KENTUCKY LAW SUMMARY

A Timely Review of Decisions Rendered by the Kentucky Supreme Court and Court of Appeals

September 30, 2018
65 K.L.S. 9
Louisville, Kentucky

CASE DIGESTS

VERBATIM OPINIONS

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CRIMINAL LAW

VIOLENT OFFENDER

ROBBERY IN THE FIRST DEGREE

Pursuant to KRS 439.3401, violent offender includes any person who has been convicted of or pled guilty to robbery in the first degree — Thus, where defendant has been convicted of or pled guilty to robbery in first degree, trial court does not need to include recitation in judgment that victim suffered death or serious physical injury in order for defendant to be classified as violent offender —

Aaron Campbell v. Rodney Ballard, Commissioner, Kentucky Department of Corrections (2018-CA-000098-MR); Franklin Cir. Ct., Shepherd, J.; Opinion by Judge Jones, *affirming*, rendered 8/17/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Acting without the assistance of counsel, Appellant, Aaron Campbell, appeals from an order of the Franklin Circuit Court. The circuit court dismissed Campbell's declaratory judgment action against the Kentucky Department of Corrections ("Department") and its Commissioner, Rodney Ballard, for failure to state a claim. Having reviewed the record in conjunction with applicable legal authority, we affirm.

I.

Appellant, Aaron Campbell, is an inmate housed at the Green River Correctional Complex. On September 13, 2013, Appellant entered a conditional guilty plea to robbery, first degree, in violation of KRS[1] 515.020. The Department classified Campbell as a violent offender pursuant to KRS 439.3401. The effect of this designation is that Campbell must serve eighty-five percent of his sentence before he becomes eligible for parole.

[1] Kentucky Revised Statutes.

Campbell does not agree with the Department's decision to designate him as a violent offender. As a result, by way of a declaratory judgment action, he sought a determination from the Franklin Circuit Court that the Department cannot legally classify him as a violent offender because his judgment does not include any recitation by the trial court that the victim suffered death or serious physical injury. The circuit court determined that Campbell could not prevail as a matter of law because KRS 439.3401 explicitly states that a violent offender includes "any person who has been convicted of or plead guilty to the commission of . . . (m) robbery in the first degree." This appeal followed.

– Note –
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II.

Upon appellate review, dismissals for failure to state a claim under CR[2] 12.02(f) are reviewed *de novo*. *Carruthers v. Edwards*, 395 S.W.3d 488, 491 (Ky. App. 2012). "Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (citing *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009)). The pleadings are to be "liberally construed in a light most favorable to the plaintiff[,]" and all allegations in the complaint are to be taken as true. *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007) (citing *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987)); *see Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968) ("For the purpose of testing the sufficiency of the complaint the pleading must not be construed against the pleader and the allegations must be accepted as true.").

[2] Kentucky Rules of Civil Procedure.

At the time of Appellant's conditional guilty plea, KRS 439.3401(1) provided as follows[3]

> As used in this section, "violent offender" means any person who has been convicted of or pled guilty to the commission of:
>
> (a) A capital offense;
> (b) A Class A felony;
> (c) A Class B felony involving the death of the victim or serious physical injury to a victim;
>
> . . .
>
> (m) Robbery in the first degree.
>
> The court shall designate in its judgment if the victim suffered death or serious physical injury.

[3] KRS 439.3401 has been amended several times over the years. Most recently, in 2018, the statute was amended such that "(m) Robbery in the first degree" is now "(n) Robbery in the first degree." This amendment, however, has no effect our analysis herein.

On appeal, Appellant argues that Class B felonies are only classified as violent offenses when a court's judgment designates that a victim has suffered death or serious physical injury. Appellant bases this argument, in part, on KRS KRS 439.3401(1) and, in part, on *Pate v. Department of Corrections*, 466 S.W.3d 480, 488-89 (Ky. 2015).[4] Although Appellant is correct in pointing out that the *Pate* court interpreted the 2005 version of KRS 439.3401(1) as applying the qualifier, "involving the death of the victim or serious physical injury to a victim[,]" to Class B felonies, that case neither addressed nor involved the provision of the statute regarding robbery in the first degree.

[4] Appellant also references an unpublished case from the Kentucky Supreme Court: *Al Kini v. Commonwealth*, 2015 Ky. Unpub. LEXIS 72 (Ky. Sept. 24, 2015).

Some Class B felons cannot be classified as violent offenders unless the crime involved the death or serious injury to the victim, and the trial court so designates. However, where the Class B felony is robbery, the felon is automatically considered a violent offender. The violent offender statute is clear that any person who has been convicted of or pled guilty to the commission of robbery in the first degree qualifies as a violent offender. No designation by the trial court is required. *See Benet v. Commonwealth*, 253 S.W.3d 528, 533 (Ky. 2008); *see also Pollard v. Commonwealth*, 2017-CA-000608-MR, 2018 WL 2277170, at *2 (Ky. App. May 18, 2018) ("Pollard became a violent offender upon pleading guilty to robbery in the first degree, and the trial court correctly found its failure to designate whether a victim suffered death or serious physical injury did not provide grounds to modify his sentence.").

Campbell became a violent offender when he pled guilty to robbery in the first degree. When the crime involved is first-degree robbery, the violent offender statute applies even without a designation by the trial court regarding whether the victim suffered death or serious injury. The relief Campbell sought from the circuit court, a determination that he does not qualify as a violent offender, is not authorized. Accordingly, the circuit court properly dismissed Campbell's action for failure to state a claim.

III.

For the reasons explained above, we affirm the order of the Franklin Circuit Court.

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

ALL CONCUR.

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

EMPLOYMENT LAW

GOVERNMENT

KENTUCKY WAGE AND HOUR ACT

PAY INCREASES FOR COUNTY DEPUTY JAILERS

Scott County Jailer awarded promotions and pay increases to Scott County deputy jailers during 2011-2013 fiscal years; however, Fiscal Court denied requests — Deputy jailers filed instant action alleging violation of Kentucky Wage and Hour Act (Act) — Fiscal Court filed motion to dismiss alleging that deputy jailers failed to state claim under Act since Fiscal Court never agreed to pay increased wages — Trial court granted Fiscal Court's motion to dismiss — Deputy jailers appealed — AFFIRMED — Act makes it unlawful for employer to withhold "any part of the wage agreed upon" between employer and employee — Pursuant to KRS 441.225(2), jail personnel and employees are considered county employees for purposes of receiving their compensation out of county treasury (jail budget) — Jailer's role is simply to direct county treasurer to pay deputies their wages as agreed upon by fiscal court — Further, KRS 64.530(2) states that deputies of county officers shall be deemed to be county employees — Under KRS 64.530(1), fiscal court of each county shall fix reasonable compensation of every county officer and employee — KRS 64.530(4) gives fiscal court authority to set and adjust compensation of deputies to elected officer — In instant action, since Fiscal Court never agreed to claimed wages; therefore, Act does not apply —

Robert F. Grossl, Adam T. Zornes, Anne Northcutt, Richard Ledoux, Jr., Joe Stamper, and Fred Thomas Williamson v. Scott County Fiscal Court (2016-CA-001762-MR); Scott Cir. Ct., Logue, J.; Opinion by Judge Acree, *affirming*, rendered 8/17/18. A motion for discretionary review was filed with the Kentucky Supreme Court on 9/17/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

The Appellants appeal the Scott Circuit Court's order dismissing their complaint against the Scott County Fiscal Court with prejudice. Finding no error, we affirm.

Appellants are Scott County deputy jailers. During the 2011-2013 fiscal years, the Scott County Jailer awarded promotions and pay increases to Appellants. The Jailer submitted the necessary forms for processing the pay raises to the Fiscal Court for approval; however, the Fiscal Court denied the requests.

Appellants filed a complaint alleging a violation of the Kentucky Wage and Hour Act, KRS[1] 337.010 *et seq.*, seeking wages owed to them in accordance with the pay increases promised by the Scott County Jailer. In lieu of an answer, the Fiscal Court responded with a motion to dismiss on the grounds that Appellants' complaint failed to state a claim under the Wage and Hour Act because the law provides "wages" as being only that compensation agreed upon by the employer and employee; the Scott County Fiscal Court never agreed to ever pay Appellants the wages they now seek.

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[1] Kentucky Revised Statutes.

Appellants responded to the motion by arguing the Jailer was authorized to grant the pay increases by KRS 441.225, so long as the amounts remained within the budget line item previously approved by the Fiscal Court and, therefore, the Fiscal Court was bound to honor the Jailer's promises. They further alleged KRS 337.385 grants them a cause of action against the Fiscal Court to recover their promised, but unpaid wages.

The Scott Circuit Court agreed with the Fiscal Court that Appellants' allegations failed as a matter of law to state a claim under the Wage and Hour Act. The court dismissed Appellants' complaint with prejudice, and this appeal followed.

"Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (citing *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009)). Additionally, "[i]t is well settled in this jurisdiction when considering a motion to dismiss under [Kentucky Rules of Civil Procedure (CR) 12.02] that the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007) (citing *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987)). "A motion to dismiss for failure to state a claim does not test the merits of the action but is confined solely to the sufficiency of the pleading." *White v. Brock*, 487 S.W.2d 908, 909 (Ky. 1972).

Appellants alleged in their complaint that KRS 441.225 authorizes the Jailer to promote and increase the pay of the deputy jailers within the budgetary limits previously set by the Fiscal Court. Therefore, so goes the logic, the Fiscal Court is bound to pay Appellants their increased wages. Also, they assert KRS 64.530(3) and (4) further support their position. We disagree.

KRS 441.225 provides;

> (1) Except for capital improvements, utilities and building insurance and except as provided in subsection (2) of this section, the jailer shall have authority to authorize expenditures from the jail budget. Such expenditures shall only be made in accordance with the line item jail budget duly adopted or amended by the fiscal court and the established county procurement code or purchase order procedure of the county. Payment for purchases for the jail shall be subject to fiscal court approval prior to payment. The fiscal court shall not withhold approval of payment for jail expenditures which are within the jail budget and not unlawful.
>
> (2) The jailer shall submit, in accordance with county payroll procedures, time reports for all full-time and part-time jail personnel and employees to the county treasurer or other designated payroll official. The county treasurer shall review and pay such claims in accordance with policies and procedures for the payment of other county employees.

KRS 441.225.

It is the Court's duty to ascertain and give effect to the intent of the Legislature when engaging in statutory interpretation. *Hale v. Combs*, 30 S.W.3d 146, 151 (Ky. 2000). Thus, we "may not interpret a statute at variance with its stated language." *Commonwealth v. Allen*, 980 S.W.2d 278, 280 (Ky. 1998) (citations omitted). "[A]ll statutes should be interpreted to give them meaning, with each section construed to be in accord with the statute as a whole." *Commonwealth, Transportation Cabinet v. Tarter*, 802 S.W.2d 944, 946 (Ky. App. 1990).

The statute grants a jailer power to authorize expenditures, with certain exceptions, in accordance with the Fiscal Court's jail budget. Still, expenditures are subject to the approval of the Fiscal Court prior to payment. The statute's reference to the county procurement code and purchase order procedure as well as the exceptions of capital improvements, utilities, and building insurance indicate that the expenditures within the Jailer's authority relate to material items necessary to operate the jail, not compensation of its deputies. Listed explicitly as an exception to the Jailer's authority are the time reports of jail personnel referenced in KRS 441.225(2). "KRS 441.225(2) refers narrowly to the fact that jail personnel and employees are considered county employees for purposes of their receiving their compensation out of the county treasury (jail budget)." Ky. OAG[2] 84-291 (Aug. 13, 1984).

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[2] Opinion of the Attorney General of Kentucky.

Even though the deputies' salaries are paid from the jail budget, the statute clearly excepts this category of expenditure from the Jailer's discretionary authority. The Jailer's role is simply to direct the county treasurer to pay the deputies their wages as agreed upon by the fiscal court. "We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." *Beckham v. Board of Educ. of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994). In sum, the Jailer's authority over expenditures referenced in KRS 441.225(1) has nothing to do with the determination of compensation or the discretion to adjust the compensation of the deputy jailers based upon a plain reading of the statute.

"The fiscal court is one of the courts provided for in the Constitution of the state, and is given charge

and direction of the fiscal affairs of the county." *Fox v. Lantrip*, 162 Ky. 178, 172 S.W. 133, 137 (1915). KRS 64.530(2) states "deputies . . . of county officers shall be deemed to be county employees[.]" As county employees, Appellants' compensation is set by the Fiscal Court; "the fiscal court of each county shall fix the reasonable compensation of every county officer and employee[.]" KRS 64.530(1).

Appellants maintain that KRS 64.530(3) supports their interpretation of the Jailer's authority because the statute provides: "The fiscal court shall fix annually the reasonable maximum amount, including fringe benefits, which the officer may expend for deputies and assistants, and allow the officer to determine the number to be hired and the individual compensation of each deputy and assistant." KRS 64.530(3). However, that subsection of the statute applies to officers compensated from fees, or partly from fees and partly by salary. It is not applicable here.

"In the case of county officers elected by popular vote . . . the compensation of the officer shall not be changed during the term but the compensation of his deputies or assistants *may be reviewed and adjusted by the fiscal court* not later than the first Monday in May of any successive year *upon the written request of the officer*." KRS 64.530(4) (emphasis added). The statute clearly states that the authority to set and adjust the compensation of the deputies to an elected officer (in this case, the jailer) resides with the Fiscal Court.

Appellant's complaint asserts a claim under KRS 337.385 for their earned but unpaid wages from the Fiscal Court. The Kentucky Wage and Hour Act only imposes liability when an employer "pays any employee less than wages and overtime compensation to which such employee is entitled[.]" KRS 337.385(1). The statute makes it unlawful for the employer to withhold "any part of *the wage agreed upon*." KRS 337.060(1)(emphasis added). The Fiscal Court never agreed to the claimed wages.

In this case, the Fiscal Court expressly declined the recommended increase in the deputy jailers' wages, which it was permitted to do according to KRS 64.530(4); the Jailer is not vested with authority to override the authority of the Fiscal Court. Appellants have received all the pay to which they are entitled. Accordingly, there is no claim in Appellants' complaint that would survive a motion pursuant to CR 12.02 because wages promised by the Jailer are not recoverable under the Kentucky Wage and Hour Act.

For the foregoing reasons, we affirm the Scott Circuit Court's October 25, 2016 order granting the Scott County Fiscal Court's motion to dismiss Appellants' complaint for failing to state a claim under the Kentucky Wage and Hour Act, KRS 377.010 *et seq*.

ALL CONCUR.

BEFORE: ACREE, DIXON, AND NICKELL, JUDGES.

TERMINATION OF PARENTAL RIGHTS

INVOLUNTARY TERMINATION

DEPENDENCY v. NEGLECT

In 2014, mother gave birth to child in hospital — Hospital was concerned that mother could not care for child — Cabinet for Health and Family Services (Cabinet) took custody of child directly from hospital — Child has remained in Cabinet's custody since then — Child has been with same foster family — Mother has had continuous and ongoing visitation with child, but never unsupervised or overnight visitation — Over three years later, Cabinet filed petition for involuntary termination of parental rights of both biological mother and biological father — Father did not appeal termination of his parental rights — Licensed psychologist evaluated mother — Mother was 19 at time of evaluation and being treated for autism and depression — Mother was diagnosed with Pervasive Developmental Disorder — There were no signs of substance abuse — Psychologist did not expect any improvement from mother — Psychologist opined that he was concerned with neglect if mother was placed in care-giving role for child — However, he believed that mother could live independently in apartment by herself and work part-time — Representative from Cabinet testified that mother had completed her case plan and showed improvement with her parenting skills — However, he was concerned about her ability to parent based on her cognitive limitations — He noted mother was currently employed and had apartment with month-to-month lease — Cabinet noted that mother's visits with child are consistent, have improved over time, and are appropriate — Mother did not owe child support and had brought food and clothing during her visits with child — Representative noted that there were individual services that could benefit mother — Further, he admitted that there was period in which Cabinet was inactive on case (January 2016 through January 2017), due to changes in Cabinet caseworkers — Representative noted that there are other services that could improve mother's parenting skills, but not within reasonable time — Cabinet admitted that mother had completed every task asked of her and that she loved and cared deeply for her child — Mother's autism advocate noted that mother had improved her parenting skills and could continue to improve them — Trial court terminated mother's parental rights finding that child was neglected — VACATED and REMANDED because there was insufficient evidence that child was neglected — Trial court must first find by clear and convincing evidence that child is abused or neglected before involuntarily terminating parent's rights to child — Child is neglected or abused if child suffers harm as result of parent's intentional acts — However, child is dependent if harm results from parent's unintentional acts, or from cause unrelated to parental culpability — Child cannot be both neglected and dependent — In instant action, mother never had opportunity to parent child independently because child has always been committed to Cabinet's custody — Reason for commitment was that mother did not seem to be able to parent child — There is no culpability on mother's part — This is more like dependency than neglect — Psychologist noted risk of neglect — Risk of neglect is not same as neglect; rather, it indicates child is dependent — There was not sufficient evidence to show that child was neglected — Mother's developmental disabilities, standing alone, are not sufficient to render her behavior as neglectful —

K.S. v. Com., Cabinet for Health and Family Services; and A.W.S. (A Child) (2018-CA-000088-ME); Kenton Cir. Ct., Gentry, J.; Opinion by Chief Judge Clayton, *vacating and remanding*, 8/17/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

K.S. (Mother) appeals the Kenton Circuit Court's order terminating parental rights to A.W.S. (Child). After careful consideration, we vacate and remand the decision because insufficient evidence was provided that Child was neglected.

BACKGROUND

Child was born on January 6, 2014. The Cabinet for Health and Family Services ("Cabinet") became involved with Child shortly after his birth when the hospital expressed concern about Mother's ability to care for him. He was taken into the Cabinet's custody directly from the hospital on January 13, 2014, and has remained in its custody since then. Further, Child has also been with the same foster family. Child was adjudged to be dependent on February 20, 2014. During the Cabinet's custody of Child, Mother has had continuous and ongoing visitation, but has never had unsupervised or overnight visitation.

More than three years later, on June 16, 2017, the Cabinet filed a petition for involuntary termination of parental rights of both the biological father and mother.[1] A trial was held on December 5, 2017. The Cabinet called Dr. James Rosenthal and Kevin Minch as witnesses. Mother and her autism advocate, Maureen Simpson-Henson, testified for her case.

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[1] The father has not appealed the termination of his parental rights, and therefore, is not a part of this appeal.

Dr. Rosenthal, a licensed psychologist, evaluated Mother. She was 19 at the time of the evaluation and being treated for autism and depression. His review of her medical records from North Key, a previous treatment facility, indicated that she had been diagnosed with Pervasive Developmental Disorder. During the evaluation, Mother denied substance abuse, and Dr. Rosenthal observed no signs of substance abuse.

Dr. Rosenthal administered the Wechsler Adult Intelligence test and stated that Mother's full-scale I.Q. score was 65, which is deemed borderline

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

mental retardation. He testified that she had deficits in social judgment and interactions. Dr. Rosenthal stated that intellectual disabilities do not increase after the age of 14, and he did not expect any improvement for Mother. He acknowledged that some people with autism do experience difficulty with taking intelligence tests, but he did not believe that had occurred here. Dr. Rosenthal also opined that he was concerned with neglect if the Mother was placed in a care-giving role for Child. He did, however, think that the mother could live independently in an apartment by herself and work part-time.

Kevin Minch was the next witness, Minch testified that Mother had completed her case plan with the Cabinet and showed improvement in her parenting skills. Nonetheless, he had concerns about her ability to parent the child based on her cognitive limitations. He testified that Mother was currently employed and had obtained an apartment, although he thought occupancy was unstable because she had a month-to-month lease.

Minch explained the current visitation between Mother and Child was biweekly and supervised at the Cabinet's office. The visits are consistent, have improved over time, and are appropriate. The visits were at Mother's prior residence, where she lived with her mother, but there were bedbugs. Hence, the visits were moved back to the Cabinet.

Minch further testified that Mother has no criminal history nor are there any concerns about substance abuse. Further, she does not owe any child support. Mother has brought food and clothing during her visits. In addition, she has attended some of Child's medical appointments.

Minch opined that there were individual services that could benefit Mother. However, he still thought the Cabinet had made reasonable efforts to reunify Mother with the child. She is receiving services for developmental delays including speech therapy and physical therapy. Minch admitted that there was a period that the Cabinet was inactive on the case – January 2016 through January 2017, which was the result of changes in Cabinet caseworkers. Minch also testified that Mother's autism advocate, Simpson-Henson, provided additional information about services for Mother's autism and developmental delays. These services began in January 2017. He believed there are other services that could improve Mother's parenting skills but not within a reasonable time.

Minch provided that the Mother is very likeable, has worked very well with the Cabinet, and loves and cares deeply about her child. Indeed, on cross-examination, Minch said Mother has completed every task the Cabinet has asked her to do. He just has concerns about her ability to function at an appropriate level to care for the child. Furthermore, Minch testified that Child has a strong emotional attachment to his foster parents. Child calls them mom and dad. He had been in foster care for 46 months (at the time of the trial).

The next witness was Maureen Simpson-Henson, Mother's autism advocate. Simpson-Henson is a speech pathologist who worked with Mother when she was a young child in the school system by providing speech and language therapy. She testified that Mother has speech delays and autism. In fact, Simpson-Henson stated that she was on the original team of professionals who diagnosed Mother during her childhood. In January 2017, Simpson-Henson became involved with Mother as her advocate.

Simpson-Henson advised the Cabinet of additional services available to assist Mother. She observed that the Mother has improved her parenting skills and could continue to improve them. Also, Mother has become much more independent since Child's birth.

On December 14, 2017, the trial court entered findings of fact and conclusions of law as well as a judgment terminating Mother's parental rights. Mother now appeals the judgment.

On appeal, Mother argues that the judgment was clearly erroneous because insufficient evidence supported that the child was neglected; insufficient evidence was provided as to the best interests of the child; and insufficient evidence was provided, pursuant to the statutory grounds for termination. Namely, Mother maintains that the Cabinet had not established by clear and convincing evidence the following statutory grounds for termination: that Mother was incapable of caring for the child with no expectation of improvement; and that Mother, for reasons other than poverty alone, had failed or was incapable of providing the essential needs of a child with no reasonable expectation of improvement; the Mother conceded that the child had been in foster care for fifteen of the last twenty-two months preceding the filing of the petition.

The Cabinet counters that it was established by clear and convincing evidence that the elements of Kentucky Revised Statutes (KRS) 625.090 were met, and that termination of parental rights was proper.

ANALYSIS

To protect the rights of natural parents, Kentucky courts require strict compliance with statutory provisions governing the involuntary termination of parental rights. *P.C.C. v. C.M.C., Jr.*, 297 S.W.3d 590, 592 (Ky. App. 2009). Under KRS 625.090, to involuntarily terminate a parent's right to a child, a trial court must find, by clear and convincing evidence that the child (1) is an "abused or neglected child" as defined by KRS 600.020(1) and (2) that termination is in the child's best interest. After that threshold is met, the trial court must find the existence of one of the grounds cited by KRS 625.090(2). It must first be determined that the child is abused or neglected before the other requirements of the statute come into play. KRS 625.090(1)(a)1-3; *H.M.R. v. Cabinet for Health and Family Services*, 521 S.W.3d 221, 225 (Ky. App. 2017).

Trial courts are given broad discretion in ascertaining whether a child is abused or neglected when determining whether the termination of parental rights is necessary. Accordingly, an appellate court's review of such decisions is limited to the clearly erroneous standard. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). A trial court's order is clearly erroneous if it is unsupported by substantial evidence on the record. *V.S. v. Com., Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986).

As noted, the first hurdle to meet in the involuntary termination of parental rights is to prove, by clear and convincing evidence, that a child was abused or neglected. In the matter at hand, the judgment held that A.W.S. was a neglected child. The trial court noted in its findings that Dr. Rosenthal testified the **risk of neglect** remains high based on Mother's reasoning skills. Further, the trial court noted that while testimony revealed that the Mother could live independently, no testimony was given that she could care for the child. Because of Mother's mental deficiency as defined by KRS 202A.011(9) or KRS 202B.010(9), the trial court concluded that she was incapable of caring for a child. Mother responds that insufficient evidence supported the finding of neglect.

Therefore, it is our task to ascertain whether sufficient evidence supported the trial court's finding that Child was a neglected child under KRS 600.020. This statute defines an abused or neglected child. Here, the child has not been adjudicated as "abused" but rather "neglected." A review of KRS 600.020 shows the pertinent provisions in this matter are as follows:

> 3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005; [or]
>
> 4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child; [or]
>
> 8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child; or
>
> 9. Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) cumulative months out of forty-eight (48) months[.]

KRS 600.020(1)(a)3-4, 8-9.

Perusal of the statute shows that for a parent to neglect a child, he or she must intend to do so. We do not believe it has been established that Mother intended to neglect the child. Instead, the facts of this matter implicate dependency, which is different than neglect. While dependency may occur in circumstances similar to neglect, it lacks the requisite intent on the part of the parent. "A child who suffers harm as a result of a parent's intentional acts is neglected or abused. In contrast, a child is dependent if the harm results from a parent's unintentional acts, or from a cause unrelated to parental culpability." L. Graham & J. Keller 15 Ky. Practice Series, Domestic Relations Law § 6:9 (2017).

Further examination of KRS 600.020(20)

provides the definition of "dependent" child:

> "Dependent child" means any child, other than an abused or neglected child, who is under improper care, custody, control, or guardianship that is not due to an intentional act of the parent, guardian, or person exercising custodial control or supervision of the child[.]

Our courts have long held that a child cannot be both neglected and dependent. *J.H. v. Commonwealth, Cabinet for Human Resources*, 767 S.W.2d 330, 332 (Ky. App. 1988).

After review of the record, we are confounded by the Cabinet's assertion that A.W.S. was neglected by Mother. Clearly, the Mother never had the opportunity to parent the child independently because Child has always been committed to the Cabinet's custody. The reason for the commitment was because the Mother did not seem to be able to parent him. This reason comports much more with dependency rather than neglect.

Moreover, Cabinet's rationale to support the Mother's ostensible neglect is somewhat disingenuous. The reason Child has been in foster care for the last four years is because the Cabinet removed Child from Mother's custody based on its perception that Mother was unable to care for him. There is no culpability on the Mother's part.

The case law provided by the Cabinet to support the termination was unpublished case law. According to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c), unpublished opinions shall not be cited or used as binding precedent. Nonetheless, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration if no published opinion would adequately address the issue. *Id.* Still, to cite such an opinion for the Court's consideration, the unpublished decision must be so designated, and a copy of the entire decision shall be provided to the Court and all parties to the action. *Id.* In the case at bar, the cases were not properly cited nor provided to the Court.

The first case provided by the Cabinet was *R.L.R. v. Commonwealth, Cabinet for Health and Family Services*, 2010-CA-001829-ME, 2011 WL 2436810 (Ky. App. June 17, 2011). The Cabinet maintains that this case is analogous to the one herein. That is, the mother was unable to care for the child because of a low IQ score, and the psychologist opined that it was highly unlikely she would ever be able to parent the child. *Id.* at *2. Therein, the Cabinet suggests that the trial court found that the children were abused and neglected because the mother did not make sufficient progress in the case plan and the children had been in the Cabinet's custody for 15 of the most recent 22 months. *Id.* at *5-6.

Termination of parental rights matters are fact-specific and to analogize facts from one situation to another is often problematic. The *R.L.R.* case is factually quite different than our matter. For one thing, although at one time during the *R.L.R.* dependency action, the children were adjudicated dependent, the mother stipulated that her oldest child was an abused or neglected child in another proceeding, and during the termination procedure, she did not contest that the two children were neglected or abused. In fact, the parents' sole argument on appeal was that the trial court erred in finding that the Cabinet met its burden of proving, by clear and convincing evidence, the grounds for termination – progress in meeting their reunification goals.

Therefore, *R.L.R.* is distinguishable from our facts since the parents stipulated that the children were neglected. In our case, the Mother denied neglect, and the only neglect indicated by the trial court was "risk of neglect." Further, the Mother here did make progress toward her goals.

The next case proffered by the Cabinet to sustain the validity of the finding of neglect against the Mother is *R.N. v. Commonwealth, Cabinet for Health and Family Services*, 2012-CA-001600-ME, 2013 WL 6158043 (Ky. App. Nov. 22, 2013). R.N. was the mother of three children. The mother and children had extensive dealings with the Cabinet. *Id.* at *1. The mother, prior to the Cabinet's involvement, had custody of the children, and initially, continued to have them in the home even after the Cabinet became involved. *Id.* In that case, the Cabinet had concerns about educational neglect, medical neglect, unsanitary living conditions, and drug use in the home. *Id.* The relationship between the Cabinet and the family lasted nine years. Ultimately, the mother was unable to meet her children's basic needs and her parental rights were terminated. *Id.* at *3.

Here, again, we note that the children were neglected. The mother had drug problems, she failed to care for them, and she was unable to comply with the Cabinet's case plan. In contrast, Mother in this matter never had custody of the child, never neglected the child, and complied with her case plan.

The evidence on the record is primarily from Dr. Rosenthal stating that Mother's limited intellect and adaptive behavior skills give rise to a **risk of neglect**. We believe that "risk of neglect" is not the same as neglect but rather indicates a child is dependent. Hence, we do not believe sufficient evidence was provided to show Child was a neglected child.

We are cognizant that KRS 600.020(1) provides that an "'[a]bused or neglected child' means a child whose health or welfare is harmed or threatened with harm" and that some would interpret "threatened with harm" as implicating a risk of neglect. Although this interpretation may be sound in some cases, it does not obviate the necessity of intent for neglect or abuse. Mother, here, has developmental disabilities. But that alone is insufficient to render her behavior as neglectful. There are no incidents of neglect, and she has completed her case plan.

We hold that the termination of parental rights was improper because insufficient evidence supported the determination that the child was "neglected" by Mother. Thus, the trial court did not meet the first requirement for a termination of parental rights – establishment of neglect. Having so determined, we need not address the other two prongs required to terminate parental rights. However, we do note that for almost one year, Mother was not provided with services, that her advocate provided new resources to help Mother, and that the Cabinet's Family Supervisor testified that there were likely additional services the Cabinet could provide to help Mother.

Child has been in foster care for over four years, and Mother has done everything the Cabinet has asked her to do. She has a job, and an apartment. Mother procured the apartment when the Cabinet noted that her other residence had bedbugs. Bedbugs are a problem, but whether that requires termination of parental rights is questionable. Mother's interaction with the child improved with time. The Family Services Supervisor testified that the Mother's behavior with the child was appropriate.

Mother does have cognitive limitations, but the severity of these problems in terms of parenting the child has not been established since she has had no opportunity to parent her child. The length of time in this case – 4 years – seems to relate in part to the Cabinet's failure to provide appropriate services for Mother more than any recalcitrance or failure to follow the directives of the case on her part.

Under our system of jurisprudence, parental relationships are held in the highest esteem and found deserving of the highest protection. Our nation's highest court has so held. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). In Kentucky, our appellate courts have reiterated the special protections afforded to parental rights under the law. *See Cabinet for Health and Family Servs. v. A.G.G.*, 190 S.W.3d 338, 342 (Ky. 2006). Because of the sanctity of parental rights, we must strictly conform to the requirements for termination of parental rights. In the case at bar, insufficient evidence of neglect was provided.

CONCLUSION

Therefore, we conclude that the Cabinet failed to provide substantial evidence that Child was neglected as required under KRS 600.020(1). Indeed, the basis of the child's removal from Mother was dependency. Moreover, since the removal of Child, Mother has done everything required by the Cabinet and shown steady improvement. The Cabinet admitted, after the intervention of the Mother's advocate, that additional services could have been provided to the Mother to address her specific disability. Hence, the Cabinet did not provide sufficient evidence that the child was neglected, and consequently, the trial court's judgment was clearly erroneous.

Accordingly, we vacate the judgment of involuntary termination of parental rights and remand the matter for additional services to the Mother to ascertain whether the Mother is capable of parenting this child while keeping in mind the child's best interest.

ALL CONCUR.

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

LANDLORD AND TENANT LAW

CONTRACT TO LEASE LAND TO GROW SOYBEANS

HOLDOVER STATUTE

Farming company (farmer) entered into written contract with landowner to lease land to grow soybeans — Term was for "one[-]year project" — Parties agreed to evenly split profits and expenses — Contract was dated January 20, 2011 — Parties did not execute new written contract, but continued to operate in same manner in 2012, 2013, and 2014 as they had done under 2011 lease — In February 2015, parties could not reach agreement — Landowner notified farmer on March 26, 2015 that it had accepted another offer to lease property — Farmer filed breach of contract action — Using common industry standards, customs, and practices, farmer claimed that parties' 2014 lease expired on November 1, 2014, and that from November 1, 2014 to March 26, 2015, which exceeded 90 days, farmer was holdover tenant under KRS 383.160(1) — Thus, farmer claimed that it was entitled to remain as tenant and to use land for another year — Trial court granted summary judgment to landowner — Trial court found that contract was clear and unambiguous in that it was for one-year term starting on January 20, 2011; therefore, it expired on January 20, 2012 — Since parties treated contract as continuing after its expiration, by operation of law parties entered into subsequent one-year term contracts, with 2014 lease expiring on January 20, 2015 — Trial court found that farmer did not qualify as holdover tenant since farmer did not occupy land for period of 90 days after expiration of 2014 lease — Farmer appealed — AFFIRMED — Pursuant to KRS 383.160(1), tenancy for term of one year is created by operation of law if tenant holds over for more than 90 days after expiration of lease and landlord does not take certain actions within that time — Tenancy can endure "from year to year" until tenant abandons premises, is turned out of possession, or makes new contract with landlord — In instant action, language of original lease is plain and unambiguous: it was for one-year project — Ordinary meaning of one year is one calendar year or 365 days — Thus, original lease terminated on January 20, 2012 — All subsequent holdover leases also began and ended on January 20th of appropriate year — 2014 lease was in effect from January 20, 2014 to January 20, 2015 — One year did not mean "one crop year" — There was no mention of crop year in contract — Within 30 days of January 20, 2015, parties entered into fruitless contract negotiations — Landowner then turned farmer out of possession by informing farmer on March 26, 2015 that lands would be leased to another — All of these events occurred within 90 days of expiration of 2014 lease — Thus, farmer had no right to remain on land in 2015 —

Smithfield Farms, LLC v. Riverside Developers, LLC (2016-CA-001520-MR); Gallatin Cir. Ct., Schrand II, J.; Opinion by Judge Acree, *affirming*, rendered 8/17/18. A motion for discretionary review was filed in the Kentucky Supreme Court on 9/14/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

The issue before us is whether the Gallatin Circuit Court properly entered summary judgment against Appellant Smithfield Farms, LLC, finding its contract with Appellee Riverside Developers, LLC was unambiguous and thus not subject to explanation by extrinsic evidence, and that Riverside properly terminated the contract because Smithfield did not qualify as a holdover tenant under KRS[1] 383.160(1). We find no error, and affirm.

[1] Kentucky Revised Statutes.

FACTS AND PROCEDURE

In January 2011, Smithfield entered into a written contract with Riverside to lease land to grow soybeans. The term was for a "one[-]year project." The parties agreed to evenly split the profits and expenses. The agreement, dated January 20, 2011, stated in full:

> I wish to thank you for your time and great discussions on your agreement to raise soybeans on our Riverside Developers LLC land on both sides of US 42 just east of Warsaw! Mr. Stan Freeman, our GM, will handle all issues on this one[-]year project. This will be a 50-50 agreement with your usage of your (very nice equipment) equipment [sic]. Your trucking of finished beans will be charged additional!! Both Stan & I look forward to your experience on this project & hopefully longer[-]term relationship!! Please return to me, one of my contracts!!

Both parties signed the agreement.

Even though the parties did not execute a new written contract, they continued to operate in the same manner in 2012, 2013, and 2014 as they had done under the 2011 lease – Smithfield grew soybeans on Riverside's land, and the parties split the profits equally. In February 2015, representatives from Smithfield and Riverside met to discuss a "price per acre" lease. The parties failed to reach an agreement. Riverside notified Smithfield on March 26, 2015, that it had accepted another offer to lease the property.

Smithfield then filed this breach of contract action, claiming Riverside wrongfully terminated the lease, thereby depriving Smithfield of reasonably anticipated profits. Citing common industry standards, customs, and practices, Smithfield asserted that the parties' 2014 lease expired on November 1, 2014, and that from November 1, 2014 to March 26, 2015, a period in excess of ninety days, it was a holdover tenant under KRS 383.160(1). Consequently, Smithfield claimed, it was entitled to remain as a tenant and to use the land for another year (until November 1, 2015).

Riverside moved for summary judgment, claiming it was undisputed that in February 2015 the parties entered into discussions regarding a new lease agreement and Riverside informed Smithfield that it was going to lease the land to another tenant on March 26, 2015, both within ninety days of the expiration of the 2014 holdover lease on January 20, 2015. Riverside claimed it was entitled to judgment as a matter of law in light of these undisputed facts.

The circuit court granted Riverside's motion by order entered September 16, 2016. It found the contract clear and unambiguous in that it was for a one-year term starting January 20, 2011, and therefore expiring January 20, 2012. However, because the parties treated the contract as continuing after its expiration, by operation of law the parties entered into subsequent one-year term contracts in 2012, 2013, and 2014, with the 2014 lease expiring on January 20, 2015. It then found that Smithfield did not occupy the land for a period of ninety days after the expiration of the 2014 lease, and therefore it did not qualify as a holdover tenant under KRS 383.160(1). It awarded Riverside summary judgment. Smithfield appealed.

STANDARD OF REVIEW

Our review of the circuit court's decision to grant summary judgment is *de novo*. *Harstad v. Whiteman*, 338 S.W.3d 804, 809 (Ky. App. 2011). In doing so, we must ascertain "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR[2] 56.03. "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present" evidence establishing a triable issue of material fact. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). That is, "[t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

[2] Kentucky Rules of Civil Procedure.

ANALYSIS

Smithfield argues that genuine issues of material fact exist precluding summary judgment. Specifically, it claims there are genuine disputes as to: when the 2014 contract terminated; whether Smithfield held over for the requisite ninety days; and whether KRS 383.160(1) extended the lease through 2015. We are not persuaded.

We start with KRS 383.160(1), commonly referred to as Kentucky's holdover statute. The statute outlines the ramifications when a tenant overstays the expiration of his or her lease. The statute provides:

> If, by contract, a term or tenancy for a year or more is to expire on a certain day, the tenant shall abandon the premises on that day, unless by express contract he secures the right to remain longer. If without such contract the tenant shall hold over, he shall not thereby acquire any right to hold or remain on the premises for ninety (90) days after said day, and possession may be recovered without demand or notice if proceedings are instituted within that time. But, if proceedings are not instituted within ninety (90) days after the day of expiration, then none shall be allowed until the expiration of one (1) year from the day the term or tenancy expired. At the end of that year the tenant shall abandon the premises without demand or notice, or stand in the same relation to his landlord that he did at the expiration of the term or tenancy aforesaid; and so from year to year, until he abandons the premises, is turned out of possession, or makes a new contract.

KRS 383.160(1). "In essence, [KRS] 383.160(1) creates a default relationship between a landlord and a holdover tenant, giving the tenant the right to remain on the land for one year past the expiration of the lease, unless the landlord initiates ejection proceedings within 90 days after that date." *Alabama Farmers Co-op., Inc. v. Jordan*, 440 F. App'x 463, 466 (6th Cir. 2011). Stated another way, by operation of KRS 383.160(1), a tenancy for a term of one year is created by operation of law if the tenant holds over for more than ninety days after the expiration of the lease and the landlord does not take certain actions within that time. The tenancy can then endure "from year to year" until the tenant "abandons the premises, is turned out of possession, or makes a new contract" with the landlord. KRS 383.160(1).

We agree, generally, that Smithfield's continued occupancy of Riverside's land is governed by KRS 383.160(1). Smithfield did not abandon the land at the expiration of the original one-year lease, but instead continued to grow crops on the property in 2012, 2013, and 2014. It became a holdover tenant, subject to a one-year lease in each of those years.

The pivotal question, then, is when did the original lease expire? For that determines when all the subsequent holdover leases began and ended, including the 2014 lease. *See* KRS 383.160(1) ("But, if proceedings are not instituted within ninety (90) days after the day of expiration, then none shall be allowed until the expiration of one (1) year from the day the term or tenancy expired . . . and so from year to year, until he abandons the premises, is turned out of possession, or makes a new contract."). If there is an ambiguity in the contract, this is a material fact about which there is a genuine issue precluding summary judgment. *See Cook United, Inc. v. Waits*, 512 S.W.2d 493, 495 (Ky. 1974); CR 56.03. Because our resolution of the ambiguity question will dictate how our interpretive analysis will proceed, we must first determine whether the contract is ambiguous as to its term.

Riverside asserts that the contract is unambiguous, and that by its plain language it was for a one-year term, starting January 20, 2011 and terminating January 20, 2012. Consequently, the 2012, 2013, and 2014 holdover lease agreements were for the same one-year terms, beginning and ending on January 20th of the appropriate year.

Smithfield, on the other hand, focuses exclusively on the 2014 holdover lease. It claims the contract terminated as of November 1, 2014, being the industry standard end-of-growing season date and the date when the executory contract was fully performed. Smithfield's argument is this: the phrase "one[-]year project" as used in the original lease agreement is an unusual way to express the term of a lease, and its meaning is unclear and ambiguous. It is proper then to rely on parol evidence to explain the contract. The subject of the contract in this case was the project to produce and sell soybeans, and split the profits. And in the agricultural industry, it is common practice and custom for such a contract to terminate upon full performance of its purpose – that is, the date the crop is fully harvested, sold, and the proceeds divided. That occurred in this case, Smithfield claims, on November 1, 2014. Accordingly, November 1, 2014, is the day the project and contract terminated. We disagree.

Ordinary contract principles require that, absent an ambiguity, a written instrument be enforced strictly according to its terms and the contract's meaning discerned from the four corners of the agreement without resort to extrinsic evidence. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003); *Smith v. Crimson Ridge Development, LLC*, 410 S.W.3d 619, 621 (Ky. App. 2013) ("A contract is interpreted by looking solely to the four corners of the agreement."). "A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent, yet reasonable, interpretations." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002); *Frear*, 103 S.W.3d at 106, n.12 ("[A]n ambiguous contract is one capable of more than one different, reasonable interpretation."). However, "an otherwise unambiguous contract does not become ambiguous when a party asserts . . . that the terms of the agreement fail to state what it intended." *Frear*, 103 S.W.3d at 107. Stated differently, "[t]he fact that one party may have intended different results . . . is insufficient to construe a contract at variance with its plain and unambiguous terms." *Cantrell Supply Inc.*, 94 S.W.3d at 385.

Where the contract's language is clear and unambiguous, the agreement is to be given effect according to its terms, and "[the] court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Frear*, 103 S.W.3d at 106. In the absence of ambiguity, the parties' intention must be gathered from the four corners of the instrument at issue, and extrinsic evidence may not be admitted to vary the instrument's terms. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000).

In this case, the language of the contract is plain and unambiguous. It was for a one-year project. The ordinary meaning of one year is one calendar year or 365 days. Use of the phrase "one-year project" was a choice of the parties and is in no way ambiguous. If the contract began on January 20, 2011, it terminated one year later, on January 20, 2012. All subsequent holdover leases also began and ended on January 20th of the appropriate year, concluding with the 2014 lease, which was in effect from January 20, 2014, to January 20, 2015.

Smithfield claims the parties intended the phrase "one year" to mean "one crop year." It then relies on industry standards and customs for its position that a crop year ends by November 1st. Smithfield attempts to use extrinsic evidence to *create* an ambiguity, and in turn, a genuine issue of material fact. But that is putting the proverbial cart before the horse. We are confined to the four corners of the contract in determining whether an ambiguity exists. Examining the contract in this case reveals no ambiguity – the contract was for one year. The language is plain, clear, and concise. The lease makes no mention of a crop year, industry standards, or November 1 as the contract's end date. Finding no ambiguity, there is no need to turn to extrinsic evidence to interpret the contract.

Again, an unambiguous written contract must be strictly enforced according to the plain meaning of its express terms. *Allen v. Lawyers Mut. Ins. Co. of Kentucky*, 216 S.W.3d 657, 660 (Ky. App. 2007). We are powerless to interpret a contract contrary to such a plain meaning as is discernible from this agreement. *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699, 703 (Ky. 2006).

Turning back to KRS 383.160(1), this Court, like the circuit court, finds that within ninety days of January 20, 2015 – the date the 2014 lease terminated – Riverside and Smithfield engaged in fruitless contract negotiations, after which Riverside turned Smithfield out of possession by informing it on March 26, 2015, that the lands would be leased to another. All of this occurred within ninety days of the expiration of the 2014 lease. *See* KRS 383.160(1). Smithfield had no right or hold to remain on the land in 2015. *Id.*

A straightforward application of ordinary contract principles yields an unambiguous contract with a one-year duration that was extended by operation of law under KRS 383.160(1) from year to year until terminated by Riverside within ninety days of the expiration of the 2014 lease. There are no *material* facts that warrant a trial, and the circuit court correctly found that Riverside was entitled to judgment as a matter of law.

CONCLUSION

We affirm the Gallatin Circuit Court's September 16, 2016 order awarding summary judgment in favor of Riverside.

ALL CONCUR.

BEFORE: ACREE, DIXON, AND NICKELL, JUDGES.

DIVORCE

SETTLEMENT AGREEMENT

MAINTENANCE

MODIFICATION OF MAINTENANCE

NON-MODIFICATION CLAUSE IN SETTLEMENT AGREEMENT

Pursuant to KRS 403.180(2), unless family court finds separation agreement unconscionable, agreement's terms shall generally be binding on parties and court — KRS 403.250(1) permits modification of any

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

decree concerning maintenance upon showing of changed circumstances so substantial and continuing as to make terms unconscionable — However, KRS 403.180(6) permits parties to expressly preclude or limit modification of terms in settlement agreement — KRS 403.250(1) does not apply where parties have expressly precluded subsequent modification of terms of separation agreement pursuant to KRS 403.180(6) —

Cherie Jaburg v. John Scott Jaburg (2015-CA-001768-MR); Jefferson Fam. Ct., Sherlock, J.; Opinion by Judge Maze, *reversing and remanding*, rendered 8/24/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Cherie Jaburg (Cherie) appeals the order the Jefferson Family Court that modified the obligations of Appellee, John Scott Jaburg (John), under the parties' marital settlement agreement. We hold the family court did not have the authority to modify the marital settlement agreement and reverse and remand for proceedings consistent with this opinion.

BACKGROUND

John and Cherie were married in 1981 and a decree of legal separation was granted in 2004. To effectuate their divorce, the parties entered into a Property Settlement Agreement (the Settlement Agreement). The Settlement Agreement contained a maintenance clause stating "Petitioner [Cherie] shall be entitled to permanent maintenance in the amount of $2,700 per month until the Petitioner either dies or remarries. The parties agree this amount is non-modifiable." The Settlement Agreement also required John to keep Cherie on his military health insurance policy, to pay Cherie's insurance premiums, and to maintain a life insurance policy with Cherie named as the primary beneficiary. The Settlement Agreement also contained a catch-all modification or waiver clause stating that "[n]o modification or waiver of any of the terms of this Agreement shall be valid unless in writing and executed by the Parties hereto."

Ten years later, John moved to terminate his obligations to provide maintenance, pay Cherie's insurance premiums, and to maintain a life insurance policy with Cherie as the beneficiary. John alleged that he had been notified he would be losing his position at Chamber Corporation due to downsizing and would be unable to meet his obligations under the Settlement Agreement in the future. John contended his pending unemployment constituted a changed circumstance so substantial and continuing it rendered continued enforcement of the Settlement Agreement unconscionable; therefore, it was modifiable under KRS[1] 403.250(1).

[1] Kentucky Revised Statutes.

After a hearing on the matter, the family court agreed and granted John's motion. Cherie then moved, pursuant to CR[2] 60.02, to alter, amend, or vacate the order, arguing the non-modification clauses in the Settlement Agreement precluded the parties from seeking modification. The family court denied the motion, finding KRS 403.250(1) gave it authority to modify a settlement agreement that had become unconscionable, even if it contained a non-modification clause. This appeal follows.

[2] Kentucky Rules of Civil Procedure.

STANDARD OF REVIEW

This case involves the interpretation of a marital settlement agreement and the family court's statutory authority to modify that agreement. Accordingly, only issues of law are involved and our review is *de novo*. *Sadler v. Buskirk*, 478 S.W.3d 379, 382 (Ky. 2015); *Artrip v. Noe*, 311 S.W.3d 229, 231 (Ky. 2010).

ANALYSIS

John argues, for the first time on appeal, that the terms of the Settlement Agreement did not preclude the family court from terminating his maintenance obligation because the maintenance clause stated that the parties agreed only that "this amount was non-modifiable." Under this reasoning, the duration of Cherie's maintenance award was not constrained by the non-modification provision; therefore, the family court had the authority to terminate John's maintenance obligation. We are not persuaded. By terminating John's maintenance obligation, the family court did modify the amount of maintenance Cherie received a month: she received $0.00. Moreover, John's interpretation of the maintenance clause conflicts with the Settlement Agreement's catch-all modification or waiver clause, which prohibits modification of "any" term of the agreement absent a valid writing executed by both parties. Therefore, we find the express terms of the Settlement Agreement prohibited either party from unilaterally seeking modification of its terms.

We now turn to the family court's finding that KRS 403.250(1) gave it authority to modify the Settlement Agreement despite the presence of non-modification clauses. Under KRS 403.180(1), the parties to a dissolution of marriage action may enter into a written separation agreement containing provision for maintenance and the disposition of property. Unless the family court finds the separation agreement unconscionable, the agreement's terms shall generally be binding on the parties and the court. KRS 403.180(2). However, KRS 403.250(1) states that "[e]xcept as otherwise provided in subsection (6) of KRS 403.180, the provisions of any decree respecting maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." Under KRS 403.180(6), the parties to a dissolution of a marriage "may expressly preclude or limit modification of terms if the separation agreement so provides." By including such a clause in the separation agreement, "the parties may settle their affairs with a finality beyond the reach of the court's continuing equitable jurisdiction elsewhere provided." *Brown v. Brown*, 796 S.W.2d 5, 8 (Ky. 1990).

In this case, the family court found that changed circumstances under KRS 403.250(1) provide an exception to the mandate in KRS 403.180(6) that the parties may expressly preclude modification of their separation agreement. That is not the law. Changed circumstances rendering the terms of a maintenance award unconscionable is the only ground upon which a court has authority to modify any maintenance award. However, the clear language of KRS 403.250(1) prohibits a court from invoking this limited authority when the parties have a separation agreement pursuant to KRS 403.180(6) that expressly precluded subsequent modification of the terms of their separation agreement. The family court's finding it could modify the Settlement Agreement despite the presence of non-modification clauses was erroneous.

We note that a different panel of this Court interpreted KRS 403.250(1) and KRS 403.180(6) in the same way. *Lockhart v. Lockhart*, 2012-CA-000219-MR, 2013 WL 5969839, at *1 (Ky. App. Nov. 8, 2013). We emphasize what we said in that case:

> We recognize . . . "[t]he potential harm of a trial court not being able to modify a maintenance provision can lead to the financial ruination of a party." *Woodson*, 338 S.W.3d at 263. Nevertheless, we are constrained to follow the clear language of KRS 403.180(6). Furthermore, we note that the trial court has only declined to modify Phillip's maintenance obligation. The court has not attempted to hold Phillip in contempt for his arrearage and he may be entitled to assert impossibility as a defense to any contempt motion. *See Campbell County v. Commonwealth, Kentucky Corrections Cabinet*, 762 S.W.2d 6, 10 (Ky. 1988).

Id. at *2. Accordingly, the family court's order must be reversed.

CONCLUSION

For the reasons stated herein, we reverse and remand the matter to the Jefferson Family Court with instructions to reinstate John's maintenance obligations and requirements to maintain health and life insurance for Cherie.

ALL CONCUR.

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

NEGLIGENCE

SLIP AND FALL

PREMISES LIABILITY

FALL ON EXTERIOR STAIRS ATTACHED TO CITY POLICE DEPARTMENT BUILDING

NOTICE REQUIREMENTS UNDER KRS 411.110

"PUBLIC THOROUGHFARE"

Plaintiff went to city police department to provide information concerning criminal

investigation — After her interview, plaintiff left building using outside concrete stairway leading from front door of police department to public parking lot — Plaintiff fell on stairway and was injured — Plaintiff filed instant action alleging fall was caused by defective condition of steps — City moved for summary judgment claiming that plaintiff's action was barred because she failed to give proper notice of her injury prior to bringing action as set forth in KRS 411.110 — Trial court granted motion for summary judgment — Plaintiff appealed — REVERSED and REMANDED — KRS 411.110 sets forth notice requirements for action against city arising from injury caused by condition of "public thoroughfare" — "Thoroughfare" is intended merely to summarize category of properties that includes bridges, streets, sidewalks, and alleys — "Public thoroughfare" includes only those exterior improvements that are similar to named items — Stairway at issue in instant action does not qualify as public thoroughfare under KRS 411.110 — Stairway does not merely provide means of access to police department building; rather, exterior stairway is physically part of that structure — Thus, plaintiff's claim was not subject to notice requirements of KRS 411.110 — Court of Appeals noted that its holding is limited to facts of instant action —

Mary Clair Krietemeyer v. City of Madisonville, Kentucky; and Madisonville Police Department (2017-CA-001250-MR); Hopkins Cir. Ct., Brantley, J.; Opinion by Judge Maze, *reversing and remanding*, rendered 8/24/18. A motion for discretionary review was filed with the Kentucky Supreme Court on 9/20/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Mary Clair Krietemeyer appeals from a summary judgment by the Hopkins Circuit Court dismissing her personal-injury claims against the City of Madisonville and the Madisonville Police Department (collectively, "the City"). Krietemeyer argues that her claim was not subject to the notice requirements of KRS[1] 411.110 because the stairs on which she fell were not part of a "public thoroughfare" within the meaning of the statute. While this is a matter of first impression, we conclude that the exterior stairs attached to the Police Department building were not a public thoroughfare, and therefore her claim was not subject to the statute's notice requirement. Hence, we reverse and remand for additional proceedings.

