KENTUCKY SUPREME COURT SUMMARIES
JUNE 2022 – APRIL 2023

ABORTION:

***Cameron v. EMW Women's Surgical Center,* 664 S.W.3d 633 (Ky. 2023)**
Opinion of the Court by Justice Lambert. VanMeter, C.J.; Bisig, Conley, Nickell, Thompson, and Keller, J.J.; sitting. Conley, J. concurs. VanMeter, C.J., concurs in result only without separate opinion. Bisig, J., concurs in part and dissents in part by separate opinion in which Keller, J., joins. Keller, J., concurs in part and dissents in part by separate opinion in which Bisig, J., joins. Nickell, J., concurs in part and dissents in part by separate opinion. Thompson, J., concurs in part and dissents in part by separate opinion.

The statutes at issue, KRS 311.772 ("the trigger ban") and KRS 311.7707-11 ("the heartbeat ban") prohibit abortion in Kentucky except in certain limited circumstances. The heartbeat ban prohibits abortions after a fetal heartbeat has been detected, unless necessary to preserve the life and health of the mother, and the trigger ban completely prohibits abortion unless necessary to preserve the life and health of the mother. The trigger ban became effective when the United States Supreme Court issued *Dobbs v. Jackson Women's Health Organization*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022), which overruled *Roe v. Wade*, 410 U.S. 133 (1973). Any person who violates either ban by performing or inducing an abortion is subject to prosecution for a Class D felony. And, a woman upon whom an abortion is performed in violation of the heartbeat ban may sue the person that performs it for wrongful death.

Two abortion service providers operating in Kentucky, EMW Women's Surgical Center and Planned Parenthood Louisville, filed for injunctive and declaratory relief against the trigger ban and the heartbeat ban, asserting the constitutional rights of both them and their patients. No individual patient, nor any other woman who had been denied abortion care by operation of the bans, was named as a plaintiff. The providers alleged that the bans violated their patients' rights to privacy and safety guaranteed by Sections 1 and 2 of the Kentucky Constitution. On their own behalf, the providers alleged that the trigger ban: violated the providers' right to due process by imposing serious criminal penalties without giving fair notice of when it took effect; was constitutionally unintelligible because it failed to define the point at which it would become effective; improperly delegated the power of the General Assembly to define the scope of Kentucky criminal law; and took effect upon the authority of an entity other than the General Assembly. The providers made no arguments against the heartbeat ban in relation to their own rights.

The circuit court found that the providers had both first-party, constitutional standing to challenge the bans on their own behalf, and third-party standing to challenge the bans by asserting the rights of their patients. The circuit court found that the requirements for injunctive relief were satisfied and enjoined both bans pending a trial on the merits. Thereafter, the Attorney General filed for emergency interlocutory relief with the Court of Appeals which was granted. The Court of Appeals then recommended transfer of the Attorney General's motion for interlocutory relief to the Supreme Court, which it accepted.

A majority of the Court agreed that the providers lacked third-party standing to challenge either ban by asserting their patients' rights. However, six justices agreed that the providers had first-party standing to challenge the trigger ban on the grounds that it was an unlawful delegation of legislative authority and that it became effective upon the authority of an entity other than the Kentucky General Assembly. The providers' other two first-party standing claims regarding the effective date of the trigger ban are now moot, and the providers did not have first-party standing to challenge the heartbeat ban as they offered no arguments against it in relation to their own rights. One justice contended that the providers had neither first nor third party standing to challenge either of the bans. A majority of the Court agreed that the circuit court erred by enjoining the bans pending a trial on the merits. Accordingly, the Court dissolved the circuit court's temporary injunction, and remanded for proceedings on the merits as to the first-party claims of the abortion service providers.

ADMINISTRATIVE LAW:

***River City Fraternal Order of Police Lodge No. 614, Inc. v. Louisville/Jefferson County Metro Government*, 664 S.W.3d 486 (Ky. 2022)**

Opinion of the Court by Justice Keller. All sitting; all concur. The River City Fraternal Order of Police Lodge No. 614, Inc. (FOP) filed an unfair labor practice claim against the Louisville-Jefferson County Metro Government (Louisville Metro). The FOP alleged that the Louisville Metro Police Department (LMPD) engaged in an unfair labor practice by coercing Sergeant David Mutchler, the FOP President, to reveal communications he had with Sergeant Armin White that the FOP asserted were protected by a "union business privilege." The Kentucky Labor Cabinet found that because no union business privilege exists in the Commonwealth, LMPD did not engage in an unfair labor practice. Both the Jefferson Circuit Court and the Court of Appeals affirmed.

After granting discretionary review, the Supreme Court held that Kentucky Revised Statute (KRS) 67C.402 creates a confidentiality but not a privilege. This confidentiality is limited to communications between a union member and an officer of the union. It operates only as against the public employer, on a matter where the member has a right to be represented by a union representative, and then only where the observations and communications are made in the performance of a union duty. The confidentiality does not and cannot apply to legal proceedings.

The Court further held that because KRS 67C.402 creates a limited confidentiality for union representative communications with members, it cannot be unilaterally waived. Both the FOP's individual members and the FOP are entitled to confidentiality. Thus, the Court held that because Sgt. White could not have waived confidentiality for the FOP, and because the statute clearly requires a limited confidence to be effectual, Sgt. Mutchler should not have been compelled to disclose the substance of his communications with Sgt. White. In compelling him to do so, Louisville Metro unlawfully interfered with the right of the police officers to bargain collectively regarding conditions of employment under KRS 67C.402(1). Accordingly, Louisville Metro committed an unfair labor practice under KRS 67C.410. Thus, the Supreme Court reversed the decision below and remanded to the Labor Cabinet to enter a cease-and-desist order pursuant to KRS 67C.410(2).

***Friends of Louisville Public Art, LLC, et al. v. Louisville/Jefferson County Metro Historical Landmarks and Preservation Districts Commission, et al.*, ___ S.W.3d ___, 2023 WL 3113325 (Apr. 27, 2023)**

Opinion of the Court by Chief Justice VanMeter. All sitting. Conley, Keller, Lambert, Nickell, and Thompson, JJ., concur. Bisig, J., dissents by separate opinion. The issues involve due process concerns relating to consideration of a certificate of appropriateness seeking to remove the Castleman statue from a roundabout at a primary entrance to Cherokee Park in Louisville. Primarily, whether the Court of Appeals and Jefferson Circuit Court erred in affirming the Louisville/Jefferson County Metro Historic Landmarks and Preservation Districts Commission's approval of the Louisville/Jefferson County Metro Government's 2022 application to remove the statue when Louisville Metro employees participated as members of the Commission. The Supreme Court held that the decision-making participation in this matter by Louisville Metro employees serving on the Landmarks Commission's review of their own employer's application is an inherent and intolerable conflict of interest, within the holding of *Hilltop Basic Res., Inc. v. Cnty. of Boone*, 180 S.W.3d 464, 469 (Ky. 2005), and resulted in a denial of procedural due process. Accordingly, the Court found that the lower courts did err and reversed and remanded to the circuit court with directions to set aside the Commission's decision as arbitrary.

CIVIL PROCEDURE:

***Bruner v. Cooper*, ___ S.W.3d ___, 2022 WL 12212262 (Oct. 20, 2022)**

Opinion of the Court by Justice Lambert. All sitting. Minton, C.J.; Conley, Hughes, Keller, and VanMeter, JJ., concur. Nickell, J., concurs by separate opinion in which Keller and VanMeter, JJ., join. In 2009, Don and Cathy Cooper sought to have a dead-end road that had been maintained by the Pulaski County Fiscal Court and used by the public and adjoining landowners John and Beth Bruner declared their private roadway. The Pulaski Circuit Court found, in part, that the Coopers were estopped from bringing their claim. The Court of Appeals, without addressing the estoppel issue, directed the Pulaski Circuit Court to enter an order finding that the road was not a county road because it had not been formally adopted by the fiscal court. During the second round of litigation, the Court of Appeals affirmed the circuit court's order finding that the road was neither a public road nor an easement.

After the second trip to the Court of Appeals, the Coopers closed the road with a gate which gave notice to the adjoining landowners of the Coopers claim of exclusive control of the road. The adjoining landowner intervened. The Bruners were later granted CR 60.02 relief from the circuit court's previous orders regarding the road's classification. The circuit court then granted summary judgment in favor of the Bruners based on its finding that the road was a public road by prescription. Thereafter, the Court of Appeals held that the circuit court erred by granting the Bruners CR 60.02 relief, and vacated its summary judgment order.

The Kentucky Supreme Court held that the circuit court did not abuse its discretion in granting the Bruners CR 60.02 relief. It further held that the Coopers should have been estopped from bringing their claim in the first instance based on their delay in bringing it. The Coopers bought their property encompassing the road in 1993, but waited sixteen years before filing to have it declared their private roadway. In the

intervening years, the Pulaski County Fiscal Court maintained and improved the road, and it was used as a common roadway to all. The Court also held in the alternative that the circuit court was correct in finding that the road qualified as a public road by prescription.

CONSTITUTIONAL LAW:

***Commonwealth ex rel. Cameron v. Johnson,* 658 S.W.3d 25 (Ky. 2022)**

Opinion of the Court by Justice Hughes. All sitting. All concur. The Kentucky General Assembly passed House Bill (HB) 563, the "Education Opportunity Account Act" or "EOA Act," creating a structure by which Kentucky taxpayers who donate to account-granting organizations (AGOs) receive a nearly dollar-for-dollar tax credit against their income taxes. These AGOs allocate taxpayer contributions to education opportunity accounts (EOAs) that are set up for eligible students. Funds in the EOAs can be used for various education-related expenses and for nonpublic school tuition for eligible students. The EOA Act was challenged as violative of the Kentucky Constitution in Franklin Circuit Court and that court found it unconstitutional under Section 59, the special legislation provision, and Section 184, an education provision prohibiting the raising or collecting of any sum for education "other than in common [public] schools" unless the taxation question is submitted to and approved by the voters.

On discretionary review, the Supreme Court concluded the EOA Act violates Section 184 and affirmed the circuit court's holding that the statute is unconstitutional. The near dollar-for-dollar tax credits offered by the EOA program allow any Kentucky taxpayer to send their money to an AGO for use at nonpublic schools instead of paying a comparable amount they owe in Kentucky income taxes. The Court must look through the form of a statute to the substance of what it does, regardless of how the funds at issue are characterized. The EOA Act tax credits are distinguishable from charitable donations, which have a relatively *de minimis* effect on state income tax collections. The EOA program is a state-created structure that raises sums "for education other than in common schools" in violation of Section 184 of the Kentucky Constitution. With this conclusion, the remaining constitutional challenges to the EOA Act were rendered moot.

***City of Pikeville v. Kentucky Concealed Carry Coalition, Inc.,* ___ S.W.3d ___, 2023 WL 3113397 (Apr. 27, 2023)**

Opinion of the Court by Justice Nickell. All sitting. VanMeter, C.J.; Bisig, Conley, Keller, and Lambert, JJ., concur. Thompson, J., dissents by separate opinion. Kentucky Concealed Carry Coalition (KC3) filed suit against the City of Pikeville alleging that various administrative rules, policies, and contractual provisions violated KRS 65.870, which generally prohibits the regulation of firearms by local government. The Pike Circuit Court granted summary judgment in favor of Pikeville. The Court of Appeals reversed. On discretionary review, the Supreme Court held KC3 lacked constitutional standing because it failed to allege a sufficiently specific injury resulting from Pikeville's prohibition on the possession and carrying of firearms. Likewise, KC3 failed to establish associational standing because it failed to identify any specific injury suffered by any of its members. Therefore, the Supreme Court reversed the decision of the Court of Appeals and remanded to the trial court with instructions to dismiss the action without prejudice.

***Stivers v. Beshear*, 659 S.W.3d 313 (Ky. 2022)**
Opinion of the Court by Chief Justice Minton. All sitting. All concur. In this case, the Governor sued several members of the legislature, petitioning the trial court to enjoin several statues he alleged the Legislative Defendants passed in violation of the separation of powers doctrine. The trial court denied the Legislative Defendants' motion to dismiss on the grounds of legislative immunity. The Legislative Defendants filed an interlocutory appeal regarding legislative immunity, and the Supreme Court granted transfer of the case.

The Supreme Court reversed the trial court's denial of the Legislative Defendants' motion to dismiss on the grounds of legislative immunity. After considering the history of legislative immunity, the Court concluded that this type of conflict between branches of government is the exact circumstance in which legislative immunity is intended to operate. Thus, the Court found the Legislative Defendants were immune from the Governor's suit and remanded the case for dismissal of all claims against the Legislative Defendants.

<u>CONTRACTS:</u>
***Green v. Frazier*, 655 S.W.3d 340 (Ky. 2022)**
Opinion of the Court by Justice VanMeter. All sitting; all concur. On appeal from the Court of Appeals affirming the Powell Circuit Court's finding that the arbitration clause contained in a sales contract between the parties was unconscionable and unenforceable, the Supreme Court reversed and remanded. The matter arose from an agreement between Green's Toyota and Frazier for the purchase of a new pickup truck from Green's. As part of the sale, Frazier signed or initialed several documents that respectively contained variations of an arbitration clause. Upon discovering that the vehicle had been previously repaired prior to purchase, Frazier brought a civil complaint against Green's. Green's moved to dismiss for lack of jurisdiction and improper venue or to compel arbitration pursuant to the contract. The trial court found the arbitration clause unconscionable because it precluded or limited consequential or punitive damages. A non-unanimous panel of the Court of Appeals affirmed finding both procedural and substantive unconscionability in the clause. The dissenting judge opined the challenge to the arbitration terms was within the purview of the arbitrator and would have ordered arbitration. The Supreme Court reversed and remanded the matter, directing the trial court to enter an order compelling arbitration. In so holding, the Court found the parties had clearly agreed to arbitrate and all other issues were properly to be left to an arbitrator's determination. Both parties signed a contract containing a conspicuous arbitration provision and the imbalance in remedial rights created by the clause did not render the provision unconscionable. Accordingly, the contract was neither procedurally nor substantively unconscionable. The Court further found Frazier's claims under KRS 190.071 and the Consumer Protection Act to fall under the terms of the arbitration agreement, as did the question of proper venue.

***MGG Investment Group LP v. Bemak N.V., Ltd., et al.*, ___ S.W.3d ___, 2023 WL 2622736 (Mar. 23, 2023)**
Opinion of the Court by Chief Justice VanMeter. All sitting. All concur. On appeal from the Court of Appeals' affirmation of dismissal of Appellees in suit by Bemak to enforce security interests on certain thoroughbred horses and mares and their breeding rights, including the Triple Crown winner AMERICAN PHAROAH. The

Supreme Court affirmed. This matter arose from the conduct of Zayat Stables and its disposition of several horses and their breeding rights upon which Zayat Stables had granted a security interest to Bemak in exchange for a $30 million loan. Unbeknownst to Bemak, Zayat Stables sold the horses to various entities over a period of several years before ultimately defaulting on the loan. Bemak brought an action against Zayat Stables to recover the loan and discovered the sales during its investigation. Bemak then amended its complaint to include Appellees. All appellees save Yeomanstown Stud moved for dismissal asserting the Federal Food Security Act of 1985 ("FSA") dissolved the security interest upon sale from Zayat Stables. The Circuit Court agreed and granted the motion. Yeomanstown stud sought dismissal based on violations of KRS 413.242 and the statute of limitations. The Circuit Court similarly granted the motion but dismissed without prejudice finding equitable tolling may be applicable. On appeal, the Court of Appeals agreed with the Circuit Court as to the FSA but disagreed to the extent that it found Yeomanstown should have been dismissed with prejudice. The Supreme Court affirmed the Court of Appeals in both respects, finding the plain language of the FSA pre-empted the Kentucky UCC's farm products exception and the FSA's language included thoroughbreds and their breeding rights as "farm products." Accordingly, Bemak's security interests were extinguished upon sale of the thoroughbreds or their breeding rights to their respective purchasers. As to the procedural questions, the Supreme Court found Bemak's action against Yeomanstown did violate KRS 413.242 regardless of the fact that Yeomanstown was brought into the action upon filing of an amended complaint. Further, equitable tolling would not be available to Bemak because Bemak failed to pursue its rights diligently by neglecting to exercise its extensive contractual rights to inspect at any point prior to running of the statute of limitations.

Wieland v. Freeman, **____ S.W.3d ____, 2023 WL 3113381 (Apr. 27, 2023)**
Opinion of the Court by Justice Keller. All sitting. All concur. Joe Wieland and Hot Rods & BBQ, LLC (Hot Rods) signed a lease for a property owned by Dana Freeman, Ben Freeman, and their company, Kountry Korner Kafe (collectively, "the Kafe"). In the spring and summer of 2018, however, the relationship between the parties regarding the tenancy began to deteriorate. Wieland and Hot Rods filed suit against the Kafe, alleging wrongful eviction, breach of contract, and defamation. After a grant of partial summary judgment in the Kafe's favor on the wrongful eviction claim and with a partial summary judgment motion pending on the defamation claim, the trial court ordered the parties to alert the trial court to any matters that were still outstanding. Wieland and Hot Rods filed a response expressing confusion as to whether their breach of contract claim had been ruled upon. Subsequently, the trial court issued an order dismissing the defamation claim and erroneously noting that Wieland and Hot Rods had not responded to the trial court's previous order.

Wieland and Hot Rods then appealed to the Court of Appeals. The Court of Appeals held that Wieland and Hot Rods had waived their breach of contract claim because they did not ask the trial court to make any findings of fact on that claim pursuant to Kentucky Rule of Civil Procedure (CR) 52.04 nor did they deny that they had failed to respond to the trial court's order.

The Supreme Court granted discretionary review to determine if Wieland and Hot Rods had waived their contract claim. The Supreme Court affirmed the Court of Appeals, holding that CR 52.04 was dispositive. Under that rule, Wieland and Hot Rods were

required to move the trial court for additional findings regarding their contract claim. Because they did not do so and failed to alert the trial court in any other way of its error, they waived their breach of contract claim.

CRIMINAL LAW:

***Commonwealth v. Reed*, 647 S.W.3d 237 (Ky. 2022)**

Opinion of the Court by Chief Justice Minton. All sitting. Hughes, Keller, and Nickell, JJ., concur. Minton, C.J., concurs by separate opinion in which Hughes and Keller, JJ., join. VanMeter, J., dissents by separate opinion in which Conley and Lambert, JJ., join. After Reed was alleged to have committed a robbery at a gas station, police officers contacted Reed's cell-service provider to track Reed's location through his cell phone's real-time cell-site location information (CSLI). Using this CSLI, the officers located and apprehended Reed. Prior to trial, Reed moved for suppression of the warrantless acquisition of his CSLI as an unreasonable search, violative of the Fourth Amendment. The trial court denied Reed's motion, and Reed entered a conditional guilty plea, reserving his right to challenge the denial of his suppression motion. The Court of Appeals reversed the trial court's denial of Reed's suppression motion, finding that the officers' acquisition of Reed's real-time CSLI constituted a warrantless, unreasonable search. Additionally, the Court of Appeals found that the good-faith exception to the warrant requirement did not apply because the officers were not acting in reliance on binding precedent.

