BENCH & BAR 2023
KENTUCKY COURT OF APPEALS UPDATE
SELECTED CASES FROM JULY 1, 2022, to JUNE 16, 2023

PRESENTED BY: JUDGE PAMELA R. GOODWINE

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

I. CIVIL PROCEDURE

A. ***BARBARA ANN DITTO, ET AL. v. JERRY T. MUCKER***

2021-CA-1488-MR 11/18/2022 663 S.W.3d 456
Opinion by CETRULO; SUSANNE M., ACREE, J. (CONCURS) AND GOODWINE, J. (CONCURS)

The Court of Appeals reviewed a Breckinridge Circuit Court Order dismissing the Appellants' lawsuit for failure to revive their personal injury action within one year of the death of the Appellee.

Appellants Robert E. Murray, Jr. and Barbara Ann Ditto were involved in a two-vehicle accident with Appellee Jerry Mucker. The Appellants filed a complaint in circuit court claiming Mucker acted negligently while driving his vehicle. First Chicago Insurance Company, Mucker's vehicle insurer, represented him in the action. After an unsuccessful mediation, Appellants' counsel informed First Chicago that Mucker had recently died of COVID-19. First, Chicago filed a Notice of Death of Defendant with service to the Appellants. No personal representative was appointed for the deceased Mucker, and no estate was opened for Mucker.

More than one year after Mucker's death, First Chicago filed a motion for summary judgment, which the Breckinridge Circuit Court granted. The trial court found that, despite receiving proper notice of Mucker's death, the Appellants failed to revive their action — by substituting a personal representative for Mucker — within the one-year statute of limitations. Additionally, the trial court determined that any agency relationship between First Chicago and Mucker may have been terminated upon Mucker's death. Finally, the trial court found no conflict of interest or ethical violations "for a plaintiff to take action to revive claims against a deceased defendant."

The Court affirmed and, in its opinion, noted that under *Harris v. Jackson*, 192 S.W.3d 297, 307 (Ky. 2006), the attorney for the deceased has a duty to disclose his or her client's death to the opposing party if a defendant dies between the filing of a complaint and legal resolution. However, the Court stated that the deceased's attorney is not *required* to file the motion for substitution. CR 25.01(1). The Court further stated that if the representative or other party decides to revive the action, they must file a motion for substitution within one year after the defendant's death. KRS 395.278. In this matter, the Court held that the duty to disclose Mucker's death was not at issue, and all parties were aware of it approximately one week after it occurred. Instead, the Court determined that the Appellants attempted to expand the duty beyond disclosure as required under *Harris*.

The Court was unpersuaded by the Appellants' position that First Chicago had a duty to file the revivor because of the ongoing agency relationship between Mucker and his insurer. It was reasoned that there was no need to discuss *whether an agency relationship existed because even if it* existed, the agency ended at Mucker's death. *Ping v. Beverly Enterprises, Inc*., 376 S.W.3d 581, 591 (Ky. 2012) (citing *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 50 (Ky. 2003). *See also Restatement 2d of Agency*, § 120.

Lastly, the Appellants argued that if they had filed a petition on Mucker's behalf, that would be — in a limited capacity — the same as representing both sides of the litigation, thereby violating SCR 3.130 (1.7). However, the Court disagreed and concluded that *not* petitioning for the appointment is contrary to the Appellants' *own interest* because without the appointment, the litigation could be properly dismissed under CR 25.01 and KRS 395.278. Additionally, the Court indicated that the appointment, under these circumstances, is more akin to *joining* an essential party than it is *representing* an opposing party. Moreover, it was noted that the Kentucky Supreme Court addressed the issue of revivor without imposing a duty to file the petition for substitution on a *particular* party. *See Harris*, 192 S.W.3d at 307; *see also Jackson v. Est. of Day*, 595 S.W.3d 117, 123 (Ky. 2020).

II. CRIMINAL LAW

A. ***COMMONWEALTH OF KENTUCKY v. WENDY FILLHARDT***

2020-CA-1563-DG 09/02/2022 652 S.W.3d 213
Opinion by ACREE, GLENN E.; DIXON, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

After receiving reports of a drunk driver, Cold Spring Police Officer Billy Linkugel (Officer Linkugel) initiated a traffic stop with the reported vehicle. The driver, Wendy Fillhardt (Fillhardt), admitted to drinking that night and displayed signs of intoxication. Looking to cut Fillhardt a break, Officer Linkugel arrested her for public intoxication. He did not charge her with Operating a Motion Vehicle Under the Influence pursuant to KRS 189A.010, and consequently, he failed to conduct a field sobriety test or test for Fillhardt's blood alcohol content. The Commonwealth amended the public intoxication charge, instead charging Fillhardt under Kentucky's DUI statute. Fillhardt then moved to dismiss the DUI charge, arguing the Commonwealth's evidence could not overcome a directed verdict at trial. The Campbell County District Court agreed and dismissed the DUI charge. The Campbell Circuit Court found jeopardy attached and declined to overturn the district court's decision. The Commonwealth appealed, and the Court granted discretionary review. On appeal, the Court addressed whether the district court had the authority to dismiss the DUI charge against Fillhardt. The Court concluded that the district court lacked the authority to do so. Only the Commonwealth can dismiss criminal charges before trial under Kentucky Rule of Criminal Procedure (RCr) 9.64. The Court also noted that the Kentucky Supreme Court has made clear: "the authority to dismiss a criminal complaint before trial may only be exercised by the Commonwealth, and the trial court may only dismiss via a directed verdict following a trial." *Commonwealth v. Isham*, 98 S.W.3d 59, 62 (Ky. 2003). Further, "[i]t is premature for the trial court to weigh the evidence before trial to determine if the Commonwealth can or will meet [its] burden." *Isham*, 98 S.W.2d at 61. In this case, the Court determined that the Commonwealth never consented to dismiss the DUI charge. Accordingly, the district court erred when it dismissed the charge against Fillhardt.