[1] Kentucky Revised Statutes.

The facts of this case are not in dispute. On May 28, 2015, Krietemeyer went to the Madisonville Police Department to provide information to assist the police in a criminal investigation. After her interview, she left the building via an outside concrete stairway leading from the front door of the Police Department to the public parking lot. Krietemeyer fell on the stairway and sustained injuries as a result.

On May 17, 2016, Krietemeyer filed this action against the City, alleging that her fall was due to the defective condition of the steps and seeking damages for her injuries. After filing an answer to the complaint, the City moved for summary judgment, arguing that Krietemeyer's action was barred because she failed to give proper notice of her injury prior to bringing the action, as required by KRS 411.110. After considering the City's motion and Krietemeyer's response, the trial court granted the motion for summary judgment and dismissed the action. Krietemeyer now appeals.

The sole issue on appeal concerns the interpretation of the notice requirements set out in KRS 411.110. To determine legislative intent, we look first to the language of the statute, giving the words their plain and ordinary meaning. *Osborne v. Commonwealth*, 185 S.W.3d 645, 648-49 (Ky. 2006) (quoting *Gateway Construction Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962)). But where a statute is unambiguous, extrinsic evidence of legislative intent and public policy is not admissible. *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 94 (Ky. 2005). Because the construction and application of a statute is a question of law, it is subject to *de novo* review. *Richardson v. Louisville/Jefferson Cty. Metro Gov't*, 260 S.W.3d 777, 779 (Ky. 2008) (citing *Osborne*, 185 S.W.3d at 648).

KRS 411.110 sets out the following notice requirement for an action against a city arising from an injury caused by the condition of a "public thoroughfare."

> No action shall be maintained against any city in this state because of any injury growing out of any defect in the condition of any bridge, street, sidewalk, alley or other public thoroughfare, unless notice has been given to the mayor, city clerk or clerk of the board of aldermen in the manner provided for the service of notice in actions in the Rules of Civil Procedure. This notice shall be filed within ninety (90) days of the occurrence for which damage is claimed, stating the time of and place where the injury was received and the character and circumstances of the injury, and that the person injured will claim damages therefor from the city.

The question in this case is whether exterior stairs which access a City-owned building are a "public thoroughfare" within the meaning of the statute. Krietemeyer takes the position that the notice requirement was not applicable to her claim because the stairs leading to the Police Department were not a "public thoroughfare" as contemplated by the statute. Where general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose. *Mills v. City of Barbourville*, 273 Ky. 490, 117 S.W.2d 187, 188 (1938).

Thus, Krietemeyer maintains that the term "thoroughfare" should be construed in light of the other terms used; bridges, streets, sidewalks and alleys. Specifically, Krietemeyer argues that the term "thoroughfare," refers only to open-ended public passages, in the same sense as the other terms used. The stairs in this case terminate at the entrance to the Police Department and there is no through access from that point to the other side of the building. Krietemeyer also points to a conspicuous "No Soliciting" sign at the top of the stairs, which limits public access to the building. Since access to the building is restricted to certain members of the public, she contends that the stairs cannot be considered as a "public thoroughfare" for purposes of KRS 411.110.

In contrast, the City points out that Kentucky case law tends to give a broad interpretation of the statute, at least with regard to what constitutes a "defect" in a street or public thoroughfare. Therefore, the word "defect" is to be construed to mean any defect, whether overhead or underfoot, which it is the duty of the city to correct to render the street or thoroughfare in a reasonably safe condition for travel by the public. *Galloway v. City of Winchester*, 299 Ky. 87, 92, 184 S.W.2d 890, 893 (1944). Thus, an injury caused by a tree branch overhanging a public sidewalk is subject to the notice requirement. *Id.*

Similarly, the public thoroughfare includes a defect in a sidewalk adjacent to the entrance of a retail store, *Reibel v. Woolworth*, 301 Ky. 76, 190 S.W.2d 866 (1945), as well as a defect in a sidewalk at the base of stairs to private building. *Broaddus v. Cox*, 300 Ky. 501, 504, 189 S.W.2d 726, 727-28 (1945). Likewise, a defective cover on a water meter box located within the sidewalk, a defective manhole cover within the street, and landscape edging along the sidewalk each have been held as part of the "public thoroughfare" for purposes of the notice requirement. *See*, respectively, *Hancock v. City of Anchorage*, 299 S.W.2d 794, 796 (Ky. 1957), *City of Dawson Springs v. Reddish*, 344 S.W.2d 826, 828 (Ky. 1961), and *Sylvester v. Oak St. Hardware Store, Inc.*, No. 2002-CA-000432-MR, 2003 WL 22416712, at *2 (Ky. App. Oct. 24, 2003). Given the broad interpretation of the term "defect," the City argues that the term "thoroughfare" should not be unnecessarily limited to include only open-ended public passages.

The City also points to *Williams v. City of Kansas City, Missouri*, 782 S.W.2d 64 (Mo. 1990), in which the Missouri Supreme Court interpreted that state's similar notice statute, Mo. Rev. Stat.[2] § 82.210.[3] In *Williams*, the plaintiff fell on steps leading from the terminal to a parking facility at a city-owned airport. The Missouri Court noted that the term "thoroughfare" is commonly defined as "a way or place through which there is a passing . . . an unobstructed way open to the public." *Id.* at 65. (quoting Webster's Third New International Dictionary, at 2380 (1976)). The Court concluded that, since the steps were part of the sidewalk, they were likewise part of the thoroughfare for purposes of the notice statute. *Id.* at 65-66.

[2] Missouri Revised Statutes.

[3] Mo. Rev. Stat. § 82.210, contains similar notice requirements and language to KRS 411.110, and provides as follows:

> No action shall be maintained against any city of this state which now has or may hereafter attain a population of one hundred thousand

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

> inhabitants, on account of any injuries growing out of any defect in the condition of any bridge, boulevard, street, sidewalk or thoroughfare in said city, until notice shall first have been given in writing to the mayor of said city, within ninety days of the occurrence for which such damage is claimed, stating the place where, the time when such injury was received, and the character and circumstances of the injury, and that the person so injured will claim damages therefor from such city.

However, the additional reasoning by the Supreme Court of Missouri is more instructive to our inquiry in the current case. The Missouri Court noted that the common law permitted recovery against a municipality for negligence in carrying out its proprietary duties, including maintenance of streets and sidewalks. *Id.* at 65. Missouri's notice statute, like Kentucky's, grants immunity to municipalities for such liabilities unless certain conditions precedent are met.

> The list of defective property for which the Section 82.210 requires a notice of claim includes all of those publicly maintained exterior improvements designed to facilitate travel for which the common law permitted liability because of their proprietary nature. The statutory list, then, is the product of the legislature's desire to limit the liability of municipalities in the face of the general liability imposed upon a municipality by the common law.

Id.

Although the Missouri statute did not specifically include "steps" in its list of defective property, the Supreme Court of Missouri determined that steps that were built as part of the sidewalk were necessarily included. "Steps do no more than permit the sidewalk of which they are a part to adjust to changes in topography efficiently within a limited space." *Id.* Since the steps were a part of the sidewalk, the Missouri Court determined that they were a "publicly maintained exterior improvements designed to facilitate travel" within the meaning of the notice statute. *Id.*

Although this particular question regarding KRS 411.110 is a matter of first impression, we find that Missouri's interpretation of its notice requirement is applicable to our statute. Kentucky, like Missouri, does not extend governmental immunity to municipalities, although Kentucky does not distinguish between proprietary and governmental functions. *See Haney v. City of Lexington*, 386 S.W.2d 738, 742 (Ky. 1964). But like Missouri's statute, KRS 411.110 serves:

> to give the city an opportunity to investigate the scene of an accident and correct any defective condition, if such exists, to enable the city to investigate and evaluate the case so that if liability exists it might have an opportunity to settle it without long and expensive litigation, and to give the city an opportunity to protect its funds against unjust and illegal claims.

Denton v. City of Florence, 301 S.W.3d 23, 25 (Ky. 2009) (quoting *City of Louisville v. O'Neill*, 440 S.W.2d 265, 266 (Ky. 1969)).

KRS 411.110 imposes a notice requirement on certain identified public thoroughfares as a condition precedent to bringing a tort claim against a municipality. *Treitz v. City of Louisville*, 292 Ky. 654, 167 S.W.2d 860, 862 (1943). Beyond that identified class, the statute does not apply, and no notice is required. We conclude that the steps at issue in the current case were not a public thoroughfare within the meaning of KRS 411.110.

As used in KRS 411.110, the term "thoroughfare" is intended merely to summarize the category of properties that includes bridges, streets, sidewalks, and alleys. Broadly speaking, the steps in the current case could be viewed as a "publicly maintained exterior improvements designed to facilitate travel. . . ." *Williams*, 782 S.W.2d at 65. But in context, the term "public thoroughfare" includes only those exterior improvements that are similar to the named items.

In this case, the record is clear that the stairs do not merely provide a means of access to the Police Department building. The exterior stairs are physically part of that structure. To this extent, they are not a public thoroughfare in the same way as are bridges, streets, sidewalks, or alleys.

To be clear, our holding is limited to the particular facts of this case. This Court's function is to draw a line where the statute clearly requires notice prior to bringing an action, and where it clearly does not. If Krietemeyer's injury had occurred in an interior hallway or stairwell inside the building, then no notice would be required. If Krietemeyer's injury had occurred on the sidewalk in front of the building, then notice would be required. Because the stairs were physically part of the building, we conclude that they are more similar to the former situation than the latter.[4] We are not at liberty to extend the statute beyond its clearly delineated terms.

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[4] In interpreting *Williams*, the Missouri courts have held that a municipal parking lot is not a thoroughfare simply because it connects to a public street. *Walls v. City of Overland*, 865 S.W.2d 839, 841 (Mo. App. 1993). That issue is not before us, and we decline to say whether the same reasoning would apply to KRS 411.110.

Consequently, Krietemeyer's claim was not subject to the statute's notice requirement. Therefore, her failure to give notice to the City did not bar her claim. As a result, the trial court erred in granting the City's motion for summary judgment.

Accordingly, we reverse the summary judgment of the Hopkins Circuit Court, and remand for further proceedings on the merits of Krietemeyer's claim.

ALL CONCUR.

BEFORE: D. LAMBERT, MAZE, AND NICKELL, JUDGES.

LEGAL MALPRACTICE

PROBATE

WILLS AND ESTATES

ATTORNEYS

ESTATE'S CLAIMS AGAINST ITS LEGAL COUNSEL

ATTORNEY'S FEES

BREACH OF FIDUCIARY DUTY

NO CIVIL ACTION CAN ARISE FROM VIOLATION OF KENTUCKY RULES OF PROFESSIONAL CONDUCT

In 1986, attorney drafted simple will for client — At that time, client had few assets — Over his lifetime, client amassed large estate, which included 15 automobile dealerships, two motorcycle dealerships, significant real estate holdings, and business providing all ground flight support for regional airport — Over course of time, attorney advised client to update his will and take steps to minimize his taxes — Attorney, who worked for law firm, did not consider himself to be estate planning attorney; therefore, attorney often sought help from other lawyers in his firm — Client died in 2006 from motorcycle accident — Client had not updated his will — Client was survived by his wife and three adult children — None of client's survivors were involved in his businesses — At time of his death, client and his wife lived apart — Pursuant to will, after a few bequests to wife and children, remaining assets were to be sold with one-half of proceeds going to wife, and other half divided equally among three children — Family decided to retain some of dealerships, but could not decide how to distribute those they retained — Will named wife and attorney as co-executors — Wife did not oppose serving as co-executor with attorney — Attorney hired his own law firm to act as legal counsel for Estate — Attorney did not consider hiring any other firm as it would have taken much time for new firm to become familiar with client's extensive business dealings — Wife agreed to hire firm — Wife was concerned with costs associated with Estate — It was estimated that Estate would take three years to settle; however, due to delays and family indecision, Estate was still open in 2017 — Attorney did not serve as attorney for Estate — Record indicated that there was no dual representation — Attorney's role included dealing with lenders, manufacturers, and corporate issues — Combined charges for legal services rendered by firm and attorney's services as co-executor was 3% of value of personal estate, plus costs — Real estate owned by client individually or in survivorship, individual retirement 401K accounts and life insurance proceeds were

excluded from personal estate — Combined fee was to be prorated and paid monthly over 36 month period — Attorney testified that he did not bill Estate for legal services by hour because no one could realistically predict number of hours required to administer Estate and hourly billing would not cap costs as wife desired — Wife agreed to terms and signed engagement letter — Gross estate was $63 million, but commission was charged only against $46 million of personal estate — Attorney was paid $360,000 commission and law firm was paid $1,041,789.54 in legal fees — Attorney and firm continued to work on Estate until wife asked them to resign in 2013 — Wife hired new counsel — New counsel did not document any deficiencies in services provided by attorney or his firm — Attorney filed periodic settlement with district court in 2013 in attempt to settle fees owed to attorney and firm — Attorney testified that Estate's goal was to file only a final settlement to maintain Estate's privacy — Each time settlement was to be filed, district court granted Estate's request for extension — Wife did not object to extensions — While approval of periodic settlement pending, wife filed instant action in circuit court alleging negligent administration of Estate by not filing periodic settlements; corrective litigation costs; and legal malpractice and/or breach of fiduciary duty for charging excessive attorney/executor fees — District court stayed its determinations pending outcome of circuit court proceeding — Wife testified that attorney and firm did everything that she had requested that they do — However, wife alleged that attorney should have given her more choices and that attorney and firm should have been more proactive in forcing client to plan his Estate and in forcing wife and children to make decisions — Wife admitted that she never complained to attorney or firm prior to filing instant action — Wife reviewed monthly bank statements from Estate — Wife never requested description of specific legal work performed by firm — Circuit court granted partial summary judgment in favor of attorney and firm — Remaining charges were "compensation claims" alleging violation of SCR 3.130(1.7) in choosing firm to represent Estate; violation of SCR 3.130(1.5) for charging excessive fees; and negligence for not advising wife of full spectrum of potential fee arrangements — Circuit court granted summary judgment in favor of attorney and firm concerning alleged failure to file periodic settlements because there was no proof of damages — Circuit court again granted partial summary judgment to attorney and firm finding that Kentucky does not recognize negligence claim based solely on fee dispute — Circuit court then scheduled bench trial — Parties agreed that case should be returned to district court for determination of reasonable attorney and administrative fees — Circuit court denied request to dismiss circuit court action and to remand to district court stating that it retained jurisdiction over remaining claims for unethical conduct and unreasonable attorney fees — Wife petitioned Court of Appeals for writ of prohibition and sought writ of mandamus directing circuit court to finalize its orders granting summary judgment — While petition was pending, wife appealed grant of summary judgment — It appeared that wife's goal was to present her case to circuit court jurors, instead of having circuit court bench trial — AFFIRMED — Jury trial is not required simply because wife demanded one and had requested punitive damages — No civil cause of action can arise from violation of Kentucky Rules of Professional Conduct — There is no rule or authority requiring that attorney discuss alternative methods of computing fees with client — SCR 3.130(1.5) discusses fees and prohibits unreasonable fee, but does not specify how particular fee is to be reached — It does list factors to consider in determining if fee is reasonable — Kentucky does not recognize claim of legal malpractice or breach of fiduciary duty based solely on fee dispute between executor or attorney of Estate and client in probate case — For more practical reasons, negligence claim could not move forward in circuit court — Reasonableness of fee must be remanded to district court for determination in probate case — Attorney testified that from beginning, Estate's plan was to file only final settlement — Wife's expert testified that lack of periodic settlements did not damage Estate — Since there was no damage, there could be no cause of action — Thus, summary judgment in favor of attorney and firm was appropriate —

Gail Martin, as Co-Executrix of the Estate of Cornelius Martin, and Gail Martin Individually v. Bell, Orr Ayers and Moore, PSC, and Timothy Mauldin, Individually and as Co-Executor of the Estate of Cornelius Martin (2016-CA-001217-MR); Warren Cir. Ct., Howard, Special J.; Opinion by Judge Nickell, *affirming*, rendered 8/24/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Gail Martin ("Gail"), both in her individual capacity and as Co-Executrix of the Estate of Cornelius Martin ("Cornelius")—her late husband—appeals from two orders entered by the Warren Circuit Court awarding summary judgment to Hon. Timothy Mauldin ("Mauldin"), the former Co-Executor of the Estate and to Bell, Orr, Ayers and Moore, PSC ("BOAM")—the law firm with which Mauldin practices and the provider of legal services to the Estate. Gail alleged legal malpractice, excessive billing procedures and breach of fiduciary duty. Following review of the record, the briefs and the law, we affirm.

PROCEDURAL BACKGROUND

After completing high school and vocational school in Kentucky, Cornelius began working as an auto mechanic before becoming a shop foreman, a car salesman, and then completing the General Motors minority dealer program in Dayton, Ohio. Cornelius and Gail married in 1973, divorced in 1979, and remarried in 1984. In August 1985, Cornelius opened his first car dealership in Bowling Green, Kentucky. Gail did not immediately accompany Cornelius to Kentucky. She remained in Dayton where she worked to earn the down payment for the first of two homes they would build in Bowling Green. She never discussed estate planning with Cornelius.

At the age of fifty-seven, Cornelius died testate in a motorcycle accident on June 3, 2006. Mauldin had met Cornelius around 1986, and drafted a simple will for him when he had few assets. That will, executed by Cornelius on September 8, 1988, was filed for probate in Warren District Court on June 5, 2006.[1] The will named Gail and Mauldin as Co-Executors—a fact Gail knew prior to Cornelius' death and did not oppose.[2] Cornelius had told her Mauldin would know what to do in the event Cornelius died.

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[1] *Estate of: Martin, Cornelius Allen*, Case No. 2006-P-00303. A notice of appeal was filed by the Estate in the probate case on October 10, 2017.

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[2] The will did not specify who would serve as legal counsel for the Estate. Mauldin was not named as both Co-Executor and attorney for the Estate.

From a single car dealership in 1986—purchased with help from his family—Cornelius built The Martin Automotive Group which at the time of his death included fifteen automobile dealerships and two motorcycle dealerships across six states. Cornelius also had significant real estate holdings and was the fixed-base operator providing all ground flight support at the Bowling Green-Warren County Regional Airport. His interests were diverse. His survivors were Gail and their three children,[3] none of whom was involved in or knowledgeable about the businesses. The Estate was burdened with approximately $100 million in debt.

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[3] The three children—all adults—are not parties to this action. There is no suggestion the purpose of this lawsuit is settling the Estate.

Cornelius was the face of his business empire. He appeared in his own car commercials and was the sole guarantor of all dealership floor plan loans. As Cornelius' portfolio grew into a substantial estate, Mauldin urged him to update his will and take steps to minimize taxes. In December 1994, Mauldin mailed estate planning documents to Cornelius at his home.

Not considering himself to be an estate planning attorney, Mauldin asked other BOAM attorneys to prepare tax documents[4] which were sent to Cornelius for review. Jim Weiss prepared some of those documents, but they were never executed. Beth Sigler followed up on the drafts, sending half a dozen letters to Cornelius stressing the consequences of inaction. At Cornelius' death, Mauldin located the unsigned documents in Cornelius' corporate office. Mauldin thought Cornelius delayed acting because he did not know what his family wanted to do with his vast business holdings. The children were young and there were marital issues to consider. Gail had consulted a divorce lawyer and had accused Cornelius of

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having an affair which he denied. At the time of Cornelius' death, he and Gail were living apart.

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[4] It is suggested the proposed estate plan would have saved significant federal estate taxes.

On learning of Cornelius' death, Mauldin went to the family home. Plans were quickly made for a small group to meet the next day to plan the future of Cornelius' property—especially the auto franchises for which Cornelius had named no successor. Cornelius' death triggered instant default on all franchise agreements including floor plan loans exceeding $70 million. At the family's request, Mauldin served on the board of directors for each corporation—twenty-six of them—charging nothing for serving in that capacity. As Co-Executor, Mauldin dealt with a wide variety of scenarios—key employees threatening to leave dealerships, the shutdown of General Motors, discontinuation of Saturn dealerships, sale of an airplane, a federal tax audit, and a federal estate tax obligation of $9.7 million. Under Mauldin's eye, all franchise agreements remained undisturbed and financing for the seventeen dealerships remained intact.

Under the terms of the will, after a few bequests to Gail and the children, all remaining assets were to be sold with one-half of the proceeds going to Gail, and the other half being divided equally among the three children. The family decided to retain some of the dealerships, but could not decide how to distribute the franchises they retained.

Mauldin had met Cornelius soon after Cornelius arrived in Bowling Green in the mid-1980's. Mauldin had performed legal work for Cornelius for twenty years. When a legal task outside Mauldin's expertise surfaced, Mauldin called on other BOAM attorneys to perform the task. BOAM being most familiar with Cornelius' vast holdings, Mauldin thought it appropriate to engage BOAM to serve as legal counsel for the Estate—Mauldin considered hiring no other law firm. Had a different firm been selected, precious time would have been spent familiarizing the new firm with Cornelius' extensive holdings whereas BOAM was already aware of the ventures because of its prior work. Time was of the essence.

Mauldin did not decide to hire BOAM alone. Throughout June and July of 2006, he discussed administration of the Estate with Gail. Mauldin testified anytime Gail felt strongly about an issue, he deferred to her. Gail was particularly concerned about costs associated with the Estate and wanted to cap them, but no one could accurately predict how much time and work would be required.

It was estimated the Estate would remain open three years. Delays in receiving tax documentation and family indecision about dividing assets extended the life of the Estate, as did ancillary probate proceedings in seven different states. What was originally expected to close in 2009—three years post-death—was still open in 2017.

Ultimately, Mauldin proposed taking a Co-Executor's fee of three percent, from which he would directly pay BOAM for its legal work as attorneys for the Estate. Mauldin testified he did *not* serve as an attorney for the Estate. While Gail persists in characterizing Mauldin as both executor and lawyer for the Estate, the record indicates there was no dual representation. Without contradiction, Mauldin described his role and that of BOAM during his deposition:

> A: Well, first and foremost, let me say that both I and BOAM were going to do whatever work was necessary to further the interest of the estate and to work toward the best interest of the estate.
>
> My role was more centered on dealing with the lenders, dealing with manufacturers, dealing with people in corporate. I don't have my time records in front of me, but I tried to document what that was. We tried to set that out in some detail in the motion that we filed with the probate court on the fees and itemized, in a general sense, what I did and what members of the firm did. Beth's [Sigler] role and members of the firm were more focused on actual estate issues, the disclaimer, matters dealing with payment of the estate tax, matters dealing with the Treasury Department, the accountants, the business valuations and things of that nature.
>
> Q: Would you –
>
> A: But I would say – I mean, if someone contacted me out in the world concerning the estate and I needed – something had to be done in response to that phone call, I would do it if I was capable and had the knowledge to do it. If I felt that that task was better suited to Beth, I referred it to her and it got done.
>
> So this was not a situation where I might refuse to do something saying, well, I'm the executor, that's not my job. No, I just – I made sure things got done. I was also the point person, as far as corporate was concerned, as far as members of the public, as far as the manufacturers were concerned, as far as the lenders were concerned.
>
> So I was the person that got contacted by those entities, by those people. And if there was something that needed to be done in response to those contacts that required something of Beth's expertise, then I referred it to her. If it was something I could do, I did it. My job was to make sure things got done.

Mauldin prepared a letter of engagement stating in relevant part:

> As I have advised, KRS[5] 395.150 provides that the maximum fee for services rendered by an executor is five percent (5%) of the value of the personal estate of the decedent, plus five percent (5%) of the income generated by the estate collected by the executor, unless a greater amount is allowed by the probate court. The statutory executor's fee does not include fees for legal services rendered to an estate.
>
> For this matter, the **combined** charges for legal services rendered by Bell, Orr, Ayers & Moore, P.S.C. to the Estate and the services provided by the undersigned in my capacity as co-executor, shall be three percent (3%) of the value of the personal estate, plus costs. For purposes of this calculation, real estate owned by Cornelius A. Martin individually or in survivorship, individual retirement accounts 401K accounts and life insurance proceeds will be excluded from the personal estate. All other assets will be deemed to be part of the personal estate, including real estate owned at the time of death by any corporate entity owned by Mr. Martin, including, but not limited to, Martin Land Development Company, Inc. and Saturn of Dayton, Inc. Costs include, but are not limited to, items such as filing fees, service fees, travel expenses, long distance telephone charges, photocopying expenses and facsimile charges. The combined fee for legal and co-executor's services will be prorated and paid monthly over the thirty-six month period it is anticipated that the estate will remain open. If the estate is concluded in less than three years, any fee balance owed will become due and payable at that time.

(Emphasis in original.) When deposed, Mauldin explained his reasoning for selecting the terms used in the engagement letter.

> A: . . .
>
> As I've already explained, we were looking for a vehicle that Gail wanted in order to know what the expenses would be for the cost of administration going forward so there would be a cap on that.
>
> And in point of fact, the fact I was directing the payment of attorney's fees out of my executor fee made sure that BOAM's fees could never exceed what we agreed to pay them. They were never going to be able to bill over and above that. The agreement that Gail entered into was quite clear. The fee would be paid over 36 months and no further fees would be owed, despite the length of time the estate remained open, which we know turned out to be an additional four years.

When asked why he chose not to bill the Estate for legal services by the hour, Mauldin explained no one could realistically predict the number of hours required to administer Cornelius' complicated Estate and hourly billing would not cap the costs as Gail desired. Mauldin stated he proposed the three percent commission, as Co-Executor of the Estate, based on KRS 395.150. Gail agreed to the terms, signing the engagement letter on September 26, 2006.

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[5] Kentucky Revised Statutes. (Footnote added).

Cornelius' gross estate amounted to $63 million, but Mauldin's three percent commission was charged against only $46 million of the personal estate; nothing was charged against income[6] Mauldin collected for the Estate as Co-Executor. Gail chose not to take a fee as Co-Executor—any fee she could have received as Co-Executor would have been taxed, whereas she would take tax-free as a beneficiary. She renounced the will.

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[6] Individual retirement accounts, 401K accounts, life insurance proceeds, and proceeds recovered from the wrongful death action stemming from Cornelius' fatal motorcycle accident were excluded

from the personal estate when computing Mauldin's commission as Co-Executor.

A commission of $360,000 was paid to Mauldin as Co-Executor of the Estate. BOAM was paid $1,041,789.54 in legal fees via checks written from the Estate. Both Mauldin and BOAM continued working on the Estate until 2013 —when Gail asked both to resign. No fees[7] or commissions were paid to either beyond 2009. A total of $1.4 million was paid to Mauldin (and BOAM) for handling the Estate.

[7] An additional $31,212.83 in legal fees was paid to out-of-state law firms. Probate attorneys were hired in West Virginia and Ohio where Cornelius had business ventures.

Mauldin testified he never represented himself as being anything but a Co-Executor of the Estate. He further stated he had an undivided loyalty to the Estate—eclipsing even his relationship with BOAM. In 2013, after asking Mauldin to resign as Co-Executor and BOAM to cease representing the Estate, Gail hired new counsel to advise her on the Estate. At a subsequent hearing, new counsel posed questions about administration of the Estate, but no deficiencies in Mauldin's or BOAM's work were documented.

On December 27, 2013, in an attempt to settle his accounts with the Warren District Court as required by KRS 395.325(1) ("[i]f any fiduciary resigns or is removed, he shall upon the appointment of his successor settle his accounts"), Mauldin filed a periodic settlement coupled with a verified motion seeking approval of his fee as Co-Executor. Initially, Gail excepted and objected, but subsequently withdrew her objections to all but Mauldin's commission and BOAM's fee for legal services. This was the only periodic settlement Mauldin filed. He stated in his deposition the goal was to file only a final settlement to maintain privacy for the Estate. Each time a settlement was to be filed, an extension was requested—without objection—and granted by the District Court.

On February 14, 2014—while approval of the periodic settlement, Mauldin's commission, and BOAM's fee for legal services was pending—Gail filed a complaint in Warren Circuit Court alleging: negligent administration of the Estate by not filing periodic settlements; corrective litigation costs; and, legal malpractice and/or breach of fiduciary duty for charging excessive attorney/executor fees that constituted "an exorbitant amount in relation to the actual legal and administrative work performed."[8] The complaint did *not* address settling the Estate, nor did it allege breach of contract. Five days later, the District Court heard the motion to approve the commission and legal fees. Initially it reserved ruling, but after a second hearing, entered an order finding filing of the complaint in circuit court either divested it of jurisdiction, or at a minimum the circuit court action should conclude before the probate case resumed. Filing of the complaint was construed as an "adversary proceeding."[9] Mauldin and BOAM answered the complaint.

[8] Claims of negligent estate planning and negligence in not objecting to accounting fees were raised and abandoned.

[9] KRS 24A.120 directs in relevant part:

> District Court shall have exclusive jurisdiction in:
>
> . . .
>
> (2) Matters involving probate, except matters contested in an adversary proceeding. Such adversary proceeding shall be filed in Circuit Court in accordance with the Kentucky Rules of Civil Procedure and shall not be considered an appeal;
>
> (3) Matters not provided for by statute to be commenced in Circuit Court shall be deemed to be nonadversarial within the meaning of subsection (2) of this section and therefore are within the jurisdiction of the District Court . . . .

Gail was deposed on February 24, 2015. She recalled few specifics, often stating she lacked knowledge of particular facts and knew only what her attorneys had told her. She did, however, testify everything she had asked Mauldin and/or BOAM to do was done and no question she had posed was unanswered. Her criticism was Mauldin should have given her more choices, and Mauldin and BOAM should have been more proactive in forcing Cornelius to plan his Estate, and in forcing her and the children to make decisions. In her opinion, sending letters suggesting they act was insufficient. She acknowledged even though new counsel was working on the Estate, several franchises remained in the Estate and the family could not agree how to dispose of them. She testified she and all three children receive salaries from the Martin Management Group of which she is the Chief Executive Officer although she has no responsibility for day-to-day operations. She confirmed she never complained to Mauldin or BOAM prior to filing the complaint, never questioned any charges made against the Estate even though she reviewed monthly bank statements and cancelled checks, and never requested a description of the specific legal work BOAM was performing. One of the last exchanges in her deposition went as follows:

> Q. Ms. Martin, in your own words, after going through these documents and looking through these various transactions that have occurred, I would like for you to explain to me what it is you believe that Tim Mauldin and the law firm of Bell, Orr, Ayers and Moore have done that is either improper or has prevented the estate of Cornelius Martin from being resolved and wrapped up?
>
> A. Mr. English, I can't explain that to you because I am not an attorney or I'm not a tax attorney and so I have people working on that. That's why we're sitting here today.
>
> Q. But in terms of what you believe in your position as the co-executor of the estate and also as the plaintiff in this action, you can't explain to me in your own terms what you believe they've done wrong?
>
> A. Right, Yes.

On November 20, 2015, Mauldin and BOAM moved for summary judgment. On January 27, 2016, the Circuit Court, with a special judge presiding, granted partial summary judgment to Mauldin and BOAM, leaving unresolved only three "compensation claims" alleging violation of SCR[10] 3.130 (1.7) in choosing BOAM to represent the Estate; violation of SCR 3.130 (1.5) for charging excessive fees; and negligence for not advising Gail of the full spectrum of potential fee arrangements. The Circuit Court determined these claims were not time-barred and could be heard only in circuit court. The same order granted summary judgment on the alleged failure to file periodic settlements because there had been no proof of damage—Gail's expert had testified there was no damage and Gail herself had acknowledged receiving and reviewing monthly bank statements and cancelled checks. Finally, summary judgment was granted on a claim of causing payment of corrective litigation costs because there had been no showing of any error requiring correction.[11] The only claims surviving the summary judgment motion pertained to compensation.

[10] Rules of the Supreme Court of Kentucky.

[11] The Circuit Court characterized this claim as an argument for attorney fees.

Mauldin moved the Circuit Court to approve the periodic settlement and noticed the matter for a hearing. A few days later, Mauldin and BOAM moved the Circuit Court to reconsider its prior order finding the compensation claims were not barred by any applicable statute of limitations—a motion that would be denied after a hearing. In short order, Mauldin and BOAM moved the Circuit Court again to approve Mauldin's commission as Co-Executor of the Estate, arguing approval would obviate inquiry into the legal fees paid to BOAM because those fees were paid from Mauldin's commission. After a hearing on May 23, 2016, Mauldin and BOAM moved for partial summary judgment on the issue of fee computation methods.

In an order entered August 2, 2016, the Circuit Court again granted partial summary judgment to Mauldin and BOAM. The Circuit Court framed the question before it as, "whether disputes about the compensation of an executor/attorney of an estate amount to legal malpractice or breach of fiduciary duty under Kentucky law." The Circuit Court noted neither it nor the parties had located any published case—in Kentucky or elsewhere—affirming a negligence claim "based solely on a fee dispute" and ultimately concluded Kentucky does not recognize such a claim. The same order scheduled a bench trial for August 22, 2016, at which it would rule on motions to approve the periodic settlement and Mauldin's commission in "a probate-style hearing[.]" In prior hearings, the Circuit Court had expressed concern about conserving judicial

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resources and avoiding piecemeal litigation.

In the wake of summary judgment being entered on all but the compensation claims, BOAM moved to dismiss the circuit court action and remand the case to district court for determination of reasonable attorney and administrative fees. Gail agreed the case should return to Warren District Court because KRS 24A.120 vests jurisdiction over non-adversarial probate issues in district court. On August 10, 2016, the Circuit Court denied the defense motion, stating it retained jurisdiction over the "remaining claims for unethical conduct and unreasonable attorney fees" which "are not routine probate accounting matters" over which the district court typically exercises exclusive jurisdiction.

Attempting to prevent the Circuit Court bench trial—Gail wanted a jury trial—she petitioned this Court for a writ of prohibition and sought a writ of mandamus directing the Circuit Court to finalize its orders granting summary judgment.[12] While the petition was pending, Gail appealed the grant of summary judgment to this Court.

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[12] On August 19, 2016, a motion panel of this Court entered an order directing the Warren Circuit Court "to REFRAIN from conducting the planned bench trial until further order of this Court." On October 20, 2016, another panel of this Court entered a second order granting the petition for writ of prohibition and dismissing, as moot, the petition for writ of mandamus. The panel determined Warren District Court has exclusive jurisdiction over "[m]atters involving probate, except matters contested in an adversary proceeding." KRS 24A.120(2). Moreover, adversary proceedings must be authorized by statute. KRS 24A.120(3). Because no statute gives circuit court jurisdiction over a compensation issue in a probate matter, but KRS 24A.120(3) vests district court with jurisdiction over "[m]atters not provided for by statute to be commenced in Circuit Court[,]" jurisdiction over compensation for representatives of an estate—controlled by KRS 395.150—resides exclusively in district court.

In preparation for the scheduled bench trial—which never occurred—Gail stated she was seeking compensatory damages of $1,401,789.54;[13] $672,858.98 in pre-judgment interest from 2009 at eight percent; consequential attorney's fees of $97,539.12; and, an amount of punitive damages to be determined by a jury. Her main goal—both then and now—appears to be arguing her case to circuit court jurors in hopes they will refund the full amount—and more —paid by the Estate to Mauldin and BOAM for seven years of complex work. This appeal followed.

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[13] This is the full amount paid to Mauldin and BOAM between 2006 and 2009, even though their work continued until December 2013. Gail apparently assigns no value to the seven years of service provided by Mauldin as Co-Executor and by BOAM as the Estate's legal adviser.

ANALYSIS

Because this case reaches us by way of summary judgment, we state the applicable standard of review.

> On appeal from the granting of a motion for summary judgment, the appellate court must determine "whether the trial court correctly found that there were no genuine issues of any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR[14] 56.03. In considering a motion for summary judgment, the trial court must consider the evidence in a light most favorable to the non-moving party. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper where the movant shows that the adverse party could not prevail under any circumstances. *Id.* Because summary judgment involves no fact finding, this Court will review the trial court's decision *de novo*. *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005).

Davis v. Scott, 320 S.W.3d 87, 90 (Ky. 2010) (footnote added).

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[14] Kentucky Rules of Civil Procedure.

Our analysis begins with a claim underlying this entire appeal—whether Gail was wrongly denied a jury trial. Gail argues a jury trial must occur every time a party demands one or requests punitive damages.[15] We disagree.

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[15] Gail argues a claim of punitive damages "must be decided by the jury." This is an inaccurate statement of the law. KRS 411.186(1) allows a judge to assess punitive damages "if jury trial has been waived."

First, as stated above, when the non-moving party cannot prevail under any circumstances, a jury trial—even though demanded, "sacred" and "inviolate," Kentucky Const. § 7; *see also* CR 38.01—is not required. Were we to endorse Gail's view, no case in which a party demands a jury trial could ever be dismissed. This would needlessly clog Kentucky courts and is not the law.

Second, a jury trial is required only when a "proper" demand is made. *Smith v. Bear, Inc.*, 419 S.W.3d 49, 57 (Ky. App. 2013). Whether a jury trial will be needed or even desired is often unknown when a complaint is filed, but is routinely demanded by attorneys out of an abundance of caution. Consistent with *Steelvest* and *Scifres*, a "proper" claim must have substance—meaning the non-moving party could prevail at trial.

Third, CR 38.02 states, "[a]ny party may demand a trial by jury of any issue *triable of right* by a jury[.]" (Emphasis added.) The rule's specific wording dooms Gail's theory that every jury demand ends in a jury trial.

> [I]n civil cases, Kentucky law recognizes exceptions to the right to a jury, including causes of action at common law that would have been regarded as arising in equity rather than law. *Reese's Administrator v. Youtsey*, 113 Ky. 839, 69 S.W. 708 (1902); *see Steelvest, Inc. v. Scansteel Service Center, Inc.*, 908 S.W.2d 104, 108 ([Ky.] 1995). If the nature of the issues presented is essentially equitable, no jury trial is available. If the issues are predominantly legal in scope, however, a right to a jury trial exists. *See Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992).

Daniels v. CDB Bell, LLC, 300 S.W.3d 204, 210 (Ky. App. 2009). Even though a jury may be demanded on an equitable claim, a jury will not be impaneled.

Fourth, despite a jury demand, trial need not occur when a "court upon motion or of its own initiative finds that a right of trial by jury of some or all of the issues does not exist under the Constitution or Statutes of Kentucky." CR 39.01(b). Here, the trial court concluded "[Gail's] negligence claims . . . do not exist under Kentucky law." As summarized above, Gail has misconceived the law. A jury trial is not required simply because she demanded one and requested punitive damages.

Before considering whether entry of summary judgment was proper, we *sua sponte* take Gail to task for non-compliance with CR 76.12(4)(c)(v). Preservation is critical because "[a] new theory of error cannot be raised for the first time on appeal." *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011), *as modified* Sept. 20, 2011 (citations omitted). Gail's brief does not specify whether or how she preserved the issues she asserts on appeal.

Requiring an appellate brief to

> contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). A statement of preservation is required

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

Gail includes numerous references to the record in her opening brief, but no statement of preservation. This absence is particularly noticeable

regarding her discussion of dismissal of the legal malpractice and breach of fiduciary duty claims. Under this argument she poses three questions, two alleging violations of SCR 3.130(1.5)[16] and (1.7).[17] She claims the trial court never addressed these questions, causing us to wonder whether she raised them in the circuit court and if she did, whether she pressed for an answer. We have not been cited to a CR 52.04 motion showing she sought a finding of fact on an essential issue. As an appellate court, we will not search the record to fill in gaps Gail has left unanswered. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). We would be well within our authority to deny review for non-compliance, CR 76.12(8), but have chosen not to apply such a harsh sanction for an error which is rarely the client's fault. Counsel is warned such leniency may not be extended in the future.

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[16] Gail alleged Mauldin and BOAM charged an excessive fee. KRS 395.150 allows an Executor's Commission of up to five percent of the gross estate without court approval. Mauldin charged only three percent.

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[17] Gail alleged BOAM should not have represented the Estate because Mauldin, a BOAM shareholder, served as Co-Executor. The Model Rules "do not prohibit the fiduciary from appointing himself or his firm as counsel to perform legal work during the administration of the estate or trust because the dual roles do not involve a conflict of interest." 02-426 Lawyer Serving as Fiduciary for an Estate or Trust, ABA Formal Op. 02-426 (internal footnotes omitted).

Defense expert Hon. Glen Bagby echoed the ABA Opinion, testifying there is no prohibition on an executor hiring his firm as attorney for an estate, so long as the charge is reasonable and the attorney is not paid twice for the same work.

Rather than addressing multiple alleged rules violations separately, the Circuit Court concluded in its order entered January 27, 2016, "no civil cause of action can arise from violation of [the Kentucky Rules of Professional Conduct]. SCR 3.130 (XXI)." We agree with this conclusion. The rules give guidance and "establish standards of conduct" for attorneys; they "are not designed to be a basis for civil liability." *Id.* Gail's arguments are based on alleged rule violations and were properly dismissed.

A third compensation claim—which Gail maintains was incorrectly answered—is whether Mauldin was negligent in not advising her of the full spectrum of fee options resulting in the Estate paying more than $1 million to BOAM on a percentage basis when Gail contends it would have paid only $591,000[18] if charged by the hour. Mauldin and BOAM correctly argue no authority has been cited requiring an attorney to discuss alternative methods of computing fees with a client. SCR 3.130(1.5) discusses fees, prohibits an unreasonable fee, but does not specify how a particular fee is to be reached, although it does list eight factors to consider in determining a fee to be reasonable. We have not been cited to—nor have we located on our own—any rule, statute or case requiring an attorney to discuss with a client every type of fee arrangement available.

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[18] Gail bases this amount on BOAM billing records. However, there was testimony BOAM did not record all activity because it was charging a flat fee and not by the hour. Thus, BOAM argues an hour for hour comparison is misleading.

Gail claims the Circuit Court erred in concluding Kentucky does not recognize a claim of legal malpractice or breach of fiduciary duty based solely on a fee dispute between an executor or attorney of an Estate and the client in a probate case. However, she cites no Kentucky case supporting her position. Mauldin and BOAM argue the reasonableness of the fee must be decided by the district court because this is a probate matter. They further argue if Gail is correct, every dispute over an executor's commission or an attorney's fee arising from an estate will give rise to a civil action for legal malpractice and breach of fiduciary duty coupled with a demand for a jury trial.

Several states have held allegedly "excessive legal fees cannot provide the sole basis for a malpractice claim." *Davis v. Findley*, 260 Ga.App. 443, 579 S.E.2d 848 (2003). The Circuit Court stated its research—and that of the parties—had revealed "no negligence claim based solely on a fee dispute has been approved in any published case law in Kentucky or nationally."

Both briefs and the Circuit Court opinion discuss *Estate of Sicotte v. Lubin & Meyer, P.C.*, 959 A.2d 236 (N.H. 2008), wherein a minor sustained birth injuries giving rise to a medical malpractice suit. The minor's parents signed an agreement to pay the law firm representing the minor's estate forty percent of the gross amount collected. The medical malpractice action settled for $2,250,000. When the petition to approve the settlement was heard, the law firm's motion for a contingent fee of one-third was approved. Nearly two years later, the estate moved for return of a portion of the attorney's fee claiming it had not been told any fee exceeding twenty-five percent of a minor's estate required a showing of good cause. Nor were the parents told the estate could have paid for legal services by the hour rather than agreeing to a contingent fee. The trial court dismissed the motion without prejudice believing it could not reopen the fee issue when there had been no appeal. The estate then filed a legal malpractice suit alleging breach of contract; negligence; and, failure to train, supervise and properly instruct agents, directors and employees. The estate's alleged loss was paying an excessive legal fee for representation in the medical malpractice action which reduced the amount of the settlement paid to the estate. The estate sought return of the difference between the one-third contingent fee paid and the twenty-five percent fee it described as "fair, reasonable, standard and customary, plus interest[.]"

While the legal malpractice action in *Sicotte* was initiated by the minor's estate, it was not a probate case. Moreover, it turned not on the reasonableness of the fee charged, but on the estate's failure to disclose experts[19] needed to prove its case. It was determined to prove legal malpractice, the parents would have to establish had they been told they could "hire an attorney on an hourly basis, they would have retained alternate counsel who would have obtained a similar settlement or verdict at a lower cost." *Id.* at 240. Using *Sicotte* as a yardstick, Gail would have to show another firm would have agreed to represent the Estate at an hourly rate, produced the same amount of work, and achieved a similar result at a lower cost. She made no such showing. *Sicotte* does not convince us the Circuit Court erred in dismissing the malpractice and breach of fiduciary duty claims.

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[19] Gail maintains she has experts to support her claims. However, much of their opinions are based on rule violations which we have already stated cannot be the basis for a legal malpractice claim.

Both briefs and the Circuit Court opinion also discuss *Inn-Group Mgmt. Servs. v. Greer*, 71 S.W.3d 125 (Ky. App. 2002), which announced a "simple test" for determining who should decide the reasonableness of an attorney's fee.

> What constitutes a reasonable attorney fee is an issue of fact when the action is between an attorney and client to collect or defend a fee for representation. It is an issue of law when the attorney and/or client seeks to recover a reasonable attorney fee from an opposing or third party.

Id. at 130. *Greer* has been cited in several unpublished cases, but only once in a published decision, *Gibson v. Kentucky Farm Bureau Mut. Ins. Co.*, 328 S.W.3d 195, 204 (Ky. App. 2010), *as modified* Dec. 3, 2010, where it was cited for the premise, "[i]t is the responsibility of the trial court, and not the jury, to determine the availability and amount of attorney fees." While a true statement, that is not the scenario we dissect today.

Greer tried to strike a balance between two lines of cases, neither of which overrules or distinguishes the other. Most importantly for our purposes, *Greer* did not concern an estate—it was an action by a hotel management company to collect attorney fees and costs from a third party to whom it had provided management services. *Greer* held the court, not a jury, should have determined the reasonableness of that attorney's fee because it was to be collected from a third party—not a client. *Greer* offered no policy reason for allowing a jury to resolve a fee dispute between an attorney and client, and certainly offered no reason to take that approach in the context of an estate. *Greer* was also based on cases wherein the dispute concerned far more than a fee, such as whether the legal work claimed to have been done was performed. Here, there has been no claim Mauldin and BOAM failed to do anything they were asked to do or required to do. While we fully recognize no two attorneys would ever practice a case alike, *see Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003), *as amended* Aug. 25, 2003 and Sept. 5, 2003, *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), there has simply been no showing Mauldin and BOAM made errors in handling this Estate.

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The distinctions between *Sicotte* and *Greer* and the case at bar are too vast to ignore. We hold Kentucky does not recognize a claim of legal malpractice or breach of fiduciary duty based solely on a fee dispute between an executor or attorney of an Estate and the client in a probate case.

For a more practical reason, the negligence claims in this case could not go forward in Circuit Court. As this Court's order of August 19, 2016, directed, the reasonableness of the fee must be remanded to the Warren District Court for determination in the probate case. Were we to hold the negligence claims could go forward in Warren Circuit Court, we would create the potential for inconsistent results, which we will not do. *See MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324, 340 (Ky. 2014); *Booth v. CSX Transp., Inc.*, 334 S.W.3d 897, 902 (Ky. App. 2011).

Gail's final claim is failure to file periodic settlements resulted in corrective litigation expenses of $100,000. Mauldin and BOAM argue this claim is not properly before us because the lack of periodic settlements was not specifically mentioned in the prehearing statement filed pursuant to CR 76.03. While it is true the statement did not mention periodic settlements, it did mention corrective litigation costs. At this stage of this case, Mauldin and BOAM were clearly on notice of the nature of the claim and cannot cry foul.

Nonetheless, Gail cannot prevail on the claim. Mauldin testified the plan from the start was to file only a final settlement and the district court routinely granted extensions of time deferring timely filing of the periodic settlements. Additionally, Gail's own expert testified the lack of periodic settlements did not damage the Estate. There being no damage, there could be no cause of action.

> One of the essential elements of a good cause of action, whether based on an alleged breach of contract or on a tortious act, is a consequential injury or damage to the plaintiff, and in the absence of injury or damage to a plaintiff or his or her property, he or she has no cause of action, and no right of action can accrue to the plaintiff.

1 Am.Jur.2d Actions § 48 (footnote omitted).

There being no meritorious grounds on which to save this action, the award of summary judgment to Mauldin and BOAM is AFFIRMED.

ALL CONCUR.

BEFORE: ACREE, MAZE, AND NICKELL, JUDGES.

EMPLOYMENT LAW

SEXUAL HARASSMENT

HOSTILE WORK ENVIRONMENT

KENTUCKY CIVIL RIGHTS ACT

ADMISSIBILITY OF EVIDENCE

INSTANCES OF ALLEGED SEXUAL HARASSMENT DIRECTED AT OTHER EMPLOYEES

Plaintiff began working for Beech Bend Park, Inc. (BBP), in 2001, at age of 13, as seasonal employee — Plaintiff worked for BBP from 2001 through 2004 — Plaintiff took time off for birth of her child, then resumed working Christmas season of 2008 — Plaintiff worked until July 2009 when she claimed BBP's owner put his hands down her pants — Plaintiff filed instant action in July 2014 alleging that from 2001 forward, on a weekly basis, owner fondled her breasts and genitalia, made unwelcome comments about her breasts, and boasted that he would bed her if he was younger — Plaintiff alleged that when she asked owner to stop touching her, he would say "Do you like your job?" — Plaintiff claimed that she objected when owner licked her breasts and that owner gave her $4,000 to buy her silence — Alleged activities occurred mostly when plaintiff and owner were alone — Plaintiff had no witnesses, diaries, photographs or recordings of alleged activities — Plaintiff told no one because she did not think anyone would believe her — Prior to trial, owner was dismissed from case — Jury found in favor of BBP — Both parties appealed — AFFIRMED — Trial court did not abuse its discretion in excluding testimony from two female former BBP employees who alleged owner had sexually harassed them — In context of alleged hostile work environment claim filed by single plaintiff, instances of alleged sexual harassment directed at employees other than plaintiff cannot be foundation of successful case — "Severe and pervasive" climate required in sexual harassment case must be unique to plaintiff, *i.e.*, plaintiff had to experience it; plaintiff had to subjectively and objectively view treatment as sexual harassment; and alleged treatment had to impede plaintiff's job performance — Evidence of how another female employee believes she was treated or how she responded to such treatment could not prove plaintiff's case — In addition, such evidence would have been highly prejudicial — Plaintiff must prove how owner harassed her, not others, with such severity and pervasiveness that she quit her job — Alleged experiences of women who worked at BBP after plaintiff quit were irrelevant to proving owner treated plaintiff so badly that she considered BBP to be hostile work environment — Further, this evidence did not show common scheme or plan — Plaintiff alleged that owner engaged in pattern of conduct in which he preyed on financially vulnerable, well-endowed women working at BBP — Allegations from two other women were unsubstantiated — One woman (Wilson) settled her lawsuit and record was sealed — Other woman (Dixon) never filed suit against owner — Both women testified briefly at plaintiff's trial — Neither woman's case was "identical" to plaintiff's experience — Party cannot introduce proof on collateral matter as vehicle for introducing proof trial court has previously determined is inadmissible — On direct examination, plaintiff asked BBP's general manager, who was also owner's daughter and had worked at BBP for 23 years, "In all that time, no employee or officer of Beech Bend has ever been disciplined for sexual harassment have they?" — General manager responded that there had never been a claim or allegation — Trial court did not err in denying plaintiff's request to impeach general manager with allegations from two other women — Plaintiff claimed that she was improperly denied access to sealed record in Wilson's case — Plaintiff filed motion to intervene in Wilson's case and unseal record — Trial court in Wilson's case denied motion to intervene and unseal record — Plaintiff should have appealed from that denial in Wilson's case; however, she did not — That denial is not properly before Court of Appeals — Ultimately, judge gave plaintiff access to entire Wilson record except confidential settlement agreement, but forbade discussion of any content of Wilson record without prior court approval — Defendants were not entitled to summary judgment —

Jami L. Summers v. Beech Bend Park, Inc. (2016-CA-001600-MR) and *Beech Bend Park, Inc.; Beech Bend Raceway Park, Inc.; and Dallas C. Jones v. Jami L. Summers* (2016-CA-001654-MR); Warren Cir. Ct., Grise, J.; Opinion by Judge Nickell, *affirming*, rendered 8/24/18. A motion for discretionary review was filed with the Kentucky Supreme Court on 9/24/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Jami L. Summers appeals from four orders entered by the Warren Circuit Court: a protective order; a trial order and judgment; an order denying a judgment notwithstanding the verdict ("JNOV") or alternatively, a new trial; and, an order denying a renewed motion to show cause. Each order was entered in a lawsuit filed by Summers in 2014 alleging Beech Bend Park, Inc. ("BBP") was a hostile work environment and violated the Kentucky Civil Rights Act (KCRA).[1] Named as defendants were BBP, Beech Bend Raceway Park, Inc. ("Raceway"), and, Dallas Jones, owner and president of both entities. Summers claimed Jones sexually harassed, abused and molested her weekly beginning in 2001, creating conditions so intolerable she was compelled to resign in 2009. After a four-day trial—by a vote of nine to three—jurors found in favor of BBP, the only defendant not dismissed[2] before deliberations began. On review of the record, the briefs and the law, we affirm.

[1] Kentucky Revised Statutes (KRS) 344.010 *et seq*.

> Under the Kentucky Civil Rights Act, it is unlawful for an employer, on the basis of sex, to "discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment . . . [or] to limit, segregate, or classify employees in any way which would . . . tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee." The Kentucky Act is similar to Title VII of the 1964 federal Civil Rights Act and should be interpreted consistently with federal law.

Ammerman v. Board of Educ., of Nicholas County, 30 S.W.3d 793, 797-98 (Ky. 2000) (footnotes omitted).

[2] Jones was dismissed from the case before trial commenced. Summers voluntarily dismissed Raceway at the close of all proof.