Upon review, the Supreme Court concluded that the acquisition of an individual's real-time CSLI constitutes a search under the Fourth Amendment to the United States Constitution because an individual has a reasonable expectation of privacy in his real-time CSLI. The Supreme Court also concluded that the good-faith exception to the warrant requirement was not applicable in Reed's case because the privacy interest in an individual's real-time CSLI was an unsettled point of law. The Court reasoned that its silence on a topic should not embolden law enforcement to assume that a space or object is not protected under the Fourth Amendment. Accordingly, the Supreme Court affirmed the Court of Appeals, remanding Reed's case to the trial court for further proceedings.

***Sexton v. Commonwealth*, 647 S.W.3d 227 (Ky. 2022)**

Opinion of the Court by Justice Keller. All sitting; all concur. Jonathan Sexton was convicted of second-degree rape, third-degree rape, and two counts of incest for sexually abusing his daughter. Sexton was jointly tried with his wife, Tina, who was charged with complicity to rape and incest. At trial, Sexton, through counsel, admitted responsibility for the crimes of rape and incest, asking for mercy in sentencing. He was sentenced to 55 years' imprisonment. He appealed as a matter of right. The issues before the Supreme Court included whether the jury instructions violated Sexton's right to a unanimous verdict, whether KRE 404(b) evidence was impermissibly admitted, and whether his trial should have been severed from his wife's trial. Neither the KRE 404(b) issue nor the unanimous jury verdict issue were preserved below and were reviewed for palpable error.

The Supreme Court affirmed the trial court. Specifically, the Court held that any unanimity error, to the extent that one existed, could not rise to the level of manifest injustice requiring reversal because Sexton had admitted guilt. The Court similarly held that any evidentiary errors were not palpable and therefore not reversible. The

Court also held that it was not an abuse of discretion for the trial court to deny severance since the mere threat of prejudice is insufficient for reversal.

***Jerome v. Commonwealth,* 653 S.W.3d 81 (Ky. 2022)**
Opinion of the Court by Justice Keller. All sitting; all concur. Jackie Jerome (Jackie) was convicted of burglary in the first degree, rape in the first degree, kidnapping, violation of an EPO/DVO, and terroristic threatening. He appealed his conviction arguing that the trial court erred in refusing to instruct the jury on the lesser included offense of burglary in the third degree and dismissing a juror during penalty phase deliberations and then deciding on its own Jackie's sentence.

The Supreme Court held that the trial court did not err in refusing to instruct the jury on burglary in the third as a less included offense of burglary in the first degree because the evidence presented did not justify an instruction on that lesser offense. Therefore, the Court affirmed Jackie's conviction.

However, the Supreme Court held that the trial court failed to sufficiently inquire into the juror's potential partiality or unfairness before excusing her during deliberations. Therefore, the Court vacated Jackie's sentence and remanded to the trial court for a new sentencing phase.

***Haney v. Commonwealth,* 653 S.W.3d 559 (Ky. 2022)**
Opinion of the Court by Justice Nickell. All sitting. Minton, C.J.; Hughes and Lambert, JJ., concur. Conley, J., concurs by separate opinion in which Keller and VanMeter, JJ., join. Haney was operating a vehicle in Morgan County which collided head-on with a motorcycle, killing its driver and passenger. Haney was transported to an out-of-state hospital for treatment of her injuries. A Kentucky State Police Trooper went to the hospital to interview Haney and obtain a blood sample. During the twenty-minute recorded interview, the Trooper believed Haney could have been intoxicated. He did not provide *Miranda* warnings but did read Kentucky's implied consent warning and told Haney she was not under arrest, nor did he intend to arrest her at that time. Haney declined the opportunity to contact an attorney and consented to a blood draw. Subsequent testing revealed the presence of oxycodone and hydrocodone in Haney's blood. More than two months later, Haney was indicted on two counts of wanton murder.

Haney moved to suppress her statements as being obtained in violation of *Miranda*. She further moved to suppress the blood draw as the sample was obtained without a warrant. The trial court denied both motions in a detailed written order concluding Haney was not in custody, so no *Miranda* warning was required, and Haney's consent to the blood draw negated her assertion a warrant was necessary. The trial court further denied Haney's motion to dismiss based on her allegations of abuse of the grand jury process as being without merit. Haney entered a conditional guilty plea to amended charges and received a sentence of twenty-five years' imprisonment. She appealed as a matter of right, raising the same three allegations of misconduct complained of in the trial court.

The Supreme Court first analyzed the totality of the circumstances surrounding Haney giving a statement to the investigating officer. It concluded she was not in a coercive custodial environment which would render any statements involuntary. Because a

reasonable person would not have felt they were under arrest or deprived of their freedom, the officer's duty to administer *Miranda* warnings was not triggered. Thus, the trial court did not err in denying the suppression motion.

Next, the Supreme Court concluded the trial court erred in failing to determine whether Haney's consent was voluntary before refusing to suppress the blood draw. Acknowledging a warrant is generally required for a blood draw, after discussing the holdings in *Birchfield v. North Dakota*, 579 U.S. 438 (2016), *Commonwealth v. Morriss*, 70 S.W.3d 419 (Ky. 2002), *Commonwealth v. Brown*, 560 S.W.3d 873 (Ky. App. 2018), *Commonwealth v. McCarthy*, 628 S.W.3d 18 (Ky. 2021), and the language of KRS 189A.105(2)(b), the Supreme Court held questions of fact existed as to whether Haney's consent was voluntary and therefore reversed and remanded for the trial court to consider the totality of the circumstances surrounding her consent.

Finally, the Supreme Court found no error in the trial court's denial of Haney's motion to dismiss the indictment. Noting the extreme reluctance courts have to scrutinize grand jury proceedings, any allegedly misleading statements made by the officer regarding road conditions were not sufficiently prejudicial nor did they constitute a flagrant abuse of the grand jury process warranting relief.

***Commonwealth v. Shirley*, 653 S.W.3d 571 (Ky. 2022)**
Opinion of the Court by Justice Hughes. All sitting; all concur. Criminal Appeal, Discretionary Review Granted. Shopping at a Walmart in Pulaski County, Chasity Shirley switched bar codes on two items and used the self-scanner to check out, paying $80.80 less than she should have paid based on the prices at which the items were offered for sale. Rather than charging Shirley with a theft crime, the Commonwealth charged Shirley under KRS 434.845 with committing unlawful access to a computer in the first degree, a Class C felony. At trial, the circuit court denied Shirley's motion for a directed verdict on the charge, concluding that Shirley did not retain the effective consent of Walmart to use its self-checkout register. The jury found Shirley guilty of the crime. On Shirley's appeal, the Court of Appeals in a 2-1 decision reversed the circuit court's denial of the directed verdict. *Held*: The Court of Appeals did not err. In order to be found guilty of unlawful access to a computer in the first degree, the defendant must access or attempt to access a computer without the effective consent of the owner for a fraudulent purpose as prescribed in KRS 434.845(1)(a) and (b). At issue here is whether Shirley lost Walmart's effective consent to use the self-scanner; effective consent is lost if the consent is "[u]sed for a purpose other than that for which the consent is given." KRS 434.840(9)(d). In accordance with statutory interpretation principles, the focus of KRS 434.840(9)(d) is the purpose for which consent to use the computer was given, not the fraudulent purpose a bad actor desires to achieve. Because the Commonwealth did not present proof that Shirley accessed Walmart's self-checkout register beyond the consented-to barcode scanning for completion of a self-checkout sales transaction, it was clearly unreasonable for the jury to find Shirley guilty of unlawful access to a computer in the first degree. The circuit court erred by denying Shirley's motion for a directed verdict of acquittal on that charge. The Court noted other criminal statutes addressing theft likely were relevant to Shirley's conduct.

***Simpson v. Commonwealth,* 653 S.W.3d 855 (Ky. 2022)**
Opinion of the Court by Justice VanMeter. All sitting; all concur. On appeal from the judgment of the Muhlenberg Circuit Court sentencing Simpson to twenty-years' imprisonment for two counts of manslaughter second degree, driving under the influence of controlled substances first offense, and persistent felony offender first-degree, the Supreme Court Affirmed. Simpson was charged with two counts of wanton murder and driving under the influence after his vehicle crossed the center line of U.S. Route 431 and struck another vehicle containing Karen Leach and Linda Embry, killing both. Simpson, unharmed, consented to a blood draw to determine the presence of alcohol or other drugs in his system. The blood draw indicated Simpson's blood contained methamphetamine. At trial, the jury found him guilty of two counts of a lesser charge, manslaughter second-degree. In this matter of right appeal, Simpson argued (1) failure to mirandize prior to interviewing him and a lack of probable cause to take the blood draw; (2) erroneous excusal of a prospective juror; and (3) improper testimony at trial.

The Supreme Court held Simpson was not in custody when he was interviewed unrestrained in the passenger's seat of an unmarked police SUV with the door open and was informed that he was free to leave. Accordingly, officers were not required to read his Miranda rights prior to the interview. The blood draw was proper as KRS 189A.103(1) does not require the presence of probable cause prior to an officer asking for consent to obtain a blood draw. The trial court properly excused a juror whose grandfather was convicted of vehicular manslaughter and who indicated she would be inclined to find for a lesser charge from the outset. There was no error when the trial court declined to declare a mistrial after the prosecutor described Leach and Embry as "murdered" during his questioning. Though the phrasing was impermissible, the trial judge properly admonished the jury and the presumption that such admonition cured the defect was not overcome by Simpson.

The Court further found that testimony characterizing Simpson's behavior during the interview as flippant and erratic was properly within KRE 702 and opinion testimony regarding a person's apparent intoxication is permissible. Simpson's belief that the testimony was an improper mischaracterization was unfounded and did not constitute palpable error. Testimony from a trooper at the scene that Simpson did not act like a typical person involved in a fatal collision ran afoul of *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013). However, the impermissible statement did not constitute palpable error as the statement was only a minor detail of the case against Simpson, which included laboratory evidence of the presence of methamphetamine in his system.

***Commonwealth v. Boone,* 653 S.W.3d 593 (Ky. 2022)**
Opinion of the Court by Justice Nickell. All sitting; all concur. Following a traffic stop in February 2016, Boone was found to be in possession of narcotics. After informing the investigating officer his driver's license was suspended, Boone provided the officer with a false name and birthdate, even after being warned doing so was a crime. After severing the drug charge, Boone was convicted by a jury in Fayette Circuit Court of theft of identity, operating on a suspended license, failure to illuminate rear license, and being a persistent felony offender in the first degree (PFO I). He was sentenced to ten years' incarceration.

Boone appealed to the Court of Appeals which reversed his conviction of theft of identity (and consequently his conviction for PFO I) but affirmed in all other respects. The Court of Appeals concluded the trial court erred in refusing to instruct the jury on the misdemeanor offense of giving a peace officer false identifying information as a lesser-included offense to theft of identity. It held the requirement that an officer warn a person providing false information constituted a crime was merely a prerequisite, rather than an element, of the misdemeanor crime. Because theft of identity and giving false identifying information to a peace officer are "remarkably similar" crimes, the panel found the proper course is for a trial court to always submit both charges to a jury.

On discretionary review, the Supreme Court reversed the Court of Appeals. The Supreme Court held the crime of giving false identifying information to a peace officer requires proof of an element which theft of identity does not. It rejected the notion the required warning contained in the statutory definition for the misdemeanor was merely a prerequisite rather than an element of the crime. To qualify as a lesser-included offense, the lower crime must include proof of the same or fewer facts than the primary offense. Because giving false identifying information to a peace officer requires proof of an additional fact—a warning by the investigating officer—it cannot qualify as a lesser-included offense of theft of identity. The Supreme Court thus concluded the trial court properly refused to grant Boone's requested instruction on the lower offense.

***Commonwealth v. Hensley,* 655 S.W.3d 122 (Ky. 2022)**
Opinion of the Court by Justice VanMeter. All sitting; all concur. On appeal from the decision of the Court of Appeals affirming the Boone Circuit Court's dismissal with prejudice on speedy trial grounds, the Supreme Court reversed and remanded. Hensley was arrested for first-degree possession of a controlled substance and possession of drug paraphernalia on January 30, 2019. Between Hensley's arraignment on April 17 and the pre-trial conference on May 6, the Commonwealth submitted the suspected controlled substance for lab testing, but the state lab's testing schedule was backlogged. On June 19, Hensley invoked his right to a speedy trial, and the trial court set a trial date for August 26. On August 21, five days before the scheduled trial, the Commonwealth had still not received the lab's test results and requested a continuance. The trial court denied the Commonwealth's motion and found the period of six months and twenty-three days between Hensley's arrest and the final pre-trial conference violated Hensley's right to a speedy trial, focusing on the Commonwealth's delay in submitting the suspected narcotic residue for testing. The Court of Appeals found no abuse of discretion and affirmed the trial court's decision. However, the Court found that the Court of Appeals, and by extension the Boone Circuit Court, did err. A possible speedy trial violation necessitates consideration of four factors: (1) the length of the delay, (2) the reason for the delay, (3) defendant's assertion of the right, and (4) prejudice to the defendant. The length of delay, if approaching a year or longer, creates a presumption of prejudice and a finding of presumptive prejudice acts as a triggering mechanism for the remainder of the analysis. However, in this case the length of delay only approached seven months. While Hensley's case was relatively simple, the delay was not long enough to trigger presumptive prejudice and as such the Court did not reach the other factors. The Boone Circuit Court therefore erred in finding Hensley's speedy-trial rights violated.

***Commonwealth v. Bell,* 655 S.W.3d 132 (Ky. 2022)**
Opinion of the Court by Justice Conley. All sitting. Minton, C.J.; Hughes, Lambert, and Nickell, JJ., concur. Keller and VanMeter, JJ., dissent by separate opinions. In this case the Court of Appeals reversed the trial court's denial of a directed verdict motion on the tampering with physical evidence charge. At trial the defendant argued there was insufficient evidence for a jury to reasonably conclude that Perry had tampered with physical evidence when he, in the presence of police officers, dropped a bindle containing synthetic marijuana between the passenger seat and the vehicle door. The Court of Appeals reversed citing this Court's decision in *Commonwealth v. James,* 586 S.W.3d 717 (2019).

The Supreme Court affirmed the Court of Appeals, and overruled *Taylor v. Commonwealth,* 987 S.W.2d 302 (Ky. 1998). Reiterating and slightly broadening the holding in *James,* the Supreme Court held once more that when a defendant, in the presence of an officer, drops evidence and the evidence is easily retrievable, the defendant has only abandoned evidence and not tampered with physical evidence.

***Kelly v. Commonwealth,* 655 S.W.3d 154 (Ky. 2022)**
Opinion of the Court by Justice VanMeter. All sitting; all concur. On appeal from the Marion County Circuit Court, Kelly appeals as a matter of right his convictions for unlawful imprisonment, wanton endangerment, and criminal trespass. The Supreme Court affirmed in all respects. After an episode of mental instability, Kelly began to believe persons unknown were surveilling him through his and his fiancée's cell phones. Attempting to avoid this surveillance, Kelly, armed with a pistol, left his house to seek assistance. Kelly eventually arrived at the home of the victims and encountered two of them on the front porch. While brandishing and waving his weapon, Kelly ordered the two members of the family into their home and conscripted them into helping him contact the FBI. When family members asked if they could leave, Kelly refused. Another member of the family arrived at the home and was similarly ordered inside and not allowed to leave. A fourth family member discovered the situation and informed law enforcement. After a brief standoff with police, Kelly surrendered. No one was harmed. Kelly was convicted of three counts of unlawful imprisonment, three counts of wanton endangerment, and one count of criminal trespass. On appeal, Kelly asserted the circuit court erred in four respects: (1) denial of his motion for directed verdict as to two of the victims; (2) a double jeopardy violation; (3) improper admission of prior bad acts evidence; and (4) prosecutorial misconduct. As to the directed verdict, the Court found there was sufficient evidence to place before the jury the question of Kelly's guilt as to respective counts of wanton endangerment and respective counts of unlawful imprisonment relating to two of the victims. The evidence adduced at trial showed that Kelly pointed the gun at two of the victims and waved the gun around the third. The danger presented by Kelly's waving of a firearm in the direction of that third victim satisfied the minimal evidence needed for the wanton endangerment charges to be submitted to the jury. Similarly, Kelly's actions were sufficient to submit the unlawful imprisonment charges to the jury. The Court found no double jeopardy violation for convictions of unlawful imprisonment and wanton endangerment where the elements of the two crimes differed and the proof underlying each conviction was sufficiently unique. Third, admission of a similar incident occurring two weeks prior was not error was not an abuse of discretion where the evidence showed intent and lack of mistake. Finally, prosecutor's penalty-phase

statements expressing disappointment with the jury and inviting the jury to consider Kelly's parole eligibility date were not misconduct.

***Saxton v. Commonwealth,* ___ S.W.3d ___, 2022 WL 17726197 (Ky., Dec. 15, 2022)**
Opinion of the Court by Justice Conley. All sitting. Minton, C.J.; Hughes, Keller, JJ., concur. VanMeter, J., concurs in part and dissents in part by separate opinion joined by Nickell and Lambert, JJ. Saxton was convicted of first-degree strangulation, tampering with physical evidence, second-degree persistent felony offender, criminal mischief, possession of marijuana, and possession of drug paraphernalia. After review, the Court reversed all convictions apart from those for possession of marijuana and criminal mischief.

First, the Court held Saxton was not denied his constitutional right to cross-examine a witness. Saxton had sought to cross-examine the victim as to whether she had been apprised of her rights under Marsy's Law and whether those rights were being fulfilled by the Commonwealth. The Court declared the "plain, indubitable" meaning of Marsy's Law deprived Saxton of any standing to inquire of the victim whether she had been informed of her rights under Marsy's Law or if her rights were being fulfilled. Moreover, there was no relief available to Saxton even if the victim's rights were being violated and, for those reasons, his attempt to question the victim on that subject was constitutionally inappropriate. Reviewing the claimed error under traditional Sixth Amendment rules, however, the Court concluded there was no error as Saxton only alleged that the victim was compelled to testify against her will by subpoena. The Court noted this is a standard practice throughout the Commonwealth and in fact is a guaranteed right under Ky. Const. § 11.

