWA. *Held*: Summary judgment was properly granted. Kentucky Revised Statute 61.102(1) refers to an administrative regulation duly promulgated pursuant to KRS Chapter 13A, and thus Dr. Kearney's allegations related to UK's internal administrative regulation, AR 3:14, did not constitute a disclosure protected by the KWA. Dr. Kearney's other identified communications also did not meet the KWA's requirements. The communication related to UK's alleged mismanagement of the Kentucky Medical Services Foundation's (KMSF) funding lacked objective facts or information, a prerequisite for a disclosure protected by the KWA. Furthermore, the affidavit related to KMSF's use of funds, which was filed in the record of the case after Dr. Kearney's disciplinary action concluded and after UK notified him that his salary was being reviewed due to the material change in his employment status, was not evidence sufficient to allow a reasonable person to conclude the affidavit's disclosures were a contributing factor in Dr. Kearney's May 2016 salary reduction.

FARM ANIMALS ACTIVITY ACT:

***Keeneland Association, Inc. v. Prather*, 627 S.W.3d 878 (Ky. 2021)**

Opinion of the Court by Justice Hughes. Minton, C.J.; Conley, Keller, Lambert, and Nickell, JJ., sitting. All concur. VanMeter, J., not sitting. During the 2016 September Yearling Sale at Keeneland, a horse broke loose from its handler and headed toward pedestrians who were crossing a path between barns. One pedestrian, Roy J. Prather, fell while attempting to flee and fractured his shoulder. Prather and his wife, Nancy Prather, filed suit in Fayette Circuit Court alleging various negligence claims against Keeneland and Sallee Horse Vans, Inc., the transportation company that agreed with the horse's purchaser to transport it to its destination. Keeneland and Sallee argued that the Prathers' claims were barred by Kentucky Revised Statute (KRS) 247.402, a provision of the Farm Animals Activity Act (FAAA) that limits the liability of farm animal activity sponsors and other persons as to claims for injuries that occur while engaged in farm animal activity. Finding the FAAA applicable, the trial court granted summary judgment in favor of Keeneland and Sallee. On appeal, the Court of Appeals raised a new legal theory *sua sponte* and reversed the trial court's decision. Noting that in a separate statute the legislature recognized the sale of race horses as integral to horse racing activities and that horse racing activities are specifically exempted from the FAAA, the appellate court concluded the trial court erroneously dismissed the Prathers' claims.

Prather qualified as a farm animal activity participant, Keeneland qualified as a farm animal activity sponsor and Sallee was engaged in farm animal activity at the time of Prather's injury. The FAAA generally precludes Prather, who was reasonably warned of the inherent risks of the farm animal activity at Keeneland, from bringing a claim against Keeneland and Sallee. Prather failed to prove that either the defendants were engaged in horse racing activities, which would render the FAAA inapplicable, or that one of the exceptions in KRS 247.402(2) applied. Nothing in the record supported a conclusion that any of the parties were engaged in horse racing activities because the

only activities occurring on Keeneland premises were the transport of horses, by hand, to and from the backside of the track, sales arena and transport vans were the horses were loaded and taken off the premises after being purchased. Further, Prather's injury stemmed from an inherent risk of engaging in farm animal activity. While it was unclear what precisely caused the horse to break loose from its handler, the FAAA recognizes the unpredictability of a farm animal as an inherent risk, KRS 247.4015(9)(b). The injury unquestionably stemmed from the horse's behavior in escaping the handler. Holding Keeneland or Sallee liable for Prather's injury would contradict the purpose of the FAAA and the protections afforded to farm animal activity sponsors, professionals and persons for farm animal behavior. The Supreme Court reversed the Court of Appeals and reinstated the order granting summary judgment.

GUARDIANSHIP:

***Jackson v. Legacy Health Services, Inc.*, 640 S.W.3d 728 (Ky. 2022)**

Opinion of the Court by Justice Lambert. All sitting; all concur. This appeal arose from an order of the Fayette Circuit Court denying the motion of the Defendants to dismiss or, in the alternative, stay a lawsuit and compel arbitration of medical malpractice claims brought by Christopher Jackson, III, as guardian for his mother. The circuit court determined that Christopher did not have the authority as his mother's guardian to enter into a binding but voluntary arbitration agreement on his mother's behalf. Defendants appealed. The Court of Appeals reversed. After review, the Supreme Court held that a guardian has the authority to bind their ward to contracts that limit or deprive the civil rights of their ward only to the extent necessary to provide needed care and services to the ward, as clearly indicated by the plain language of KRS 387.660. To determine if a contract is voidable for a guardian's lack of authority demands a two-part analysis: courts must determine if (1) there was a limitation or deprivation of the ward's civil rights, and (2) the limitation or deprivation of rights was only to the extent necessary to provide needed care and services to the ward. If the contract restricted the civil rights of the ward beyond that which was required for the guardian to secure needed care and services to the ward, then the guardian lacked the authority to enter into the contract on their ward's behalf, and the contract is void. If it deprives the ward of her rights only to the extent necessary, then the guardian has the authority to enter the contract and it is valid. In the instant case, the Supreme Court determined that, because the arbitration agreement was not a condition of the guardian's admission to the facility, and the arbitration agreement waived the ward's right to a trial by jury, it was void.

IMMUNITY:

***Meinhart v. Louisville Metro Government*, 627 S.W.3d 824 (Ky. 2021)**

Opinion of the Court by Justice Nickell. All sitting; all concur. Louisville Metro Police Department officer engaged in a pursuit of a suspected perpetrator of an assault and purse snatching. Less than two minutes into the pursuit, the suspect ran a traffic light and struck another vehicle, killing a minor passenger and injuring multiple others. Decedent's estate and injured parties filed suit. After several years of discovery and litigation, including an interlocutory appeal to the Court of Appeals, the trial court denied officer's renewed motion for summary judgment on qualified immunity grounds finding his actions were ministerial and material issues of fact existed. The trial court further denied Louisville Metro Government's motion for summary judgment on sovereign immunity grounds.

On interlocutory appeal, the Court of Appeals expressly rejected the trial court's conclusion officer's actions in initiating and continuing pursuit were ministerial, found them to be discretionary, and held officer was entitled to qualified immunity. The Court of Appeals, also concluding Louisville Metro Government was entitled to sovereign immunity, fully reversed the trial court and remanded for entry of orders of dismissal.

On discretionary review, the Supreme Court affirmed the Court of Appeals. First, it rejected appellants' argument interlocutory appeals are inappropriate in qualified immunity cases and reiterated the fundamental purposes of immunity. Next, after examining the Standard Operating Procedures covering pursuits, the Supreme Court concluded significant, independent professional judgment is necessary in making the determination of whether to initiate, continue, or terminate a pursuit, thereby rendering such decisions discretionary and entitled to qualified immunity. Next, the Supreme Court held appellants had failed to produce evidence establishing the officer acted in bad faith despite the years of discovery and appellants' attempts to piece together snippets of testimony to establish same were unconvincing. Finally, observing the matter had been pending for nearly fourteen years, the Court noted this case illustrated an extreme failure of one of the purposes of immunity which is to free the possessor from the burdens of defending the action.

***Independence Bank v. Welch*, 636 S.W.3d 528 (Ky. 2021)**
Opinion of the Court by Justice Hughes. Minton, C.J.; Conley, Keller, Lambert, and VanMeter, JJ., sitting. All concur. Nickell, J., not sitting. Anthony W. Noel was seriously injured in a collision between his bicycle and a police cruiser driven by Trevor Welch, a Lexington police officer and employee of the Lexington-Fayette Urban County Government (LFUCG). He filed suit against Welch in his individual and official capacities and against LFUCG and two of its divisions. The LFUCG defendants moved for dismissal, asserting, among other things, sovereign immunity as protection from civil judgments and the costs and burdens of defending such actions. Noel countered that LFUCG's purchase of a retained-limit insurance policy, purchased for coverage beyond the limits of its self-insurance policy, waived sovereign immunity up to policy limits. The trial court disagreed, concluding that the LFUCG defendants are entitled to sovereign immunity and dismissing all claims against them. The Court of Appeals affirmed.

On discretionary review, the Supreme Court determined that LFUCG did not waive its sovereign immunity from Noel's tort claims. Kentucky Revised Statute (KRS) 67.180 allows a county to purchase insurance policies and permits suits instituted on such policies against a county but explicitly states that it is only for the purpose of measuring the liability of the insurance carrier to the injured party, creating a limited waiver of sovereign immunity. It also states that such a judgment cannot be enforced or collected against the county. The Court distinguished self-insurance from insurance and explained that LFUCG's self-insurance policy does not constitute the purchase of insurance because there is no risk shifting – the risk always remains with LFUCG. The Court was not convinced by Noel's argument that LFUCG's excess retained-limit insurance policy, which is not triggered until the retained limit of $2 million is satisfied, constituted a wavier of sovereign immunity for liability between $2 million and $5 million because that would result in an intermittency of exposure, is

entirely unworkable and cannot be what the legislature intended. The Court presumes the legislature is aware of the Court's longstanding interpretation that KRS 67.180 provides only a very limited waiver of sovereign immunity and if it intended a broader waiver as advocated by Noel, it could have so stated. Finding the statute and legislative intent clear, the Court affirmed the Court of Appeals with a different legal analysis.

***Martin v. Wallace*, ____ S.W.3d ___, 2022 WL 1284030 (Apr. 28, 2022) (petition for rehearing pending)**

Opinion of the Court by Justice Nickell. All sitting. Minton, C.J.; Conley, Hughes, Keller, and Lambert, JJ., concur. VanMeter, J., concurs in result only. Officer Ben Martin arrested Durbin Wallace for assault following an investigation of an incident involving a five-year-old passenger on Wallace's school bus. The charge was later amended to harassment and a jury found Wallace not guilty. Wallace filed a civil suit against Martin and the school superintendent alleging malicious prosecution, abuse of process, and defamation. Martin moved for summary judgment on grounds of qualified official immunity and, alternatively, failure of proof by Wallace on elements of his claims including malice or lack of probable cause. Two years after the suit began, summary judgment was entered after the trial court concluded Martin acted in good faith in the investigation, no evidence of malice or bad faith had been presented, and Martin was thus entitled to qualified official immunity.

The Court of Appeals reversed in part, finding good faith and malice to be mutually exclusive, intentional torts preclude acting in good faith, and relying on *Martin v. O'Daniel*, 507 S.W.3d 1 (Ky. 2016), held qualified official immunity is inapplicable to malicious prosecution claims. Further, because defamation claims require proof of malice, qualified official immunity is inapplicable to such claims. Finally, the Court of Appeals found the trial court correctly dismissed the abuse of process claim against Martin as the allegations regarding that claim applied only to the superintendent.

On discretionary review, the Supreme Court affirmed in part and reversed in part. First, it held the Court of Appeals correctly relied on Martin to conclude the trial court erroneously granted Martin immunity as a matter of law on the malicious prosecution and defamation claims. However, the Supreme Court concluded the trial court's grant of summary judgment was still proper as the record contained no evidence of malice or lack of probable cause by Martin. The failure of proof of essential elements of his claims was fatal to Wallace's allegations of malicious prosecution and defamation. Thus, the Court of Appeals' decision was erroneous and was therefore reversed in part. Finally, the Supreme Court held the Court of Appeals correctly determined Wallace failed to allege facts supporting a claim for abuse of process against Martin and affirmed as to that issue.