According to Summers, she and a friend saw a job posting for BBP on television in 2001. Summers was thirteen and had just graduated eighth grade. Both girls applied and were hired. Summers was immediately trained to operate amusement park rides. During her time as a park employee, she was also a life guard, and an attendant at the ticket booth, main gate, concessions and racetrack.

The seasonal job paid well. Summers' family had little money and she was responsible for providing her own school essentials. She liked the job. While employed at BBP she had frequent contact with Jones.

Summers says she worked at BBP from 2001[3] through 2004. In May 2005, she gave birth to her first child and did not work at the park again until the Christmas holiday season of 2008. She also worked part of the next year before quitting[4] in July 2009 when she claims Jones put his hands down her pants.

[3] BBP maintains Summers did not begin working at the park until 2002.

[4] BBP contends Summers was terminated after missing or being tardy for several work shifts.

Summers filed her verified complaint in July 2014, alleging from 2001 forward on a weekly basis Jones fondled her breasts and genitalia, made unwelcome comments about her breasts, and boasted he would bed her if he was younger. When Summers told Jones to stop touching her, as she contends she frequently did, he would say, "Do you like your job?" Once, when Summers objected to Jones licking her breasts during a power outage, she claims Jones coerced her silence by giving her $4,000 to buy a vehicle.

Because much of the alleged activity occurred while Summers and Jones were alone—often in Jones' truck, scooter or golf cart traveling around the park—Summers had no corroborating proof. She had no witnesses, no diaries, no photographs and no recordings. She could specify no date on which Jones touched her inappropriately. Thinking she would not be believed, she told no one of Jones' unwanted advances—not family, friends, co-workers or supervisors. After leaving BBP in 2009, Summers sought legal advice, but no one returned her call.

Summers raises three claims on appeal. Likewise, BBP, Raceway and Jones—the three original defendants—raise three issues on cross-appeal.

APPEAL

Summers' first claim is the trial court erred in excluding testimony from two other women[5]—former BBP employees, one of whom had filed suit against BBP, Raceway and Jones—alleging Jones had sexually harassed them. Summers argues their testimony was critical to proving Jones' harassment of her created a "sufficiently severe or pervasive" atmosphere, altered her job conditions and produced "an abusive working environment." *Ammerman*, 30 S.W.3d at 798 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405, 91 L. Ed. 2d 49 (1986)). In contrast, BBP argues the trial court properly excluded the testimony because admitting it would have run afoul of KRE[6] 401, 403 and 404(b). We review the trial court's ruling for an abuse of discretion. *Trover v. Estate of Burton*, 423 S.W.3d 165, 173 (Ky. 2014).

> In 1986, the United States Supreme Court decided the watershed case of *Meritor Saving Bank v. Vinson*, [477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)], which held that a sexual harassment claim can be brought based upon a hostile or abusive work environment. For sexual harassment to be actionable under the *Meritor* standard, it must be sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive working environment. [*Meritor*, 477 U.S. at 67, 106 S.Ct. at 2405, 91 L.Ed.2d at 60; *Harris v. Forklift Systems*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993); *Faragher v. City of Boca Raton*, 524 U.S. 775, 784-86, 118 S.Ct. 2275, 2282-83, 141 L.Ed.2d 662, 675 (1998); *Meyers* [*v. Chapman Printing Co. Inc.*, 840 S.W.2d 814, 821 (Ky. 1992)]]. In other words, hostile environment discrimination exists "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." [*Williams v. General Motors Corp.*, 187 F.3d 553, 560 (6th Cir. 1999) (citing *Harris*, 510 U.S. at 21, 114 S.Ct. 367 (citations and quotation marks omitted))]. Moreover, the "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." [*Carrero v. New York City Housing Authority*, 890 F.2d 569, 577 (2d Cir. 1989)]. As stated by the United States Supreme Court in *Harris v. Forklift Systems*, the harassment must also be both objectively and subjectively offensive as determined by "looking at all the circumstances." [510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295, 302; *Faragher*, 524 U.S. at 786-87, 118 S.Ct. at 2283, 141 L.Ed.2d at 676; *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80-82, 118 S.Ct. 998, 1002-03, 140 L.Ed.2d 201, 208 (1998) (quoting *Harris*)]. These circumstances may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." [*Harris*, 510 U.S. at 23, 114 S.Ct. at 371.]

Ammerman, 30 S.W.3d at 798.

[5] In the argument portion of her brief, Summers does not specify whose testimony was wrongly excluded. In preparation for trial, she deposed multiple women who had worked at BBP. Based on the section of her brief titled "Relevant Procedural History," we assume she is referencing Connie Wilson and her daughter, Aliyah Dixon. A third former BBP employee, Cheryl French, is mentioned by BBP in its brief on this issue. French's suit was unresolved when Summers' case was tried. French testified in her deposition she did not leave BBP because of anything Jones had done. French did not testify at trial.

[6] Kentucky Rules of Evidence.

In the context of an alleged hostile work environment claim—filed by a single plaintiff—instances of alleged sexual harassment directed at *employees other than* the plaintiff cannot be the foundation of a successful case. *Id.* Reading *Ammerman* too broadly, Summers claims testimony from other female park employees was critical to establishing the hostile work environment necessary to prevail at trial. This is a misstatement of the law. The "severe and pervasive" climate required by *Ammerman* must be unique to Summers—she had to experience it; she had to subjectively and objectively view the treatment as sexual harassment; and the alleged treatment had to impede her job performance. *Id.* (citing *Harris*, 510 U.S. at 23, 114 S.Ct. at 371). As the trial court found, introducing proof of how another female employee believes she was treated or how she responded to such treatment could not prove Summers' case and would have been highly prejudicial to the defense.

The questions jurors were impaneled to answer in Summers' case were whether:

> 1. [Summers], because of her female sex, was subjected to unwelcome sexual advances, unwelcome sexual touching, or other unwelcome verbal or physical conduct of a sexual nature;
>
> AND
>
> 2. That such conduct was so severe or pervasive that it had the purpose or effect of unreasonably interfering with a reasonable female employee's work performance or creating an intimidating, hostile or offensive work environment for a

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reasonable female employee;

AND

3. That such conduct caused injury to [Summers'] emotional and/or mental well-being.

Under the foregoing instruction, which is not challenged as erroneous, jurors were not required to make any finding about the experience of any BBP employee other than Summers. Admitting such testimony would have been extraneous.

Having no witnesses to shed light on her own experience with Jones, Summers came to trial armed with only her own testimony and anticipated testimony from other female employees who claimed Jones had harassed them. But suggesting Jones may have touched other women in a sexual way could not prove Jones touched Summers that way and did so with such severity and pervasiveness she felt it necessary to quit a job she testified she liked. Separating the wheat from the chaff, as the sole plaintiff, Summers had to prove Jones harassed *her*—not others—with such severity and pervasiveness she quit her job. *Id.* The alleged experiences of women who worked at BBP *after* Summers quit (or was terminated) was irrelevant to proving Jones treated Summers so badly Summers considered BBP to be a hostile work environment. A majority of jurors recognized Summers had not sustained her burden and returned a verdict in favor of BBP.

Summers argues the proposed testimony was admissible to show Jones' "common scheme or plan"—an exception to KRE 404(b) and the basis of the trial court's exclusion of other acts evidence. Summers argues the sexual assaults on Wilson and Dixon were "close in time," occurred "in the exact same manner" as Jones' harassment of her, and were "eerily similar." We disagree.

KRE 404 reads in relevant part:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . .

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

The purpose of the rule

is to guard against the substantive use of so-called character or propensity evidence. This type of evidence is generally evidence that on other occasions a person has acted in a particular way, and it is offered as proof that the person, being the sort of person who does that sort of thing or acts that way, is likely to have done the same sort of thing or acted that same way on the occasion at issue in the case. Our courts have long been concerned that triers of fact are apt to give such evidence more weight than it deserves, and that such evidence poses a substantial risk of distracting the trier of fact from the main question of what actually happened on a particular occasion. *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007).

Trover, 423 S.W.3d at 172. KRE 404(b) does not completely prohibit use of other acts evidence at trial—it may be offered for another purpose—but only "if (1) it is relevant for a legitimate purpose; (2) it is probative, *i.e.*, only if there is sufficient evidence that the other crime, wrong, or act actually occurred; and (3) its probative value is not substantially outweighed by any prejudicial effect." *Id.* (citing *Bell v. Commonwealth*, 875 S.W.2d 882, 889-91 (Ky. 1994)).

In the case at bar, Wilson's lawsuit was settled and the record was sealed. Wilson's claims against Jones were unsubstantiated. Dixon never filed suit against Jones. The allegations of both women—being bare and untested—were not probative under *Bell*.

The similarity of Jones' treatment of Wilson and her daughter, Dixon, was not "identical" to Summers' experience. Both Wilson and Dixon testified briefly at trial. Both stated they considered Jones to be dishonest.

No deposition of Wilson appears in the appellate record. Thus, we do not know how she would have testified about her interaction with Jones. Dixon was deposed in 2016 at the age of twenty-one. She stated she worked two summers in the park—2009-2011—beginning when she was fifteen. She stated on one occasion Jones "made a comment about the size of my breasts and how they were similar to my mom's. And then I went -- for prom I went to show them my dress so they could see me and he told me I had a healthy body." When asked whether she had seen Jones touch her mother's breasts, Dixon responded, "I would see him brush up against her but not just literally grab, like that." Dixon further stated Jones never touched her personally.

Summers theorized Jones engaged in a pattern of conduct in which he preyed on financially vulnerable, well-endowed women working at the park. Her strategy was to show a common plan or scheme, but the evidence she could muster did not support her theory. First, neither Wilson nor Dixon worked at BBP with Summers or even at the same time as Summers. Neither woman could establish a hostile work environment existed at the park between 2001 and 2009. Second, there was no proof Wilson or Dixon were in financial straits. Third, consistent with her deposition, Dixon would have testified Jones "brushed up" against Wilson but did not "grab" her breast. Fourth, Dixon stated Jones never touched her. Fifth, there was no mention of Jones putting his hands down Wilson's or Dixon's pants. Sixth, there was no mention of Jones buying Wilson's or Dixon's silence. Seventh, neither woman testified about the frequency of Jones' actions. Objective review of the evidence casts doubt on whether testimony from Wilson and Dixon about their personal experience with Jones would have secured a jury verdict for Summers. Wilson's and Dixon's experiences were not similar enough to constitute a common plan or scheme.

Allowing Wilson and Dixon to reveal their personal experiences with Jones would have distracted jurors from the case Summers filed and would have improperly bolstered Summers' allegation—precisely what KRE 404 forbids. Because their testimony did not tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence[,]" the other acts testimony was irrelevant under KRE 401. Moreover, it was properly excluded because its "probative value [was] substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. The trial court properly exercised its discretion in excluding allegations of other acts. *Trover*, 423 S.W.3d at 173.

Summers' second claim[7] is she was improperly prohibited from impeaching Jones and Charlotte Gonzalez—Jones' daughter and BBP's general manager—about whether any BBP employee or officer had ever been disciplined for sexual harassment, to which Gonzalez responded, "[n]ever had a claim or an allegation." Summers argues this was a "lie" because Wilson and French had filed suit against BBP. As soon as Gonzalez responded, defense counsel asked to approach the bench where counsel sought to impeach Gonzalez with claims made by Wilson and French. Defense counsel stated Gonzalez was responding in terms of an insurance policy.

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[7] Summers bases her claim in part on an unpublished case rendered by the Supreme Court of Kentucky in 2011. Said case was not included in the appendix to her brief as required by Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

The trial court disallowed the impeachment, stating, "you asked the question, live with the answer." The trial court then reiterated—as it had stated multiple times during the run-up to trial and throughout trial—claims by BBP employees other than Summers are not being tried, "we're gonna try *this* case."

We resolve this issue on the strength of *Commonwealth v. Prater*, 324 S.W.3d 393 (Ky. 2010), from which we quote at length.

This case forces us to apply the somewhat confusing rule against collateral impeachment. In fact, there is no particular rule in the Kentucky Rules of Evidence (KRE) clearly addressing impeachment on collateral facts, matters, or issues. Yet, our case law continues to hold that impeachment on collateral matters by extrinsic evidence is not allowed. Despite the clear prohibition from case authority against impeachment on collateral matters by extrinsic evidence, we still review the trial court's decision to admit evidence over objections of collateral impeachment under an abuse of discretion standard of review as we explain below.

Professor Lawson notes that rules concerning collateral impeachment "are easy to describe but very difficult to apply, because of the complexity involved in determining 'collateralness.'" And because determinations of the collateralness are so fact-specific and generally not clear-cut, Kentucky precedent provides that a trial court's decision to admit impeachment evidence on

> a purportedly collateral matter is subject to an abuse of discretion standard: "decisions on collateralness fall within the discretion of the judge and are reviewed for abuse of that discretion[; and this is] no surprise since they depend so heavily on the specific facts of the case and require a careful exercise of sound judgment in the heat of courtroom battle."

324 S.W.3d at 397-98 (footnotes omitted). In *Prater*, impeachment on a collateral matter was allowed because Prater raised the issue on direct examination and it would have been unfair to allow the question to go unexplored. Just like *Prater*, Summers raised the issue when questioning Gonzalez on direct examination as follows:

> Q: So the last 23 years you have seen probably thousands of employees come and go?
>
> A: I have.
>
> Q: In all that time, no employee or officer of Beech Bend has ever been disciplined for sexual harassment have they?
>
> A: Never had a claim or an allegation.

As the trial court stated during the bench conference, "[y]ou invited that answer."

Prater queried:

> "[m]ay a party who first opens the door to a collateral issue take advantage of the prohibition against collateral facts impeachment?" On the one hand, "[t]he damaging effects of issue proliferation do not depend upon who takes the initiative to introduce a collateral issue into the case." On the other, "one must harbor at least some doubt as to whether a party should be permitted to raise a collateral matter and then use the law as a shield against full contradiction of that matter." And Professor Lawson notes a split among Kentucky cases before adoption of the Kentucky Rules of Evidence. He cites *Dixon v. Commonwealth*, [487 S.W.2d 928 (Ky. 1972),] as indicating that impeachment on collateral matters may be permitted when a party "opens the door" to a collateral issue through that party's testimony on direct examination. He also cites *Keene v. Commonwealth*[, 307 Ky. 308, 210 S.W.2d 926 (1948), *overruled on other grounds by Colbert v. Commonwealth*, 306 S.W.2d 825, 828 (Ky. 1957), *overruled by Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991] as an opposing example where impeachment on a collateral matter was considered improper without any discussion of the fact that the collateral issue was first raised by the defendant upon direct examination. Professor Lawson concludes that this split "may suggest that outcomes should depend upon specific facts and circumstances of a case and the exercise of sound discretion by the trial judge." [Robert G. Lawson, *The Kentucky Evidence Law Handbook* (4th ed. 2003) §4.05[4].]
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> In light of the concerns raised in Professor Lawson's discussion—desire to avoid issue proliferation versus potential use of collateral impeachment rules as a "license to lie"—including an apparent split in authority, we conclude that the trial court has discretion to determine whether or not to permit impeachment on collateral issues when a party has opened the door to such issues by raising them in direct testimony. And we believe that our conclusion is supported by Kentucky precedent. To the extent that some Kentucky cases might appear to hold that a trial court invariably lacks discretion to permit impeachment on a collateral issue raised by a party on direct examination, such cases are hereby overruled.
>
> We believe the trial court is in the best position to decide whether the facts and circumstances of that case present a scenario in which the evil of allowing a party to offer voluntarily what may be knowingly false testimony with impunity outweighs the evil of having to devote trial time to impeachment on collateral matters. And we now clearly hold that the trial court has discretion to permit or deny impeachment by extrinsic evidence on a collateral issue raised by a party on direct examination.

324 S.W.3d at 399-400 (footnotes omitted).

Just as *Prater* involved a unique set of facts, so too does this case. Summers had no direct proof of her own claim. Her trial strategy was to introduce unsubstantiated allegations of sexual harassment made by other women against Jones to convince jurors she had been treated similarly. Had Summers been allowed to introduce the desired proof, trial would have shifted from the case Summers had pled in her complaint to allegations made by others on unrelated, unsubstantiated matters. As a result, BBP would have had to defend those claims, resulting in a trial within a trial—something the trial court rightly strove to avoid.

As a corollary to *Prater*, we hold a party cannot introduce proof on a collateral matter as a vehicle for introducing proof the trial court has previously determined is inadmissible. That is precisely what happened here. Defense counsel knew he could not impeach Gonzalez with unrelated allegations made by other women and admitted as much at the bench. When counsel saw an opening based on Gonzalez' response, he pounced and tried to open the door. The trial court rightly prohibited the attempt.

The trial court consistently ruled jurors would try only Summers' complaint. As it was, it took five days. Had collateral proof been admitted, it would not have provided probative support for Summers' case, it would have been highly prejudicial to the defense, and it would have unnecessarily prolonged trial with extraneous matters. Based on a review of the record before us, we simply cannot say the trial court erred in its evidentiary rulings. There was no abuse of discretion. *Id.*

In another aspect of this claim, Summers alleges she was wrongly precluded from impeaching Jones with inconsistent prior testimony on multiple topics—whether Jones was circumcised; had filed a false insurance application; had been held in contempt in a property dispute; had admitted kissing Wilson and touching her breast; and had commented on Dixon's breasts and compared them to her mother's. "Generally, the law disfavors impeachment of a witness on a collateral matter through the introduction of extrinsic evidence." *Brown v. Commonwealth*, 416 S.W.3d 302, 311 (Ky. 2013) (citing *Prater*, 324 S.W.3d at 399). As an example, whether Jones was circumcised was irrelevant in Summers' case as she never claimed to have seen Jones' genitalia. In contrast, whether Jones was circumcised was apparently an issue in *Wilson v. Beech Bend Park, Inc.*, Warren Circuit Case No. 12-CI-01128, because of the precise accusations made in that case. The same is true of whether Jones kissed Wilson, touched Wilson's breast, and commented on Dixon's body. Those events were unique to Wilson and her daughter and they were not contemporaneous with any action alleged by Summers.

There was a dearth of proof in Summers' case. As a result, she tried to introduce anything negative about Jones to besmirch his reputation, even though it was wholly unrelated to her case and did not tend to prove her case. As stated previously, the trial court properly recognized the proof offered was low in probative value, high in prejudicial value, and irrelevant to the claims jurors were deciding. The trial court properly exercised its discretion in excluding testimony on collateral matters. We have no reason to disturb the result.

Summers' final claim is the trial court committed reversible error in denying her full access[8] to the *Wilson* record. She specifically argues the trial court sealed the *Wilson* record without holding a hearing and without finding good cause as required by *Fiorella v. Paxton Media Grp., LLC*, 424 S.W.3d 433 (Ky. App. 2014). BBP—a party to both *Wilson* and this case—maintains a hearing was held in *Wilson*, good cause for sealing the record was shown, and Summers' access to the record was appropriately limited by the trial court. During a hearing in the Summers case, the trial court—which presided during both *Wilson* and *Summers*—also indicated the request to seal the *Wilson* record had been heard and good cause shown and found before the order sealing the record was entered.

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[8] During a hearing on April 27, 2015, counsel for Summers stated, "I'm okay with for your eyes only."

We devote little time to this claim because Summers failed to pursue it properly. In the *Wilson* case, Summers moved to intervene in and unseal the record. In the *Wilson* case, the trial court entered an order denying the motion to intervene and unseal the *Wilson* record. It is from that order—in the *Wilson* case—Summers should have sought appellate review. She did not. Hence, her claim is not properly before this panel. Furthermore, the judge ultimately gave Summers' legal team access to the entire *Wilson* record except the confidential settlement agreement but forbade discussion of any content of the *Wilson* record without prior court approval. Summers having failed to properly seek appellate review in the *Wilson* case, we discern no abuse of discretion and no error in this appeal.

CROSS-APPEAL

All three original defendants filed a timely cross-appeal alleging three errors made by the trial court: the complaint should have been dismissed as time-barred; summary judgment should have been granted in favor of the defendants because Summers could prove neither existence of a hostile work environment nor violation of the KCRA; and BBP should have received attorney's fees. We view the cross-appeal as an effort by the defense to protect itself in the event of reversal on appeal.

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Having affirmed the trial court, we discuss the cross-appeal in cursory fashion.

First, suit was filed within the applicable five-year statute of limitations. KRS 413.120(2). Summers alleged Jones improperly touched her on a weekly basis during seasonal employment between 2001 and 2009, however, the only incident for which she could specify a date occurred in July 2009, the day she says Jones put his hands down her pants and she quit. The trial court properly found this incident occurred within the allowable window; a finding the defense does not challenge. Their dispute centers on the court's additional finding of activity allegedly occurring between 2001 and 2004 being "part of the same unlawful unemployment practice[,]" and its further finding this activity occurred while Summers was an infant which tolled the statute of limitations until August 2005 when she turned eighteen. KRS 413.170(1). Applying the "continuing violation doctrine," the court "consider[ed] conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice.'" *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 107, 122 S.Ct. 2061, 2069, 153 L.Ed.2d 106 (2002) (citations omitted). Subject matter, frequency, and permanence are three of many criteria to be considered when determining whether to apply the doctrine. *Ammerman*, 30 S.W.3d at 798-99. We discern no reason to disturb the trial court's decision.

Second, summary judgment, CR 56, is a means of disposing of civil cases where the nonmoving party cannot prevail, thereby avoiding unnecessary trials. T*ransportation Cabinet, Bureau of Highways, Commonwealth of Ky. v. Leneave*, 751 S.W.2d 36, 38 (Ky. App. 1988). BBP sought summary judgment on two intertwined grounds—the single 2009 act could not possibly create the "severe and pervasive" atmosphere needed to prove a hostile work environment and Summers could not prove BBP violated the KCRA.

While the 2009 touching was the only alleged act to have occurred within the window for filing a timely claim, that act did not have to be considered in isolation. Summers alleged Jones touched her weekly between 2001 and 2004 and again in 2009. Depending on the proof Summers could muster, she may have convinced jurors Jones created a hostile workplace environment at BBP lasting many years. Awarding the defense summary judgment would have been improper.

BBP also sought summary judgment claiming Summers could not sustain her burden of proving BBP violated the KCRA.

> A plaintiff may establish a violation of Title VII by proving that the discrimination based on sex created a hostile or abusive work environment. To establish a prima facie case of a hostile work environment based on sex, a plaintiff must show that:
>
> (1) she is a member of a protected class,
>
> (2) she was subjected to unwelcome sexual harassment,
>
> (3) the harassment was based on her sex,
>
> (4) the harassment created a hostile work environment, and that
>
> (5) the employer is vicariously liable.

Gray v. Kenton County, 467 S.W.3d 801, 805 (Ky. App. 2014) (quoting *Clark v. United Parcel Service, Inc.*, 400 F.3d 341, 347 (6th Cir. 2005)).

Viewing the evidence in the light most favorable to Summers, it appeared possible Summers could establish all five factors required for a successful claim. She was part of a protected class; she did not want Jones' sexual advances; she claimed Jones repeatedly fondled her breasts and genitalia indicating he groped her because she was female; she endured sexual harassment for years until she finally quit a good paying job she liked; and as owner and president of BBP and Raceway, Jones was vicariously liable for his actions toward Summers—a park employee. In light of Summers' allegations, we cannot say the defense was entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). We affirm denial of summary judgment.

Finally, KRS 344.450 reads:

> [a]ny person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the *plaintiff's attorney of record* and any other remedies contained in this chapter.

(Emphasis added.) BBP claims KRS 344.450 violates Kentucky's equal protection provision, presumably referring to Section 3 of the Kentucky Constitution. The gist of BBP's argument is attorney's fees should not be limited to plaintiff's counsel, but should be available to any prevailing counsel.

We need not—and do not—address this claim because BBP failed to notify the Office of the Attorney General ("OAG") it was challenging the constitutionality of a statute as required by KRS 418.075(1). Noncompliance with that statute is fatal. *Benet v. Commonwealth*, 253 S.W.3d 528, 532-33 (Ky. 2008).

BBP argued its request for attorney's fees at a hearing on September 12, 2016. At that time, the trial court told defense counsel he would need to notify the OAG of the challenge and defense counsel agreed. However, we are not cited to any point at which the OAG was given notice of the constitutional challenge. Furthermore, in her reply brief, Summers stated BBP had *not* notified the OAG. BBP did not correct Summers—presumably because there was no correction to be made—and did not comment on the statement in its reply brief. In light of BBP's failure to preserve the issue by giving notice to the OAG, we say nothing more.

For the foregoing reasons, we affirm the orders of the Warren Circuit Court *in toto*.

ALL CONCUR.

BEFORE: ACREE, DIXON, AND NICKELL, JUDGES.

EMPLOYMENT LAW

EDUCATION

ADMINISTRATIVE LAW

COUNTY PUBLIC SCHOOLS

LIMITED TEACHING CONTRACT

Plaintiff was hired for 2013-2014 school year as non-tenured teacher with limited contract of employment with Jefferson County Public Schools (JCPS) — Contract reserved JCPS Superintendent's right to transfer, suspend, non-renew or terminate plaintiff's employment — Plaintiff worked in JCPS elementary school for first year of her teacher internship — Plaintiff was counseled on multiple occasions concerning perceived deficiencies in classroom management, teaching performance, and student behavior supervision — Plaintiff failed to turn in completed work for her internship program or was late in submitting work — Near end of school year, elementary school principal, who supervised plaintiff's internship, recommended that Superintendent not renew plaintiff's limited employment contract — Plaintiff did not file grievance or challenge recommendation — Superintendent did not renew limited teaching contract for 2014-2015 — Since plaintiff did not successfully complete her internship, she lost her certification — Plaintiff asked Superintendent for written explanation — Superintendent provided detailed response with multiple supporting documents attached to response — Fifteen months later, plaintiff sought to appeal her evaluations and nonrenewal by requesting Local Evaluation Appeals Panel (LEAP) hearing — JCPS denied request as being untimely — Plaintiff filed petition in Franklin Circuit Court against principal, Superintendent, and JCPS (collectively JCPS) seeking, among other things, reinstatement, damages, and injunctive relief — One month later, plaintiff requested and was granted State Evaluation Appeals Panel (SEAP) hearing — SEAP found that appeal was not ripe for review because LEAP had denied initial hearing — Matter was remanded to LEAP to convene hearing — JCPS moved circuit court to dismiss complaint, or, in alternative, to transfer action to Jefferson Circuit Court — Franklin Circuit Court dismissed breach of contract claim based on statute of limitations, then transferred remainder of case to Jefferson Circuit Court — Meanwhile, LEAP hearing was held — Both parties presented evidence — LEAP upheld evaluations and nonrenewal of plaintiff's limited teaching contract — Plaintiff appealed to SEAP — SEAP held hearing — All parties were present — Entire LEAP record was presented to SEAP — All parties filed prehearing written briefs — SEAP entered final order noting that its jurisdiction was limited to review of procedural matters already addressed by local panels and that it did not have authority to review or amend

Superintendent's decision not to renew limited teaching contract — SEAP found that plaintiff had not shown material procedural violation sufficient to overturn LEAP's decision — Plaintiff then filed new "Verified Petition" in Jefferson Circuit Court challenging SEAP's decision — Claims were similar to those brought tin earlier action — The two actions were consolidated — JCPS moved to dismissed both actions — Jefferson Circuit Court dismissed both actions — Plaintiff appealed — AFFIRMED — Administrative hearing procedures set forth in KRS Chapter 13B apply to all administrative hearings conducted by agency except those which are specifically exempted — Pursuant to KRS 13B.101(2), administrative hearing means any type of formal adjudicatory proceeding conducted by an agency as required or permitted by statute or regulation to adjudicate legal rights, duties, privileges, or immunities of named person — KRS Chapter 13B creates only procedural rights and is not to be construed to confer upon any person a right to hearing not expressly provided by law — There is no express provision for judicial review in statutory framework or administrative regulations related to SEAP — There is no appeal to courts from action of administrative agency as matter of right — SEAP does not conduct administrative hearings as envisioned by KRS Chapter 13B — SEAP is review panel possessing very limited statutorily defined functions — There is no provision for hearing officer, presentation or cross-examination of witnesses, or any of traditional hallmarks of administrative hearing — SEAP merely reviews actions of LEAP to determine compliance with approved evaluation plan and thereby provide accountability and encouragement for local districts to implement appropriate evaluation plans — SEAP is not empowered to reinstate teacher to prior position or to provide any other remedy apart from setting aside defective evaluation — Thus, SEAP's actions do not fall within KRS Chapter 13B — However, courts may assume jurisdiction in absence of specific statutory authorization to prevent arbitrary action — Arbitrariness in administrative actions occurs when agency acts in excess of statutory powers, denies due process, or makes decision unsupported by substantial evidence — In instant action, SEAP's actions were not arbitrary — Pursuant to KRS 1161.750, Superintendent has express authority and nearly unfettered discretion on whether to renew plaintiff's employment — Superintendent exercised right not to re-employ plaintiff based on numerous unfavorable evaluations and plaintiff's continued decline in performance over course of school year —

Shaina M. Geron v. Jefferson County Board of Education d/b/a Jefferson County Public Schools; Angela Hosch, Principal; Dr. Donna M. Hargens, Superintendent; and State Evaluation Appeals Panel, Kentucky Board of Education, Kentucky Department of Education, Education and Workforce Development Cabinet (2017-CA-000540-MR); Jefferson Cir. Ct., Cunningham, J.; Opinion by Judge Nickell, *affirming*, rendered 8/31/18. A petition for rehearing was filed on 9/25/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Shaina M. Geron appeals from the Jefferson Circuit Court's dismissal of her action seeking review of the decision not to renew her limited teaching contract with Jefferson County Public Schools ("JCPS") which decision had been upheld following hearings before the Local Evaluation Appeals Panel ("LEAP") and the State Evaluation Appeals Panel ("SEAP"). Following a careful review, we discern no error and affirm.

Geron was a non-tenured teacher with a limited contract of employment for JCPS. The contract specifically stated it was for the 2013-2014 school year and reserved the right of the Superintendent of JCPS "to transfer, suspend, non-renew, or terminate" the employment. Geron worked at Portland Elementary School during the 2013-14 school year, the first year of her teacher internship. She was directly supervised by Principal Angela Hosch.

On multiple occasions during the year, Geron was informed and counseled regarding perceived deficiencies in her classroom management, teaching performance and student behavior supervision. Additionally, several times Geron failed to turn in completed work for her Kentucky Teacher Internship Program ("KTIP")[1] or was tardy in submitting the work. At her mid-year summative evaluation, Geron's performance on all benchmarks was classified as "inconsistently meets" which means an "employee's performance is less than the performance criteria expected and needs improvement." The deficiencies were described in detail in a summative evaluation report. Unfortunately, Geron's performance did not improve, despite continued counseling and advice from school administrators.

[1] KTIP is a program for new teachers administered by the Educational Professional Standards Board of the Kentucky Department of Education.

Near the end of the school year, Geron received another summative evaluation which reflected the decline in her performance. The rating on all benchmarks was classified as "does not meet" which means her "performance [was] substantially below expectations and is unacceptable. The employee rarely accomplishes the performance criteria even with frequent assistance and support." Again, detailed information was provided in the summative evaluation report outlining Geron's failure to improve from her mid-year evaluation. Hosch recommended Superintendent Dr. Donna M. Hargens not renew Geron's limited employment contract for the following year. Geron did not file a grievance or otherwise challenge the recommendation.

Superintendent Hargens informed Geron by letter of the nonrenewal of her limited teaching contract for the 2014-15 school year. Because Geron had not successfully completed her KTIP, she lost her teaching certification. Due to this loss of certification, Superintendent Hargens issued another letter informing Geron she would be ineligible to hold a teaching position after June 30, 2014.

Geron subsequently requested a written explanation from Superintendent Hargens for the nonrenewal of her limited teaching contract. A detailed response was issued explaining the nonrenewal with multiple supporting documents attached thereto. Fifteen months after her nonrenewal, Geron—through counsel—sought to appeal her evaluations and nonrenewal, specifically requesting a LEAP hearing. Because JCPS believed the time for seeking such a hearing was fourteen days after receiving notice, the request was denied as untimely.

Geron filed a "Verified Petition" in Franklin Circuit Court against Hosch, Superintendent Hargens and JCPS (collectively "JCPS appellees") seeking reinstatement to her teaching position, damages and injunctive relief based on claims of breach of contract, violation of statutory and regulatory procedures precipitating her nonrenewal, age discrimination, and religious discrimination. Approximately one month later, Geron requested and was granted a SEAP hearing. Geron and representatives from JCPS, all represented by counsel, attended the SEAP hearing. The SEAP determined the appeal was not ripe for review because the LEAP had denied an initial hearing. On December 17, 2015, the matter was remanded to the LEAP to convene a hearing.

On December 28, 2015, the JCPS appellees moved to dismiss Geron's complaint or, alternatively, to transfer the action to Jefferson Circuit Court. Geron responded and challenged what she believed was the improper inclusion of numerous documents to the motion to dismiss.

On April 15, 2016, the Franklin Circuit Court dismissed Geron's breach of contract claim upon concluding the statute of limitations period had run before the action was filed. The remainder of the claims were transferred to Jefferson Circuit Court for disposition. After Geron moved to alter, amend or vacate the April 16 order, the Franklin Circuit Court ordered the record returned from Jefferson Circuit Court. Although technically granting Geron's motion, by order entered on August 21, 2016, the Franklin Circuit Court reaffirmed its prior dismissal of her breach of contract claim and transfer of the action to Jefferson Circuit Court.

While the Franklin Circuit Court action was progressing, a LEAP hearing was convened at which all parties were represented by counsel and were permitted the opportunity to present evidence supportive of their respective positions. The LEAP upheld the evaluations and nonrenewal of Geron's limited teaching contract. Geron timely appealed the decision to the SEAP which conducted a hearing on October 4, 2016. Again, all parties were present and represented by counsel; the entire LEAP record was presented to the SEAP and all parties filed prehearing written briefs. In its final order dated October 25, 2016, the SEAP noted its jurisdiction was limited to review of procedural matters already addressed by local panels and it did not have authority to review or amend a superintendent's decision not to renew a limited teaching contract. After considering the arguments and exhibits presented, the SEAP concluded Geron had failed to show a material procedural violation sufficient to overturn the decision of the LEAP.

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

On November 23, 2016, Geron filed a "Verified Petition" in Jefferson Circuit Court challenging the decision of the SEAP.[2] The new petition raised similar claims and allegations to those brought in the earlier action. Geron's subsequent motion to consolidate the two actions was granted. On January 1, 2017, the JCPS appellees moved to dismiss the junior action. The Jefferson Circuit Court granted the motion and Geron timely moved to reconsider. In denying reconsideration, the Jefferson Circuit Court clarified the dismissal was applicable to both of the consolidated actions. This appeal followed.

[2] The effect of initiating the new suit was to bring the Kentucky Department of Education (KDE) and Kentucky Board of Education (KBE) into the fray.

Geron raises multiple allegations of error in seeking reversal. First, she contends attaching multiple documents to the first motion to dismiss filed by the JCPS appellees in Franklin Circuit Court was improper, those documents should be disregarded, and consideration of the exhibits by the court constituted reversible error. Second, Geron alleges the SEAP decision to uphold nonrenewal of her limited teaching contract was arbitrary and capricious and, therefore, subject to judicial review. She believes the dismissal of her petitions deprived her of such review. Next, she contends JCPS materially breached its contractual promises, thereby rendering the Franklin Circuit Court's dismissal of her breach of contract claim erroneous. Finally, Geron contends she presented a *prima facie* showing of religious discrimination sufficient to withstand a motion to dismiss.

In response, the JCPS appellees, KDE and KBE (collectively "school appellees") contend SEAP decisions are not subject to judicial review, thereby rendering the circuit court's dismissal appropriate. Alternatively, the JCPS appellees argue the documents attached to the motion to dismiss were referred to and relied on by Geron in her Verified Petition and thus were properly tendered to and considered by the court; Geron was not denied due process and no arbitrary action occurred at the administrative level;[3] no breach of contract occurred when Geron's limited teaching contract was not renewed following its expiration; and Geron did not establish a *prima facie* case for religious discrimination. Discerning no error in the proceedings below, we affirm.

[3] KDE and KBE likewise assert Geron was provided sufficient due process and the SEAP's decision was not arbitrary.

First, Geron presents what she believes is a "threshold matter," arguing the inclusion of "twenty-six (26) exhibits, spanning one hundred and twenty-seven (127) pages" by the JCPS appellees in their first motion to dismiss was improper. She contends these documents should be disregarded and the trial court's failure to do so constituted reversible error. Geron alleges consideration of the exhibits converted the motion to dismiss into one for summary judgment, a motion which would be clearly premature as no discovery had been completed, thereby mandating reversal. Geron's assertions fall wide of the mark.

In her petition, Geron referenced and relied on the contents of the exact documents the JCPS appellees attached to their motion to dismiss. They were clearly essential to her case as she made multiple allegations regarding the content and meaning of these documents. To cry foul when these matters are presented to the court for its consideration is disingenuous at best. Generally, when a court considers matters outside the pleadings, a motion to dismiss is converted to a motion for summary judgment. CR[4] 12.02. However, when the documents or exhibits are central to the issues raised in a plaintiff's complaint and referenced therein, even if not incorporated by reference or attached to the complaint, "the records are subject to consideration without having to convert the motion under review to a summary judgment motion." *Netherwood v. Fifth Third Bank, Inc.*, 514 S.W.3d 558, 564 (Ky. App. 2017). *See also Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 514 (6th Cir. 1999) (document not fully incorporated by reference or attached to complaint may be considered part of pleadings when referred to in complaint and central to plaintiff's claim). The attached documents were not "matters outside the pleadings" as Geron suggests and were properly placed before the trial court. No error occurred.

[4] Kentucky Rules of Civil Procedure.

Second, Geron contends the SEAP's upholding of Superintendent Hargens' nonrenewal of her limited teaching contract constituted an arbitrary and capricious action. She argues judicial review is required under KRS[5] Chapter 13B and the dismissal of her petitions deprived her of such review. The school appellees counter that the SEAP does not conduct administrative hearings pursuant to KRS Chapter 13B and thus, its decisions are not subject to judicial review.

[5] Kentucky Revised Statutes.

The administrative hearing procedures set out in KRS Chapter 13B apply to all administrative hearings conducted by an agency except those which are specifically exempted. KRS 13B.020(1). Pursuant to KRS 13B.010(2), "'[a]dministrative hearing' or 'hearing' means any type of formal adjudicatory proceeding conducted by an agency as required or permitted by statute or regulation to adjudicate the legal rights, duties, privileges, or immunities of a named person." However, KRS Chapter 13B "creates only procedural rights and shall not be construed to confer upon any person a right to hearing not expressly provided by law." KRS 13B.020(1). Importantly, no express provision for judicial review appears in the statutory framework or administrative regulations related to the SEAP. "There is no appeal to the courts from an action of an administrative agency as a matter of right." *Board of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978). Thus, unless the SEAP conducts "administrative hearings" the provisions of KRS Chapter 13B do not apply.

Our review reveals SEAP proceedings simply do not constitute "administrative hearings" as envisioned by KRS Chapter 13B. The SEAP is organized pursuant to KRS 156.557(7) which states:

> [t]he Kentucky Board of Education shall establish an appeals procedure for certified school personnel who believe that the local school district failed to properly implement the evaluation system. The appeals procedure shall not involve requests from individual certified school personnel members for review of the judgmental conclusions of their personnel evaluations.

The operating procedures for the SEAP are set forth at 704 KAR[6] 3:370 §12(2)(a) as follows:

> [t]he Kentucky Board of Education shall appoint a committee of three (3) state board members to serve on the state evaluation appeals panel (SEAP). The SEAP's jurisdiction shall be limited to procedural matters already addressed by the local appeals panel related to the district's alleged failure to implement an evaluation plan as approved by the department. The SEAP shall not have jurisdiction of a complaint involving the professional judgment conclusion of an evaluation, and the SEAP's review shall be limited to the record of proceedings and documents therein, or lack thereof, at the local district level.

A finding by the SEAP of noncompliance with a district's evaluation plan renders the subject evaluation void. 704 KAR 3:370 § 12(2)(e).

[6] Kentucky Administrative Regulations.

Clearly, the SEAP is a review panel possessing very limited statutorily defined functions, and no provision exists for a hearing officer, the presentation or cross-examination of witnesses or any of the traditional hallmarks of an administrative hearing. The SEAP merely reviews the actions of the LEAP to determine compliance with an approved evaluation plan and thereby provide accountability and encouragement for local districts to implement appropriate evaluation plans. The SEAP is not empowered to reinstate a teacher to a prior position or provide any other remedy apart from setting aside a defective evaluation. Therefore, we conclude the SEAP does not conduct "administrative hearings" and actions of the SEAP do not come within the purview of KRS Chapter 13B.

Nevertheless, courts may assume jurisdiction in the absence of a specific statutory authorization to prevent arbitrary action. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). Arbitrariness occurs in administrative actions when the agency acts in excess of statutory powers, denies due process, or makes a decision unsupported by substantial evidence. *Id.* In this case the SEAP acted within the powers permitted it by statute and administrative regulation. Geron was

permitted due process hearings. Lastly, substantial evidence supported the final decision. Under such circumstances this Court may not substitute its judgment for that of the administrative body. Thus, the decision must stand. We find no reversible error in the trial court's dismissal of Geron's petition.

Although we have determined the trial court did not err in dismissing Geron's claims, for clarity and completeness, we shall address her remaining arguments on appeal. Neither of her contentions warrant relief.

Geron contends JCPS materially breached its contractual obligations to her, thereby giving rise to a viable breach of contract claim. The sole contract at issue in this matter is Geron's one-year limited teaching contract. Pursuant to KRS 161.750, Superintendent Hargens had express authority and nearly unfettered discretion on whether to renew Geron's employment. Geron's contract clearly recognized this power and specifically stated Superintendent Hargens' authority would be "in no manner impaired or affected by this contract." It is axiomatic that superintendents may decline to renew a limited teaching contract without cause. *See Board of Education of Louisville v. Louisville Education Association*, 574 S.W.2d 310 (Ky. App. 1977); *Johnson v. Dixon*, 501 S.W.2d 256 (Ky. 1973). "Non-tenured teachers have very few rights under our statutory scheme. A school board neither has to rehire a teacher on a limited contract nor provide him with a hearing if he is not rehired." *Gibson v. Board of Education of Jackson County*, 805 S.W.2d 673, 675 (Ky. App. 1991). Reemployment of a non-tenured teacher "is dependent on the grace of the board of education." *Belcher v. Gish*, 555 S.W.2d 264, 266 (Ky. 1977). Superintendent Hargens exercised her statutory right to not reemploy Geron based on the results of numerous unfavorable evaluations and Geron's continued decline in performance over the course of the school year. We are not at liberty to substitute our judgment for hers and decline to do so.

Further, Geron's attempt to couch her claim on the alleged failure of JCPS to follow its own procedures related to evaluations and teacher performance deficiency improvement is unavailing as these matters cannot serve as the basis for Geron's claim for breach of her limited teaching contract. These are exactly the types of issues for which the General Assembly required creation of the LEAP and SEAP. Geron took advantage of those systems but was unsuccessful in obtaining relief. Her dissatisfaction with the result of the administrative process is insufficient to support a breach of contract claim. We discern no error in the Franklin Circuit Court's dismissal of Geron's breach of contract claim.

Finally, Geron's religious discrimination claim is wholly without merit and fails as a matter of law.

> KRS 344.040 prohibits religious discrimination by employers. The elements of a *prima facie* case of religious discrimination were set forth by this court in *Kentucky Comm'n on Human Rights v. Lesco*, Ky. App., 736 S.W.2d 361 (1987). Therein, the court held that "one must prove that (1) he has a bona fide belief that compliance with an employment requirement is contrary to his religious faith; (2) he informed his employer about the conflict; and (3) he was discharged because of his refusal to comply with the employment requirement." *Id.* at 363.

Irvin v. Aubrey, 92 S.W.3d 87, 89 (Ky. App. 2001). In her petition, Geron claimed she is a practitioner of Judaism, her limited teaching contract was not renewed, she was qualified for the position she held, and she was replaced by someone who was not Jewish. Thus, she asserted JCPS must have discriminated against her because of her religion. Nowhere in the record is there any indication Geron believed any portion of her employment conflicted with her religious beliefs. Nor is there any suggestion she informed JCPS of the existence of any such conflict. Further, Geron does not allege adherence to her religious beliefs and refusal to act contrary thereto was the basis for the nonrenewal of her contract. Geron plainly did not establish a *prima facie* showing of religious discrimination. The trial court properly dismissed this claim.

Therefore, for the foregoing reasons the judgment of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

BEFORE: DIXON, NICKELL, AND THOMPSON, JUDGES.

WORKERS' COMPENSATION

MEDICAL FEE DISPUTE

"CURE AND RELIEF" FROM THE EFFECTS OF AN INJURY

Claimant was injured in work-related motor vehicle accident — ALJ found that claimant's cervical injuries, lumbar injuries, neurogenic bladder, and psychological conditions were work-related and that proposed back surgery was reasonable, necessary and related to work injury — Dispute arose over reasonableness of spinal cord stimulator; reasonableness and necessity of repeat sacroiliac (SI) joint injection; reasonableness and necessity of repeat caudal epidural steroid injection; and referral to neurosurgeon — Dr. Braun's Utilization Review (UR) noted that diagnostic SI injections are no longer supported by relevant guidelines because no further treatment can be recommended based upon any diagnostic information — In addition, SI injections are not recommended for non-inflammatory pathology based on insufficient evidence — They are recommended on case-by-case basis for inflammatory sacroiliitis — Dr. Lewis's UR stated that Kentucky guidelines do not specifically address claimant's repeated caudal epidural steroid injections — Dr. Lewis noted that claimant's most recent caudal epidural steroid injection provided greater than 50% relief of his pain, but that there was no documentation of functional improvement — ALJ found that repeat caudal injections and SI joint injections were not reasonable and necessary; however, spinal cord stimulator and referral to neurosurgeon were reasonable and necessary — ALJ denied claimant's petition for reconsideration — Workers' Compensation Board affirmed — Claimant appealed — HELD that ALJ did not err in denying SI injection; however, ALJ erred in finding that caudal epidural injections were not reasonable and necessary — KRS 342.020(1) requires employer to pay for "cure and relief from the effects of an injury" — "Cure and relief" is construed as "cure and/or relief" — ALJ reasonably inferred that SI injections were unproductive or outside type of treatment generally accepted by medical community based upon Dr. Braun's opinion — However, ALJ did not use proper standard of "cure and relief" in denying caudal epidural steroid injection — Evidence indicated that claimant received greater than 50% pain relief from caudal epidural steroid injection, which indicates that procedure is reasonable and necessary for cure and relief from effects of injury —

Jason Conley v. Super Services, LLC; Hon. Monica Rice-Smith, ALJ; and Workers' Compensation Board (2018-CA-000709-WC); Petition for review of a decision of the Workers' Compensation Board; Opinion by Judge Combs, *affirming in part, vacating in part, and remanding*, rendered 9/7/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Appellant, Jason Conley, appeals from an Opinion of the Workers' Compensation Board affirming the denial of proposed caudal epidural steroid and sacroiliac injections. After our review, we affirm in part, vacate in part, and remand.

We limit our discussion of the record to the issue before us. Conley was employed as a truck driver by the Appellee, Super Services, LLC (Defendant/Employer). On April 21, 2014, he was injured in a work-related motor vehicle accident. On November 17, 2015, he filed a Form 101/Application for Resolution of Injury Claim.

Following the taking of proof and a formal hearing, the Administrative Law Judge (ALJ), Jeanie Owen Miller, determined that Conley's cervical and lumbar injuries, neurogenic bladder, and psychological conditions were work-related and that proposed back surgery was reasonable, necessary and related to the work injury. By Interlocutory Opinion, Award, and Order, rendered on June 10, 2016, the ALJ awarded temporary total disability (TTD) benefits and reasonable and necessary medical expenses. The ALJ placed the claim in abeyance until Conley reached maximum medical improvement (MMI) after medical treatment. On August 3, 2016, Conley underwent an L4-5 discectomy. He continued to have pain following surgery and treated with Dr. Gutti for pain management.

On January 19, 2017, Super Services filed a Form 112/Medical Fee Dispute challenging the reasonableness of a spinal cord stimulator requested by Dr. Deer based upon the Utilization Review (UR) of Dr. Trotter.

By Order of March 29, 2017, the ALJ removed the case from abeyance and scheduled proof-time.

On May 2, 2017, Super Services filed a Form 112/Medical Fee Dispute challenging the

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

reasonableness and necessity of a repeat sacroiliac (SI) joint injection requested by Dr. Gutti based upon Dr. Braun's UR. According to Dr. Braun, diagnostic SI injections are no longer supported by relevant guidelines because no further treatment can be recommended based upon any diagnostic information. Furthermore, therapeutic SI injections are not recommended for non-inflammatory pathology based on insufficient evidence. They are recommended on a case-by-case basis for inflammatory sacroiliitis, a condition generally considered rheumatologic in origin. The report further reflects that Dr. Braun "Spoke with Dr. Gutti explained the current status of guidelines. Provider accepted the denial."

On June 29, 2017, Super Services filed a Form 112/Medical Fee Dispute challenging the reasonableness and necessity of a repeat caudal epidural steroid injection and referral to a neurosurgeon -- both requested by Dr. Gutti. Super Services relied upon the UR report of Dr. Lewis, which provides in relevant part:

> Kentucky guidelines do not specifically address the requested repeat caudal epidural steroid injection. According to the Official Disability Guidelines (ODG)(Online Version) Low Back Chapter (updated 05/12/17) , Epidural steroid injections (ESIs) therapeutic, "Radiculopathy (due to herniated nucleus pulposus, but not spinal stenosis) must be documented. Objective findings on examination need to be present. Radiculopathy must be corroborated by imaging studies and/or electrodiagnostic testing … [*sic*] Repeat injections should be based on continued objective documented pain relief, decreased need for pain medications, and functional response."
>
> In this case, provided documents highlight the claimant recently underwent a caudal epidural steroid injection in March. Although the clinical note from 04/07/2017 documents greater than 50% relief of pain from this injection, there is no documentation of functional improvement or an associated reduction of medication use for six (6) to (8) weeks. Further, provided documentation does not include the actual report from the recent MRI of the lumbar spine, which is referenced. Due to this lack of documentation, the service as requested, caudal epidural steroid injection with fluoroscopic (62310) is not medically necessary.

On September 12, 2017, ALJ Miller conducted a formal hearing. Conley testified that he continues to see Dr. Gutti monthly, that he still had pain since the surgery, and that his leg pain has gotten worse. Conley also testified that injections were recommended and that he has gotten "decent relief" from them in the past.

An October 31, 2017, Agreed Order of Submission reflects that the parties had reached an agreement to resolve all pending issues except for the reasonableness of repeat lumbar caudal injection and SI injections, proposed spinal cord stimulator, and referral to a neurosurgeon. These issues were bifurcated for the ALJ to decide. A Form 110 Agreement as to Compensation was approved by Order entered on November 3, 2017.

On January 2, 2018, ALJ Monica Rice-Smith rendered an Opinion and Order on the pending medical fee disputes in relevant part as follows:

> The ALJ is persuaded by the opinions of Dr. Braun and Dr. Lewis. Although the medical evidence establishes that Conley continues to have back pain despite his surgery, Dr. Braun and Dr. Lewis offer the only opinions regarding the reasonableness and necessity of the caudal injections and SI joint injections. Dr. Braun opined the SI joint injections were no longer recommended. He explained that the procedure was no longer supported by the guidelines. With regard to the caudal injections, Dr. Lewis opines the [*sic*] despite Dr. Gutti's report that the injection provided 50% relief, there was no evidence that there was improved functioning. There was also no documentation that the injections resulted in any decrease in pain medication for any period.
>
> Based on the foregoing, the ALJ finds the repeat caudal injections and SI joint injections are not reasonable and necessary, thus not compensable.

The ALJ determined that the spinal cord stimulator and the referral to a neurosurgeon were reasonable and necessary.

Conley filed a petition for reconsideration on grounds that it appeared that the ALJ may have not reviewed all available evidence and may have used an incorrect standard in determining the reasonableness and necessity of the denied medical treatment. By Order rendered on February 7, 2018, the ALJ denied Conley's petition as a re-argument of the merits.

Conley appealed to the Workers' Compensation Board, which affirmed by Opinion rendered April 13, 2018, in relevant part as follows:

> [T]he ALJ utilized the proper standard for deciding a medical dispute. As noted by the ALJ, the Court has held the words in KRS 342.020(1) "cure and relief" should be construed as "cure and/or relief." National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App. 1991). Treatment shown to be unproductive or outside the type of treatment generally accepted by the medical profession as reasonable in the injured workers' particular case is non-compensable. Square D. v. Tipton, 862 S.W. 2d 308 (Ky. 1993). The ALJ did not utilize a [*sic*] "improved functioning" standard in making her determination. Rather, this was one of several factors considered by Dr. Lewis in determining the caudal epidural steroid injection was not medically reasonable or necessary.

With respect to the SI joint injection, the Board explained that Dr. Braun noted that the procedure is no longer supported by the ODG (Official Disability Guidelines) and that the blocks are not recommended for non-inflammatory SI pathology based on insufficient evidence. Further, the ODG noted that current research was minimal in terms of trials supporting the use of SI injections for non-inflammatory pathology.

Conley appeals and contends that the ALJ erred in disallowing the injections because "improved functioning" is not the proper standard to resolve a medical fee dispute.

KRS[1] 342.020(1) mandates that "the employer shall pay for the cure and relief from the effects of an injury . . . ." As cited by the Board in its opinion, *National Pizza Co. v. Curry*, 802 S.W.2d 949, 951 (Ky. App. 1991), holds as follows:

> [T]he words in KRS 342.020(1) "cure and relief" should be construed as "cure and/or relief." *See* KRS 446.080 and *Firestone Textile Company Division, Firestone Tire and Rubber Company v. Meadows*, Ky., 666 S.W.2d 730 (1984), which states that "[a]ll presumptions will be indulged in favor of those for whose protection the enactment [the Workers' Compensation Act] was made." *Id.* at 732. Thus KRS 342.020(1) requires the employer of one determined to have incurred a work-related disability to pay for any reasonable and necessary medical treatment for relief whether or not the treatment has any curative effect.

