

2022 FCBA Court of Appeals Update

I. ADMINISTRATIVE LAW – 2

The two admin law cases addressed procedural questions specific to the legislation authorizing judicial review or relief from the action of an administrative agency.

Gwaltney v. Board of Social Work, 644 S.W.3d 270 (Ky. App. 2022)

Public Service Commission of Kentucky v. Metropolitan Housing Coalition, 2019-CA-0542-MR, 2022 WL 1699868 (Ky. App. May 27, 2022) (not final)

II. ARBITRATION – 1

As a matter of apparent first impression, arbitrations were quasi-judicial proceedings to which the judicial statements privilege applied;

New Albany Main Street Properties, LLC v. Stratton, 2021-CA-0562-MR, 2022 WL 1695881 (Ky. App. May 27, 2022) (not final).

NOTE: See *Green and Clay Green, Inc. v. Frazier* in Section IX. CONTRACTS, below.

III. CHILD CUSTODY AND RESIDENCY – 1

Parenting a child alongside parent does not meet the de facto custodian standard KRS 403.270(1).

Burgess v. Chase, 629 S.W.3d 826 (Ky. App. 2021)

IV. CIVIL PROCEDURE – 1

A default judgment was not set aside because the defendant/appellant did not demonstrate “good cause” for failing to file an answer; explanation did not establish excusable neglect or reasons of an extraordinary nature.

Bennche, Inc. v. Silver Creek Transport, LLC, 2020-CA-0389-MR, 2022 WL 1592695 (Ky. App. May 20, 2022) (not final)

V. CIVIL RIGHTS – 1

After describing role of Commission on Human Rights to investigate discrimination, COA concluded Homeowners association did not engage in housing discrimination by requesting documentation regarding owner's disability or taking period of time to consider owner's request to have emotional support animal in her home despite association's no-pet policy, where owner's claimed disability was not readily apparent, association granted owner temporary accommodations that permitted owner to keep her emotional support animal while association's board considered request, and association ultimately granted owner's request.

Commission on Human Rights v. Fincastle Heights Mutual Ownership Corp., 633 S.W.3d 808 (Ky. App. 2021)

VI. CLASS ACTIONS – 1

Trial court did not abuse its discretion by denying purchaser leave to file amended complaint; trial court's dismissal on the basis that purchaser was not appropriate class representative was warranted; and trial court's dismissal prior to class certification discovery was warranted.

Swearingen v. Hagyard Davidson McGee Associates, PLLC, 641 S.W.3d 186 (Ky. App. 2022)

VII. CONSTITUTIONAL LAW – 1

Probable cause standard for Casey's Law violates due process clause, although remainder of Act is constitutional.

S.W. v. S.W.M., 2020-CA-0307-DG, 2022 WL 981848 (Ky. App. Apr. 1, 2022) (DR pending)

VIII. CONSTRUCTION LAW -1

Genuine issues of material fact existed; trial court should not have granted summary judgment; contractors are liable for injuries resulting from construction that does not conform to specifications.

Windus v. Buffalo Construction, Inc., 2020-CA-1035-MR, 2022 WL 1592870 (Ky. App. May 20, 2022) (not final)

IX. CONTRACTS – 3

A case that should be in the “ARBITRATION” category above, the COA held the unconscionable limitations-of-damages clause in a purchase contract invalidated the entire agreement, including the arbitration provision. The Supreme Court granted discretionary review.

Curtis Green and Clay Green, Inc. v. Frazier, 2020-CA-0781-MR, 2021 WL 2878360, at *7 (Ky. App. July 9, 2021), review granted (Oct. 20, 2021).

The fact that one party may have intended different results is insufficient to construe a contract at variance with its plain and unambiguous terms. COA concluded LLC's president personally guaranteed a corporate loan.

Wells Group, LLC v. Bishop, 644 S.W.3d 523 (Ky. App. 2022)

Summary judgment reversed; opinion addresses parol evidence rule and statute of frauds interplay.

Johnson v. Kentucky Enterprises, LLC, 2020-CA-1574-MR, 2022 WL 1194173 (Ky. App. Apr. 22, 2022) (DR pending)

X. CORPORATE LAW – 1

Review after remand of trial court's application of the standard adopted in *Unbridled Holdings, LLC v. Carter*, 607 S.W.3d 188 (Ky. App. 2020) of a seven-factor, non-exclusive standard to determine whether proof supported LLC members' allegations that it was “not reasonably practicable” to continue the business of the LLC.

Arvin v. Carter, 644 S.W.3d 534 (Ky. App. 2022)

XI. CORRECTIONS – 1

Prisoner's declaration of rights action to claim parole eligibility even though given a life sentence by virtue of being a PFO I; for reasons explained in the opinion, COA reversed dismissal of petition because prisoner remains subject to the default ten-year parole eligibility requirement found in KRS 532.080(7) for a PFO I convicted of a Class B felony.

Goben v. Keeney, 626 S.W.3d 692, 699 (Ky. App. 2021)

XII. CRIMINAL LAW – 22

Defendant's conduct of hiding plastic bag of synthetic marijuana under his leg and between car door and seat did not constitute concealment.