The Court then recognized *Taylor v. Commonwealth*, 987 S.W.2d 302 (Ky. 1998), had been overruled by its recent case of *Commonwealth v. Bell*, 2022 WL 12196438 (Ky. 2022). Therefore, the Court held there was insufficient evidence to sustain a tampering with evidence conviction because the marijuana abandoned by Saxton had been abandoned in the presence of a police officer while Saxton was detained in the back of the police cruiser, and the officer searched his vehicle for only 11 seconds before recovering the marijuana. Additionally, the cruiser contained blockers underneath the front seats to prevent any contraband from being concealed. Accordingly, the tampering with physical evidence and the concomitant persistent felony offender in the second-degree convictions were reversed. The Court did, however, sustain the possession of marijuana conviction upon the basis of the bag of marijuana that Saxton had abandoned.

Next, the Court agreed with Saxton that the Commonwealth had failed to establish a sufficient chain of custody regarding a plastic container containing a marijuana cigarette and the two DNA buccal swabs of Saxton and his victim. No police officer testified to recovering the plastic container and marijuana cigarette from Saxton's person thus the evidence was not linked to Saxton from the inception—neither did anyone testify to collecting the DNA buccal swabs from Saxton and his victim. Though the Court affirmed that a perfect chain of custody is not required, it held that rule inapplicable where the foundational link in the chain connecting the evidence to the person in question is not established. On that basis, the possession of drug paraphernalia conviction was reversed. Similarly, because the DNA evidence

corroborated the victim's account of her strangulation, the Court reasoned the DNA evidence substantially influenced the jury and was not harmless error; therefore, the first-degree strangulation conviction and the concomitant second-degree persistent felony offender conviction were reversed.

Finally, the Court rejected Saxton's argument that a Commonwealth's Investigator attempting to stop him from walking in front of the jury to get to his table on the first morning of trial created an inherently prejudicial environment that tainted the subsequent trial. Holding that the situation was more analogous to an outburst, and should be analyzed under rules governing outbursts, the Court concluded Saxton had not shown the Commonwealth's Investigator intended to prejudice Saxton by his action, nor did he show that the jury had even noticed the incident despite having the opportunity to do so during voir dire. Accordingly, the Court affirmed the trial court's refusal to declare a mistrial.

***Cavanaugh v. Commonwealth,* ___ S.W.3d ___, 2022 WL 17726279 (Ky., Dec. 15, 2022)**

Opinion of the Court by Justice Conley. All sitting; all concur. All sitting. All concur. In this case, Cavanaugh was convicted of first-degree assault and being a persistent felony offender in the first degree. He was sentenced to thirty-four years in prison. On appeal, Cavanaugh claimed the trial court erred in its application of Marsy's law by allowing the victim to be present during the entire trial after KRE 615 was invoked. Cavanaugh also contended the trial court erred by failing to instruct the jury on lesser-included offenses.

The Supreme Court affirmed the trial court. It held Marsy's law, as a provision of the Kentucky Constitution, prevails over KRE 615 should they conflict. The Supreme Court also held that the trial court did not abuse its discretion by declining to instruct the jury on lesser-included offenses.

***Commonwealth v. Woods,* 657 S.W.3d 902 (Ky. 2022)**

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Hughes, Keller, and Nickell, JJ., concur. Conley, J., dissents by separate opinion in which Lambert, J., joins. On review from the Court of Appeals, the Commonwealth appealed the intermediate court's finding that the record was insufficient to support Woods' conviction for driving under the influence. The Supreme Court reversed and reinstated the conviction. Police officers found Woods sleeping in his truck in a Waffle House parking lot shortly after midnight. Based on Woods's actions, officers suspected he was under the influence of alcohol, although no alcohol containers were found in the truck. Woods admitted to consuming several alcoholic beverages earlier in the night at a nearby bar after which he traveled to Waffle House for a late meal, but he did not explicitly state he drove himself from the bar to Waffle House. After Woods failed a field sobriety test, officers placed him under arrest. After a bench trial, Woods was convicted of DUI. The Jessamine Circuit Court affirmed the conviction. Woods appealed to the Court of Appeals. That court found the record insufficient to show that Woods was in control of the vehicle, relying on *Wells v. Commonwealth*, 709 S.W.2d 847 (Ky. App. 1986). Specifically, it held the evidence was insufficient to show that Woods intended to operate the vehicle when police found him. The Supreme Court found the Court of Appeals' application of the *Wells* factors erroneous. The Court clarified that the factors set forth in *Wells* are non-exhaustive and emphasized

that the Commonwealth need not prove every factor to show operation or control of a vehicle. In this case, the Court of Appeals erred in weighing too heavily the "intent" factor when more focus should have been placed on assessing the circumstances bearing on Woods's arrival at the Waffle House parking lot. Officers found Woods intoxicated and alone in the parking lot of an establishment that does not sell alcohol. Woods further admitted to consuming alcohol prior to traveling to Waffle House. The evidence against Woods, though circumstantial, supported the reasonable inference that he drove himself from the bar to Waffle House in an inebriated state. This evidence was sufficient to support the judgment of the District Court.

***Commonwealth v. Moore,* ___ S.W.3d ___, 2023 WL 2033450 (Ky., Feb. 16, 2023)**
Opinion of the Court by Justice Lambert. All sitting. All concur. In accordance with his plea agreement, Thomas Moore was convicted of two class D felonies and of being a persistent felony offender in the second degree (PFO II) and sentenced to twenty years in prison, probated for five years. Moore's probation was revoked and according to the final judgment, he was sentenced to an enhanced ten years on each class D felony and to twenty years on the PFO II charge, the sentences running concurrently for a total of twenty years in prison. Moore moved the circuit court under RCr 10.26 to vacate his sentence based upon the illegal twenty-year sentence on the PFO II charge. The circuit court denied the motion. When Moore appealed to the Court of Appeals, the Commonwealth argued that Moore's RCr 10.26 motion was procedurally barred from consideration. The Court of Appeals, however, concluded that the circuit court committed palpable error and that Moore was entitled to relief from the illegal sentence on the PFO II charge. The Court of Appeals further concluded that Moore's appeal from the denial of his RCr 10.26 motion to vacate was a direct appeal and that Moore was not precluded from appropriately seeking relief under RCr 11.42. The Supreme Court of Kentucky held Moore presented a sentencing issue which alters the procedural analysis. Because an illegal sentence may not stand uncorrected, relief may be sought by direct appeal, RCr 11.42, CR 60.02, or a writ of habeas corpus. Although the Court of Appeals may have erred by considering Moore's appeal from the RCr 10.26 motion as a direct appeal, the Court of Appeals properly determined that Moore is entitled to relief from the illegal twenty-year sentence on the PFO II charge.

***Burdette v. Commonwealth,* ___ S.W.3d ___, 2023 WL 2033695 (Ky., Feb. 16, 2023)**
Opinion of the Court by Chief Justice VanMeter. All sitting. All concur. Roger Burdette appealed as a matter of right from the Jefferson Circuit Court judgment sentencing him to twenty-seven years' imprisonment for his convictions of murder, four counts of wanton endangerment in the first degree, operating a motor vehicle while under the influence, and failure to give right-of-way to a stopped emergency vehicle. On appeal, Burdette argued the trial court made numerous erroneous rulings which he claims resulted in a fundamentally unfair trial. With respect to the three evidentiary rulings Burdette raised, the Supreme Court held: 1) the trial court did not abuse its discretion in admitting five autopsy photos; 2) admitting evidence of Burdette's texts about purchasing pills illicitly was not an abuse of the trial court's discretion; and 3) the trial court did not abuse its discretion in admitting evidence of the content of the video (pornography) that Burdette was watching at the time of the collision. The Supreme Court further held that the trial court did not err by allowing the jury to view the vehicles involved in the collision. Regarding the trial court's denial of Burdette's motions to suppress, the Supreme Court affirmed the lower court,

holding that under the "booking exception" to *Miranda v. Arizona*, 384 U.S. 436 (1966), two witnesses were permitted to testify regarding statements Burdette made that were contained in his medical records from jail, obtained through a grand jury subpoena. Lastly, the Supreme Court held that while the trial court committed error in forbidding defense counsel from using proof of a statement of Burdette, already admitted into evidence, to argue during closing argument that his intent was at most reckless, not wanton, such error was harmless beyond a reasonable doubt, given the overwhelming evidence presented against Burdette.

Commonwealth v. McMichael, **___ S.W.3d ___, 2023 WL 2621985 (Mar. 23, 2023)**
Opinion of the Court by Justice Lambert. VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. All concur. Thompson, J., not sitting. McMichael pleaded guilty to theft by unlawful taking over $500, but less than $10,000. The charges resulted from McMichael and a co-defendant removing several pieces of custom stainless-steel siding from a kitchen-less, 1950s-era modular diner which they then sold for $155.81. Most of the siding was later recovered by the owner. At the time of the theft, the diner had sat in a field exposed to the elements for at least fifteen years and was in a significant state of disrepair. As part of his plea agreement, McMichael agreed to pay restitution to the diner's owner. During McMichael's combined sentencing and restitution hearing, the diner's owner was the sole witness for the Commonwealth. The only evidence presented as to the diner's value was the owner's testimony that he bought it in the early 1990s for around $25,000. The owner also presented two estimates from a contracting company. The first, $62,493, was the cost to replace only the siding that was stolen. The second, $221,800, was to replace all the siding so that it would match. The trial court ordered McMichael to pay $62,493 in restitution jointly and severally with his co-defendant.

The Court of Appeals reversed, holding that there was insufficient evidence to support the restitution amount ordered. The Court of Appeals held as a matter of first impression that when a victim's property is damaged, the pre-incident and post-incident values of the property must be established, and the difference between those two values must serve as a cap on restitution. In addition, in this case, the value of the recovered siding must be determined and used to offset the restitution award. On appeal to the Supreme Court, the Commonwealth did not challenge the restitution calculation framework established by the Court of Appeals. Rather, it argued that the Court of Appeals' holding required the owner of damaged property to have heightened qualifications to testify as to its value in contradiction to long-standing precedent. The Supreme Court disagreed with this interpretation and simply reiterated that to establish an item's value for restitution purposes a witness' testimony must be based on reliable facts that have minimal indicum of reliability beyond mere allegation.

Pozo-Illas v. Commonwealth, **___ S.W.3d ___, 2023 WL 2623213 (Mar. 23, 2023)**
Opinion of the Court by Justice Lambert. VanMeter, C.J.; Conley, Keller, Lambert, Nickell, and Thompson, JJ., sitting. VanMeter, C.J.; Lambert, Keller, Conley, and Nickell, JJ., concur. Thompson, J., concurs in result only. Bisig, J., not sitting. Pozo-Illas was driving through a public park doing twice the speed limit while intoxicated. He struck a golf cart occupied by two individuals as it was using a designated cart path to cross a main road. The cart passenger was killed, and the driver was seriously injured. Pozo-Illas was convicted of a host of crimes, including wanton murder.

The Court held: (1) The trial court did not err by excluding evidence of subsequent remedial signage and safety measures placed at the cart path, as it was not relevant. The Court further held that although KRE 407 regarding subsequent remedial measures can apply to criminal cases, its underlying purpose is served only if the criminal defendant was the party responsible for implementing the remedial measures. (2) The trial court did not err by refusing to instruct the jury in accordance with its order taking judicial notice, as the order took notice of the law rather than an adjudicative fact. Accordingly, KRE 201 was not violated. (3) The trial court did not err by declining to hold a Daubert hearing prior to the admission of two of the Commonwealth's witnesses, as the defense did not present any evidence to rebut the reliability of the experts' respective conclusions. (4) The trial court did not err by declining to instruct the jury on reckless homicide, as no reasonable juror could have found beyond a reasonable doubt that his conduct was reckless while entertaining reasonable doubt that his conduct was wanton.

***Taylor v. Commonwealth,* ___ S.W.3d ___, 2023 WL 2622558 (Mar. 23, 2023)**
Opinion of the Court by Justice Conley. VanMeter, C.J.; Keller, Lambert, Nickell, and Thompson, JJ., concur. Bisig, J., dissents by separate opinion. Dwight Taylor was charged with rape and wanton endangerment after he went home with a woman he met at a night club. She alleged that Taylor had strangled her repeatedly for twenty minutes and raped her, and she testified to her account at trial. A Sexual Assault Nurse Examiner also testified and corroborated much of the victim's account. Taylor testified in his own defense. His story was that he could not recall having sex with the woman, but when he woke up the next morning and got ready to leave, he let it slip that he was married. This angered the complainant and the two began arguing. Taylor admitted to placing his hands around her neck and applying a grip though he insisted it was only for a few moments.

At the conclusion of evidence, Taylor requested and submitted a jury instruction for second-degree wanton endangerment as a lesser-included offense for first-degree wanton endangerment. The difference between the two is the latter requires wanton conduct manifesting "extreme indifference to the value of human life" and the conduct must create a "substantial danger of death or serious physical injury." The trial court denied the requested jury instruction because the only evidence to support the instruction was Taylor's uncorroborated testimony. The Court of Appeals affirmed, in a 2-1 decision.

The Supreme Court reversed the Court of Appeals, holding that the uncorroborated testimony of a defendant will generally be enough to merit a jury instruction except in certain circumstances. The Court made clear that the jury is the fact-finder and is empowered to weigh the evidence and determine the credibility of witnesses. Because of this, even when a defendant's testimony is uncorroborated, his testimony nonetheless is evidence, and the jury has the authority to believe him and his account. Therefore, uncorroborated testimony will generally support giving a requested jury instruction.

***Halvorsen v. Commonwealth,* ___ S.W.3d ___, 2023 WL 2622712 (Mar. 23, 2023)**
Opinion of the Court by Chief Justice VanMeter. VanMeter, C.J.; Conley, Keller, Lambert, and Nickell, JJ., concur. Thompson, J., concurs in result only by separate

opinion in which Bisig, J., joins. This case presents two issues: (1) whether the opinion in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) on unanimous verdicts should be retroactively applied to prior convictions in a collateral attack and (2) whether defendants' convictions under a combination principal-accomplice jury instruction present a unanimity issue. As to the first issue, the Court held that *Ramos* does not apply retroactively and further, was entirely inapplicable, as the holding in that case does not apply to verdicts in which twelve jurors found the defendant guilty. As to the second issue, the Court held that the defendants' convictions under a principal-accomplice jury instruction cannot be attacked as a nonunanimous verdict where both theories are supported by the evidence. Resultingly, the Supreme Court affirmed the Fayette Circuit Court's denial of the defendants' post-conviction motions.

***Campbell v. Commonwealth*, ___ S.W.3d ___, 2023 WL 3113315 (Apr. 27, 2023)**
Opinion of the Court by Justice Conley. All sitting. VanMeter, C.J.; Bisig, Keller, and Nickell, JJ., concur. Thompson, J., concurs by separate opinion. Lambert, J., concurs in result only by separate opinion. The trial court allowed a medical doctor to testify via zoom over the objections of defense counsel who argued it was a violation of defendant's 6th Amendment right to confront witnesses. The jury convicted on assault in the first-degree, robbery in the first-degree, violation of a domestic violence order, and being a persistent felony offender in the first-degree. The trial court accepted the recommendation of the jury and thereby sentenced Campbell to life in prison. The Supreme Court reversed Campbell's conviction for assault in the first-degree by holding that Campbell's Sixth Amendment rights were violated by allowing a doctor to testify via zoom as to serious physical injury, as alleged by the Commonwealth. Analyzing the issue under *Maryland v. Craig,* the Supreme Court found the trial court erred and held there was not a sufficient finding of necessity to allow the doctor to testify remotely. 497 U.S. 836, 853 (1990).

***Leavell v. Commonwealth*, ____ S.W.3d ___, 2023 WL 3113316 (Apr. 27, 2023)**
Opinion of the Court by Justice Keller. All sitting. All concur. Anshanique M. Leavell appealed from her convictions for murder, receiving stolen property—firearm, and tampering with physical evidence. These convictions arose after she shot Amareya Freeman one time in the chest. At trial, she asserted that she acted in self-defense. On appeal, Leavell asserted several issues, including that the trial court erred in denying her motions for directed verdict, that the trial court erred in admitting evidence that she was potentially affiliated with a gang, and that the Commonwealth's Attorney engaged in prosecutorial misconduct. The Kentucky Supreme Court held that the trial court did not err on any of these issues.

Finally, Leavell asserted that the trial court erred in admitting testimony that Leavell did not act consistently with someone who truly acted in self-defense in violation of *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013). On this issue, the Supreme Court held that the trial court did not err in admitting testimony that would have otherwise violated *Ordway* because Leavell first elicited testimony about the way a typical suspect behaves. After she did so, the Commonwealth was permitted to elicit similar testimony to rebut the evidence Leavell elicited.

***Kimmel v. Commonwealth,* ____ S.W.3d ___, 2023 WL 3113334 (Apr. 27, 2023)**
Opinion of the Court by Justice Bisig. All sitting. Lambert and Nickell, JJ., concur. Thompson, J., concurs by separate opinion. Conley, J., concurs in part and dissents in part by separate opinion in which VanMeter, C.J., and Keller, J., join. David A. Kimmel was charged separately with burglary, theft, and being a first-degree persistent felony offender after shoplifting from Walmart. While released on bond for that offense, he shoplifted from Rural King and was charged with the same offenses. Kimmel agreed to have all charges tried together and was sentenced to forty years in prison pursuant to KRS 533.060(3), which requires that the sentence imposed for the offense committed while awaiting trial must run consecutively to the confinement for the offense for which the person is awaiting trial. Kimmel argued that the forty-year sentence violated KRS 532.110(1)(c), which requires that the maximum aggregate sentence of consecutive sentences cannot exceed the longest term authorized for the highest class of crime committed – here, twenty years.

The Supreme Court relied on *Blackburn v. Commonwealth,* 394 S.W.3d 395 (Ky. 2011), in which the Court analyzed KRS 533.060(2) and held that the subsection does not modify the aggregate maximum sentence authorized by KRS 532.110(1). The Supreme Court held that the reasoning in *Blackburn* is equally applicable to KRS 533.060(3). As such, the Court concluded that KRS 533.060(3) and KRS 532.110(1)(c) can both be applied to Kimmel's sentence because treating KRS 533.060(2) and (3) differently would lead to illogical and inconsistent results. The Court employed its obligation to harmonize apparently conflicting statutes when possible and held that while sentences under KRS 533.060(3) must be consecutive, the resulting total term of years cannot violate the maximum aggregate sentence cap set forth in KRS 532.110(1)(c). The Court also found no error in the admission of KRS 404(b) evidence, nor in permitting witness narration while surveillance videos of the incident were played for the jury. The Court affirmed Kimmel's convictions but vacated his forty-year sentence and remanded the case to the trial court to sentence Kimmel to twenty years in prison.