However, "the legislature did not intend to require an employer to pay for . . . treatment that does not provide 'reasonable benefit'. . . [or which is] shown to be unproductive or outside the type of treatment generally accepted by the medical profession as reasonable . . . ." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309–10 (Ky. 1993).

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[1] Kentucky Revised Statutes.

First, we address the denial of the SI injection. We cannot agree that the ALJ erred or applied an incorrect standard in that regard. Rather, it appears that the ALJ reasonably inferred that the procedure was unproductive or outside the type of treatment generally accepted by the medical community based upon Dr. Braun's opinion, which constitutes substantial evidence. To that extent, we affirm.

With respect to the caudal epidural injection, the Board disagreed with Conley's contention that the ALJ erred in using an "improved functioning" standard. The Board explained that "improved functioning" was only one of several factors upon which Dr. Lewis relied. The Board noted that Dr. Lewis had also stated that the guidelines require documentation of radiculopathy due to a herniated nucleus pulposus and corroboration of radiculopathy by imaging studies -- and that the documentation provided did not include the report of a recent lumbar MRI.

However, the ALJ did not base her denial upon lack of documentation. On the contrary, in discussing the spinal cord stimulator, the ALJ noted that the most recent MRI revealed multiple disc herniations and that the most recent nerve conduction study revealed chronic bilateral SI radiculopathy. In determining that the referral to a neurosurgeon was reasonable and necessary, the ALJ considered the "significant objective findings on the most recent MRI and nerve conduction test."

The ALJ determined that the proposed caudal epidural injection was not reasonable and necessary based upon Dr. Lewis's opinion that there was no evidence of improved functioning and no documentation that the injections resulted in any decrease in pain medication for any period. However, KRS 342.020(1) requires neither of these conclusions. "It is clear that KRS 342.020(1) places responsibility on the employer for payment of medical and nursing services that promote

cure and relief from the effects of a work-related injury . . . . All that is required is that the services be for **cure and relief** of the effects of injury." *See Bevins Coal Co. v. Ramey*, 947 S.W.2d 55, 56 (Ky. 1997) (emphases added).

Dr. Lewis's UR report indicates that he reviewed Dr. Gutti's April 7, 2017, progress note, which "highlights [that Conley] received greater than 50% relief of pain from the caudal epidural steroid injection in March. [He] reported good relief with the radicular component of pain and the residual pains were tolerable on medications." Prior to the injection, Conley had suffered intractable back pain despite his many medications according to Dr. Gutti's office notes, which Conley filed as evidence. We cannot consider or imagine any evidence more compelling that a procedure is reasonable and necessary for the "cure and relief from the effects of an injury" than one which actually affords relief from the devastating misery of intractable pain. We agree with Conley that the ALJ did not use the proper standard in denying the epidural injection, and to that extent, we vacate the Board's opinion.

The April 13, 2018, Opinion of the Workers' Compensation Board is affirmed in part, vacated in part, and remanded for entry of an order consistent with this opinion.

ALL CONCUR.

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

WORKERS' COMPENSATION

PERMANENT PARTIAL DISABILITY BENEFITS

"TIER DOWN" PROVISION IN 1994 VERSION OF KRS 342.730(4)

Claimant began working for employer in 1973 — In 1990s, claimant underwent surgery on his cervical spine to address nerve damage in his hands — Surgery did not provide any significant improvement in symptoms to his neck and upper extremities — However, claimant testified it did not interfere with his ability to work — Claimant did not seek any further treatment for his neck until after 2016 accident — In March 2016, claimant was injured when his bulldozer slid down embankment — At time of injury, claimant was 75 years old — Claimant experienced pain in his neck and right arm as well as numbness — Claimant was released to work without restrictions in May 2016, but his employer terminated his employment — Claimant's condition continues to worsen — ALJ found that claimant had sustained work-related injury, relying on claimant's own testimony as well as opinions of two doctors — ALJ did not find pre-existing impairment related to claimant's condition and awarded permanent partial disability (PPD) benefits based on 15% impairment rating for as long as claimant was eligible to receive them under KRS 342.730(4) — Version of KRS 342.730(4) in effect at that time terminated workers' compensation benefits for employees who qualified for old-age Social Security retirement benefits — Both parties filed petitions for reconsideration — ALJ amended his ruling concerning KRS 342.730(4) in light of recently decided *Parker v. Webster Cty. Coal, LLC (Dotiki Mine)* (Ky. 2017) which held that KRS 342.730(4) was unconstitutional — ALJ ordered that duration of award was 425 weeks — In second order, ALJ instead ordered application of 1994 version of KRS 342.730(4) and found that claimant was subject to its "tier down" provisions — Workers' Compensation Board (Board) affirmed ALJ's finding that claimant did not have pre-existing active impairment — Board agreed with ALJ that 1996 version of KRS 342.730(4) was no longer applicable — However, Board found that plain language of 1994 version of KRS 342.730(4) did not apply to claimant since claimant was already 75 at time of accident — Employer appealed — AFFIRMED — To be characterized as active, underlying pre-existing condition must be symptomatic and impairment ratable pursuant to AMA *Guidelines* immediately prior to occurrence of work-related injury — Burden of proving existence of pre-existing condition is on employer — ALJ relied on claimant's testimony that his condition was not symptomatic prior to accident — Claimant testified that he worked 12-hour shifts, five days per week prior to accident and had no trouble getting in and out of bulldozer or operating its controls — Claimant was able to continue working for employer many years following cervical surgery — None of medical experts assessed pre-existing active impairment — During pendency of claimant's appeal, General Assembly amended KRS 342.730, which became effective on July 14, 2018 — KRS 342.730(4) now provides, in part, that all income benefits payable under Chapter 342 shall terminate as of date employee reaches age of 70 or four years after employee's injury or last exposure, whichever last occurs — KRS 342.730(4), as amended, does not apply retroactively; therefore, KRS 342.730(4), as amended, does not apply retroactively to limit duration of claimant's benefits — Version of KRS 342.730 in effect at time of claimant's injury included unconstitutional provision in subsection (4) — Remainder of statute is valid and can be executed without subsection (4); therefore, duration of claimant's benefits is controlled by KRS 342.730(1)(d), which specifies compensable period of 425 weeks for PPD benefits of 50% or less —

Lafarge Holcim v. James Swinford; Hon. Greg Harvey, ALJ; and Workers' Compensation Board of Kentucky (2018-CA-000414-WC); Petition for review of a decision of the Workers' Compensation Board; Opinion by Chief Judge Clayton, *affirming*, rendered 9/7/18. A petition for rehearing was filed on 9/19/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Lafarge Holcim (Lafarge) appeals from an opinion of the Workers' Compensation Board which affirmed in part and reversed in part an order of the Administrative Law Judge (ALJ). The Board affirmed an award of permanent partial disability (PPD) benefits to James Swinford, a former Lafarge employee who suffered a workplace injury while operating a bulldozer, and reversed the ALJ's determination that the benefits were subject to the "tier down" provision of the 1994 version of Kentucky Revised Statutes (KRS) 342.730(4). Having reviewed the record and applicable law, we affirm.

The claimant in this case, James Swinford, has a sixth-grade education and no vocational training. He started working for Lafarge's predecessor in 1973. Since 2010, his primary job was operating a bulldozer on twelve-hour shifts, five days per week. At the time of his injury, he was seventy-five years of age.

At some time in the 1990s, Swinford underwent surgery on his cervical spine to address nerve damage in his hands. The surgery did not provide any significant improvement in symptoms in his neck and upper extremities and he continued to experience tingling and numbness in both hands.

On March 10, 2016, the bulldozer Swinford was operating slid forty to seventy feet down an embankment. Swinford was wearing a seatbelt at the time of the accident. He had to wait for approximately seven hours in the cab of the bulldozer before help arrived. During that time, he ate his lunch and napped. When he woke up, he felt a "crick" in the right side of his neck.

Following the accident, Swinford was taken to the hospital by ambulance and later consulted his family physician, Dr. William Barnes. He received physical therapy but it provided no relief. Dr. Barnes referred him to Dr. K. Brandon Strenge, an orthopedic surgeon. Dr. Strenge ordered an MRI and prescribed Tramadol, a pain medication. He referred Swinford to Dr. J. T. Ruxer, a doctor of osteopathic medicine, for pain management. Dr. Ruxer recommended injections and indicated that Swinford might need surgery.

Swinford continued to experience pain in his neck and right arm as well as numbness. He was released to work without restrictions in May 2016, but when he attempted to return to work at Lafarge, his employment was terminated. According to Swinford, his condition continues to worsen and his pain medication has been increased. He does not believe he will be able to return to work as a bulldozer operator due to his neck pain.

Swinford filed a Form 101 Application for Resolution of Injury Claim alleging that he sustained multiple upper extremity injuries and a neck injury as a result of the bulldozer accident.

Swinford testified that the cervical surgery in the 1990s provided little relief. He continued to experience numbness in his right hand, but it did not interfere with his ability to work, and he did not seek any treatment for his neck until after the March 10, 2016 accident.

Medical evidence was offered by Dr. Strenge, Dr. Ruxer, and Dr. Robert Weiss, a neurosurgeon who served as the Independent Medical Examiner (IME). Office records from Baptist Occupational Medicine for the two months following the accident

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were also introduced.

Dr. Strenge acknowledged Swinford's prior cervical surgery in the 1990s but observed that Swinford had been able to work without restrictions or limitations for many years following that surgery. The MRI showed that Swinford suffers from a T1-T2 disc herniation causing mild central and foraminal stenosis. Dr. Strenge ultimately diagnosed Swinford with T1-T2 disc herniation caused by the bulldozer accident, which exacerbated his neck pain and caused worsening of right arm numbness and a new onset of right triceps weakness. He assigned a 15% impairment rating.

Dr. Ruxer described Swinford's condition as a worsening of pre-existing neck and right arm pain, although he noted that Swinford had been working without restrictions until the accident. He recommended pain medication and some cervical medial branch blocks on the right side.

The IME, Dr Weiss, found degenerative changes in the cervical spine and cervical spondylosis typical of a male of Swinford's age but no evidence of a surgical lesion or disc herniation. He did find Swinford's current symptoms to be related to the work injury and did not recommend Swinford return to operating heavy equipment. He did not believe surgery or any further treatment was necessary and gave no impairment rating.

The ALJ found that Swinford had sustained a work-related injury in the bulldozer accident. The ALJ relied upon Swinford's own testimony, which he found to be credible, and upon the opinions of Dr. Strenge and Dr. Ruxer. The ALJ did not find a pre-existing impairment relating to Swinford's condition and awarded PPD benefits based on the 15% impairment rating assigned by Dr. Strenge for as long as Swinford was eligible to receive them "in accordance with KRS 342.730(4) and applicable case law." The version of KRS 342.730(4) then in effect terminated workers' compensation income benefits for employees who qualified for old-age Social Security retirement benefits.

Swinford and Lafarge filed petitions for reconsideration raising multiple issues. The ALJ issued two subsequent orders neither of which altered his finding regarding the absence of a pre-existing impairment and the award of PPD benefits. The first order, dated November 3, 2017, amended his ruling regarding the application of KRS 342.730(4) in light of a Kentucky Supreme Court opinion which had just held the subsection to be unconstitutional. The ALJ ordered that the duration of the award should be 425 weeks. In the second order, entered on November 7, 2017, he ordered instead the application of a prior version of KRS 342.730(4) dating from 1994. The Board subsequently affirmed the ALJ's finding that Swinford did not have a pre-existing active impairment but reversed the ALJ's ruling that a prior version of KRS 342.730(4) was applicable to Swinford's case. This appeal by Lafarge followed.

Our standard of review requires us to show considerable deference to the ALJ and to the Board. "The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citing *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985)). Because the decision of the fact-finder in this case favored Swinford, the person with the burden of proof, "his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Our role in reviewing the decision of the Board "is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Lafarge argues that the Board erred in upholding the ALJ's finding that Swinford did not have a pre-existing active impairment and in relying on Dr. Strenge's 15% impairment rating in awarding PPD benefits. In Lafarge's view, Swinford's prior neck surgery and subsequent treatment with pain medication constituted a pre-existing and active disability not resulting from the bulldozer accident and consequently not compensable.

"To be characterized as active, an underlying pre-existing condition must be symptomatic *and* impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work-related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer." *Finley v. DBM Techs.*, 217 S.W.3d 261, 265 (Ky. App. 2007) (emphasis in original) (citing *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).

Lafarge points to the fact that Swinford's previous cervical fusion is an impairment ratable condition under the AMA Guides, and Swinford's admission the fusion did not alter his symptoms and he continued to take medication for ongoing nerve pain in the upper extremities for ten to fifteen years preceding the date of the bulldozer accident. Lafarge argues that Dr. Strenge did not account for or address this situation and urges us to rely instead on Dr. Weiss's opinion that Swinford's ongoing problems related back to his prior cervical surgery.

In finding that Swinford's condition was not symptomatic prior to the accident, the ALJ relied on Swinford's own testimony that he worked twelve-hour shifts, five days per week prior to the accident and had no trouble getting in and out of the bulldozer or operating its controls. The ALJ concluded:

> Because the right arm weakness was not actively disabling prior to the incident the ALJ declines to find pre-existing active impairment as it pertains to that condition. Similarly, with regard to the disc herniation at T1-T2 and resulting triceps weakness there is no evidence that condition was symptomatic and ratable immediately prior to the bulldozer accident[.] Therefore the ALJ does not believe there is any pre-existing active impairment here and relies upon Dr. Strenge's rating of 15%.

The Board affirmed the ALJ's analysis, also emphasizing the fact that Swinford had been able to continue working for Lafarge for many years following the cervical surgery as evidence that there was no active impairment. The Board also noted that none of the medical experts, including Dr. Weiss, assessed a pre-existing active impairment.

We agree with the Board's analysis. The ALJ was not compelled to accept the opinion of Dr. Weiss, and acted well within his powers in relying on the opinion of Dr. Strenge and on Swinford's own testimony. "As fact-finder, an ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof." *Ford Motor Co. v. Jobe*, 544 S.W.3d 628, 631-32 (Ky. 2018) (quoting *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 753-54 (Ky. 2011) (footnotes omitted)). There was no medical testimony that Swinford had a ratable pre-existing impairment and no evidence that any symptoms experienced by Swinford following the surgery had any effect whatsoever on his ability to perform his job.

Lafarge's next argument concerns the effect of KRS 342.730(4) on the duration of Swinford's PPD benefits. "[T]he law in effect on the date of injury or last injurious exposure is deemed to control . . . an employer's obligations with regard to any claim arising out of and in the course of the employment." *Hale v. CDR Operations, Inc.*, 474 S.W.3d 129, 137 (Ky. 2015) (quoting *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 93 (Ky. 2000)). On the date of Swinford's injury, March 10, 2016, KRS 342.730(4) provided that all workers' compensation benefits would "terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits . . . or two (2) years after the employee's injury or last exposure, whichever last occurs." KRS 342.730(4). This version of the statute came into effect in 1996.

The Kentucky Supreme Court subsequently ruled that the disparate treatment of older workers under this provision violated their equal protection rights. *Parker v. Webster Cty. Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759, 770 (Ky. 2017), *reh'g denied* (Nov. 2, 2017). Swinford argued, in reliance on *Parker*, that his award of PPD should extend for the full 425 weeks as provided in KRS 342.730(1)(d) rather than the shorter period imposed under KRS 342.730(4).

The ALJ ultimately ruled that the version of KRS 342.730(4) in effect before 1996 should apply to Swinford's benefits and found that he was subject to its "tier down" provision, which states:

> If the injury or last exposure occurs prior to the employee's sixty-fifth birthday, any income benefits awarded under KRS 342.750, 342.316, 342.732, or this section shall be reduced by ten percent (10%) beginning at age sixty-five (65) and by ten percent (10%) each year thereafter until and including age seventy (70). Income benefits shall not be reduced beyond the employee's seventieth birthday[.]

The Board agreed with the ALJ that the 1996 version of KRS 342.730(4) was no longer applicable but reversed the ALJ's use of the "tier down" provision, holding that the plain language of the 1994 version of the statute did not apply to Swinford who was already seventy-five years of age at the time of the accident.

In its appellate brief, Lafarge acknowledged the effect of *Parker* but argued that currently proposed legislation pending before the Kentucky General Assembly might lead to further amendment of KRS 342.730. During the pendency of this appeal, the General Assembly did pass an amended version of

KRS 342.730 which became effective on July 14, 2018. Subsection (4) now provides in relevant part as follows: "All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last occurs." KRS 342.730(4).

The issue is whether this provision applies retroactively to limit the duration of Swinford's PPD benefits to four years following the injury. Generally, "[n]o statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080(3). The Legislative Research Commission Note appended to the amended statute reports the following statements which are contained in the text of Chapter 40 of House Bill 2:

> This statute [KRS 342.730] was amended in Section 13 of 2018 Ky. Acts ch. 40. Subsection (2) of Section 20 of that Act reads, "Sections 2, 4, and 5 and subsection (7) of Section 13 of this Act are remedial and shall apply to all claims irrespective of the date of injury or last exposure, provided that, as applied to any fully and finally adjudicated claim, the amount of indemnity ordered or awarded shall not be reduced and the duration of medical benefits shall not be limited in any way." Subsection (3) of Section 20 of that Act reads, "Subsection (4) of Section 13 of this Act shall apply prospectively and retroactively to all claims: (a) For which the date of injury or date of last exposure occurred on or after December 12, 1996; and (b) That have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal has not lapsed, as of the effective date of this Act [July 14, 2018]."

Although the Note is evidence the legislature considered making the statutory amendment of subsection (4) retroactive, this language was not included in the final version of the statute. "[T]he plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source." *Commonwealth v. Ford*, 543 S.W.3d 579, 581 (Ky. App. 2018) (quoting *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005)). Under the circumstances, the amended statute does not apply retroactively to limit the duration of Swinford's benefits. This interpretation is in keeping with the general principle that when a statutory amendment affects "the level of income benefits payable for a worker's occupational disability, the [Kentucky Supreme] Court has consistently determined that the amendment was substantive in nature and that the law on the date of injury . . . controls." *Schmidt v. S. Cent. Bell*, 340 S.W.3d 591, 595 (Ky. App. 2011) (quoting *Spurlin v. Adkins*, 940 S.W.2d 900, 901 (Ky. 1997)). We see no reason that this principle should not also apply when the duration of a worker's benefits is affected.

"It is a fundamental principle that a statute may be valid in one part and invalid in another part, and if the invalid part is severable from the rest, the part which is valid may be sustained." *Democratic Party of Kentucky v. Graham*, 976 S.W.2d 423, 437 (Ky. 1998), *as modified* (Oct. 15, 1998) (citation omitted); *see also* KRS 446.090 ("It shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force, unless the statute provides otherwise, or unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly.").

The version of KRS 342.730 in effect at the time of Swinford's injury included the unconstitutional provision in subsection (4). Because the remainder of the statute is valid and can be executed without subsection (4), the duration of Swinford's benefits is controlled by KRS 342.730(1)(d), which specifies a compensable period of 425 weeks for PPD benefits of 50% or less. This provision of the statute has remained unchanged since 1996.

In light of the foregoing, we affirm the opinion of the Board as to the award of PPD benefits based upon a 15% impairment rating and the absence of a pre-existing active impairment; affirm its holding that the ALJ's application of the 1994 version of KRS 342.730(4) containing the "tier down" provision was erroneous; and affirm the Board insofar as the PPD benefits must be awarded in accordance with KRS 342.730(1)(d).

ALL CONCUR.

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

FAMILY LAW

MARRIAGE

CIVIL PROCEDURE

THIRD PARTY'S STANDING TO ATTACK VALIDITY OF MARRIAGE

Pursuant to KRS 403.120(1), circuit court may invalidate marriage under following circumstances: (a) party lacked capacity to consent to marriage at time marriage was solemnized or party was induced to enter marriage by force or duress or by fraud involving essentials of marriage; (b) party lacks physical capacity to consummate marriage and other party did not know of incapacity at time marriage was solemnized; or (c) marriage is prohibited — Pursuant to KRS 403.120(2), declaration of invalidity under (a) and (b) may be sought by party or by legal representative of party who lacked capacity to consent, who was offended party or did not know of incapacity — Declaration of invalidity under (c) may be sought by either party — Only for causes under (a) may declaration of invalidity be sought after death of either party to marriage — In instant action, husband and wife re-married — Third parties, consisting of husband's mother and sister, sought to invalidate marriage after death of husband — Husband and wife never separated after their first divorce, sought legally valid civil marriage, and ultimately completed all steps required to comply with legally valid civil marriage — Husband and wife did not apply for marriage license before solemnizing their marriage, but ultimately did obtain marriage license — Under facts, third parties did not have standing to contest validity of marriage — *Pinkhasov v. Petocz* (Ky. App. 2011), which requires strict compliance with marriage license requirements pursuant to KRS 402.080, does not extend standing to contest validity of marriage to third party — *Pinkhasov* arose from dispute between parties to marriage —

Helen Louise Marshall and Martha Wilke v. Martha Dianne Marshall (2017-CA-001755-MR); Livingston Cir. Ct., Woodall, III, J.; Opinion by Judge Combs, *affirming*, rendered 9/7/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Helen Louise Marshall and Martha Wilke appeal from the Livingston Circuit Court's denial of their motion to hold this case in abeyance and to grant Martha Dianne Marshall's motion to dismiss. For the reasons set forth below, we affirm.

Appellant Helen Louise Marshall is the mother of decedent, Robert L. Marshall. Appellant Martha Wilke is his sister. We refer to them collectively as "Decedent's Family." Decedent's Family filed this action to contest the validity of his October 29, 2016, remarriage to Appellee, Martha Dianne Marshall (Wife), with whom Decedent had cohabited since their divorce. The solemnization of the marriage occurred at his hospital bedside, and it was duly officiated before two witnesses. After his return home from the hospital on November 16, 2016, the newlyweds applied for a marriage license with the Livingston County Clerk's Office. All parties purportedly signed the license, and it was filed the next day.

Count I of the complaint of Decedent's Family sought a declaration of rights as to the validity of the marriage, asserting its invalidity due to the couple's failure to strictly comply with marriage license requirements pursuant to KRS[1] 402.080 as interpreted in *Pinkhasov v. Petocz*, 331 S.W.3d 285 (Ky. App. 2011). Count II of the complaint alleged that Decedent was mentally incapacitated at the time of the marriage and that Wife fraudulently induced him into entering into the marriage.

[1] Kentucky Revised Statutes.

After Wife filed her answer, Decedent's Family moved for judgment on the pleadings. The trial court's order denied the motion, finding that Decedent's Family did not have standing to file on Decedent's behalf. The trial court allowed the action to continue, indicating the possibility that Decedent's Family might have standing in its own right. The trial court then entered a new order clarifying its first ruling and dismissing Count I for lack of standing.

Decedent's Family moved to alter, amend, or vacate the clarified order and moved to hold the proceedings in abeyance pending the resolution of their separate action contesting Decedent's last

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will and testament.[2] Wife responded by moving to dismiss for lack of standing pursuant to KRS 403.120. The trial court denied Decedent's Family's motion to hold in abeyance and dismissed the case. This appeal followed.

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[2] Livingston Circuit Case *Martha Wilke, et al. v. Robert L. Marshall, et al.*, Number 17-CI-00062.

The standard of review of a motion to dismiss for failure to state a claim upon which relief can be granted is well established. CR[3] 12.03. "In ruling on a motion to dismiss, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true." *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009). "The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). When, as here, factual findings are not at issue, we must review the legal conclusions of the trial court *de novo*. We owe no deference to the trial court's ruling. *Pinkhasov*, 331 S.W.3d at 291. Statutory interpretation is purely a legal matter and is reviewed *de novo*. *See*, *e.g.*, *Commonwealth v. McBride*, 281 S.W.3d 799, 803 (Ky. 2009) ("The construction and application of statutes is a matter of law. Therefore, this Court reviews statutes de novo without deference to the interpretations adopted by lower courts."). Courts must interpret statutes according to their plain meaning. *Id.*

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[3] Kentucky Rules of Civil Procedure.

The sole issue presented in this case is whether a third party has standing to collaterally attack a marriage under Kentucky law. If third parties do not have standing, Decedent's Family cannot attack his marriage to Wife as invalid due to failure to follow KRS 402.080[4] -- nor as invalid due to incompetence, impairment, or fraudulent under KRS 403.120. If Decedent's Family does not have standing to contest Wife's marriage to Decedent, Kentucky law presumes validity unless Wife herself -- either on her own behalf or as executrix of Decedent's estate -- contests the marriage. Under the facts presented in this case, we conclude that the third parties collectively attacking this marriage lack standing to do so.

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[4] "No marriage shall be solemnized without a license therefore."

Kentucky has a strong public policy in favor of upholding marriage. *Pinkhasov*, 331 S.W.3d at 293. The law presumes validity, and a party to the marriage must overcome that presumption before contesting it. *Id.* at 293-94. Under the facts before us, the parties, who had never separated after their divorce, sought a legally valid civil marriage and ultimately completed all steps required to comply. Therefore, any third party attacking the marriage must meet specific statutory criteria in order to carry out that endeavor.

"The statutory requirements enacted by the Kentucky legislature regulating the establishment of a legally valid civil marriage within the Commonwealth are concise and unambiguous." *Pinkhasov*, 331 S.W.3d at 293. In discussing statutory interpretation, "our duty is to ascertain and give effect to the intent" of the legislature. *Beckham v. Board of Education of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994). In so doing, it is not our function "to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." *Id*. "When the words of the statute are clear and unambiguous and express the legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written." *McCracken County Fiscal Court v. Graves*, 885 S.W.2d 307, 309 (Ky. 1994) (citations omitted).

The circumstances under which a court may invalidate a marriage are detailed in KRS 403.120, in part, as follows:

> (1) The Circuit Court shall enter its decree declaring the invalidity of a marriage entered into under the following circumstances:
>
> > (a) A party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or deformity or because of the influence of alcohol, drugs, or other incapacitating substances, or a party was induced to enter into a marriage by force or duress, or by fraud involving the essentials of marriage;
> >
> > (b) A party lacks the physical capacity to consummate the marriage . . .
> >
> > (c) The marriage is prohibited.
>
> (2) A declaration of invalidity under paragraph (a), (b) or (c) of subsection (1) may be sought by any of the following persons and must be commenced within the times specified, but only for the causes set out in paragraph (a) may a declaration of invalidity be sought after the death of either party to the marriage:
>
> > (a) For a reason set forth in paragraphs (a) and (b) of subsection (1), by party or by the legal representative of the party who lacked capacity to consent, who was the offended party or did not know of the incapacity . . .
> >
> > (b) For the reason set forth in paragraph (c) of subsection (1), by either party . . . .

This Court has historically rejected third-party attempts to invalidate marriages -- even those prohibited and against public policy, such as bigamous and incestuous unions. *Ferguson v. Ferguson*, 610 S.W.2d 925, 927 (Ky. App. 1980) (denying son standing to challenge deceased father's bigamous second marriage six days prior to divorce decree entered dissolving father's first marriage); *see also Mathews v. Mathews*, 731 S.W.2d 832 (Ky. App. 1987) (granting stepchildren standing to attack father's divorce decree entered without the court's jurisdiction, but declining to decide the issue of standing to attack father's second marriage).

Decedent's Family argues that *Pinkhasov* requires strict compliance with KRS 402.080. Because Wife and Decedent did not apply for a marriage license before solemnizing their marriage, they argue that no valid marriage exists and that there is no valid relationship to be protected from collateral attack. However, several facts distinguish the context of *Pinkhasov* from the facts presented here. *Pinkhasov* arose from a dispute between the **parties** to the marriage with one party seeking to enforce a civil marriage that the parties had intentionally and knowingly sought to avoid. In this case, third parties are seeking to invalidate a marriage. The married couple here completed all the requirements to create a legally valid civil marriage rather than intentionally and knowingly trying to avoid one. The trial court correctly found that *Pinkhasov* does not extend standing to a third party to contest a marriage.

We affirm the order of the Livingston Circuit Court denying the motion to hold this case in abeyance and granting the motion to dismiss.

ALL CONCUR.

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

CRIMINAL LAW

DRIVING UNDER THE INFLUENCE (DUI)

GUILTY PLEA

RETROACTIVE APPLICATION OF TEN-YEAR LOOK-BACK PERIOD IN KRS 189A.010(5)(d)

Defendant was previously convicted of driving under the influence (DUI) in 2007, 2015, and 2016 — Defendant was arrested again on August 12, 2016 for series of offenses, including DUI fourth — On April 9, 2016, amendments to KRS 189A.010 went into effect — KRS 189A.010 was amended to extend look-back period for enhancement of DUI penalties from 5 to 10 years — Since defendant's August 2016 offense occurred after effective date of amendments, he was charged with DUI fourth offense due to inclusion of his 2007 DUI conviction in calculating his prior offenses — Defendant entered conditional guilty plea to DUI fourth, reserving his right to appeal issue of whether 10-year look-back period could be applied — HELD that trial court did not err in applying amended look-back provisions — Defendant argued that, at time of his previous plea agreements, there was 5-year look-back period — Defendant alleged that he entered into those agreements with understanding that convictions based on those pleas could not be used to enhance any subsequent DUI offenses which occurred beyond period of 5 years — However, contract principles do not preclude

application of amended statute to current offense — Recognition of 2007 DUI conviction for purposes of enhancement did not breach or violate defendant's previous plea agreement — Because defendant was charged with DUI after effective date of amendment to look-back provision, *ex post facto* principles do not bar application of new period —

Anthony Terrell Martin v. Com. (2017-CA-001187-MR); Logan Cir. Ct., Gill, J.; Opinion by Judge Johnson, *affirming*, rendered 9/7/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Anthony Terrell Martin entered a conditional plea in the Logan Circuit Court to a fourth offense of driving under the influence of alcohol or drugs ("DUI") within a ten-year period. Martin now appeals the judgment based upon that plea which sentenced him to four years' imprisonment. After reviewing the record in conjunction with the applicable legal authorities, we affirm the judgment of the Logan Circuit Court.

BACKGROUND

Martin was indicted for a series of offenses, including DUI fourth, stemming from his arrest on August 12, 2016. Prior to this current DUI charge, Martin had previously been convicted of DUI in 2007, 2015, and 2016. On April 9, 2016, certain amendments to Kentucky Revised Statutes ("KRS") 189A.010 went into effect. Pertinent to this appeal, there was a substantive change to KRS 189A.010 which extended the look-back period for enhancement of DUI penalties from a period of five years to ten years. Because Martin's August 2016 offense occurred after the effective date of the amendment to KRS 189A.010, he was charged with DUI fourth offense due to the inclusion of his 2007 DUI conviction in calculating his prior offenses.

Martin subsequently entered a conditional guilty plea to the DUI fourth charge, reserving his right to appeal the issue of whether the ten-year look-back period could be applied for the purposes of imposing the mandatory penalty provisions of KRS 189A.010(5)(d). He now appeals from the judgment based on that plea, alleging a violation of his rights under contract law, under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed.2d 274 (1969), and under his constitutional right to be free from the application of *ex post facto* laws.

STANDARD OF REVIEW

"Generally, plea agreements in criminal cases are contracts between the accused and the Commonwealth, and are interpreted according to ordinary contract principles." *McClanahan v. Commonwealth*, 308 S.W.3d 694, 701 (Ky. 2010) (citations omitted). The interpretation of a contract is a question of law to be determined *de novo* on appellate review. *Kentucky Shakespeare Festival, Inc. v. Dunaway*, 490 S.W.3d 691, 695 (Ky. 2016).

ANALYSIS

In *Commonwealth v. Jackson*, 529 S.W.3d 739 (Ky. 2017), the Supreme Court of Kentucky thoroughly analyzed and rejected each of the arguments Martin advances in this appeal. Guided by the rationale set out in *Jackson*, we first address Martin's contract argument in which he maintains that because there was a five-year look-back period at the time his previous plea agreements were entered, those agreements were made with the understanding that the convictions based on those pleas could not be used to enhance any subsequent DUI offenses which occurred beyond a period of five years. Only Martin's 2007 DUI conviction lies outside the five-year look-back period and he argues that to allow the Commonwealth to use that conviction for purposes of enhancement of the 2016 charge violates his prior plea agreement. However, in specifically addressing that contention, the *Jackson* court decided otherwise:

> It is also worth noting that, under the defendants' theory, a DUI defendant who had incurred the same prior DUI offenses on the same previous dates but who went to trial instead of pleading guilty would have no cognizable claim to the exemption from the 2016 amendment, while the similarly situated defendant pleading guilty would be exempted. This theory produces an absurd result, which further supports our conclusion that this was not the intent of the plea agreement language relied upon by the defendants.
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> [W]e conclude that language in DUI agreements such as that in this case, and similar allusions to the five-year look-back period which may have occurred during the plea bargain process, were not intended to constitute an immunization of DUI defendants from the 2016 changes to the DUI statute, and so may not be relied upon by defendants to avoid the application of the new look-back period.

529 S.W.3d at 745.

Because contract principles do not preclude application of the amended statute to Martin's current offense, we are convinced that the circuit court's recognition of the 2007 DUI conviction for purposes of enhancement did not breach or violate his previous plea agreement. *Id.*

Having concluded that Martin's contract argument does not afford him the requested relief, we turn to his contention that the decision of the United States Supreme Court in *Boykin* bars application of the amended look-back period to include his 2007 conviction. *Boykin* requires that at the time a guilty plea is entered, the record must affirmatively show that the defendant was informed of and waived his privilege against self-incrimination; his right to a jury trial; and his right to confront his accusers. *Boykin*, 395 U.S. at 243. That a defendant waived these constitutional rights may not be inferred from a silent record. *Id.*

Again, *Jackson* is dispositive of Martin's *Boykin* argument. As the Kentucky Supreme Court fully explained in *Jackson*, "[t]he fact that subsequent legislative measures may unforeseeably alter the consequences and effects of the criminal conviction does not take the plea retrospectively outside the scope of the *Boykin* requirements." 529 S.W.3d at 747. In other words, the mere possibility that there may be unforeseen future legislative changes which impact the penalties for future offenses does not serve to retroactively render an otherwise valid plea to have been involuntarily entered. What *Boykin* proscribes is the entry of a guilty plea without knowledge of its immediate *foreseeable* consequences. Under the rationale of *Jackson*, the circuit court correctly ruled that Martin's previous guilty pleas, taken in ignorance of legislative changes which occurred years in the future, are not within the scope of a *Boykin* challenge.

Lastly, Martin contends that to allow the Commonwealth to apply the ten-year look-back period to include his 2007 conviction would violate *ex post facto* principles under both the United States Constitution and the Kentucky Constitution. U.S. Const. art. I § 10; Kentucky Constitution § 19(1). To determine whether a statute violates *ex post facto* principles, we must consider whether the law imposes a punishment for an act that was not punishable at the time it was committed or imposes additional punishment to an already prescribed punishment. *Pate v. Dep't of Corr.*, 466 S.W.3d 480, 486-87 (Ky. 2015).

Here, the amendments to KRS 189A.010 became effective on April 9, 2016, and Martin was charged for an offense which occurred on August 12, 2016. A conviction for DUI fourth was subject to the same penalty before and after the amendment to the look-back period. The 2016 amendment did not impose additional punishment, it merely changed the manner in which the penalty was calculated by enlarging the look-back period.

Once again, the Supreme Court in *Jackson* foreclosed Martin's *ex post facto* argument:

> Under essentially these identical circumstances, we previously held that any new DUI penalty provisions as contained in the amended statute may be applied to the new DUI charges. In *Commonwealth v. Ball*, 691 S.W.2d 207 (Ky. 1985), the defendant had a prior DUI conviction obtained before the enactment of the statute enhancing the penalties for subsequent DUI offenses, KRS 189A.010. When the same defendant was charged with another DUI after the enactment of KRS 189A.010, we held that *ex post facto* principles posed no barrier to using the first conviction to enhance the penalties for the latter conviction. We said that the new statute did not create a new offense, but merely imposed different penalties on the same criminal act depending on the status of the offender. The same principle is applicable here.

529 S.W.3d at 746.

Because Martin was charged with a DUI after the effective date of the amendment to the look-back provision, *ex post facto* principles do not bar application of the new period in this case. Thus, we find no error in the trial court's decision to allow the amended look-back provisions of KRS 189A.010 to apply to Martin's sentencing for a fourth DUI conviction within a ten-year period.

CONCLUSION

Based upon the foregoing, we affirm the judgment of the Logan Circuit Court.

ALL CONCUR.

BEFORE: JOHNSON, D. LAMBERT, AND J. LAMBERT, JUDGES.

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CRIMINAL LAW

SEARCH AND SEIZURE

TRAFFIC STOP

SEARCH OF CELL PHONE AND TABLET

SEARCH WARRANT

AFFIDAVIT FOR SEARCH WARRANT

GOOD-FAITH EXCEPTION TO WARRANT REQUIREMENT

GUILTY PLEA

WITHDRAWAL OF GUILTY PLEA

Police officers received report of chase between two vehicles, with one of drivers being armed with gun — Officer observed vehicle matching description of one of vehicles — Officer conducted traffic stop — Officer asked defendant to exit vehicle — Officer explained reason for stop and asked defendant if he had gun — Defendant stated he did not have gun — Defendant volunteered that he had recently been released from prison and did not want trouble with police — Officer subsequently learned that defendant had outstanding warrant for failure to register as sex offender — Back-up officer arrived and saw handgun in plain view in seat pocket within reach of driver — There was also methamphetamine on console between front seats — Defendant was arrested and charged with trafficking in methamphetamine — Officers found additional drugs, scales and packaging material in vehicle — Officers also found two cell phones, one tablet computer and one digital camera in vehicle — Officer prepared search warrant for two phones and tablet — Officer believed that devices might contain information relevant to drug investigation — In affidavit, officer indicated that he was looking for photos, videos or communications related to guns, drug activity, co-conspirators, drug network activity, and other associated information — After warrant was issued, digital investigator learned that phones and tablet were equipped with either SIM or MicroSD memory card to expand their memory capabilities — Presence of expanded memory cards was not readily discernible by a user — Investigator found photographs that he suspected to be of methamphetamine cooking operation — Investigator was not looking for evidence of other crimes; however, he could not tell from file names what images he would find upon opening each file — Several of files contained photos and videos of child pornography — Based on this finding and defendant's prior conviction for possessing child pornography, officer obtained second search warrant for digital camera — No evidence of illegal activity was recovered on camera — Third search warrant was obtained to conduct further examinations on all devices — This search warrant revealed text messages relating to drug trafficking and additional photos and videos of child pornography — Defendant was indicted for firearm-enhanced trafficking in methamphetamine and being PFO II — Defendant was separately indicted for possession of handgun by convicted felon — In third indictment, defendant was charged with seven counts of possessing material portraying sexual performance by a minor and being PFO II — Defendant moved to suppress all evidence seized under search warrants — Defendant challenged validity of warrants and argued investigators exceeded scope of warrants — Trial court raised issue related to sufficiency of affidavit supporting initial search warrant — Trial court eventually denied motion to suppress — Defendant entered *Alford* conditional plea on charges of possessing material portraying sexual performance by a minor, reserving right to appeal denial of motion to suppress — In that case, PFO II charge was dismissed — Defendant entered unconditional plea on trafficking charge, with PFO II charge being dismissed — Defendant entered unconditional plea on charge of possession of firearm by convicted felon — Trial court denied defendant's motion to withdraw his guilty pleas on trafficking and possession of handgun charges — Defendant appealed — Commonwealth conceded that trial court improperly attempted to impose special conditions on defendant's parole; improperly ordered defendant to pay court costs; and in assessing public defender fee — Court of Appeals REVERSED as to those errors and AFFIRMED remaining convictions — Defendant's arguments on appeal concerning his motions to withdraw guilty pleas on charges of trafficking and possession of a handgun by convicted felon are different than those he presented to trial court; therefore, Court of Appeals did not consider them — Defendant alleged that he was not convicted felon — However, defendant entered unconditional plea in which he waived all defenses except that indictment did not charge an offense — Post-judgment challenges to sufficiency of evidence are precluded by unconditional guilty pleas — Defendant was ultimately successful in having underlying felony conviction overturned; however, that conviction was not void *ab initio*, and was valid at time he armed himself with handgun in instant matter — Defendant argued on appeal that initial search warrant was invalid — At trial, defendant did not challenge search for images; rather, he only argued that videos were not listed as item subject to search — On appeal, defendant argued that search for images and videos exceeded scope of warrant — Again, Court of Appeals did not consider this argument since it was not presented to trial court — Affidavit underlying search warrant was poorly drawn; however, relevant information necessary for judge to determine nexus between electronic devices, defendant, and alleged criminal activities was contained in affidavit — Search warrant authorized officers to conduct search for images, both still and moving, for evidence of defendant's involvement in drug trafficking — Memory card from tablet was included in parameters of search warrant — Officers were authorized to open various files to determine whether they contained incriminating evidence — While searching for evidence of drug trafficking, officers found clear, unequivocal and immediately apparent evidence of possession of child pornography — Evidence was found in same types of files which could have reasonably contained evidence related to drug trafficking — Trial court originally believed that affidavit lacked sufficient indicia of nexus between defendant and tablet, but concluded that good-faith exception cured any defect — Court of Appeals found that there was appropriate nexus; however, Court of Appeals noted that if it hadn't found appropriate nexus, good-faith exception applied —

Christopher Applegate v. Com. (2016-CA-001293-MR); *Christopher Applegate v. Com.* (2016-CA-001303-MR); *Christopher Applegate v. Com.* (2016-CA-001304-MR); and *Christopher Applegate v. Com.* (2016-CA-001686-MR); Campbell Cir. Ct., Stine, V, J.; Opinion by Judge Nickell, a*ffirming in part and reversing in part*, rendered 9/14/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

In these consolidated appeals, Christopher Applegate challenges the Campbell Circuit Court's denial of a suppression motion, denial of a motion to withdraw his guilty pleas, recommendation of special conditions of parole, imposition of court costs, and imposition of a partial public defender fee. Applegate also challenges his conviction on a charge of possession of a handgun by a convicted felon. Following a careful review, we affirm in part and reverse in part.

On May 12, 2014, police received a report of a pursuit between two cars with one of the drivers being armed with a gun. On arrival in the area, Campbell County Police Officer Thomas Lakes observed a vehicle matching the description in the report. Officer Lakes conducted a traffic stop of the vehicle, approached the car, and asked the driver—later identified as Applegate—to exit the vehicle. Once he explained the reason for the stop, Officer Lakes inquired whether Applegate had any guns. Applegate indicated he did not; volunteering he had recently been released from prison and wanted no trouble with the police. Officer Lakes subsequently learned Applegate had an outstanding warrant for failure to register as a sex offender.

Backup officers arrived on-scene, one of whom observed a handgun in Applegate's car in plain view in a seat pocket within reach of the driver. On top of the console between the front seats was a quantity of methamphetamine. Applegate was arrested and charged with trafficking in methamphetamine. Officers located additional drugs, scales and packaging material, as well as two cellular telephones, a tablet computer and a digital camera in the vehicle.

Believing the electronic devices might contain information pertinent to his drug investigation, Officer Lakes prepared an affidavit for a search

warrant for the two phones and the tablet. He indicated he was looking for photos, videos or communications related to guns, drug activity, co-conspirators, drug network activity and other associated information. After the warrant was issued, the devices were delivered to Bureau of Alcohol, Tobacco and Firearms Enforcement Agent Michael Oergel, a digital investigator, for forensic examination, analysis and recovery of data. Both phones and the tablet were equipped with either a SIM or MicroSD memory card to expand the memory capabilities of the devices; the presence of the expanded memory cards could not be readily discerned by a user.

During his examination, Agent Oergel found what he suspected to be photographs of a methamphetamine cooking operation. Although he had not been looking for evidence of other crimes, he could not tell from the file names what sort of images he would find upon opening each file. Several of the files contained photos and videos he immediately recognized as depicting child pornography. Agent Oergel returned the phones and tablet to Officer Lakes along with a narrative report of the contents of his findings.

Based on the finding of child pornography, and Applegate's prior conviction for possessing such illicit material, a second search warrant was procured for the digital camera that was in Applegate's possession on the day of his arrest. No evidence of illegal activity was recovered.

A third search warrant was procured to conduct a further, more in-depth examination and analysis of all the devices. This analysis revealed a large amount of data, including text messages relating to drug trafficking and additional photos and videos depicting child pornography.

Applegate was indicted for firearm-enhanced trafficking in methamphetamine[1] and being a persistent felony offender in the second degree (PFO II).[2] He was separately indicted for possession of a handgun by a convicted felon.[3] In a third indictment, he was charged with seven counts of possessing material portraying a sexual performance by a minor[4] and being a PFO II.

[1] Kentucky Revised Statutes (KRS) 218A.1412, a Class C felony.

[2] KRS 532.080.

[3] KRS 527.040, a Class C felony.

[4] KRS 531.335, a Class D felony.

Prior to trial, Applegate moved to suppress all evidence seized as a result of the search warrants, challenging their validity and arguing investigators exceeded the scope of the warrants. At the conclusion of a hearing on the matter, the trial court raised an issue related to sufficiency of the affidavit supporting issuance of the initial search warrant. After permitting the parties to brief the matter and receiving multiple memoranda on the issue, the trial court convened a second hearing to take testimony from Officer Lakes and former District Court Judge Gregory Popovich, the issuing magistrate of the challenged search warrant. The trial court denied the suppression motion in a lengthy and comprehensive order entered on July 1, 2016.

Applegate subsequently entered an *Alford*[5] conditional plea on the charges of possessing material portraying a sexual performance by a minor, reserving the right to appeal from the trial court's denial of his suppression motion.[6] In that case, the PFO II charge was dismissed, and the Commonwealth recommended a sentence of thirteen years' imprisonment. Applegate entered an unconditional plea on the trafficking charge with the PFO II charge being dismissed and the Commonwealth recommending an eight-year sentence. He also entered an unconditional plea on the charge of possession of a firearm by a convicted felon, receiving a recommended sentence of five years on that charge. The eight- and five-year sentences were to run consecutively to each other and concurrently with the thirteen-year sentence, for a total aggregate sentence of thirteen years' imprisonment. A subsequent motion to withdraw his guilty pleas on the trafficking and possession of a handgun charges was denied. These consolidated appeals followed.

[5] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

[6] We note the record does not contain any written reservation of the right to appeal the suppression issues as required by the plain language of Kentucky Rules of Criminal Procedure (RCr) 8.09. However, the Commonwealth and Applegate each informed the trial court the plea would be conditional, and the issues raised on appeal were expressly discussed during the plea colloquy. A similar practice was accepted by the Supreme Court of Kentucky in *Dickerson v. Commonwealth*, 278 S.W.3d 145, 149 (Ky. 2009).

Applegate raises multiple contentions of error in seeking relief from his convictions. First, he launches a multi-faceted attack on the trial court's denial of his suppression motion. Next, he contends he was not a convicted felon and therefore, could not legally be found guilty of the charge of being a felon in possession of a handgun. Third, he contends the trial court should have granted his motion to withdraw his guilty pleas. Finally, he argues the trial court made three errors in his sentencing when it sought to impose special conditions on his parole, ordered him to pay court costs, and levied public defender fees. We address these issues in reverse order.

The Commonwealth concedes error as to the sentencing issues. We have reviewed the record and agree the trial court improperly attempted to impose special conditions on Applegate's parole. *Chames v. Commonwealth*, 405 S.W.3d 519 (Ky. App. 2012). We likewise agree the trial court erred in ordering Applegate to pay court costs in installments beginning sixty days after his release, as these necessarily could not be paid within one year of the date of sentencing as required by KRS 23A.205(3). Further, we hold the trial court erred in assessing a public defender fee as it did not conduct a nonadversarial hearing to determine whether Applegate had the present ability to pay for his legal representation as required by KRS 31.211(1). *See also Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012). For these reasons, the judgments of the Campbell Circuit Court are reversed in part. The trial court is directed to enter corrected sentencing orders removing the offending language and requirements.

Next, Applegate contends the trial court should have granted his motion to withdraw his guilty pleas on the charges of trafficking and possession of a handgun by a convicted felon. However, review of the record reveals the arguments presented to this Court in support of his position are wholly different from those presented to the trial court. Attempting to present new reasons supporting his position at this late date is wholly insufficient. The time to make these arguments was in the trial court. It is axiomatic that a party may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 327 (Ky. 2010) (citations omitted). As the trial court was not presented these additional arguments, nor given the opportunity to rule thereon, we shall not consider them for the first time on appeal.

Applegate next contends he was not a convicted felon and therefore, his conviction of being a felon in possession of a handgun was improper. We disagree. First, Applegate entered an unconditional plea, thereby waiving "all defenses except that the indictment did not charge an offense." *Hughes v. Commonwealth*, 875 S.W.2d 99, 100 (Ky. 1994). Second, although he attempts to circumvent his waiver by couching his argument in terms of an allegedly illegal sentence, the issue presented is actually one of sufficiency of the evidence, alleging the Commonwealth could not prove the fact of a prior felony conviction. Post-judgment challenges to sufficiency of the evidence are precluded by unconditional guilty pleas. *Johnson v. Commonwealth*, 103 S.W.3d 687, 696 (Ky. 2003) (citing *Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky. App. 1986)). Further, although Applegate was ultimately successful in having the underlying felony conviction overturned, that conviction was not void *ab initio*, and was valid at the time he armed himself with a handgun in the instant matter. "The Supreme Court has long since held that weapons disability statutes . . . require felons to clear their legal status prior to obtaining a firearm. *Lewis v. United States*, 445 U.S. 55, 65, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980) (denying, as a defense to prior firearms statute, collateral attack that predicate felony conviction had been unconstitutionally obtained)." *United States v. Coleman*, 458 F.3d 453, 456 (6th Cir. 2006). Applegate's contention is without merit.

Finally, we turn to Applegate's challenges to the trial court's denial of his suppression motion. Although three search warrants were obtained over a period of three months, Applegate's arguments center solely on the validity of the initial warrant and the resulting evidence obtained following that

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

search. He argues the search exceeded the scope of the search warrant; the affidavit in support of the search warrant lacked a sufficient nexus to establish probable cause; the "good faith" exception to the exclusionary rule was inapplicable and could not be used to save the search; and the officers engaged in an improper "general" search. Again, we disagree with Applegate's contentions.

> Our standard for appellate review of rulings on pretrial motions to suppress evidence remains unchanged despite the recent repeal of RCr 9.78 and its reformulation under RCr 8.27. *Simpson v. Commonwealth*, 474 S.W.3d 544, 546-47 (Ky. 2015). We apply the same two-step process adopted in *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). First, we review the trial court's findings of fact, which are deemed to be conclusive, if they are supported by substantial evidence. Next, we review de novo the trial court's application of the law to the facts to determine whether its decision is correct as a matter of law.

Maloney v. Commonwealth, 489 S.W.3d 235, 237 (Ky. 2016).

Applegate first alleges the search exceeded the scope of the terms of the search warrant and was, therefore, unconstitutional. He claims the language of the warrant permitted officers to search only for communications between himself and others but did not permit a search for images or videos. Further, Applegate contends the failure to list a memory card inserted into the tablet as an item to be searched rendered any subsequent search of that memory card impermissible.

Our review of the record reveals the basis Applegate presents for his assertion regarding the impropriety of police searching the electronic devices for images and videos is wholly different from that presented to the trial court. In his argument to the trial court, Applegate raised no challenge to police searching for images, arguing only that videos were not listed as an item subject to the search. Before this Court, Applegate contends the warrant did not authorize a search for images or any kind—whether still or moving—asserting rules of grammar mandate such a finding; no such challenge was previously raised. Because this attack was not presented to the trial court for a ruling, it will not be considered for the first time on appeal. "Our jurisprudence will not permit an appellant to feed one kettle of fish to the trial judge and another to the appellate court. *See Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012) (citing *Kennedy*, 544 S.W.2d at 222)." *Owens v. Commonwealth*, 512 S.W.3d 1, 15 (Ky. App. 2017) (footnote omitted). Only issues fairly brought to the attention of the trial court are adequately preserved for appellate review. *Elery*, 368 S.W.3d at 97 (citing *Richardson v. Commonwealth*, 483 S.W.2d 105, 106 (Ky. 1972); *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999); and *Young v. Commonwealth*, 50 S.W.3d 148, 168 (Ky. 2001)).

In his challenge to the search of the memory card from the tablet, Applegate makes little more than a passing swipe, consisting of only conclusory assertions. No authority is cited for his position. We will not search the record to construct Applegate's argument for him, nor will this Court undergo a fishing expedition to find support for underdeveloped arguments. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).

A careful review of the record reveals substantial evidence to support the trial court's decision, and we discern no error in its application of the law to the facts. We agree with the trial court that, although inartfully drawn, the search warrant authorized officers to conduct a search for images—both still and moving—for evidence of Applegate's involvement in drug trafficking. The memory card from the tablet—internal flash media used to expand storage capacity—was likewise included within the parameters of the search warrant. Applegate's contentions to the contrary are without merit.

Coupled closely with his argument the officers exceeded the scope of the warrant is Applegate's contention officers conducted an impermissible "general" search. In this portion of his challenge, he does not contend the warrant was overbroad, but rather, rephrases his previous argument and wraps it in different cloth. He alleges officers looked at all the files recovered from the devices, thus making the search "general" rather than the limited search authorized by the warrant. We disagree.