INJUNCTIVE RELIEF:

***Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021)**

Opinion of the Court by Justice VanMeter. All sitting; all concur. Hughes, J., concurs by separate opinion in which Minton, C.J., joins. The Supreme Court granted transfer of this case from the Court of Appeals to review its decision to uphold the temporary injunction issued by the Franklin Circuit Court which enjoined implementation of certain legislation enacted during the 2021 session of the General Assembly (House Bill 1, Senate Bill 1, and Senate Bill 2) which governed Governor Andy Beshear's

ability to respond to emergencies as granted in KRS Chapter 39A, pending an adjudication of the constitutionality of that legislation. As a threshold matter, the Supreme Court held that the case presented a justiciable controversy and thus was reviewable. As to the propriety of the issuance of the temporary injunction, the Supreme Court held that the trial court's issuance of injunctive relief was unsupported by sound legal principles because occasioned by an erroneous application of the law. Specifically, the Supreme Court found the Governor failed to meet the requirements set forth in *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978), to obtain a temporary injunction: show a probability of irreparable injury, present a substantial question as to the merits of his Complaint, and persuade the court that the equities balanced in favor of issuance. Accordingly, the Court reversed the trial court's issuance of a temporary injunction and instructed the court, on remand, to dissolve the injunction and proceed with a review of the merits of the Complaint.

***Beshear v. Goodwood Brewing Co.*, 635 S.W.3d 788 (Ky. 2021)**
Opinion of the Court by Justice Keller. All sitting; all concur. Goodwood Brewing Company, LLC, d/b/a Louisville Taproom, Frankfort Brewpub, and Lexington Brewpub; Trindy's, LLC; and Kelmarjo, Inc., d/b/a The Dundee Tavern (collectively referred to as "Goodwood") filed a lawsuit in Scott Circuit Court against Governor Andy Beshear, Cabinet for Health and Family Services Secretary Eric Friedlander, and the Commissioner of the Kentucky Department of Public Health, Dr. Steven Stack (collectively referred to as "the Governor") seeking declaratory relief, a temporary injunction, and a permanent injunction regarding the Governor's orders related to COVID-19. Goodwood also filed a motion for a temporary injunction pursuant to Kentucky Rules of Civil Procedure (CR) 65.04.

Goodwood's CR 65.04 motion for a temporary injunction was heard in the Scott Circuit Court during which the Governor requested a date for an evidentiary hearing where he could present evidence regarding the public interests at stake as well as the likelihood of harm. The trial court denied the Governor's request. After hearing arguments, the Scott Circuit Court entered an opinion and order granting temporary injunctive relief to Goodwood. The circuit court enjoined the Governor from issuing or enforcing new restrictions against "only these specific [plaintiffs]" and enjoined the "Defendants and their designees and agents . . . from enforcing against only the individual Plaintiffs herein at their now-existing locations" a host of specifically enumerated executive orders, administrative regulations, and directives.

The Governor sought relief from the Scott Circuit Court's order in the Court of Appeals pursuant to CR 65.07, and the Supreme Court accepted transfer of the case. The Supreme Court held that evidentiary hearings at which witnesses testify and are cross-examined are the preferred procedure to resolve motions for a temporary injunction. In this case, the Scott Circuit Court abused its discretion in failing to hold an evidentiary hearing, and the Court vacated its order granting a temporary injunction. The Court declined to remand the issue back to the trial court for an appropriate hearing, holding the issues surrounding the temporary injunction were moot, as the specific orders, regulations, and directives the Governor was enjoined from enforcing had been rescinded and there was no practical relief the Court could grant either party.

INSURANCE LAW:

Mosley v. Arch Specialty Ins. Co., 626 S.W.3d 579 (Ky. 2021)

Opinion of the Court by Chief Justice Minton. All sitting; all concur. The Kentucky Supreme Court accepted discretionary review in this third-party bad-faith case to determine whether Arch Specialty Insurance Company and National Union Fire Insurance Company acted in bad faith while mediating negligence and wrongful death claims asserted by Crystal Lee Mosley against insureds of Arch and National Union after her husband's death in a coal mining accident. The trial court summarily dismissed bad-faith claims against both companies, finding that the Plaintiffs had failed to state a claim for which relief could be granted, as well as failed to prove a genuine issue of material fact existed. Further, the trial court found that any evidence of National Union's and Arch Specialty's bad faith conduct would be inadmissible under Kentucky Rule of Evidence 408 because it was mediation conduct. The Court of Appeals affirmed.

On discretionary review, the Supreme Court affirmed the decision of the Court of Appeals but found that evidence of bad faith conduct is admissible under KRE 408, but not in this instance because the Plaintiffs had failed to show any evidence would reveal prohibited bad faith conduct.

***Davis v. Progressive Direct Ins. Co.*, 626 S.W.3d 518 (Ky. 2021)**

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Conley, Hughes, Keller, Nickell and VanMeter, JJ., concur. Lambert, J., dissents without separate opinion. While driving her motorcycle, Linda Davis collided with a horse-drawn wagon. The issue before the Court was whether a horse-drawn wagon qualified as either a "motor vehicle" or a "trailer." The Supreme Court held that horse-drawn wagons failed to meet either definition because the horse and buggy operate as a single integral unit and is muscle powered. Additionally, the Court held that Kentucky's Motorized Vehicle Reparations Act does not include horse-drawn wagons within its definition of "motor vehicle." Consequently, the Supreme Court affirmed the Court of Appeals opinion affirming the Wayne Circuit Court's grant of summary judgment in favor of the insurance company.

***Thomas v. State Farm Fire & Cas. Co.*, 626 S.W.3d 504 (Ky. 2021)**

Opinion of the Court by Justice VanMeter. All sitting; all concur. While operating a home day care center Bessie Perkins injured two children, S.T. and C.R. The issue before the Court was whether the child care services exclusion in the Perkins's home insurance policy operated to exclude coverage not only for Bessie, but her husband as well. The Supreme Court held that the term "any insured" broadened the exclusion to include injuries triggered by one insured in connection with the activities of another. Consequently, the Supreme Court affirmed the Court of Appeals opinion which affirmed the Madison Circuit Court's grant of summary judgment in favor of State Farm.

***United States Liab. Ins. Co. v. Watson*, 626 S.W.3d 569 (Ky. 2021)**

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Conley, Keller, Nickell, and VanMeter, JJ., concur. Lambert, J., dissents by separate opinion. Civil Appeal, Discretionary Review Granted. After William G. Watson settled his dram shop claim against Pure Country, LLC, an establishment insured by United States Liability Company (USLI), he made a bad faith claim against USLI pursuant to Kentucky's

Unfair Claims Settlement Practices Act. The trial court ultimately concluded the claim was barred by the five-year statute of limitations because Watson's claim against Pure Country was settled before August 9, 2012, the date five years before the filing of the bad faith claim. The Court of Appeals reversed the trial court, perceiving the settlement to have occurred in December 2012, making Watson's August 2017 bad faith claim timely. Held: The trial court correctly concluded that Watson's bad faith claim against USLI was barred by the statute of limitations. The facts of the case support the trial court's finding regarding a binding settlement more than five years before the filing of the bad faith claim because the essential elements of an enforceable contract were present no later than July 30, 2012.

***Nichols v. Zurich Am. Ins. Co.*, 630 S.W.3d 683 (Ky.2021)**
Opinion of the Court by Justice VanMeter. All sitting; all concur. Nichols appeals the decision by the Jefferson Circuit Court and affirmed by the Court of Appeals finding that Zurich Insurance had a reasonable basis for denying Nichols' claim for underinsured motorists benefits under the commercial policy purchased by Miller Pipeline. Nichols argued that Zurich's failure to respond to his *Coots* notice, its subsequent delays in negotiating a settlement with him, and its attempt to retroactively amend the insurance policy nearly three years after the accident occurred constituted bad-faith under the UCSPA and common law principles of good faith and fair dealing. KRS 304.12-230; *Indiana Ins. Co. v. Demetre*, 527. S.W.3d 12, 26 (Ky. 2017). Zurich countered, arguing that because Miller did not intend to purchase the UIM, Zurich acted reasonably when it denied Nichols' claim and retroactively amended the policy. The Supreme Court held that Zurich's claim of mutual mistake was not reasonable because the contract between Zurich and Miller Pipeline was clear and complete. Moreover, Zurich's failure to meaningfully engage with Nichols in settlement discussions and its attempt to add a UIM rejection to the original policy violated KRS 304.12-230(1, 2, 5). Additionally, the Supreme Court held that Nichols is entitled to the internal Zurich documents relating to its initial denial of Nichols' claim because of the extraordinary delay between Nichols' notice to Zurich and Zurich taking any action in the matter.

JUDICIAL ETHICS:
***In re: Jud. Ethics Op. 101*, 626 S.W.3d 641 (Ky. 2021)**
Opinion of the Court by Justice VanMeter. All sitting; all concur. Per SCR 4.310, the Court reviewed a judicial ethics opinion of the Ethics Committee of the Kentucky Judiciary, JE-101, in which the Committee addressed two situations implicating an appearance of impropriety and a judge's obligation to recuse: a) the judge's secretary is married to an attorney appearing before the judge, and b) the judge's law clerk is married to a local assistant county attorney. In each instance, and relying upon SCR 4.300, Canon 3(E)(1), the Committee opined that public perception and the appearance of impropriety required disclosure and recusal. Importantly, however, the Committee noted that Canon 3(F) permitted the waiver of disqualification. The Court held that with respect to a trial judge's law clerk's spouse appearing in front of the judge in an adoption case, when the law clerk had no involvement in the case, the judge's isolation of the law clerk plus disclosure of the marital relationship dictated that a reasonable observer, being aware of all the facts and circumstances, would NOT reasonably question the judge's impartiality. In other words, the trial judge would not be required to recuse. The second inquiry addressed whether isolation plus disclosure would extend to other attorneys working out of the same office as the spouse attorney.

The Supreme Court held that the procedure should be followed for the particular Legal Aid of the Bluegrass office in which the spouse attorney works but is not required with respect to the other three Legal Aid of the Bluegrass offices.

MEDICAL NEGLIGENCE:

***Jewish Hosp. v. Perry*, 626 S.W.3d 509 (Ky. 2021)**

Opinion of the Court by Justice Lambert. All sitting; all concur. Appellant, Jewish Hospital, argued that KRS 311.377, as amended in 2018, rendered a root cause analysis report privileged. After the circuit court denied the hospital's motion in limine, it sought a writ of prohibition from the Court of Appeals. The Court of Appeals denied the writ, holding that the report was not created pursuant to a "designated professional review function" as required by statute.