Bell v. Commonwealth, 2019-CA-1260-MR, 2021 WL 2274313 (Ky. App. June 4, 2021), review granted (Oct. 20, 2021)

Defendant retained effective consent of store when she used self-checkout register for its intended purpose, to buy items, and, thus, did not unlawfully access self-checkout register's computer.

Shirley v. Commonwealth, 2020-CA-0373-MR, 2021 WL 2272814 (Ky. App. June 4, 2021), review granted (Sept. 22, 2021)

Defendant's convictions violated double jeopardy, and thus conviction of possession of controlled substance would be reversed, and evidence was insufficient to support conviction of promoting contraband.

Collins v. Commonwealth, 640 S.W.3d 55 (Ky. App. 2021), review denied (Mar. 16, 2022)

Prejudicial impact of text messages that showed defendant's prior bad acts of texting while driving, driving while impaired, and speeding outweighed limited probative value, and trial court's admittance of text messages was not harmless.

Feinauer v. Commonwealth, 640 S.W.3d 47 (Ky. App. 2021), review denied (Mar. 16, 2022)

Detective had reasonable suspicion to extend traffic stop by calling for canine unit; positive drug dog alert to vehicle defendant had just been driving provided probable cause to search defendant's person; but as a matter of first impression, misdemeanor offense of giving false identifying information to peace officer can be lesser-included offense of felony theft of identity; and evidence warranted lesser-included offense instruction.

Boone v. Commonwealth, 2019-CA-0966-MR, 2021 WL 3572864 (Ky. App. Aug. 13, 2021), review granted (Mar. 16, 2022)

Plea agreement was enforceable, and restitution hearing, where defendant was ordered to pay \$20,129.45 in restitution, was conducted in accordance with due process.

Ridenour v. Commonwealth, 632 S.W.3d 337 (Ky. App. 2021)

Defendant's right to counsel at critical stage in proceedings was violated when defendant attempted to withdraw guilty plea at final sentencing hearing.

Burchfield v. Commonwealth, 629 S.W.3d 24 (Ky. App. 2021)

Governor's commutation of defendant's death sentence to sentence of life without possibility of parole (LWOP) did not violate state constitution; trial court did not abuse its discretion in determining that sentence of LWOP was warranted; and sentence of LWOP for murder committed while juvenile did not violate Eighth Amendment.

Stanford v. Commonwealth, 643 S.W.3d 96 (Ky. App. 2021), review denied (Apr. 20, 2022)

State trooper did not fail to reasonably facilitate defendant's statutory right to be afforded opportunity to contact attorney before having blood test administered when he did not allow defendant to call wife to obtain attorney's phone number; trooper did not fail to reasonably facilitate statutory right to have opportunity to contact attorney before blood test by failing to provide defendant with a phonebook; even if trial court erred by allowing introduction of evidence regarding defendant's refusal to submit to a blood test, any constitutional error was harmless beyond a reasonable doubt; defendant's failure to request *Daubert* hearing relieved

trial court of responsibility to conduct one to determine whether trooper's testimony regarding defendant's performance in field sobriety tests should have been admitted; trooper's testimony regarding performance in field sobriety tests was admissible; and jury instructions regarding DUI offense that reflected pre-amendment version of DUI statute did not result in manifest injustice and, thus, did not constitute palpable error.

Longwell v. Commonwealth, 2020-CA-0652-MR, 2021 WL 4805097 (Ky. App. Oct. 15, 2021) (finality 6/17/2022)

Restitution for failure to have or maintain insurance coverage may be ordered only if the uninsured motorist is found to have been at fault in the underlying motor-vehicle accident; defendant's due-process rights were violated by district court's failure to allow defendant proper opportunity to contest issue of fault for underlying accident; and failure of district court to make factual findings about defendant's ability to pay rendered restitution award improper.

Bradley v. Commonwealth, 642 S.W.3d 731 (Ky. App. 2021), *review denied* (Apr. 20, 2022)

Defendant's CR 60.02(e) challenge to his sentence based on a change in the law was held to be outside jurisdiction of court to impose and, therefore, void ab initio. Concurrence urges adoption of analytical framework proposed by Justice Nickell in *Rothfuss v. Commonwealth*, No. 2010-CA-000117-MR, 2010 WL 3361769, at *1-2 (Ky. App. Aug. 27, 2010)

Duncan v. Commonwealth, 640 S.W.3d 84 (Ky. App. 2021), *review denied* (Mar. 16, 2022)

Trial court's failure to indicate in its judgment that victim suffered death was clerical error subject to correction, rather than judicial error; trial court did not deny defendant finality in its judgment by correcting clerical error; and defendant's argument faulting trial court for its misstatement of law in its unamended judgment was moot.

Durbin v. Commonwealth, 2020-CA-0750-MR, 2022 WL 258951 (Ky. App. Jan. 28, 2022) (finality 5/10/2022)

Inmate was not entitled to early release.

Martin v. Commonwealth, 639 S.W.3d 433 (Ky. App. 2022)

Defendant abandoned for appellate review allegations of ineffective assistance of counsel; defendant was not permitted to challenge denial of motion for concurrent sentences; motion for relief from judgment, order, or proceeding was not in record on appeal; probationary period began to run on date judge signed probation order; and issuance of warrant of probation tolled probationary period.