***Hernandez v. Commonwealth*, ___ S.W.3d ___, 2023 WL 3113330 (Apr. 27, 2023)**
Opinion of the Court by Justice Bisig. VanMeter, C.J.; Bisig, Keller, Lambert, Nickell, and Thompson, JJ., sitting. All concur. Conley, J., not sitting. Ruviel Hernandez appealed as a matter of right from the Greenup Circuit Court judgment sentencing him to a sentence of life plus twenty years for his convictions of rape and four counts of sexual abuse. On appeal, Hernandez argued the trial court erred 1) in refusing to suppress his interview with law enforcement because he was not provided *Miranda* warnings or an interpreter, 2) in admitting other bad acts evidence regarding another victim's allegations against him pursuant to KRE 404(b), and 3) in running his life sentence consecutive to his sentence of twenty years. The Supreme Court held that *Miranda* warnings were not required because Hernandez was not in custody at the time of the interview, nor was an interpreter required given Hernandez's proficiency with the English language and the American legal system. The Supreme Court further held evidence of another victim's allegations against Hernandez were similar to the allegations at issue at trial and admissible under KRE 404(b) for the issues of mistake, motive, intent, opportunity, preparation, and plan. The Supreme Court also held that Hernandez's pre-trial motion in limine to exclude the KRE 404(b) evidence was not a "motion to suppress" for purposes of RCr 8.27, and thus the lack of a hearing on that motion was not error. Finally, the Supreme Court held pursuant to *Bedell v. Commonwealth*, 870 S.W.2d 779 (Ky. 1993), that the trial court erred in running

Hernandez's sentences for life and twenty years consecutively and therefore remanded for entry of a new judgment running the life and twenty-year sentences concurrently.

DEPENDENCY, NEGLECT AND ABUSE:

Cabinet for Health and Family Services v. L.G.**, 653 S.W.3d 93 (Ky. 2022)**
Opinion of the Court by Justice Keller. All sitting; all concur. Over the course of several years, L.G. and her son, H.M., made numerous allegations of abuse, including sexual abuse, against H.M.'s father, J.M. Child Protective Services (CPS) did not substantiate any of the allegations until the last one. During its investigation into this last allegation, CPS also began an investigation into L.G. for emotional abuse of H.M. CPS worried that L.G. was manipulating H.M. into making and supporting false claims against his father and using the allegations to get back at J.M. after arguments.

After a dependency, abuse, or neglect action was filed against each parent, the Jefferson Family Court found that L.G. emotionally abused H.M. and that J.M. did not abuse him. L.G. appealed the finding of abuse against her, and the Court of Appeals reversed. The Supreme Court granted discretionary review.

The Supreme Court held that the family court's findings were not clearly erroneous nor were its actions an abuse of discretion. The Court explained that the family court heard and received numerous claims regarding the ways in which L.G.'s behavior served to impair H.M. The trial court found that H.M. was deprived of his ability to have a stable and appropriate relationship with his father and was encouraged to deceive and manipulate those around him. L.G. intentionally impeded any attempts to remedy these harms in H.M.'s therapy, only worsening his ability to overcome deficits in his ability to "function within a normal range of performance and behavior. Based on this evidence, the Supreme Court reversed the Court of Appeals and reinstated the orders of the family court.

EMPLOYMENT LAW:

Mouanda v. Jani-King International**, 653 S.W.3d 65 (Ky. 2022)**
Opinion of the Court by Justice Hughes. All sitting; all concur. Constance Mouanda is the sole owner of The Matsoumou's, LLC (the LLC), an entity she was required to form in order to purchase the rights to operate a Jani-King commercial cleaning franchise from Cardinal Franchising. Jani-King sells master franchisees, like Cardinal, the right to operate as a Jani-King sub-franchisor in an exclusive territory. Having never realized the profits promised under the Franchise Agreement with Cardinal, Mouanda individually filed suit in Jefferson Circuit Court for fraud, breach of contract, and unconscionability. In addition, she sought damages for Cardinal and Jani-King's failure to comply with Kentucky wage and hour laws. The trial court granted Cardinal's and Jani-King's motion to dismiss based on Mouanda's failure to bring the suit on behalf of the LLC and the Court of Appeals affirmed.

The Supreme Court held that the trial court erred in dismissing Mouanda's claims. Mouanda asserted a wage and hour claim that belonged to her individually, not a claim that belonged to the LLC. Although the plain language of the Kentucky Wage and Hour Act explicitly excludes franchisees as employees of a franchisor, the franchisee is not Mouanda, it is the LLC. This case also requires consideration of whether Mouanda is an employee or an independent contractor and the application of

the economic realities test. *Keller v. Miri Microsystems, LLC*, 781 F.3d. 799, 806 (6th Cir. 2015). In assessing the true nature of the parties' relationship, courts must look at the practical, not just contractual, realities of the relationship. The Franchise Agreement alone suggests that Cardinal maintained a significant degree of control over the day-to-day activities of the LLC in performing cleaning services. The allegations in Mouanda's complaint, namely that Cardinal never offered her enough cleaning contracts to fulfill its obligations to the LLC under the Franchise Agreement, are sufficient to survive a motion to dismiss. On remand, the trial court must apply the economic realities test and examine the true nature of Mouanda's working relationship with the purported employer, rather than relying on the contractual label or structures applied to the relationship.

***Hughes v. UPS Supply Chain Solutions, Inc.*, ___ S.W.3d ___, 2023 WL 2622566 (Mar. 23, 2023)**
Opinion of the Court by Chief Justice VanMeter. Bisig, Conley, and Nickell, JJ., concur. Thompson, J., dissents by separate opinion in which Keller and Lambert, JJ., join. The issues presented in this appeal include whether Kentucky employers are required to pay employees for time spent undergoing employer-required pre-shift and/or post-shift security screenings when: (1) the U.S. Supreme Court's opinion in *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014), holds that employers are not required to pay employees for screening time under federal law, the Portal-to-Portal Act, which was added to the Fair Labor Standards Act in 1947; and (2) Kentucky's General Assembly did not enact the Portal-to-Portal Act when it adopted the state's version of the Fair Labor Standards Act, the Kentucky Wages and Hours Act, in 1974. The majority opinion affirmed the decisions of the Court of Appeals and the Jefferson Circuit Court holding that preliminary and postliminary security screenings required by UPS are not compensable under KRS Chapter 337, under customary rules of statutory construction. The Court reasoned that the Portal-to-Portal Act's exemptions were incorporated into Kentucky law in 1975, when the Department of Workplace Standards applied the Portal-to-Portal Act's exemptions to KRS Chapter 337. Nearly a half century of legislative inaction clearly demonstrates that the legislature has acquiesced to the Department's administrative interpretation. In addition, a federal case, *Vance v. Amazon.com, Inc. (In re Amazon.com, Inc., Fulfillment Ctr. Fair Lab. Standards Act (FLSA) & Wage & Hour Litig.)*, 852 F.3d 601 (6th Cir. 2017), addressed a virtually identical factual situation and applied the Portal-to-Portal Act's exemptions to KRS Chapter 337. The majority opinion noted that a contrary interpretation would be squarely inconsistent with well-settled law concerning the legal force of properly enacted administrative regulations, the Court's precedent regarding the proper application of legislative inaction, and accepted principles of statutory interpretation.

<u>FAMILY LAW:</u>
***Thielmeier v. Thielmeier*, 664 S.W.3d 563 (Ky. 2022)**
Opinion of the Court by Justice Lambert. All sitting. All concur. In this dissolution of marriage case, the husband and wife were married for three decades and had six children. Throughout the marriage, the husband was the primary breadwinner, and the wife was a full-time stay-at-home mom. The husband was a physician-owner of a successful anesthesiology practice, Anesthesiology Consultants Enterprises, Inc. (ACE). The relevant issues to be decided by the circuit court were the division of the husband's ACE 401(k); the valuation and division of the husband's ownership interest

in ACE, which increased during the parties' separation; the award of spousal maintenance; and the award of attorney's fees.

The Supreme Court held that the circuit court erred by dividing the ACE 401(k), which was undisputedly martial property, as of a date shortly after the husband vacated the marital residence instead of the date of the divorce decree. The circuit court further erred by failing to explain why such a division was just under the factors in KRS 403.190. The Court further held that, while the circuit court did not err in its valuation of Ken's ownership interest in ACE, it did err in its division of that interest. The circuit court awarded 100% of the post-separation increase in the interest in ACE, which was undisputedly marital property, to the husband. The circuit court further failed to explain why its division was just under KRS 403.190. Finally, the circuit court erred by permitting the husband to pay 100% of his attorney's fees with marital funds but denying the wife the ability to do the same. Based on the Court's other holdings, it further held that spousal maintenance would have to be reevaluated on remand.

***Miller v. Bunch,* 657 S.W.3d 890 (Ky. 2022)**
Opinion of the Court by Justice Lambert. All sitting. Conley, Hughes, and VanMeter, JJ., concur. Nickell, J., dissents by separate opinion in which Minton, C.J., and Keller, J. join. Miller and Bunch dated for a brief time. Soon after they separated, Bunch discovered she was pregnant. During Bunch's pregnancy, it was unknown whether Miller or Bunch's new boyfriend, Walker, was the child's father. Tragically, the child was stillborn. Bunch thereafter filed a wrongful death suit against the delivering hospital, naming Walker as the child's father. Miller filed a motion to intervene and to compel a paternity test, which ultimately proved Miller's paternity. Bunch and Miller later settled the claim with the hospital, but Bunch thereafter alleged that Miller was entitled to none of the settlement proceeds by virtue of Mandy Jo's Law, KRS 411.137 and KRS 391.033. The circuit court agreed, citing Miller's lack of financial and emotional support for Bunch during her pregnancy.

The sole issue addressed by the Court was whether Mandy Jo's Law was applicable to cases involving a stillborn child. The Supreme Court held that Mandy Jo's Law, as it is currently written, does not evince a legislative intent for its application to cases involving a stillborn child. The Court reasoned that neither the statutory exceptions to Mandy Jo's Law nor our judicially crafted definitions of "willful abandonment" and "care and maintenance" could be applied to a stillborn child. Further, the fundamental purpose of Mandy Jo's Law is to prevent a parent from financially benefiting from his or her child's death if the parent has abandoned the *child*, not the child's other parent.

***Mahl v. Mahl*, ___ S.W.3d ___, 2023 WL 3113308 (Apr. 27, 2023)**
Opinion of the Court by Justice Bisig. VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. All concur. Thompson, J., not sitting. Dr. Charles and Louanne Mahl were married for twenty-eight years and had two children before they were eventually divorced in 2007. The circuit court ordered Charles to pay Louanne spousal maintenance for ten years and once that expired, Louanne successfully petitioned the court for modification, proving a substantial and continuing change in circumstances that rendered the original maintenance award unconscionable. KRS 403.250. Charles appealed to challenge maintenance modification and attorney's fees

awarded pursuant to KRS 403.220 but failed to name Louanne's attorney as a party to the appeal. The Court of Appeals declined to address the attorney's fee issue but reversed the circuit court's modification of maintenance, concluding that the circuit court abused its discretion.

On appeal, the Supreme Court held that Charles's failure to name Louanne's attorney in the notice of appeal was not fatal, particularly in light of this Court's recent opinion in *M.A.B. v. Cabinet for Health and Family Services,* 635 S.W.3d 90 (Ky. 2021), and its adoption of the new Rules of Appellate Procedure. The Supreme Court upheld the attorney's fee award because the circuit court properly considered the financial position of the parties and recognized the difficulties created by Charles's noncompliance with discovery orders. Finally, the Supreme Court concluded that the Court of Appeals erred in reversing the circuit court's modification of maintenance. The circuit court conducted numerous hearings and considered copious information presented by the parties regarding their financial circumstances. As such, the circuit court did not abuse its discretion in modifying maintenance and was undoubtedly best positioned to make that determination. The Court of Appeals opinion is reversed, and the circuit court order is reinstated.

IMMUNITY:

***Jefferson County Public Schools v. Tudor, Next Friend of J.T.,* 664 S.W.3d 600 (Ky. 2023)**

Opinion of the Court by Justice Keller. All sitting. All concur. Shontai Tudor is mother and next friend of J.T., a minor. J.T. was involved in a physical and verbal altercation at school when his assistant principal, Brian Raho, interceded. Because of Raho's intervention, Tudor brought suit alleging assault and battery against the Jefferson County Board of Education and Raho. The Jefferson Circuit Court granted summary judgment to the school and to Raho on immunity grounds. The Court of Appeals reversed the judgment. The Jefferson County Board of Education sought discretionary review solely to address the issue of whether the Jefferson County Board of Education is entitled to summary judgment on its immunity claim.

The Supreme Court reversed the Court of Appeals' opinion to the extent that it reversed the Jefferson Circuit Court's grant of summary judgment in favor of the Jefferson County Board of Education. Specifically, the Court held that the Board of Education was not engaged in a proprietary function when Raho interceded into the fight in question, and therefore, the Jefferson County School Board was entitled to governmental immunity.

INSURANCE:

***Belt v. Cincinnati Ins. Co.,* 664 S.W.3d 524 (Ky. 2022)**

Opinion of the Court by Chief Justice Minton. All sitting. Hughes, Lambert, and VanMeter, JJ., concur. Keller, J., dissents by separate opinion in which Conley and Nickell, JJ., join. In this case, the Court of Appeals reversed the jury verdict granted against Cincinnati Insurance Company, finding that the trial court erred in failing to grant a directed verdict in favor of CIC on Belt's bad-faith claims.

The Supreme Court affirmed the Court of Appeals, clarifying that the test set out in *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993), is a prerequisite for submission of a common law or statutory bad faith claim to the jury. Finding that Belt failed to show

that CIC lacked a reasonable basis in law or fact for challenging coverage—element two of the *Wittmer* test—the Court concluded that Belt did not meet the standard set out in *Wittmer*, and thus the trial court erred when it denied CIC's motion for a directed verdict.

***Ashland Hospital Corp. v. Darwin Select Insurance Co.*, 664 S.W.3d 509 (Ky. 2022)**
Opinion of the Court by Justice Conley. Minton, C.J.; Conley, Hughes, Keller, Nickell, and VanMeter, JJ., sitting. Hughes, Keller, Nickell, and VanMeter, JJ., concur. Minton, C.J., concurs in part and dissents in part by separate opinion. Lambert, J., not sitting. In May 2011, the DOJ began an investigation into KDMC for potential violations of federal health laws. KDMC notified and obtained coverage for the costs of complying with that investigation under a D&O policy. In September 2013, hundreds of plaintiffs filed suit against KDMC in Boyd Circuit Court, alleging tortious conduct related to the DOJ investigation (but this would not be an established fact until May 2014). KDMC notified and sought professional liability and excess coverage for those claims under its 2012-13 policies. Darwin and Homeland Insurance denied coverage based on Exclusion 15, the prior notice of events exclusion, arguing the coverage obtained under the D&O policy in 2011 was notice of facts, matters, and events giving rise to a claim to a prior insurer based on the subpoena issued by the DOJ in May 2011. KDMC filed a declaration of rights in 2015. The Circuit Court ruled in KDMC's favor. On appeal, the Court of Appeals reversed and found Exclusion 15 was applicable to bar coverage. The appellate court further ordered KDMC pay recoupment costs to the insurers for the costs of litigation up to that point. KDMC sought discretionary review and the Supreme Court granted.

Held: Exclusion 15 did not apply to bar coverage because the May 2011 subpoena was lacking in the requisite specificity required by the insurance policy to constitute notice of circumstances giving rise to a claim and because KDMC had given the insurers notice of the subpoena and investigation during the negotiation period for the 2012-13 policies. The Court noted that the insurers' understanding of the subpoena up until November 2013 had also been the subpoena was insufficient to constitute notice of circumstances giving rise to a claim—only when coverage was sought for the tort litigation in Boyd County did the insurers officially reverse their position. Nonetheless, the unambiguous language of the policy required the time, date and place of the incident giving rise to a claim*;* a description of it; a description of the injury or damage which has allegedly resulted or may result from it; how and when KDMC first became aware of the incident and the names, addresses and ages of the injured parties and any witnesses. The subpoena simply did not contain this information with the requisite specificity, and in several respects wholly omitted the required information altogether.

The Court also reversed the Court of Appeals in holding that notice could be obtained from multiple sources over a number of years. Instead, a reasonable interpretation of the policy as a lay reader would understand it would require notice of circumstances giving rise to a claim be contained in a single communication, with supplementation allowed for errors or inadvertent omissions within a reasonable time. The Court also held that despite KDMC obtaining insurance coverage for the investigation under the D&O policy in 2011-12, because the insurers were aware of that fact when negotiating the insurance policies for 2012-13, it was incumbent on the insurers to clearly state in

the policy that they would not cover any potential claims which may have arisen from the same facts, matters, and events of the DOJ investigation. The failure of either party to clearly state its understanding of the effect notice of the DOJ investigation had on the policy coverage led to a latent ambiguity as to the effect of the notice on Exclusion 15's applicability. Under normal rules of insurance contract interpretation, an interpretation favoring coverage will be adopted so long as it is reasonable given a lay reader's understanding of the facts and language. According to this rule, the Court held the specific notice of the DOJ investigation to the insurers prior to the policies taking effect defeated the general provision of Exclusion 15. The insurers stimulated the expectation of risk protection by failing to inform KDMC of their belief Exclusion 15 would bar any coverage of potential claims related to the DOJ investigation.

Finally, the Court reversed the Court of Appeals ruling as to recoupment, holding the lack of a final order or judgment from the circuit court on that matter, as well as the fact the issue had not been identified on appeal by either party nor briefed before the appellate court, means the Court of Appeals lacked subject matter jurisdiction to make that ruling. The Supreme Court remanded back to the Court of Appeals to consider the applicability of two other exclusions invoked by the insurers but not considered by that court previously due its ruling on Exclusion 15.

JUDICIAL DISCIPLINE:

***Gordon v. Judicial Conduct Commission*, 655 S.W.3d 167 (Ky. 2022)**

Opinion of the Court by Justice Hughes. All sitting; all concur. The Judicial Conduct Commission determined that Julia Hawes Gordon, Family Court Judge for the 6th Judicial Circuit in Daviess County, Kentucky, committed judicial misconduct as charged in five of the six counts against her and ordered that she be removed from office. Judge Gordon appealed the Commission's Final Order, and the Supreme Court found no error warranting reversal. Between 2017 and 2021, Judge Gordon inappropriately inserted herself into at least three of her son's Daviess County criminal cases by acting as counsel, advisor, and advocate for her son, lobbying and pushing both the prosecutor and presiding judge over those cases to take actions as she directed, and acting well outside the constitutional role of judge.

On appeal, Judge Gordon made numerous arguments including that her rights as a victim under Marsy's Law, Kentucky Constitution Section 26A, were infringed, that evidence produced against her was inadmissible and insufficient, and that her removal was unwarranted. The Court held that Marsy's Law does not create a different standard of conduct for a sitting judge. Additionally, the Commission's finding for all charges were supported by clear and convincing evidence and there were no errors in the admission of evidence. Based on Judge Gordon's numerous violations of the Code of Judicial Conduct, removal was warranted. The Court affirmed the Commission's Final Order.