B. ***BRYAN N. MCCUE v. COMMONWEALTH OF KENTUCKY***

2021-CA-0948-MR 09/02/2022 652 S.W.3d 218
Opinion by ACREE, GLENN E.; CALDWELL, J. (CONCURS) AND LAMBERT, J. (CONCURS)

A grand jury indicted Appellant on several charges, including driving under the influence, resisting arrest, and third-degree assault. Before trial, the Appellant filed a motion to dismiss for lack of probable cause pursuant to *Wells v. Commonwealth*, 709 S.W.2d 847 (Ky. App. 1986); though the Commonwealth repeatedly asserted that a motion to dismiss was improper in a criminal case, the Hart Circuit Court held a "*Wells* hearing" on the motion. The Hart Circuit Court determined that the Commonwealth presented sufficient evidence to establish probable cause but did not discuss whether the Appellant's motion or the hearing was proper. The appellant entered a conditional guilty plea, reserving his right to appeal the circuit court's denial of his motion to dismiss. While the Court of Appeals agreed Appellant was not entitled to dismiss his indictments, it concluded that the circuit court should not have entertained the motion. Under the Kentucky Rules of Criminal Procedure (RCr), "[t]he attorney for the Commonwealth, with the permission of the court, may dismiss the indictment, information, complaint or uniform citation before the swearing of the jury or, in a non-jury case, before the swearing of the first witness." RCr 9.64. Kentucky jurisprudence interprets this rule to mean that only the Commonwealth has the authority to dismiss a criminal complaint before trial and that a trial court can only dismiss upon a motion for a directed verdict following trial. Accordingly, a trial court cannot dismiss criminal indictments, as the Appellant requested summarily. While exceptions to this general prohibition exist—for example, where a trial court detects prosecutorial misconduct which prejudices the defendant—no exception permits a trial court to weigh the evidence. The Court noted that the Commonwealth's authority to dismiss criminal indictments is rooted in the separation of powers principle: the judiciary is unable to encroach upon the Commonwealth's executive function in prosecuting criminal cases by dismissing indictments prior to trial. The Court concluded that a "*Wells* hearing" does not exist. Though the Court noted the circuit court never had the option to dismiss prior to trial without the consent of the Commonwealth, it agreed that denial of Appellant's motion was correct. Therefore, the Court affirmed the circuit court's denial of Appellant's motion.

C. ***DONNA WARFIELD v. COMMONWEALTH OF KENTUCKY***

2021-CA-1404-MR 03/31/2023 2023 WL 2718970
Opinion by ACREE, GLENN E.; CETRULO, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Following a traffic stop, Appellant was arrested and indicted on various counts of drug trafficking and possession after a search of her vehicle revealed drugs, paraphernalia, and cash. The appellant filed a motion to suppress, arguing the police illegally extended the traffic stop beyond its initial purpose—failure to wear seat belt violations—so that the police could summon a drug-sniffing dog to check the vehicle for drugs. The Boone Circuit Court denied the motion. The appellant entered a conditional guilty plea and appealed but absconded from her probation while her appeal was pending. The Court of Appeals affirmed but declined to dismiss the appeal because Appellant had absconded. The opinion concluded that Section 115 of the Kentucky Constitution guarantees an appeal from a criminal conviction, even if an appellant absconds from justice. The Court declined to apply case law

in which a criminal appeal was dismissed after an appellant escaped confinement because such case law predated Kentucky's present constitution. The Court also declined to extend the application of the federal courts' "fugitive disentitlement doctrine" to Kentucky criminal appeals because the federal doctrine says nothing about the Kentucky Constitution's guaranteed right of appeal from a criminal conviction. Although the fugitive disentitlement doctrine had been applied in *Commonwealth v. Hess*, 628 S.W.3d 56 (Ky. 2021), such application was limited to an appeal from an order revoking probation and, thus, the constitutional right to appeal from a criminal conviction was not implicated. Finally, though the Court determined that Appellant did not waive her appeal, it ultimately affirmed because the police did not unlawfully extend the traffic stop in violation of Appellant's rights under the Fourth Amendment.

Discretionary Review Granted on June 7, 2023

III. DOMESTIC VIOLENCE

A. ***CHRISTINA HOLT TAYLOR v. LEIGH-ANN FITZPATRICK***

2022-CA-0946-ME 01/13/2023 659 S.W.3d 745
Opinion by CETRULO, SUSANNE M.; DIXON, J. (CONCURS) AND TAYLOR, J. (CONCURS)

This is an appeal from an Allen County Family Court ruling which extended an interpersonal protective order (IPO) for three more years on a finding of stalking by Appellant against the new girlfriend of the Appellant's former husband. The Court of Appeals vacated the IPO as there was insufficient evidence of stalking, as that is defined by the criminal statutes, and the trial court failed to make written findings to support the issuance of a protective order.