Parker v. Commonwealth, 641 S.W.3d 197 (Ky. App. 2022)

Inmate was not entitled to relief under rule of civil procedure governing amendment of judgments; inmate was not entitled to equitable relief under rule of civil procedure allowing independent action to relieve a person from judgment; and inmate was not entitled to relief under Eighth Amendment.

Jackson v. Commonwealth, 640 S.W.3d 99 (Ky. App. 2022)

Officer's initial failure to properly *Mirandize* defendant, who confessed to burglary, was the product of a good-faith Miranda mistake, and thus defendant's second post-Miranda confession to the same crime was knowingly and voluntarily made.

Burdine v. Commonwealth, 641 S.W.3d 708 (Ky. App. 2022)

Supplemental record on appeal would not be disturbed; defendant was allowed to raise an ineffective assistance of counsel claim in a post-conviction relief motion; trial court failed to make statutorily mandated findings to support decision to void defendant's pretrial diversion; and record could not conclusively resolve whether counsel's alleged deficiency was prejudicial, requiring remand of trial court's denial of defendant's post-conviction relief motion.

Hunt v. Commonwealth, 2020-CA-0411-MR, 2022 WL 880140 (Ky. App. Mar. 25, 2022) (DR Pending)

“Capable of repetition, yet evading review” exception to mootness doctrine did not apply to appeal; public interest exception to mootness doctrine applied to appeal; and inmates, were entitled to no relief other than a writ of mandamus compelling Board to conduct the hearing on the Board’s failure to timely comply with KRSA 439.440.

Johns v. Kentucky Parole Board, 2020-CA-1151-MR, 2022 WL 815716 (Ky. App. Mar. 18, 2022) (finality 4/29/2022)

Defendant freely and voluntarily agreed to pay restitution for total amount of stolen money, though amount was not specified in plea agreement; joint and several liability for entire amount stolen was consistent with legislative intent; and restitution hearing complied with due process.

Thompson v. Commonwealth, 644 S.W.3d 528 (Ky. App. 2022)

Denial of summary judgment was appealable; parole statute did not prohibit Parole Board from authorizing serve-outs for life sentences; and Parole Board did not encroach on legislative powers, in violation of separation of powers doctrine, when it granted serve-outs for life sentences.

Conn v. Kentucky Parole Board, 2020-CA-1495-MR, 2022 WL 1194186 (Ky. App. Apr. 22, 2022) (DR pending)

Trial court's order of probation after imprisonment was illegal sentence.

Moreland v. Commonwealth, 2021-CA-0621-MR, 2022 WL 1051762 (Ky. App. Apr. 8, 2022) (DR pending)

Procedural amendments governing whether defendant's case should transfer from juvenile court to circuit court apply retroactively in any case with no final decision on merits, and statute governing retroactive application of criminal statutes required remand to juvenile court for rehearing on transfer.

Commonwealth v. Burkhead, 2021-CA-0873-MR, 2022 WL 1435435 (Ky. App. May 6, 2022) (pet. Reh. Denied)

XIII. DOMESTIC VIOLENCE – 2

Former boyfriend's right to due process was not violated; evidence was insufficient to establish former boyfriend intentionally engaged in two or more acts directed at former girlfriend that amounted to threat with intent to place former girlfriend in reasonable fear of sexual contact, physical injury, or death, required to establish stalking; but substantial evidence supported family court's finding that dating violence occurred and was likely to occur again.

Sewell v. Sweet, 637 S.W.3d 330 (Ky. App. 2021)

Stepfather's alleged act of kissing his 12-year-old stepdaughter constituted domestic violence, as would support issuance of DVO.

Johnston v. Johnston, 639 S.W.3d 428 (Ky. App. 2021)

XIV. EMINENT DOMAIN – 1

Condemnation proceedings to take conservation easement impacted Commonwealth's property rights; and Board was competent to defend Commonwealth's interests by asserting defense of sovereign immunity; but as matter of first impression, statutory mandate that eminent domain powers are exercisable as if conservation easements do not exist constitutes waiver of sovereign immunity; and doctrine of prior public use did not bar utility from taking property.

Commonwealth v. Louisville Gas and Electric Company, 2020-CA-0882-MR, 2022 WL 1194180 (Ky. App. Apr. 22, 2022) (finality 5/26/2022)

XV. EMPLOYMENT LAW – 3

Teacher's continuing contract status was portable and remained enforceable.

Smith v. Bennett, 644 S.W.3d 516 (Ky. App. 2021)

Officer's expunged criminal records were not admissible; investigatory records, witness statements, and materials relating to domestic violence petition, arising from officer's arrest and criminal prosecution for domestic violence, were admissible; board's error in considering officer's expunged criminal records was harmless; officer did not have Sixth Amendment right to confront and cross-examine witnesses in hearing; any failure to exclude statements of witnesses, instead of obtaining direct testimony, was harmless; and substantial, competent evidence supported board's finding that officer violated no-contact orders, such that board's decision to uphold dismissal of officer was not arbitrary.