> General searches are prohibited as is the "seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Berger v. New York*, 388 U.S. 41, 58, 87 S.Ct. 1873, 1883, 18 L.Ed.2d 1040 (1967) (quoting *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927)). "If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional" and the evidence excluded. *Horton v. California*, 496 U.S. 128, 140, 110 S.Ct. 2301, 2310, 110 L.Ed.2d 112 (1990).
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> The scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." *United States v. Ross*, 456 U.S. 798, 824, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982). The *Ross* Court held that a lawful search is not "limited by the possibility that separate acts of entry or opening may be required to complete the search." *Id.* at 820-21, 102 S.Ct. at 2170-71. . . .
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> An otherwise valid search is transformed into an impermissible general search only where the searching officers demonstrate a "flagrant disregard for the limitations of a search warrant[.]" *United States v. Lambert*, 771 F.2d 83, 93 (6th Cir. 1985).

Lundy v. Commonwealth, 511 S.W.3d 398, 402-03 (Ky. App. 2017)

Here, the terms of the warrant specifically authorized searching officers to examine the three devices for electronic evidence of Applegate's involvement with drug trafficking. In executing the search, the officers opened various types of files to determine whether they contained incriminating evidence. Contrary to Applegate's assertion, the officers' actions did not constitute an impermissible general search because they were following the authorization contained in the search warrant.

> [S]o long as the computer search is limited to a search for evidence explicitly authorized in the warrant, it is reasonable for the executing officers to open the various types of files located in the computer's hard drive in order to determine whether they contain such evidence.

United States v. Richards, 659 F.3d 527, 540 (6th Cir. 2011) (citation omitted). As previously stated, the record contains no evidence officers exceeded the scope of the warrant. Likewise, it is clear officers were searching only for evidence tying Applegate to drug trafficking. In so doing, they uncovered clear, unequivocal and immediately apparent evidence of Applegate's possession of child pornography. This evidence was found in the same types of files which could reasonably have contained evidence related to drug trafficking. The officers properly limited their search in conformity with the warrant and, as the trial court correctly found, did not conduct an impermissible general search.

Applegate next asserts the affidavit underlying the search warrant failed to establish a sufficient nexus to establish probable cause for issuance of the warrant related to the tablet. Again, we disagree.

Appellate courts "review the four corners of the affidavit and not extrinsic evidence in analyzing the warrant-issuing judge's conclusion." *Commonwealth v. Pride*, 302 S.W.3d 43, 49 (Ky. 2010) (citation omitted). When sufficiency of an affidavit is challenged, our review is deferential and undertaken "in a commonsense, rather than hypertechnical, manner." *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005). Issuing judges are permitted to make reasonable inferences about the evidence and where it might be located. *Elders v. Commonwealth*, 395 S.W.3d 495, 501 (Ky. App. 2012); *Beckam v. Commonwealth*, 284 S.W.3d 547 (Ky. App. 2009).

As previously stated, the affidavit underlying the search warrant was not artfully drafted and could clearly have been more thorough. However, the relevant information necessary for the issuing judge to determine a nexus between the electronic devices, Applegate, and the alleged criminal activities was contained in the affidavit. The devices were particularly described, the events preceding their seizure were set out in detail, and the evidence sought was specified. The issuing judge could easily synthesize the information and reasonably infer the devices were under Applegate's control and contained evidence of illicit activity. Thus, we hold a sufficient nexus was shown, and the search warrant was properly issued.

Finally, Applegate argues the trial court incorrectly determined the "good-faith" exception to the exclusionary rule was applicable. Although the trial court originally believed the affidavit lacked sufficient indicia of a nexus between Applegate and the tablet, it concluded the good-faith exception cured any defect. Having determined the affidavit adequately revealed an appropriate nexus, we do not believe the trial court was required to reach the issue of whether the exception applied. It is axiomatic that we may affirm the trial court for any reason supported by the record. *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 (Ky. 2009). Nevertheless, were we to have determined—as did

the trial court—the affidavit did not establish the requisite nexus, the good-faith exception would apply to the facts before us.

Suppression is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974). In *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the Supreme Court held the exclusionary rule does not apply when police officers act in good faith in executing what is later ruled to be a legally deficient search warrant. If an officer has an objectively reasonable belief in the sufficiency of the warrant and the probable cause determination, suppression is not warranted. However,

> [i]f the affidavit contains false or misleading information, the officer's reliance cannot be reasonable. Likewise, the Court retained the exclusionary rule and applied no presumption of validity in cases of abandonment by the judge of a detached and neutral role, and in cases where the officer's belief in the existence of probable cause is entirely unreasonable. Finally, suppression was retained as a remedy where the warrant is facially deficient by failing to describe the place to be searched or the thing to be seized. In sum, the court imposed a standard of objective reasonableness on police activity and retained the suppression remedy when police conduct falls below that standard. *Leon*, 468 U.S. at 922-924, 104 S.Ct. at 3420-3421.

Crayton v. Commonwealth, 846 S.W.2d 684, 687-88 (Ky. 1992).

The record herein reveals none of the deficiencies described in *Crayton* to preclude application of the good-faith exception. The investigative officers acted in an objectively reasonable manner, no misconduct occurred in the making of the affidavit or otherwise, the issuing judge did not abandon his neutral and detached role, and the items to be searched were adequately described. It plainly appears the affidavit for the initial search warrant was made in good faith. If the warrant was "erroneously issued by virtue of judicial error, neither the Constitution nor sound public policy requires suppression of the evidence." *Id.* at 688. Suppression of the evidence could have no deterrent effect on the officers' actions and would be improper under the circumstances. Had there been an error in finding probable cause, receiving or relying on information not contained within the four corners of the affidavit, or in issuing the warrant,

> [t]he error in the assessment of the affidavit was a judicial error and any error in receipt of information extrinsic to the affidavit was likewise a judicial error. The trial court candidly acknowledged its error in assessment of the affidavit but forthrightly found that the officer acted in good faith. Suppression of the evidence here could have no deterrent effect upon the police and the record fails to show any abandonment by the judge of his judicial function. It should not be overlooked that suppression of the evidence is not a remedy for judicial error as there is no constitutional right to suppression.

Id. at 689. The trial court did not err in concluding the good-faith exception was applicable and cured any alleged defects in the affidavit or ensuing search warrant.

For the foregoing reasons, the judgments of the Campbell Circuit Court are AFFIRMED IN PART and REVERSED IN PART.

ALL CONCUR.

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON AND NICKELL, JUDGES.

OPEN RECORDS ACT

OPEN RECORDS ACT REQUEST FOR UNIVERSITY OF KENTUCKY AUDIT RECORDS

EXEMPTION FOR PRELIMINARY RECORDS NOT INCLUDED IN FINAL ACTION

ATTORNEYS

ATTORNEY-CLIENT PRIVILEGE

WORK-PRODUCT DOCTRINE

University of Kentucky (University) acquired cardiac clinic — Approximately one year after acquisition, University received two complaints concerning treatment practices at clinic — University directed audit of physicians' medical documentation and billing — Those records were provided to University's Chief Medical Compliance Officer and its General Counsel — Audits revealed clinic's medical record documentation was inadequate and likely resulted in overpayments — Rather than determining precise amount of overpayments, University refunded all payments received for period in question — University then terminated its affiliation with clinic — At May 2, 2016 dinner meeting, University's outside counsel presented summary of this information to University's Board of Trustees — Newspaper learned of dinner meeting and requested copy of audit, copy of agenda of meeting, and copy of PowerPoint presentation shown at dinner meeting — University denied requests — Attorney General found that audit records were not preliminary; therefore, they were not exempt from disclosure under Open Records Act (Act) — In addition, Attorney General found that University violated KRS 61.835 by not creating minutes of dinner meeting and that discussions at dinner meeting with outside counsel were not privileged — Trial court found, in part, that audit documents, excluding any patient records or identifying information, were subject to disclosure under Act — University appealed ruling on audit records — AFFIRMED — University took its final action based upon information revealed during audits — Records which are of internal, preliminary and investigatory nature lose their exempt status once they are adopted by agency as part of its actions — Act does not require that agency reference or incorporate specific documents in order for those records to be adopted into final agency action — KRE 503(b) defines general rule of attorney-client privilege — For privilege to apply, the following must be met: (1) statements must actually be confidential, *i.e.*, they are not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of rendition of professional legal services to client or those reasonably necessary for transmission of communication, and (2) statements must be made for purpose of obtaining or furthering rendition of legal services to client — University did not suggest that audits were prepared or conducted under direction of either its inside or outside counsel — Further, University did not contend that audits were intended to be disclosed only to counsel for purposes of preparing legal advice — Thus, University failed to establish claim of attorney-client privilege with respect to audit documents — Under CR 26.02(3), there is qualified privilege from discovery for documents prepared in anticipation of litigation or for trial by party's representative, which includes an attorney — However, mere potential for litigation is not sufficient to place documents within scope of work-product doctrine — Documents which are primarily factual, non-opinion work product are subject to lesser protection than "core" work product, which includes mental impressions, conclusions, opinions, or legal theories of attorney — In instant action, audit documents were prepared in course of University's normal business oversight of clinic's operation, and only remotely in anticipation of potential litigation — Audit documents related primarily to factual matters, rather than attorney's impressions, conclusions or legal theories — Thus, University failed to establish that audit documents are subject to work-product doctrine —

University of Kentucky v. Lexington H-L Services, Inc., d/b/a Lexington Herald-Leader (2017-CA-001243-MR); Fayette Cir. Ct., Goodwine, J.; Opinion by Judge Maze, *affirming*, rendered 9/14/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

The University of Kentucky (the University) appeals from an Opinion and Order by the Fayette Circuit Court which affirmed an opinion by the Attorney General on an Open Records Act request by Lexington H-L Services, Inc. d/b/a the Lexington Herald Leader (the Herald-Leader). The University argues that certain audit records were exempt from disclosure under the Act because they were preliminary and not incorporated into its final action, and because they were protected by the attorney-client privilege or the work-product doctrine. We find that the circuit court correctly found that the records were not exempt from disclosure under the Open Records Act. Hence, we affirm.

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

I. Facts and Procedural History

The relevant facts of this action are not in dispute. In the summer of 2013, the University pursued an affiliation with the Appalachian Heart Center in Hazard, Kentucky ("the Clinic"). Under the terms of the affiliation, the University would purchase the Clinic's assets and enter into professional and adjunct medical facility staff agreements with the cardiologists. Prior to the acquisition, the University sought an independent valuation of the agreements with the physicians, and independent reviews of the care provided by the physicians and of the Clinic's operations and revenue.

Approximately a year after the acquisition, the University received two complaints concerning treatment practices at the Clinic. In response to these complaints, the University directed an audit of the physicians' medical documentation and the billing for their services. Those records were ultimately provided to the University's Chief Medical Compliance Officer and its General Counsel.

The audits revealed that the Clinic's medical record documentation was inadequate and likely resulted in overpayments. Rather than determining the precise amount of the overpayments, the University elected to refund all payments received for the period in question. The University subsequently terminated its affiliation with the Clinic. At a May 2, 2016, dinner meeting, the University's outside counsel presented a summary of this information to the University's Board of Trustees.

Upon learning of the information provided at the dinner meeting, the Herald-Leader requested a copy of the audit performed in response to the University's description of the problems that were uncovered at the Clinic. The Herald-Leader also requested a copy of the agenda and the PowerPoint presentation shown at the dinner meeting. The University denied these requests.

On June 7, 2016, the Herald-Leader sought the Kentucky Attorney General's review of the University's failure to produce the documents. The Herald-Leader also sought review of the University's failure to prepare an agenda or to keep minutes of the dinner. The University refused to grant the Attorney General's office access to the materials *in camera*, taking the position that it may be considered a waiver of its claims of privilege.

On August 31, 2016, the Attorney General's office issued an opinion on the Herald-Leader's Open-Records Request. *In re: Lexington Herald Leader/University of Kentucky*, 16-ORD-193, 2016 WL 4607945 (2016) (A. Beshear, A.G.). The Attorney General held that the audit records were not preliminary and, therefore, were not exempt from disclosure under the Act. In a separate opinion, the Attorney General concluded that: (1) the University violated the requirements of Kentucky Revised Statute (KRS) 61.835 by not creating minutes of the dinner meeting; (2) the Board of Trustees' discussion at the dinner meeting with the outside counsel was not privileged; (3) the University was required to create minutes that "reflect the substance" of that discussion; (4) even if the Board of Trustee's discussion with counsel was privileged, the privilege is not an exception to the Open Meetings Act unless the discussion concerned actual proposed or pending litigation per KRS 61.810(1)(c). *In re: Lexington Herald-Leader/University of Kentucky*, 16-OMD-154 (2016) (A. Beshear, A.G.).

The University brought an appeal from both opinions, and the matters were consolidated into the current action. The circuit court directed the University to provide the documents at issue for an *in camera* review. There were three categories of documents at issue. The first category consists of documents relating to the audit initiated by the University's Medical Chief Compliance Officer in August 2014. The second category consisted of the PowerPoint presentation presented by outside counsel at the May 2, 2016, dinner meeting. The third category consisted of the unredacted invoices by outside counsel to the University of Kentucky from April 2, 2015, through May 31, 2016. Only the documents in the first category are at issue in this appeal.

In pertinent part, the circuit court concluded that the audit documents, excluding any patient records or identifying information, were subject to disclosure under the Open Records Act. The court first found that the audit records ceased to be preliminary in nature after the University took its final action of refunding the payments received during the period in question. The court further found that the audit records were not prepared for the sole purpose of rendering legal advice or in anticipation of litigation. Consequently, the court concluded that the records were not exempt from disclosure under the attorney-client privilege or work-product doctrine.[1] The University now appeals from this order.

[1] The court separately found that PowerPoint presentation was subject to disclosure under the Open Records Act, but the attorney billing records were not. These rulings are not at issue in this appeal.

II. Standard of Review

In *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013), the Kentucky Supreme Court set out the process for review of an Open Records Act request.

> To begin, it is helpful to observe that when an agency denies an ORA request, the requester has two ways to challenge the denial. He or she may, under KRS 61.882, file an original action in the Circuit Court seeking injunctive and/or other appropriate relief. Alternatively, under KRS 61.880, he or she may, as was done in this case, ask the Attorney General to review the matter. Once the Attorney General renders a decision either party then has thirty days within which to bring an action pursuant to KRS 61.882(3) in the Circuit Court. Although the statutes refer to this second type of Circuit Court proceeding as an "appeal" of the Attorney General's decision, it is an "appeal" only in the sense that if a Circuit Court action is not filed within the thirty-day limitations period, the Attorney General's decision becomes binding on the parties and enforceable in court. Otherwise, this second sort of Circuit Court proceeding is an original action just like the first sort. The Circuit Court does not review and is not in any sense bound by the Attorney General's decision, nor is it limited to the "record" offered to the Attorney General. The agency, rather, bears the burden of proof, and what it must prove is that any decision to withhold responsive records was justified under the Act. Its proof may and often will include an outline, catalogue, or index of responsive records and an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld. The trial court may also hold a hearing if necessary, and the parties may request or the court on its own motion may require the *in camera* inspection of any withheld records. We review the trial court's factual findings for clear error, and issues concerning the construction of the ORA we review *de novo*.

Id. at 848-49 (cleaned up).[2]

[2] This opinion uses the (cleaned up) parenthetical to indicate that internal quotation marks, alterations, ellipses, and citations have been omitted from quotations. *See*, *e.g.*, *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017); *Smith v. Commonwealth*, 520 S.W.3d 340, 354 (Ky. 2017); *I.L. through Taylor v. Knox Cty. Bd. of Educ.*, 257 F. Supp. 3d 946, 960 (E.D. Tenn. 2017).

The basic policy of the Open Records Act "is that free and open examination of public records is in the public interest . . . even though such examination may cause inconvenience or embarrassment to public officials or others." KRS 61.871. Consequently, the Act requires that all exceptions to production, statutory or otherwise, must be strictly construed. As noted, the burden of establishing that an exception applies rests upon the agency resisting disclosure. KRS 61.882(3).

III. Issues

A. Preliminary Status of Audit Records

The University raises three grounds why the audit records were not subject to disclosure under the Open Records Act. First, the University argues that the audit records were preliminary in that they were prepared as part of its ongoing efforts to ensure compliance with Federal and State Medicare requirements. The University correctly points out that KRS 61.878(1)(i) & (j) excludes from disclosure:

> (i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;
> (j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended;

The University acknowledges the authority holding that preliminary records may lose that status once they are adopted into final agency action. *Univ. of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). However, the University contends that this authority is not consistent with the statutory

text. We acknowledge the University's argument to preserve the issue for further review, but it is well established that this Court is bound to follow precedents set by the Kentucky Supreme Court. *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000). *See also* SCR[3] 1.030(8)(a).

[3] Kentucky Rules of the Supreme Court.

In the alternative, the University argues that the audit documents retain their status as preliminary because they were never incorporated into a final agency action. The University agrees that its repayment of the charges found in the audit constituted a final action for purposes of the Open Records Act. However, the University takes the position that the audit records were not incorporated in that action. Rather, the University contends that the audit documents were part of its regular course of business to ensure the Clinic's compliance with applicable federal statutes and regulations. For this reason, the University maintains that it never adopted the audit records into its final action, and thus they retain their status as preliminary under the Act.

The University's position is novel, but we do not find any authority supporting it. Indeed, there is no dispute that the University took its final action based upon the information revealed during the audits. Records which are of an internal, preliminary and investigatory nature lose their exempt status once they are adopted by the agency as part of its action. *Courier-Journal*, 830 S.W.2d at 378. The Act does not require that an agency reference or incorporate specific documents in order for those records to be adopted into the final agency action. Rather, we agree with the Attorney General that preliminary records which form the basis for the agency's final action are subject to disclosure.

The University further urges that it has a need for clear and candid preliminary investigations such as the audit records, and that its work would be impeded if such records were later subject to disclosure. However, the General Assembly has clearly defined the public policy behind the Open Records Act, and we are not at liberty to interpret the Act in light of different public policy considerations. Therefore, we must agree with the circuit court that the preliminary-records exception does not apply in this case.

B. Attorney-Client Privilege

The University next argues that the audit records were protected by attorney-client privilege, as they were prepared for the benefit of counsel in the course of determining its legal obligations. As this presents a question of law, our standard of review is *de novo* and without deference to the decision of the circuit court. *Hahn v. University of Louisville*, 80 S.W.3d 771, 773 (Ky. App. 2001).

KRE[4] 503(b) defines the general rule of attorney-client privilege as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
>
> (2) Between the lawyer and a representative of the lawyer;
>
> (3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
>
> (4) Between representatives of the client or between the client and a representative of the client; or
>
> (5) Among lawyers and their representatives representing the same client.

KRE 503(a)(5) further provides that a communication is deemed

> "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

[4] Kentucky Rules of Evidence.

The application of the privilege turns on two questions. First, the statements must actually be confidential, meaning they are "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Collins v. Braden*, 384 S.W.3d 154, 161 (Ky. 2012) (Quoting KRE 503(a)(5)). Second, the statements must be made for the purpose of obtaining or furthering the rendition of legal services to the client. *Id.* (Citing KRE 503(b)).

The University takes the position that its Chief Medical Compliance Officer directed that the audit be conducted in response to specific issues regarding the Clinic's compliance with laws and regulations. Since non-compliance with fraud and abuse laws can result in litigation, the University contends that the audit documents were prepared and compiled for its counsel to give sound and informed advice regarding that potential litigation. Finally, the University contends that the audit documents were prepared only to allow the Chief Medical Compliance Officer to render legal advice to the University, and thus were "confidential" for purposes of the attorney-client privilege.

However, the privilege "protects only those disclosures necessary to obtain legal advice which might not have been made absent the privilege and is triggered only by a client's request for legal, as contrasted with business, advice. Where the attorney acts merely as a business adviser the privilege is inapplicable." *Lexington Pub. Library v. Clark*, 90 S.W.3d 53, 60 (Ky. 2002) (Cleaned Up). In this case, the University asserts that its Chief Medical Compliance Officer directed the audit to ensure the Clinic's compliance with Federal and State Medicaid requirements.

However, the University does not suggest that the audits were prepared or conducted under the direction of either its inside or outside counsel. Likewise, the University does not contend that the audits were intended to be disclosed only to counsel for the purposes of preparing legal advice. Under the circumstances, we agree with the circuit court that the University failed to establish a claim of attorney-client privilege with respect to the audit documents.

C. Work-Product Doctrine

Finally, the University that the audit records were subject to the work-product doctrine. The doctrine, as defined under CR[5] 26.02(3), affords a qualified privilege from discovery for documents "prepared in anticipation of litigation or for trial" by that party's representative, which includes an attorney. The privilege may be available even where the attorney whose work product is sought does not represent a party in current litigation. *O'Connell v. Cowan*, 332 S.W.3d 34, 42 (Ky. 2010). However, the mere potential for litigation is not sufficient to place documents within the scope of the work-product doctrine. *Frankfort Reg'l Med. Ctr. v. Shepherd*, No. 2015-SC-000438-MR, 2016 WL 3376030, at *14 (Ky. 2016). Furthermore, documents which are primarily factual, non-opinion work product are subject to lesser protection than "core" work product, which includes the mental impressions, conclusions, opinions, or legal theories of an attorney. *Id.* at 42. (Citing *Morrow v. Brown, Todd & Heyburn*, 957 S.W.2d 722, 725 (Ky. 1997)).

[5] Kentucky Rules of Civil Procedure.

Here, the audit documents at issue were prepared in the course of the University's normal business oversight of the Clinic's operation, and only remotely in anticipation of potential litigation. In addition, the audit documents relate primarily to factual matters, rather than an attorney's impressions, conclusions or legal theories. Under the circumstances, we agree with the circuit court that the University failed to establish that the audit documents are subject to the work-product doctrine. Since the University failed to establish that the audit records were exempt from disclosure under the Open Records Act or other applicable law, the circuit court properly granted the Herald-Leader's request for production of those documents.

IV. Conclusion

Accordingly, we affirm the opinion and order of the Fayette Circuit Court. Once finality attaches to this opinion, the University shall produce the documents as directed by the circuit court.

ALL CONCUR.

BEFORE: COMBS, DIXON AND MAZE, JUDGES.

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

FAMILY LAW

DOMESTIC VIOLENCE ORDER (DVO)

FULL EVIDENTIARY HEARING

SUFFICIENCY OF THE EVIDENCE

CIVIL PROCEDURE

SERVICE OF PROCESS
ON PARTY TO BE PROTECTED

Boyfriend and girlfriend dated and lived in boyfriend's home — They had no children together — Parties broke up and girlfriend left home around November 2016 — On January 6, 2018, boyfriend went to see girlfriend at her new home — Girlfriend alleged that she noticed boyfriend's vehicle in parking lot beside her apartment when she returned home — Girlfriend went into apartment — After 20 minutes, girlfriend called police because boyfriend was hanging around — Girlfriend called police again after boyfriend began banging on her door and yelling an obscenity while asking to be let in — Police arrived and spoke with both parties — Girlfriend filed petition for Emergency Protective Order (EPO) — Girlfriend stated in petition that she had no contact with boyfriend for 14 months after he had thrown her and her daughter out of his home — Girlfriend stated that boyfriend had been very angry prior to throwing her out of his home and that she was afraid of him during that time — At Domestic Violence Order (DVO) hearing, boyfriend and girlfriend appeared *pro se* — Neither party was sworn in — Trial court asked girlfriend what she wanted — Girlfriend responded that she wanted no contact order — Boyfriend agreed to her request — Trial court entered DVO prohibiting boyfriend from having any contact with girlfriend for three years and from possessing any firearms during that period — Boyfriend obtained counsel and filed motion to alter, amend or vacate — Boyfriend claimed that he had stopped by girlfriend's apartment to see how she was doing and that he was leaving when police arrived — Boyfriend denied using obscenity when asking her to answer door and denied any acts of domestic violence — Boyfriend argued hearing was improper as neither party was sworn and there was no evidence of current or past domestic violence — Boyfriend claimed that he agreed to stay away from girlfriend, not to entry of DVO — Hearing was noticed three times because there was trouble obtaining service on girlfriend at her listed home address and she never appeared — At second hearing, trial court ordered girlfriend be served through protective order summons by sheriff — At final hearing, trial court noted that final attempt by sheriff to serve girlfriend was not successful — Trial court found that it would not be proper to dismiss DVO without girlfriend being present and proof being presented that she was actually served — Boyfriend appealed — VACATED DVO, although permitted DVO to remain in effect for 30 days after opinion becomes final, and REMANDED — There was no clear and knowing waiver of boyfriend's due process right to full evidentiary hearing and to have sufficient evidence introduced to support entry of DVO — Due process is not satisfied when DVO is granted without full hearing, such as when sworn testimony is not presented from both parties or testimony is cut short — Girlfriend did not provide basis why she was afraid at time of incident except that they had not had any contact for 14 months and he was angry when they broke up — Girlfriend alleged that boyfriend had guns, but did not allege that he had threatened her with them or that she was fearful that he would shoot her — While motion to alter, amend or vacate DVO may not technically be governed by KRS 403.730(1)(b) and KRS 403.735(2)(a), to protect girlfriend from potential domestic violence, trial court acted properly by trying to make sure that girlfriend was personally served — It would have been appropriate for trial court to continue matter until girlfriend was served and to follow provisions in KRS 403.735(2)(a) by repeating process of continuing hearing and reissuing new summons girlfriend was served in advance of hearing — Court of Appeals noted that this process was not required before proceeding, but it would have been preferable to use this process rather than simply deny boyfriend's motion — There was no indication that girlfriend received notice of appeal since it was served on her by mail at same address as was used for motion to alter, amend or vacate — To act without girlfriend present without knowing whether she received actual notice would deny her right to receive full hearing — Although girlfriend is technically not adverse party in DVO petition, statutory measures to effect service on adverse party and protect that party's rights are reasonably applied to girlfriend under facts of case — Both parties' rights must be protected — Court of Appeals recommended that trial court attempt service on girlfriend through protective order summons before holding new evidentiary hearing, but noted that this recommendation is based on unique facts of instant action, not statutory requirements —

Bradley Clark v. Tonya Parrett (2018-CA-000507-ME); Fayette Fam. Ct., Messer, J. Opinion by Judge Thompson, *vacating and remanding*, rendered 9/21/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Bradley Clark appeals from the Fayette Family Court's Domestic Violence Order (DVO) prohibiting him from having contact with Tonya Parrett. Clark argues that the family court erred in entering a DVO against him where he was not afforded a full evidentiary hearing and there was not sufficient evidence introduced to support the entry of the DVO.

Clark and Parrett formerly dated and lived together in Clark's home. When they broke up sometime around November 2016, Parrett left the home.

They did not have any further contact until January 6, 2018, when Clark went to see Parrett at her new home. According to Parrett's petition for an emergency protective order (EPO) and DVO, when she arrived home she noticed Clark parked in a parking lot beside her apartment. She parked her car and went into her apartment. After about twenty minutes, she called the police because Clark was hanging around. She called the police a second time after Clark began "banging on my door stating, 'let me the f*** in, I want to talk to you.[']" The police arrived and talked with both of them and Parrett was advised to file an EPO.

In the petition, Parrett reported she was afraid of Clark for the following reasons:

> I fear him after 14 months of no contact; after he throwed my daughter and I out of his home placing my personal items that he chose to give back onto his front and back porch. Bradley has multiple guns and as soon as I see him I start shaking all over becoming very anxious. . . . Before being kicked out of Bradley's home he was very angry acting making me fear him then. I have not had any communication in anyway from Bradley since December 2016.

In indicating she wanted him to stay away from her place of employment, she stated she was "unsure to be honest what he is capable of." Parrett received an EPO that day.

On January 17, 2018, at the DVO hearing, Clark and Parrett appeared *pro se*.[1] Neither party was sworn with the entire hearing lasting one minute and thirty-three seconds and consisting of the following exchange:

> Judge: Ok, are you Tonya Parrett?
>
> Parrett: Yes sir, I am.
>
> Judge: All right, you are Bradley Clark?
>
> Clark: Yes sir.
>
> Judge: What do you want to do today Ms. Parrett?
>
> Parrett: I want an order put in place to where he can't come back around me.
>
> Judge: Okay, you want a no contact order?
>
> Parrett: Yes sir.
>
> Judge: Ok, and how are you all related?
>
> Parrett: He's an ex-boyfriend?
>
> Judge: Ex-boyfriend? Did you all live together?
>
> Parrett: We did fourteen months ago.
>
> Judge: Ok, so this is fairly simple from your perspective, just no contact?
>
> Parrett: Very simple.
>
> Judge: No kids?
>
> Parrett: That's correct sir.
>
> Judge: You all don't have any kids together?

Parrett: No sir.

Judge: So Bradley, are you in agreement with her request? Yes?

Clark: Yes sir.

Judge: Ok, I know there is talk about the police in here. Were there any criminal charges filed because of this incident? Ok. All right then we will keep it simple. A domestic violence order, no contact, this will be good for three years. All right, anything else?

Parrett: No sir.

Judge: I think it's that simple, I hope. Ok, well hang around for a few minutes and you will get a copy of the order. Ok, thank you all.

Parrett: Thank you sir.

The DVO was entered that day prohibiting Clark from having any contact with Parrett for three years and from possessing any firearms during this period.

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[1] Former Judge Timothy N. Philpot presided over the January 17, 2018 DVO hearing.

Clark obtained counsel who filed a motion to alter, amend or vacate. Clark argued he stopped by Parrett's home to see how she was doing and was leaving when the police arrived. He denied using an obscenity when asking her to answer the door. He denied committing any acts of domestic violence.

Clark argued the hearing was improper because neither party was sworn, there was no evidence of domestic violence shown during the hearing and there was no allegation of past domestic violence in Parrett's petition. Clark explained that when he stated he agreed with Parrett's request at the hearing, he was agreeing he would stay away from her rather than consenting to the entry of a DVO. He did not understand the accompanying consequences of a DVO beyond that it would mean he would have no contact with Parrett. Clark stated he had no criminal history and used firearms on his farm and hunted with his son and was concerned about the negative consequences the DVO would have on his employment in the cable business.

The hearing on the motion to alter, amend or vacate was heard by a different judge than who issued the DVO. The hearing was noticed three times, on January 31, 2018, February 14, 2018, and February 28, 2018, because there was trouble obtaining service on Parrett at her home address listed and Parrett never appeared.

At each hearing, the court indicated Parrett needed to be served for it to hold a full hearing on the matter. At the January 31, 2018 hearing, the court indicated that perhaps Parrett had moved and not informed the court. At the February 14, 2018 hearing, the family court ordered Parrett be served through a protective order summons by the sheriff.

At the final hearing on the motion held on February 28, 2018, counsel for Clark indicated that Parrett was served at her residence by first class mail three times, once for each hearing date and it was counsel's position that this was all that was required. The family court noted that although a final attempt had been made by the sheriff to serve Parrett on February 26, 2018, it was not successful. The family court ruled it would not be proper to dismiss a DVO without Parrett being present and proof being presented that she was actually served, the motion did not meet the very high standard needed to alter, amend or vacate the DVO and, without Parrett's agreement, the DVO would not be dismissed. The family court indicated it did not review the video of the hearing.

While someone may consent to entry of a DVO, under these circumstances, there was no clear and knowing waiver of Clark's due process right to a full evidentiary hearing and to have sufficient evidence introduced to support the entry of the DVO. We agree with Clark that the family court erred in entering a DVO against him in the absence of a full hearing and sufficient evidence for a finding of domestic violence and abuse.

"Domestic violence and abuse" is defined as "physical injury, serious physical injury, stalking, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple[.]" Kentucky Revised Statutes (KRS) 403.720(1). "Any family member or any member of an unmarried couple may file for and receive protection . . . from domestic violence and abuse[.]" KRS 403.750(1). "Following a hearing . . . if a court finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur, the court may issue a domestic violence order[.]" KRS 403.740(1). "Our review in this Court is not whether we would have decided the case differently, but rather whether the trial court's findings were clearly erroneous or an abuse of discretion." *Gibson v. Campbell-Marletta*, 503 S.W.3d 186, 190 (Ky.App. 2016).

"As a result of the volume and the nature of protection claims, courts may be tempted to give [domestic violence hearings] less attention than they deserve, but these proceedings are entitled to the same dignity as any court proceeding." *Carpenter v. Schlomann*, 336 S.W.3d 129, 132 (Ky.App. 2011). "[A] DVO has significant long-term consequences for both parties." *Rankin v. Criswell*, 277 S.W.3d 621, 625 (Ky.App. 2008). "[T]he impact of having an EPO or DVO entered improperly, hastily, or without a valid basis can have a devastating effect on the alleged perpetrator" including the perpetrator's "becom[ing] subject to immediate arrest, imprisonment, and incarceration for up to one year for the violation of a court order, no matter what the situation or circumstances might be." *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky.App. 2005).

A DVO "cannot be granted solely on the basis of the contents of the petition." *Rankin*, 277 S.W.3d at 625. "[A] party has a meaningful opportunity to be heard where the trial court allows each party to present evidence and give sworn testimony before making a decision." *Holt v. Holt*, 458 S.W.3d 806, 813 (Ky.App. 2015). Due process is not satisfied when a DVO is granted without a full hearing, such as when sworn testimony is not presented from both parties or testimony is cut short. *Carpenter*, 336 S.W.3d at 132; *Wright*, 181 S.W.3d at 53. Without a full hearing a trial court cannot make a finding based upon a preponderance of the evidence. *Wright*, 181 S.W.3d at 53.

Parrett's petition stated she was afraid of Clark based on their breakup and his banging on her door, but she did not provide a basis why she was afraid at that time except that they had not had any contact for fourteen months and he was angry when they broke up. While she alleged Clark had guns, she did not allege that he had threatened her with them or that she was fearful that he would shoot her.

Neither Parrett nor Clark was sworn in and neither of them was asked about the contents of the petition other than to ascertain what Parrett wanted. Therefore, we do not know whether Parrett could have testified about additional matters to establish that Clark committed domestic violence against her previously or whether Clark's actions when knocking on her door caused "infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault[.]" KRS 403.720(1). We also do not know whether Clark could have successfully rebutted any such claims. There was nothing in Parrett's petition or testimony to support any factual finding that domestic violence had occurred.

As in *Wright*, 181 S.W.3d at 53, "[b]ecause there was either no evidence or insufficient evidence presented to meet the applicable standard or proof, we must vacate [the ruling] before us and remand the matter[] for a 'full hearing' as contemplated by the statute, comprised of the full testimony of any appropriate witnesses sought to be presented."

While a motion to alter, amend or vacate a DVO may not technically be governed by KRS 403.730(1)(b) and KRS 403.735(2)(a), to protect Parrett from potential domestic violence, we believe the family court acted properly by trying to make sure Parrett was personally served. While the matter was repeatedly re-noticed for a hearing, only once did the family court issue a protective order summons to be served on Parrett. The sheriff was never successful at serving Parrett at her home address, with the summons returned to the court as expired on March 1, 2018.[2] It would have been appropriate for the family court to continue the matter until Parrett was served and to follow the provision in KRS 403.735(2)(a) by "repeat[ing] the process of continuing the hearing and reissuing a new summons until the adverse party is served in advance of the scheduled hearing." While this was not required before proceeding, it would have been preferable to use this process rather than simply deny Clark's motion.

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[2] We note that service on Parrett was attempted at the address listed as her home address in the EPO and DVO. Her petition also lists her work address, but apparently service was never attempted on her there.

We note that the notice of appeal was also served on Parrett by mail at this same address. As Parrett, *pro se*, has not filed anything in this appeal, we do not know whether she received actual notice of the appeal.

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

As explained in *Wright*, "because of the immense impact . . . DVOs have on individuals and family life, the court is mandated to provide a full hearing to *each party*. To do otherwise is a disservice to the law, the individuals before the court, and the community the judges are entrusted to protect." *Wright*, 181 S.W.3d at 53 (emphasis added). While Clark's right to a full hearing was previously denied, to act without Parrett's presence without knowing whether she received actual notice would deny her right to receive a full hearing. Both parties' rights must be protected. While Clark and not Parrett is technically the adverse party in the DVO petition, the statutory measures to effect service on the adverse party and protect that party's rights are reasonably applied to Parrett under these circumstances. We recommend that the family court attempt service on Parrett through a protective order summons before holding a new evidentiary hearing but note that this recommendation is based on the unique facts of this case and not statutory requirements.

Based on the foregoing, the DVO is vacated and this action is remanded for proceedings consistent with this opinion. However, because the DVO serves a significant purpose and for the protection of Parrett, the DVO issued by the Fayette Family Court shall remain effective for thirty days after this opinion becomes final.

ALL CONCUR.

BEFORE: COMBS, J. LAMBERT, AND THOMPSON, JUDGES.

EMPLOYMENT LAW

EDUCATION

ADMINISTRATIVE LAW

COUNTY PUBLIC SCHOOLS

CONTINUING SERVICE CONTRACT

NONRENEWAL OF CONTRACT

REQUEST FOR TRIBUNAL HEARING

WRIT OF PROHIBITION

County school teacher taught math at high school from 2012-2016 — Teacher signed "Continuing Contract of Employment" on August 19, 2016 — Superintendent also signed contract — Teacher requested tribunal hearing upon receiving letter of nonrenewal of her contract for 2017-2018 — School District (District) moved to dismiss request for hearing claiming lack of subject matter jurisdiction — Superintendent and County School Board (Board) argued teacher could not request tribunal under KRS 161.790(4) because she did not statutorily qualify for tenure in 2016 — This claim did not arise until May 2017 — Hearing officer found contract to be presumptively valid and that it was continuing contract — Hearing officer found that Board did not terminate teacher's contract as required by KRS 161.790(3) — Hearing officer directed District to file more definite statement of charges against teacher or state no grounds existed for termination — District filed no statement of charges, no statement of nonexistent charges, and no exceptions — Teacher moved for entry of final order — Superintendent and Board then petitioned Franklin Circuit Court for entry of writ of prohibition seeking to prevent hearing officer from entering final order — Superintendent and Board argued that hearing officer did not have subject matter jurisdiction — Circuit court determined that Superintendent and Board had not proven lack of subject matter jurisdiction; that teacher's allegation of continuing contract entitled her to administrative review; that attack on validity of underlying teaching contract did not defeat teacher's right to administrative review under KRS 13B.140; that any final order entered by hearing officer would be subject to judicial review; and that there were no sufficient grounds to issue writ — Superintendent and Board appealed — AFFIRMED denial of writ of prohibition — Pursuant to KRS 161.720(4), "continuing service contract" remains in full force and effect until teacher resigns or retires, or until terminated or suspended as provided for in KRS 161.790 and KRS 161.800 — Pursuant to KRS 161.720(3), "limited contract" employs teacher for term of one year only or for that portion of school year that remains at time of employment — Limited contract is subject to nonrenewal — In instant action, parties disputed type of contract under which teacher taught during 2016-2017 — Teacher argued that since she taught math for 4 consecutive years, from 2012-2016, and she had signed "Continuing Contract of Employment" on August 19, 2016, she had continuing service contract, which Board may terminate for cause, but cannot be nonrenewable — In contrast, Superintendent and County School Board (Board) argued that they timely notified teacher in May 2016 that her contract for 2016-2017 school year was being nonrenewed and that this notice caused teacher's contract with Board to naturally expire on June 30, 2016 — Due to contract's expiration, Superintendent and Board argued that continuing contract was erroneously signed on August 19, 2016, since teacher was not a currently employed teacher being reemployed by Superintendent after teaching 4 consecutive years in same district under KRS 161.740(1)(b) — Superintendent and Board believed that teacher had, at most, a limited contract subject to nonrenewal after one year — Superintendent and Board did not demonstrate lack of jurisdiction — At most, they argued that jurisdiction was not addressed in prehearing conference report — In addition, they have not shown that judicial review of hearing officer's final order would be inadequate remedy — Since teacher executed "Continuing Contract of Employment," she was entitled to tribunal hearing — Upon giving timely notice of her intention to answer charge, tribunal process was set in motion — If "Continuing Contract of Employment" was signed in error, error should have been corrected long before notice of nonrenewal —

Steve Miracle, In His Official Capacity as Superintendent of the Trimble County Schools; and the Board of Education of Trimble County v. Tammy Duncan; Stephen L. Pruitt, Ph.D., In His Official Capacity as the Commissioner of Education; and Andrew Beshear, Attorney General, Com. (2017-CA-001737-MR); Franklin Cir. Ct., Shepherd, J.; Opinion by Judge Nickell, *affirming*, rendered 9/21/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

The Trimble County Board of Education (Board) and Steve Miracle, in his official capacity as Superintendent, appeal from the Franklin Circuit Court's dismissal of a petition for a writ of prohibition to foreclose entry of a final order in an administrative action initiated by Tammy Duncan. A high school math teacher, Duncan requested a tribunal hearing after receiving notice her continuing contract was being nonrenewed. Claiming the contract signed by Miracle and Duncan is invalid, Miracle and the Board allege the hearing officer lacked subject matter jurisdiction to convene the hearing and a writ should issue to prohibit entry of the hearing officer's final order reinstating Duncan as a Trimble County teacher. Having reviewed the record, the briefs and the law, and discerning no abuse of discretion, we affirm dismissal of the petition for a writ.

Citing KRS[1] 161.790(4), Duncan—who along with Miracle signed a "Continuing Contract of Employment" on August 19, 2016—requested a hearing upon receiving a letter of nonrenewal of her teaching contract for the 2017-18 school year. In response, the Trimble County School District (District) moved to dismiss the request for a hearing arguing lack of subject matter jurisdiction. The District's motion to dismiss was fully briefed and orally argued to a hearing officer assigned by Attorney General Andy Beshear. The Board and Miracle argued Duncan could not request a tribunal pursuant to KRS 161.790(4) because she did not statutorily qualify for tenure[2] in 2016—a claim that did not surface until May 2017. In his report, the hearing officer treated Duncan's fully executed contract "as being presumptively valid and intended by the parties to be a continuing contract." He found the Board did not terminate Duncan's contract as mandated by KRS 161.790(3), and arguably "elected to breach" the contract by notifying Duncan it would be nonrenewed. In two orders accompanying the report, the hearing officer denied the District's motion to dismiss; directed the District to file a more definite statement of charges against Duncan after which a prehearing conference would be convened; or, state no grounds existed for termination after which the hearing officer would enter a final order reinstating Duncan as a Trimble County teacher. The District filed no statement of charges, no statement of nonexistent charges, and no exceptions. Duncan moved for entry of a final order.

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[1] Kentucky Revised Statutes.

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[2] The word "tenure," while undefined in KRS Chapters 160 and 161, is shorthand for a continuing teaching contract.

Thereafter, Miracle and the Board petitioned the Franklin Circuit Court for entry of a writ of prohibition seeking to prevent the hearing officer from entering the final order. Beshear was named as a party because he appointed the hearing officer who presided over the hearing. As Commissioner of Education, Stephen L. Pruitt, requested appointment of the hearing officer in response to Duncan's timely notification she would "answer the charge" as allowed by KRS 161.790(3).

Beshear moved for dismissal of the petition arguing Miracle and the Board had not challenged the hearing officer's authority to hear the matter, but had challenged only Duncan's right to invoke the statute and request a hearing. Miracle and the Board argued the hearing officer had erred by not discussing jurisdiction in his report. In dismissing the petition, the circuit court found lack of subject matter jurisdiction had not been proved; Duncan's allegation of a continuing contract entitled her to administrative review; an attack on the validity of the underlying teaching contract did not defeat Duncan's right to administrative review under KRS 13B.140; any final order entered by the hearing officer would be subject to judicial review; and, sufficient grounds for issuance of a writ had not been demonstrated. This appeal followed.

Every Kentucky teacher works pursuant to a written contract—"either limited or continuing . . . ." KRS 161.730. A "continuing service contract" remains "in full force and effect until the teacher resigns or retires, or until it is terminated or suspended as provided in KRS 161.790 and 161.800." KRS 161.720(4). A "limited contract" employs "a teacher for a term of one (1) year only or for that portion of the school year that remains at the time of employment." KRS 161.720(3). A "limited contract" is subject to nonrenewal so long as the superintendent

> present[s] written notice to the teacher that the contract will not be renewed no later than May 15 of the school year during which the contract is in effect. Upon receipt of a request by the teacher, the superintendent shall provide a written statement containing the specific, detailed, and complete statement of grounds upon which the nonrenewal of contract is based.

KRS 161.750(2).

> A school board neither has to rehire a teacher on a limited contract nor provide him with a hearing if he is not rehired. KRS 161.750 gives the non-tenured teacher only the right to (1) notice of nonrenewal before [May 15], and (2) a written statement "containing the specific, detailed and complete" grounds for nonrenewal, if requested.

Gibson v. Board of Educ. of Jackson County, 805 S.W.2d 673, 675 (Ky. App. 1991).

Underlying this appeal is a dispute about the type of contract pursuant to which Duncan taught geometry during the 2016-17 school year. Because she had taught math at Trimble County High School four consecutive years (2012-2016), and she and Miracle both executed a "Continuing Contract of Employment" on August 19, 2016—enabling her to teach geometry at the same school during the 2016-17 school year—Duncan argues she has a continuing service contract with the Board which may be terminated for cause, but cannot be nonrenewed.

Miracle and the Board disagree. They argue Miracle timely notified Duncan in May 2016 her contract for the 2016-17 school year was being nonrenewed and said notice caused Duncan's contract with the Board to naturally expire on June 30, 2016. KRS 158.050. As a result of the contract's expiration, Miracle and the Board maintain the continuing contract on which Duncan relies was erroneously signed on August 19, 2016, because at the time of execution, Duncan was not "a *currently employed* teacher [being] reemployed by the superintendent after teaching four (4) consecutive years in the same district . . . ." KRS 161.740(1)(b) (emphasis added). In their view, Duncan had at most a limited contract subject to nonrenewal after one year.

While the facts of the contract dispute provide context, they do not resolve the limited question before this panel: whether the Franklin Circuit Court properly exercised its discretion in granting Beshear's CR[3] 12.02 motion to dismiss the petition for a writ of prohibition.

> A motion to dismiss for failure to state a claim upon which relief may be granted "admits as true the material facts of the complaint." So a court should not grant such a motion "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved . . . ." Accordingly, "the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true." This exacting standard of review eliminates any need by the trial court to make findings of fact; "rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?" Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010) (footnotes omitted). Issuing or denying a writ is "always discretionary, even when the trial court was acting outside its jurisdiction." *Cox v. Braden*, 266 S.W.3d 792, 797 (Ky. 2008) (quoting *Hoskins v. Maricle*, 150 S.W.3d 1, 9 (Ky. 2004)). Thus, we review the trial court's dismissal of the petition for abuse of discretion, the test being, "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

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[3] Kentucky Rules of Civil Procedure.

Writs are disfavored and reserved for "truly extraordinary cases." *Cox*, 266 S.W.3d at 797. The standard for issuing an extraordinary writ was expressed in *Hoskins*, 150 S.W.3d at 10.

> A writ of prohibition may be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Miracle and the Board argue the hearing officer lacked subject matter jurisdiction, but they have not *demonstrated* a lack of jurisdiction. The most they have argued is jurisdiction was not addressed in the prehearing conference report. Additionally, they have not shown judicial review of the hearing officer's final order would be an inadequate remedy.

Because Duncan had a fully executed "Continuing Contract of Employment"—as opposed to a limited contract—she was entitled to a tribunal hearing. Furthermore, upon giving timely notice "of [her] intention to answer the charge," Commissioner Pruitt was statutorily required to set the process for a tribunal hearing in motion.

> KRS 161.790 establishes the process for the adjudication of public school teacher disciplinary matters. KRS 161.790(4)-(9) provides for the selection of an *ad hoc* hearing Tribunal to conduct an administrative evidentiary hearing. The Tribunal makes findings of fact, determines whether grounds for termination have been proven, and renders a final order accordingly. The decision of the Tribunal is a final order, subject to judicial review by the circuit court "in accordance with KRS Chapter 13B."

Board of Educ. of Fayette County v. Hurley-Richards, 396 S.W.3d 879, 882 (Ky. 2013) (footnotes omitted). Had Duncan allowed ten days to expire without notifying Commissioner Pruitt and Miracle of her "intention to answer the charge" under KRS 161.790(3), the Board's decision would have become final and Duncan would have had no recourse to salvage her teaching position. "[A] teacher's election to not answer a charge and thereby forego the institution of administrative proceedings does not entitle the teacher to instead challenge his disciplinary claims in circuit court." *Jefferson County Board of Educ. v. Edwards*, 434 S.W.3d 472, 476 (Ky. 2014).

Miracle and the Board may disagree with Duncan, but the fully executed agreement Duncan and Miracle signed on August 19, 2016, appears to be a continuing contract, making Duncan subject to mandatory strict compliance with KRS 161.790. *Id.* (citing *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 625 (Ky. 2001)). Moreover, those indicia are not limited to the heading of the document as suggested in the petition. The entire contract is replete with references to "continuing employment," "services . . . from year to year," "the continuing contract of employment," and references to KRS 161.720, KRS 161.730, KRS 161.790, and KRS 161.810, all of which have some application to continuing contracts. Furthermore, Miracle's affidavit, signed on June 7, 2017, admits, "[a]t the time Mrs. Duncan accepted the offer of employment [in August 2016], she was sent a contract to

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sign which was labeled "Continuing Contract of Employment." If the continuing contract was signed in error, steps could—and should—have been taken to correct the mistake long before notice of nonrenewal was sent on May 2, 2017. Based on the record we have, Miracle and the Board sat on their hands and did nothing.

Moreover, their desire to attack the validity of the signed contract is separate and apart from operation of KRS 161.790 which dictates how a *teacher* must pursue a grievance.

> [W]here an administrative remedy is provided by the statute, relief must be sought from the administrative body and this remedy exhausted before the courts will take hold. The procedure usually is quite simple. Ordinarily the exhaustion of that remedy is a jurisdictional prerequisite to resort to the courts.

Goodwin v. City of Louisville, 309 Ky. 11, 14, 215 S.W.2d 557, 559 (1948) (citing *Martin v. Board of Council of City of Danville*, 275 Ky. 142, 120 S.W.2d 761, 762 (1938)). Miracle and the Board simply cannot defeat Duncan's statutorily mandated right to a hearing and frustrate her attempt to exhaust all administrative remedies by challenging her right to a tribunal hearing.

If Miracle and the Board disagree with the final order, they may pursue judicial review under KRS 13B.140. If the tribunal exceeds its authority, Miracle and the Board may move the trial court, pursuant to KRS 13B.150(2)(b), to set aside the final order. Because they have adequate remedies by appeal, and have not established a lack of subject matter jurisdiction, dismissal of the petition was proper and not an abuse of discretion.

For the foregoing reasons, dismissal of the petition for a writ of prohibition is affirmed.

ALL CONCUR.

BEFORE: ACREE, NICKELL, AND SMALLWOOD, JUDGES.

PETITIONS FOR REHEARING, ETC.

FILED AND FINALITY ENDORSEMENTS

ISSUED BETWEEN

AUGUST 10, 2018 AT 10:00 A.M.

AND SEPTEMBER 21, 2018 AT 10:00 A.M.

(Cases previously digested in K.L.S.)

PETITIONS:

Auto Club Property-Casualty Insurance Co. v. Foreman, 65 K.L.S. 8, p. 8; Petition for rehearing was filed on 8/29/18.

Howard v. Big Sandy Area Development District, Inc., 65 K.L.S. 8, p. 4; Petition for rehearing was filed on 8/16/18.

The City of Nicholasville Police Department v. Abraham, 65 K.L.S. 7, p. 63; Petition for rehearing was filed on 8/16/18.

MOTIONS for extension of time to file petitions:

Lamb, Sr. v. Light Hearth, Inc., 65 K.L.S. 5, p. 5; Appellant's motion for additional time to file a petition for rehearing was denied on 8/17/18. Appellant filed a motion to reconsider denial of motion for additional time on 8/28/18.

FINALITY ENDORSEMENTS:

During the period from August 10, 2018, through September 21, 2018, the following finality endorsements were issued on opinions which were designated to be published. The following opinions are final and may be cited as authority in all the courts of the Commonwealth of Kentucky. CR 76.30.

Caldwell v. Com., 65 K.L.S. 8, p. 1, on 9/13/18.

J.E. v. Cabinet for Health and Family Services, 65 K.L.S. 7, p. 22, on 8/13/18.

Flege v. Com., 65 K.L.S. 8, p. 2, on 9/13/18.

Fry v. Caudill, 65 K.L.S. 7, p. 31, on 9/11/18.

Fultz v. Com., 65 K.L.S. 8, p. 2, on 9/13/18.

Harms v. Chase Home Finance, LLC, 65 K.L.S. 5, p. 14; Finality endorsement entered on 8/22/18. Motion to dismiss discretionary review was granted by the Kentucky Supreme Court on 8/10/18.

Humber v. Lexington-Fayette Urban County Government, 65 K.L.S. 7, p. 22, on 8/21/18.

Lipson, M.D. v. University Medical Center, Inc., 65 K.L.S. 7, p. 39, on 9/11/18.

Marks v. Com., 65 K.L.S. 7, p. 45, on 9/5/18.

Masters v. Com., 64 K.L.S. 10, p. 41; Finality endorsement was issued on 8/14/18. The Kentucky Supreme Court denied discretionary review on 8/8/18.

McCargo v. Com., 64 K.L.S. 9, p. 12; Finality endorsement was issued on 8/14/18. The Kentucky Supreme Court denied discretionary review on 8/8/18.

Mitchell v. Com., 65 K.L.S. 1, p. 10; Finality endorsement was issued on 8/17/18. The Kentucky Supreme Court denied discretionary review on 8/8/18.

Pearson v. Pearson, 65 K.L.S. 4, p. 26; Finality endorsement was issued on 8/22/18. The Kentucky Supreme Court granted the joint motion to dismiss discretionary review on 8/10/18.

Robinson v. Robinson, 65 K.L.S. 8, p. 7, on 9/13/18.

Roach v. Wilson, 64 K.L.S. 10, p. 22; Finality endorsement was issued on 8/15/18. The Kentucky Supreme Court denied discretionary review on 8/8/18.

University of Kentucky v. Davis, 64 K.L.S. 9, p. 29; Finality endorsement was issued on 8/15/18. The Kentucky Supreme Court denied discretionary review on 8/8/18.

Wilson v. Inglis, 65 K.L.S. 7, p. 28, on 8/22/18.