IV. ELECTION LAW

A. ***JAMES LUERSEN, IN HIS OFFICIAL CAPACITY AS CAMPBELL COUNTY CLERK, ET AL. v. DAVID FISCHER, ET AL. and BRIAN PAINTER, ET AL. v. DAVID FISCHER, ET AL.***

2022-CA-0788-EL 08/26/2022 651 S.W.3d 206
2022-CA-0789-EL
Opinion by THOMPSON, KELLY; COMBS, J. (CONCURS) AND LAMBERT, J. (CONCURS)

The appeal arose from an order of the Campbell Circuit Court vacating the results of the 2022 May Republican Primary for Campbell County Commissioner after Appellee primary challenger, David Fischer, filed an election contest petition and petition for injunctive relief challenging Appellant Campbell County Commissioner Brian Painter's victory. Fischer alleged that Painter violated the state's anti-electioneering law, KRS 117.235, and provisions of the Corrupt Practices Act, KRS 121.055, by distributing campaign materials and pens at the County Administration Building to poll workers during a training session while early voting was occurring on an above separate floor. Citing *Ellis v. Meeks*, 957 S.W.2d 213 (Ky. 1997), the circuit court found that Painter received a significant statistically larger share of votes cast before election day and noted, while impossible to know exactly how many votes were influenced, his actions suggested a potential ripple effect that swayed voters

beyond those with whom he had direct interactions. After an in-depth examination of prior case law concerning electioneering, the Court of Appeals reversed the lower court's ruling citing the high evidentiary burden to vacate an election result. The Court indicated there was no evidence to suggest all the individuals Painter had improper interactions with voted for him or motivated others to vote for him, and the number of all the votes cast on the day in question was not enough to have secured him the number necessary to have won the election. Quoting *Hardin v. Montgomery*, 495 S.W.3d 686, 698 (Ky. 2016), the Court wrote, "Because a statistical anomaly alone does not authorize the courts to disturb results of th[e] election, other evidence of significant irregularities affecting those votes must be established."

V. FAMILY LAW

A. ***T.G.-F. v. J.Y., ET AL.***

2021-CA-1480-ME 07/08/2022 648 S.W.3d 90
Opinion by ACREE, GLENN E.; CETRULO, J. (CONCURS IN RESULT ONLY) AND L. THOMPSON, J. (CONCURS)

The Estill Circuit Court granted Aunt and Uncle's petition to adopt the Child without Mother's consent, terminating Mother's parental rights to the Child. While nothing in the record demonstrates that the Estill Circuit Clerk sent copies of the adoption petition to the Cabinet for Health and Family Services (Cabinet) as required by KRS 199.510(1), the fact remains that the Cabinet did not participate in the adoption in any manner. Mother appealed, partly arguing that the circuit court failed to strictly comply with the adoption statutes. The Court agreed with Mother, concluding that the circuit court committed reversible error by proceeding with the adoption without the Cabinet's participation. The Court held that Kentucky's adoption statutes require Cabinet participation in every adoption in one of two forms. KRS 199.510 requires the Cabinet or a designee either to perform an investigation and report "not later than ninety (90) days from the placement of the child or ninety (90) days after the filing date of the petition, whichever is longer," or "within ten (10) days of receipt of the petition [to] notify the court of its inability to conduct the investigation." KRS 199.510(1)–(2). The Court rejected Aunt and Uncle's argument that KRS 199.470(4)(a), dealing with pre-petition Cabinet participation, authorizes the circuit court discretion to proceed with no Cabinet participation when adoption petitions are brought by certain members of a proposed adoptive child's family, including aunts and uncles. Rather, the Court addressed the legislative history of KRS Chapter 199 and concluded that when the Cabinet declines to investigate and report or fails to comply with KRS 199.510 in adoption by persons identified in KRS 199.470(4)(a), that provision authorizes the circuit court to direct the Cabinet to investigate and report. Because the circuit court failed to strictly comply with the adoption laws, the Court of Appeals vacated the adoption and remanded it for further proceedings; Mother's other arguments were moot.

B. ***T.C., ET AL. v. CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY, ET AL.***

2021-CA-0441-ME 07/22/2022 652 S.W.3d 670
2021-CA-0445-ME
2021-CA-0446-ME

Opinion by MAZE, IRV; ACREE, J. (CONCURS) AND COMBS, J. (CONCURS)

Appellants, T.C. and J.C. are the natural parents of three children. Based upon allegations of dependency/neglect or abuse, Appellee Cabinet, initiated petitions for the removal of the children. The children were removed and placed in the temporary custody of the Cabinet. The Cabinet then placed them in two separate foster homes. The Cabinet continued to work with the family, with reunification as the goal. Although the natural parents did not immediately complete their case plans, they consistently made progress. Each time their cases were reviewed, the Cabinet and the family court agreed that reunification remained the goal. However, the foster parents moved to intervene in the dependency actions, seeking custody. Leave to intervene was granted, and the family court awarded temporary custody to the foster parents who then filed separate custody actions. The family court ordered the dependency cases to be closed and directed that all future motions be filed in the custody actions.