Moore v. Louisville/Jefferson Cnty. Metropolitan Government, 2020-CA-1296-MR, 2022 WL 67441 (Ky. App. Jan. 7, 2022) (finality 5/24/2022)

Employer was entitled to damage award for lost-profit damages equal to amount of lost profits attributed to all of employer's former commercial clients serviced by employee; employer was entitled to temporal extension of nonsolicitation restrictive covenant in employment contract; remand was required for trial court to reconsider whether permanent injunction against employee was appropriate; none of LLC's actions could constitute intentional interference with contract; remand was required for trial court to reconsider amount of attorney fees to which employer was entitled; trial court improperly calculated award of \$42,364 in lost profits for employer; employer needed only to demonstrate that it incurred loss of anticipated profits by employee's servicing of employer's former personal lines clients in order to recover lost-profit damages; and employee was not entitled to award of attorney fees.

Brown & Brown of Kentucky, Inc. v. Walker, 2020-CA-1265-MR, 2022 WL 1122503 (Ky. App. Apr. 15, 2022) (Pet. Reh. Denied)

XVI. EQUINE LAW – 1

State-law farm products exception was preempted by the Food Security Act (FSA); thoroughbred race horses were “farm products” under FSA; breeding rights were “farm products” under FSA; buyers were buyers in the ordinary course of business under FSA; debtor created security interest in lifetime breeding rights; discovery rule did not apply to render creditor's action against one buyer timely; and creditor was not entitled to equitable tolling.

MGG Investment Group LP v. Mull Enterprises Limited, 2020-CA-0434-MR, 2021 WL 5264189 (Ky. App. Nov. 12, 2021), review granted (Apr. 27, 2022)

XVII. FAMILY LAW – 14

Bank's intervening complaint invoked trial court's jurisdiction to address bank's claims; trial court's decision that bank's mortgage and litigation costs had priority from proceeds of sale of marital property was not clearly erroneous; but bank's mortgage and litigation costs were former wife's non-marital debt.

James v. James, 636 S.W.3d 549 (Ky. App. 2021)

Substantial evidence supported finding that husband and wife failed to make full disclosure of the extent and value of their estates prior to signing prenuptial agreement, to support wife's claim that prenuptial agreement was void; statements by husband made to wife immediately prior to wedding were admissible as declaration against interest; and Court of Appeals could not add requirement that a prenuptial agreement should not be invalidated for inadequate disclosure unless there was also evidence of deception, fraud, or material omission.

King v. King, 638 S.W.3d 464 (Ky. App. 2021)

Reference in statutory requirement, for trial court's findings on petition for termination of parental rights, to petition filed by Cabinet for Health and Family Services means the Cabinet's filing of a petition for dependency, neglect, or abuse.

L.G.A. v. W.R.O., 638 S.W.3d 472 (Ky. App. 2021)

Court's finding that father abused or neglected each of his three minor children was supported by sufficient evidence to support involuntary termination; substantial evidence supported trial court's finding that there was no reasonable expectation of improvement in father's conduct, considering ages of his three children, as required to support involuntary termination; substantial evidence supported trial court's finding that termination of father's parental rights as to each of his three children would be in each child's best interests; and court's error, if any, in failing to comply with statutory provision requiring trial court to enter decision either terminating father's parental rights or dismissing petition within 30 days of hearing, was harmless and otherwise did not violate or affect father's substantial rights.

D.H. v. Cabinet for Health and Family Services, 640 S.W.3d 736 (Ky. App. 2022)

Court of Appeals would decline to exercise its discretion to impose a penalty for mother's failure to submit an appellee brief; mother waived her right to contest aunt's statutory standing to seek visitation; aunt had substantial interest in motion-to-terminate proceeding, as required for aunt to have constitutional standing; aunt would have been negatively impacted by a ruling adverse to her on mother's motion, as required for aunt to have constitutional standing; and remand to family court to make best-interest determination was warranted.

F.E. v. E.B., 641 S.W.3d 700 (Ky. App. 2022)

Determination that child's mother failed to rebut statutory presumption of joint custody was not abuse of discretion; exclusion of evidence of father's mental health treatment did not violate circuit court's duty to consider mental and physical health of all involved; social worker's investigative reports were admissible through her supervisor's testimony under business records hearsay exception; circuit court misapplied presumption of equally shared parenting time, thus requiring vacatur and remand; and on remand, circuit court would be

required to begin its analysis with presumption that equal parenting time was in child's best interest.

Carr v. Carr, 2019-CA-1780-MR, 2022 WL 815845 (Ky. App. Mar. 18, 2022) (DR pending)

Entry of district court's disposition order rendered moot mother's petition; mother's petition was not entitled to default judgment; and public interest exception to mootness doctrine did not apply to petition.

Anderson v. Cabinet for Health and Family Services, 643 S.W.3d 109 (Ky. App. 2022)

Termination of parental rights statute's use of term "shall" regarding 30-day timeframe did not render timeframe mandatory; any error in court's tardiness in ordering termination of father's parental rights after statute's directory 30-day timeframe was harmless; juvenile court files from children's dependency, neglect, and abuse records were admissible; substantial evidence was adduced during termination hearing that children had been abuse or neglected, even without admission of juvenile court records that children were exposed to domestic violence or were being inappropriately disciplined; social worker reading from discharge summary from therapy and protective parenting program indicating father did not complete program and only attended three sessions was not inadmissible hearsay; and Cabinet met its burden in proving statutory element required to terminate father's parental rights to children.

E.L.T. v. Cabinet for Health and Family Services, 2021-CA-1107-ME, 2022 WL 879769 (Ky. App. Mar. 25, 2022) (finality 5/11/2022)

Ordering visitation, in absence of finding of father's parental unfitness, violated substantive due process.