The Supreme Court reversed and granted the writ of prohibition. The Court held: (1) the amendments to KRS 311.377 applied retroactively to this case because the amendments were procedural in nature and (2) the plain language of the statutory, alongside the context in which it was passed, demonstrates that the root cause report was created pursuant to a "professional review function" because it was the product of the retrospective review of the competency of medical professionals.

***Univ. Med. Ctr., Inc. v. Schwab*, 628 S.W.3d 112 (Ky. 2021)**

Opinion of the Court by Justice Hughes. All sitting; all concur. Reagan Brooke Shwab was diagnosed with a kidney disease which became severe in 2008, necessitating a kidney transplant. Interested in avoiding the need for lifetime immunosuppressant drugs following the transplant, Brooke consented to participate in a Phase I clinical trial that had as its goal participants achieving tolerance of a transplanted kidney and avoiding a continuing regimen of immunosuppressant drugs. Shortly after participating in the clinical trial, Brooke developed myelodysplastic syndrome (MDS), a rare form of blood cancer. Brooke and her husband filed suit against the clinical trial's medical providers alleging that her consent to the medical treatment involved in the trial was invalid pursuant to Kentucky Revised Statute (KRS) 304.40-320, the statute that provides the framework for determining when informed consent has been properly given in an action involving medical care. After eight years of discovery, the trial court found that the informed consent in this case complied with Kentucky statutory authority and federal regulations and granted summary judgment to the medical defendants. The Court of Appeals reversed, holding that the Shwabs presented enough evidence to potentially convince a jury that the medical defendants did not give them enough information to reasonably understand the clinical trial or the potential risks.

On discretionary review, the Supreme Court determined that the actions of the medical care providers satisfied KRS 304.40-320. Brooke met with five medical care providers and was informed of the trial's lack of success, substantial risks and potential complications. She also had ample opportunity to review the consent form and ensure that she understood its contents. The Shwabs introduced one expert whose testimony failed to qualify as expert testimony necessary to satisfy KRS 304.40-230(1) because he did not possess all relevant information regarding the Shwabs' discussions with medical providers and instead relied almost entirely on the Shwabs' testimony regarding the informed consent process. KRS 304.40-320(1) requires more than one physician's personal opinion regarding how he believes informed consent should work. Further, the medical defendants adequately informed Brooke of the

substantial risks inherent in the clinical trial treatment when evaluated from the standpoint of "a reasonable individual," thus satisfying KRS 304.40-230(2). No testimony established than MDS was a recognized substantial risk of the medical procedures and the Shwabs ultimately did not have a viable informed consent claim under Kentucky law. The Supreme Court reversed the Court of Appeals and remanded the case to the trial court for reinstatement of summary judgment in favor of the medical defendants.

***Ky. Guardianship Adm'rs, LLC, v. Baptist Healthcare Sys., Inc.*, 635 S.W.3d 14 (Ky. 2021)**

Opinion of the Court by Justice Keller. Minton, C.J.; Conley, Hughes, and VanMeter, JJ., concur. Lambert, J., concurs in part and dissents in part without opinion. Nickell, J., not sitting. Kali Crusenberry was admitted to Baptist Health in Corbin on August 1, 2013, for symptoms including fever, vomiting, and extreme nausea. Upon arrival, Crusenberry was diagnosed with several infections and hypokalemia (low potassium). After being treated at the hospital and sent home, Crusenberry suffered a cardiac arrest that left her permanently injured. Crusenberry sued the hospital and one of her physicians, Dr. Bathina, for her injuries. After eleven days of trial, the jury found that neither party had breached their standard of care.

On appeal to the Supreme Court, Crusenberry raised eight alleged errors. Those errors included whether the trial court improperly admitted certain evidence (such as undisclosed expert testimony), improperly excluded certain evidence (such as an incident report, certain expert testimony, and restrictions on cross-examination of witnesses), and improperly limited the hospital's legal duty in a jury instruction. The Supreme Court affirmed the Whitley Circuit Court on all issues.

***Watson v. Landmark Urology, P.S.C.*, 642 S.W.3d 660 (Ky. 2022)**

Opinion of the Court by Justice VanMeter. All sitting. All concur. The issue presented is whether the Scott Circuit Court erred, as subsequently affirmed by the Court of Appeals, in dismissing Charmin Watson's action alleging Dr. Amberly Kay Windisch failed to obtain Ms. Watson's informed consent prior to surgical placement of a mid-urethral sling to address complaints of stress urinary incontinence. The Supreme Court affirmed, noting that prior to performing a medical procedure, a health care provider is generally required to obtain the patient's informed consent, the requirements of which are set forth in KRS 304.40-320. And, as in any medical malpractice claim, the plaintiff bears the burden of proof. In this case, competing medical evidence was presented as to whether Dr. Windisch's actions and disclosures complied with the applicable standard of care in obtaining Ms. Watson's informed consent, and whether they satisfied the objective standard concerning the information that a reasonable individual must be provided. Because Ms. Watson's medical expert did not render an opinion of the standard of care concerning informed consent, or specifically opine that Dr. Windisch's actions for obtaining consent fell outside the accepted standard of medical practice, the Court held that the trial court properly granted summary judgment in favor of Dr. Windisch on the issue of informed consent. Lastly, the Court addressed Dr. Windisch's argument that Ms. Watson failed to adequately plead failure of informed consent. Considering that the first notice regarding lack of informed consent arose in Dr. Wilson's October 2018 deposition, almost six years following the November 2012 surgery and the filing of the complaint in 2014, Dr. Windisch reasonably believed the medical negligence alleged only

regarded the surgical implanting of the urethral sling. The Court held that a general claim of medical malpractice without specific mention of informed consent fails to give adequate notice of the essential nature of the claim. Because identifying which professional standard the doctor is alleged to have violated is essential to a medical malpractice claim, a medical malpractice claim based upon lack of informed consent must be specifically pled since a generalized claim of medical malpractice fails to give fair notice to the defendant that informed consent will be at issue. The Court encouraged trial courts to allow plaintiffs to freely amend their complaints in appropriate situations, as the information necessary to plead informed consent may not always be available immediately to plaintiffs.

PREMISES LIABILITY:

***Phelps v. Bluegrass Hosp. Mgmt., LLC*, 630 S.W.3d 623 (Ky. 2021)**

Opinion of the Court by Justice Nickell. All sitting; all concur. Phelps slipped and fell at a restaurant managed by Bluegrass Hospitality Management, then filed a premises liability claim. After about two years of discovery had taken place, Fayette Circuit Court granted Bluegrass Hospitality Management's motion for summary judgment.

On appeal, the Court of Appeals affirmed the grant of summary judgment citing two grounds. First, the condition of the floor was open and obvious to Phelps. Second, Phelps had failed to produce sufficient evidence of negligence by BGH to establish a material issue of fact existed.

On discretionary review, the Supreme Court first held Phelps failed to produce proof of a material fact—that being any evidence of a hazardous condition on BGH's premises. Phelps would have needed some corroborative proof beyond her own speculative testimony and belief to create a material issue of fact. Second, the Supreme Court agreed with Phelps the Court of Appeals had misapplied the open and obvious doctrine as an alternative ground to grant summary judgment in her case, but this did not rise to the level of reversible error. Under a comparative fault system of negligence like Kentucky has now, the open and obvious nature of a hazard is only a circumstance the trier of fact can consider in apportioning fault. Only in rare instances where a plaintiff's conduct in the face of an open and obvious hazard is so clearly only the fault of plaintiff's injury is summary judgment warranted.

***Bramlett v. Ryan*, 635 S.W.3d 831 (Ky. 2021)**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Craig Bramlett and Stephanie Cline, individually and as co-administrators of the estate of Landon Bramlett, brought a tort action in Pike Circuit Court against A.J. and Pam Ryan alleging negligent operation of the Ryans' residential swimming pool, negligent supervision, and gross negligence resulting in the drowning death of Landon Bramlett, which occurred at a pool party hosted by the Ryans at their home. The circuit court granted summary judgment in favor of the Ryans, finding that the Ryans owed no duty to warn Landon of the danger posed by swimming in the pool and finding that the Ryans fulfilled any duty owed to supervise and control the conduct of the children present at the pool party. The Court of Appeals affirmed.

The Kentucky Supreme Court accepted discretionary review to determine the applicability of the common law distinctions of licensee and invitee in identifying the scope of duty owed by the Ryans to the Bramletts. The Court first determined that

disputes of material fact existed as to the conditions and circumstances surrounding Landon's death, and those disputed facts were sufficient to convince a reasonable jury that the Ryans breached their duty, whatever it may be, to Landon. As such, the Court held that the trial court erred in granting summary judgment.

The Court next held that a property owner owes a reasonable duty of care to guests invited to her property to participate in an activity. The Court specified that the determination of the existence of a duty is still a legal question for the trial court to determine. However, the court need only consider (1) whether the property owner invited or ratified the presence of the guest on the premises, and (2) whether the guest was injured or harmed in the course of or as a result of an activity taking place on the premises. If both requirements are met, the property owner owes a duty of reasonable care to the guest as a matter of law. Accordingly, the Court reversed the Court of Appeals and remanded the case to the circuit court for further proceedings.

PROTECTIVE ORDERS:

***Smith v. Doe*, 627 S.W.3d 903 (Ky. 2021)**

Opinion of the Court by Justice Lambert. All sitting; all concur. A case wherein an interpersonal protective order (IPO) was entered between a minor petitioner and a minor respondent by the general division of the Jefferson District Court. The petitioner was represented by counsel but the respondent was not. The Jefferson Circuit Court affirmed. The Court of Appeals reversed and remanded with orders that the IPO be vacated. The basis for the Court of Appeals' holding was that the general division of district court lacked jurisdiction over the case because the juvenile division of district court has exclusive jurisdiction over cases involving a minor respondent. The Kentucky Supreme Court affirmed the Court of Appeals on different grounds, and remanded with orders that all traces of the IPO be removed from the record.

Preliminarily, the Supreme Court held that the collateral consequences exception to mootness permitted review of the case notwithstanding that the IPO was no longer in effect. It then held that the general division of district court properly exercised jurisdiction over the case, as KRS Chapter 456 grants concurrent jurisdiction to both district court and circuit court over IPO cases and does not differentiate between adult and minor parties for the purposes of jurisdiction. However, an IPO hearing involving a minor petitioner and/or a minor respondent must be made confidential. It next held that, under CR 17.03, an unrepresented minor party to an IPO proceeding must be appointed a guardian *ad litem*. And, because the minor respondent in this case was not represented by counsel, the IPO was erroneously entered. The Court therefore reversed and remanded with orders that all traces of the IPO be removed from the record.

***Smith v. McCoy*, 635 S.W.3d 811(Ky. 2021)**

Opinion of the Court by Justice Keller. All sitting; all concur. The Warren Circuit Court issued a domestic violence protective order against Jason McCoy, restraining him from having any contact with the biological daughter of Daniel Smith. The court made oral findings of fact and conclusions of law. It also fully and accurately completed Administrative Office of the Courts (AOC) Form 275.3, finding "[f]or the Petitioner against the Respondent in that it was established, by a preponderance of the evidence, that an act(s) of sexual assault has occurred and may again occur." The trial court

also filled in a pre-typed Findings of Fact and Conclusions of Law form that expressly and specifically incorporated its oral findings of fact and conclusions of law.