PROBATE:

***McGaha v. McGaha*, 664 S.W.3d 496 (Ky. 2022)**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Civil appeal. On discretionary review, the Supreme Court reversed the decision of the Court of Appeals and reinstated the judgment of the Russell Circuit Court in this probate action. The Supreme Court held that the Court of Appeals failed as a reviewing court to give proper deference to the trial court's decision whether to grant the motion for leave to

amend a pleading. In so holding, the Court also held that the Court of Appeals erred when it found that the district court below lacked jurisdiction to probate the will at issue in this action.

The Supreme Court clarified that KRS 24A.120 statutorily empowers district courts with exclusive original jurisdiction in non-adversarial probate matters. The same statute requires that adversarial probate proceedings be filed in the circuit court. The Court of Appeals' reliance on *Kentucky Unemployment Insurance Commission v. Wilson*, 528 S.W.3d 336 (Ky. 2017), was an incongruous application of this Court's precedent regarding verification and its effect on jurisdiction. The Supreme Court explained that *Wilson* applies to review of administrative rulings in which there is no appeal in the courts as a matter of right. But *Wilson* provides no support for the Court of Appeals' conclusion that the district court lacked jurisdiction in a probate proceeding, a matter unrelated to review of administrative appeals.

Next, the Supreme Court reaffirmed that, while leave to amend a pleading shall be freely given when justice so requires, the decision on whether to allow an amendment is within the trial court's discretion. Here, the Court of Appeals "presumed" to know—without actually knowing—why the trial court denied the motion for leave to amend and then proceeded to engage in its own de novo review concerning denial of the motion for leave to amend. The Court concluded that the circuit court did not abuse its discretion by denying the motion for leave to amend on these facts.

Finally, the Supreme Court held that dismissal of the action was appropriate. After the sole plaintiff reached extrajudicial settlement of his claims there were no remaining claims for the circuit court to resolve. As a result, the Supreme Court reinstated the circuit court's dismissal.

PROPERTY LAW:

***Gray v. Stewart,* 658 S.W.3d 1 (Ky. 2022)**

Opinion of the Court by Justice Hughes. Minton, C.J.; Conley, Keller, Nickell, and VanMeter, JJ., sitting. All concur. Lambert, J., not sitting. Civil Appeal, Discretionary Review Granted. The trial court, considering parol evidence, concluded that the contract at issue satisfied the statute of frauds by sufficiently identifying the property to be conveyed. The Court of Appeals reversed that decision, but based upon the trial court's findings of fact, concluded that one co-owner of the property, Appellee Frank Stewart, conveyed his property interest under the merger doctrine. Because Frank Stewart did not cross-appeal that adverse decision by way of a cross-motion for discretionary review, that decision stands. Held: The contract does not satisfy the statute of frauds because it does not sufficiently describe the boundary of the property to be conveyed, making the contract unenforceable against Appellees William and Mary Stewart. While Appellant Henry Gray also claims that the Court of Appeals erred by not relying on the trial court's findings of fact and concluding that William and Mary Stewart likewise conveyed their interest under the merger doctrine, this is not a viable argument for reversing the Court of Appeals. Although not addressed by the Court of Appeals, the Stewarts did not waive their right to a jury trial. Because the trial court was not properly sitting as the fact finder, the trial court's factual findings cannot be the basis for application of the merger doctrine as to William and Mary Stewart.

STANDING:

***Bradley v. Commonwealth ex rel. Cameron*, 653 S.W.3d 870 (Ky. 2022)**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Civil appeal. On transfer from the Court of Appeals, the Supreme Court vacated the judgment of the Franklin Circuit Court and remanded the case with instruction that the action be dismissed without prejudice for lack of standing.

The Supreme Court held that Bradley had not demonstrated constitutional standing in her individual capacity. The Court concluded that Bradley had failed to demonstrate that the removal of Floyd Circuit Court, Division II, harmed her in a concrete and particularized way, especially where the Court of Appeals took judicial notice of the fact that Bradley had filed to run for a position on the Floyd District Court.

Finally, the Court held that Bradley had failed to demonstrate associational standing. The Floyd County Bar Association was not properly named as a party in the action. And the Court concluded that the Floyd County Bar Association had not demonstrated associational standing because it had not established that its attorney members would have standing to sue in their own right to remedy alleged injuries to their unnamed clients. As a result, the Court vacated the judgment of the Franklin Circuit Court and remanded the action with instruction that the case be dismissed without prejudice.

SUMMARY JUDGMENT:

***Erie Insurance Exchange v. Johnson*, 647 S.W.3d 198 (Ky. 2022)**

Opinion and Order of the Court. All sitting; all concur. Megan Johnson and Terri Reed, following treatment for injuries sustained in a motor vehicle accident, sought to direct the order in which their medical expenses were paid from their BRB (basic reparation benefits) under Kentucky's Motor Vehicle Reparations Act. Erie Insurance Exchange declined to follow their direction, instead initiating a declaratory judgment action against Johnson and Reed in Floyd Circuit Court. The trial court issued several orders, but none of those orders were final and appealable. Nonetheless, Erie appealed, and the Court of Appeals determined that Johnson and Reed should be able to direct their payments within an element of loss. The Supreme Court granted discretionary review. Because there was no final and appealable order below, the Supreme Court vacated the opinion of the Court of Appeals and dismissed the appeal.

TAX:

***Friedmann v. Jefferson County Board of Education*, 647 S.W.3d 181 (Ky. 2022)**

Opinion of the Court by Justice Conley. All sitting; all concur. The Jefferson County Board of Education (JCBE) announced a tax increase in May 2020 from 73 to 80.6 cents per $100. This was over 4% of the compensating tax rate; as such, the excess portion over 4% was subject to a recall. KRS 132.017. Appellants formed the Tax Recall Petition Committee to gather the requisite signatures required by statutory law. The principal means to gather these signatures was electronic. The Jefferson County Clerk certified the recall had gathered the requisite signatures and allowed the recall to proceed to the ballot on November 3, 2020. The JCBE challenged the certification in circuit court. The Appellants filed a counter-claim, alleging the JCBE was non-compliant with the notice and publication requirements of KRS 133.185. The Circuit Court ruled the requirements of KRS 132.017 clashed with the requirements of KRS 133.185, as such a substantial compliance test was called for and under that test, the JCBE had substantially complied with the notice requirements of KRS 132.017. The

court also ruled the certification was improper after having struck several thousands of signatures for various reasons of non-compliance with KRS 132.017.

The Supreme Court unanimously affirmed but on different grounds than those of the trial court. It ruled that the Uniform Electronic Transactions Act requires security measures to ensure that an electronic signature is the act of the purported signatory. The Tax Recall Petition Committee failed to utilize any security measures whatsoever to accomplish this task thus, because the vast majority of signatures were electronically signed, all such signatures were "insufficient to establish attribution. Based on the proof, there is simply no way to determine the electronic signatures are attributable to the person they purport to be." Therefore, the recall petition should not have been certified. The Supreme Court also affirmed the trial court's ruling regarding JCBE's notice compliance, again on slightly different grounds. The Court found KRS 160.470 to be specific and controlling over KRS 133.185. Nonetheless, the requirements of KRS 160.470 clashed with the deadline requirements of KRS 132.017 because the former required certain information to be published that was not available to the JCBE in time for it to announce the tax increase and have the tax placed on the ballot of November 3, 2020, if a recall petition had been successful. Therefore, those notice and publication requirements could not be enforced thus, there was no statutory violation on the part of JCBE.

***Century Aluminum of Kentucky, GP v. Dep't of Revenue,* 664 S.W.3d 546 (Ky. 2022)**

Opinion of the Court by Justice Hughes. All sitting. All concur. Keller, J., also concurs by separate opinion. Kentucky Revised Statutes (KRS) Chapter 139 provides for the collection of state sales and use taxes, although some sales transactions are tax exempt. In particular, "supplies" purchased by a manufacturer are tax exempt, but "repair, replacement, or spare parts" are not. Century Aluminum of Kentucky, GP (Century) and the Department of Revenue disagreed as to the interpretation of the statutes which categorize tangible personal property as either tax-exempt supplies or taxable repair, replacement, or spare parts. The Kentucky Claims Commission agreed with Century's interpretation, but the Franklin Circuit Court and the Court of Appeals did not. Upon review of KRS 139.470(10) and KRS 139.010(26), in effect the during the relevant time period (2010-2015), consistent with the statute, a tax-exempt supply is consumed within the manufacturing process and has a useful life less than one year, making it an item which the manufacturer inevitably, regularly, and/or frequently buys to maintain the manufacturing process. This regularly consumed supply is distinguishable from a taxable repair, replacement, or spare part, which maintains, restores, mends or repairs solid machinery or equipment of a long-term or permanent nature and which does not necessarily have a known, limited useful life.

<u>TORTS:</u>

***Armstrong v. Estate of Elmore,* 647 S.W.3d 214 (Ky. 2022)**

Opinion of the Court by Justice Conley. Minton, C.J.; Keller, Lambert, Nickell, and VanMeter, JJ., sitting. All concur. Hughes, J., not sitting. This case came before the Supreme Court for a second time after rendering its decision in *Travelers Indem. Co. v. Armstrong*, 565 S.W. 3d 550 (Ky. 2018). In the original decision, the trial court had granted summary judgment to the auto dealers, ruling that Jonathan Elmore was the owner of the vehicle which had crashed and caused the deaths of both Elmore and of Craig Armstrong, his passenger. *Travelers* affirmed the trial court's summary

judgment, reversing the Court of Appeals. Back at the trial court, the Armstrong Estate filed a motion to amend its complaint to file a claim against another auto-dealer, DeWalt, as the statutory owner of the vehicle. The trial court granted the motion. DeWalt filed a motion to dismiss, which was also granted. On appeal, the Court of Appeals affirmed the trial court's dismissal based on law of the case doctrine citing to *Travelers*.

The Supreme Court granted discretionary review and affirmed. The decision in *Travelers* affirmed the trial court's summary judgment which declared that Elmore was the statutory owner. The issue of who owned the vehicle was, therefore. governed by law of the case. The Estate argued against application of the doctrine based on the intervening change in law exception. But the intervening change in law had occurred as a result of *Travelers* and, therefore, was inapplicable. The Estate also argued the language in *Travelers* was dicta, but that argument failed as the issue in *Travelers* was to determine who the statutory owner of the vehicle was at the time of the crash. Finally, the Estate argued law of the case only applies when the same parties are arguing the same issues and, because DeWalt was not a party to *Travelers*, the doctrine was inapplicable. The Court rejected that argument, pointing out the lack of authority for the proposition that law of the case required the same parties being present. Instead, because the Estate was seeking to continue to litigate the issue of the statutory owner of the vehicle—which had been determined on summary judgment and affirmed by this Court previously—law of the case was applicable.

Primal Vantage Co., Inc. v. O'Bryan, **___ S.W.3d ___, 2022 WL 3641122 (Aug. 18, 2022),** ***reh'g granted*** **(Feb. 16, 2023)**
Opinion of the Court by Chief Justice Minton. All sitting; all concur. Civil appeal. Discretionary review granted. In this products liability case, Primal Vantage appealed from a decision of the Court of Appeals affirming the trial court's judgment that awarded substantial damages to Kevin O'Bryan and Santé O'Bryan.

On discretionary review, the Supreme Court affirmed the Court of Appeals' holding regarding the jury instructions on the failure-to-warn claims and the apportionment of fault to the Martins—the landowners where the accident occurred. The Supreme Court also affirmed the trial court's directed verdict to Defendants on the design defect claims but reversed the holding of the Court of Appeals in all other respects as to Primal Vantage. Accordingly, the trial court's judgment was reversed, and the action was remanded to the trial court for a new trial.

First, the Court concluded that the trial court erred by abandoning its role as evidentiary gatekeeper and allowing the jury to hear substantial evidence regarding other accidents and injuries involving ladderstands that the trial court concluded were inadmissible at the end of trial. Still, the Court clarified that trial courts enjoy broad discretion in making evidentiary determinations and there is no exact chronological procedure mandating when trial courts must make evidentiary determinations.

Second, the Supreme Court concluded that the trial court's jury instructions regarding failure to warn were not erroneous. The Court explained that since negligence and strict liability are distinct, yet closely related, legal concepts, it was not error for the trial court to provide separate instructions for recovery under each theory.

Third, the Court concluded that the lower courts correctly concluded that fault could not be apportioned to the Martins, the owners of the land and ladderstand at issue under KRS 150.645(1). KRS 150.645(1) provides that landowners—like the Martins—who give permission for others to hunt on their land owe no duty of care to keep the premises safe.

Fourth, the Court affirmed the trial court's directed verdict in favor of Primal Vantage on plaintiff's design defect claims because it was not clearly erroneous.
Finally, the Court declined to consider assignments of error regarding Santé O'Bryan's loss of consortium claims and Primal Vantage's arguments regarding allegedly improper references to China and Chinese locations at trial. The Court acknowledged that it consistently considers moot issues that are likely to recur upon retrial. But the Court explained that consideration of those moot issues was inappropriate because it was not likely those issues would recur since recurrence of those issues was dependent upon proof to be presented upon retrial.

Zepeda v. Central Motors, Inc., 653 S.W.3d 59 (Ky. 2022)
Opinion of the Court by Justice Conley. Minton, C.J.; Conley, Keller, Lambert, Nickell and VanMeter, JJ., sitting. All concur. Hughes, J., not sitting. In this case, the Court of Appeals affirmed the summary judgment of the trial court. The Court of Appeals agreed with the lower court that Central Motors, Inc. had substantially complied with all the requirements of KRS 186A.220 and had delivered possession of the vehicle. Therefore, Central Motors, Inc. was no longer the statutory owner of the vehicle at the time of the accident.

The Supreme Court affirmed the Court of Appeals. It held that Central Motors had substantially complied with KRS 186A.220(1) by giving notice to the county clerk's office of its acquisition of a vehicle when it submitted all the documents necessary to transfer ownership to Zepeda. And that by acting on behalf of the purchaser, Central Motors, Inc. had delivered all the necessary documents to the county clerk prior to the accident. Therefore, Central Motors had substantially complied with all the requirements of KRS 186A.220 and had delivered physical possession to the purchaser. Therefore, Central Motors, Inc. was no longer the statutory owner of the vehicle when it was involved in a fatal car accident.

***Walmart, Inc. v. Reeves,* ___ S.W.3d ___, 2023 WL 2033691 (Feb. 16, 2023)**
Opinion of the Court by Justice Keller. Bisig, Conley, Keller, Lambert, Nickell, and Thompson, JJ., sitting. All concur. VanMeter, C.J., not sitting. Reeves suffered from assaultive criminal activity in the parking lot of the Walmart on Nicholasville Road in Lexington, Kentucky after midnight on March 22, 2017. Following the attack, Reeves brought suit against Walmart for negligence. The Fayette Circuit Court granted Walmart's motion for summary judgment, stating that Walmart owed Reeves no duty as a matter of law since the event was not reasonably foreseeable. On appeal, the Court of Appeals reversed the decision.

The Supreme Court granted discretionary review and reversed the decision of the Court of Appeals. Specifically, the Court held that for third-party criminal acts, a landowner owes a duty to protect only from dangers that are reasonably foreseeable. Accordingly, the Court reinstated the trial court's order.

***Savage v. Allstate Ins. Co., et al.*, ___ S.W.3d ___, 2023 WL 2622560 (Mar. 23, 2023)**
Opinion of the Court by Justice Conley. VanMeter, C.J.; Bisig, Keller, Lambert, and Nickell, JJ., concur. Thompson, J., concurs in result only. James Savage was killed on I-65 after being thrown from his motorcycle and run over by a vehicle driven by Oscar Ramos, an agent for Auto Usados Felix. AUF had bought a Toyota owned by Allstate Insurance Company and a Jeep owned by Property and Casualty Insurance Company of Hartford. Both these vehicles were purchased through Copart of Connecticut, acting as the independent contractor for these insurance companies to sell their vehicles. Both vehicles were salvage-titled vehicles.

There were several issues before the Court and its rulings were as follows: first, Hartford was not the owner of the Jeep for insurance liability purposes because Copart had executed a bona fide sale prior to the collision. Copart did not need to obtain proof of insurance from Oscar Ramos prior to delivering possession of the Jeep because the certificate of title had been delivered to AUF four days prior. Second, the statutory scheme in Kentucky prohibits placement of tags on salvage-titled vehicles, because tags are only required for vehicles that are sold for use on the highways of Kentucky, and the General Assembly has declared that salvage-titled vehicles are not usable upon the highways of Kentucky. Third, the Court reversed the Court of Appeals by holding that Copart was not an employer or "otherwise directing" Ramos when he drove the vehicles from the Copart facilities, therefore it had no duty to ensure he drove the vehicles lawfully. Fourth, the Court reversed improper fact-finding by the Court of Appeals. Fifth, the Court refused to hold that strict liability applies to all claims based upon violations of KRS Chapter 186A.500. Sixth, the Court reversed the Court of Appeals by holding the trial court did not abuse its discretion in allowing the withdrawal of an admission. The record demonstrated the discovery period had been re-opened for two months following the withdrawal, and Savage could have taken the necessary depositions in that time so there was no prejudice from the withdrawal. Finally, the Court abrogated *Aull v. Houston*, 345 S.W.3d 232 (Ky. App. 2010), holding that Social Security Disability payments function as a substitute for income and may be considered for damages purposes by a jury in a wrongful death suit.

UNIFORM COMMERCIAL CODE:

***Versailles Farm Home & Garden, LLC v. Haynes*, 647 S.W.3d 205 (Ky. 2022)**
Opinion of the Court by Justice VanMeter. All sitting; all concur. The question presented was whether the Woodford Circuit Court erred in its determination that the security agreement between Harvey Haynes, the debtor, covered future advances made by Jerry Rankin d/b/a Farmers Tobacco Warehouse ("Farmers") so as to have priority over the security interest claimed by Versailles Farm, Home and Garden, LLC ("Versailles Farm") in Haynes' 2013 tobacco crop. Versailles Farm argued that since the parties failed to include an explicit future advance clause, as permitted by KRS 355.9-204, none existed and therefore future advances were not covered under the agreement. The result, Versailles Farm argued, was that Farmers' advances after June 25, 2013, never attached to the security interest, was unsecured, and thus had no priority. The Court disagreed, noting that under Article 9 of the Uniform Commercial Code, priority of claims between two secured creditors is determined by order of filing or perfection, provided that each had an appropriate security interest which had attached and which covered the collateral in question and any proceeds.