Hoskins v. Elliott, 643 S.W.3d 115 (Ky. App. 2022)

Substantial evidence supported finding that transferred money was gift to wife.

Lewis v. Fulkerson, 2020-CA-0978-MR, 2022 WL 1194024 (Ky. App. Apr. 22, 2022)

Trial court erroneously allowed grandparents' dual petition for adoption and involuntary termination of parental rights to move forward and entered a judgment of termination of parental rights in granting grandparents' dual petition; sufficient evidence supported grandparents' petition to adopt child without mother's consent; and substantial evidence supported family court's finding that best interests of the child would be promoted by adoption by grandparents without mother's consent.

J.L.R. v. A.L.A., 2021-CA-1485-ME, 2022 WL 1194213 (Ky. App. Apr. 22, 2022) (finality 6/17/2022)

Fact that family court wrote summary on docket sheet of terms of potential settlement as outlined orally by wife's attorney was insufficient to create binding agreement as to dismissal of husband's petition.

Waggoner v. Waggoner, 644 S.W.3d 548 (Ky. App. 2022)

Grandmother and uncle had no right to intervene under dependency statute, thus, they lacked standing to petition for custody of children; circuit court erred in ruling Cabinet was equitably estopped from challenging grandmother and uncle's standing; circuit court erred in applying doctrine of equitable estoppel; and circuit court erred in exercising jurisdiction over grandmother and uncle's petition.

Cabinet for Health and Family Services v. Batie, 2021-CA-0580-ME, 2022 WL 1510614 (Ky. App. May 13, 2022) (finality 6/13/2022)

XVIII. FORECLOSURE – 1

Mortgagee had right to enforce mortgage; mortgagee's records and affidavit regarding default were admissible under hearsay exception for records of regularly conducted activity; mortgagor was afforded adequate opportunities to be heard regarding motion for summary judgment; the Circuit Court acted within its discretion in denying motion to compel dismissal; grant was not warranted of mortgagor's motion for order directing clerk to retain original case file; the Circuit Court acted within its discretion in denying motion to compel discovery; and claim of error as to disqualification of judges could not be reviewed.

Augenstein v. Deutsche Bank National Tr. Company as Tr. for Certificateholders of Soundview Home Loan Tr. 2005-OPT4, Asset-Backed Certificates, Series 2005-OPT4, 2018-CA-1831-MR, 2021 WL 5142113 (Ky. App. Nov. 5, 2021) (DR pending)

XIX. IMMUNITY – 1

As a matter of first impression, guardians ad litem are protected by quasi-judicial immunity from actions taken in child custody proceedings.

Gambrel v. Croushore as Next Friend of Villarreal, 638 S.W.3d 452 (Ky. App. 2021), review denied (Feb. 16, 2022)

XX. INSURANCE – 2

Ambiguity, in policies' definition of covered "resident relative," regarding which parent was first-person named insured would be resolved in favor of coverage, and genuine issue of material fact existed as to whether motorcycle passenger resided primarily with mother.

Bratcher v. State Farm Fire and Casualty Company, 642 S.W.3d 724 (Ky. App. 2021), review denied (Apr. 20, 2022)

Attorney was not entitled to fees for reparations benefits that were reimbursed by at-fault party's liability insurer.

Byrnes v. Nationwide Mutual Insurance Company, 2021-CA-0706-MR, 2022 WL 728037 (Ky. App. Mar. 11, 2022) (DR pending)

XXI. KENTUCKY CIVIL RIGHTS ACT – 2

Cancer did not constitute a qualifying disability under the KCRA, and former employee failed to show that her breast cancer substantially limited one or more of her major life activities.

Norton Healthcare, Inc. v. Joyce Turner, 2019-CA-0328-MR, 2021 WL 4228329 (Ky. App. Sept. 17, 2021), review granted (Apr. 20, 2022)

Former employee's firing by supervisor and manager was not retaliation for making age discrimination complaints; *McDonnell Douglas* burden-shifting framework applied to age discrimination claim; and former employee's replacement, who was 45 years old when she was hired, was not substantially younger than employee, who was 50 years old when she was fired, and thus employer did not engage in age discrimination.

Williams v. Brown-Forman Corporation, 640 S.W.3d 73 (Ky. App. 2021), review denied (Mar. 16, 2022)

XXII. LANDLORD / TENANT – 2

Tenant forfeited lease; landlord was entitled to damages award for future rent; genuine issues of material fact existed as to whether landlord satisfied its duty to mitigate its damages; landlord was not entitled under lease to award of attorney's fees; and landlord's claim for prejudgment interest was liquidated in nature.

AnyConnect US, LLC v. Williamsburg Place, LLC, 636 S.W.3d 556 (Ky. App. 2021)

District court acted within its discretion in punishing tenant for contempt by converting jury trial to bench trial.