McCoy appealed to the Court of Appeals. Concluding that the trial court did not make sufficient written factual findings, the Court of Appeals remanded the case to the circuit court for entry of written findings of fact. On discretionary review, the Supreme Court held that the trial court included its essential findings of fact on AOC Form 275.3. The Court saw no need to require busy family courts to transcribe their clear oral findings in protective order cases when they also completely and accurately fill out AOC Form 275.3 and issue a written order explicitly incorporating their clear oral factual findings. Accordingly, the Supreme Court reversed the Court of Appeals and reinstated the domestic violence protective order.

PUBLIC PENSIONS:

***City of Villa Hills v. Ky. Ret. Sys.*, 628 S.W.3d 94 (Ky. 2021)**

Opinion of the Court by Chief Justice Minton. Conley, Hughes, Keller, Lambert and VanMeter, JJ., sitting. All concur. Nickell, J., not sitting. We accepted discretionary review to consider the application of what is known as the pension-spiking statute, Kentucky Revised Statute (KRS) 61.598. KRS accrued $200,000 in actuarial costs against the City of Villa Hills following the retirement of one of its employees. KRS argued that the increases in the employee's compensation over the five years preceding his retirement was "not the direct result of a bona fide promotion or career advancement." KRS then places the burden on the City to pay the added actuarial costs of the retiree's pension benefits. The City raised several objections on appeal: (1) the Retirement Systems applied KRS 61.598 in an improperly retroactive manner to compensation paid to the employee before the effective date of the statute; (2) the burden of proof was improperly placed on the City to prove the 2 existence of a bona fide promotion related to the pay raise; (3) the courts below erroneously concluded the assessment was supported by substantial evidence that the employee did not experience a bona fide promotion; and (4) that KRS 61.598 is unconstitutional for being arbitrary, overbroad, an ex post facto law, and a law violating the Contracts Clause. We affirmed the Court of Appeals decision that the burden of the extra costs remained with the City, as the employee's promotion as not a direct result of a bona fide promotion.

***Jefferson Cnty. Sheriff's Off v. Ky. Ret. Sys.*, 626 S.W.3d 554 (Ky. 2021)**

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Conley, Hughes, Keller, Lambert, and VanMeter, JJ., sitting. All concur. Nickell, J., not sitting. Appellant sought review of an order and opinion of the Court of Appeals holding under KRS 61.598 that an assessment imposed on Appellant by Appellee Kentucky Retirement Systems was proper for lack of a showing of a bona fide promotion or career advancement, even though the Appellant's employee simply took bona fide unpaid sick leave then returned to work the next fiscal year to his normal compensation. Appellants claimed on appeal to the Supreme Court (1) that KRS 61.598 should not apply because the employee's compensation did not actually increase, so it was improper for the Retirement Systems to impose an assessment; and (2) that the burden of proving a justification for the pay increase was improperly assigned to the Appellant instead of the Appellee Retirement Systems.

First, the Supreme Court held for the Appellant, that KRS 61.598 contemplates compensation "increases" subject to assessment. Simple comparison of gross compensation in fiscal years may show a positive difference, but the difference might not be a true "increase," for instance where, as here, the employee's pay did not truly increase and they just took time off and later returned to previous pay. Second, the Supreme Court held that where an employee's compensation actually increases, the employer bears the burden of proving a "bona fide promotion or career advancement" to justify the increase, not the Retirement Systems.

The Supreme Court reversed the Court of Appeals, holding the assessment was improper.

***Ky. Ret. Sys. v. Jefferson Cnty. Sheriff's Off.*, 630 S.W.3d 610 (Ky. 2021)**
Opinion of the Court by Chief Justice Minton. Minton, C.J.; Conley, Hughes, Keller, Lambert, and VanMeter, JJ., sitting. All concur. Nickell, J., not sitting. Appellant Kentucky Retirement Systems sought review of a trial court's reversal of the Appellant-agency's imposition of an assessment under KRS 61.598 for purported "pension-spiking" by Appellant with respect to two employees. The circuit court held (1) the burden of proof should have been on the Retirement Systems to prove the lack of a "bona fide promotion or career advancement" justifying the pay increase; (2) that KRS 61.598 only applies where more than one pay increase occurs within the five years preceding an employee's retirement; and (3) that overtime work is not subject to assessment by the Retirement Systems where it is bona fide, i.e., compensated in "good faith for a legitimate purpose." Appellant Retirement Systems alleged error as to each one of these conclusions. Appellee-employer then raised several constitutional claims against application of the statute, including that KRS 61.598 violated the prohibition against ex post facto laws, it violated the Contracts Clause, and that it was generally arbitrary and overbroad.

The Supreme Court held first that the hearing officer properly assigned the burden of proof to the employer in justifying an apparent compensation increase with a "bona fide promotion or career advancement." Second, it held that part of the assessment was improperly applied where an accounting fluke caused a superficial deduction in gross compensation in one fiscal year with a corresponding addition to the next fiscal year, that this was not a true "increase" in the employees' compensation under KRS 61.598. Third, the Court held that any individual annual increase in compensation in the five years preceding retirement can be subject to assessment, and that the trial court erred in requiring more than one. Fourth, the Court again reversed the trial court, holding that overtime compensation generally is subject to assessment by the Retirement Systems, even if it is worked and compensated in good faith for a legitimate purpose. Fifth, the Appellant-employer's constitutional claims were without merit, because ex post facto laws are exclusively criminal in nature, the contracts clause was not violated because no contract or contractual relationship of the employer's was retroactively affected, and the statute was not arbitrary overbroad, having passed rational basis review and since the pension system is within the obvious purview of the legislature to impose such assessments on participant-employers.

The Supreme Court reversed and remanded to the Retirement systems to recalculate any remaining assessment.

***City of Fort Wright v. Bd. of Trs.*, 635 S.W.3d 37 (Ky. 2021)**
Opinion of the Court by Justice VanMeter. Minton, C.J.; Conley, Hughes, Lambert, and Keller, JJ., sitting. Minton, C.J.; Hughes and Lambert, JJ., concur. Keller, J., concurs by separate in which Conley, J., joins. Nickell, J., not sitting. The cities of Fort Wright, Covington, Taylor Mill, and Independence appeal the decision of the Franklin Circuit Court finding that the Board of Trustees for the County Employees Retirement System (CERS) are governed by KRS 61.650 and KRS 61.545(21), which contains a "prudent investor" standard and afforded them the discretion to invest in certain unregulated hedge funds and private equity funds. The cities argued that the Board's investment conduct is governed by KRS 78.790, which requires the Board to invest within an enumerated list of financial products. The Supreme Court held that the coextensive legislative history of both KERS and CERS is clear evidence of the Board's broad, and exclusive control over investments. Specifically, the Court noted that the 2002 amendments to KRS 61.650(1) which deleted the reference to "securities which, at the time of making the investment, are, by law, permitted for the investment of funds by fiduciaries in this state" means that the Board was "no longer limited by the KRS 386.020 list" and reaffirmed the Board's "exclusive control of all investments." Justice Keller, concurring by separate opinion, noted that, although, the Board enjoyed a general grant of authority to invest in hedge funds, it was still constrained by the prudent investor standard and that "[i]f the Board is to adequately reflect [beneficiares'] investment interests with caution. . . it may look to this case, and no further, in which some beneficiaries have stated clearly their displeasure with hedge fund investment."

REAL ESTATE:
***Booth v. Lawson*, 626 S.W.3d 601 (Ky. 2021)**
Opinion of the Court by Justice Keller. All sitting; all concur. Nicole Ribiero sued K&D, Booth, and Lawson seeking rescission or damages resulting from the purchase of a home where the seller and real estate agents failed to fully comply with the statutory disclosure requirements of KRS 324.360. Ribeiro purchased a home in 2016 and claimed to have not received the seller's disclosure mandated by statute. Testimony conflicted as to whether she received the disclosure, but it was acknowledged she did not receive the disclosure in the timeframe required under KRS 324.360. Ribiero's purchase contract permitted Ribiero to rescind the contract based on a failure to receive the disclosure and allowed her to complete an inspection by an inspector of Ribeiro's choice. In addition, the contract provided Ribiero could rescind the contract based on the results of the inspection. Ribeiro's inspection identified a number of deficiencies, including the deficiencies that would later be the basis of her claim. After negotiations with K&D regarding the deficiencies discovered, Ribiero completed the closing on the home. Some months later, Ribiero made a claim under the arbitration clause of her purchase contract for rescission of the purchase or damages as a result of deficiencies in the home based on the seller's failure to disclose. She named as defendants in the action: K&D as the seller; Booth as the listing agent; and Lawson as her agent.

In a comprehensive review, the arbitrator found the merger doctrine extinguished Ribeiro's right to rescind the contract at closing based on a failure to receive a seller's disclosure. Second, Ribiero failed to show evidence of fraud or misrepresentation as required to invoke an exception to the merger doctrine. Third, Ribiero failed to show

the necessary elements of negligence in seeking statutory damages from Booth or K&D for their failure to comply with KRS 324.360. Lastly, she failed to offer evidence that her agent breached her fiduciary duty or fell below the applicable standard of care regarding the purchase of the home. Ribiero sought review of the arbitrator's award, arguing the arbitrator exceeded his authority in applying the merger doctrine, KRS 417.160(1)(c), and refused to hear evidence material to the controversy when he excluded the testimony of one of Ribiero's experts as irrelevant to the issue before him. KRS 417.160(1)(d). The circuit court upheld the arbitrator's award, and Ribiero appealed.

The Court of Appeals held that the adoption of KRS 324.360 superseded the merger doctrine as articulated in Borden v. Litchford, 619 S.W.2d 715 (Ky. App. 1981). Therefore, the arbitrator exceeded his powers when he relied on Borden to invalidate the statute. The Court of Appeals also held that Ribeiro was entitled to present her expert's testimony and that the arbitrator's refusal to allow it was an error. Based on these two issues, the Court of Appeals vacated the circuit court's order upholding the arbitration award and remanded for a new order directing a new arbitration to be granted. The defendants appealed.

The Supreme Court reversed, holding the Court of Appeals exceeded the statutory basis for vacating an arbitration award. KRS 417.160 delineates the limited basis under which a court may vacate an arbitration award. The Court held that the arbitrator did not exceed his authority in applying the merger doctrine to Ribiero's claim. Furthermore, based on Kentucky precedent, even if the arbitrator erred in applying the merger doctrine, a reviewing court may not set aside an award that is fairly and honestly made on an issue within the arbitrator's scope of authority because of a misinterpretation of the law. The Court also held that the arbitrator's exclusion of Ribiero's expert was not a failure to hear evidence for purposes of KRS 417.160(1)(d); rather, it was an evidentiary ruling on the relevance of the evidence offered. Arbitrators are empowered to determine the admissibility, relevance, and materiality of the evidence offered. The Court said that in the absence of a record of the proceedings below, a court is required to assume the evidence supported the arbitrator's decision. For these reasons, the Supreme Court reversed the Court of Appeals and ordered the reinstatement of the Jefferson Circuit Court's order upholding the arbitration award.