The Court of Appeals found that the family court had abused its discretion by directing the Cabinet to close its files on the dependency cases, as such an order violated the separation of powers provided for in Kentucky Constitution §§ 27 and 28. The Court of Appeals found that the foster parents lacked standing to seek custody as either *de facto* custodians as defined in KRS 403.270 or as "persons acting as parents" as described in KRS 403.800(13). The Court of Appeals reversed and remanded the cases to the family court on the grounds that the family court abused its discretion in awarding temporary custody to the foster parents as it lacked statutory authority to do so under the dispositional alternatives provided in KRS 620.140 and had failed to make the findings of fact that the factors set forth in both KRS 403.270 (2) (a) – (k) and KRS 620.023 (1) and (2) had been met.

C. ***C.L v. COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMLY SERVICES, ET AL.***

2021-CA-1188-ME 09/09/2022 653 S.W.3d 599
2021-CA-1192-ME
2021-CA-1194-ME
2021-CA-1197-ME

Opinion by THOMPSON, KELLY; CLAYTON, C.J. (CONCURS) AND CALDWELL, J. (CONCURS)

The mother of three children appealed their ordered custodial removal and the findings entered against her in a dependency, neglect, and abuse (DNA) matter by the Lewis Family Court. The findings were based on allegations that she made false reports that one of her children was sexually abused, had mental health issues, abused alcohol, and failed to provide essential care for her children. During the adjudication, testimony was presented that there were concerns about the mother's mental condition and suspicions of alcohol abuse. The mental health concerns were predicated on observed paranoid, "very erratic," and "very combative" behavior. The suspicions of

alcohol abuse were based on a statement by one of her children that he was afraid when she drank with her boyfriend along with her observed behavior during a home visit, in which when the children weren't present, after she admittedly consumed alcohol. The family court relied on the testimony in making its findings and took *sua sponte* judicial notice of a domestic violence case previously and separately argued before it. The family court further justified its findings by noting the mother made three unproven reports of sexual abuse within a fourteen-month period involving allegations the child initially denied and which lacked physical evidence.

The Court of Appeals reversed and remanded the lower court's orders based on a lack of substantial evidence. The Court ruled there was never an official finding any of the sexual abuse allegations were fabricated and noted there was still an ongoing investigation. Citing *M.A.B. v. Commonwealth Cabinet for Health and Family Services*, 456 S.W.3d 407, 412 (Ky. App. 2015), the Court deemed the lower court's judicial notice of the previous domestic violence case to be improper since there was a lack of any documentation or evidence of the matter within the appellate record, and there was insufficient notice regarding it provided to the parties before the ruling. The lack of physical evidence and initial denials of the alleged sexually abused child, in the opinion of the Court, was not conclusive the acts of abuse did not occur. The Court stated that the evidence presented to establish the mother's alleged mental health issues was vague and insufficient to suggest it posed a risk to her children or motivated her to make the sexual abuse reports. Regarding the mother's alcohol use, the Court declared that consumption alone, particularly without any indications of underlying substance abuse, was insufficient to justify the findings without clear evidence that it presented a danger to the children. Citing *M.C. v. Cabinet for Health and Family Services*, 614 S.W.3d 915, 923 (Ky. 2021), the Court reasoned that there was simply no evidence presented that the mother failed to provide essential care and the family court's finding was speculative at best. Lastly, the Court determined that the mother did not sufficiently preserve her argument that the family court erred by refusing to interview the children in chambers, but for purposes of future guidance, discussed the holding in *Addison v. Addison*, 463 S.W.3d 755 (Ky. 2015) and distinguished that its ruling concerned the discretion of family courts in limiting a child witness' testimony in custody and time sharing matters under KRS 403.290 as opposed to a DNA action under KRS Chapter 620.

D. ***D.W. v. CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY, ET AL.***

2021-CA-1011-ME 10/28/2022 2022 WL 15527880

Opinion by COMBS, SARA W.; GOODWINE, J. (DISSENTS AND FILES SEPARATE OPINION) AND McNEILL, J. (CONCURS)

Appellant father appealed from the termination of parental rights (TPR) order entered by the Jefferson Circuit Court. Upon entry of the order to terminate, the case became sealed and was closed to further electronic filings (eFiling). As a result, Appellant was unable to file a notice of appeal in the TPR case, and to avoid a late filing, electronically filed the notice in a related dependency, neglect, or abuse (DNA) case. The Court of Appeals noted the issue posed by this as one of first impression and further noted that the eFiling rules were ambiguous as to whether eligible actions eFiling could later become ineligible. The Court expressed concern that practitioners could be "lured into a false sense of security that they may eFile a notice of appeal in their TPR actions up until the clock strikes midnight -- when in reality they cannot." Citing the intent and purpose of eFiling to "allow greater and

more convenient access" to the trial courts as well as the ambiguity of the eFiling rules, the Court ruled that sufficient cause was shown to allow the appeal to be deemed timely filed. Upon review of the merits, the lower court was reversed on the basis that there was insufficient evidence to show terminating Appellant's parental rights was in the best interest of the child. The Court reasoned that Appellant's incarceration could not alone be found to constitute abandonment, and his conviction was not directly related to the educational neglect finding at the DNA adjudication.