Johnson v. Bielefeld, 2020-CA-0867-DG, 2022 WL 128303 (Ky. App. Jan. 14, 2022) (DR pending)

XXIII. MUNICIPAL EMPLOYEES AND OFFICERS – 1

Actions for declaration of rights may be filed based upon alleged violations of ordinances; pursuant to city ordinances, mayor did not have authority to discharge police chief or city clerk without cause prior to expiration of two-year terms; police chief and city clerk were not at-will employees, and thus were covered by city's personnel policy requiring pre-termination hearing and prohibiting termination without just cause; police chief stated claim under city ordinance governing discipline and termination of police officers; police chief and city clerk stated declaratory judgment claims under state constitution; police chief and city clerk stated claims for wrongful termination; but mayor did not act in bad faith in terminating police chief and city clerk's employment, and thus mayor was entitled to qualified official immunity.

Schell v. Young, 640 S.W.3d 24 (Ky. App. 2021), review denied (Mar. 16, 2022)

XXIV. OPEN RECORDS – 3

Former board members of riverport authority had constitutional standing to bring action; grain farmers association had a direct interest in defendants' alleged violation of the Open Meetings Act; grain farmers association's alleged injuries could be redressed; and grain farmers association's claims were not moot.

Lincoln Trail Grain Growers Association, Inc. v. Meade Cnty. Fiscal Court, 632 S.W.3d 766 (Ky. App. 2021)

Requester's failure to make prima facie showing of records' existence after UK denied such existence precluded AG from reviewing other records implicated in UK's denial of request under Open Records Act; requester's failure to submit written complaint to presiding officer of public agency precluded AG from reviewing agency's compliance with Open Meetings Act; indeterminate "public agency" status of alleged committee precluded AG from applying presumption that meeting minutes of public agency existed, for purposes of Open Meetings Act; circuit court lacked subject matter jurisdiction to affirm AG's determination that because committee was public agency, Open Meetings Act required it to create meeting minutes; requester was not entitled to hearing on whether responsive records existed; issue of whether committee was public agency was moot; and UK's failure to produce records that never existed did not constitute willful withholding in violation of Open Records Act.

University of Kentucky v. Hatemi, 636 S.W.3d 857 (Ky. App. 2021)

Decision of Commission was not a nonjusticiable political question; news organization's request to have judicial branch compel disclosure of legislative branch records was not barred by the separation of powers doctrine; constitutional provision granting General Assembly authority to investigate or discipline member misconduct did not shield disclosure of records pursuant to Open Records Act; constitutional provision granting immunity to members of General Assembly for debate did not shield disclosure of documents related to member misconduct; amendment to Open Records Act did not apply retroactively; policy of General Assembly did not supplant clear language of Open Records Act; and Commission's noncompliance with open records request was willful, for purposes of statute authorizing attorney fees and costs.

Hartz v. McClatchy Company, LLC, 643 S.W.3d 286 (Ky. App. 2022)

XXV. PUBLIC PROCUREMENT – 1

Trial court had jurisdiction to hear declaratory action; Court of Appeals would consider claims university may not have raised before trial court; as a matter of apparent first impression, Systems' use of IRS test to determine if employees were “still” employees for retirement benefits was improper; trial court did not abuse its discretion when it made discovery determinations; Model Procurement Code cost reimbursement provision did not apply to university's contract; whether or not university complied with Model Procurement Code provision which governed outsourcing contract was not relevant; university was well within authority granted it by the legislature when it privatized maintenance workers' jobs by outsourcing; and outsourcing contract non-party state university entered into for purpose of privatizing its employees was relevant.

Kentucky Retirement Systems by and through Board of Trustees of Kentucky Retirement Systems v. Western Kentucky University, 640 S.W.3d 62 (Ky. App. 2021), review denied (Mar. 16, 2022)

XXVI. PUBLIC SERVICE COMMISSION – 1

Would-be intervenor was a “party” with right to seek judicial review of Commission's denial of intervention; remand was necessary for Public Service commission to consider whether adjoining landowners had special interest in action.

Biddle v. Public Service Commission of Kentucky, 643 S.W.3d 83 (Ky. App. 2021), review denied (Apr. 20, 2022)

XXVII. REAL PROPERTY – 1

Life tenant owed no fiduciary duty to remaindermen that could support exception to general rule that remainderman has no interest in insurance proceeds from destruction of life estate, and purported unfairness to remaindermen did not warrant disregarding general rule.

McCoy v. Horn, 643 S.W.3d 282 (Ky. App. 2021)

XXVIII. REVIVAL OF ACTIONS – 1

Motion for substitution filed by husband of employee was adequate to serve as application for revival under revival statute.

Stone Through Stone v. Dean Dairy Holdings, LLC, 638 S.W.3d 877 (Ky. App. 2022)

XXIX. SERVICE OF PROCESS – 1

Nonresident landowner, both as individual and trustee, was subject to personal jurisdiction under long arm statute; landowner was properly served in his individual capacity; but landowning trust was not properly served.

Hicks v. City of Hopkinsville, 2021-CA-0219-MR, 2022 WL 1051985 (Ky. App. Apr. 8, 2022) (Pet. Reh. Denied)

XXX. STATUTORY INTERPRETATION - 1

Application of “double dipping” statute, which prohibited Systems participants from drawing both a pension and an employment salary, to retiree led to absurd result.

Kentucky Retirement Systems v. Wagner, 2020-CA-0475-MR, 2022 WL 1592814 (Ky. App. May 20, 2022) (DR pending)

XXXI. TERMINATION OF PARENTAL RIGHTS – 1

Evidence was insufficient to support finding that children were abused or neglected; evidence was insufficient to establish the Cabinet provided reasonable efforts to reunite mother and her children; and mother's due process rights were violated when the trial court terminated parental rights after conducting termination hearing through use of live video teleconferencing, due to COVID-19, even though technical difficulties resulted in the court having difficulty in hearing and understanding mother's testimony.