***Phillips v. Rosquist*, 628 S.W.3d 41 (Ky. 2021)**
Opinion of the Court by Chief Justice Minton. All sitting; all concur.
Appellants sought review of an order and opinion of the Court of Appeals reversing a trial court's injunction award to restore land Appellants claimed was adversely possessed, where Appellee years before Appellants bought the land had excavated part of it, causing water to flow over to fill a small area bordering a lake. In addition to the substantive property issue, the Appellants appealed the denial of a motion for a judge on the Court of Appeals panel to recuse.

Appellants claimed on appeal to the Supreme Court (1) that they were entitled to an injunction to refill the land to its original contours because they filed their action to recover land within 15 years of the excavation, satisfying the statute of limitations; (2) alternately, they were entitled to enforce a mutually restrictive covenant against building and excavation; and (3) that the judge on the Court of Appeals was required to recuse when he and his wife were good friends of the defendant, the judge's wife

apparently suggested the Appellee contact the judge about the case, the judge had recused from other cases in light of his wife's executive role in the local HOA governing the properties, and when a very similar canoe as Appellee's appeared to be stored on the judge's nearby property soon after it was ordered removed from the land in question.

First, the Supreme Court held that because the deed spoke at the time of delivery, the deed description established the land terminated at the edge of the body of water, and that because the allegedly infringing condition existed at the time of delivery, the deed excluded Appellant's title to the land in question. Since Appellants lacked ownership of the land, they lacked standing to bring a claim either for trespass or to recover land. Second, the Appellant did have standing under mutually restrictive covenants to bring a claim to restore the land, but because several years had passed before Appellants bought the land and several more before they brought suit, because the alleged breaching condition was open and visible to them when purchased, and because injunction would inure very little if any benefit to the Appellant but would incur great cost to the Appellee, it was held equity could not support the injunction, so the trial court abused its discretion in issuing it. Finally, the Supreme Court held in light of *Abbott Inc. v. Guirguis* that the Court of Appeals judge abused his discretion by not recusing, where the totality of the circumstances supported a reasonable question as to his impartiality, notwithstanding his assertion and subjective belief that he could remain fair and impartial.

The Supreme Court affirmed the Court of Appeals in part and reversed in part.

***Adamson v. Adamson*, 635 S.W.3d 72 (Ky. 2021)**
Opinion of the Court by Justice Conley. All sitting; all concur. In this case, the Court of Appeals affirmed the circuit court's enforcement of a mediation agreement that included a contract to sell a piece of land and transfer title. The Court of Appeals held the agreement was not a contract of sale therefore the Statute of Frauds was inoperable. Moreover, it held Charles Adamson was his wife's agent at the mediation when the contract was entered into based upon apparent authority, and equitably estopped him from arguing he was not.

The Supreme Court reversed. It held the Statute of Frauds was applicable as the contract was one for the sale of land on its own terms; additionally, the Statute of Frauds was applicable in any contract whose purpose is to transfer title to land. The Court ruled that neither Charles Adamson nor his wife nor an authorized agent of either signed the mediation agreement insofar as it applied to the contract for the sale of land, therefore the Statute of Frauds barred enforcement. Finally, the Court overruled the grant of equitable estoppel, holding a husband's representation that he would make his wife go along with any agreement is an erroneous basis upon which to find he had apparent authority to act for his wife.

STANDING:
***Beshear v. Ridgeway Properties, LLC*, ___ S.W.3d ___, 2022 WL 575442 (Ky. Feb. 24, 2022) (petition for rehearing denied)**
Opinion of the Court by Justice Hughes. All sitting; all concur. Minton, C.J., also concurs by separate opinion, in which Keller and VanMeter, JJ., join. Beans Cafe

initially filed a complaint in Boone Circuit Court on June 16, 2020 challenging the Governor's COVID-19 mandates. Attorney General Daniel Cameron intervened as a Plaintiff in the action. The Kentucky Supreme Court reversed the Boone Circuit Court's temporary injunction order that would have enjoined the enforcement of the Governor's COVID-19 orders in *Beshear v. Acree,* 615 S.W.3d 780 (Ky. 2020).

In its 2021 regular session, the Kentucky General Assembly passed three bills which amended the Governor's emergency powers under Kentucky Revised Statutes (KRS) Chapter 39A. This legislation (the 2021 Legislation) significantly lifted the restrictions on businesses, limited the Governor's orders to thirty days unless an extension is approved by the General Assembly, and directed the Cabinet for Health and Family Services to promulgate any regulations regarding infectious diseases pursuant to KRS Chapter 13A. The 2021 Legislation became effective February 2, 2021 when the Governor's vetoes were overridden by the General Assembly. That same day, the Governor filed an action in Franklin Circuit Court against the Legislature and Attorney General Daniel Cameron and that court eventually enjoined the implementation of the 2021 Legislation.

On March 11, 2021 Beans filed a Third Amended Complaint in the still-pending Boone County case advocating for the constitutionality of the 2021 Legislation. The Boone Circuit Court entered an order declaring the constitutionality of the 2021 Legislation, holding any orders to the contrary imposed by the Governor unconstitutional, and prohibiting the enforcement of any order in conflict with the 2021 Legislation against any person in the Commonwealth. Meanwhile, the Kentucky Supreme Court determined that the Franklin Circuit Court's temporary injunction enjoining the enforcement of the 2021 Legislation was improper in *Cameron v. Beshear,* 628 S.W.3d 61 (Ky. 2021).

On appeal of the Boone Circuit Court's order in *Beshear v. Ridgeway Properties,* the Kentucky Supreme Court held that Beans lacked standing because it has no injury, actual or imminent, caused by the Governor or any of the other defendants named in its Third Amended Complaint. The trial court stated that Beans "presented evidence of the injury it is suffering" but that limited evidence all predated the passage of the 2021 Legislation. Since that legislation, and pursuant to it, Beans operated under its own COVID-19 plan, choosing to comply with the Centers for Disease Control guidelines without any harm or interference from the Governor. Given Beans' lack of concrete actual or imminent injury, there was no constitutionally-required justiciable cause and the Boone Circuit Court lacked jurisdiction to grant "relief" by opining on the constitutionality of the 2021 Legislation.

Further, the Attorney General's presence in the Boone Circuit Court action did not remedy Beans' lack of standing. Kentucky's doctrine of "exclusive concurrent jurisdiction" prevents the same parties from litigating the same issue in two courts by giving priority to the court that first properly acquired jurisdiction over the parties and their dispute. The first court to acquire jurisdiction over the dispute between the Attorney General and the Governor regarding the constitutionality of the 2021 Legislation was the Franklin Circuit Court on February 2, 2021. As a result, the Attorney General was precluded from presenting a justiciable cause in Boone Circuit Court in March 2021. The Court reversed the Boone Circuit Court and remanded the matter for dismissal of the action in its entirety.

***Ward v. Secretary of State, ex rel. Adams*, ___ S.W.3d ___, 2022 WL 1284024 (Ky. Apr. 28, 2022) (petition for rehearing pending)**
Opinion of the Court by Chief Justice Minton. All sitting. Conley, Hughes, Keller, Lambert and Nickell, JJ., concur. VanMeter, J., concurs in result only by separate opinion. In 2020, the General Assembly proposed Marsy's Law, a constitutional amendment related to crime victims' rights. Appellants David M. Ward and Kentucky Association of Criminal Defense Lawyers, Inc. filed a complaint against the Secretary of State, the State Board of Elections, and the Chairperson of the State Board of Elections before the 2020 general election. The Complaint sought declaratory and injunctive relief. The Kentucky Attorney General, Marsy's Law for Kentucky, LLC, and Senator Whitney Westerfield intervened as Defendants. The trial court granted partial summary judgment in favor of the Intervening Defendants but withheld ruling on Appellant's facial challenges to the substantive provisions of Marsy's Law, finding that they were not ripe prior to the 2020 general election because the Marsy's Law constitutional amendment had not been ratified by Kentucky voters.

The parties filed cross appeals. The Court of Appeals recommended transfer, which the Supreme Court granted. While the appeals were pending, Kentucky voters ratified the Marsy's Law constitutional amendment.

On discretionary review, the Supreme Court vacated the judgment of the Franklin Circuit Court and remanded the matter with instruction to dismiss the action in its entirety without prejudice for lack of standing. The Court held that Appellants lacked constitutional standing because they had not met their burden of establishing that the alleged injuries harmed them in a concrete and particularized manner. Instead, Appellants' claims represented nonjusticiable generalized grievances because the harms asserted were shared in equal measure by all citizens of the Commonwealth.

Additionally, the Court concluded that Appellants lacked taxpayer standing because Appellants did not have an interest that was sufficiently direct, pecuniary, and substantial to invoke taxpayer standing. The Court noted that Appellants had neither cited nor was the Court aware of any authority granting taxpayer standing in similar circumstances to those presented in this case. The issues of statutory and associational standing were neither implicated nor discussed in this decision.

Finally, the Court reaffirmed its prior holding in *Westerfield v. Ward*, 599 S.W.3d 738 (Ky. 2019) (hereinafter "*Ward I*"). The Court acknowledged similarities between *Ward I* and this case. Still, the Court explained that the issues of constitutional and taxpayer standing were neither challenged nor analyzed in *Ward I*. In *Ward I*, the Supreme Court reached a final, non-appealable judgment, which remains good law.

TORTS:
***Childers v. Albright*, 636 S.W.3d 523 (Ky. 2021)**
Opinion of the Court by Special Justice Tennyson. Minton, C.J.; Conley, Hughes, Keller, and VanMeter, JJ.; and Special Justice Cheryl U. Lewis and Special Justice Julie A. Tennyson sitting. All concur. Lambert and Nickell, JJ., not sitting. William Albright was indicted by a Jefferson County Grand Jury on charges of murder and first-degree assault following a dispute outside of the gun store where Albright worked. The incident resulted in Cameron Pearson being killed and others being injured. In his

criminal case, the trial court found Albright was immune from criminal prosecution under KRS 503.085, Kentucky's "Stand Your Ground" law, and ordered that the indictments against him be dismissed with prejudice.

Various members of the Pearson Family, in their individual and representative capacities, filed a civil suit in Jefferson Circuit Court against Albright and Hardshell Tactical, LLC, the business at which Albright was working at the time of the shooting, alleging negligence and wrongful death claims. Albright and Hardshell sought dismissal of the civil action, arguing that collateral estoppel and Albright's grant of KRS 503.085(1) immunity in his criminal case required that they be immune from civil action. The trial court denied the motion, and Albright and Hardshell appealed the denial. The Court of Appeals reversed, finding that collateral estoppel applied and that the grant of self-defense immunity in Albright's criminal case barred continued litigation in the civil action.