Zewoldi v. Transit Authority of River City, 65 K.L.S. 5, p. 34, on 9/11/18.

RULINGS on petitions previously filed:

Abbott, Inc. v. Guirguis, 65 K.L.S. 4, p. 1; Petition for rehearing was denied on 9/19/18.

Com. v. Martin, 65 K.L.S. 3, p. 14; Petition for rehearing was denied on 5/24/18.

Fraley v. Zambos, M.D., 65 K.L.S. 3, p. 6; Petition for rehearing was denied on 3/28/18.

RLB v. Seiller Waterman, LLC, 65 K.L.S. 6, p. 18; Petition for rehearing was denied on 8/30/18.

Simms v. Estate of Blake, 65 K.L.S. 5, p. 22; Petition for rehearing was denied on 8/10/18.

OTHER: None.

WEST Official Cites on Court of Appeals opinions upon which Finality Endorsements have been issued:

Coleman v. Campbell County Library Board of Trustees, 65 K.L.S. 1, p. 13—547 S.W.3d 526.

Estate of Adams v. Trover, M.D., 65 K.L.S. 3, p. 36—547 S.W.3d 545.

Gaddie v. Benaitis, 65 K.L.S. 5, p. 2—548 S.W.3d 896.

Harrod v. Caney, 65 K.L.S. 3, p. 23—547 S.W.3d 536.

Matehuala v. Torres, 65 K.L.S. 4, p. 34—547 S.W.3d 142.

—END OF COURT OF APPEALS—

SUPREME COURT

WORKERS' COMPENSATION

PERMANENT PARTIAL DISABILITY BENEFITS

ENHANCEMENT OF BENEFITS UNDER KRS 342.730(1)(c)2

APPLICATION OF TWO-MULTIPLIER WHEN CLAIMANT VOLUNTARILY CHOOSES TO RETIRE

When claimant voluntarily chooses to retire, where decision is made for reasons not solely related to claimant's work-related injury, claimant is entitled to two-multiplier set forth in KRS 342.730(1)(c)2—Thus, in instant action, two-multiplier in KRS 342.730(1)(c)2 applied to claimant's permanent partial disability benefits where claimant returned to work and later retired for reasons not solely related to work-related injury itself — Voluntary retirement is a cessation of employment for any reason under KRS 342.730(1)(c)2 —

Active Care Chiropractic, Inc. v. Katherine Rudd; Hon. Jeanie Owen Miller, ALJ; Workers' Compensation Board and Kentucky Court of Appeals (2017-SC-000377-WC); On appeal from Court of Appeals; Opinion by Justice VanMeter, *affirming*, rendered 9/27/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

KRS[1] 342.730(1)(c)2 states; "During any period of cessation of . . . employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable[.]"[2] The sole issue for this Court on appeal, an issue of first impression, is whether the two-multiplier under KRS 342.730(1)(c)2 applies to a claimant's benefits when that claimant returns to work and later retires for reasons not solely related to the work-related injury itself. We hold that in such circumstances the two-multiplier must be applied to comply with the unambiguous language of KRS 342.730(1)(c)2. Accordingly, we affirm.

[1] Kentucky Revised Statutes.

[2] We note that the General Assembly amended KRS 342.730 this past legislative session. 2018 Ky. Acts ch. 40, § 13. But these amendments do not affect this case in any way.

I. FACTUAL BACKGROUND.

The facts in this case are not in dispute. Active Care Chiropractic employed Katherine Rudd part-time. One day, while taking out the trash at work, she slipped and fell, injuring her shoulder. After three shoulder surgeries, she returned to work. About a year after her return to work, she voluntarily retired, for reasons not solely related to the work-related injury. At her Formal Hearing Rudd stated:

> It was not due to the accident, not directly. I was turning sixty, and I'd never had any medical problems before. This kind of made me re-evaluate things. I decided I wanted to spend what quality years I have left doing things that provide the greatest satisfaction, and decided that being a secretary just wasn't doing it for me anymore. So 1 retired.

At Rudd's Benefit Review Conference, the parties agreed that the only issue before the ALJ was the correct multiplier to be applied to Rudd's benefits. The ALJ acknowledged that the parties originally agreed that no multiplier would apply. But Rudd argued that changes in the caselaw placed the modifier application at issue.

Rudd referred to our recent decision in *Livingood v. Transfreight, LLC*, 467 S.W.3d 249 (Ky. 2015), which overruled the holding in *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671 (Ky. 2009), that a work-related disability must be the reason for an employee's cessation of employment in order to afford application of the two-multiplier. Instead, *Livingood* held that "KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases 'for any reason, with or without cause,' except where the reason is the employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another." 467 S.W.3d at 259 (quoting KRS 342.730(1)(c)2).

Rudd argued that, since her cessation from work was not due to intentional or reckless misconduct, that being the only restriction on a claimant's ability to recover under the statute, she should be entitled to the two-multiplier. In other words, because voluntary retirement constitutes a "cessation of employment . . . for any reason" and does not constitute intentional or reckless misconduct under *Livingood*, she qualified for the two-multiplier.

The ALJ agreed, concluding she was "bound by the plain wording" of the statute and this Court's holding in *Livingood*, with the only purported restriction on application of the two-multiplier being the employee's intentional or reckless misconduct. The Workers' Compensation Board ("Board") and the Court of Appeals affirmed the ALJ's decision. Active Care Chiropractic's ("Active Care") appeal to this Court followed. *See* Ky. Const. § 115.

II. STANDARD OF REVIEW.

We review statutory interpretation *de novo*. *Cumberland Valley Contractors, Inc. v. Bell Cty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007). The well-established standard for reviewing a workers' compensation decision is to "correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *W. Baptist Hasp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Finally, review by this Court "is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude." *Id.* at 688.

III. ANALYSIS.

KRS 446.080(1) directs that "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature[.]" This Court's goal, in construing statutes, "is to give effect to the intent of the [legislature]. We derive that intent . . . from the language the [legislature] chose, either as defined by the [legislature] or as generally understood in the context of the matter under consideration." *Livingood*, 467 S.W.3d at 256 (internal quotations and citations omitted). "General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy." *Cty. of Harlan v. Appalachian Reg'l Healthcare, Inc.*, 85 S.W.3d 607, 611 (Ky. 2002). However, when construing provisions to match objectives of whole statutes, "[w]e have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion." *Livingood*, 467 S.W.3d at 257-58 (internal citations and quotations omitted). Moreover, "it is neither the duty nor the prerogative of the judiciary to breathe into the statute that which the Legislature has not put there.'" *Wilson v. SKW Alloys, Inc.*, 893 S.W.2d 800, 802 (Ky. App. 1995) (quoting *Gateway Constr. Co. v. Wallbaum*, 356 S.W.2d 247, 248-49 (Ky. 1962)).

The plain language of KRS 342.730(1)(c)2 unquestionably supports Rudd's position: "During *any period of cessation of . . . employment, temporary or permanent, for any reason, with or without cause*," a claimant shall be awarded permanent-partial disability benefits as modified by the two-multiplier. (emphasis added). Taken at face value, Rudd's argument, that voluntary retirement and removal from the workforce for reasons not solely related to the workplace injury qualifies as "cessation of . . . employment . . . for any reason" and affords the application of the two-multiplier to benefits received, is supported by the language of the statute.

Active Care argues that this Court should disregard this unambiguous language and carve out an exception akin to the intentional misconduct exception from *Livingood*. In *Livingood*, we noted the "legislative intent in KRS Chapter 342 that an employee should not benefit from his own wrongdoing." 467 S.W.3d at 258. The many examples throughout Chapter 342 barring compensation due to wrongdoing by the employee exemplify this legislative intent and support the exception fashioned in *Livingood*. *See* KRS 342.035(3) (denying compensation for unreasonable failure to follow medical advice); 342.165(2) (denying compensation when employee knowingly and willingly makes a false representation regarding physical condition at time of employment); 342.610(3) (denying compensation when injury occurs due to voluntary intoxication or willful intent to injure oneself or another).

In the present case, absent any evidence of Rudd's intentional or reckless wrongdoing, no exception to the unambiguous language of KRS 342.730(1)(c)2 precludes the recovery of the

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two-multiplier. Indeed, voluntary retirement cannot possibly be construed as "an intentional, deliberate action with a reckless disregard of the consequences." *Livingood*, 467 S.W.3d at 259. Instead, voluntary retirement falls squarely within the statute as a "cessation of . . . employment . . . for any reason, with or without cause[.]" KRS 342.730(1)(c)2.

As stated previously, we have a "duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion." *Livingood*, 467 S.W.3d at 257-58. In *Livingood*, we determined that allowing an employee to "benefit from his own wrongdoing" would lead to such a wholly unreasonable result based upon the whole of Chapter 342. *Id.* at 257. Here, however, a literal construction of KRS 342.730(1)(c)2 prescribes that Rudd receive the two-multiplier because voluntary retirement is a "cessation of . . . employment . . . for any reason," and does not lead to an absurd or unreasonable result in conjunction with the rest of Chapter 342, unlike intentional misconduct, even if the purpose of the statute is to "encourage continued employment," as *Livingood* noted in dicta. *Id.*

Thus, when an individual voluntarily chooses to retire, a decision made for reasons not solely related to that individual's work-related injury, that individual is entitled to the two-multiplier listed in KRS 342.730(1)(c)2. Such a conclusion complements our decision in *Livingood*, a case in which we recognized an appropriate limitation on the use of KRS 342.730(1)(c)2's two-multiplier in accordance with other provisions of KRS Chapter 342.

IV. CONCLUSION.

A workers' compensation claimant is entitled to a two-multiplier under KRS 342.730(1)(c)2 when that individual voluntarily chooses to retire. Accordingly, the judgment is affirmed.

All sitting. Cunningham, Hughes, Keller, VanMeter, Venters, and Wright, JJ., concur. Minton, C.J., dissented with opinion.

MEDICAL MALPRACTICE

CIVIL PROCEDURE

ACTIONS BROUGHT BY "NEXT FRIEND"

ATTORNEYS

THE UNAUTHORIZED PRACTICE OF LAW

DISABLED MINOR'S ATTORNEY'S MOTION TO WITHDRAW FROM CASE

TRIAL COURT ORDERS DISABLED MINOR'S NON-ATTORNEY PARENT TO EITHER FIND SUBSTITUTE COUNSEL OR BE DEEMED TO PROCEED *PRO SE* ON BEHALF OF CHILD

PROPER PROCEDURE WHERE DISABLED PARTY'S ATTORNEY SEEKS TO WITHDRAW FROM CASE

"NEXT FRIEND" CANNOT PROVIDE *PRO SE* REPRESENTATION TO REAL PARTY IN INTEREST

On March 27, 2012, mother, by and through counsel, brought medical malpractice action, as mother and next friend of her son, against doctor alleging son's developmental delays were caused by doctor's negligence in mother's prenatal care and son's delivery — Discovery commenced — Approximately 13 months after action was filed, trial court entered pretrial order setting date for jury trial and deadlines for expert witness disclosures — Parties requested trial be re-scheduled twice — On April 16, 2014, plaintiff's counsel moved to withdraw from case and requested 90-day continuance of all deadlines — Counsel alleged irreconcilable differences and breakdown in communications as grounds for withdrawal — Counsel informed court that he had advised mother of his intention to withdraw and sent her copy of motion via certified mail — Record did not indicate if mother was at hearing on motion to withdraw — No questions were directed towards mother and her presence was not acknowledged — Trial court granted counsel's motion to withdraw and continued deadlines for 60 days for mother to find replacement counsel, or she would be deemed to proceed *pro se* — Four days later, mother signed and filed expert disclosures that appeared to have already been prepared by prior counsel — Mother made several requests for more time to find attorney — Trial court denied mother's motion for extension of time — Doctor moved to strike mother's experts alleging that she had engaged in unauthorized practice of law — Trial court found that mother had engaged in unauthorized practice of law and stated that her experts would be stricken unless she found attorney within 30 days — Eventually, trial court entered order striking mother's expert witnesses and, subsequently, entered order dismissing case with prejudice — Mother obtained counsel to file notice of appeal from grant of summary judgment to doctor — Court of Appeals affirmed and held that mother had engaged in unauthorized practice of law; therefore, trial court did not err in striking her pleadings and granting summary judgment to doctor — Mother appealed — REVERSED and REMANDED — Pursuant to CR 17.03(1), actions involving unmarried infants or persons of unsound mind shall be brought by party's guardian or committee; however, if there is none or they are unwilling to act, next friend may bring action — Next friend is merely minor's agent — Real party in interest is minor — Attorney has attorney-client relationship with, and owes professional duties to, minor — SCR 1.16(b) gives trial court broad discretion in granting motions for counsel to withdraw "so long as the client's interests are not affected" — In instant action, trial court abused its discretion in permitting counsel to withdraw as its actions were unreasonable under facts and caused great injustice to son — Actual hearing on motion to withdraw focused on continuance of deadlines — Although attorney alleged that mother had no objection to his withdrawal, record contained no evidence of irreconcilable differences or breakdown in communication between mother and counsel — More importantly, there was no inquiry into whether irreconcilable differences or breakdown in communication had occurred between counsel and son, who was his client — In addition, counsel's withdrawal could not be accomplished without material adverse effects on son — Remanded to trial court for appropriate inquiry — Upon remand, if trial court finds sufficient justification to permit counsel's withdrawal, and mother and son have not found substitute counsel, Kentucky Supreme Court directed trial court to hold case in abeyance for reasonable time for mother and son to secure counsel — If substitute counsel cannot be found in reasonable amount of time, then trial court should strongly consider dismissing case without prejudice — Trial courts must be cautious in cases such as that of instant action so as not to dismiss case with prejudice, and foreclose disabled party from any future ability to pursue his claim — Proper procedure is for trial court to abate action pending procurement of replacement counsel — If replacement counsel is not found, trial court can dismiss case without prejudice, leaving real party in interest ability to bring his claims when minority or disability is removed, or party is otherwise able to present his case to courts — Mother did not engage in unauthorized practice of law because she was specifically authorized and ordered to proceed as counsel according to trial court's order — Parties are bound by pretrial order — Kentucky Supreme Court noted that its finding that mother did not engage in unauthorized practice of law is narrow and based on facts of case — Since mother was not engaged in unauthorized practice of law, trial court erred in striking her expert disclosures — "Next friend" cannot provide *pro se* representation to real party in interest — Interests of "next friend" and real party in interest may not always be aligned —

Sameena Azmat, As Mother and Next Friend of Nausher Azmat v. George W. Bauer, M.D. III and Elizabethtown Physicians for Women, P.S.C. (2016-SC-000560-DG); On review from Court of Appeals; Opinion by Justice Keller, *reversing and remanding*, rendered 9/27/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Sameena Azmat appeals from an opinion of the Court of Appeals which upheld the Hardin Circuit Court's dismissal of the case. The dismissal arises from an action brought by Sameena as mother and "next friend" of her son, Nausher Azmat.[1] This Court granted discretionary review to address the important issues presented. Because we find error in the courts below, we reverse and remand the case to the Hardin Circuit Court for further proceedings.

[1] Appellants will be collectively referred to as "Azmat." When a distinction needs to be made between Sameena Azmat and Nausher Azmat, we will respectfully refer to the individuals by their first names, "Sameena" and "Nausher."

I. FACTUAL AND PROCEDURAL BACKGROUND

Sameena gave birth to Nausher on July 5, 1997. Dr. George Bauer at Elizabethtown Physicians for Women, P.S.C., provided Sameena with prenatal care. Sameena was concerned that she did not seem to be gaining weight similarly to other pregnant women, but Dr. Bauer informed her that her child would be small because Sameena was a petite woman.

After Sameena had completed her regular prenatal appointments, the child was scheduled to be delivered on July 5, 1997. However, on July 3, 1997, Sameena noticed a decrease in fetal movement. Dr. Bauer performed an ultrasound and noted that everything was normal. When Sameena arrived for her child to be delivered on July 5, she was told the baby was in distress and a caesarian section would be performed.

Nausher was born blue and suffered cardiac arrest post-delivery. His birth history included hypoxia, aspiration of meconium. Intrauterine Growth Restriction, a "paucity" of amniotic fluid, two cardiac arrests, a 14-day hospital stay, perinatal asphyxia, intubation for the first week of life. Persistent Pulmonary Hypertension of the Newborn (PPHN), cardiorespiratory arrest with CPR required, and coagulopathy of such severity that he was not a candidate for ECMO.[2]

[2] Extracorporeal membrane oxygenation.

Sameena brought suit, by and through counsel, on March 27, 2012, as mother and next friend of Nausher, against Dr. Bauer and Elizabethtown Physicians for Women, P.S.C. Sameena alleged that Nausher's developmental delays were caused by Dr. Bauer's negligence in Sameena's prenatal care and Nausher's delivery. Discovery commenced thereafter. Although numerous, the circuit court proceedings are all relevant to this matter, thus we outline them below.

The circuit court entered a Pretrial Order on May 2, 2013 setting a date for jury trial as well as deadlines for the parties' expert witness disclosures. In October 2013, Azmat's attorney filed a motion for an extension to file expert disclosures and a request to reschedule the trial date. The justification for the motion and the extension was that Nausher was to undergo genetic testing. Dr. Bauer had no objection to Azmat's request for an extension, and the trial court granted the motion and entered a new Pretrial Order.

In December 2013, the parties jointly filed a motion for a new trial date. The circuit court granted the motion and rescheduled the jury trial.[3] On April 16, 2014, Azmat's counsel moved to withdraw from the case and also requested a 90-day continuance of all deadlines. Counsel cited irreconcilable differences and a breakdown in communication as grounds for withdrawal. Counsel also told the court that he had advised Sameena of his intention to withdraw and sent her a copy of the motion via certified mail. The record does not purport to show Sameena's presence at this hearing. Neither counsel nor the court directed any questions towards Sameena nor otherwise acknowledged her presence, so this Court cannot conclusively determine if Sameena was present.[4] The trial court granted counsel's motion to withdraw by order entered on April 24, 2014, and continued deadlines for 60 days for Sameena to find replacement counsel, or she would be deemed to proceed *pro se*.

[3] The new trial date conflicted with a prior trial date for defense counsel. Defense counsel subsequently moved for a new date in early 2015.

[4] We also note that Sameena resided in Georgia during this litigation.

On April 28, 2014, Sameena filed expert disclosures. It appears that the disclosures had already been prepared by prior counsel, but Sameena signed the documents and filed them. On June 20, 2014, Sameena wrote a letter to the judge requesting additional time to find counsel. On July 2, 2014, Dr. Bauer filed his expert disclosures and objection to Azmat's request for additional time to find replacement counsel. Dr. Bauer pointed out that Sameena filed her expert disclosures p*ro se* and such filing was an effective entry of appearance as a *pro se* litigant.

On July 3, 2014, Dr. Bauer moved to compel Sameena to provide dates for experts to be deposed, or, in the alternative, to exclude Sameena's experts. On July 10, 2014, Sameena moved for more time to find an attorney.[5] On July 17, 2014, the trial court entered an order compelling Sameena to provide dates for her experts to give depositions. On July 28, 2014, Sameena refiled her motion for an extension of time.

[5] This motion was not heard because it was improperly filed for a day in which the trial court did not have motion docket.

On July 31, 2014, Sameena sent defense counsel an email giving date ranges for depositions based on her experts' availability. Also, on July 31, 2014, the defense moved to exclude experts for failure to disclose dates for depositions and for summary judgment. The defense argued that because the possible dates for depositions were after the scheduled trial date, Sameena had not effectively complied with the court's order, and exclusion was warranted. If the experts were excluded, defense argued they would be entitled to judgment as a matter of law because a plaintiff in a medical malpractice case must provide expert testimony as part of the *prima facie* case.

On August 8, 2014, the trial court denied Sameena's motion for an extension of time. On August 18, 2014, Sameena responded to defense's motion to exclude experts and summary judgment. By order entered September 4, 2014, the trial court rescheduled the trial for March 30, 2015, ordered that depositions be scheduled before March 2, 2015, and that the parties mediate before March 16, 2015. The trial court further indicated that there was no finding that Sameena had deliberately disregarded the court's prior orders.

On September 9, 2014, Dr. Bauer moved to strike Sameena's experts alleging Sameena had engaged in the unauthorized practice of law. The defense argued that Sameena, as "next friend," had no claims in the case, thus she could not proceed *pro se* on behalf of Nausher. The trial court set forth a briefing schedule on the issue of the unauthorized practice of law. Sameena did not file a response and Dr. Bauer submitted his reply brief on October 17, 2014.

On November 10, 2014, the trial court entered an order finding that Sameena had engaged in the unauthorized practice of law and stated that Sameena's experts would be stricken unless she found an attorney within 30 days. On January 26, 2015, an order was entered striking Sameena's expert witnesses. On February 13, 2015, the trial court entered an order dismissing the case with prejudice.

On March 13, 2015, Sameena secured counsel to file her notice of appeal from the grant of summary judgment to Dr. Bauer. The Court of Appeals affirmed, holding that Sameena did engage in the unauthorized practice of law, thus it was proper for the trial court to strike her pleadings and grant summary judgment to Dr. Bauer. Sameena, without counsel, filed a motion for discretionary review with this Court. Dr. Bauer moved to strike and dismiss the motion because it was not filed by counsel. This Court passed Dr. Bauer's motion to the consideration of the merits of the motion for discretionary review. Because we granted discretionary review, any challenge to the motion or to this appeal being properly before this Court is rendered moot.[6]

[6] We are also compelled to provide a cautionary note to counsel. While persuasive argument is required and expected in appellate briefing, this Court neither appreciates nor tolerates misrepresentations of the record; as such it would behoove counsel to accurately cite to the record. Specifically, counsel's characterization of the trial extensions being made solely at the request of Azmat are blatantly false. The first request to reschedule the trial, filed by Azmat's counsel, garnered no objection from the defense. The next request was a joint motion. Defense counsel also made its own request due to a conflict with a scheduled trial date. This motion by defense counsel requested a trial date in early 2015, and when the trial was scheduled for March 2015, defense counsel vehemently opposed.

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II. ANALYSIS

"Actions involving unmarried infants or persons of unsound mind shall be brought by the party's guardian or committee, but if there is none, or such guardian or committee is unwilling or unable to act, a next friend may bring the action." Kentucky Rules of Civil Procedure (CR) 17.03(1). "[T]he 'next friend' device is a procedural one by which a minor's claim is brought into court and a person acting as such is only a nominal party with no unilateral statutory or other authority to settle the minor's claim." *Jones By and Through Jones v. Cowan*, 729 S.W.2d 188, 190 (Ky. App. 1987). A next friend is the minor's agent, merely bringing an action on the minor's behalf. "[T]he minor is the real party in interest in any lawsuit filed on the minor's behalf by the minor's next friend." *Branham v. Stewart*, 307 S.W.3d 94, 97-98 (Ky. 2010). *The attorney "has an attorney-client relationship with, and owes professional duties to, the minor." Id.* at 99 (emphasis added).

None of the alleged errors are preserved for review. Nonetheless, this Court can review the claims under the palpable error standard.

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

CR 61.02.

A. The trial court erred in permitting Azmat's attorney to withdraw.

There are certain instances in which counsel is required to decline or terminate the representation of a client. Supreme Court Rules (SCR) 3.130(1.16)(a)(1)(2)and(3). There are also instances where a lawyer may be able to withdraw from representing a client if:

> (1) Withdrawal can be accomplished without material adverse effect on the interests of the client; or
>
> (2) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or
>
> (3) The client has used the lawyer's services to perpetrate a crime or fraud; or
>
> (4) The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; or
>
> (5) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or
>
> (6) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (7) Other good cause for withdrawal exists.

SCR 3.130(1.16)(b)(1)(2)(3)(4)(5)(6) and (7).

Azmat's counsel moved to withdraw from the case via motion filed on April 16, 2014. As justification for the motion, "counsel states that irreconcilable differences and breakdown in communications have arisen between the undersigned and the Plaintiffs that preclude further representation, the details of which are within the confines of the attorney-client privilege. Counsel avows that reasonable grounds exist for the Court to grant this Motion."

"Section (b) of SCR 1.16 gives the trial court broad discretion in granting such motions liberally, *as long as the client's interests are not affected*." *Lofton v. Fairmont Specialty Ins. Managers, Inc.*, 367 S.W.3d 593, 596 (Ky. 2012) (emphasis added). We must review the trial judge's grant of permission for counsel to withdraw under an abuse of discretion standard. *St. Clair v. Commonwealth*, 140 S.W.3d 510, 561 (Ky. 2004) (citing *Jacobs v. Commonwealth*, 58 S.W.3d 435, 449 (Ky. 2001)). "An abuse of discretion occurs if the trial court's ruling is 'arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Doyle v. Doyle*, 549 S.W.3d 450, 456-57 (Ky. 2018) (citing *Garrett v. Commonwealth*, 534 S.W.3d 217, 224 (Ky. 2017) citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). This Court finds an abuse of discretion because the trial court's actions were unreasonable in these circumstances and caused great injustice to Azmat.

The hearing on counsel's motion to withdraw was held on April 22, 2014. Azmat's attorney indicated that the hearing was pursuant to his motion to withdraw, but the actual hearing focused on the continuance of deadlines.[7] Counsel stated that he had notified Sameena of his intention to withdraw. Counsel also asserted, and the judge acknowledged the assertion, that Sameena had no objection to the withdrawal.

[7] Hearing, April 22, 2014, 9:30:04-9:35:51 a.m.

The motion to withdraw hearing lasted less than six minutes[8], and as stated above, focused on counsels' respective positions as to the continuance of the deadlines in the case. The trial judge stated, "[W]e have a September trial date that was just set a few weeks ago . . . and . . . I realize it's going to be challenging for any counsel to take the case."[9]

[8] Hearing, April 22, 2014, 9:30:04-9:35:51 a.m.

[9] Hearing, April 22, 2014, 9:32:39-9:33:01 a.m.

As stated above, in actions brought by a "next friend," the minor or incompetent is the real party in interest and the lawyer's duty is to such minor or incompetent. The record is completely void of any evidence that irreconcilable differences or a breakdown in communication occurred between Sameena and counsel. But more accurately, and certainly more importantly, the record is completely void of *even an inquiry* into whether irreconcilable differences or a breakdown in communication had occurred between counsel and his client, Nausher.

Dr. Bauer points out, and this Court agrees, that one does not have a substantial right to an attorney in a civil case. *Parsley v. Knuckles*, 346 S.W.2d 1, 2 (Ky. 1961). However, we do not hold that the trial court erred in not providing the Azmats with counsel, but rather we find error in the actions by the court after Azmat's counsel brought the claim. Dr. Bauer further argues that to hold for the Azmats would require an attorney to pursue a case he/she no longer believes to be meritorious, a case he/she can no longer financially afford, or a case he/she simply no longer can physically pursue. To the contrary, the concerns Dr. Bauer points to are precisely the sufficient justifications for a trial court to consider in permitting an attorney to withdraw from a case; such justifications were only summarily cited by Azmat's counsel and not explored by the trial judge.

"The trial judge is charged with knowing how to conduct a fair and impartial trial. He should know what is necessary to be said and when it should be said[.]" *Collins v. Sparks*, 310 S.W.2d 45, 49 (Ky. 1958). "Where legal disability of the individual is shown, the jurisdiction of the court is plenary and potent to afford whatever relief may be necessary to protect his interests and preserve his estates).]" *DeGrella By and Through Parrent v. Elston*, 858 S.W.2d 698, 704 (Ky. 1993) (internal citations omitted). Because the trial court did not inquire into the justification for counsel's withdrawal from the case, we find that the trial court acted unreasonably and unfairly to Nausher's substantial detriment. CR 61.02.

Additionally, the trial court's grant of permission for counsel to withdraw is not within the allowance of the rule because it could not be accomplished without material adverse effects on the client, Nausher. SCR 3.130(1.16)(b)(1). The judge acknowledged the previously scheduled trial date as well as the unlikelihood that replacement counsel could be found. While the trial was scheduled for September, and the motion to withdraw was granted in April, this action by the trial court less than six months prior to trial in a complex medical malpractice case was clearly erroneous. Therefore, we remand the case to the trial court for the appropriate inquiry.

If, upon remand, the trial court finds sufficient justification permitting counsel's withdrawal, and Azmat has not acquired substitute counsel, we direct the trial court to hold the case in abeyance for a reasonable time for Azmat to secure counsel. If substitute counsel cannot be found in a reasonable amount of time, then the trial court should strongly consider dismissing the case *without* prejudice.

It has long been the law of the Commonwealth that an infant or a person of unsound mind may bring an action within the applicable statute of limitations after a disability has been removed. Kentucky Revised Statutes (KRS) 413.170 ("If a person entitled to bring any action mentioned in KRS 413.090 to 413.160, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant or of unsound mind, the action may be brought within the same number of years after the removal of the disability or death of the person, whichever happens first, allowed to a

person without the disability to bring the action after the right accrued."); see also *Newby's Adm'r v. Warren's Adm'r*, 126 S.W.2d 436 (Ky. 1939) (The statute of limitations does not begin to run until the individual under disability is capable of bringing suit.). "A cause of action accrues when a party has the right and capacity to sue[.]" *Creson v. Scott*, 275 S.W.2d 406, 408 (Ky. 1955). Thus, trial courts must be cautious in such cases as this so as not to dismiss the case with prejudice, and thereby foreclose the disabled party from any future ability to pursue his or her claim. The proper procedure is for the trial court to abate the action pending procurement of replacement counsel, and, if such attempt is not successful, dismiss the case without prejudice, leaving available to the real party in interest the ability to bring his or her claims when minority or disability is removed, or the party is otherwise able to present his case to the courts.[10]

[10] Dismissal without prejudice is the followed procedure in other jurisdictions as well. "It would be inconsistent for a court to hold that a non-attorney had no authority to assert a claim on behalf of another, yet hold that the claim the non-attorney had wrongfully attempted to assert on behalf of that party was, as a result, subject to dismissal with prejudice." *Kinasz v. S. W. Gen. Health Ctr.*, No. 100182, 2014 WL 504885, *1 at *5 (Ohio Ct. App. Feb. 6, 2014) (quoting *Williams v. Global Constr. Co., Ltd.*, 498 N.E.2d 500, 502 (Ohio Ct. App. 1985)).

B. Sameena did not engage in the unauthorized practice of law and the trial court's act of striking the pleadings was in error.

1. Unauthorized Practice of Law.

Our unauthorized practice of law statute, KRS 524.130, states as follows:

> (1) Except as provided in KRS 341.470 and subsection (2) of this section, a person is guilty of unlawful practice of law when, without a license issued by the Supreme Court, he engages in the practice of law, as defined by the Supreme Court.
>
> (2) A licensed nonresident attorney in good standing, although not licensed in Kentucky, is not guilty of unlawful practice if, in accordance with rules adopted by the Supreme Court, he practices law under specific authorization of a court.
>
> (3) Unlawful practice of law is a Class B misdemeanor.

The Supreme Court has defined the practice of law as "any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services." SCR 3.020. The unauthorized practice of law is the performance of those services by "non-lawyers" for "others." *Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, 113 S.W.3d 105, 108 (Ky. 2003).

> [T]he basic consideration in suits involving unauthorized practice of law is the public interest. Public interest dictates that the judiciary protect the public from the incompetent, the untrained, and the unscrupulous in the practice of law. Only persons who meet the educational and character requirements of this Court and who, by virtue of admission to the Bar, are officers of the Court and subject to discipline thereby, may practice law. The sole exception is the person acting in his own behalf.

Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778, 782 (Ky. 1964), *as modified* (1965).

This Court could find no cases, from this jurisdiction or any jurisdiction in the country, where a trial court erroneously ordered *pro se* representation constituting the unauthorized practice of law. "Error correction is not the purpose of discretionary review. Special reasons must exist such as novel questions of law and the interpretation of statutes, matters of general public interest and the administration of justice, or clearly erroneous judgments resulting in manifest injustice." 7 Kurt A. Philipps, David V. Kramer and David W. Burleigh, *Kentucky Practice-Rules of Civil Procedure Annotated*, Rule 76.20, cmt. 1 (5th ed. West Group 1995). This case requires not only error correction by this Court but raises timely issues of public interest. The other important issues we confront are the resulting manifest injustice to Azmat, as well as the interpretation of our unauthorized practice of law statute and our rules of civil procedure.

Sameena did not engage in the unauthorized practice of law because she was specifically authorized and ordered to proceed as such according to the circuit court's order. "The law is well settled that the parties are bound by a pre-trial order." *Commonwealth ex rel. Marcum v. Smith*, 375 S.W.2d 386, 387 (Ky. 1964) (citing *Sapp v. Massey*, 358 S.W.2d 490 (Ky. 1962)); *see also* CR 16. However, our Court of Appeals has held that a non-lawyer cannot bring a claim on behalf of another, and to do so constitutes the unauthorized practice of law. *See Sosa v. Irving Materials, Inc.*, No. 2002-CA-000796-MR, 2003 SL 1227234, *1 (Ky. App. Jan. 17, 2003); *Brozowski v. Johnson*, 179 S.W.3d 261 (Ky. App. 2005); *Bobbett v. Russellville Mobile Park, LLC*, No. 2007-CA-000684-DG, 2008 WL 4182001, *1 (Ky. App. Sept. 12, 2008) as modified (Oct. 17, 2008)).

CR 16 is entitled Pretrial procedure; formulating issues, and states as follows:

> (1) In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:
>
> (a) The simplification of the issues;
>
> (b) The necessity or desirability of amendments to the pleadings;
>
> (c) The possibility of obtaining admissions of fact and documents which will avoid unnecessary proof;
>
> (d) The limitation of the number of expert witnesses;
>
> (e) The advisability of a preliminary reference of issues to a commissioner;
>
> (f) Such other matters as may aid in the disposition of the action.
>
> (2) The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at or before the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

"CR 16 provides that a pre-trial order limits the issues and 'controls the subsequent course of action[.]'" Smith, 375 S.W.2d at 387.

At first glance, it would appear that there is a conflict between KRS 524.130 and CR 16. However, upon closer examination, no conflict exists. Once the Hardin Circuit Court entered its order directing Sameena to find replacement counsel or to automatically be deemed to proceed *pro se*, and after Sameena's subsequent inability to procure counsel, Sameena was obligated to do as the trial court ordered. Because the trial court did not extend the deadlines regarding expert disclosures, and because the trial court entered the order days before such disclosures were due, Sameena had to follow the court's directive, for not doing so would have made her not only non-compliant with a court-ordered obligation but also potentially subject to the court's contempt power.

As stated above, this Court decides what constitutes the unauthorized practice of law. This issue is a matter of first impression and this Court has never held that a next friend representing the real party in interest has engaged in the unauthorized practice of law when explicitly directed by the trial court to proceed in such a manner. Therefore, no conflict exists between KRS 524.130 and CR 16, and we hold that Sameena did not engage in the unauthorized practice of law. This holding is necessarily narrow as we find it a rare oddity for trial courts to explicitly direct those unauthorized to practice law to engage in the practice of law.

2. Striking Pleadings.

The trial court struck Sameena's expert disclosures solely because of its determination that Sameena had engaged in the unauthorized practice of law. Dr. Bauer argues that any pleading that is filed by someone engaging in the unauthorized practice of law is void *ab initio*, thus, the circuit court had no choice but to strike Azmat's expert disclosures. Because this Court holds that Sameena was not engaged in the unauthorized practice of law, we must also hold that it was error for the trial court to strike the expert disclosures.

C. Summary judgment was improper.

As stated above, it was improper for the circuit court to strike the expert disclosures. The trial court's grant of summary judgment was premised on the fact that expert proof is required to establish a medical negligence claim. *Blankenship v. Collier*,

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

302 S.W.3d 665, 668 (Ky. 2010). While it is certainly true that a plaintiff must provide expert proof to sustain a medical malpractice action, the trial court's entry of summary judgment here was the final of several compounded errors.

We note Dr. Bauer's assertion that; "Sameena['s] [] inability to find counsel to take on [Nausher's] case, and the consequent failure of [Nausher] to respond to motions, failure to comply with Trial Court orders, and/or failure to appear in front of the Trial Court for a dispositive motion ruling are the direct causes for his claims being dismissed." "Still more, the Trial Court's decision to grant dismissal, especially when [Sameena] failed to respond to the motion for summary judgment, is in no way a manifest injustice to [Sameena]."

We note that it was defense counsel who first requested that Sameena be deemed to proceed *pro se* in the event replacement counsel was not found.[11] It was defense counsel who treated Sameena as a *pro se* litigant, certifying service to Sameena for various motions and requesting that the court take action against Sameena for alleged violations of discovery orders. This placed Sameena in a catch-22 dilemma; her hands being forced to practice law and then suffering the allegations of the unauthorized practice of law and its consequences.

[11] Hearing, April 22, 2014, 9:31:38 - 9:31:48 a.m. "We would ask for 30 days. I would like an order that says 30 days to obtain new counsel or inform the court that you intend to proceed pro se."

Dr. Bauer argues that neither the circuit court nor the parties have the ability to waive or permit the unauthorized practice of law. *See*, *e.g.*, *Naylor Senior Citizens Hous., LP v. Sides Constr. Co.*, 423 S.W.3d 238, 250 (Mo. 2014) ("'[O]ne cannot consent to the unauthorized practice of law' or waive the requirement that all parties other than natural persons be represented by licensed attorneys.'"). Based on the facts of this case, we do not find Dr. Bauer's argument persuasive. Dr. Bauer's argument is not only legally incorrect, as evidenced by our holdings here today, but on its face appears to lack genuineness, or, at the least, logic.[12]

[12] Dr. Bauer alleges Sameena committed the unauthorized practice of law in following the circuit court's directive, yet argues for the affirmance of the entry of summary judgment based on Sameena's lack of response to defense's motion. We posit that had Sameena responded to Dr. Bauer's motion for summary judgment. Dr. Bauer would have moved for that response to be stricken from the record as well.

It is abundantly clear that everyone involved in this litigation was educated and versed in the law - everyone except Sameena and Nausher Azmat. While "[t]rial judges are presumed to know the law and to apply it in making their decisions," *Bowling v. Commonwealth*, 168 S.W.3d 2, 13 (Ky. 2004) (quoting *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.E.2d 556 (2002)), we again acknowledge the novelty of the issue presented. Nevertheless, justice demands that "[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Kentucky Constitution Section 14.

Dr. Bauer's request that Sameena be deemed to proceed *pro se*, whether because of strategy or otherwise, and the trial court's erroneous order constitutes manifest injustice that "seriously affected the fairness, integrity, or public reputation of the proceeding." *Wise v. Commonwealth*, 422 S.W.3d 262, 276 (Ky. 2013) (internal citations omitted). We find the case of *Ward v. Houseman* somewhat instructive. 809 S.W.2d 717 (Ky. App. 1991). The Ward's attorney untimely filed supplemental answers to interrogatories identifying expert witnesses. 809 S.W.2d 717, 718. The Ward case was dismissed on summary judgment because the trial court concluded there was no genuine issue of material fact because of Ward's failure to timely supply the name of an expert. *Id.* The Court of Appeals held that "summary judgment is not to be used as a sanctioning tool" for failure to follow pretrial orders. *Id.* at 719.

If summary judgment should not be used for sanctioning the noncompliance with a trial court order, certainly it must not be used when there is actual compliance with the court's order. Sameena presented expert witnesses sufficient to survive a motion for summary judgment. It is clear that the experts were considered by counsel, as it appears counsel prepared such disclosures. Expert witnesses were proffered, Sameena's disclosure should not have been stricken, and summary judgment was improper. We reverse and remand.

D. "Next friend" cannot proceed *pro se* on behalf of a real party in interest.

This Court granted discretionary review, in part, to address whether a "next friend" can provide *pro se* representation to the real party in interest. Despite our holdings here today, which are specific to the facts and procedural posture of Azmat's case, we hold that a "next friend" cannot provide pro se representation to the real party in interest. The reasoning is simple: the interests of the "next friend" and the interests of the real party in interest may not always be aligned. When such respective interests become adverse, the "next friend" no longer acts as agent for the minor or incompetent because the only reason the "next friend" is even a nominal party in the case, rests upon the premise that the "next friend" brings the minor or incompetent's claims.

"The general rule appears to be that the existence of adverse interests which are likely to raise antagonisms or opposite purposes in the proceedings constitute sufficient grounds for the disqualification of one acting as next friend of an infant, who otherwise might be qualified." *Rosenberg v. Green*, 187 S.W.2d 1013, 1015 (Ky. 1945) (citing 27 Am.Jur. § 123, p. 845). Because such adverse interests disqualify an otherwise appropriate "next friend," we also hold that the "next friend" is precluded from providing *pro se* representation in such capacity.

We do acknowledge that some federal courts have held to the contrary. In these cases, the courts have focused on the fact that the parent, or "next friend," was the primary caregiver and would receive the benefits of successful litigation, showing that the parent's and child's interests were sufficiently similar to permit representation. *See Machadio v. Apfel*, 276 F.3d 103 (2nd Cir. 2002); *Harris v. Apfel*, 209 F.3d 413 (5th Cir. 2000); *Thomas v. Astrue*, 674 F.Supp.2d 507 (S.D.N.Y. 2009); *Tindal v. Poultney High School District*, 414 F.3d 281 (2d Cir. 2005). We do not adopt the holdings of these courts at this time.

This Court is mindful of its duty to protect the due process rights of all litigants before it. In addition to the right of Nausher Azmat to have his cause of action heard, this Court recognizes that, likewise. Dr. Bauer and his associates are entitled to a just and timely defense. This matter is now over six years old and, while recognizing the complexities it presents, this Court urges immediate attention and timely resolution of this case upon remand.

IV. CONCLUSION

For the foregoing reasons, we reverse and remand to the Hardin Circuit Court for further proceedings consistent with this opinion. The circuit court shall conduct an appropriate hearing on Azmat's counsel's motion to withdraw and shall proceed accordingly. The guidance provided herein shall be noted by all courts of this Commonwealth when presiding over litigation involving minors, incompetents, or "next friends."

All sitting. All concur.

TERMINATION OF PARENTAL RIGHTS

INVOLUNTARY TERMINATION

EXERCISING CUSTODIAL CONTROL OR SUPERVISION OVER CHILD AS SET FORTH IN KRS 600.020(1)(a)

PARENT WITH DRUG ABUSE ISSUES

Under KRS 600.020(1)(a), parent does not have to be exercising control or supervision over child in order to be found to have neglected or abused child — In instant action, Cabinet for Health and Family Services (Cabinet) placed newborn child with maternal grandmother, who supervised biological father's contact with child — Father was drug addict who was only sporadically compliant with Cabinet's case plan regarding drug use and drug testing — Trial court did not err in finding that child was neglected child due to risk of harm associated with father's substance abuse issues, even though father did not have custody or supervision of child — Trial court did not err in relying, in part, on father's extensive history of drug abuse that was found to have created risk of harm in prior involuntary termination of parental rights case involving other children — There was also evidence that father's drug abuse issues were ongoing —

Cabinet for Health and Family Services, Com., On Behalf of the Minor Child C.R. v. C.B.

(2018-SC-000092-DGE); On review from Court of Appeals; Opinion by Justice Keller, *reversing*, rendered 9/27/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

The Clark Circuit Court found C.B.'s[1] daughter to be a neglected child pursuant to the Kentucky Unified Juvenile Code. C.B. appealed and the Court of Appeals reversed. The Cabinet for Health and Family Services (Cabinet) petitioned this Court for discretionary review, which we granted. After our review of the record and the law, we reverse the Court of Appeals and reinstate the orders of the Clark Circuit Court.

[1] Due to the confidential nature of dependency, neglect, and abuse proceedings in family court, the parties will be identified by initials.

I. BACKGROUND

C.B. and Mother[2] lived together but were never married. Mother had a previous case plan with the Cabinet regarding another child, and C.B. had a previous involuntary termination of parental rights (TPR) case with the Cabinet, involving other children.

[2] The Child's, Mother's, and maternal grandmother's initials are C.R. To avoid confusion in identifying the parties, we refer to these individuals as "Child," "Mother," and "C.R.," respectively.

In late June 2016, C.B. began attending the suboxone clinic, Beall Recovery. C.B.'s intake form at the clinic indicated that he admitted to using heroin, Percocet, and off-street suboxone. Mother also had a history of substance abuse problems. Child was born on August 5, 2016. Child tested positive for suboxone, had low oxygen intake, mild retractions and hip dysplasia.

Also, in August 2016, social worker Roberta Mardis (Roberta) received a new investigation request relating to Child being born, positive for suboxone, referencing C.B.'s and Mother's previous histories with the Cabinet and substance abuse. C.B. and Mother agreed to the Cabinet's Prevention Plan (case plan). Child was placed in the care of the maternal grandmother, C.R. C.R. was to supervise C.B.'s and Mother's contact with Child.

The case plan also required C.B. to call the Cabinet office three times per week for random drug tests. If required to test, C.B. would report to the office during a designated time. C.B. was also required to continue attending Beall Recovery, follow all treatment recommendations and take all medications as prescribed, and to have only supervised contact with Child until further notice.

C.B. called the Cabinet office, as required, during the early stages of his case plan. At the adjudication hearing, however, the Commonwealth introduced drug tests showing that C.B. had tested positive for Gabapentin on three occasions. C.B. did not have a prescription for Gabapentin. C.B. also failed to call the Cabinet office for random testing on several occasions and even left the office prior to providing a testing sample on two occasions. C.B. also continued to test positive for suboxone, even though he was not currently receiving suboxone prescriptions.

The Cabinet filed a petition on November 29, 2016, seeking a finding that the Child was dependent, neglected, or abused. The case was set for an adjudication hearing on April 13, 2017. The Commonwealth requested, and the court granted, that Mother's case be adjusted and continued for two months. The Commonwealth indicated its intention to dismiss the case against Mother so long as Mother continued to follow and make progress on her case plan.

The above evidence was presented at the adjudication hearing. Roberta also testified regarding C.B.'s prior TPR proceeding. C.B. testified that he had never taken the drug Gabapentin and that he was willing to do a hair follicle test to show he had never taken the drug. There were also drug screens presented from Beall Recovery that did not show the presence of Gabapentin. These drug screens were taken on consecutive days to those from the Cabinet showing the presence of Gabapentin. In regard to the positive suboxone tests, C.B. indicated that he had "stretched" out his prescription to keep from getting sick. C.B. began working two jobs and did not think he would be able to see the doctor for a couple of months, so he had not been using suboxone according to his prescription in order to make it last longer.

C.B. also testified about the TPR proceeding. He stated that the children from that case were not his biological children. The trial judge reviewed the TPR file finding that C.B. had held himself out as the father and made no objection in the case about not being the father. The trial judge indicated that his rights were terminated in that case because of his history of substance abuse.

In the instant case, the trial judge found that the petition was proven by a preponderance of the evidence. Child was found to be a neglected child due to the risk of harm associated with C.B.'s substance abuse issues.

C.B. appealed and the Court of Appeals reversed. Not only did the Court of Appeals find that the Cabinet's evidence was speculative and did not rise to the preponderance level, but the Court of Appeals also found that the Child could not be found to be neglected because C.B. had never exercised custodial control or supervision over the Child. This Court granted the Cabinet's motion for discretionary review. We now reverse the Court of Appeals.

II. ANALYSIS

A. Statutory Interpretation.

This case primarily presents us with the task of interpreting Kentucky Revised Statute (KRS) 600.020. Statutory interpretation is an issue of law which we review *de novo*. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007) (citing *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998)).

> In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes.

Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542, 551 (Ky. 2011) (internal citations omitted).

> (1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when:
>
> **(a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:**
>
> 1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
>
> 2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
>
> 3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
>
> 4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
>
> 5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
>
> 6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
>
> 7. Abandons or exploits the child;
>
> 8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child;
>
> 9. Fails to make sufficient progress toward

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

> identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months; or
>
> (b) A person twenty-one (21) years of age or older commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon a child less than sixteen (16) years of age;

KRS 600.020(1) (emphasis added).

C.B. argued, and the Court of Appeals agreed, that the emphasized portion of the statute requires that an individual have custody or supervision of a child before a finding of abuse or neglect can be made. We disagree.

In the emphasized portion above, the phrase "exercising custodial control or supervision" modifies "other person." This makes sense based on the grammatical construction of the provision. First, the provision separates the enumerated relationships by an "or." "In common and natural usage the word 'or' is disjunctive and expresses an alternative as between either of two or more separate subjects or conditions and implies an election or choice as between them." *Board of Nat;l Missions of Presbyterial Church v. Harrel's Trustee*, 286 S.W.2d 905, 907 (Ky. 1956). It is therefore plain and apparent that the General Assembly intended to name multiple alternatives in the provision.

Second, this theory of interpretation is supported by the fact that the alternatives are all distinct classifications of relationships. KRS 600.020(46) defines parent as "the biological or adoptive mother or father of a child." "Guardianship gives a person 'the powers and responsibilities of a parent regarding the ward's support, care, and education[.]'" *Hicks v. Halsey*, 402 S.W.3d 79, 83 (Ky. App. 2013) (internal citations omitted).

> "Position of authority" means but is not limited to the position occupied by a biological parent, adoptive parent, stepparent, foster parent, relative, household member, adult youth leader, recreational staff, or volunteer who is an adult, adult athletic manager, adult coach, teacher, classified school employee, certified school employee, counselor, staff, or volunteer for either a residential treatment facility or a detention facility as defined in KRS 520.010(4), staff or volunteer with a youth services organization, religious leader, health-care provider, or employer.

KRS 532.045(1)(a).

"'Position of special trust' means a position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the minor." KRS 532.045(1)(b).

Despite these distinct definitions, the General Assembly added the clause "or other person exercising custodial control or supervision of the child." This makes logical sense as parents are separate and distinct due to their natural and legal obligation to provide care for their children. *Cashen v. Riney*, 40 S.W.2d 339, 341 (Ky. 1931) (emphasis added) ("It is the legal, as well as the natural, duty of parents not only to educate, maintain, and support their infant children, but also to shield and protect them from evil and injury.").

We further reject C.B.'s argument premised on our prior case law. In *Commonwealth, Cabinet for Health & Family Servs v. T.N.H.*, 302 S.W.3d 658, 659 (Ky. 2010), mother and child were both in the custody of the Cabinet after petitions for dependency and neglect had been filed. After the mother failed to comply with the Cabinet's case plan, the child was removed from mother's custody. Eventually the Cabinet filed a petition for involuntary termination of the mother's parental rights. *Id.* at 660. The mother's rights were terminated, but the Court of Appeals reversed, holding that the Cabinet failed to prove that the mother was incapable of rendering the appropriate care for the child in the future. *Id.* at 661.

On discretionary review before this Court, the mother claimed there was no evidence that the child was abused or neglected "because the child was committed to the Cabinet this whole time and all of his emotional, supervisory and material needs were met by the Cabinet through the maternal aunt or foster parents, who were the ones exercising custodial control and supervision[.]" *Id.* at 662. This Court rejected the argument. "Just because the child, and the parent for that matter, are committed to the Cabinet does not mean that the parent has no further responsibilities to the child." *Id.* "The Cabinet developed a case plan," and "continually offered services." *Id.* Nevertheless, mother neglected her duties and failed to complete the goals set by the Cabinet. *Id.* This case is directly analogous to C.B.'s circumstances.

This Court is satisfied that the General Assembly drafted KRS 600.020(1)(a) with the intention that "exercising custodial control or supervision" modifies "other person." Grammatical construction, logic, and our prior case law support the statutory interpretation that a parent does not have to be exercising control or supervision in order to be found to have neglected or abused a child.

B. Substantial Evidence Supported the Lower Court's Finding of Neglect.

A trial court has broad discretion in its determination of whether a child is dependent, neglected, or abused. *Dep't for Human Res. v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977). "The adjudication shall determine the truth or falsity of the allegations in the complaint. The burden of proof shall be upon the complainant, and a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence. The Kentucky Rules of Civil Procedure shall apply." KRS 620.100(3).

A "trial court's findings regarding the weight and credibility of the evidence shall not be set aside unless clearly erroneous." Kentucky Rule of Civil Procedure (CR) 52.01. "Under this standard, an appellate court is obligated to give a great deal of deference to the trial court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them." *D.G.R. v. Commonwealth, Cabinet for Health & Family Servs*, 364 S.W.3d 106, 113 (Ky. 2012) (citations omitted). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. S*myzer v. B.F. Goodrich Chem. Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

Furthermore, KRS 620.023 states:

> (1) Evidence of the following circumstances if relevant shall be considered by the court in all proceedings conducted pursuant to KRS Chapter 620 in which the court is required to render decisions in the best interest of the child:
> . . .
> (b) Acts of abuse or neglect as defined in KRS 600.020 toward any child;
> (c) Alcohol and other drug abuse, as defined in KRS 222.005, that results in an incapacity by the parent or caretaker to provide essential care and protection for the child;
> . . .

The Cabinet was required to investigate the instant case due to the Child being born with drugs in her system.[3]

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[3] (4) The Cabinet. . .
(b) shall investigate or conduct an assessment upon receipt of a report that alleges neglect of a child perpetrated by a caretaker that may result in harm to the health and safety of a child in the following areas:
. . .
(8) At risk of harm due to an act described at KRS 600.020(1), if a child is:
(a) Born exposed to drugs or alcohol, as documented by a health care provider pursuant to:
(i) 42 U.S.C. 5106a(b)(2)(B)(ii); and
(ii) KRS 620.030(2).
922 KAR 1:330(4)(b)(8)(a)(i) and (ii).

The purpose of the dependency, neglect, and abuse statutes is to provide for the health, safety, and overall wellbeing of the child. KRS 620.010. Based on our review of the evidence, the family court's findings are supported by the record and its ultimate finding of neglect is sound.

Evidence was presented that C.B. initially complied with the drug testing requirements of his case plan. C.B. appeared for testing multiple times per week. Evidence was presented that C.B.'s suboxone levels became inconsistent with the dosage of suboxone C.B. was supposed to be consuming. C.B. admitted that he had "stretched" his suboxone prescription because he did not know if he could see a doctor due to his new employment. Although inconsistent with the Beall Recovery Center drug tests, the Cabinet's drug tests also showed the presence of Gabapentin, a drug that C.B. had not been prescribed. Even though C.B. presented evidence and explanation of his own, all of this evidence was properly submitted before the trial judge, and the trial judge was certainly permitted to find the Cabinet's evidence more credible or persuasive.