The Court found that the relevant statutes, KRS 355.9-203(2), 355.9-204(3), 355.1-201(2)(c), and 355.1-303, when read together, do not require that a future advance clause be explicitly included in a written security agreement. Thus, a security agreement, properly construed, requires only authentication by the debtor and a description of the collateral. KRS 355.9-203(2). The record demonstrated the basic evidentiary requirement that Haynes authenticated a security agreement granting a security interest in his 2013 tobacco crop to Farmers. Further, the parties' course of performance and course of dealing supplemented that writing, demonstrating their agreement with respect to the production credit to be advanced by Farmers to Haynes, i.e., the future advances, over the ensuing months of 2013 were to be secured by Haynes' 2013 tobacco crop. And the parties' previous course of dealing as to advances and repayment when tobacco was sold confirm the agreement. The Court found this evidence sufficient to establish the "bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade." KRS 355.1-201(2)(c). The Court noted that the record was devoid of any contrary evidence. Because the parties' agreement covered Farmers' advances made after June 25, 2013, its security interest attached and was perfected by its October 30, 2012, financing statement filed with the Secretary of State, which in turn gave it priority over Versailles Farm's claim. Accordingly, the Court affirmed the trial court's grant of summary judgment in favor of Farmers and affirmed the Court of Appeals' opinion, albeit on different grounds than as stated in that opinion.

WORKERS' COMPENSATION:

***Helton v. Rockhampton Energy, LLC,* 647 S.W.3d 233 (Ky. 2022)**

Opinion of the Court by Justice Hughes. Minton, C.J.; Conley, Keller, Nickell, and VanMeter, JJ., sitting. All concur. Lambert, J., not sitting. Jarvis Helton appealed from a Court of Appeals' decision affirming the Workers' Compensation Board's reversal of an Administrative Law Judge's (ALJ) application of the 2x multiplier in Kentucky Revised Statute (KRS) 342.730(1)(c)2, the provision that doubles a claimant's benefits if the claimant returns to work after injury at the same or higher wages but then experiences a cessation of that employment. Helton suffered a work-related injury that manifested on November 16, 2018, and continued working his normal job until he was laid off for economic reasons on September 2, 2019. The ALJ determined that since Helton earned no wage after the lay-off, he qualified for the 2x multiplier. The Board reversed, and the Court of Appeals agreed.

The Kentucky Supreme Court affirmed the Court of Appeals. Helton did not "return" to work because he never left work. The Court found similarity to *Bryant v. Jessamine Car Care*, No. 2018-SC-000265-WC, 2019 WL 1173003 (Ky. February 14, 2019), in which the Court held that a continuation of work is not a return to work. To qualify as a "return," there must be a cessation followed by a resumption. Because Helton indisputably continued to perform his regular job after his injury and only ceased working when he was laid off due to the mine closing, no "return" to work occurred because there was no cessation followed by a resumption. While the Court recognized that Helton's employment with Rockhampton ended for reasons he could not control, the purposes of KRS 342.730(1)(c)2 are to encourage continued employment and create an incentive to return to work. Awarding the 2x multiplier did not accomplish the recognized objectives and does not comport with the plain language of the statute.

***Tractor Supply v. Patricia,* 647 S.W.3d 192 (Ky. 2022)**
Opinion of the Court by Justice Conley. All sitting; all concur. Patricia Wells was injured in August 2018. The ALJ made a finding of fact that she was unable to return to her previous work, therefore applied the three multiplier under KRS 342.730(1)(c)1. She was subsequently fired for allegedly filing false information on a work report. Tractor Supply moved for further findings of fact, arguing this Court's holding in *Livingood v. Transfreight, LLC*, 467 S.W.3d 249 (Ky. 2015), precluded application of the three-multiplier. The ALJ and Worker's Compensation Board both concluded *Livingood* was not applicable. On appeal, the Court of Appeals affirmed.

The Supreme Court unanimously affirmed the Court of Appeals. *Livingood*'s holding was based on the totality of the text of KRS Chapter 342, to hold that the two-multiplier did not apply when a claimant's conduct proximately causing his cessation of employment is "shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another." *Id.* at 259. In this case, the Supreme Court ruled "[t]he three-multiplier benefit is concerned with a finding of disability, and not tied to any condition of employment. Therefore, application of the general rule that no claimant should profit by his or her misconduct serves no substantive purpose regarding the three-multiplier." Because Wells did not gain or prolong any benefit as a result of her alleged misconduct, the rule was inapplicable. The Court concluded that nothing in the statutory text or facts of the case justified extending *Lviningood*'s holding to KRS 342.730(1)(c)1.

***Toler v. Oldham County Fiscal Court*, 657 S.W.3d 914 (Ky. 2022)**
Opinion of the Court by Justice Lambert. All sitting; all concur. The employee suffered a work-related injury to his left knee requiring surgical repair. To dispute the employee's entitlement to an additional impairment rating for pain, the employer submitted a report by a physician, Dr. Brigham, who did not have a medical license issued by the Commonwealth of Kentucky. Dr. Brigham conducted a review of the employee's medical records, but did not physically examine him. Dr. Brigham opined that the employee was not entitled to an additional impairment rating for pain. The employee objected to the admission of Dr. Brigham's report as evidence before the ALJ on the basis that he was not a "physician" as that term is defined in KRS Chapter 342. The ALJ disagreed and allowed the report to be admitted as evidence. The Workers' Compensation Board and the Court of Appeals affirmed.

The Supreme Court reversed, and held that Dr. Brigham did not meet the statutory definition of "physician" because he does not hold a Kentucky medical license. KRS 342.0011(32) declares that "[a]s used in this chapter, unless the context otherwise requires . . . 'Physician' means physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and osteopathic and chiropractic practitioners acting within the scope of their license issued by the Commonwealth[.]" The Court held that the context of submitting a physician's report as evidence did not compel the definition of physician to be expanded to include individuals not licensed in Kentucky in contravention of the plain language of the statute. The Court further held that the employee's argument that Dr. Brigham was unqualified to determine whether he was entitled to an additional impairment rating for pain because he did not physically examine him was moot. The Court vacated the ALJ's opinion and order and remanded for further proceedings.

***Lakshmi Narayan Hospitality Group Louisville v. Jimenez,* 653 S.W.3d 580 (Ky. 2022)**

Opinion of the Court by Justice Hughes. All sitting; all concur. Maria Jimenez was employed as a housekeeper by Lakshmi Narayan Hospitality Group (Holiday Inn) when she slipped and sustained injuries to her neck, head, left shoulder, and back in 2014. The Chief Administrative Law Judge (CALJ) awarded temporary total disability benefits and in 2019, Jimenez's claim was reopened pursuant to Kentucky Revised Statute (KRS) 342.125(1)(d) after she alleged a worsening of her condition. Holiday Inn objected and asserted that *res judicata* barred reopening. Relying on Jimenez's deposition testimony and medical evidence, a different Administrative Law Judge (ALJ) awarded Jimenez permanent partial disability benefits and future medical benefits for treatment of her cervical spine. The Workers' Compensation Board (Board) disagreed and determined that Jimenez's claim was barred by *res judicata*. The Court of Appeals concluded that Jimenez's claim was not barred and that the Board misconstrued the reopening statute because nothing in the statute precludes the reopening of an award of temporary disability benefits.

The Supreme Court affirmed the Court of Appeals, holding that the Board misconstrued the reopening statute. The statute does not restrict or limit reopening to particular types of claims or awards. Further, *res judicata* does not apply if the issue is the claimant's physical condition or degree of disability at two entirely different times. The observable symptoms necessary to support a permanent disability award can become more manifest over a period of time extending beyond the original proceedings and applying *res judicata* in this instance would undermine the purpose of the workers' compensation system.

***Personnel Cabinet v. Timmons,* ___ S.W.3d ___, 2022 WL 17726204 (Dec. 15, 2022)**

Opinion of the Court by Chief Justice Minton. All sitting. Conley, Hughes, and Van Meter, JJ., concur. Nickel, J., dissents by separate opinion in which Keller and Lambert, JJ., join. In this case, the Court of Appeals affirmed a decision of the Workers' Compensation Board to overturn an Administrative Law Judge's ruling that Timmons's injury was not work-related for the purposes of workers' compensation.

The Supreme Court reversed the Court of Appeals and affirmed the ALJ, albeit on different grounds. The Court held that, for the purposes of applying the "traveling-employee" exception to the coming-and-going doctrine, an employee's work-related travel does not begin until that employee avails himself of the common risks of the public road. Because Timmons's injury occurred while she was still on her property, her work-related travel had not begun and the injury she sustained was not work-related for the purposes of workers' compensation.

***Oufafa v. Taxi, LLC,* 664 S.W.3d 592 (Ky. 2023)**

Opinion of the Court by Justice Keller. All sitting. All concur. Daoud Oufafa was working as a taxi driver for Taxi-7 when he was shot during a ride, severely injuring him. Oufafa sought workers' compensation benefits. An Administrative Law Judge (ALJ) determined that Oufafa was an independent contractor under the Supreme Court's past precedent and therefore was not entitled to workers' compensation benefits. The ALJ was reversed by the Workers' Compensation Board, which was reversed by the Court of Appeals.

The Supreme Court reversed and remanded the ALJ. Specifically, the Court held that pursuant to its decision in *Mouanda v. Jani-King Int'l*, 653 S.W.3d 65 (Ky. 2022), the appropriate test to determine whether a worker is an employee or independent contractor is the economic realities test. Accordingly, the Court remanded to the ALJ to apply the economic realities test to Oufafa's case.

***Perry County Board of Education v. Campbell,* ___ S.W.3d ___, 2023 WL 2623026 (Mar. 23, 2023)**

Opinion of the Court by Justice Keller. VanMeter, C.J.; Bisig, Conley, Keller, Nickell, and Thompson, JJ., sitting. All concur. Lambert, J., not sitting. Mark Campbell was working for Perry County Board of Education when he injured his knee in 2018. The injury required a meniscal repair. Following the successful arthroscopy, Campbell continued to experience knee pain. He ultimately underwent total knee replacement surgery to treat his ongoing pain. Perry County Board of Education filed a medical fee dispute against the total knee replacement, arguing that Campbell's condition requiring further treatment was not caused by his initial work injury and that the total knee replacement was neither reasonable nor necessary to treat his condition. An ALJ disagreed, finding causation as well as reasonableness and necessity of the surgery. The Workers' Compensation Board affirmed, and the Court of Appeals affirmed the Board.

On appeal to the Supreme Court, first, Perry County Board of Education argued that the ALJ improperly relied upon inferences instead of medical opinion evidence in reaching his conclusions on causation. Second, it argued that the ALJ erred by relying on inferences instead of medical opinion evidence to determine that the total knee replacement was reasonable and necessary.

The Supreme Court affirmed the lower tribunals. Specifically, the Court held that the ALJ's findings satisfied *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007). It further held that the ALJ properly relied on inferences from medical evidence regarding causation, reasonableness, and necessity under *Kingery v. Sumitomo Electric Wiring*, 481 S.W.3d 492 (Ky. 2015).

***Lexington Fayette Urban County Gov't v. Gosper,* ___ S.W.3d ___, 2023 WL 3113319 (Apr. 27, 2023)**

Opinion of the Court by Justice Nickell. All sitting. All concur. The Administrative Law Judge (ALJ) determined that a worker's bilateral knee condition was caused by work-related cumulative trauma. The Workers' Compensation Board and the Court of Appeals affirmed. On direct appeal, the Supreme Court held there was sufficient evidence to support the finding of work-related injury and causation. The ALJ's findings were also held to be sufficiently specific. The Supreme Court further reaffirmed the standard for cumulative trauma injuries as stated in *Haycraft v. Corhart Refractories Co.*, 544 S.W.2d 222 (Ky. 1976). Therefore, the Supreme Court affirmed the decision of the Court of Appeals.

<u>WRITS:</u>

***Violett v. Grise,* 664 S.W.3d 481 (Ky. 2022)**

Opinion of the Court by Justice VanMeter. All sitting; all concur. On appeal from the judgment of the Court of Appeals denying Donald Ray Violett's motion for a writ of

mandamus against the Warren Circuit Court, the Supreme Court affirmed, albeit on different grounds. The current matter arises from Violett's pro se "Notice to Submit Documents to Support Motion for New Trial" filed in the trial court, in relation to his 1993 conviction for 141 counts of first-degree sexual abuse and five counts of first-degree rape. The trial court denied the submission, stating that "[n]o new trial motion is pending before this Court, nor will one be accepted because this issue has been litigated for decades, and relief denied to the defendant (see prior orders)." The trial court further ordered "that the Clerk shall not accept these documents or pleadings, or any future ones, without a specific order of the Court and shall return same to the defendant." Notably, in the three decades following his convictions, Violett has filed more than eighty-four appeals and original actions in an attempt to relitigate his convictions. In 2016, a panel of the Kentucky Court of Appeals finally sanctioned Violett, directing the Clerk of the Court of Appeals to convene a three-judge panel to review whether all actions filed by Violett (original or appeals) are frivolous and must be summarily dismissed. *Violett v. Grise*, 2015-CA-0670-MR (Ky. App. Sep. 21, 2016). In the present action, the Court of Appeals, relying on its 2016 sanction order, dismissed Violett's petition for a writ as frivolous. The Supreme Court affirmed on procedural grounds, noting that following the entry of the trial court's September 21, 2020, Order, Violett was required to file his appeal within thirty days, CR 73.02(1)(a), *i.e.*, on or before October 21, 2020. Because he failed to do so, automatic dismissal is the prescribed sanction. The Court further affirmed the imposition of sanctions on Violett for his long history of frivolous and vexatious appeals, and the lower courts' exemption of other affected parties from responding. However, because of its concern with the summary dismissal of frivolous pleadings, observing that too cursory of a review process could serve to deprive a litigant meaningful access to the courts and to his right to appeal, the Court directed the lower courts to permit the filing of the pleadings in the record, even without responsive pleadings, so that any further review as may be undertaken would be based on as complete a record as possible. In short, the courts shall review a pleading and may, if appropriate, relieve the opposing party from any duty to respond.

***Leslie-Johnson v. Eckerle*, 653 S.W.3d 588 (Ky. 2022)**
Opinion of the Court by Justice VanMeter. All sitting; all concur. On appeal from the Court of Appeals' denial of petitioners' writs of prohibition and mandamus, the Supreme Court affirmed, finding petitioners failed to make the necessary showing of irreparable harm or to demonstrate an error to justify invocation of the "special circumstances" exception. The matter arose from civil litigation between Johnson and Norton Hospitals. Johnson gave birth at a Norton facility by way of a c-section, but the child died of complications shortly after birth. Johnson and her husband, as administrators of the child's estate, filed a medical negligence action against the hospital. As part of that litigation, Norton sought in discovery extensive social media records for both parents. The Johnsons objected and Norton moved to compel production. The circuit court granted the motion and denied a subsequent motion to reconsider. The Johnsons then filed an original action in the Court of Appeals seeking writs of prohibition and mandamus. The Court of Appeals denied the petition and the Johnsons appealed. The Supreme Court affirmed, noting that writs are extraordinary remedies which may only be granted in two circumstances. Only the second circumstance was at issue, where the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result. The Court reasoned the

production of social media information did not fall into the second circumstance. CR 26.02(1), read liberally, tilts in favor of production and the Johnsons could point to no specific privilege that production of the records would violate. The discovery request was relevant, the period for which discovery was sought was made broad partially by the actions of the Johnsons, and the trial court ordered all social media data to be treated as "strictly confidential." Accordingly, the Court found the Johnsons failed to show the irreparable harm required to justify the grant of the writs.

***Goff v. Edwards,* 653 S.W.3d 847 (Ky. 2022)**
Opinion of the Court by Justice Hughes. All sitting; all concur. Civil Appeal. After Debra Goff was appointed as the Executrix of her father Elbert Goff, Sr.'s Estate, Goff's sisters, beneficiaries, filed an action in circuit court against Goff. The sisters alleged that Goff breached her fiduciary duties to Elbert before he died by self-dealing through the misuse of the Power of Attorney and after he died by self-dealing through the misuse of her authority as Executrix of Elbert's Estate. The sisters also claimed Goff failed to pursue debts owed to Elbert by other family members and that Goff herself did not report to the probate court the $400,000 she owed to Elbert. The sisters subsequently amended the complaint to include claims against other family members alleged to owe money to the Estate. Goff moved to dismiss the original complaint against her and objected to the filing of the amended complaint on the basis that the circuit court did not have jurisdiction of the district court probate claims. The circuit court concluded it has subject-matter jurisdiction, and Goff petitioned the Court of Appeals for a writ mandating the Jefferson Circuit Court dismiss the sisters' complaint. The Court of Appeals denied the request. *Held*: The Court of Appeals did not err. In accordance with KRS 24A.120(2) and (3), the circuit court's jurisdiction provided within KRS 395.510 and KRS 395.515 allows it, as stated in KRS 395.515, to resolve settlement and distribution claims "if it appears that there is a genuine issue as to what constitutes a correct and lawful settlement of the estate, or a correct and lawful distribution of the assets." The claims alleging that Goff and other family members owe money to the Estate satisfy the statute's requirement as there appears to be a genuine issue as to what constitutes a correct and lawful settlement of the Estate and/or a correct and lawful distribution of the assets.

***G.P. v. Bisig*, 655 S.W.3d 128 (Ky. 2022)**
Opinion of the Court by Justice Keller. All sitting; all concur. G.P. was indicted in 2018 for one count of murder. C.M. was indicted for one count of first-degree rape (victim under 12 years of age), one count of first-degree assault, and one count of first-degree robbery in 2019. Both were found incompetent to stand trial, and the Commonwealth filed a Petition for Commitment for C.M. and G.P. under Kentucky Revised Statutes (KRS) Chapter 202C. While their KRS 202C proceedings were still pending, C.M. and G.P. filed petitions for writs of prohibition at the Court of Appeals requesting relief from the alleged unconstitutional process set out in KRS 202C. The Court of Appeals denied their petitions. G.P. and C.M. appealed the denials to the Supreme Court.

In their appeal to the Supreme Court, G.P. and C.M. both argued the unconstitutionality of KRS 202C, which creates a procedure for indefinite involuntary commitment for incompetent criminal defendants, and therefore sought relief from that process. The Supreme Court held that G.P. and C.M. did not meet the writ standard because they each had an adequate remedy by appeal following the

conclusion of the KRS 202C proceedings. Accordingly, the Supreme Court affirmed the denial of both petitions.

***Ex Parte Smith*, 664 S.W.3d 505 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. In this original action, petitioners moved for a supervisory writ interpreting the Rules of the Supreme Court, including the Rules of Professional Conduct, to determine whether those Rules permit attorneys to be members of a collective bargaining unit. The Court denied the petition for a supervisory writ for two reasons.

First, the Court concluded that Petitioners' request did not present well defined and compelling circumstances justifying issuance of an extraordinary writ. The petitioners raised broad, speculative ethical issues that attorney may face if they join a collective bargaining unit.

Second, the ethical issues raised in the petition only impacted a relatively small number of attorneys in Jefferson County. As such, the Court was hesitant to issue a supervisory writ of statewide impact when the underlying issues only involve a relatively small number of attorneys practicing in the Commonwealth.