The dissenting opinion disagreed on the matter of the timeliness of the appeal and stated it should have been dismissed. The opinion stated section 15(4) of the eFiling rules along with KRS 625.108(2) demonstrated that eFiling was not available in TPR actions upon entry of final judgment, and thus, there was no ambiguity in the rules. The dissent also disagreed with the holding on the merits citing Appellant's admission he was out of custody for nearly a year, his non-compliance with the lower court's remedial orders and his case treatment plan, and the possibility his child could reach the age of majority before his release from incarceration.

Discretionary Review Granted on February 8, 2023

E. ***CABINET FOR HEALTH AND FAMILY SERVICES v. JEFFERSON COUNTY ATTORNEY'S OFFICE, ET AL.***

2022-CA-0570-ME 1/13/2023 2023 WL 175514
Opinion by CALDWELL, JACQUELINE M.; GOODWINE, J. (CONCURS) AND L. THOMPSON, C.J. (CONCURS)

This appeal concerned whether Appellant Cabinet for Health and Family Services could appeal from an order requiring it to pay expert witness fees to Appellee indigent parents in a dependency, neglect, or abuse (DNA) action. The parents brought their child to the hospital after reportedly rolling off the couch and hitting his head. Medical caregivers reported suspected child abuse based on observed bruising around the child's ears, and four months later, the Cabinet filed a DNA petition. The parents requested the Jefferson Family Court grant expert funds on the basis that the child suffered from a medical condition that causes easy bruising, and since the Cabinet consulted with an expert before filing its petition, they were entitled to have an expert rebut the accusations. The family court granted funding and denied the Cabinet's subsequent motion to vacate.

The Court of Appeals affirmed the family court's order and held that these circumstances permitted an interlocutory appeal under the collateral order doctrine. It was determined that the family court's order satisfied the three factors of the doctrine in that it: 1) conclusively decided an important issue separate from the merits of the case; 2) would be effectively unreviewable after a final judgment due to the inability to recoup spent expert funds; and 3) involved a substantial public interest, based on the presence of a government agency and taxpayer funds, that would be imperilled absent an immediate appeal. The Court emphasized the public interest prong in making its determination. It was held that the family court's grant of expert funding was not an abuse of discretion as the record sufficiently demonstrated that the parents were indigent. Further, despite insufficiently identifying the type of expert sought in their pleadings, the parents sufficiently identified the type of expert needed at a hearing before the family court, and that witness was "reasonably necessary" because "medical evidence would be a significant factor in the determination of neglect or abuse." Lastly, due process "weigh[ed] in favor" of granting the funds because the matter involved a "liberty interest in the

custody" of Appellees' child, and the Cabinet's accusations manifested after consultation with an expert.

F. ***COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES, ET AL. v. R.C., A CHILD, ET AL.***

2022-CA-0921-ME 02/17/2023 661 S.W.3d 305
Opinion by ECKERLE, AUDRA JEAN; ACREE, J. (CONCURS) AND COMBS, J. (CONCURS)

In February 2021, the Cabinet for Health and Family Services ("CHFS") filed a Dependency, Neglect, and Abuse ("DNA") petition on behalf of a 12-year-old Child who was found in Kentucky in the company of two unrelated adults. CHFS suspected the adults of trafficking Child. Child's Mother was in North Dakota and had another child removed due to her drug use and suspected trafficking of Child. CHFS placed Child in foster care and coordinated Mother's case plan with the North Dakota child-welfare agency. By the end of 2021, Mother was fully compliant with her case plan. The local CHFS workers and CHFS counsel recommended that Child be transferred back to North Dakota under the Interstate Compact on Placement of Children ("ICPC"). In January 2022, the Barren Family Court entered an order directing that CHFS "immediately" return Child to North Dakota for a trial home visit with Mother. In the alternative, the order directed CHFS to identify any barriers under the ICPC to return of Child within ten (10) days. Child was not immediately returned to North Dakota, and CHFS did not file any pleadings with the family court. Several weeks later, Mother's counsel filed a motion to hold CHFS in contempt for failure to comply with the January order. During the hearings on the motion, the local workers testified that state-level CHFS officials privately objected to returning the Child and refused to assist the local officials. The state-level officials admitted to expressing concerns about the January order but denied directing the local workers not to comply. They also suggested that the blame lay with the local workers. However, emails from those officials advised the local workers that the January order was improper under the ICPC, and CHFS had no intention of complying with it. The family court directed CHFS to return Child to North Dakota within ten (10) days. CHFS complied with this later order. The family court found CHFS in civil contempt for willful violation of the January order. The family court assessed CHFS with attorney fees incurred by Mother's counsel and Child's GAL in bringing the show cause motion. The family court also stated that two state-level officials were "subject to contempt" for their violations of the January order and for giving false testimony at the hearings, but ultimately, did not find them in contempt or impose any penalties. Instead, the family court suggested that the Commonwealth Attorney pursue perjury charges. Finally, the family court suggested that CHFS counsel had knowingly introduced false testimony. The Court did not find counsel in contempt but referred counsel to the Kentucky Bar Association ("KBA") for disciplinary action.

The Court of Appeals affirmed the family court's finding of contempt against CHFS. The Court first concluded that CHFS was subject to a finding of civil contempt even though it returned the Child to North Dakota before the contempt finding was entered. The Court further concluded that CHFS failed to show good cause for its failures to comply with the January order, and that there was evidence to show its failures were willful. However, the Court also opined that the state-level officials and CHFS counsel were not subject to civil contempt for their actions. While the actions of the state-level officials were attributable to CHFS, they were not personally liable for contempt for violation of the order. Similarly, civil contempt will not lie against the state-level officials for alleged perjury.