C.B. argues that the family court erred in relying on evidence of his seven-year old TPR proceeding. For several reasons, we find no error. First, it must be stated that in order for a trial judge to terminate

an individual's parental rights, in an involuntary proceeding, one of the prerequisites to termination is that the trial judge find that the child has been abused or neglected.[4] So in C.B.'s prior TPR proceeding, the judge had to have found C.B.'s putative children[5] to be abused or neglected. This is significant because, as stated above, KRS 620.023 indicates that acts of abuse or neglect against *any child* are relevant in *any proceeding* pursuant to KRS Chapter 620, and the trial court *shall* consider such circumstances.

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[4] (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:

(a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;

2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or

3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated. . . .

KRS 625.090(1)(a)(1),(2),(3).

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[5] C.B. claimed that he was not the father of the four children involved in the TPR proceeding. However, the trial judge reviewed the file and determined that C.B. held himself out as the father and did not object to the proceedings against him on the basis of him not being the father.

Second, the same statute mandates the trial judge to consider whether alcohol or drug abuse incapacitates a parent to the point of affecting the care of the child. KRS 620.023(1)(c).

(3) "Alcohol and other drug abuse" means a dysfunctional use of alcohol or other drugs or both, characterized by one (1) or more of the following patterns of use:

(a) The continued use despite knowledge of having a persistent or recurrent social, legal, occupational, psychological, or physical problem that is caused or exacerbated by use of alcohol or other drugs or both;

(b) Use in situations which are potentially physically hazardous;

. . .

(d) Use of alcohol or other drugs or both is accompanied by symptoms of physiological dependence, including pronounced withdrawal syndrome and tolerance of body tissues to alcohol or other drugs or both;

KRS 222.005(3)(a)(b)(d).

The trial judge indicated to C.B., that the "termination of parental rights happened because you had a significant long-term substance abuse history and you weren't doing what you needed to do to fix the issue back then."[6] "Even without that history, it is absolutely uncontested that you have a very recent substance abuse history."[7] C.B. checked into the Beall Recovery Center a little over a month before the Child was born. C.B. admitted to using heroin, Percocet, and off-street suboxone. At the adjudication hearing, C.B. further conceded that he had not been following his suboxone prescription. He indicated that he stretched out his suboxone prescription so he would not get sick.

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[6] VR 4/13/17, 12:23:25-12:23:39 P.M.

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[7] *Id.* at 12:23:45-12:23:54 P.M.

This evidence and testimony clearly satisfies KRS 222.005. C.B.'s admitted drug use, occurring as far back as 2009 and the earlier TPR proceeding, certainly caused and exacerbated C.B.'s legal problems involving his children and/or putative children. KRS 222.005(3)(a). C.B.'s incorrect use of his suboxone prescription so he would not get sick, albeit for the stated purpose of maintaining employment, also tends to show C.B.'s continued dependency and fear of withdrawal symptoms. KRS 222.005(3)(c).

As stated in KRS 600.020(1)(a)(2), a court can find neglect if an individual "creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means." "The statute, as written, permits the court's finding where a *risk of abuse* exists and *does not require actual abuse* prior to the child's removal from the home or limitation on the contact with an abusive parent." *Z.T. v. M.T.*, 258 S.W.3d 31, 36 (Ky. App. 2008) (emphasis added).

C.B.'s prior history of drug abuse was found to have created a risk of harm in the prior TPR proceeding. C.B.'s recent compliance with the Cabinet's case plan, followed by missed tests and positive tests, provide an inference that C.B.'s drug issues are still not resolved. While family courts are not left with unfettered discretion when it comes to restricting parents' rights to their children, the family court certainly does not have to wait for actual harm to occur before taking protective measures.[8] Based on the evidence and C.B.'s own admissions, it was reasonable for the family court to rely upon this evidence in finding neglect.

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[8] This measure is granted to the family court, provided evidence of a risk of harm is proved by a preponderance of the evidence.

III. CONCLUSION

For the foregoing reasons, we reverse the Court of Appeals and reinstate the orders of the Clark Circuit Court.

All sitting. All concur.

CRIMINAL LAW

ADMISSIBILITY OF EVIDENCE

WITNESS'S LIFETIME PAROLE STATUS

INTERPLAY BETWEEN KRE 609(b) AND KRE 611

Even though evidence of 30-year-old conviction may be prohibited as being too remote in time to allow general attack on witness's credibility under KRE 609(b), evidence of witness's lifetime parole status stemming from that conviction may still be admissible for impeachment purposes to allow more specific attack on witness's credibility by showing bias or motive to lie under broader scope of KRE 611 —

Com. v. Terrance Armstrong (2017-SC-000602-DG); On review from Court of Appeals; Opinion by Chief Justice Minton, *reversing and remanding*, rendered 9/27/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

We accepted discretionary review of this criminal case to determine whether a witness's status as a parolee is admissible on cross-examination as impeachment pursuant to Kentucky Rule of Evidence (KRE) 611 despite the provision of KRE 609(b) that would render as presumptively too remote in time evidence of the more than thirty-year-old conviction upon which the witness's parole was based. We hold that even though evidence of a conviction may be prohibited to allow a general attack on the witness's credibility under KRE 609(b), evidence of the witness's lifetime parole status stemming from the conviction may still be admissible to allow a more specific attack on the witness's credibility by showing bias or motive to lie under the broader scope of KRE 611. That said, we further hold that the trial court's error was harmless beyond a reasonable doubt, and therefore reverse the Court of Appeals and reinstate the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY.

The police responded to a call reporting an assault with injuries and found Harry Stewart lying in the road, unconscious and severely injured. Stewart was transported to a hospital where he was ultimately diagnosed with a fractured jaw, a swollen and lacerated tongue, and swelling of the face. Stewart spent about a month in a coma and remained hospitalized for several months following the incident. He is no longer able to work or care for himself.

After interviewing bystanders, police identified and arrested Terrence Armstrong for assaulting Stewart. The grand jury indicted Armstrong for second-degree assault, but the charges were later amended to first-degree assault. At trial, Armstrong admitted to the elements of assault by admitting to punching Stewart but disputed virtually every detail leading up to the assault. The jury found Armstrong guilty of assault in the fourth-degree, a misdemeanor.

The defense put forth a self-defense theory,

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

and Armstrong testified in his own defense that he and his two friends, all of whom were African-American, were headed to their friend Spencer's apartment when the incident began. Armstrong testified that on their walk, the friends stopped to pet a dog, but he continued to Spencer's apartment. After no one answered the door, Armstrong waited outside on the curb, listening to music. He testified that he noticed a few men standing beside him, and one of them said "get the fuck out of here, nigger, before we stab you up." He explained that the men approached him, and that one of them had a knife. He "punched at the same time, with no pause, one hand and then the other" at the one closest to him, and the man fell to the ground. The two other men backed up, spread out, and pulled out knives. Armstrong testified that they continued to say things like "I'm going to fuck you up" and "get out of here."

The Commonwealth's key eyewitness, John Flynn, gave a different account of the events leading to the assault. Flynn testified that he grew up with Harry's brother, Richard Stewart, and that he had driven to Richard Stewart's apartment building—where Harry Stewart also lived—to go with Richard Stewart to a nearby shelter for supper. After supper, Flynn and Richard returned to the apartment building, and Harry came outside. Flynn testified that three men were talking outside of the apartment building when "a black fella and a woman" showed up. He said the man—Terrance Armstrong—then approached the three men and said, "we got a problem." Flynn testified that Richard Spencer backed up, reached into his front pocket, and said "I'll cut your fucking heart out," but that Richard did not actually pull out a knife. Flynn testified that Armstrong hit Harry in the face, causing Harry to fall to the ground, and, when Armstrong got back up, hit Harry in the face with a full pop can by throwing it at him. According to Flynn, Armstrong then hit Harry in the face again, causing him to fall to the ground, and struck Harry with at least more kicks and punches. Flynn himself denied having a knife or threatening anyone with a knife during the incident.

During cross-examination of Flynn, defense counsel sought to impeach Flynn's credibility by asking him "Are you on parole for life for murdering a black man?" The Commonwealth objected and, after hearing arguments and reviewing case law, the trial court allowed the defense to ask whether Flynn was a convicted felon but held that KRE 609 disallowed any questions about the details of the crime or whether Flynn was on lifetime parole. The trial court admonished the jury regarding the defense counsel's question.

On avowal, Flynn testified that, in 1983, he and three others had robbed two black victims and stabbed one of them to death. He testified that he was sentenced to life imprisonment and was currently out on lifetime parole. He admitted that threatening someone with a knife or possessing a knife would be a violation of his parole and would likely send him back to prison.

The jury convicted Armstrong of fourth-degree assault and fixed punishment at twelve months' confinement and a $500 fine. On appeal of the resulting judgment to the Court of Appeals, Armstrong argued that the trial court erred in refusing to allow defense counsel to cross-examine Flynn about his lifetime parole status because that testimony was permissible evidence of Flynn's motive to lie about having threatened Armstrong with a knife. The Court of Appeals agreed, holding that evidence of Flynn's lifetime parole status was admissible under KRE 611, and that excluding such evidence amounted to a Confrontation Clause violation and an abuse of discretion. Accordingly, the Court of Appeals reversed the judgment. The Commonwealth sought discretionary review, which we granted.[1]

[1] In its brief, the Commonwealth focuses on the argument that the trial court properly excluded both evidence that Flynn was on lifetime parole and the details of the underlying crime giving rise to the parole—specifically, that Flynn had pleaded guilty to murdering an African American male in 1983. Worth noting is that the issue of whether the details of the underlying crime were admissible at trial is not before this Court because that argument was waived by Armstrong in his brief to the Court of Appeals. Further, the Court of Appeals explicitly declined to consider the issue in its opinion, from which the Commonwealth appealed. Accordingly, this Court addresses only the issue concerning the admissibility of Flynn's lifetime parole status.

II. ANALYSIS.

The issue before this Court is whether the trial court violated Armstrong's Sixth and Fourteenth Amendment rights when it limited the scope of his cross-examination of Flynn. Armstrong argues both that he should have been permitted to ask Flynn whether he was on lifetime parole because his parole status would have provided a motive to testify in a manner helpful to the Commonwealth, and that it would have provided a motive to lie about threatening Armstrong with a knife or possessing a knife at the time of the incident.

To determine whether Armstrong's constitutional rights have been violated, it is first necessary to give guidance on an issue that has caused some confusion in the courts below: whether a witness's lifetime parole status is admissible for impeachment purposes under KRE 611, despite evidence of the underlying crime itself being presumptively inadmissible as too remote in time under KRE 609(b).

a. Evidence of Flynn's lifetime parole status is admissible for impeachment purposes under KRE 611, despite KRE 609 rendering details of the underlying crime inadmissible.

KRE 611(b) defines the general scope of cross-examination. Under that rule, "a witness may be cross-examined on any matter relevant to any issue in the case, including credibility."[2] Therefore, KRE 611(b) embodies the "wide open" rule of cross-examination, "permitting the inquiry on cross to extend to the full limits of the dispute . . . unaffected by the content of the direct testimony of the witness under cross-examination."[3]

[2] KRE 611(b).

[3] Lawson, The Kentucky Evidence Law Handbook § 3.20[2][c] (5th ed. 2013).

Even without the broad scope of KRE 611, it is undisputed that the cross-examiner is allowed to discredit the witness's testimony "subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation."[4] Two important methods by which the impeaching party may discredit a witness's testimony on cross-examination are by introducing the fact that the witness has a prior felony conviction and by "revealing possible biases, prejudices, or ulterior motives of the witness as they may relate to issues . . . in the case at hand."[5]

[4] *Davis v. Alaska*, 415 U.S. 308 (1974).

[5] *Id.*

By introducing evidence of a prior felony conviction, "the cross-examiner intends to afford the jury a basis to infer that the witness's character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony."[6] This type of evidence provides a general attack on the witness's credibility.[7] KRE 609 governs the use of criminal convictions to impeach the credibility of a witness. Under that rule, a criminal conviction can be used to impeach only if the crime underlying the conviction "was punishable by death or imprisonment for one . . . year or more"[8] and the conviction is not more than ten years old, unless the court determines the probative value of the conviction substantially outweighs its prejudicial effect.[9] Even still, the nature of the felony underlying the conviction cannot be disclosed unless the witness denies having been convicted.[10]

[6] *Id.*

[7] *Id.*

[8] KRE 609(a).

[9] KRE 609(b) ("Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect.").

[10] KRE 609(a) ("The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction.").

While no specific provision of the Kentucky Rules of Evidence provide for impeachment of a witness by bias, prejudice, or ulterior motives,[11] we have always recognized that impeachment is permissible on cross-examination.[12] Exposing a witness's bias or motivation to testify is "a proper and important function of the constitutionally protected right of cross-examination."[13]

[11] There is, likewise, no specific provision in the Federal Rules of Evidence. Lawson, The Kentucky Evidence Law Handbook § 4.10[2][a] (5th ed. 2013).

[12] *See Baker v. Kammerer*, 187 S.W.3d 292, 295 (Ky. 2006) (stating that "exposing the bias of an opposing witness" is "one of the most crucial goals of cross-examination").

[13] *Davis*, 415 U.S. at 316.

In this case, the trial court prohibited Armstrong from asking a key prosecution witness whether he was currently on lifetime parole, finding that such evidence was inadmissible under KRE 609's prohibition of evidence of criminal convictions more than ten years old.[14] While KRE 609 undoubtedly bars for impeachment purposes evidence of the underlying crime itself—in this case, a murder conviction from 1983—we have previously held that the fact that a witness's credibility may not be impeached by proof of a prior conviction does not deny the defendant the right to show potential bias of a witness that a juror might infer from the fact that the witness was on parole for that conviction.[15] As argued in this case, evidence that a witness is on parole may, in some cases, support an inference that the witness was biased. In these cases, bias may result either because the witness's parole status creates a relationship with the prosecution that motivates that witness to testify in a manner favorable to the prosecution, or because it creates a penal interest in the subject matter of the testimony on the part of the witness.[16]

[14] There is no suggestion in the trial record that the trial court was asked, or undertook on its own, a consideration of whether probativeness of the 1983 conviction substantially outweighed the possibility of prejudice.

[15] In *Adcock v. Commonwealth*, 702 S.W.2d 440, 441 (Ky. 1986), the trial court determined that evidence of a witness's parole status stemming from an inadmissible criminal conviction was also inadmissible for impeachment purposes, as such evidence "would accomplish indirectly what could not be accomplished directly." *Id.* But in reversing the trial court's ruling, this court explained that the fact that the witness could not be impeached by evidence of a certain crime was "not a sufficient reason to deny a defendant the right to show potential bias of a witness which a juror might infer from the fact that the witness was on parole under active supervision." *Id.*

[16] *See* Lawson, The Kentucky Evidence Law Handbook § 4.10[2][a] n. 3 (5th ed. 2013) ("There are two broad categories of bias. First, a relationship between a witness and one of the parties may be evidence of bias. The relationship may be a favorable one . . . or it may be a hostile relationship . . . . Second, a relationship between a witness and the litigation also may be evidence of bias—such as a financial interest in the case at bar, or in a related case.'") (quoting Paul C. Gianneli, Understanding Evidence 271-72 (3d ed. 2009)).

Put more succinctly, while evidence of a conviction may be prohibited to launch a general attack on the witness's credibility under KRE 609, evidence of the witness's parole status stemming from the conviction may still be admissible as a more specific attack on the witness's credibility by showing bias or motive to lie under the broader scope of KRE 611.

Thus, while the trial court may not have abused its discretion in excluding for impeachment purposes evidence of Flynn's 1983 murder conviction under KRE 609—as that crime was more than ten years old—it incorrectly determined that evidence of Flynn's lifetime parole status was also barred by that rule. Instead, Flynn's lifetime parole status could have been admitted as a more specific attack on his credibility—namely, to show potential bias of Flynn that a juror might infer from the fact that he was on lifetime parole. While the trial court could ultimately have barred defense counsel from asking Flynn about his lifetime parole status under its broad discretion to limit cross-examination under KRE 611, the point is that KRE 609 does not automatically bar such evidence.

b. The trial court abused its discretion by prohibiting Armstrong from cross-examining a key witness about his motive or bias.

Armstrong alleges that the trial court abused its discretion when it prohibited him from cross-examining Flynn about his status as a lifetime parolee and the potential revocation of his parole if he were to testify that he threatened or possessed a knife at the time of the incident. Armstrong contends that this examination would allow an inference that Flynn was motivated to testify in a manner that would curry favor from the Commonwealth and an inference that Flynn was motivated to lie about threatening or possessing a knife during the incident. Armstrong argues that this prohibition violated his Sixth Amendment right to confront witnesses against him.

"An essential aspect of the Sixth Amendment Confrontation Clause is the right to cross-examine witnesses," and "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[17] Accordingly, the Sixth Amendment right to confrontation must be analyzed whenever the accused is prohibited from cross-examining a witness about his motive or bias.

[17] *Davenport v. Commonwealth*, 177 S.W.3d 763, 767 (Ky. 2005). This Court has recognized that a showing of bias can be particularly important in cross-examination because, unlike other forms of impeachment "which might indicate that the witness is lying[,] evidence of bias suggests *why* the witness might be lying." *Star v. Commonwealth*, 313 S.W.3d 30, 38 (Ky. 2010) (quoting *Stephens v. Hall*, 294 F.3d 210, 224 (1st Cir. 2002)) (emphasis in original).

However, "the right to cross-examination is not absolute and the trial court retains the discretion to set limitations on the scope and subject."[18] "The Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[19] Instead, trial courts retain "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[20]

[18] *Id.* at 767-78.

[19] *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (emphasis in original).

[20] *Id.*

"Therefore, a limitation placed on the cross-examination of an adverse witness does not automatically require reversal."[21] Instead, "a reviewing court must first determine if the Confrontation Clause has been violated."[22] The Sixth Amendment "does not prevent[] a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness."[23] Rather, "[s]o long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries."[24]

[21] *Davenport*, 177 S.W.3d at 768.

[22] *Id.*

[23] *Van Arsdall*, 475 U.S. at 679.

[24] *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997).

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To state a violation of the Confrontation Clause, the defendant must show that "he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'"[25] A defendant has satisfied this burden if "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [the defense's] counsel been permitted to pursue his proposed line of cross-examination."[26]

[25] *Van Arsdall*, 475 U.S. at 680 (quoting *Davis*, 415 U.S. at 318).

[26] *Van Arsdall*, 475 U.S. at 680.

Reviewing courts have found this burden to be met "when the excluded evidence clearly supports an inference that the witness was biased, and when the potential for bias exceeds mere speculation."[27] A violation does not occur where the excluded evidence supports an inference of bias based on mere speculation.[28] In *Davenport v. Commonwealth*, for example, the appellant challenged the trial court's refusal to allow defense counsel to ask a prosecution witness on cross-examination about his probationary status in an adjacent county, as well as his pending misdemeanor charges in the venue county.[29] The appellant argued that the proposed line of cross-examination would have established "the possibility that the witness may have cooperated with [police] in anticipation of leniency regarding his probation" and to "establish that an even greater potential for bias existed where [the witness] was facing two misdemeanor charges . . . at the time of trial."[30] The appellant claimed that the exclusion of that testimony violated his Sixth Amendment right to cross-examine the prosecution's witnesses.[31]

[27] *Davenport*, 177 S.W.3d at 769.

[28] *See id.* at 771.

[29] *Id.* at 767.

[30] *Id.*

[31] *Id.*

In upholding the trial court's limitation on the appellant's cross-examination, this Court explained that "[w]hile a witness's pending charges or probationary status alone may, in some cases, be a satisfactory basis upon which to infer bias, the facts in evidence here were simply insufficient to support the inference of [the witness's] bias."[32] "Other than the plain fact of [the witness's] probationary status, defense counsel offered no evidence whatsoever to support the claim that he was motivated to testify in order to curry favor with authorities."[33] Importantly, this Court noted that the witness lacked an implicit motivation to divert suspicion away from himself by cooperating with police, as no attempt was made to implicate him in the crime and he was never identified as a potential perpetrator.[34] Further, the witness's testimony was corroborated in nearly every material aspect. Therefore, this Court stated, an inference that the witness was biased based solely on his probationary status would be "purely speculative."[35]

[32] *Id.* at 771.

[33] *Id.*

[34] *Id.*

[35] *Id.*

Here, as Flynn testified on avowal, he was not only on lifetime parole at the time of the incident and trial, but he acknowledged that possessing or threatening Armstrong with a knife—a fact alleged by Armstrong and which formed a part of his self-defense theory—would result in revocation of his parole status. Further, Flynn's account of the incident was not corroborated by any other witness, as he was the Commonwealth's only witness to provide testimony about the facts leading up to the assault, and his testimony conflicted with that of the defense. Therefore, unlike the witness at issue in *Davenport*, Flynn's testimony was not only uncorroborated, but he possessed an implicit motivation to provide testimony that he was not an aggressor during the incident.

Accordingly, our determination is that Armstrong met the burden for stating a Confrontation Clause violation. Flynn's avowal testimony would not merely provide a speculative inference that he was motivated to testify to curry favor from the Commonwealth. Instead, the jury could have reasonably inferred from the avowal testimony that Flynn was motivated to avoid revocation of his parole status, and a return to prison, by providing testimony that he neither threatened Armstrong nor possessed a knife at the time of the incident. These facts would support an inference of bias that exceeds mere speculation, and without them being available for the jury to consider, we cannot say that "a reasonably complete picture of the witness' veracity, bias and motivation" was developed.

"In Kentucky, the trial court's rulings concerning limits on cross-examination are reviewed for abuse of discretion."[36] "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[37] Because the trial court's refusal to allow Armstrong's counsel to ask Flynn about his lifetime parole status violated Armstrong's Sixth Amendment right to confront this witness, we are persuaded that the trial court abused its discretion.

[36] *Id.*

[37] *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

C. The trial court's error was harmless beyond a reasonable doubt.

A trial court's improper denial of the defendant's opportunity to impeach a witness for bias is subject to harmless error analysis.[38] Because the error is of constitutional significance, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt."[39] Therefore, the error is harmless beyond a reasonable doubt if there is no "reasonable possibility that exclusion of the evidence complained of might have contributed to the conviction."[40]

[38] *Star v. Commonwealth*, 313 S.W.3d 30, 38 (Ky. 2010) (quoting *Van Arsdall*, 475 U.S. at 684).

[39] *Star v. Commonwealth*, 313 S.W.3d 30, 38 (Ky. 2010) (quoting *Van Arsdall*, 475 U.S. at 684).

[40] *Talbott v. Commonwealth*, 968 S.W.2d 76, 84 (Ky. 1998) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)).

We are persuaded that this standard has been met. At trial, jurors heard uncontradicted testimony from Flynn that at least one of the three men involved in the incident—Richard Stewart—threatened Armstrong with a knife, said "I will cut your fucking heart out," and reached into his pocket just before Armstrong assaulted Stewart. Armstrong himself testified that not until after the assault did he believe a second knife—presumably Flynn's—was pulled out. They also heard testimony from the defendant and two other defense witnesses to the effect that Harry Stewart, Richard Stewart, and John Flynn were the initial aggressors in the incident.

Faced with this testimony, the jury rejected Armstrong's self-defense theory and found him guilty of assault in the fourth-degree. Had the trial court admitted evidence that Flynn was on lifetime parole, the jury could have inferred Flynn had a motive to lie about not threatening Armstrong with a knife and about himself, Richard Stewart, and Harry Stewart not being the initial aggressors.

Even if the jury had outright rejected Flynn's version of events based on any inferred bias, we cannot say that a reasonable possibility exists that

the jury would have found either that Armstrong did not assault Harry Stewart—given that he admitted the elements of assault during his own testimony—or that he acted in self-defense. In short, we are not convinced the absence of any evidence supporting an inference that Flynn was biased contributed to the guilty verdict reached by the jury. Therefore, we find the trial court's error to be harmless beyond a reasonable doubt.

III. CONCLUSION.

Armstrong's Sixth Amendment right to confrontation was violated when his defense counsel was prohibited from asking a key prosecution witness about his parole status on cross-examination. Because we find there is not a reasonable possibility that lack of this evidence might have contributed to the jury's verdict, the error was harmless beyond a reasonable doubt. Accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's judgment.

All sitting. All concur.

CIVIL PROCEDURE

APPELLATE PRACTICE

CONSTITUTIONAL STANDING

MEDICAID

BENEFICIARY HAS NO CONSTITUTIONAL STANDING TO BRING INTERLOCUTORY APPEAL OF INSURER'S DENIAL OF HOSPITAL'S REQUEST FOR PREAUTHORIZATION OF BENEFICIARY'S MEDICAL SERVICES

Trial court's ruling on issue of constitutional standing, in and of itself, does not give rise to immediate right to appeal, *i.e.*, interlocutory appeal — However, such prohibition does not constrain power of appellate court, at instance of party-opponent or acting upon its own motion, from inquiring into whether plaintiff has requisite standing to sue when interlocutory appeal is properly before appellate court on an issue recognized as immediately appealable — Constitutional standing concerns power of a court to resolve dispute — Statutory standing concerns whether legislature has accorded injured plaintiff right to sue defendant to redress his injury — All Kentucky courts have constitutional duty to ascertain issue of constitutional standing, acting on their own motion, to ensure that only justiciable causes proceed in court — Issue of constitutional standing is not waivable — Kentucky Supreme Court formally adopted *Lujan v. Defenders of Wildlife* (1992) test for constitutional standing doctrine in Kentucky — Under *Lujan*, initiating party must have requisite constitutional standing to sue, as defined by following requirements: (1) injury, (2) causation, and (3) redressability — Thus, plaintiff must allege personal injury fairly traceable to defendant's allegedly unlawful conduct and likely to be redressed by requested relief — If circuit court cannot maintain proper original jurisdiction over a case to decide its merits because case is nonjusticiable due to plaintiff's failure to satisfy constitutional standing requirement, then Court of Appeals and Supreme Court are constitutionally precluded from exercising appellate jurisdiction over case to decide its merits — Legislature cannot erase constitutional standing requirements by statutorily granting right to sue to plaintiff who would otherwise not have standing — In instant action, Medicaid beneficiary was admitted to hospital — Hospital sent preauthorization request for medical services to managed-care organization that contracted with Kentucky Cabinet for Health and Human Services (Cabinet) to provide reimbursement to hospitals for certain services provided to Medicaid beneficiaries — Medicaid beneficiary, through hospital, which was beneficiary's designated representative for disputed claims, requested extension of benefits — Managed-care organization denied reimbursement for request — Hospital requested Medicaid Fair Hearing to challenge denial — Hearing officer determined that beneficiary lacked standing to pursue appeal of denial because beneficiary herself had no stake in outcome of dispute between hospital and managed-care organization — Hearing officer found that, since Medicaid had paid hospital for services rendered to beneficiary, beneficiary would owe nothing to hospital for extended stay — Cabinet Secretary upheld decision — Hospital, as beneficiary's representative, sought judicial review in Harlan Circuit Court — Cabinet and managed-care organization alleged, among other things, that beneficiary lacked standing and that petition was barred by sovereign immunity for failure to strictly comply with KRS 13B.140 — Circuit court denied motions to dismiss — Cabinet and managed-care organization each filed interlocutory appeal to Court of Appeals — Court of Appeals found that circuit court's rulings on sovereign immunity were immediately appealable — Further, it found that sovereign immunity had been waived — Court of Appeals found that case should be transferred to Franklin Circuit Court — Cabinet and managed-care organization appealed — Kentucky Supreme Court determined that case was properly before it on interlocutory appeal of whether doctrine of sovereign immunity bars beneficiary from suit — However, Kentucky Supreme Court did not reach issue of whether doctrine of sovereign immunity bars beneficiary from suit because beneficiary lacked constitutional standing to sue — Beneficiary, not hospital, is true plaintiff; therefore, analyzed standing as to beneficiary — Beneficiary will not suffer "injury" as she is not financially interested in outcome of dispute — Action is, at its core, dispute over whether hospital can pursue reimbursement claim from managed-care organization through Medicaid administrative process at Cabinet — Beneficiary did not allege that she did not receive all proper medical care she needed or that she will be precluded from receiving medical care in future — Kentucky Supreme Court noted that legislature has amended Medicaid reimbursement scheme to provide hospital with redress if reimbursement issue arises again — In addition, it appeared that hospital can and did seek redress of its reimbursement grievances against managed-care organization by filing its own lawsuit —

Com., Cabinet for Health and Family Services, Department for Medicaid Services v. Lettie Sexton, By and Through Her Authorized Representative, Appalachian Regional Healthcare, Inc.; and Coventry Health and Life Insurance d/b/a Coventry Cares, Inc. (2016-SC-000529-DG); *Coventry Health and Life Insurance d/b/a Coventry Cares, Inc. v. Lettie Sexton, By and Through Her Authorized Representative, Appalachian Regional Healthcare, Inc., and Com., Cabinet for Health and Family Services* (2016-SC-000534-DG); *Lettie Sexton, By and Through Her Authorized Representative, Appalachian Regional Healthcare, Inc. v. Com., Cabinet for Health and Family Services and Coventry Health and Life Insurance d/b/a Coventry Cares, Inc.* (2016-SC-000540-DG); and *Coventry Health and Life Insurance v. Lettie Sexton, By and Through Her Authorized Representative, Appalachian Regional Healthcare, Inc., and Com., Cabinet for Health and Family Services* (2017-SC-000095-DG); On review from Court of Appeals; Opinion by Chief Justice Minton, *reversing, vacating, and remanding*, rendered 9/27/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

This case requires us to consider whether the courts of Kentucky can undertake a statutorily created judicial review of an administrative agency's final order when the person appealing that final order does not have a concrete injury. Our resolution requires us to apply the doctrine of constitutional standing, and, in doing so, we hold as a matter of first impression that the pursue any action in the courts of this Commonwealth, adopting the United States Supreme Court's test for standing as espoused in *Lujan v. Defenders of Wildlife*.[1] Because this case reaches us via an interlocutory appeal from the circuit court's review of an agency ruling, we further hold that all of Kentucky's courts have the responsibility to ascertain, upon the court's own motion if the issue is not raised by a party opponent, whether a plaintiff has constitutional standing, an issue not waivable, to pursue the case in court. Under that test, we conclude that Medicaid beneficiary Lettie Sexton, the putative petitioner in the present case, does not have the requisite constitutional standing to pursue her case in the courts of the Commonwealth. So, we reverse the decision of the Court of Appeals, vacate the ruling of the circuit court, and remand this case to the circuit court with instructions to dismiss the case.

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[1] 504 U.S. 555, 560-561 (1992).

I. BACKGROUND.

Lettie Sexton, a Medicaid beneficiary, was

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admitted to Appalachian Regional Healthcare ("ARH"), complaining of chest pain. ARH sent a request for preauthorization of medical services to Coventry Health and Life Insurance, d/b/a Coventry Cares, Inc. ("Coventry"), a managed-care organization that had contracted with the Kentucky Cabinet for Health and Human Services ("Cabinet") to provide reimbursement to hospitals for certain services provided to Medicaid beneficiaries. Coventry approved a 23-hour observation stay at ARH. Sexton, through ARH, her designated representative for any disputed claims, requested that the observation stay at ARH be extended 15 more hours for a cardiology consultation. Coventry denied reimbursement for this request. Sexton was eventually hospitalized at ARH for approximately 38 hours.

ARH then requested an internal review by Coventry of its denial of reimbursement for the 15 hours of additional hospitalization. After review, Coventry upheld its denial. ARH, ostensibly acting for Sexton, then requested a Medicaid Fair Hearing to challenge Coventry's denial. A hearing officer for the administrative-services branch of the Cabinet conducted that hearing and ruled that Sexton lacked standing to pursue an appeal of Coventry's denial of reimbursement to ARH because Sexton herself had no stake in the outcome of the dispute between ARH and Coventry. The hearing officer's ruling was based upon the fact that because Medicaid had paid ARH for the services rendered to Sexton, she would owe nothing at all to ARH for the extended hospital stay.[2] In due course, the Cabinet Secretary adopted the hearing officer's recommendation as the Cabinet's final order.

[2] This argument is a reoccurring one used by several managed-care organizations that has resulted in numerous pending cases in the Court of Appeals.

ARH, acting as Sexton's representative, then sought judicial review under Kentucky Revised Statute (KRS) 13B.140 of the Cabinet's final order by timely filing a petition for review in the Harlan Circuit Court. The Cabinet filed a motion to dismiss the petition, alleging that: (1) Sexton lacked standing; (2) ARH was not Sexton's authorized representative; (3) venue did not lie in Harlan County; and (4) that the petition was barred by the doctrine of sovereign immunity because it did not strictly comply with the requirements of KRS 13B.140. Coventry joined in the Cabinet's motion on the same grounds.

Following a hearing, the circuit court denied the motion to dismiss. On the issue of standing, the circuit court found that the individual ARH employees who had been authorized by Sexton to represent her interests were sufficiently identified in the exhibits to the petition to provide standing and to comply substantially with the requirements of KRS 13B.140. As for venue and subject-matter jurisdiction, the circuit court ruled that the addresses for Sexton's designated representatives were the address of the ARH hospital employees located in Harlan County, thus fixing venue there in accordance with KRS 13B.140. On the issue of sovereign immunity, the circuit court determined that this argument was based upon the proposition that a failure strictly to comply with KRS 13B.140 eliminated waiver of sovereign immunity. But since the circuit court found the petition to be otherwise sufficient, the limited waiver of immunity was not eliminated. So, the circuit court denied Coventry's and the Cabinet's motions to dismiss the petition.

Because the circuit court denied the Cabinet and Coventry's sovereign-immunity argument, they each filed an interlocutory appeal in the Court of Appeals. ARH initially sought a dismissal of the appeal, claiming that the circuit court's order was not final and appealable.

On ARH's motion to dismiss the appeal, the Court of Appeals found that the circuit court's rulings on sovereign immunity were immediately appealable, and therefore denied ARH's motion to dismiss the appeal. The Court of Appeals also found that there was no requirement that KRS 13B.140 be strictly followed for the waiver of sovereign immunity to apply. But the Court of Appeals also found that in Medicaid reimbursement cases like this one, sovereign immunity has been waived by the overwhelming implication of statutory language, including KRS 45A.235.[3] Additionally, the Court of Appeals found that the statutes governing the state Medicaid program, KRS 205.510-645, indicate that sovereign immunity had been waived.

[3] All parties now agree that the Court of Appeals erred by applying KRS 45A.235 to this case.

Finally, the Court of Appeals found that venue, as provided in the Kentucky Model Procurement Code, specifically KRS 45A.245, mandated that an aggrieved person, firm, or corporation who has a valid written contract must bring an enforcement action in Franklin Circuit Court. Because the petition was filed in Harlan Circuit Court, the Court of Appeals held that the circuit court's ruling denying the motion to dismiss based on improper venue should be vacated and directed that the parties may make a motion to transfer the case to Franklin Circuit Court or file a new petition for review in Franklin Circuit Court.

Both parties then filed discretionary-review petitions, which we granted.

II. ANALYSIS.

A. Reviewability of the Issues.

From the outset of our analysis, it is important to note that this case is before us at this juncture as an *interlocutory* appeal because of the lower courts' rulings on the sovereign immunity issue. And we recently held in *Baker v. Fields* "that the scope of appellate review of an interlocutory appeal of the trial court's determination of the application of qualified official immunity is limited to the specific issue of whether the immunity was properly denied and nothing more."[4] Although the case before us today involves a circuit court's ruling on an issue of sovereign-immunity, not qualified official immunity, the principle is the same—the scope of appellate review of an interlocutory appeal of the trial court's determination of the application of sovereign immunity is limited to that issue and nothing more.

[4] 543 S.W.3d 575, 578 (Ky. 2018).

Such a rule grounds itself in this Court's analysis of issues that can and cannot be decided via interlocutory appeal in *Breathitt County Bd. of Educ. v. Prater*.[5] At the risk of simply restating our analysis in that case and in *Baker v. Fields*, we simply note that interlocutory appeals are a vehicle to be used rarely, only to decide a few, enumerated issues.

[5] 292 S.W.3d 883 (Ky. 2009).

Admittedly, the question of whether the issue of standing can be reached on an interlocutory appeal has never been before this Court. But a nationwide review of relevant case law reveals a trend that parties, themselves, may not raise the issue of standing by interlocutory appeal.[6] Most consistently, federal appellate courts hold "that a district court's denial of a motion to dismiss on justiciability grounds is *not* immediately appealable under the collateral-order doctrine."[7] "Under the 'collateral order doctrine,' also called the '*Cohen*[8] doctrine,' a limited set of district court orders are reviewable though short of final judgment."[9] And in *Breathitt County*, we aligned Kentucky's stance on interlocutory appeals with that of federal law's collateral-order doctrine.[10]

[6] *See*, *e.g.*, *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334-35 (11th Cir. 1999) (holding that a party may not take an immediate appeal of a trial court's decision regarding standing because appealing such issue fails the collateral order doctrine); *compare SCI Texas Funeral Servs, Inc. v. Hijar*, 214 S.W.3d 148, 153 (Tx. App. 2007) (holding that a party may take an immediate appeal of a trial court's decision regarding standing for the purposes of class certification).

[7] *Pryor*, 180 F.3d at 1334 (11th Cir. 1999); s*ee Crymes v. DeKalb County*, 923 F.2d 1482, 1484-85 (11th Cir. 1991) (holding the same in the specific context of ripeness); s*ee also Children's Healthcare Is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1418 (6th Cir. 1996); *Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 496-97 n.2 (7th Cir. 1993); *Shanks v. City of Dallas*, 752 F.2d 1092, 1099 n. 9 (5th Cir. 1985); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 474-75 (2d Cir. 1974).

[8] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

[9] 36 C.J.S. *Federal Courts* § 432.

[10] *Breathitt County*, 292 S.W.3d at 886-87.

The rare use of interlocutory appeals in Kentucky, the absence of legal precedent in Kentucky allowing an interlocutory appeal of a trial court's ruling on the issue of standing, the uniform federal legal precedent prohibiting an interlocutory appeal on the issue of standing, this Court's "compelling interest in maintaining an orderly appellate process,"[11] and the general rule that a nonfinal order cannot be immediately appealed, all converge to satisfy us of the value of a rule that prohibits an interlocutory appeal of a trial court's decision regarding the plaintiff's standing to sue.

[11] *Ready v. Jamison*, 705 S.W.2d 479, 482 (Ky. 1986).

Therefore, we hold that a trial court's ruling on the issue of constitutional standing, in and of itself, does not give rise to an immediate right to an appeal, i.e. an interlocutory appeal. But such prohibition against interlocutory appeal on solely the issue of standing should not constrain the power of the appellate court, at the instance of a party-opponent or acting upon on its own motion, from inquiring into whether a plaintiff has the requisite standing to sue when an interlocutory appeal is properly before an appellate court on an issue recognized as immediately appealable.

In *Harrison v. Leach*, we held that an appellate court errs when it raises the issue of standing on its own motion because standing is a waivable defense.[12] But Harrison crafted this rule while analyzing the issue of *statutory*, not *constitutional*, standing.[13] To clarify the differences among the standing concepts, we find helpful this explanation offered by the U.S. Court of Appeals for the Third Circuit:

> Though all are termed "standing," the differences between statutory, constitutional, and prudential standing are important. Constitutional and prudential standing are about, respectively, the constitutional power of a . . . court to resolve a dispute and the wisdom of so doing. Statutory standing is simply statutory interpretation; the question it asks is whether [the legislature] has accorded *this* injured plaintiff the right to sue the defendant to redress his injury,

Put differently, "The question whether a plaintiff can sue for violations of [a statute] is a matter of statutory standing, 'which is perhaps best understood as not even standing at all.' . . . Dismissal for lack of statutory standing is properly viewed as dismissal . . . for failure to state a claim [upon which relief may be granted]."[15]

[12] 323 S.W.3d 702, 703 (Ky. 2010).

[13] This Court in *Lawson v. Office of Atty. Gen.* recognized this to be the case. 415 S.W.3d 59, 67 (Ky. 2013).

[14] *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 295 (3d Cir. 2007).

[15] 13A Fed. Prac. & Proc. Juris. § 353 (3d ed.) (quoting *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 51-53 (4th Cir. 2011)).

In this case, by contrast, constitutional standing is at issue because Coventry and the Cabinet are not alleging that the federal or state Medicaid statutes and regulations do not afford Sexton relief, i.e. that these laws make no provision for Sexton to bring suit; rather, Coventry and the Cabinet are alleging that Kentucky courts cannot hear this case because no *justiciable cause—a constitutional predicate to maintaining a case in Kentucky courts*—exists. We hold that all Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only *justiciable causes* proceed in court, because the issue of constitutional standing is not waivable.[16] Our holding conforms to the general understanding of constitutional standing as a predicate for a court to hear a case and the ability of a court, acting on its own motion, to address that issue.[17]

[16] "Because [constitutional] standing to sue is an essential aspect of . . . courts'. . . jurisdiction, it cannot be waived. It may be challenged for the first time at any time during the pendency of the proceedings and, if none of the parties raises it, the . . . courts (both trial and appellate) may, and indeed have a duty to, raise the issue sua sponte if there is any doubt about it." Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 Ga. L. Rev. 813 (2004) (citing *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 488 n.4 (1980) (Rehnquist, J., dissenting); *Juidice v. Vail*, 430 U.S. 327, 331 (1977)).

[17] See *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) ("We are obliged to examine standing *sua sponte* where standing has erroneously been assumed below."); *see also*, *e.g.*, *Community First Bank v. National Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994) ("Standing is not an affirmative defense that must be raised at risk of forfeiture. Instead, it is a qualifying hurdle that plaintiffs must satisfy even if raised *sua sponte* by the court."); *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 983 (6th Cir. 2012) ("The issue of standing, however, may be raised *sua sponte*."). Judge Batchelder of the Sixth Circuit wrote an extremely persuasive concurring opinion in *Children's Healthcare is a Legal Duty, Inc. v. Deters* explaining why a court should raise the issue of standing sua sponte on an interlocutory appeal. 92 F.3d 1412, 1418-20 (6th Cir. 1996).

In this case, the procedurally proper interlocutory-appeal issue before this Court is whether the doctrine of sovereign immunity bars Sexton from suit. Our holding today is not an affirmation that sovereign immunity exists in this case to bar Sexton from suit—we do not reach the merits of that argument because Sexton lacks the constitutional standing necessary for us to reach any of the other potential issues in this case. A party need not be correct on the merits of its interlocutory appeal issue for an appellate court to raise the issue of constitutional standing. But a party must have a facially valid and procedurally proper interlocutory appeal for an appellate court to reach the issue of standing.[18] Because we have determined that this case is properly before this Court on interlocutory appeal, we now turn to the constitutional standing issue in this case.

[18] For example, a private bakery, acting as the sole defendant, who may have a legitimate argument that the plaintiff does not possess the requisite standing to bring suit, would not be able to file a facially valid and procedurally proper interlocutory appeal on the basis of sovereign immunity, and the appellate court hearing the case would not be able to reach the issue of standing.

B. The principle of constitutional standing in Kentucky.

An elementary principle of the federal and state governmental structure is the division of power among three branches of government: the legislature, the executive, and the judiciary.[19] The United States Supreme Court has interpreted the United States Constitution as providing a "series of limits on the federal judicial power."[20] Identified as the "justiciability doctrines," these limits on the federal judicial power derive from Article III, Section 2, Clause 1 of the U.S. Constitution, which states, "The judicial Power shall extend to all *Cases* . . . [and] *Controversies* . . . ."[21] A federal court cannot adjudicate a case that does not meet the requirements of the justiciability doctrines.

[19] *See* Ky. Const. § 27 ("The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which judicial, to another."); Ky. Const. § 28 ("No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.").

[20] Erwin Chemerinsky, *Constitutional Law*, 40 (Vicki Been et al. eds., 5th ed. 2013).

[21] (emphasis added).

The U.S. Supreme Court has identified five major justiciability doctrines: (1) the prohibition against advisory opinions, (2) standing, (3) ripeness,

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(4) mootness, and (5) the political-question doctrine.[22] The Court has also distinguished between justiciability requirements that are "constitutional," meaning that Congress by statute cannot override them, and "prudential," meaning that they are based on prudent judicial administration and can be overridden by Congress since they are not constitutional requirements.[23] Of most concern in this case is the standing requirement and the constitutional limitations, if any, the standing requirement imposes.

[22] Chemerinsky, at 40.

[23] *Id.*

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[24] Federal constitutional standing has three requirements: the plaintiff must allege that 1) he or she has suffered or imminently will suffer an injury; 2) the injury is fairly traceable to the defendant's conduct; and 3) a favorable federal court decision is likely to redress the injury.[25] In addition to these federal constitutional requirements, two major federal prudential standing principles exist: (1) a party generally may assert only his or her own rights and cannot raise the claims of third parties not before the court, i.e. the prohibition against "third-party standing"; and (2) a plaintiff may not sue as a taxpayer who shares a grievance in common with all other taxpayers, i.e. the prohibition against "generalized grievances."[26]

[24] *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

[25] Chemerinsky, at 45.

[26] *Id.*

To be clear, these standing requirements as outlined above are discussed in the context of application to the limit on *federal* judicial power, not *state* judicial power. Under principles of federalism, "[l]ong-established precedent holds that Article III standing requirements do not apply in state courts and courts of the territories."[27] So we now examine Kentucky's current standing doctrine.

[27] John W. Curran, *Who's Standing in the District After Grayson v. AT&T Corp.? The Applicability of the Case-or-Controversy Requirement in D.C. Courts*, 62 Am. U. L. Rev. 739, 740 (2012) (citing *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 8 n.2 (1988) ("[T]he special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts.")).

A recently published law journal article[28] aptly summarizes Kentucky's standing doctrine:

> In Kentucky, standing is not a constitutional doctrine, but appears to be a self-imposed restraint based on a prohibition against generalized grievances as a "fundamental" principle of adjudication. Kentucky courts have offered limited explanation of their standing doctrine. The source of the doctrine appears to be a 1957 case challenging an alcohol board's decision to increase the number of licenses available.[29] There, [Kentucky's highest Court] held that "[i]t is fundamental that a person may attack a proceeding of this nature by independent suit only if he can show that his legal rights have been violated."[30] This was based on the principle that "[a] public wrong or neglect or breach of a public duty cannot be redressed in a suit in the name of an individual whose interest in the right asserted does not differ from that of the public generally, or who suffers injury only in common with the general public."[31]
>
> Under the modern Kentucky test, "[t]o have standing to sue, one must have a judicially cognizable interest in the subject matter of the suit" that is not "remote and speculative," but "a present and substantial interest in the subject matter."[32] Kentucky courts have not adopted the *Lujan* test, but have adopted elements of federal decisions on associational standing, which have seen substantially more elaboration than general standing doctrine in the Kentucky courts.[33]

Kentucky courts have seemingly created a judicially—as opposed to constitutionally—imposed standing requirement. At the federal level, where standing is partly grounded in Article III, Section 2, Clause 1 of the U.S. Constitution, while "[the legislature] may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute,"[34] "[i]t is, of course, true that '[the legislature] may not confer jurisdiction on . . . courts to render advisory opinions[.]'"[35] Federal law's constitutional standing requirement is a safeguard against the overreach of judicial, legislative, and executive power. To ascertain what, if any, constitutional standing requirements exist in Kentucky, we turn to the Kentucky Constitution first and foremost.

[28] Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky. J. Equine, Agric. & Nat. Resources L. 349, 369-70 (2016).

[29] *Lexington Retail Beverage Dealers Ass'n v. Dep't of Alcoholic Beverage Control Bd.*, 303 S.W.2d 268, 269-70 (Ky. 1957).

[30] *Id.*

[31] *Id.* (citing *Wegener v. Wehrman*, 221 S.W.2d 997, 998 (Ky. 1950)).

[32] *Bailey v. Pres. Rural Roads of Madison Cnty., Inc.*, 394 S.W.3d 350, 355 (Ky. 2011).

[33] *See Bailey*, 394 S.W.3d at 356; *see also Interactive Gaming*, 425 S.W.3d at 112-15. Kentucky does recognize taxpayer standing in specific circumstances. *See Price v. Commonwealth, Transp. Cabinet*, 945 S.W.2d 429, 432-33 (Ky. App. 1996) (citing *Rosembalm v. Commercial Bank*, 838 S.W.2d 423 (Ky. App. 1992) (collecting cases where "Kentucky has consistently recognized taxpayer standing")).

[34] *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring); *Hardin v. Kentucky Utilities Co*, 390 U.S. 1, 6 (1968)).

[35] *Linda R.S.*, 410 U.S. at 617 n.3 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972)).

Section 109 of the Kentucky Constitution states, "The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court." The Kentucky Constitution then goes on to outline the various levels of courts in Kentucky and their respective powers.

Most importantly, "The *Circuit Court* shall have *original jurisdiction* of all *justiciable causes* not vested in some other court. It shall have such appellate jurisdiction as may be provided by law."[36] "The *Court of Appeals* shall have *appellate jurisdiction only* . . ." except in certain situations not relevant in this case.[37] "The *Supreme Court* shall have *appellate jurisdiction* only . . ." except in certain situations not relevant to this case.[38] "The *district court* shall be a court of *limited jurisdiction* and shall exercise original jurisdiction as may be provided by the General Assembly."[39]

[36] Ky. Const. § 112(5) (emphasis added).

[37] Ky. Const. § 111(2) (emphasis added).

[38] Ky. Const. § 110(2)(a) (emphasis added).

[39] Ky. Const. § 113(6) (emphasis added).

Notably, § 109 of the Kentucky Constitution, describing the judicial power in Kentucky, does not contain the same *case or controversy* language

contained in Article III, Section 2, Clause 1 of the U.S. Constitution, nor does any other provision of the Kentucky Constitution discussing judicial power in the various levels of courts. This *case or controversy* language in the U.S. Constitution is the lynchpin for all justiciability doctrines, including standing. Most notably, however, § 112(5) of the Kentucky Constitution grants circuit courts original jurisdiction over all *justiciable causes* not vested in some other court.

The standing doctrine is said to have its origins in the U.S. Supreme Court case of *Fairchild v. Hughes*, a decision written by Justice Brandeis and rendered in 1922.[40] The U.S. Supreme Court later expounded on the doctrine: If a party does not have the requisite standing to bring suit, the case is said to be *nonjusticiable*; if a party does have the requisite standing to bring suit, the case is said to be *justiciable*.[41] The first appearance of the *justiciable causes* phrase in § 112(5) appears in the 1974 Amendments to the Kentucky Constitution. By limiting the circuit court's jurisdiction to adjudicating *justiciable causes* only, § 112(5) appears to have adopted some notion of the *justiciability doctrines* articulated by the U.S. Supreme Court.

[40] 258 U.S. 126 (1922).

[41] *See Flast v. Cohen*, 392 U.S. 83, 95 (1968) ("[N]o *justiciable* controversy is presented when . . . there is no standing to maintain the action.") (emphasis added) (citing *Tileston v. Ullman*, 318 U.S. 44 (1943); *Frothingham v. Mellon*, 262 U.S. 447 (1923)); *Steel Co. v. Citizens for a Better Envt*, 523 U.S. 83, 102 (1998) ("Standing to sue is part of the common understanding of what it takes to make a *justiciable* case.") (emphasis added).

We have recognized the *justiciable causes* phrase as a constitutional limitation on Kentucky courts' judicial power before; "'Standing,' of course, in its most basic sense, refers to an integral component of the '*justiciable cause'* requirement [in Ky. Const. § 112(5)] underlying the trial court's jurisdiction."[42] *Lawson* also provided a potential constitutional test for Kentucky courts to examine standing: "To invoke the court's jurisdiction, the plaintiff must allege [1] an *injury* [2] *caused* by the defendant [3] of a sort the court is able to *redress*."[43] The emphasized words in the sentence quoted from *Lawson*—injury, causation, and redressability—are the three constitutional standing requirements as outlined by the U.S. Supreme Court in *Lujan*.[44] To provide clarity to Kentucky's standing doctrine, we formally adopt the *Lujan* test as the constitutional standing doctrine in Kentucky as a predicate for bringing suit in Kentucky's courts.

[42] *Lawson v. Office of Atty. Gen.*, 415 S.W.3d 59, 67 (Ky. 2013) (citing Ky. Const. § 112) (emphasis added); *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989)).

[43] *Lawson*, 415 S.W.3d at 67 (emphasis added) (citing Ky. Const. § 112; *Rose*, 790 S.W.2d at 186).

[44] 504 U.S. at 560-61.

So, at bottom, for a party to sue in Kentucky, the initiating party must have the requisite constitutional standing to do so, defined by three requirements: (1) injury, (2) causation, and (3) redressability. In other words, "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. "[45] "[A] litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent . . . ."[46] "The injury must be . . . 'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical.'"[47] "The injury must be 'fairly' traceable to the challenged action, and relief from the injury must be likely' to follow from a favorable decision."[48]

[45] *Allen v. Wright*, 468 U.S. 737, 751 (1984) (overruled by *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) on other grounds).

[46] *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citing *Lujan*, 504 U.S. at 578).

[47] *Allen*, 468 U.S. at 751.

[48] *Id.*

While the *justiciable causes* language only appears in § 112(5), which specifically and only enumerates Kentucky circuit-court jurisdiction, the standing doctrine applies to cases brought before all Kentucky courts. Section 112(5) places *original jurisdiction* over a case in the circuit court; this means that all cases, not expressly designated by a rule of law to be heard by another court, must appear before the circuit court, the trial court of general jurisdiction. And recall that the circuit court "shall have original jurisdiction of all *justiciable causes*." If a case is not *justiciable*, specifically because the plaintiff does not have the requisite standing to sue, then the circuit court *cannot* hear the case. And because both this Court and the Court of Appeals "shall have *appellate jurisdiction only*," logically speaking, neither court can adjudicate a case on appeal that a circuit court cannot adjudicate because the exercise of appellate jurisdiction *necessarily assumes* that proper original jurisdiction has been established first at some point in the case.[49]

[49] Black's Law Dictionary defines "Appellate Jurisdiction" as, "The power of a court to *review and revise a lower court's decision*." (10th ed. 2014). In contrast. Black's Law Dictionary defines "Original Jurisdiction" as, "A court's power to hear and decide a matter *before any other court can review the matter*."