K.D.H. v. Cabinet for Health and Family Services, 630 S.W.3d 729 (Ky. App. 2021), review denied (Oct. 20, 2021)

XXXII. TORTS – 14

Biological mother willfully abandoned child, and thus Mandy Jo's Law applied to prevent mother from obtaining any wrongful death proceeds.

Johnson v. Estate of Knapp by Knapp, 635 S.W.3d 845 (Ky. App. 2021), review denied (Jan. 11, 2022)

All foreseeability analysis for a negligence claim is to be done when considering breach of duty.

Reeves v. Walmart, Inc., 2020-CA-0679-MR, 2021 WL 2753244 (Ky. App. July 2, 2021), review granted (Feb. 16, 2022)

School's Automated External Defibrillator (AED) policy as to the exact manner and timeline of administering an AED was “discretionary”; teacher was not required to retrieve the AED himself; teacher was not under a “ministerial duty” to obtain an AED within an allotted time period; athletic trainer's administration of an AED based on school's policy was not a “ministerial duty”; and athletic trainer's administration of an AED based on an emergency action plan was not a “ministerial duty.”

Armstrong v. Estate of Ifeacho by and through Ifeacho, 633 S.W.3d 333 (Ky. App. 2021)

Federal statute barring taxpayers from bringing suit to restrain withholding of funds by employers from their paychecks did not bar former employee's action.

Chaney v. Fields, 2020-CA-0254-MR, 2021 WL 5021579 (Ky. App. Oct. 29, 2021) (finality 6/17/2022)

Medical center and surgeon were not entitled to jury instructions on apportionment of fault or mitigation of damages; sufficient evidence supported finding of gross negligence under common law standard of wanton or reckless disregard; sufficient evidence supported finding that medical center should have reasonably anticipated surgical sponge might be left in patient; failure to include language requiring finding that medical center should have anticipated conduct in question in punitive damages instruction warranted remand; sufficient evidence supported jury's finding that surgeon deviated from standard of care; error in admission of improper speculative expert testimony was harmless; and evidence that surgical sponge left inside patient's abdomen was “never event” was not admissible.

Morris v. Boerste, 641 S.W.3d 688 (Ky. App. 2022)

Allegedly defective area was a public thoroughfare subject to statute requiring service of notice in action against city for injury from defect in thoroughfare.

Stepp v. City of Pikeville, 642 S.W.3d 741 (Ky. App. 2022)

Patient was required to file certificate of merit with her complaint, and Court would be precluded from addressing patient's claim challenging constitutionality of statute requiring certificates of merit to be filed in medical malpractice actions.

Evans v. Baptist Health Madisonville, 643 S.W.3d 105 (Ky. App. 2022)

Insurance payments for motorist's medical expenses did not toll limitations period.

Placek v. Elmore, 2021-CA-0373-MR, 2022 WL 815465 (Ky. App. Mar. 18, 2022) (Pet. Reh denied)

Statute requiring medical malpractice plaintiff to file a certificate of merit with the complaint was not limited to pro se litigants; plaintiff did not satisfy statutory requirement that he file a certificate of merit by answering various discovery requests; and circuit court retained its inherent discretion to grant extension to file certificate of merit to the extent the failure to file was the result of excusable neglect.

Sanchez v. McMillin, 2020-CA-0052-MR, 2022 WL 981843 (Ky. App. Apr. 1, 2022) (Pet. Reh. Denied)

Waiver of liability constituted valid waiver, under *Hargis v. Baize*, 168 S.W.3d 36; waiver of liability did not violate public policy based on alleged violation of city ordinance requiring quadricycles to have seatbacks or seatbelts; statute requiring seatbelts on motor vehicles was inapplicable; and business was not "common carrier."

Thomas v. Allen, 2021-CA-0529-MR, 2022 WL 1509718 (Ky. App. May 13, 2022) (DR pending)

Fact issues precluded summary judgment in favor of insurer on motorist's bad faith claim, and trial court did not abuse its discretion in denying motorist's request to amend his complaint.

Fish v. State Farm Automobile Insurance Company, 2021-CA-0573-MR, 2022 WL 1510372 (Ky. App. May 13, 2022) (DR pending)

Guest was licensee, and homeowner did not breach duty he owed to guest.

Lawson v. Smith, 2021-CA-0816-MR, 2022 WL 1697254 (Ky. App. May 27, 2022) (not final)

Arrestee's appeal was not untimely; metropolitan government was not necessary party to arrestee's appeal; arrestee's malicious prosecution claims were untenable; and arrestee's vicarious malicious prosecution claims were repackaged versions of his claims for negligent hiring and negligent supervision; and Court was not at liberty to change law that probable cause stipulations legally foreclose claims of malicious prosecution.

Mekuria v. Martin, 2020-CA-0926-MR, 2022 WL 1695873 (Ky. App. May 27, 2022)

XXXIII. TRUSTS AND ESTATES – 5

Testator's validly executed form will leaving everything to her husband, who predeceased her, failed to be effective, and was of no consequence in distributing her estate; state anti-lapse statute was not applicable in distributing testator's estate; notebook pages containing residual and specific bequests did not constitute a holographic will or codicils to her properly executed form will.