***Louisville SW Hotel, LLC v. Lindsey*, 636 S.W.3d 508 (Ky. 2021)**
Opinion of the Court by Justice Lambert. All sitting. Minton, C.J.; Conley, Hughes, and VanMeter, JJ., concur. Keller, J., concurs in result only. Nickell, J., concurs in part and dissents in part, by separate opinion. A five-year-old child tragically drowned in the defendant hotel's pool while at a birthday party. The jury found that the child's mother was 65% responsible for the child's death, and that the hotel was 35% responsible. The jury awarded compensatory damages for medical and funeral expenses totaling $211,770.25, or $74,119.59 after apportionment. It awarded $0 dollars for the compensatory damages of loss of future earning potential, pain and suffering, and loss of consortium. The jury also awarded $3 million in punitive damages. Following the defendants' motion for judgment notwithstanding the verdict, the trial court ruled that remittitur as to the punitive damages was required. It determined that a 5-1 ratio between punitive and compensatory damages was appropriate. It applied that multiplier to the entire, pre-apportionment compensatory damages award, and reduced the punitive damage award to $1,058,851.25.

The Court held first that the trial court did not err by instructing the jury on punitive damages, as the plaintiffs presented sufficient evidence to show that the defendants acted with gross negligence as to the maintenance of the pool and failure to employ sufficient staff. The Court next held that a limited retrial on the compensatory damages of loss of future earning potential, pain and suffering, and loss of consortium were improper. First, regarding the child's loss of future earning potential, the Court overruled *Turfway Park Racing Ass'n v. Griffin*, 834 S.W.2d 667 (Ky. 1992), which held that a jury is not permitted to award zero dollars in damages in a case involving the wrongful death of a healthy and capable child. The Court reasoned that loss of future earning potential for a deceased child in a wrongful death case is the only category of compensatory damages for which the jury is not free, in its discretion, to award zero dollars in damages. Next, the Court upheld the jury's zero-dollar award for the child's pain and suffering because the jury was presented with sufficient evidence to award pain and suffering, but chose not to. Lastly, as a matter of first-impression, the Court declined to adopt a rule mandating that juries award some amount of damages for loss of consortium to the parent(s) in cases involving the wrongful death of a child. It therefore upheld the jury's zero-dollar award for loss of consortium. Next, the Court held that the 5-1 ratio utilized by the trial court to reduce the punitive damage award was not excessive under *BMW of North America v. Gore*, 517 U.S. 559 (1996). Finally,

as a matter of first impression, the Court adopted the majority rule that a remittitur ratio must be applied to the pre-apportionment compensatory damage amount, rather than the post-apportionment amount.

***City of Versailles v. Johnson*, 636 S.W.3d 480 (Ky. 2021)**
Opinion of the Court by Justice VanMeter. All sitting; all concur. The City of Versailles petitioned for discretionary review of the Court of Appeals' decision reversing the trial court's grant of summary judgment in favor of all named defendants. The Court of Appeals determined that Shirley Johnson was an invitee when she was injured in 2013 while visiting the monument marking her son's grave at the Rose Crest Cemetery, which the City of Versailles maintains, and that the cemetery had an affirmative duty to inspect and repair the monument. The Supreme Court reversed, finding that Johnson, not the cemetery, owned the monument which injured her, and that the cemetery was not obligated to inspect and repair the monument, regardless of Johnson's status as either an invitee or licensee while on cemetery grounds. The Court observed that while status-based duties continue to serve Kentuckians well in general premises liability matters, cemeteries are uniquely situated among public spaces in the Commonwealth. The Court distinguished between the purchase of a grave plot and the resulting easement – a property right which, if unassigned, passes to the owner's descendants – and any monuments or grave stones placed upon the grave plot – which are the personal property of the purchaser. The Court held that unless specifically detailed in a perpetual care agreement, the cemetery where the monument is located has no property interest in the monument and consequently no duty towards its maintenance.

***Seiller Waterman, LLC v. Bardstown Cap. Corp.*, 643 S.W.3d 68 (Ky. 2022)**
Opinion of the Court by Justice Hughes. Minton, C.J.; Conley, Lambert, and VanMeter, concur. Keller, J., concurs in result only. Nickell, J., not sitting. Bardstown Capital Corporation sought to develop Jefferson County residential property into a commercial center. Neighboring homeowners opposed the development, expressing concerns with respect to noise, drainage, and increased automobile traffic. The proposed development was ultimately approved, and the homeowners initiated an appeal of the rezoning ordinance in Jefferson Circuit Court pursuant to Kentucky Revised Statute (KRS) 100.347(3), contesting it on several grounds including the adequacy of notice of the various zoning hearings. After the neighboring homeowners' unsuccessful zoning appeal, Bardstown Capital filed a complaint against them and their attorneys for wrongful use of civil proceedings and abuse of process. In granting the homeowners' motion for summary judgment, the Jefferson Circuit Court determined that the homeowners were entitled to immunity under the *Noerr-Pennington* doctrine, which protects an individual's right to petition the government for grievances. The Court of Appeals agreed the *Noerr-Pennington* doctrine applied but applied the "sham" exception to that doctrine to reverse the trial court, holding that a fact-finder must determine the legitimacy of the homeowners' underlying appeal.

On discretionary review, the Supreme Court reversed the Court of Appeals' holding that summary judgment was improper. The Court held that the *Noerr-Pennington* affords the neighboring homeowners and Seiller Waterman immunity from wrongful use of civil proceedings claims and therefore the doctrine bars Bardstown Capital's claim. Based on the statutory right to appeal zoning decisions and the importance of the First Amendment right to petition, the Court expressly applied the *Noerr-*

Pennington doctrine to zoning litigation in the context of appeals pursuant to KRS 100.347. The Court remanded the case to the trial court for reinstatement of summary judgment in favor of the homeowners and their attorneys.

TRUSTS AND ESTATES:

***Simpson v. Wethington*, 641 S.W.3d 124 (Ky. 2022)**

Opinion of the Court by Justice Conley. All sitting; all concur. After a bench trial, the Marion Circuit Court determined the Estate of Nannie Wethington was not entitled to any portion, pursuant to the dower statute, KRS 392.020, of a $38,500 gift made by her husband, James, to their son. The gift was from money in a joint account between James and Nannie. It was made two days prior to James' death, was unknown to Nannie, and James had expressed his desire to prevent Nannie and his other children from "stealing" the money after his death. The trial court determined it was a valid *inter vivos* gift and refused to apply the dower statute. The Court of Appeals affirmed.

The Supreme Court reversed and remanded. It held Kentucky has long recognized the common law rule against fraudulent deprivation of dower, prohibiting a husband from giving a substantial portion of his estate without his wife's knowledge in order to defeat her dower right. The court also ruled KRS 392.020 has no language plainly abolishing the common law rule, nor are the statute and the common law rule irreconcilable. Per the rule, a *prima facie* case of fraud arises when a substantial portion of an estate is secretly gifted prior to the donor's death. In this case, the gift was 52% of the total personalty of the estate and was unknown to Nannie therefore, the trial court should have applied the presumption of fraud and obliged the son to overcome it with evidence from the totality of the circumstances. The Supreme Court's application of the law is *de novo* and it determined the testimony of the son confirmed the presumption of fraud. Finally, the Supreme Court remanded to the trial court to determine the amount of money from the gift Nannie's estate was entitled to, to fulfil her 50% statutory share.

***Estate of Worrall v. J.P. Morgan Bank, N.A.*, ___ S.W.3d ___, 2022 WL 1284044 (Ky. Apr. 28, 2022)**

Opinion of the Court by Justice VanMeter. All sitting; all concur. James Worrall, executor of the Estate of Phillis Worrall, appeals the decision of the Jefferson Circuit Court which affirmed the district court's order liquidating the assets of a trust valued at nearly $900,000. In 1958, James Thompson's probated will established a testamentary trust for the benefit of his daughter, Phillis Worrall. That trust terminated with Phillis Worrall's death in June 2018. James Worrall became the executor of her estate and is the sole beneficiary of her probated will. In December 2018 Worrall also became the trustee of the estate. Beginning in 2019, J.P. Morgan Bank (the "Bank") filed several motions asserting its desire to liquidate the assets of the trust. The final motion for liquidation was filed in December 2019 and the Bank claimed doing so was necessitated by James Worrall's refusal to sign a receipt and release as required by the Bank to liquidate and transfer the assets. The district court held an exceedingly short hearing, focusing on Worrall's refusal to sign a release and indemnification document, thereby delaying distribution of the trust assets. Following the hearing, Worrall was ordered to sign the document and the Bank was directed to liquidate the trust's assets, pay all applicable fees and transfer the remaining proceeds to the Receiver of the Court. The Supreme Court found the district court's hearing in this case was "woefully inadequate to address Worrall's concerns" and further found

that the Bank had violated its fiduciary and statutory obligations to the trust beneficiary. Specifically, the Court noted that the Bank's notice to Worrall did not inform him of his right to object to the distribution, nor provide him with required items, such as a trust accounting and the amount of any fees pursuant to KRS 386B.8-170 & 386B.8-180(1)(a), respectively. Further, the Court held that the Bank's actions violated KRS 386B.8-180(5) which states: "[n]o trustee [of a] trust shall request that any beneficiary indemnify the trustee against loss in exchange for the trustee forgoing a request to the court to approve its accounts at the time the trust terminates or at the time the trustee is removed or resigns . . . ." Additionally, the Court held that the Bank violated its fiduciary duty to administer the trust by liquidating the trust's assets, against Thompson's direction to distribute the trust's assets in kind. The Court remanded the case to the district court with directions to require an accounting and to assess any appropriate remedy or damages against the Bank.

WORKERS COMPENSATION:

***Sheets v. Ford Motor Co.*, 626 S.W.3d 594 (Ky. 2021)**

Opinion of the Court by Justice Keller. All sitting; all concur. VanMeter, J., concurs by separate opinion in which Nickell, J., joins. Steven Ray Sheets filed suit against Ford Motor Company alleging Ford was one of multiple parties responsible for causing his malignant mesothelioma. Ford filed a motion for summary judgment arguing, among other things, that it was immune from tort liability as an "up-the-ladder," or statutory employer, under Kentucky Revised Statute (KRS) 342.610(2)(b) of the Kentucky Workers' Compensation Act (Act). The trial court denied its motion for summary judgment in a one-sentence order. Ford appealed arguing it had a matter of right appeal on this issue under *Ervin Cable Construction, LLC v. Lay*, 461 S.W.3d 422 (Ky. App. 2015). Sheets argued that the trial court's order denying summary judgment was interlocutory and not appealable.

The Supreme Court held that all three elements of the collateral order doctrine must be met before an appellate court has jurisdiction to review an interlocutory order. The three elements are as follows: the interlocutory order must (1) conclusively decide an important issue separate from the merits of the case; (2) be effectively unreviewable following final judgment; and (3) involve a substantial public interest that would be imperiled absent an immediate appeal. The Court went on to hold that the trial court's denial of up-the-ladder immunity in this case did not involve a substantial public interest that would be imperiled absent an immediate appeal. Accordingly, the Court lacked jurisdiction to hear the appeal. The Court expressly overruled *Ervin Cable*'s holding that under the collateral order doctrine, an appellate court has jurisdiction to review a trial court's denial of a motion for summary judgment based on up-the-ladder immunity.