However, since no contempt finding was made, the family's courts discussions on this point were moot and not subject to review. Similarly, the Court noted that the family court had the right to report counsel's suspected misconduct to the KBA, but those findings were not binding in any disciplinary action. Consequently, the Court concluded that counsel was not aggrieved by the family court's order.

VI. GAMING LAW

A. ***CHARLIE KIRBY, ET AL. v. KEENELAND ASSOCIATION, INC., ET AL.***

2022-CA-0603-MR 3/31/2023 2023 WL 2718316

Opinion by COMBS, SARA WALTER; JONES, J. (CONCURS) AND L. THOMPSON, C.J. (CONCURS)

For more than a decade of contradictory opinions emanating from numerous Kentucky courts, the issue of the legality of historic horse racing as a form of pari-mutuel wagering has been vigorously litigated. On September 24, 2020, the Kentucky Supreme Court issued an opinion holding that historic horse racing was not a form of pari-mutuel wagering. In reaction, the General Assembly passed legislation effective February 22, 2021, announcing its clear legislative intent that historic horse racing was indeed pari-mutuel wagering subject to the promulgation of appropriate regulations by the Kentucky Racing Commission. In this underlying case initiated in Franklin Circuit Court, Appellants sought to recover as damages the amount of their wagers and the wagers of numerous others who placed bets on the historic racing machines in the period before legislative enactment. They argued that such wagering was illegal in this critical interim and relied on the provisions of KRS Chapter 372, the Kentucky Safe Harbor Act, which allows an action by a first or third party to recoup sums lost to illegal gambling. The circuit court dismissed Appellants' complaints for failure to state a claim upon which relief can be granted. The Court of Appeals affirmed the dismissals and reasoned, by its clear terms, the Safe Harbor Act did not apply nor provide recourse if the alleged gambling was authorized, permitted, or legalized. The Court noted that, throughout twelve years of litigation, no court had ever declared the disputed regulations to be void *ab initio*, but rather, it was their interpretation that had been the subject matter of the years of litigation.

Motion for Discretionary Review Filed on April 27, 2023, and Currently Pending

VII. GOVERNMENT BIDDING AND CONTRACTS

A. ***MOLINA HEALTHCARE OF KENTUCKY, INC. v. ANTHEM KENTUCKY MANAGED CARE PLAN, INC., ET AL. and HUMANA HEALTH PLAN, INC. v. ANTHEM KENTUCKY MANAGED CARE PLAN, INC., ET AL. and UNITEDHEALTHCARE OF KENTUCKY, LTD. v. ANTHEM KENTUCKY MANAGED CARE PLAN, INC., ET AL. and AETNA BETTER HEALTH OF KENTUCKY INSURANCE COMPANY D/B/A AETNA BETTER HEALTH OF KENTUCKY INC. v. ANTHEM KENTUCKY MANAGED CARE PLAN, INC., ET AL. and KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES v. ANTHEM KENTUCKY MANAGED CARE PLAN, INC., ET AL. and ANTHEM KENTUCKY MANAGED CARE PLAN, INC. v. KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES, ET AL. and FINANCE AND ADMINISTRATION CABINET v. ANTHEM KENTUCKY MANAGED CARE PLAN, INC., ET AL.***

2021-CA-0806-MR
2021-CA-0819-MR
2021-CA-0822-MR
2021-CA-0824-MR
2021-CA-0847-MR
2021-CA-0849-MR
2021-CA-0855-MR

09/09/2022

2022 WL 4112393

Opinion by GOODWINE, PAMELA R.; JONES, J. (CONCURS) AND MAZE, J. (CONCURS)

In 2020, the Commonwealth issued a request for proposals ("RFP") for managed care organizations ("MCOs") to run the Medicaid program. The Commonwealth awarded Molina, United, Humana, Aetna, and WellCare contracts. Molina then acquired Passport's managed care assets. After the Finance and Administration Cabinet ("FAC") denied Anthem's protest, Anthem filed suit in Franklin Circuit Court. Ultimately, the circuit court granted summary judgment and invalidated the 2020 RFP based on scoring irregularities and Molina's retention of a former member of Governor Beshear's transition team, Emily Parento, which gave rise to an "appearance of impropriety." Molina appealed. Humana also appealed the circuit court's interpretation of the managed care contract to allow Molina to retain Passport's Medicaid membership, and United appealed the circuit court's order for the Cabinet for Health and Family Services ("CHFS") to award Anthem a sixth MCO contract. Aetna also appealed and CHFS, the FAC, and Anthem cross appealed.

The Court of Appeals reversed the order of the circuit court invalidating the 2020 RFP because neither the alleged scoring deficiencies nor Molina's retention of Parento rebutted the presumption of correctness afforded agency decisions under the Kentucky Model Procurement Code ("KMPC"). The Court also held that, although Parento bound herself by the Executive Branch Code of Ethics ("EBCE") by signing a confidentiality agreement. the circuit court was without jurisdiction to determine whether she violated a complaint with the Executive Branch Ethics Commission. The Court affirmed the circuit court's interpretation of the MCO contract to allow Molina to retain Passport's Medicaid membership. Finally, the Court vacated the order awarding Anthem a sixth MCO contract because the circuit court was without authority to compel CHFS to award a contract.