Willett v. Estate of Vessells, 629 S.W.3d 20 (Ky. App. 2021)

Trust amendment was contrary to public policy and thus void.

Todd v. Hilliard Lyons Tr. Company, LLC as Tr. Under Will of Todd, 633 S.W.3d 342 (Ky. App. 2021)

Trust's use of the word "descendants" was a reasonably clear expression of testator's intent to adopt the dictionary definition of "descendants" as the issue proceeding from testator's body, and adoption of testator's great-grandson did not terminate the great-grandson's status as a descendant of testator.

Murphy v. Shehan, 633 S.W.3d 350 (Ky. App. 2021)

Wife established prima facie case of fraud on the dower through deceased husband's actions that gave his sons the bulk of his assets; husband's retirement and financial accounts husband established with sons as beneficiaries, husband's joint checking account with son, and promissory note on real property that sons purchased from husband were subject to wife's claim; marital home and vehicle, and associated debts were not subject to wife's claim; withdrawals from husband's retirement account during his lifetime into husband's joint account with his wife were not to be credited against any award in wife's claim; not awarding either prejudgment or postjudgment interest on judgment on wife's claim was appropriate; executor's fee of 1%, instead of statutory 5%, was appropriate in probate of husband's estate; and award of \$7,000 in attorney's fees to husband's sons in probate of husband's estate and denial of attorney's fees of \$31,000 to sons in defending wife's claim was appropriate.

Keith v. Cross, 636 S.W.3d 842 (Ky. App. 2021)

Executor's ancillary administration of nonresident wife's estate was properly probated in state before executor's domiciliary administration of estate had been established in state of wife's domicile; allegations of executor were sufficient to entitle executor to relief; marriage agreement did not waive executor's fraud claims; and allegations of executor in fraud claim were sufficient to entitle executor to relief.

Mason v. Stikes, 2021-CA-0587-MR, 2022 WL 1435442 (Ky. App. May 6, 2022) (Pet. Reh. Denied)

XXXIV. WORKERS' COMPENSATION – 9

Claimant's subsequent termination after she was injured at work did not preclude her receipt of three-multiplier enhancement of her permanent partial disability benefits.

Tractor Supply Company v. Wells, 2021-CA-0296-WC, 2021 WL 2614063 (Ky. App. June 25, 2021), *aff'd sub nom. Tractor Supply v. Wells*, 2021-SC-0286-WC, 2022 WL 2253133 (Ky. June 16, 2022)

Trial court's designation of order as final and appealable was proper, and local cooperative was not entitled to up-the-ladder immunity under Workers' Compensation Act.

Huff v. Southern States Somerset Cooperative, Incorporated, 632 S.W.3d 343 (Ky. App. 2021)

Substantial evidence supported ALJ's finding that claimant was informed that his cumulative-trauma injury was related to his work no later than six months prior to filing claim, but claimant's failure to provide timely notice of cumulative trauma injury may have been excusable under workers' compensation statute based on claimant's intellectual limitations, and, thus, remand to ALJ for additional findings was appropriate.

Waste Management v. Maddox, 630 S.W.3d 742 (Ky. App. 2021)

Original finding that claimant's injury was temporary was not subject to doctrine of res judicata, and thus res judicata did not bar claimant from reopening her prior TTD award based on change of disability.

Jimenez v. Lakshmi Narayan Hosp. Group Louisville, 2021-CA-0515-WC, 2021 WL 4126874 (Ky. App. Sept. 10, 2021) (not final)

Claimant, who drove a taxi cab leased from putative employer, was an independent contractor, rather than an employee.

AIG v. Oufafa, 2020-CA-0942-WC, 2021 WL 5856528 (Ky. App. Dec. 10, 2021) (not final)

Substantial evidence supported ALJ's determination that claimant sustained cumulative-trauma injuries to low back and both thumbs, despite claimant's prior low back surgeries, and ALJ was within her discretion in attributing 13% impairment rating to claimant's prior low back surgeries, such that a higher carve out for previous spinal impairment was not warranted.

Quad/Graphics, Inc. v. Bartolomeo, 640 S.W.3d 93 (Ky. App. 2022)

Board applied correct standard of review to ALJ's determination that surgery was compensable; absence of explicit statements in medical reports that surgery was causally related to workplace injury did not preclude finding of such relationship; sufficient evidence supported finding that surgery was causally related to workplace injury; and sufficient evidence supported finding that surgery was reasonable and necessary.

Perry Cnty. Board of Education v. Campbell, 2021-CA-0605-WC, 2022 WL 569216 (Ky. App. Feb. 25, 2022) (not final)

Manufacturer entered into delivery contract with driver's employer as representative and for benefit of grocery store owner, and delivery of manufacturer's dairy products to grocery store was regular and recurrent part of store owner's business.

Cunningham v. Kroger Limited Partnership I, 2021-CA-0704-MR, 2022 WL 880150 (Ky. App. Mar. 25, 2022) (not final)

Amended version of workers' compensation statute that set dates for termination of benefits applied retroactively to claimant.

Roberts v. Commonwealth Dodge, 644 S.W.3d 543 (Ky. App. 2022)