***Davis v. Blendex Co.*, 626 S.W.3d 523 (Ky. 2021)**

Opinion of the Court by Justice Lambert. All sitting; all concur. The employee's right foot was injured after being sprayed with a heated pressure washer. The employee missed a total of five days of work. Then, the employee, who previously worked full-time, was medically released to return to part-time work with limited duties. The employee elected to use his previously accrued paid time off and vacation hours to supplement his part-time income in lieu of seeking workers' compensation benefits and receiving only a portion of his salary. The employer presented a settlement offer to the employee based on an impairment rating from one of his treating physicians one

year and five months prior to the expiration of the statute of limitations. The employee rejected this offer. The employer later gave the employee a weeks' notice that his statute of limitations was about to expire. The employee did not file his claim until four months after the statute of limitations expired.

The Court held that the employee "returned to work" as that phrase is used in KRS 342.0011(11)(a) and interpreted in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016). As a matter of first impression, the Court held that a full-time employee who returns to part-time work due to a work-related injury, alone, does not constitute an "extraordinary circumstance" that warrants an award of temporary total disability benefits under Tipton. The Court also held that the employee's use of previously accrued paid time off and vacation hours to supplement his income did not entitle him to temporary total disability benefits. The Court reasoned that the employee chose to use those hours instead of taking a reduction in salary, and that there was no evidence that the employer, for example, fraudulently induced or coerced him into doing so. Finally, the Court held that equitable principles did not otherwise require the statute of limitations to be tolled. The Court explained that the employer did not fail to meet its notification requirements under KRS 342.040(1), as the employee did not miss seven days of work. And, the employee was apprised of both his right to file a claim and the date that his statute of limitations would run.

***Dowell v. Matthews Contracting*, 627 S.W.3d 890 (Ky. 2021)**
Opinion of the Court by Chief Justice Minton. All sitting. Conley, Hughes, Keller, Lambert, and VanMeter, JJ., concur. Nickell, J., concurs by separate opinion. In this matter, the Supreme Court addressed whether the 2018 amendment to Kentucky Revised Statute (KRS) 342.730(4), which terminates workers' compensation income benefits when the benefit-recipient reaches the age of 70 or four years from the date of injury or last injurious exposure, whichever event occurs last, violates the Contracts Clause of the federal and state constitutions. The Court rejected Adams's and Dowell's arguments and instead found that the workers' compensation system is statutory, not contractual, in nature. Accordingly, the Court affirmed the Court of Appeals, holding that those receiving or entitled to claim benefits do not have contractual rights that the statutory amendment could infringe. Justice Nickell concurred to explain that these constitutional arguments were properly preserved and strict compliance with CR 73.03 was met.

***Cates v. Kroger*, 627 S.W.3d 864 (Ky. 2021)**
Opinion of the Court by Chief Justice Minton. All sitting. Conley, Hughes, Keller, Lambert, and VanMeter, JJ., concur. Nickell, J., concurring in part and dissenting in part by separate opinion. Plaintiffs, Cates and Bean, brought separate appeals arguing that the 2018 amendment to KRS 342.730(4), which terminates workers' compensation income benefits when the recipient reaches the age of 70 or four years from the date of injury or last injurious exposure, whichever event occurs last, is unconstitutional. The plaintiffs argued the amendment violated the state and federal Equal Protection Clauses because it discriminates based on the income-benefits recipient's age. They also argued the statute is unconstitutional special legislation because it applies only to older income-benefits recipients. Both panels of the Court of Appeals upheld the statute's age classification on equal protection grounds finding that it was rationally related to a legitimate state interest in preventing workers' compensation income-benefits recipients from receiving duplicate payments in the

form of retirement benefits. Likewise, panels rejected the special-legislation challenges to the statute, holding that the statute treated all older income-benefits recipients alike. The Supreme Court affirm the Court of Appeals in both cases and agrees with its reasoning.

Additionally, the Supreme Court, like the Court of Appeals in Bean's case, chose to address Bean's improperly preserved constitutional arguments because he had substantially complied with CR 73.03. Justice Nickell concurred with the majority's holding that the statute is constitutional but dissented in the majority's decision to find Bean had substantially complied with CR 73.03.

***Wonderfoil, Inc. v. Russell*, 630 S.W.3d 706 (Ky. 2021)**
Opinion of the Court by Justice Keller. All sitting; all concur. Richard Russell sustained a work-related injury while employed by Wonderfoil, Inc. He initiated a claim for benefits pursuant to Kentucky Revised Statutes (KRS) Chapter 342, the Workers' Compensation chapter. An Administrative Law Judge (ALJ) granted permanent partial disability (PPD) benefits to Russell but found certain medical expenses were submitted untimely and were therefore non-compensable. Russell appealed the ALJ's denial of those medical expense benefits to the Workers' Compensation Board (the Board). The Board reversed the ALJ finding the expenses were submitted timely. Wonderfoil then appealed to the Court of Appeals, which affirmed the Board's decision.

The Supreme Court interpreted 803 KAR 25:096, § 11 by viewing it in the context of the entire workers' compensation regulatory scheme. The Court concluded that the regulatory scheme governing workers' compensation claims anticipates that medical expenses will be provided to the employer pre-award and throughout the litigation of the claim. It held that 803 KAR 25:096, § 11's application only post-award best effectuates the intent of the Commissioner of the Department of Workers' Claims and prevents an absurd result. In so doing, the Court affirmed the Court of Appeals.

***Time Warner Cable, Inc. v. Smith*, 635 S.W.3d 82 (Ky. 2021)**
Opinion of the Court by Justice Conley. All sitting; all concur. In this case, the ALJ concluded Ricky Smith was totally, permanently disabled. Time Warner appealed arguing the ALJ improperly concluded total disability based solely upon evidence of Smith's psychological conditions, and that no substantial evidence supported the judgment as Smith did not have any psychological restrictions placed upon him by a doctor. The Court of Appeals affirmed the ALJ.

The Supreme Court affirmed the Court of Appeals. It held as a matter of first impression that a claimant can testify to the extent and duration of his psychological injuries, but cannot make a diagnosis, and an ALJ may rely upon such testimony in making an award of total disability so long as evidence supports the psychological condition is a direct result of a physical work injury. In this case, medical evidence did support the ALJ's conclusion. Finally, the Supreme Court reiterated the holding and import of *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000), that a finding of disability is a holistic analysis of several factors, some of which are not named in the statutory scheme but nonetheless remain viable.

***O'Bryan v. Zip Express*, 636 S.W.3d 457 (Ky. 2021)**
Opinion of the Court. All sitting; all concur. Appellant, Michael O'Bryan was injured in a work-related automobile accident during the course of his employment for Appellee, Zip Express. O'Bryan filed a workers' compensation claim. The administrative law judge found he was permanently totally disabled and should receive benefits as long as he remained disabled. Zip Express appealed to the Workers' Compensation Board, arguing O'Bryan's benefits should terminate at age 70 under a newly-amended version of KRS 342.730(4). O'Bryan countered, arguing the amendment is unconstitutional on several grounds. The Board could not determine the constitutionality of the statute, but held that it applied to O'Bryan's case. O'Bryan appealed to the Court of Appeals, which affirmed and held the statute is constitutional. O'Bryan appealed to the Supreme Court of Kentucky, which affirmed the Court of Appeals. The Supreme Court held the statute did not violate O'Bryan's right to equal protection under the law, his due process rights, that it does not amount to the exercise of an absolute and arbitrary power, that it is not special legislation, and that it did not violate the requirement that all bills be read three times before each house of the legislature.

***Dee Whitaker Concrete v. Ellison*, 641 S.W.3d 142 (Ky. 2022)**
Opinion of the Court by Justice Hughes. All sitting; all concur. Austin Ellison was employed by Dee Whitaker Concrete as a general laborer. Whitaker Concrete employees, including Ellison, routinely met at the employer's premises and traveled together to various jobsites. While leaving a jobsite and traveling back to the employer's premises, Ellison was injured in an automobile accident. Whitaker Concrete denied Ellison's workers' compensation claim, asserting that injuries sustained while going to or returning from the workplace are not compensable. The Administrative Law Judge (ALJ) determined that the "service to the employer" and "traveling employee" exceptions to the "going and coming" rule were applicable and awarded disability benefits. On appeal, the Workers' Compensation Board and Court of Appeals affirmed.

The Kentucky Supreme Court held that the traveling employee exception is applicable. Grounded in the positional risk doctrine, the traveling employee exception considers that an injury that occurs while the employee is in travel status is work-related unless the worker was engaged in a significant departure from the purpose of his trip. Ellison's work required travel away from the employer's premises and Ellison's employment was the reason for his presence at what turned out to be a place of danger. Travel was an implicit part of Ellison's employment and Whitaker Concrete acquiesced to this practice by providing company vehicles and paying for gas. Additionally, the service to the employer exception also applies because the employees traveling together ensured that employees arrived at jobsites on time and as a group, which was essential to the coordination of the arrival of concrete. The travel benefitted the employer by furthering his business. The Court affirmed the Court of Appeals.

***French v. Rev-A-Shelf*, 641 S.W.3d 172 (Ky. 2021)**
Opinion of the Court by Justice Keller. All sitting; all concur. Robbins was employed by Rev-A-Shelf as an assembly line leader. While in that employment, Robbins tripped over a pallet and fell on her extended left arm. She was eventually diagnosed with a Type II SLAP tear. She sought workers' compensation benefits. The Administrative Law Judge (ALJ) awarded Robbins temporary total disability (TTD) benefits and permanent

partial disability (PPD) benefits. He enhanced the PPD benefits by the two-times multiplier from Kentucky Revised Statute (KRS) 342.730(1)(c)2.

On appeal, the Supreme Court held that the ALJ's award of TTD benefits was supported by substantial evidence and affirmed that award. In order to determine if the ALJ erred in enhancing Robbins's PPD benefits by the two-times multiplier, the Court had to determine if the ALJ properly included the wages from her concurrent employment in the calculation of her post-injury weekly wage. The Court held that because Robbins did not obtain her concurrent employment until after she sustained the work-related injury, the requirement that Rev-A-Shelf have knowledge of the concurrent employment before the date of injury found in KRS 342.140(5) did not apply. Further, the Court held that the ALJ failed to make any findings regarding whether Robbins's earnings from her concurrent employment were covered by the Workers' Compensation Act. Therefore, the Court could not determine if those findings were supported by substantial evidence. Accordingly, the Court vacated the ALJ's enhancement of Robbins's PPD benefits by the two-times multiplier and remanded for further factual findings on that issue.

***Kindred Healthcare v. Harper*, 642 S.W.3d 672 (Ky. 2022)**
Opinion of the Court by Justice Nickell. All sitting. All concur. Harper suffered a work-related lifting injury while employed by Kindred Healthcare. ALJ ultimately determined she had sustained an eight percent whole person impairment, lacked physical capability of returning to work for which she had training and experience at time of injury, and was entitled to an award of permanent partial disability income benefits enhanced by the three multiplier. Though Harper requested vocational evaluation in hearing testimony, ALJ refused to address request due to her failure to specifically list vocational rehabilitation services as a contested issue in benefit review conference memorandum or at hearing. ALJ's award was not appealed and became final.