YOUTHFUL OFFENDERS:
***Bloyer v. Commonwealth*, 647 S.W.3d 219 (Ky. 2022)**
Opinion of the Court by Justice Nickell. All sitting; all concur. At age fifteen, Bloyer was charged with multiple sex crimes against his younger siblings. He was transferred to circuit court as a youthful offender where he ultimately entered guilty pleas to rape, two counts of sexual abuse, five counts of sodomy, and six counts of incest. He received a sentence of fifteen years' imprisonment and was committed to the Department of Juvenile Justice (DJJ) until his eighteenth birthday. At his age-eighteen hearing, Bloyer was granted permission to remain with DJJ for further treatment and he later sought and was granted permission to remain with DJJ until he turned twenty-one pursuant to KRS 640.075(1). While his motion sought probation, Bloyer admitted he did not want probation but was asking to remain in DJJ custody rather than being transferred to the Department of Corrections.

Near his twenty-first birthday, the trial court conducted a lengthy hearing on Bloyer's motion to reconsider probation pursuant to KRS 640.075(4). The trial court determined Bloyer's conviction of incest against his siblings who resided in the same house and were under age fourteen brought him under the purview of KRS 532.045 which rendered him ineligible for probation.

On appeal, the Court of Appeals affirmed, relying on *Commonwealth v. Taylor*, 945 S.W.2d 420 (Ky. 1997), to conclude KRS 532.045 applied to youthful offenders and the legislature had expressed its intent that certain sexual offenders should be ineligible for probation, no matter their age at the time they committed their crime. The Court of Appeals signaled a desire for the Supreme Court to take up the matter to resolve any potential conflict in *Taylor* and *Commonwealth v. Merriman*, 265 S.W.3d 196 (Ky. 2008).

On discretionary review, the Supreme Court affirmed the Court of Appeals. First, it reviewed the statutory provisions related to youthful offender sentencing and the

legislatively created exceptions exempting youthful offenders from the harshest sentences, noting KRS 532.045 was not included as an exception. Next, although *Taylor* was rendered twenty-five years prior, the legislature had not amended any statutes to disagree with *Taylor's* reasoning, evidencing its acquiescence with that decision. Thus, because *Taylor* was controlling and had not been superseded by statute or altered by the holding in *Merriman*, the trial court's denial of Bloyer's request for probation as statutorily impermissible was correct. Bloyer's constitutional challenges were rejected as being without merit. Finally, his request to clarify the provisions of KRS 640.075(4) to require trial courts to permit presentation of evidence at final sentencing was rejected as seeking an advisory opinion.

ATTORNEY DISCIPLINE:

***Kentucky Bar Ass'n v. Williamson*, 647 S.W.3d 265 (Ky. 2022)**

Opinion and Order of the Court. All sitting; all concur. The Kentucky Bar Association moved the Court to suspend Williamson for failure to file an Answer to a Charge. The Charge arose from an unanswered Bar Complaint filed against Williams relating to her representation of a client in a divorce matter. After Williamson failed to respond to the complaint, the Inquiry Commission issued a five-count Charge against her, which included violations of SCR 3.130(1.3) (a lawyer shall act with reasonable diligence and promptness); SCR 3.130(1.4)(a) (a lawyer shall keep the client reasonably informed); SCR 3.130(1.4)(b) (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation); SCR 3.130(1.16)(d) (a lawyer shall take steps to protect a client's interests); and SCR 3.130(8.1)(b) (a lawyer shall not knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority). Despite receiving the Charge and being informed of the possible consequences of not responding, Williamson did not file an Answer. Accordingly, under SCR 3.167(1), the Supreme Court suspended Williamson from the practice of law indefinitely.

***Hofmann v. Kentucky Bar Ass'n,* 647 S.W.3d 268 (Ky. 2022)**

Opinion and Order of the Court. All sitting; all concur. Hoffmann appealed her suspension from the practice of law for non-compliance with the minimum continuing legal education (CLE) requirements for the 2019-2020 and 2020-2021 combined educational years. After Hoffmann was suspended under SCR 3.675, she filed a "motion to appeal" in the Supreme Court, requesting that the Court revoke her suspension. As grounds for her request, Hoffmann asserted that she had not practiced law since 2019 due to a series of personal health issues and a family crisis. Because of these issues, she failed to update her bar roster address. Hoffmann provided proof that she had cured her deficiency six months after the reporting deadline.

In response, the KBA noted that Hoffman had been contacted by mail nine times and by phone once. The KBA further asserted that Hoffmann was aware that she could have requested a time extension to comply with the CLE requirements because she was granted an exception for the 2018-2019 reporting period.

Upon review of the record, the Supreme Court determined that Hoffmann had not demonstrated good cause sufficient to revoke her suspension. Accordingly, the Court denied Hoffmann's appeal to set aside her suspension and ordered that she remain suspended until such time as she complies with the appropriate restoration provisions of SCR 3.504.

***Harhai v. Kentucky Bar Ass'n*, 647 S.W.3d 272 (Ky. 2022)**
Opinion and Order of the Court. All sitting. Keller, Lambert, Nickell, and Conley, JJ., concur. Minton, C.J., dissents by separate opinion, in which Hughes and VanMeter, JJ., join. Harhai failed to pay her annual bar dues by September 1, 2021. On two separate occasions, she was sent a reminder via email that she was delinquent in payment. On November 22, 2022, a Show Cause Notice of Delinquency was mailed to her at her registered address via certified mail. Harhai failed to pay her delinquent dues and she was suspended from the practice of law on January 21, 2021. Harhai appealed her suspension and, at the same time, sent a check to the KBA for the amount owed. Although she admitted that she had not paid her dues by September 1, she argued she thought she had paid them on December 8, prior to her suspension. The KBA responded to Harhai's appeal, requesting no specific relief except what the Court deemed appropriate.

In considering Harhai's appeal, the Supreme Court reviewed the procedure for restoration under SCR 3.500. The Court noted that an application for restoration can be effective either by order of the Board of Governors or the Court, and that suspended members are required to have the requisite CLE credits prior to restoration. Accordingly, the Court ordered Harhai's suspension be lifted upon certification by the Director of CLE that she completed the necessary CLE credits for 2020-21, and that the certification be submitted to the Board of Governors, which, upon receipt, shall order her reinstatement of the practice of law.

***Kentucky Bar Ass'n v. Belcher*, 647 S.W.3d 277 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. Belcher was charged with one count of theft by unlawful taking, $10,000 or more but less than $1,000,000, in Pike Circuit Court. He was later indicted in the U.S. District Court of the Eastern District of Kentucky for bank fraud and three counts of making false statements. Because of the federal charges, the Pike Circuit case was eventually dismissed. Belcher pled guilty to one count of federal bank fraud and one count of filing a false tax return. He was committed to federal custody for a total of forty-one months was ordered to pay restitution totally $867,813.54.

In 2019, Belcher was temporarily suspended from the practice of law based on allegations that he had misappropriated at least $600,000 from a minor who had been appointed to maintain. Following the initiation of criminal charges in both state and federal court, the Inquiry Commission issued a Charge against Belcher, to which Belcher failed to respond. The Board of Governors unanimously recommended that Belcher be found guilty of violating SCR 3.130(8.4)(b), SCR 3.130(8.4)(c), and SCR 3.130(8.1)(b), and that he be permanently disbarred.

Based on the nature of Belcher's criminal conduct, the Supreme Court agreed with the Board's recommendation. Accordingly, the Court ordered Belcher permanently disbarred from the practice of law in the Commonwealth.

***Rogalinski v. Kentucky Bar Ass'n,* 647 S.W.3d 273 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. In October 2020, Rogalinski took and passed Ohio's bar examination. In December of that year, she became licensed to practice law in Ohio. However, she is not and has never been licensed to

practice law in Kentucky. In August of 2021, Rogalinski filed an application with the Kentucky Office of Bar Admissions seeking admission by her transferred Ohio bar exam score, pursuant to a special reciprocity agreement between several state supreme courts and bar licensing agencies, including Kentucky and Ohio.

From April to October of 2021, Rogalinski represented clients in court and provided legal advice while employed by the Kentucky Department of Public Advocacy, despite the fact that she was not licensed to practice law in Kentucky. After receiving an Investigative File from the Office of Bar Counsel alleging that she was practicing law in Kentucky without a license, Rogalinski resigned from DPA and ceased practicing law in either Kentucky or Ohio. The Inquiry Commission issued a one-count complaint alleging Rogalinski violated SCR 3.130(5.5)(a), which prohibits the unauthorized practice of law.

Rogalinski admitted she violated the rule and asked the Supreme Court to impose a public reprimand to dispense of any further proceedings for this violation. The KBA did not object. Upon review of similar case law and the facts of Rogalinski's case, the Court agreed that a public reprimand was appropriate. Accordingly, the Court found Rogalinski guilty of violating SCR 3.130(5.5)(a) and publicly reprimanded her for unprofessional conduct.

***Kentucky Bar Ass'n v. Weiner*, 651 S.W.3d 776 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. The Board of Governors of the Kentucky Bar Association recommended that the Court find Weiner guilty of violating Supreme Court Rule (SCR) 3.130(1.15)(a); SCR 3.130(1.4)(a); 3.130(1.5)(f); SCR 3.130 (1.16)(d); and two counts of SCR 3.130(8.1)(b). For these violations, which stemmed from two separate KBA disciplinary cases, the Board recommended Weiner be suspended from the practice of law for five years and be required to 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 pay the costs of this action.

Weiner did not respond to the charges, nor did he seek review by the Court under SCR 3.370(8). Accordingly, the Court adopted the Board's decision in accordance with SCR 3.370(10).

***Kentucky Bar Ass'n v. Morgan*, 651 S.W.3d 779 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. Morgan's disciplinary case arose from two underlying circuit court matters relating to his failure to pay child support. After Morgan pled guilty to flagrant nonsupport, the Inquiry Commission issued a two-count Charge against him for violations of SCR 3.130(3.4)(c) and SCR 3.130(8.4)(b). Morgan admitted each of the facts in the Charge but qualified some admissions by stating that his failure to pay was the result of financial inability and that while he may have knowingly disobeyed the circuit court's orders, his disobedience was not willful.

Following a hearing before a Trial Commissioner, the KBA argued that Morgan should be permanently disbarred. Although Morgan argued for more lenient discipline, the Trial Commissioner agreed with the KBA and recommended that Morgan be permanently disbarred.

In reviewing the proposed discipline, the Supreme Court considered Morgan's disciplinary history, which included a 181-day suspension and a one-year suspension; its previous admonition regarding Morgan's "pattern of habitual nonpayment;" the amount of the child support arrearage; Morgan's conviction for flagrant nonsupport; and similar case law. The Court ultimately agreed with the Trial Commissioner's recommendation and ordered Morgan permanently disbarred from the practice of law.

***Kentucky Bar Ass'n v. Denton,* 651 S.W.3d 793 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. Denton was hired by a client to represent him in a child custody case. After the client paid a retainer, Denton did some work on the case but failed to appear for hearings and trial dates as the case progressed. The client's attempts to contact Denton were unsuccessful, as were his attempts to retrieve his file from Denton. The Inquiry Commission issued a Charge against Denton asserting violations of SCR 3.130(1.3), 3.130(1.4), 3.130(1.16)(d), and 3.130(8.1)(b).

The Board of Governors unanimously recommended that Denton be found guilty of all counts. The Board further recommended that Denton be suspended from the practice of law for 61 days, that he attend and successfully complete the Ethics and Professionalism Enhancement Program; that he enter into and comply with a Kentucky Lawyer Assistance Program Monitoring Agreement; and that he refund the client fee and pay all costs associated with this matter.

Upon review of the record, and in consideration of the fact that Denton did not present any mitigating circumstances, the Supreme Court agreed with the Board's recommendation and sanctioned Denton accordingly.

***Roach v. Kentucky Bar Ass'n,* 651 S.W.3d 791 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. In this case, James Roach II, seeks readmission to the practice of law in the Commonwealth of Kentucky. He was suspended for failure to pay bar dues on March 24, 1992. Since then, Roach has neither resided in, nor practiced law in the Commonwealth of Kentucky and does not intend to practice here if readmitted. Rather, Roach now resides in Missouri and is seeking admission to the bar there and cannot be admitted unless his suspension in Kentucky is resolved.

Roach has met all the requirements for readmission save one. He must sit for and receive a passing score on the bar examination. While the Board of Governors voted unanimously to accept the recommendation from the Character and Fitness Commission to waive the requirement to sit for the bar examination, the Supreme Court disagreed. The Supreme Court held that the exception under SCR 3.500(3)(e) was inapplicable to Mr. Roach. This waiver is available for applicants only after *withdrawal* pursuant to SCR 3.480. Mr. Roach was suspended and is therefore ineligible. The Supreme Court ordered the matter referred to the Board of Bar Examiners, and should Mr. Roach receive a passing score, the Supreme Court will reconsider the application.

***Price v. Kentucky Bar Ass'n*, 651 S.W.3d 785 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. Price moved the Court under SCR 3.480(2) for a two-year suspension from the practice of law in order to resolve a number of disciplinary cases. Price had been suspended since August 2015, when the Supreme Court temporarily suspended him after finding that his conduct as alleged in a pending criminal case posted a substantial threat of harm to his clients or the public. Since the time of his suspension, Price has been working on rehabilitating and maintaining his commitment to sobriety. He has also been committed to repaying his clients, agreeing to a monthly payment plan to ensure payment in full.

As part of a negotiated sanction with the KBA, Price asked the Court to impose upon him a suspension for a further period of two years, with any reinstatement to be conditioned upon his having provided proof of repayment to his clients. Price's reinstatement would also be conditioned upon his continued participation in and compliance with drug and alcohol treatment, and successful completion of the Ethics and Professionalism Enhancement Program and the Trust Account Management Program. The KBA did not object to Price's motion or his proposed sanction.

The Supreme Court considered the record, including a number of similar cases that supported Price's motion for an additional two-year suspension. Noting Price's participation in the disciplinary proceedings, his efforts to address his substance use disorder, and his agreement to refund all unearned fees, the Court agreed that the proposed sanction was appropriate. Accordingly, Price was suspended from the practice of law for an additional period of two years, with conditions.

***Jefferson v. Kentucky Office of Bar Admissions*, 653 S.W.3d 883 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. Jefferson, a graduate of The Birmingham School of Law, applied to the Office of Bar Admissions (OBA) for admission to the Kentucky bar by reciprocity under SCR 2.110. He was notified by the OBA that the Character and Fitness Committee had determined he was not eligible for admission without examination because he did not earn a J.D. degree from a law school accredited by the American Bar Association. Jefferson was further notified that, under the Supreme Court Rules, there was a path for graduates of non-accredited law schools to seek admission to the bar by examination under SCR 2.014(3)(a). He appealed the decision to the Supreme Court under SCR 2.060.

In reviewing Jefferson's appeal, the Court noted that SCR 2.014(1) clearly and unambiguously states that "[e]very applicant for admission to the Kentucky Bar must have completed degree requirements for a J.D. or equivalent professional degree from a law school approved by the American Bar Association or by the Association of American Law Schools." The fact that The Birmingham School of Law may be regulated and "accredited" by the Alabama legislature or the Alabama Supreme Court, as argued by Jefferson, did not satisfy the requirements of Kentucky's rules. Accordingly, the Court concluded that the Character and Fitness Committee had appropriately evaluated Jefferson's application and correctly determined he is not eligible for admission without examination.

***Inquiry Comm'n v. Stanziano-Sparks*, 653 S.W.3d 881 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission filed a Petition for Temporary Suspension of Stanziano-Sparks under SCR 3.165 alleging

probable cause existed that her conduct posed a substantial risk of harm to her clients or the public, and/or that she was addicted to intoxicants or drugs and did not have the physical or mental fitness to continue to practice law. The Petition was based, in large part, on the affidavit of a judge stating that Stanziano-Sparks appeared in court for a scheduled jury trial while under the influence of illegal substances or drugs and that she refused multiple requests to submit to a drug screen.

Following the filing of the Petition, the Supreme Court entered an Order to Show Cause as to why Stanziano-Sparks should not be suspended from the practice of law. Stanziano-Sparks did not file a response. Thereafter, the Commonwealth's Attorney for the 29th Judicial Circuit filed notice that Stanziano-Sparks had entered a guilty plea to three drug-related criminal offenses, including one Class D felony. Accordingly, under SCR 3.166(1), the Court ordered that Stanziano-Sparks's suspension remain in effect until dissolved or suspended by order of the Court.

***Kentucky Bar Ass'n v. Johnson*, 655 S.W.3d 145 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. The Supreme Court indefinitely suspended Johnson from the practice of law by order on December 17, 2020. On June 17, 2021, the Court issued another suspension against Johnson for a period of 61 days, with an additional 119 days probated for a period of two years. Although neither suspension has been lifted, Johnson continued to engage in the practice of law, filing documents and appearing in court in a number of probate, criminal and family matters.

As a result of these events and after the KBA was notified, the Inquiry Commission filed a complaint against Johnson for violating SCR 3.130(3.4) and SCR 3.130(5.5)(a). Johnson failed to respond to this complaint. Consequently, on January 26, 2022, the Commission filed a Charge against Johnson. That Charge alleged that Johnson violated SCR 3.130(3.4) by knowingly disobeying an obligation under the rules of a tribunal, SCR 3.130(5.5)(a) by practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, and SCR 3.130(8.1)(b) by knowingly failing to respond to a lawful demand for information from the Inquiry Commission in its initial complaint. Johnson received the Charge by sheriff service.

Johnson did not respond to the Charge, and, accordingly, an Order of Submission was filed to the Board of Governors. The Board considered the Charge on default pursuant to SCR 3.210. After considering the current Charges against Johnson, his prior discipline, and his pattern of misconduct, the Board recommended that Johnson be suspended for one year, consecutive with his other discipline. Johnson did not file a notice to the Court to review the Board's decision and the Court did not elect to review the decision under SCR 3.370(8). Accordingly, the decision of the Board was adopted under SCR 3.370(9) and Johnson was suspended for one year, consecutive with his other discipline.

***Kentucky Bar Ass'n v. Klopfenstein*, 655 S.W.3d 143 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. The Kentucky Bar Association moved the Supreme Court to order Klopfenstein to show cause why he should not be subject to reciprocal discipline after being publicly reprimanded by the Supreme Court of Missouri. The public reprimand in Missouri resulted from Klopfenstein's deficient representation of two clients. Klopfenstein filed a response admitting no good cause

existed. Accordingly, under SCR 3.435(4), the Court granted the KBA's motion and ordered that Kopfenstein be publicly reprimanded in Kentucky consistent with the order of the Supreme Court of Missouri.