Discretionary Review Granted on April 19, 2023

VIII. PROPERTY LAW

A. ***NEWREZ LLC D/B/A SHELLPOINT MORTGAGE SERVICING v. MARY YVONNE EMERSON***

2022-CA-0051-MR 12/02/2022 656 S.W.3d 255
Opinion by GOODWINE, PAMELA R.; CETRULO, J. (CONCURS) AND COMBS, J. (CONCURS)

NewRez appealed an order of the Russell Circuit Court dismissing its *in rem* foreclosure action against Mary Yvonne Emerson. Emerson defaulted on her unrecorded mortgage loan and then discharged her debts in Chapter 7 bankruptcy. The circuit court found NewRez was not entitled to foreclose on the property because Emerson's debt was discharged in bankruptcy, and the indebtedness was unsecured. On appeal, NewRez argued Emerson's discharge of her personal liability in bankruptcy did not affect its ability to obtain an *in-rem* judgment and order of sale of the property in state court. The Court of Appeals determined, under United States Court of Appeals for the Sixth Circuit case law, state courts have subject matter over *in rem* foreclosure actions and the determination of the validity of a mortgage because a debtor's personal liability is not at stake. Stated differently, federal bankruptcy courts have jurisdiction over whether a creditor may collect debts *in personam*, and Kentucky circuit courts have jurisdiction over whether a creditor may collect debts *in rem* under a mortgage. Further, although the mortgage lien was unperfected, that only affects priority, not its validity. Thus, the Court reversed the circuit court's order and remanded with instructions to proceed with *in rem* foreclosure proceedings.

IX. SOVEREIGN AND QUALIFIED IMMUNITY

A. ***JOHN SHOLAR, ET AL. v. KAYLA TURNER***

2021-CA-1374-MR 3/17/2023 664 S.W.3d 719
Opinion by EASTON, KELLY MARK; JONES, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Two Louisville Metro Police officers appealed the denial of their motion for summary judgment asserting qualified immunity from a personal injury suit. The suit was filed against the officers in their individual and official capacities, as well as against the Louisville Metro Government (Metro), alleging the officers negligently parked their police cruisers in a hazardous manner which resulted in the collision of Appellant's vehicle with one of their vehicles. The police cruisers were parked near the middle of a concrete barrier separating the eastbound and westbound lanes of Interstate 64 while the officers attended to another motor vehicle accident. The Jefferson Circuit Court granted dismissals on sovereign immunity grounds for Metro and both officers in their official capacities but denied summary judgment in favor of the officers in their individual capacities on the reasoning that the way they parked their vehicles was a breach of ministerial duty.

The Court of Appeals reversed and remanded with instructions to dismiss the underlying suit. The Court acknowledged that prior case law established that general operation of a police cruiser is a ministerial act. However, the Court reasoned that the decision in *Meinhart v. Louisville Metro Government*, 627 S.W.3d 824 (Ky. 2021) makes it clear that decisions in emergencies cross the line

into discretion. The Court further reasoned that this case presented an issue of where the line was drawn between a ministerial and discretionary act when it involved the "placement of a vehicle with respect to investigating an accident scene[.]" Ultimately, the Court determined the parking of the officers' vehicles under these circumstances was discretionary. The officers were presented with a decision regarding the quickest route to respond to a potential emergency. The accident occurred on Interstate 64's eastbound lanes, and the officers determined the quickest route was to approach it from the westbound lanes on Interstate 64. Due to substantially similar facts, the Court cited to the unpublished decision rendered in *Estate of Brown ex rel. Brown v. Preston*, No. 2009-CA-002362-MR, 2010 WL 5018558 (Ky. App. Dec. 10, 2010), and concluded the parking of the police cruisers at their location were discretionary actions taken to secure an accident scene.

X. STATUTE OF LIMITATIONS

A. ***ESTATE OF KENDRICK BELL, JR. BY AND THROUGH LENISE BELL AS ADMINISTRATRIX v. LAURIE CRAYCROFT, M.D., ET AL.***

2020-CA-0360-MR 09/30/2022 653 S.W.3d 892
Opinion by MAZE, IRV; GOODWINE, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

On July 28, 2017, Kendrick Bell, Jr was admitted to Sts. Mary & Elizabeth Hospital ER for a drug overdose. After treatment, he was discharged but returned to the ER later that day. After several days in a coma, Bell died from an anoxic brain injury. His Estate prepared a medical negligence claim against the Hospital, physicians, and nurses which was submitted to a Medical Review Panel. While the complaint was pending, the Kentucky Supreme Court found the Medical Review Panel Act (MRPA) to be unconstitutional. *Commonwealth v Claycomb*, 566 SW 3d 202 (Ky 2018). After *Claycomb* became final, the Estate filed the complaint in circuit court. The Hospital moved to dismiss, arguing that the complaint was not filed within one year. The trial court granted the motion to dismiss, finding that, since the MRPA was found to be unconstitutional in its entirety, the statute could not operate to toll the limitation period. The trial court further found that KRS 413.270 was not applicable because the Medical Review Panel was not a "court" within the meaning of the statute.