Sixteen months later, after unsuccessfully attempting a return to suitable gainful employment and having independently obtained a vocational evaluation, Harper sought to file an application for vocational rehabilitation services and acceleration of income benefits. Because no official template exists for filing motions to reopen seeking vocational rehabilitation services under KRS 342.710, she utilized a form setting forth the four grounds for reopening compensation claims under KRS 342.125, but attached a separate motion setting out her claim for the former under KRS 324.710. CALJ overruled motion to reopen, holding Harper had failed to preserve and contest issue in original proceeding or demonstrate authorization to seek such services post-award under one of the four grounds listed for reopening in KRS 342.125.

Board reversed CALJ's decision, holding KRS 342.710 contemplates independent ground for reopening to seek vocational rehabilitation services separate to four grounds listed in KRS. 342.125. The Court of Appeals agreed, holding KRS 342.710 mandates ALJ inquiry upon finding claimant incapable of performing previous employment and Harper's failure to appeal ALJ's original refusal to address vocational rehabilitation services did not preclude a post-award motion to reopen to seek such services once requirements were established.

Concerning a matter of first impression, Supreme Court held KRS 342.710 separately governs vocational rehabilitation services and authorizes raising of disputes relating to such services at any time by any mechanism, whether during original claim or post-award reopening. Statute provides independent ground for reopening apart from grounds enumerated in KRS 342.125 relating to motions to reopen to end, diminish, or increase compensation. As used in the workers' compensation statute, "compensation" does not encompass vocational rehabilitation services. Upon factual finding claimant incapable of performing previous work, ALJ is statutorily mandated to inquire regarding voluntary evaluation and reasonable provision or rejection of vocational rehabilitation services and may exercise discretion in assessing merits of an award of vocational rehabilitation services. Statutorily mandated administrative procedure need not be preserved by a request or by listing as a contested issue. Harper implicitly raised issue of vocational rehabilitation benefits when she identified "[a]bility to return to work performed at time of injury" as contested issue, and because ALJ refused to address the merits, claim preclusion doctrine was inapplicable.

***Apple Valley Sanitation, Inc. v. Stambaugh*, ___ S.W.3d ___, 2022 WL 1284040 (Ky. Apr. 28, 2022)**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Workers' Compensation Appeal. Jon Stambaugh was awarded benefits by the Administrative Law Judge for two separate work-related injuries that occurred in the course and scope of his work for Apple Valley Sanitation. The ALJ applied the 3x multiplier from KRS 342.730(1)(c) to both Stambaugh's awards, finding that each injury individually precluded him from returning to the type of work he performed at the time of the injuries. Apple Valley appealed, arguing that the ALJ erred in applying the 3x multiplier to both awards because it reasoned that there was no change in Stambaugh's job duties between injuries and Stambaugh could not lose the same ability twice. Both the Workers' Compensation Board and the Court of Appeals affirmed the ALJ's decision.

The Kentucky Supreme Court held that the 3x multiplier was properly applied to Stambaugh's benefits awards because his injuries were assessed at the time of the benefits hearing, rather than at the time immediately following his injuries. Although Stambaugh returned to his job after his first injury, by the time of his benefits hearing, his injuries were both independently and individually severe enough to preclude him from returning to the type of work he performed at the time of his injuries. As such, the Court affirmed the Court of Appeals.

WRIT OF MANDAMUS/PROHIBITION:

***Johnson v. Wood*, 626 S.W.3d 543 (Ky. 2021)**

Opinion of the Court by Justice Keller. All sitting; all concur. After being diagnosed with breast cancer, Kimberly Johnson filed suit against various medical providers alleging medical negligence. The issues before the Supreme Court involved the propriety of the entry of a writ of mandamus to address the trial court's: (1) failure to award sanctions and attorneys' fees in relation to allegedly contemptuous conduct; (2) failure to recognize a new tort claim; (3) failure to invoke the crime-fraud exception to overcome the attorney-client privilege and require certain discovery; and (4) denial of a motion precluding bifurcation of Johnson's malpractice claims from her claims of

fraud by the defendants. The Court held that the trial court's denial of Johnson's various motions could all be adequately remedied by appeal. Accordingly, Johnson was not entitled to a writ of mandamus.

***Goble v. Mattox*, 636 S.W.3d 537 (Ky. 2021)**
Opinion of the Court by Justice Hughes. All sitting; all concur. John Goble and Amos Burdette filed petitions for writs of mandamus seeking dismissal of their respective criminal indictments for various felony and misdemeanor offenses. The Attorney General appointed the Fayette County Attorney as special prosecutor in both cases. The basis for each writ petition was a challenge to the ability of the county attorney to perform prosecutorial duties outside of his or her judicial circuit, arguing that the appointments of the Fayette County Attorney as special prosecutor were invalid. The Court of Appeals denied both writ petitions, holding that no statute prohibits such an appointment.

The Kentucky Supreme Court held that Goble and Burdette are not entitled to first-class writs because they failed to show that the trial court proceeded outside of its jurisdiction. Goble and Burdette were both indicted for multiple felonies and misdemeanors occurring in Scott County, which properly placed their cases within the jurisdiction of the Scott Circuit Court. Additionally, Goble and Burdette are not entitled to second-class writs because the trial court did not act erroneously. Kentucky Revised Statute (KRS) 15.725(3) permits Commonwealth and county attorneys to share prosecutorial duties and KRS 15.730 permits Commonwealth and county attorneys to prosecute or participate in actions outside of their judicial circuit or judicial district. The Fayette County Attorney's Office and the Scott County Commonwealth's Attorney's office maintained a written agreement allowing the Fayette County Attorney to act as special prosecutor before the Scott Circuit Court. Further, the Attorney General acknowledged the arrangement and specifically appointed the Fayette County Attorney as special prosecutor. The statutes clearly allow a county attorney to perform prosecutorial duties outside his judicial district or circuit when directed by the Attorney General. The Court affirmed the denial of the petitions for writs of mandamus.

***Cincinnati Enquirer v. Dixon*, 638 S.W.3d 379 (Ky. 2022)**
Opinion of the Court by Justice Nickell. All sitting. All concur. The Cincinnati Enquirer sought intervention in the Court of Appeals for purposes of seeking redacted copies of briefs filed in four actions concerning challenges to the constitutionality of the Matthew Casey Wethington Act for Substance Abuse Intervention, commonly known as Casey's Law. The Cincinnati Enquirer sought only access sufficient to determine the contents of any constitutional arguments relative to Casey's Law. The Court of Appeals denied intervention in each action. The Cincinnati Enquirer filed a petition seeking a writ of mandamus directed at the two presiding judges of the Court of Appeals panels which denied intervention.

The Supreme Court held the statutory language contained no mechanism for a nonparty to access any portion of the record once a Casey's Law case reaches the appellate courts and thus, any disclosure is governed by the appellate court's inherent, supervisory power over its own records. Utilizing the balancing test set forth in *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724, 728 (Ky. 2002), the Court concluded appellate briefs are presumptively open to the public and only the

most compelling reasons could justify denying access to them. Discerning no overriding interest favoring non-disclosure, and finding the Court of Appeals erred in denying access to redacted briefs, the requested writ was issued. The matters were remanded with instructions to provide the Cincinnati Enquirer copies of the briefs submitted after specifically detailed redactions were completed.

***Imhoff v. House*, 628 S.W.3d 88 (Ky. 2021)**
Opinion of the Court by Justice VanMeter. All sitting; all concur. Opinion of the Court by Justice VanMeter. All sitting, all concur. Appellants Douglas and Patricia Imhoff, Jack and Donna Harris, Margaret Johnson and Vivian Hamilton (collectively referred to as "the Lessors") appeal from the Court of Appeals' order granting Appellee Vinland Energy's petition for a writ of prohibition of the first class, thereby vacating the Clay Circuit Court's denial of Vinland's motion to dismiss the Lessors' claim for breach of contract. The Lessors, Kentucky landowners, entered into leases with Vinland, and oil and gas producer, granting Vinland the right to extract oil and gas from the Lessors' land, in exchange for one-eighth of the market price of all oil and gas taken. The leases are silent with respect to the apportionment of severance taxes. Vinland deducted severance taxes as post-production costs before paying royalties to the Lessors until the issuance of this Court's opinion in *Appalachian Land Co. v. EQT Production Co.*, which held, as a matter of first impression, that in the absence of a specific lease provision apportioning severance taxes, natural gas lessees may not deduct severance taxes or any portion thereof prior to calculating a royalty value. 468 S.W.3d 841, 848 (Ky. 2015). Thereafter, the Lessors filed a breach of contract class action suit in Clay Circuit Court alleging that Vinland impermissibly deducted severance taxes as a post-production cost before paying them royalties. The circuit court denied Vinland's motion to dismiss on grounds that the circuit court lacked subject-matter jurisdiction over the claims because none of the Lessors met the required amount in controversy. The Court of Appeals then granted Vinland's writ of prohibition on the basis that the circuit court lacked subject-matter jurisdiction. The Supreme Court affirmed the appellate court, finding that not one of the Lessors met the $5,000 amount in controversy requirement, prescribed by the legislature, to invoke the circuit court's jurisdiction. The Court rejected the Lessors' insistence the plaintiffs' damages should be aggregated to meet the $5,000 threshold in class action suits. The Supreme Court further rejected the Lessors' argument that class actions suits are matters of equity *per se* regardless of the amount-in-controversy. The Court found that the Lessors presented a clear claim of breach of contract, which is regularly adjudicated in district court when the amount-in-controversy does not exceed $5,000. If the legislature wishes to expand subject-matter jurisdiction, it is within its purview to do so, not the Courts.

***Harkins v. House*, 638 S.W.3d 346 (Ky. 2021)**
Opinion of the Court by Justice Nickell. All sitting; all concur. In separate medical malpractice actions, defendant medical providers asserted trial court erred in disqualifying their counsel of choice several years after litigation began. Plaintiffs filed numerous disqualification motions in both cases. No prior attorney-client relationship existed between Plaintiffs and defense counsel. Trial court concluded Plaintiffs had standing to assert conflicts of opposing counsel and, finding actual conflicts, disqualified defense counsel. Medical providers sought writs of prohibition. Court of Appeals adopted minority rule regarding disqualification and denied writs in each case, likewise finding Plaintiffs had standing and actual conflicts existed.

In combined appeals, medical providers contended trial court erred in concluding their attorneys had actual conflicts of interest requiring disqualification based on their multiple representation of parties and fact witnesses and further that Court of Appeals erred in denying writs. In reversing, the Supreme Court expressly rejected minority view adopted by the Court of Appeals, instead holding as a general rule a party must be a current or former client of attorney against whom conflict is asserted and disqualification is sought. Absent unethical change of sides or open and obvious violation compelling a court to act, ability of non-client to champion rights of opponent typically does not exist. Here, Supreme Court concluded Plaintiffs' intent in seeking disqualification was to gain a tactical advantage, the sort of weaponizing which should be avoided. The matters were remanded to the Court of Appeals with directions to enter the requested writs.