***Adams v. Kentucky Bar Ass'n,* 655 S.W.3d 148 (Ky. 2022)**
Opinion and Order of the Court. All sitting; all concur. On motion by Adams for approval of a negotiated sanction, the Supreme Court approved the sanction. Adams represented Client for many years. In late 2018 and early 2019, and again in May 2020, Adams had an intermittent sexual relationship with Client's wife. In May 2020, Client developed a medical issue which required hospitalization, and during this time Client's wife sought Adams' legal services to draft a Power of Attorney. The Power of Attorney's purported goal was to permit Client's wife to assist and oversee Client's business if Client remained unresponsive. Adams drafted a broader document granting Client's wife financial authority as well as the power to make health care decisions on behalf of Client. While the document was dated May 1, 2020, the document was actually drafted on May 4, 2020, on or after the date of Client's hospitalization. Though Adams did not forge the document himself, Adams admitted knowledge of the forgery. The Inquiry Commission filed a two-count Charge against Adams, the first under SCR 3.130(1.7)(a) for conflicts of interest, and the second under SCR 3.130(8.4)(c), which prohibits a lawyer from engaging in dishonest, fraudulent, or deceitful conduct. After negotiations and approval by the Inquiry Commission Chair and the Kentucky Bar Association Immediate Past President, the parties reached an agreement wherein Adams admitted to both counts of the Charge. The negotiated sanction for these violations was a one-year suspension, with one hundred days to serve and the remaining two hundred sixty-five days probated for two years with conditions. Adams has occasioned no prior discipline in his twenty-five years practicing law in the Commonwealth and has cooperated fully with the disciplinary authorities during this action. The Court further found the sanction to be in line with punishments given under similar circumstances. For these reasons, the Supreme Court found the negotiated sanction appropriate.

***Null v. Kentucky Bar Ass'n,* ____ S.W.3d ____, 2022 WL 19330699 (Dec. 15, 2022)**
Opinion and Order of the Court. Minton, C.J.; Conley, Hughes, Keller, Lambert, and VanMeter, sitting. All concur. Nickell, J., not sitting. Richard Davis Null filed a motion with the Supreme Court of Kentucky pursuant to Supreme Court Rule (SCR) 3.480(2). Null asked the Court to suspend him from the practice of law for one year, with 180 days to serve and the remainder probated for two years subject to conditions. The Kentucky Bar Association expressed no objection to the negotiated sanction subject to certain conditions. The Court agreed with the parties and imposed the suspension.

Null's case concerned eight separate disciplinary files in which the Court found he violated several Supreme Court Rules, including: seven counts of SCR 3.130(1.3), two counts of SCR 3.130(1.4)(a)(3), four counts of SCR 3.130(1.4)(a)(4), one count of SCR 3.130(1.6)(a), two counts of SCR 3.130 (1.15)(a), seven counts of SCR 3.130(1.16)(d), two counts of SCR 3.130(8.1)(a), one count of SCR 3.130(8.1)(b), and four counts of SCR 3.130(8.4)(c). In each of the several KBA files, Null had accepted money from clients and then failed to perform the requisite legal work for which he was paid. Since Null had no previous disciplinary history, the Court agreed with the sanctions as negotiated by the parties. The Court also ordered Null to repay a number of

unearned fees to his former clients and attend the next Ethics and Professionalism Enhancement and Trust Account Management programs held by the KBA. The Court ordered Null pay his KBA membership dues, satisfy all continuing legal education requirements, and pay the costs associated with the proceeding.

***Kentucky Bar Ass'n v. Moore*, 664 S.W.3d 578 (Ky. 2023)** Opinion and Order of the Court. All sitting. All concur. Jeffrey Owens Moore was indefinitely suspended from the practice of law on August 25, 2016, for failing to respond to a charge in an underlying disciplinary case. He failed to seek reinstatement within five years and the Kentucky Bar Association (KBA) moved for his permanent disbarment pursuant to Supreme Court Rule 3.167(5). The Court held Moore failed to show cause why he should not be permanently disbarred and granted the KBA's motion for permanent disbarment.

While Moore filed a response entitled "show cause," it was treated as a motion for enlargement of time. The document filed only made blanket statements about Moore's medical procedures and his alleged resulting inability to participate in the KBA proceedings against him without providing any proof thereof. Moore requested an additional sixty days to respond, which the Court granted. Moore failed to file anything further in the case. Accordingly, the Court permanently disbarred Moore from the practice of law.

***Kentucky Bar Ass'n v. Morburger*, 664 S.W.3d 710 (Ky. 2023)**
Opinion and Order of the Court. All sitting. All concur. Arthur Joseph Morburger was permanently disbarred in Florida for failing to comply with rules regulating attorney trust accounts. The Kentucky Bar Association (KBA) filed a motion to the Court asking Morburger be ordered to show cause why he should not be subject to reciprocal discipline in Kentucky. Morburger failed to file a response. Pursuant to Supreme Court Rule 3.435(4), the Court imposed identical reciprocal discipline and permanently disbarred Morburger when he failed to prove either a lack of jurisdiction or fraud in the Florida proceedings or that his misconduct warranted a substantially different discipline in Kentucky.

***Lisa M. Wells v. Kentucky Bar Ass'n*, 664 S.W.3d 712 (Ky. 2023)**
Opinion and Order of the Court. All sitting. All concur. Lisa M. Wells moved the Court to enter a negotiated sanction pursuant to Supreme Court Rule (SCR) 3.480(2). Wells asked the Court to impose a probated two-year suspension with conditions. The Kentucky Bar Association (KBA) has no objection to the proposed discipline. The Court agreed with the parties that the probated suspension and conditions were appropriate.

Wells acknowledged violating numerous rules related to her conduct in three separate KBA files. Wells pleaded guilty to both misdemeanor and felony drug charges in Ohio in 2017 and was temporarily suspended from the practice of law in Kentucky. While Wells was initially noncompliant with the Ohio Lawyer Assistance Program (OLAP), she began complying after completing treatment. Her current contract with OLAP requires Wells to call a drug screening line daily and report for urine screens upon request. The Ohio Supreme Court suspended Wells from the practice of law for two years with credit for time served under a previous interim felony suspension. Wells admits she violated SCR 3.130(8.1)(b) by filing to initially respond to the Kentucky Office of Bar

Counsel. However, since completing her substance use treatment, she has participated in the disciplinary process. The other two KBA files this negotiated sanction concerns involve trust account violations pursuant to SCR 3.130(1.15)(a) and disputed fees paid by clients. Wells asked the Court to order binding legal fee arbitration pursuant to SCR 3.810 for the fee disputes.

The Court agreed that the negotiated sanction was appropriate and ordered: fee arbitration; that Wells complete the next scheduled KBA Ethics and Professionalism Enhancement Program; that Wells complete the next scheduled KBA Trust Account Management Program; Wells' continued participation in the OLAP program and compliance with her OLAP agreement, and that Wells submit quarterly reports to the Kentucky Office of Bar Counsel demonstrating her ongoing compliance; and that Wells not receive any additional criminal or disciplinary charges.

***Kentucky Bar Ass'n v. Thornton*, ____ S.W.3d ____, 2023 WL 2442241 (Feb. 16, 2023)**

Opinion and Order of the Court. VanMeter, C.J.; Bisig, Conley, Keller, Lambert, and Nickell, JJ., sitting. All concur. Thompson, J., not sitting. Supreme Court Rule (SCR) 3.164 requires lawyers to answer charges from the Kentucky Bar Association (KBA). Steven O. Thornton failed to answer a charge and the KBA filed a motion pursuant to SCR 3.167(1) asking the Court indefinitely suspend Thornton. One of Thornton's clients had filed a bar complaint against him alleging Thornton had failed to answer any responsive pleadings in the client's case, failed to respond to repeated client communications, and failed to communicate with the client about the case. Thornton failed to participate during both the complaint stage and the formal charge stage and the Court indefinitely suspended him.

***Greene v. Kentucky Bar Ass'n*, ___ S.W.3d ___, 2023 WL 2623023 (Mar. 23, 2023)**

Opinion and Order of the Court. VanMeter, C.J., Bisig, Conley, Keller, Lambert, and Nickell, sitting. All concur. Thompson, J., not sitting. Fred Garland Greene moved the Supreme Court for reinstatement to the practice of law pursuant to Kentucky Supreme Court Rule (SCR) 3.510(2). The Court accepted the recommendations of the Kentucky Bar Association's Character and Fitness Committee and Board of Governors and denied Greene's application for reinstatement.

Greene has been temporarily suspended from the practice of law three times since his admission to the bar in 1972. The most recent of these suspensions came in 2019 and was for three years. Pursuant to SCR 3.502, a lawyer suspended for more than 181 days must undergo a reapplication process and cannot be reinstated to the practice of law except by order of the Supreme Court.

The Court boiled its inquiry down to whether Greene "is now of good moral character and is a fit and proper person to be reentrusted with the confidence and privilege of being an attorney at law." *In re* Cohen, 706 S.W.2d 832, 834 (Ky. 1986). The Court found that Greene was not and focused its analysis on Greene's lack of candor, failure to appreciate his wrongdoing, and lack of rehabilitation. Specifically, Greene misrepresented facts regarding his suspension from the practice of law and minimized his misconduct. He displayed a lack of candor and failed to fully disclose civil cases against him—including two cases filed against him during his reapplication process.

***Kentucky Bar Ass'n v. Williamson,* ___ S.W.3d ___, 2023 WL 2623211 (Mar. 23, 2023)**

Opinion and Order of the Court. All sitting. All concur. Mellissa Jan Williamson represented a client in a dissolution of marriage proceeding. Williamson failed to adequately communicate with her client and failed to include her client's interest in her husband's 401k in the parties' settlement. Williamson continued to ignore her client's communications attempts and closed her office without notifying her client. When the client filed a bar complaint regarding Williamson's misconduct, Williamson did not respond or otherwise participate in the disciplinary process. This case came to the Supreme Court as a default matter. The Court found Williamson guilty of violating Kentucky Supreme Court Rule (SCR) 3.130(1.4)(a), regarding communication with clients; SCR 3.130(1.4)(b), regarding adequate explanation to clients; and SCR 3.130(8.1)(b), regarding the failure to respond during the disciplinary process. The Court suspended Williamson from the practice of law for thirty days for these violations.

***Kentucky Bar Ass'n v. Calilung,* ___ S.W.3d ___, 2023 WL 2623209 (Mar. 23, 2023)**

Opinion and Order of the Court. All sitting. All concur. As relevant to this action, Michael R. P. Calilung represented two separate probate estates. Regarding the first of those estates, Calilung filed sworn, incomplete periodic settlements from 2006-2018. In those settlements, he indicated estate funds had been distributed. During that time, he filed four motions for extensions of time, claiming additional documents were needed to effectuate final settlement. One of the filings mentioned an overpayment to the IRS and another a claim pending against the Kentucky State Treasurer. Calilung failed to resolve either matter. In 2019, the probate court ordered Calilung to show cause and prohibited him from withdrawing any funds related to the estate. Calilung was supposed to provide the court and the public administrator a sworn accounting including the identity of all people and institutions holding estate assets and the value of the assets held. He was also to provide correspondence regarding the estate's unclaimed property, proof of distributions of bequests, a listing of documents related to his four prior motions for extensions of time, and a listing of remaining heirs. In response, Calilung filed a two-page pleading the probate court described as "woefully unresponsive to the court's directives." Calilung offered no explanation for either his failure to satisfy the show cause order or for the decade-long delay in administering and closing the estate.

The second estate was before the same probate court. In the second estate, Calilung filed a petition to probate the estate in 2015 and filed the initial inventory a few months later in 2016. Over the next four years, Calilung received multiple notices for failures to file inventories or periodic settlements. The court entered an order removing Calilung as counsel.

Calilung was charged with violating SCR 3.130(1.3) for his failure to act with reasonable diligence and promptness in representing both estates; SCR 3.130(3.3(a)(1) for knowingly making false statements of fact or law to the probate court regarding the first estate; SCR 3.130(3.4)(c) for knowingly disobeying an obligation under the rules of the probate court related to first estate; and SCR 3.130(8.4)(c) for engaging in conduct involving fraud, deceit, or misrepresentation as to the first estate.

The KBA trial commissioner found that, while Calilung had not violated SCR 3.130(8.4)(c), he had committed the remaining violations. The Board of Governors agreed with the trial commissioner's recommendation to suspend Calilung from the practice of law for 120 days, with 60 to serve and the balance probated for two years on the conditions of no further disciplinary charges and the successful completion of the Ethics and Professional Enhancement Program within twelve months. The Court adopted the Board's recommendation and suspended Calilung for 120 days for violating SCR 3.130(1.3), (3.3)(a)(1), and (3.4)(c). Sixty days of that suspension were to be served with the remainder probated for two years with the conditions recommended by the trial commissioner.

***Poole v. Kentucky Bar Ass'n,* ___ S.W.3d ___, 2023 WL 2623117 (Mar. 23, 2023)**
Opinion and Order of the Court. All sitting. All concur. Robert Lawrence Poole pleaded guilty to seven counts of promoting human trafficking, a Class D felony. The Kentucky Bar Association's Inquiry Commission issued a single charge against Poole for violating Kentucky Supreme Court Rule (SCR) 3.130(8.4)(b), which provides it is misconduct "for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Poole admits his conduct violated this rule and asked the Supreme Court to allow him to withdraw his membership under terms of permanent disbarment pursuant to SCR 3.480(3). The Court granted the motion and permanently disbarred Poole.

***Sivasubramaniam v. Kentucky Bar Ass'n,* ___ S.W.3d ___, 2023 WL 2623210 (Mar. 23, 2023)**
Opinion and Order of the Court. All sitting. All concur. The Supreme Court suspended Visaharan Sivasubramaniam from the practice of law for five years after he admitted to violating Kentucky Supreme Court Rule (SCR) 3.130(8.4)(b). That rule provides it is misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Sivasubramaniam was indicted for two counts of subscribing to false United States income tax returns. Sivasubramaniam, who is also a physician, admitted he knowingly inflated business expenses at his medical practice, resulting in an underpayment of federal taxes and pleaded guilty. He paid full restitution to the federal government in the amount of $300,000. He got the money to repay the federal government from his father-in-law. Sivasubramaniam executed a promissory note for the amount and is current on his payments.

Sivasubramaniam applied for reinstatement to the practice of law, completed the required continuing legal education, and paid all necessary fees. The Kentucky Bar Association and Sivasubramaniam submitted a joint application to the Character and Fitness Committee. The Committee accepted the joint filing and submitted its findings of fact, conclusions of law, and recommendation to the Board of Governors recommending Sivasubramaniam be reinstated to the practice of law. The Board of Governors unanimously recommended Sivasubramaniam's application for reinstatement be approved by the Court subject to conditions. Because Sivasubramaniam was forthcoming about his misconduct, met all the conditions for reinstatement, and has been rehabilitated, the Court readmitted him to the practice of law with conditions.

***Alerding v. Kentucky Bar Ass'n*, ___ S.W.3d ___, 2023 WL 2623214 (Mar. 23, 2023)**
Dennis Alerding represented a criminal client, quoting a $10,000 fee. The client paid him $9,800, which Aldering deposited directly into his operating account. Aldering also failed to maintain contemporaneous time records to verify he had earned the funds paid. However, he was subsequently able to show he had earned the entirety of the fee.

The Inquiry Commission filed a charge against Alerding, alleging he violated Kentucky Supreme Court Rule (SCR) 3.130(1.15)(e), which requires lawyers to deposit legal fees in client trust accounts an withdraw them only as the fees are earned. Aldering admitted he violated the rule and requested the Court find him guilty of the charge. The Kentucky Bar Association and Alerding had entered into a negotiated sanction pursuant to SCR 3.480(2) and the parties requested the Court publicly reprimand Alerding for his misconduct. After examining prior cases, the Court agreed this was an appropriate sanction and imposed the public reprimand.

***Kentucky Bar Ass'n v. Sales*, ___ S.W.3d ___, 2023 WL 2623123 (Mar. 23, 2023)**
The Kentucky Bar Association's Inquiry Commission opened two separate cases regarding Kenneth Lawrence Sales for various misconduct. In the first case, he missed numerous deadlines in a client's case in federal court. He eventually filed a motion to dismiss the claim without his client's knowledge, failed to turn over a settlement to his client until after disciplinary action was filed, and stopped communicating with his client.

In another case, Sales failed to respond to discovery in a timely manner and failed to appear at the hearing on a motion for summary judgment. The trial court gave Sales additional time to respond to the motion for summary judgment and Sales still failed to respond. The case was transferred to another judge and Sales did not respond to the motion in writing, though he did appear at the hearing and argued orally. Opposing counsel later discovered Sales's license to practice law was suspended during the pendency of that action and reported this misconduct to the KBA.

A KBA trial commissioner found Sales violated Kentucky Supreme Court Rule (SCR) 3.130(1.3) twice, regarding diligence; SCR 3.130(1.4)(a)(3), regarding keeping clients reasonably informed; SCR 3.130(1.15)(b), regarding client funds; SCR 3.130(3.4)(c), regarding obeying obligations pursuant to a court's rules; and SCR 3.130(5.5)(a), regarding practicing law without a valid license. The trial commissioner recommended Sales be suspended from the practice of law for one year for these violations. Neither Sales nor the KBA filed a notice of review to the Supreme Court and the Court adopted the trial commissioner's report and recommendation.
***Kentucky Bar Ass'n v. Smith*, ____ S.W.3d ____, 2023 WL 3113622**
Opinion and Order of the Court. All sitting. All concur. Ashlee Dehnae Smith failed to update her bar roster address and failed to complete her Continuing Legal Education (CLE) requirements for the 2017-18 educational year. The Board mailed a show-cause notice to Smith regarding her failure to comply with CLE requirements. Smith had not kept her bar roster address up to date, but finally received the notice when it was sent to her service address. The CLE department told Smith how to cure the CLE deficiency, but she failed to do so. Smith filed a motion with the Supreme Court and an affidavit testifying she had completed 6.5 additional hours of CLE for the

relevant year but had forgotten to submit her form for the hours. She attached a certificate of attendance. The KBA Inquiry Commission investigated Smith's claims and subpoenaed her bank records for the relevant time of the CLE she had allegedly attended—which showed her bank card was used in another city during the time she asserted she was in the CLE program. The inquiry commission issued charges against Smith for violating Supreme Court Rule (SCR) 3.130(3.3)(a)(1) by falsely testifying in an affidavit; SCR 3.130(3.3)(a)(3) by knowingly filing a false affidavit and false certificate of attendance; SCR 3.130(8.4)(c) by fraudulently certifying she earned CLE credits she had not, in fact, earned; and SCR 3.130(3.4)(c) for failing to maintain a current KBA roster address.

The Court accepted the recommendation of the Board of Governors and found Smith guilty of all the counts of ethical misconduct. It suspended her retroactively for a period of three years, beginning in 2017. She must comply with the relevant requirements of SCR 3.502 for reinstatement.