While the matter was pending on appeal, the Kentucky Supreme Court issued its decision in *Smith v. Fletcher*, 613 S.W.3d 18 (Ky 2020), holding that KRS 413.270 operated to toll the one-year statute of limitations. In that case, the Court concluded that Medical Review Panels were a "court" as defined by the statute because they performed a quasi-judicial role in that it was the agency "required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for [its] official action." The Court concluded that public policy favored the application of KRS 413.270 because plaintiffs reasonably relied upon the MRPA's requirements.

The Court of Appeals noted that all parties agreed that the holding of *Smith* was applicable. The Court also noted that the Estate properly filed its claims against all defendants with the Medical Review Panel and immediately filed its complaint in circuit court once *Claycomb* became final. Consequently, the Court of Appeals concluded that KRS 413.270 operated to toll the statute of limitations, and the Estate's complaint remained timely. Therefore, the Court vacated the summary

judgment and remanded the matter to the circuit court for further proceedings on the merits of the Estate's complaint.

XI. TORTS

A. ***CARROL CHEATWOOD v. KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY***

2021-CA-0699-MR 10/21/2022 654 S.W.3d 720
Opinion by ACREE, GLENN E.; CLAYTON, C.J. (CONCURS) AND TAYLOR, J. (CONCURS)

Appellant challenged the circuit court's denial of her loss of consortium claim against Appellee after ruling the claim was excluded by provisions of the policy of insurance. The Court of Appeals affirmed. The opinion resolves the Court of Appeals' previous conflicting unpublished opinions and the unpublished Supreme Court order indicating similarly conflicting views, all of which turned on interpretation of the same insurance policy exclusion. The Court of Appeals, relying on other published Kentucky Supreme Court precedent, held that a loss of consortium claim is a consequence of the underlying bodily injury claim (*i.e.*, is a derivative claim) and that, in the context of this insurance contract, coverage for a loss of consortium claim is implied only if the associated bodily injury claim is covered and impliedly excluded if the bodily injury claim is excluded.

B. ***HEATHER JONES, AS SISTER OF NICOLE WAGNER AND AS ADMINISTRATRIX AND ON BEHALF OF THE ESTATE OF NICOLE WAGNER, ET AL. v. ACUITY, A MUTUAL INSURANCE COMPANY***

2021-CA-0834-MR 12/22/2022 658 S.W.3d 492
Opinion by CETRULO, SUSANNE M.; COMBS, J. (CONCURS) AND GOODWINE, J. (CONCURS)

This is an appeal from a summary judgment in favor of an insurer by the Harrison Circuit Court. The trial court found that no coverage existed under the commercial general liability policy issued to a plumbing business whose employee, Donald Bottoms, had pled guilty to the fatal shooting of Nicole Wagner. Mr. Bottoms and Ms. Wagner spent time together on the night of April 18, 2020, at Bottoms' apartment located within his plumbing company's place of business. When he drove her home in the early morning hours, a struggle ensued in his vehicle, and she was shot and killed. Her estate filed a claim for wrongful death, and Acuity, the insurer of the business moved for summary judgment, asserting that the policy only covered the business and Mr. Bottoms for events that fell within the conduct of the business. The trial court's summary judgment was affirmed by the Court on the basis that coverage was intended to cover business purposes and not personal and recreational activities. The Court further found that the criminal plea could be used for purposes of collateral estoppel in this civil action.

C. ***MYRANDA JUAREZ v. BROOKE SCHILLING, ET AL.***

2021-CA-1065-MR 5/05/2023 2023 WL 3261402
Opinion by JONES, ALLISON; CALDWELL, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Appellant, a volunteer member of the Parent Teacher Association at her children's elementary school, was interrupted while she finished breastfeeding her infant child in the school gymnasium by Appellees, staff members of the school. Appellees allegedly told Appellant she could not openly breastfeed. Appellant contended that this incident caused her anxiety and distress. She filed suit in Jefferson Circuit Court against Appellees, alleging a violation of her right to breastfeed under KRS 211.755, and this statutory violation constituted a claim of *per se* negligence under KRS 446.070. Appellant further alleged the statutory violation was a form of workplace gender discrimination cognizable as a civil rights violation under KRS Chapter 344. The trial court granted summary judgment to Appellees, finding that the Appellant did not suffer an actual injury and that the Appellees did not "interfere" with Appellant's breastfeeding by merely asking her to move to an office. The trial court also found that KRS Chapter 344 did not apply to the Appellant for a claim of sex discrimination in the workplace as she was not an employee of the school, and she failed to provide expert proof allowing emotional damages. Finally, the trial court found that the Appellees were protected against suit based on qualified official immunity.

The Court of Appeals affirmed in part, reversed in part, and remanded. The Court agreed with the trial court that Appellant was not an employee of the school, meaning she was not covered by the workplace protections of KRS Chapter 344. Further, the Court agreed that Appellant could not recover emotional distress damages because she failed to provide expert proof of those damages pursuant to the rule in *Osborne v. Keeney*, 399 S.W.3d 1, 17 (Ky. 2012). However, the Court of Appeals concluded that the Appellees were not protected from suit on the grounds of qualified official immunity because compliance with the clear mandate of the breastfeeding statute was a ministerial duty. Finally, the Court held that the trial court erred in deciding that Appellant did not provide enough evidence of injury, as a finding of *per se* negligence could have resulted in nominal damages, to which punitive damages could theoretically have attached. The Court of Appeals remanded the matter to the circuit court for further proceedings.