Therefore, if a circuit court cannot maintain proper original jurisdiction over a case to decide its merits because the case is *nonjusticiable* due to the plaintiffs failure to satisfy the constitutional standing requirement, the Court of Appeals and this Court are constitutionally precluded from exercising appellate jurisdiction over that case to decide its merits. This is so because the exercise of appellate jurisdiction to decide the merits of a case necessarily assumes that proper original jurisdiction in the circuit court first exists. Stated more simply, establishing the requisite ability to sue in circuit court is a necessary predicate for continuing that suit in appellate court. In this way, the *justiciable cause* requirement applies to cases at all levels of judicial relief.

Having outlined Kentucky's standing doctrine, we now turn to determining whether Lettie Sexton has the requisite standing to sue in this case.

C. Sexton lacks standing to sue.

Simply stated, Sexton, by and through her authorized representative, ARH, lacks the requisite standing to sue in this case. We emphasize the crucial determinative fact—because Sexton, not ARH, is the true plaintiff in this case, we must examine the standing requirement through the lens of Sexton's, not ARH's, purported satisfaction.

Sexton has not and will not suffer an "injury" in this case. Under Medicaid statutes and regulations, and as conceded by both parties, Sexton is not financially interested in any way whatsoever in the outcome of this dispute, which, at its core, is over whether ARH can pursue a reimbursement claim from Coventry through the Medicaid administrative process at the Cabinet.[50] Additionally, Sexton has not alleged that she did not receive all the proper medical care she needed. Nor has she alleged that she will be precluded from receiving medical care in the future.

[50] *See* 42 C.F.R. § 447.15.

At oral argument, a suggestion was made that in some broad sense Sexton and other Medicaid beneficiaries may have been or might be potentially harmed if ARH decided to withhold future medical care from Sexton because of Coventry's refusal to reimburse ARH for such care, absent administrative oversight of that decision. But the fear of ARH denying future medical care, a "conjectural" and "hypothetical" injury, cannot establish the requisite injury component to satisfy the standing doctrine. Additionally, "[plaintiffs] cannot manufacture standing merely . . . based on their fears of hypothetical future harm that is not certainly impending."[51]

[51] *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 416 (2013) ("We hold that respondents lack Article

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III standing because they cannot demonstrate that the future injury they purportedly fear is certainly impending . . . .") (citing *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976)).

Nor can Medicaid beneficiaries' purported interest in maintaining the integrity of the system satisfy the standing requirement. This is exactly the type of "abstract, conjectural, and hypothetical injury" that fails the injury-in-fact standing requirement: "[I]t would exceed [constitutional] limitations if, at the behest of [the legislature] and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. . . . The party bringing suit must show that the action injures him in a concrete and personal way."[52]

[52] *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (quoting *Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring)) (emphasis in original).

Additionally, it has been argued that federal and state Medicaid statutes and regulations themselves create standing for Sexton to sue in court because they mandate a Medicaid State Fair Hearing be conducted to ascertain misconduct on the part of Coventry and that no such hearing was conducted. But, "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create . . . standing. Only a 'person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.'"[53]

[53] *Summers*, 555 U.S. at 496 (quoting *Lujan*, 504 U.S. at 572 n.7) (emphasis in original).

If a court were to instruct the Cabinet to conduct an administrative hearing regarding Coventry's denial of reimbursement to ARH, nothing in Sexton's life would change. Regardless of the outcome of this administrative hearing, Sexton would be no better or worse off than before the hearing was conducted. Furthermore, "[i]t is settled that [the legislature] cannot erase [constitutional] standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[54] The U.S Supreme Court has additionally instructed:

> [The legislature's] role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. [Constitutional] standing requires a concrete injury even in the context of a statutory violation. For that reason, [a plaintiff] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.[55]

[54] *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547-48 (2016) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)); *see also Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event . . . may Congress abrogate the Art. III minima.").

[55] *Spokeo*, 136 S.Ct. at 1549 (citing *Summers*, 555 U.S. at 496) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create [constitutional] standing.")).

Sexton's lack of standing becomes clearer when one looks at the root of what is being sought in this case. ARH is using Sexton as the front to redress its own potential loss. Coventry denied reimbursement to ARH in this case—ARH seeks to recover that reimbursement in some way circuitous or at least establish some process to appeal from the decisions of managed-care organizations not to reimburse providers for patient care. These are the true injuries in this case, having nothing to do with Sexton.

We acknowledge two important points. First, the legislature has amended Kentucky's legislative Medicaid reimbursement scheme to provide ARH redress should this situation arise again.[56] Second, it appears ARH can seek, and has sought, redress of its reimbursement grievances against MCOs by filing its own lawsuit.[57]

[56] *See* KRS 205.646(2) (eff. Apr. 8, 2016); *see also* KAR 17:035E, 040E.

[57] In fact, ARH has sued Coventry elsewhere, in federal court, for, in part, essentially the true relief it seeks here—obtaining reimbursement, or the chance to obtain reimbursement, for the services it provides to patients. *See*, *e.g.*, *Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 214 F.Supp.2d 606 (E.D. Ky. 2016) (dismissing ARH's complaint); *Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 970 F.Supp.2d 687 (E.D. Ky. 2013) (notably, *holding that ARH itself has standing to sue Coventry*).

Concern has been raised over the limited, if not completely absent, oversight over the decisions of managed-care organizations that fail to provide reimbursement to hospitals for coverage provided to Medicaid beneficiaries. Such a concern begs legislative, not judicial, redress.

Our decision today is not that the Cabinet correctly decided that Sexton did not have the requisite standing to seek redress through an administrative agency hearing; rather, it is that Sexton does not have the requisite standing to seek redress for this alleged injury in a Kentucky court. Whether a party has the requisite standing to seek redress through an administrative agency is an entirely different question than whether a party has the requisite standing to seek redress through a Kentucky court.[58]

[58] For a discussion of this distinction, *see* 13B Fed. Prac. 86 Proc. Juris. § 3531.13 (3d ed.). We leave the issue of standing in an administrative agency adjudication for another day.

If Sexton had the requisite standing to afford this Court the ability to hear her case on the merits, then we would analyze the issue of whether she had the requisite standing to have her case heard by the Cabinet, an administrative agency. But because Sexton does not have the requisite standing to sue, because the legislature does not have the power to confer constitutional standing where none exists, and because the standing issue summarily decides this case, we need not reach the sovereign immunity issue, nor any of the other issues raised in this case.

III. CONCLUSION.

We hold that it is the constitutional responsibility of all Kentucky courts to consider, even upon their own motion, whether plaintiffs have the requisite standing, a constitutional predicate to a Kentucky court's adjudication of a case, to bring suit. We adopt the United States Supreme Court's test for standing as announced in *Lujan v. Defenders of Wildlife*.[59] Under that test, we hold that Sexton lacks the requisite standing to sue in this case. Therefore, we reverse the Court of Appeals, vacate the decision of the trial court, and remand this case to the trial court with instructions to dismiss Sexton's petition for judicial review.

[59] 504 U.S. at 560-561.

All sitting. Minton, C.J., Cunningham, Hughes, Keller, VanMeter and Venters, J J., concur. Wright, J., dissents by separate opinion.

ARBITRATION

PRE-ARBITRATION INJUNCTIVE RELIEF

CIVIL PROCEDURE

In absence of affirmative language expressly agreeing to limitation of right to seek pre-arbitration injunctive relief, parties to arbitration agreement may seek pre-arbitration injunctive relief pursuant to Rules of Civil Procedure —

Geoffrey T. Grimes v. GHSW Enterprises, LLC (2018-SC-000271-I); On review from Court of Appeals; Opinion by Justice Venters, *affirming*, rendered 9/27/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Movant, Geoffrey T. Grimes, petitions pursuant

to CR 65.09 for relief from an order of the Court of Appeals granting a CR 65.07 motion filed by Respondent, GHSW Enterprises, LLC (GHSW), to compel arbitration. GHSW filed its CR 65.07 motion seeking interlocutory relief to compel arbitration after the Fayette Circuit Court issued an order invalidating the arbitration clause embedded within the parties' employment contract. The circuit court found the arbitration provision was unenforceable due to lack of mutuality, in that under certain circumstances, it expressly allowed GHSW to seek provisional injunctive remedies in a court pending arbitration but did not specifically provide the same right to Grimes.

The Court of Appeals concluded that this lack of reciprocal access to the courts for injunctive relief did not invalidate the arbitration agreement as written. In his CR 65.09 motion challenging the Court of Appeals' holding, Grimes contends that (1) the trial court was correct in its holding that the arbitration clause was unenforceable; (2) that without the quality of mutuality the arbitration provision must fail for lack of consideration; and (3) that even if consideration existed, the arbitration provision is unconscionable because it permits GHSW to seek pre-arbitration remedies but does not allow him to do so.

For the reasons explained below, we affirm the Court of Appeals.

I. FACTUAL AND PROCEDURAL BACKGROUND

GHSW operates a used automobile dealership in Lexington, Kentucky in which Grimes is a partner. In February 2015, GHSW and Grimes entered into an employment agreement in which Grimes would serve as GHSW's sales director. The agreement provided Grimes with a guaranteed member disbursement of $120,000 per year plus other benefits as compensation.

The employment agreement did not guarantee his employment for any particular length of time. Instead, it allowed GHSW or Grimes to terminate the employment at any time with or without cause; however, GHSW would suffer certain detriments if it discharged Grimes without cause. Those detriments included the voiding of the non-compete clause contained in the agreement.

The non-compete provision of the agreement is Section 4. It restricts Grimes from competing with GHSW within a radius of 50 miles for 12 months after the termination of the agreement. Section 8(f) releases Grimes from the non-compete provision if GHSW terminated his employment without cause. Section 25 of the agreement contains an arbitration provision which provides as follows:

> **Arbitration; Injunctive relief.** Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its National rules for the Resolution of Employment Disputes, or in accordance with such other rules as the parties mutually agree, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitration proceeding shall be conducted in Fayette County, Kentucky (or such other location agreed upon by the parties). *The arbitrator shall have the authority to award any remedy or relief that a court of competent jurisdiction could order or grant including, without limitation, the issuance of an injunction.* The parties shall keep any arbitration (including the subject matter thereof) and any information disclosed in the arbitration proceedings secret and strictly confidential, except to the extent such information (i) is or becomes available to the public other than as a result of disclosure by the parties to such arbitration, their affiliates, employees or agents, or (ii) is required to be disclosed under applicable law (including any rule or regulation of a governmental body or self-regulatory organization) or in connection with any action, proceeding, or judicial process, but only to the extent it must be disclosed. *Without limiting the rights of Company to pursue any other legal and/or equitable remedies available to it for any breach by Employee of the covenants contained in Sections 4 [the non-compete provision], and 9 through 12*[1] *above. Employee acknowledges that a breach of those covenants would cause a loss to Company for which it could not reasonably or adequately be compensated by damages in an action at law, that remedies other than injunctive relief could not fully compensate Company for a breach of those covenants and that, accordingly. Company shall be entitled to injunctive relief Accordingly, without inconsistency with this arbitration provision, Company may apply to any court having jurisdiction hereof and seek interim provisional, injunction, or other equitable relief with respect to breaches of the covenants contained in Sections 4, and 9 thought 12 above until the arbitration award is rendered or the controversy is otherwise resolved in order to prevent any breach or continuing breaches of Employee's covenants as set forth in Sections 4, and 9 through 12 above.* It is the intention of the parties that if, in any action before any arbitrator or court empowered to enforce such covenants, any covenant or portion thereof is found to be unenforceable, then such term, restriction, covenant, or promise shall be deemed modified to the extent necessary to make it enforceable by such court.

(emphasis added).

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[1] Paragraphs 9 through 12 address Grimes' confidentiality and nondisclosure obligations, his obligation to return documents and company information, his obligation not to solicit employees after the end of his employment, and his duty to refrain from disparaging the company.

Shortly after his employment with GHSW ended in June 2017, Grimes accepted employment in the used car department of the nearby Paul Miller Ford dealership. GHSW alleges that Grimes had voluntarily resigned from GHSW, thus triggering the non-compete clause which Grimes violated by going to work for a competing automobile dealership within 50 miles. Grimes claims he was terminated without cause and was, therefore, released from the non-compete clause.

To resolve the matter, GHSW filed a petition for arbitration in accordance with the terms of the arbitration clause and correspondingly did not seek provisional injunctive remedies allowed by the agreement in the event of a violation of the non-compete clause. Grimes sought to avoid arbitration by filing a complaint in Fayette Circuit Court alleging breach of contract and various other causes of action. His pleadings included a motion seeking a declaration that the arbitration provision was invalid and unenforceable.[2]

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[2] Grimes' complaint also asserts other claims not relevant to our review.

GHSW responded with a cross-motion to compel arbitration. Following a hearing, the trial court granted Grimes' motion and declared the arbitration provision invalid and unenforceable. The basis for the trial court's ruling was its conclusion that the arbitration clause lacked mutuality because it specifically allowed GHSW to seek provisional remedies in a court of law while not specifically providing Grimes with the same option. The trial court denied GHSW's motion to compel arbitration and then ordered the parties to submit to mediation.

GHSW sought immediate interlocutory relief pursuant to CR 65.07, filing a motion in the Court of Appeals to compel arbitration pursuant to the employment agreement. The Court of Appeals rejected the trial court's conclusion on lack of mutuality and granted the relief GHSW sought. Grimes opted to seek further review in this Court pursuant to CR 65.09.

CR 65.09 provides, in relevant part, that

> [a]ny party adversely affected by an order of the Court of Appeals in a proceeding under Rule 65.07 or Rule 65.08 may . . . move the Supreme Court to vacate or modify it. The decision whether to review such order shall be discretionary with the Supreme Court. Such a motion will be entertained only for extraordinary cause shown in the motion.

As provided in the Rule, our review of Grimes' claims "is limited to those cases which demonstrate 'extraordinary cause.'" *Price v. Paintsville Tourism Com'n*, 261 S.W.3d 482, 483 (Ky. 2008). Abuses of discretion by the courts below can supply such cause. *National Collegiate Athletic Ass'n v. Lasege*, 53 S.W.3d 77, 84 (Ky. 2001).

It is now well established that immediate interlocutory relief under rule CR 65 is available to challenge an order by the trial court denying a motion to compel arbitration in a case involving an employment contract. *Bridgestone/Firestone v. McQueen*, 3 S.W.3d 366, 367-68 (Ky. App. 1999). Such relief is available because the contractual right to arbitrate would be irreparably injured with no adequate remedy by appeal if the parties were required to proceed in the trial court prior to a determination of the validity of the arbitration provision. *North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102-03 (Ky. 2010). The principal question upon the application for such relief is whether the trial court correctly determined the validity of the arbitration provision under ordinary contract principles. *Id.*

To the extent findings of fact made by the trial

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court are at issue, we review those findings for clear error, while we review issues of law, including the interpretation of contractual language, under the de novo standard. *Id.* at 102.

II. ANALYSIS

In his CR 65.09 motion for interlocutory relief. Grimes contends that, by its express terms, the arbitration provision lacks mutuality because the clause permitted only GHSW to seek provisional remedies in court to the exclusion of Grimes; that in the absence of congruent mutuality the arbitration provision lacks consideration because, without further and specific compensation, it binds his remedies exclusively to arbitration while permitting GHSW to pursue court remedies; and that even if consideration existed, the arbitration provision is unconscionable because it permits GHSW to seek pre-arbitration remedies but does not allow him to do so.

A. General Principles of Arbitration

The Federal Arbitration Act (FAA) requires courts to place arbitration agreements "on equal footing with all other contracts." *DIRECTV, Inc. v. Imburgia*, 577 U.S. —, —, 136 S. Ct. 463, 465 (2015) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)); *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1424 (2017); 9 U.S.C. § 2.

The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That statutory provision establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on "generally applicable contract defenses" like fraud, lack of consideration, lack of mutuality, or unconscionability, but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

Like its federal counterpart, Kentucky law generally favors the enforcement of arbitration agreements. *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 457 (Ky. 2009) ("We do not by this opinion signify any retreat from our recognition of the prevalent public policy favoring enforcement of agreements to arbitrate."). Doubts about the scope of issues subject to arbitration should be resolved in favor of arbitration. *See Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 855 (Ky. 2004).

B. The Employment Agreement Does Not Lack Mutuality and Is Supported by Adequate Consideration

As noted, the FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The trial court voided the arbitration clause for lack of mutuality in the consideration. The trial court observed that GHSW's express ability to seek judicial relief by way of injunctive remedies was a contractual right not expressly shared by Grimes. The trial court concluded that it was "unable to find the consideration for Plaintiff Grimes being treated differently" on this issue, and therefore, concluded there was "a lack of mutuality of assent."

We have clearly recognized that an exchange of promises "to submit equally to arbitration" constitutes adequate consideration to sustain an arbitration clause. *Energy Home v. Peay*, 406 S.W.3d 828, 835 (Ky. 2013). While the agreement under review is silent on Grimes' right to seek provisional injunctive relief in a court of law pending arbitration, it likewise, does not specifically preclude Grimes from seeking such a remedy. Despite the difference in the language of the arbitration clause, in its response to Grimes' CR 65.09 petition, GHSW concedes that Grimes has that right, despite the absence of express language so stating. Federal authority supports that conclusion. "[T]he weight of federal appellate authority recognizes some equitable power on the part of the district court to issue preliminary injunctive relief in disputes that are ultimately to be resolved by an arbitration panel." *Gateway Eastern Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1141 (7th Cir. 1994). We note, to similar effect, the Second Circuit's holding in *Benihana, Inc. v. Benihana of Tokyo, LLC.*:

> [w]here the parties have agreed to arbitrate a dispute, a district court has jurisdiction to issue a preliminary injunction to preserve the status quo pending arbitration. *See Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1052-53 (2d Cir. 1990). The standard for such an injunction is the same as for preliminary injunctions generally. *Roso-Lino Beverage Distribs., Inc. V. Coca-Cola Bottling Co.*, 749 F.2d 124, 125-26 (2d Cir. 1984).

784 F.3d 887, 894-95 (2d Cir. 2015). Because we conclude that despite the absence of express language so stating. Grimes had the same right to seek injunctive relief as GHSW, there is no lack of mutuality in the consideration for the arbitration agreement.

We have not heretofore had the occasion to rule on this issue, but we do so now, adopting the holdings as stated in the above authorities. As a general matter, in the absence of affirmative language expressly agreeing to a limitation of that right, parties to an arbitration agreement may seek pre-arbitration injunctive relief pursuant to our rules of civil procedure.

The clear language of the arbitration clause, affirmatively granting GHSW the ability to seek pre-arbitration remedies for violation of the non-compete clause, does not negate that general rule cited above; nor do we construe the express acknowledgement of GHSW's right to seek such relief as an implication that Grimes has forfeited the same right the law otherwise accords him. We are constrained to agree with the Court of Appeals that the trial court erred by setting aside the arbitration agreement.

Conseco Finance Servicing Corp. v. Wilder, 47 S.W.3d 335 (Ky. App. 2003), presents an analogous situation. There, the parties entered into a mobile home financing agreement with an arbitration provision permitting Conseco, despite the arbitration clause, to expeditiously file a court action to enforce its security interest. No similar provision was granted to the debtor. In upholding this differential treatment, the Court of Appeals held that "there is no inherent reason to require that the parties have equal arbitration rights." *Id.* at 343.

An imbalance in the respective remedial rights available to the parties under an agreement does not invalidate the agreement. Our contract law does not mandate equal obligations and rights on both sides. It is within the nature of contracts and the freedom to contract that each party decides what obligation he or she will accept in return for the obligation imposed upon the other party. The question is not whether the obligations and benefits of the contract are equally disbursed between the parties; the question is whether the consideration is *adequate* to support the agreement. *Id.* If there is valuable consideration flowing to each party to a contract, we need not interfere with their judgment and contractual freedom by ascertaining if each party was treated equally.

As has been noted in other contexts, the legal doctrines of "mutuality of obligations" and "mutuality of remedy" are "largely dead letters." *Doctor's Associates, Inc. v. Distajo*, 66 F.3d 438, 451 (2d Cir. 1995).

> As applied to arbitration clauses, that [mutuality of obligation] has been restated to mean that "the consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate." . . . But 'mutuality of obligation' has been largely rejected as a general principle in contract law, as well as in the arbitration context. The latest Restatement of Contracts provides that "[i]f the requirement of consideration is met, there is no additional requirement of . . . 'mutuality of obligation.'" Restatement (Second) of Contracts § 79 (1979). Option contracts, for example, are unquestionably valid under this modern rule despite their lack of "mutuality of obligation." That is, one party's promise to honor a future offer to purchase an item is valid if supported by the other party's present payment of a sum of money. The promise to accept the offer need not be supported by a reciprocal promise to make that offer.

Id.

In *Sablosky v. Edward S. Gordon Co.*, the New York Court of Appeals held that:

> [i]f there is consideration for the entire agreement that is sufficient; the consideration supports the arbitration option, as it does every other obligation in the agreement. . . . Since it is settled that the validity of an arbitration agreement is to be determined by the law applicable to contracts generally there is no reason for a different mutuality rule in arbitration cases.

535 N.E.2d 643, 645 (N.Y. 1989) (internal citation omitted).

We agree with the trend identified in *Doctor's Associates* and stated in *Sablosky* and in Restatement (Second) of Contracts § 79 (1979): "If the requirement of consideration is met, there is no additional requirement of . . . 'mutuality of obligation.'"

The employment agreement under review guaranteed Grimes a member disbursement of $120,000 per year as compensation plus an array of other valuable benefits. In exchange. Grimes agreed to work for GHSW. Additional obligations and benefits, including the arbitration clause, were also included. Each party received, and committed

itself to provide, adequate consideration to validate the agreement, even if each party received different consideration.

C. The Arbitration Agreement Is Not Unconscionable

As an alternate ground to support the order of the trial court. Grimes argues that the arbitration provision is unconscionable because it expressly permitted GHSW to pursue provisional remedies in court pending arbitration while not specifically providing the same right to Grimes. Grimes also argues that the arbitration provision is unconscionable because it provides the arbitration proceedings must be kept confidential.

While the issue of unconscionability was presented to the trial court, the trial court did not make any findings of fact or otherwise rule on this issue. Whether a contract provision is unconscionable is "highly fact specific." *Kegel v. Tillotson*, 297 S.W.3d 908, 913 (Ky. App. 2009). Grimes' unconscionability argument is the same as his argument for striking down the arbitration clause—lack of mutuality. As noted above, the requirement for mutuality has fallen into disfavor, and so, his unconscionability argument, based upon lack of mutuality, is unpersuasive. Moreover, as noted above, because Grimes had the same right as GHSW to seek pre-arbitration injunctive remedies by operation of law, despite the absence of language in the agreement, we find no unconscionability.

III. CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Appeals.

All sitting. All concur.

ATTORNEYS

Order of suspension from the practice of law for two years to run consecutively to previous suspension —

Kentucky Bar Association v. Christina Rose Edmondson (2017-SC-000650-KB); In Supreme Court; Opinion and Order entered 9/27/18.

The Kentucky Bar Association ("KBA") charged Christina Rose Edmondson[1] in three separate matters, each of which proceeded as a default case under SCR[2] 3.210. Based on its proceedings, the KBA Board of Governors ("Board") found Edmondson guilty in all three cases, and recommended that Edmondson be suspended from the practice of law for two years, with the suspension running consecutive to suspensions that Edmondson is currently serving, and to pay costs of the proceedings pursuant to SCR 3.450. We adopt the Board's recommendations. SCR 3.370(9).

[1] Edmondson's KBA Number is 91597. She was admitted to the practice of law on October 9, 2006, and her bar roster address is 1720 Petersburg Road, Suite 102, Hebron, Kentucky 41048.

[2] Kentucky Rules of the Supreme Court.

I. Factual Background.

As noted, this matter involves three separate KBA cases or files. In each case, service of the Complaint was effected by the Kenton County Sheriff's Office. Service of the Charge in each case was attempted by certified mail and returned as undeliverable. The Charges were then served by the Kenton County Sheriff's Office on March 14, 2017 (Case 16-DIS-0225 (Eichelberger)) and on April 17, 2017 (Case 16-D1S-0063 (Thompson) and Case 16-D1S-0139 (Hill)). Edmondson did not file an Answer to any of the Charges. We address each file in turn.

A. KBA File No. 16-DIS-0063 (Thompson).

Mary J. Thompson retained Edmondson to represent her in a legal malpractice case against another Kentucky attorney. Edmondson filed the action in the Carroll Circuit Court and, despite Edmonson's failure to appear at the hearing, obtained a default judgment in the sum of $300,000 against the other attorney. Thereafter, Ms. Thompson attempted to contact her attorney regarding enforcement of the judgment, but Edmondson did not communicate any further with Ms. Thompson. In her bar complaint, filed June 10, 2016, Ms. Thompson indicated that she had attempted to contact Edmondson, but the phone number had been changed, and she could not locate Edmondson.

The Inquiry Commission filed a three (3) count Charge against Edmondson alleging violation of the following rules:

> Count I: SCR 3.130-1.4(a)(4) states, "A lawyer shall: . . . promptly comply with reasonable requests for information."
>
> Count II; SCR 3.130-1.16(d): "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law."
>
> Count III; SCR 3.130-8.1(b): "A lawyer in connection with a disciplinary matter, shall not . . . knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6."

B. KBA File No. 16-DIS-0139 (Hill).

Ronald Hill had hired the Deters Law Firm to handle a civil action which included counts of breach of contract, fraud, slander, unjust enrichment, negligence and other matters. The firm filed the action in January 2011. Edmondson, who was then working for the Deters firm, entered an appearance in the action in September 2013 by filing a Motion to Set for Trial, apparently in response to a notice to dismiss for lack of prosecution in the case.

In October 2014, the defendants in the civil suit filed a motion for partial summary judgment. Edmondson advised Hill of the motion and her intent to file a motion to stay the summary judgment motion and file an amended complaint to address the concerns raised therein. Edmondson did file a motion to stay the hearing and amend the complaint, however, the motion was improperly noticed for hearing. The court clerk returned the motion to Edmondson advising of the deficiency. Edmondson never corrected or re-noticed the pleading. In November 2014, Edmondson filed a notice of substitution of counsel for herself in place of the Deters firm. Hill indicated that he was unaware of the substitution and did not consent to that action.

After December 2014, Hill was unable to contact Edmondson further. The trial court granted the defendants' motion for partial summary judgment in the civil action. Hill hired new counsel and attempted to have the judgment set aside, but to no avail.

Hill filed his bar complaint against Edmondson in July 2016. Thereafter, the Inquiry Commission filed a four (4) count Charge against Edmonson asserting the following rule violations:

> Count I; SCR 3.130-1.3: "A lawyer shall act with reasonable diligence and promptness in representing a client."
>
> Count II: SCR 3.130-1.4(a)(4) states, "A lawyer shall: . . . promptly comply with reasonable requests for information."
>
> Count III: SCR 3.130-1.16(d): "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the- client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law."
>
> Count IV: SCR 3.130-8.1(b): "A lawyer in connection with a disciplinary matter, shall not . . . knowingly fail to respond to a lawful demand for. information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6."

C. KBA File No. 16-DIS-0225 (Eichelbrenner).

Robert Eichelbrenner hired Edmondson, then a member of the Deters firm, to handle a child visitation matter. He paid Edmondson $200 to handle the matter and provided all his paperwork relating to the issue. Edmondson never contacted Eichelbrenner again, and he was unable to reach her. No action was taken on his visitation matter. Eichelbrenner filed his complaint with the KBA in September 2016.

Subsequently, the Inquiry Commission filed a four (4) count Charge against Edmonson asserting the following rule violations:

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Count I: SCR 3.130-1.3: "A lawyer shall act with reasonable diligence and promptness in representing a client."

Count II: SCR 3.130-1.4(a)(4): "A lawyer shall: . . . promptly comply with reasonable requests for information."

Count Ill: SCR 3.130-1.16(d): "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law."

Count IV: SCR 3.130-8.1(b): "A lawyer in connection with a disciplinary matter, shall not . . . knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6."

II. Conclusions of Law.

After due deliberation, a roll-call vote was taken with respect to each count of each Charge. The Board voted as follows:

A. KBA FILE 16-DIS-0063 (Thompson).

Guilty on Count I (SCR 3.130-1.4(a)(4)); Count II (SCR 3.130-1.16(d)); and Count III (SCR 3.130-8.1(b)). The votes on all counts were unanimous.

B. KBA FILE 16-DIS-0139 (Hill).

Guilty on Count I (SCR 3.130-1.3); Count II (SCR 3.130-1.4(a)(4)); Count III (SCR 3.130-1.16(d)); and Count IV (SCR 3.130-8.1(6)). The votes on all counts were unanimous.

C. KBA FILE 16-DIS-0225 (Eichelbrenner).

Guilty on Count I (SCR 3.130-1.3); Count II (SCR 3.130-1.4(a)(4)); Count III (SCR 3.130-1.16(d)); and CountIV (SCR 3.130-8.1(6)). The votes on all counts were unanimous.

III. Adoption of Board's Recommendation.

Pursuant to SCR 3.370(9), this Court finds and orders, as follows;

A. Edmondson is guilty of the violations of the various rules of the Kentucky Supreme Court as set forth above.

B. Edmondson is hereby suspended from the practice of law for a period of two years, with the suspension to run consecutively to Edmondson's previous suspensions; and

C. Edmondson shall pay the costs associated with this disciplinary proceeding. The costs of this proceeding, including amounts incurred after the consideration and vote by the Board, as calculated and certified by the Disciplinary Clerk, are $1,100.05. These costs are assessed against, and shall be paid by, Edmondson as required by SCR 3.450.

All sitting. All concur.

ENTERED: SEPTEMBER 27, 2018.

ATTORNEYS

Order of suspension from the practice of law for one year to run concurrently with suspension in Illinois —

Kentucky Bar Association v. Robert Good Lohman, III (2018-SC-000334-KB); In Supreme Court; Opinion and Order entered 9/27/18.

The Kentucky Bar Association (KBA) has petitioned this Court to impose reciprocal discipline against Robert Good Lohman, III, under Kentucky Supreme Court Rule (SCR) 3.435. Lohman's KBA member number is 86932 and his bar roster address is 2400 E. Devon Ave., Suite 284, Des Plaines, IL, 60018-4617. On May 24, 2018, the Supreme Court of the State of Illinois entered an order suspending Lohman from the practice of law for one year.[1] On July 9, 2018, this Court ordered Lohman to show cause why we should not impose reciprocal discipline. Lohman failed to respond, so we accordingly grant the KBA's motion and impose reciprocal discipline.

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[1] The Supreme Court of the State of Illinois suspended Lohman from the practice of law for one year "and until he successfully completes the Attorney Registration and Disciplinary Commission Professionalism Seminar." The Court did not adopt the Illinois Review Board's recommendation of a six-month suspension and does not explain its reasoning for divergence in its Order. Kentucky's Office of Bar Counsel contacted the Attorney Registration and Disciplinary Commission in Illinois and confirmed that the Illinois Supreme Court did not issue any other findings of fact or filings besides the Final Order. The Report and Recommendation of the Review Board was utilized for purposes of factual background and rule violations.

The KBA's petition asserts that the Supreme Court of the State of Illinois's decision to sanction Lohman was based upon the following facts:

> Lohman represented a client in multiple actions stemming from a car accident in June 2005. Lohman negotiated a $50,000.00 settlement in one of the cases and deposited the funds into his IOLTA account. During the course of representation, the client hired a new attorney and a dispute arose regarding the amount of fees owed to Lohman. Lohman ultimately filed a lien, and the client's new attorney filed a motion to adjudicate the lien.
>
> At a hearing in July 2012, the judge ordered Lohman to hold the remaining settlement proceeds of $16,805.60 in his IOLTA account pending a further ruling by the court. However, after the order, Lohman transferred funds from his IOLTA account into his operating account and on January 2, 2014, the IOLTA account balance was $29.53. The balance remained at $29.53 until at least January 2016.

The Supreme Court of Illinois found that Lohman violated two provisions of the Illinois Rules of Professional Conduct, which are similar to Kentucky Supreme Court Rule (SCR) 3.130(8.4)(c), which states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, and SCR 3.130(1.15)(c), which prohibits commingling funds.

SCR 3.435(2) states that

> Upon receipt of a certified copy of an order demonstrating that an attorney admitted to practice in this State has been disciplined in another jurisdiction, this Court shall forthwith issue a notice directed to the attorney containing:
>
> (a) a copy of said order from the other jurisdiction; and
>
> (b) an order directing that the attorney inform the Court, within twenty (20) days from the service of the notice, of any claim by the attorney predicated upon the grounds set forth in paragraph (4) hereof that the imposition of the identical discipline in this State would be unwarranted and the reasons therefor.

Under SCR 3.435(4), Lohman is subject to reciprocal discipline unless he proves by substantial evidence: "(a) a lack of jurisdiction or fraud in the out-of-state disciplinary proceeding, or (b) that misconduct established warrants substantially different discipline in this State." SCR 3.435(4)(c) further provides that "[i]n all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this State." Lohman has offered no evidence to oppose the imposition of reciprocal discipline.

Accordingly, it is hereby ORDERED that:

1) Respondent, Robert Good Lohman, III is subject to reciprocal discipline for the misconduct found by the Supreme Court of the State of Illinois. Respondent's misconduct is established conclusively for purposes of disciplinary proceedings in this State.

2) Lohman is suspended from the practice of law in the Commonwealth of Kentucky for one year, beginning on the date of the rendition of this Opinion and Order, and to run concurrently with his suspension in Illinois; and

3) In accordance with SCR 3.450, Lohman shall pay all costs associated with these proceedings, if any, and execution for such costs may issue from this Court upon finality of this Opinion and Order; and

4) Lohman must notify all courts and clients of his suspension in accordance with SCR 3.390. Those notifications must be made by letter in the United States mail within ten days from the date of entry of this Opinion and Order. Lohman must also simultaneously provide a copy of all notification letters to the Office of Bar Counsel. Also, to the extent possible, Lohman must cancel

and cease any advertising activities in which he is engaged.

All sitting. All concur.

ENTERED: September 27, 2018.

ATTORNEYS

Order of public reprimand —

Kentucky Bar Association v. Matthew Ryan Malone (2018-SC-000246-KB); In Supreme Court; Opinion and Order entered 9/27/18.

Matthew Ryan Malone, KBA Member No. 90508, whose bar roster address is 127 West Main Street, Lexington, Kentucky, 40507, was admitted to practice law in this Commonwealth on October 15, 2004. From September 16, 2015, through January 21, 2016, Malone filed, or served upon opposing counsel, eight documents on his client's behalf. Malone signed his client's signature to all eight documents with permission. The signatures on six of the documents were notarized by employees of Malone's law firm as though his client had signed the documents in the presence of a notary. The notary's signature and number were executed and affixed by Malone on the two other documents. Malone failed to inform the court or opposing counsel that he had signed his client's name with permission on the pleadings, that the pleadings were notarized by employees of his law firm, or that two of the eight pleadings contained false notary signatures.

On January 26, 2016, Malone attended a hearing on his client's behalf. Opposing counsel questioned Malone about how he was able to obtain his client's signature, since his client had been snowed in due to a storm. Malone then admitted to signing his client's name on one of the documents because the client could not come to the office due to the snow storm. The next day, Malone self-reported the violations to the Kentucky Bar Association (KBA).

The Inquiry Commission filed a complaint against Malone on March 21, 2016. Malone filed his response to the complaint on April 27, 2016. On June 24, 2016, the Inquiry Commission filed the following two-count charge:

> Count I: SCR 3.130(3.3)(a)(1): "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;"
>
> Count II: SCR 3.130(8.4)(c): "It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"

Malone filed a timely response to the charge through counsel. On February 13, 2017, a Trial Commissioner was appointed. On October 5, 2017, the Trial Commissioner filed his report recommending that Malone be suspended from the practice of law for sixty days, with thirty days suspended for a period of one year on the condition he receives no further disciplinary charges for that period, and that Malone pay the costs of the proceedings. On November 2, 2017, Malone filed his Notice of Appeal from the Trial Commissioner's Report.

The case proceeded to the Board of Governors (Board) where oral arguments were heard on March 16, 2018. The Board unanimously voted to reject the Trial Commissioner's report, as clearly erroneous as a matter of law, and consider the matter *de novo*. The Board unanimously voted that Malone was guilty of the allegations in the charge. The Board determined, however, that Malone had permission to sign his client's name to the documents and that there was no harm or prejudice to anyone. Additionally, the Board noted that Malone did not financially profit from his actions and that Malone reported the violations to the KBA in a timely manner. The Board unanimously voted that Malone should receive a public reprimand.

While Malone admits to the violations, the true issue is the appropriate punishment. In his brief to the Board of Governors, Malone cites several factually similar cases. *In Kentucky Bar Association v. Gottesman*, Gottesman notarized a client's wife's signature on a power of attorney, despite not witnessing the signature. 243 S.W.3d 348 (Ky. 2008). In fact, the wife had not signed the power of attorney and the client used it to obtain a line of credit. *Id.* The Supreme Court of Ohio publicly reprimanded Gottesman, who then self-reported the discipline to the KBA. *Id.* This Court publicly reprimanded Gottesman for the conduct. *Id.* at 349.

In *Guilfoil v. Kentucky Bar Association*, an attorney represented a wife in a divorce proceeding against her husband who was incarcerated in Tennessee. 297 S.W.3d 571, 572 (Ky. 2009). Guilfoil personally got the husband to sign a power of attorney, but then had a notary in Kentucky sign as if the husband personally appeared and signed before the notary. *Id.* At Guilfoil's request, this Court agreed to enter public reprimand. *Id.* at 572-73.

In *Kentucky Bar Association v. Aldering*, an attorney falsely notarized a bond assignment document for his work in a criminal case. 929 S.W.2d 190, 191 (Ky. 1996). This Court agreed with the Board's recommendation for a public reprimand. *Id.*

In the KBA's brief to the Board, the KBA pointed out factual distinctions between Malone's case and his cited precedent, such as the cases only involving one document while Malone's case involved eight, and that none of the cases involved an attorney signing another's name in a notary clause. However, despite these minor differences, public reprimand is appropriate. Malone has admitted to his wrongdoings, and even voluntarily completed the KBA's Ethics and Professionalism Program.

Additionally, Malone's misconduct does not constitute serious misconduct under the American Bar Association's (ABA) Model Rules for Lawyer Disciplinary Enforcement.[1] Further, under the ABA Standards for Imposing Lawyer Sanctions, several mitigating factors apply to Malone's case, such as the absence of a prior disciplinary record, absence of a personal or dishonest motive, and timely good faith effort to rectify the misconduct. Section 9.3.

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[1] According to the ABA's Model Rules for Lawyer Disciplinary Enforcement, a lawyer's misconduct is serious misconduct if:

> (1) the misconduct involves the misappropriation of funds;
> (2) the misconduct results in or is likely to result in substantial prejudice to a client or other person;
> (3) the respondent has been publicly disciplined in the last three years;
> (4) the misconduct is of the same nature as misconduct for which the respondent has been disciplined in the last five years;
> (5) the misconduct involves dishonesty, deceit, fraud, or misrepresentation by the respondent;
> (6) the misconduct constitutes a "serious crime" as defined in Rule 19(C); or
> (7) the misconduct is part of a pattern of similar misconduct.

Rule 9(B).

As noted above, following review of the record and the Trial Commissioner's recommendation, the Board concluded that Malone had permission to sign his client's name to the documents; that he did not financially profit from his actions; that there was no harm or substantial prejudice to anyone; that Malone self-reported to the KBA within days of the hearing in family court where the issue was discussed; and that Malone has no previous discipline since his admission to the bar in 2004. The Board voted 19-0 for Malone to receive a public reprimand and, after review of the record, we agree with the recommended punishment.

Accordingly, it is hereby ORDERED that:

1. Matthew Ryan Malone, KBA member number 90508, is publicly reprimanded for his conduct.

2. Pursuant to SCR 3.450, Malone is directed to pay the costs associated with this proceeding, in the amount of $845.66, as assessed by the Board and certified by the Disciplinary Clerk, for which execution may issue from this Court upon finality of this Opinion and Order.

All sitting. All concur.

ENTERED: September 27, 2018.

CRIMINAL LAW

ROBBERY IN THE FIRST DEGREE

EVIDENCE THAT DEFENDANT WAS ARMED WITH A HANDGUN

RIGHT TO SPEEDY TRIAL

MOTION FOR DIRECTED VERDICT

DEFENDANT'S REQUEST TO MAKE HIS OWN OPENING AND CLOSING ARGUMENTS

Jury convicted defendant on charge of first-degree robbery — Defendant then pled guilty to

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being first-degree PFO — Defendant appealed as matter of right — Defendant was entitled to directed verdict on first-degree robbery charge; therefore, REVERSED first-degree robbery conviction and sentence, VACATED PFO conviction and sentence, which was predicated on underlying first-degree robbery conviction, and REMANDED — Trial court did not violate defendant's right to speedy trial — Four factors to be considered in speedy trial analysis are: (1) length of delay; (2) reason for delay; (3) defendant's assertion of his right to speedy trial; and (4) prejudice to defendant — 52-month delay between arraignment and trial was presumptively prejudicial — Nearly all trial delays were attributable to defendant and his pretrial tactics — Trial court erred when it denied defendant's motion for directed verdict on first-degree robbery trial — Defendant walked into bank, bank teller, and handed teller deposit slip — Slip said "only 20s, 50s, and 100s, no wrappers" — Teller was confused by note so she looked up at defendant — Teller stated that defendant proceeded to "signal, that he had a gun, with his hands. It was like a trigger finger." — Teller gave money to defendant, who left bank — Surveillance videos showed defendant from time he entered bank to time he left bank — Video did not show that defendant made signal to teller that he had gun, although there was one point where his hands did move — Neither of two witnesses saw defendant make gesture — It was undisputed that defendant said nothing aloud to teller; that he did not verbally threaten teller or anyone at bank; that no one was physically harmed; and that no one saw defendant in possession of weapon or dangerous instrument — It was clear that jury convicted defendant of first-degree robbery under KRS 515.020(1)(c), which requires use of handgun — Without instrument's ever being seen, intimidating threat, albeit coupled with menacing gesture, cannot suffice to meet standard necessary for first-degree robbery conviction — On remand, trial court should conduct further review of defendant's request to make opening and closing statements himself — Trial court feared that defendant would use opening and closing statements as opportunity to testify about case without being under oath and without being subject to cross-examination — Trial court can cure any potential defect by allowing defendant to write out his opening and closing statements before trial, then reviewing them and editing them for appropriate and inadmissible content — Trial court can also give admonition to jury that statements are not to be considered as evidence —

James Lang v. Com. (2017-SC-000286-MR); Jefferson Cir. Ct., Edwards, J.; Opinion by Chief Justice Minton, *reversing, vacating, and remanding*, rendered 9/27/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

A circuit court jury convicted James Ellis Lang of first-degree robbery and fixed punishment for that crime at twenty years' imprisonment. Lang then pleaded guilty to the additional charge of being a first-degree persistent felony offender (PFO), and the same jury fixed an enhanced penalty of thirty years' imprisonment. Lang now appeals the resulting judgment as a matter of right,[1] raising three issues for our review.

[1] Ky. Const. § 110(2)(b).

We reject Lang's contention that the trial court erred by failing to dismiss the indictment for the Commonwealth's alleged violation of his right to a speedy trial. We accept Lang's contention that the trial court erred when it failed to direct a verdict on the first-degree robbery charge. Following our established precedent on this issue, we reverse the first-degree robbery conviction and sentence, vacate the PFO conviction and sentence, which is predicated upon the underlying first-degree robbery conviction, and remand the case to the trial court for further proceedings consistent with this opinion.[2]

[2] We note that the double jeopardy clause prohibits the Commonwealth from pursuing a first-degree robbery conviction on remand. *See McGinnis v. Wine*, 959 S.W.2d 437, 438 (Ky. 1998) ("[T]he double jeopardy clause precludes retrial 'once the reviewing court has found the evidence legally insufficient' to support the conviction.") (quoting *Burks v. U.S.*, 437 U.S. 1, 18 (1978)). However, the Double Jeopardy Clause "does not prohibit a retrial for a lesser included offense." 8 Ky. Prac. Crim. Prac. & Proc. § 14:13 (5th ed., Dec. 2017 update) (citing *McGinnis*, 959 S.W.2d at 439 ("[T]he concept of acquittal by implication climbs up the ladder, not down.")).

Lang's third argument—that the trial court erred by preventing him from fulfilling his role as his own co-counsel by denying his request to make his own opening statement and closing argument to the jury at trial—is rendered moot by our reversal today. But because the issue is likely to arise in the event of a trial on remand, we direct the trial court to reconsider its ruling in light of our discussion of Lang's issue in this opinion.

I. ANALYSIS.

A. The trial court did not violate Lang's right to a speedy trial.

Lang argues that this Court should vacate the judgment and direct the trial court on remand to dismiss the indictment because his right to a speedy trial was violated by the protracted proceedings in this case. That this issue is preserved for appellate review is undisputed. We reject Lang's argument because the delay in this case is largely self-inflicted.

All criminal defendants have a constitutional right to a speedy trial.[3] "[A] defendant's right to a speedy trial is analyzed under the four-prong balancing test set forth in *Barker v. Wingo*[4]."[5] "The four factors to be considered in a speedy trial analysis are; 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of his right to a speedy trial; and 4) prejudice to the defendant."[6]

[3] *See* U.S. Const, amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial ... "); Ky. Const. § 11 ("In all criminal prosecutions the accused ... shall have a speedy ... trial ... .").

[4] 407 U.S. 514 (1972).

[5] *Miller v. Commonwealth*, 283 S.W.3d 690, 699 (Ky. 2009).

[6] *Id.* at 699-700 (citing *Barker*, 407 U.S. at 530).

1. Length of Delay

The Commonwealth concedes that the nearly 52-month delay between arraignment and trial in this case is presumptively prejudicial. "That prejudice, however, is not alone dispositive and must be balanced against the other factors."[7] "'Presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry."[8]

[7] *Parker v. Commonwealth*, 241 S.W.3d 805, 812 (Ky. 2007).

[8] *Miller*, 283 S.W.3d at 700 (quoting *Doggett v. United States*, 505 U.S. 647, 652 (1992)).

2. Reasons for Delay

The reasons for the delay in this case weigh heavily in favor of the Commonwealth. As the Commonwealth points out, the record supports the conclusion that nearly all the delays in this case were attributable to Lang and his pre-trial tactics.

Lang was arraigned on the first-degree robbery charge on October 2, 2012. His original trial date was set for June 18, 2013. That date, however, fell during a public defender's statewide conference, so Lang's appointed counsel asked for a continuance. At an October 1, 2013, hearing, Lang's counsel informed the trial court that Lang had recently discussed an issue with her that Lang wanted to raise pre-trial, agreeing to a continuance for that reason. A new trial date was set for May 20, 2014.

On February 6, 2014, when a pre-trial conference for the May trial date was held, Lang stated that he wanted to participate in trial as co-counsel. The court set a second pre-trial conference for March

25, 2014, to conduct the mandated *Faretta* hearing[9] and kept the May 20, 2014 trial date. Lang also requested an ex parte hearing regarding conflict counsel, which the trial court set for April 7, 2014.

[9] *Faretta v. California*, 422 U.S. 806 (1975).

The May 20, 2014 trial date was converted to a pre-trial conference because Lang filed a pro se motion asking for a continuance. Lang had also filed several other pro se motions with the trial court, including a motion to disqualify the entire Commonwealth's Attorney's office, a motion for an evidentiary hearing, a motion for an emergency protective order, a motion for additional discovery, and a motion for better access to legal materials in jail. The trial court then set a new pre-trial date and rescheduled the trial date for October 14, 2014.

By the time the next pre-trial conference occurred on August 7, 2014, Lang had filed more pro se motions, including a motion for additional discovery regarding disciplinary records for police detectives not connected to his case, a motion to hold the jail in contempt, a motion for an expert witness, a motion to "memorialize" his status as co-counsel, and a motion for bond reduction. As both parties concede, for reasons not apparent from the record, the October trial date was continued, and a new trial date was scheduled for June 9, 2015.

On June 5, 2015, the trial court, at Lang's request, held another ex parte hearing. At this hearing, Lang asked the trial court to appoint conflict counsel because his current appointed counsel had not told him until the month before that she did not agree with his theory of the defense or think it was viable. Lang stated that he and appointed counsel were "not prepared to go to trial." Appointed counsel stated that she had, on multiple occasions, discussed with Lang his defense and her concerns regarding it. Appointed counsel was also concerned that a newly appointed attorney could not prepare for a trial just five days away at that point. Lastly, appointed counsel remarked that if she remained Lang's counsel, Lang's new concerns about her assistance would necessitate further discussions between them. Because of this hearing, the trial court set a new trial date.

On August 6, 2015, conflict counsel appeared with Lang for the first time. A pre-trial conference was set for November 12, 2015, and the new trial date was set for March 29, 2016. Lang filed a motion to have conflict counsel disqualified, which the trial court denied. On March 29, 2016, conflict counsel had the flu and asked for a continuance. A new trial date of June 21, 2016 was set.

At a pre-trial conference on May 9, 2016, the trial court addressed Lang's pro se motion requesting a special prosecutor handle his case. The trial date remained set for June 21, 2016.

Both parties agree that the June 21, 2016 trial was continued for reasons unclear on the record. On June 23, 2016, the Commonwealth requested a continuance because the back-up trial date in August conflicted with the case's lead detective's out-of-state training session,[10] The trial court then scheduled a new trial date of August 30, 2016. But, the trial court was in the middle of a civil trial and had to move Lang's trial date to January 24, 2017.[11]

[10] "[A] valid reason for delay, such as a missing witness, will not be weighed against the Commonwealth, as valid reasons for delay are appropriately justified." *Goncalves v. Commonwealth*, 404 S.W.3d 180, 200 (Ky. 2013).

[11] Neutral reasons for delay, such as ... an overcrowded docket, will be weighed less heavily against the Commonwealth, but will nonetheless tip in the defendant's favor." *Id.*

On January 20, 2017, the trial court held a pre-trial hearing to address Lang's pro se motion to disqualify his second attorney, claiming that a conflict arose and that he wanted the court to assign him a different attorney. Nonetheless, the trial court proceeded with trial on January 24, 2017. We note that after Lang's trial began, he filed four more pro se motions.

3. Absence of Prejudice to Lang

It is undisputed that Lang asserted his right to a speedy trial on March 26, 2016. We note that such an assertion did not occur until about three and a half years after he was first arraigned.

Regarding the prejudice prong of the *Barker* analysis, we find it difficult to give credence to any prejudice asserted by Lang, himself a seasoned veteran of the criminal justice system, when almost the entirety of the delay in this case was largely attributable to Lang's self-directed pretrial practice. That finding weighs heavily in our holding that Lang's right to a speedy trial was not violated.

B. The trial court erred when it denied Lang's motion for a directed verdict on the first-degree robbery charge.

Lang argues that the trial court erred when it denied his motions for a directed verdict and a judgment notwithstanding the verdict on the first-degree robbery charge. Preservation of this issue is uncontested. We agree with Lang.

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal."[12]

[12] *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

Kentucky Revised Statutes ("KRS") 515.020(1) defines the elements of first-degree robbery:

> A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> (a) Causes physical injury to any person who is not a participant in the crime; or
> (b) Is armed with a deadly weapon; or
> (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

The facts of this case are practically undisputed. Lang walked into a bank. He approached one of the bank tellers, handing her a deposit slip. The slip said, "only 20s, 50s, and 100s, no wrappers." The teller testified at trial that she was confused by the note, so she looked up at Lang. The teller testified that Lang proceeded to "signal, that he had a gun, with his hands. It was like a trigger finger." The teller then gave Lang money. He took the money and left the bank.

During the teller's testimony, the Commonwealth introduced bank surveillance videos showing Lang at the bank from the time he walked up to the teller to the time he left. It is difficult to tell from any of the videos if Lang ever made a signal to the teller that he had a gun. In fact, at no point do any of the videos show Lang making such a gesture. But there is a point in one of the videos where Lang moves his hands, at which point the teller testified that Lang made the triggering gesture, although it is frankly impossible to tell from the video whether any signal was made.

Two other witnesses testified for the Commonwealth. One of the witnesses, the bank's branch manager, testified that he could not see what occurred at the teller station because Lang's back was to him. Another witness, a bank employee, testified that he saw the note passed but nothing more. What is undisputed is that Lang said nothing aloud to the teller, did not verbally threaten her or anyone at the bank, no one was physically harmed at the bank, and no one saw Lang in possession of a weapon or dangerous instrument.

As stated, the jury convicted Lang of first-degree robbery. The specific instructions the trial court gave to the jury, and under which the jury convicted Lang, are as follows:

> You will find [Lang] guilty of Robbery in the First Degree under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That [the defendant] stole or attempted to steal money from [the teller]; AND
> B. That in the course of doing so and with the intent to accomplish the theft, he used or threatened the immediate use of physical force upon [the victim] with a handgun; AND
> C. That said handgun was a dangerous instrument ... .

It is clear from the instructions that the jury convicted Lang of first-degree robbery under KRS 515.020(1)(c), which the Commonwealth confirmed in its brief. Lang never caused physical injury to anyone, ruling out application of KRS 515.020(1)(a), and there was no evidence that Lang was armed, ruling out KRS 515.020(1)(b).

The question we must answer is "if under the evidence as a whole, it would be clearly

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unreasonable for a jury to find guilt[]" under KRS 515.020(1)(c). If we answer this question in the affirmative, then we must find reversible error in Lang's case. To answer this question, we turn to our precedent.

We first turn to our decision in *Gamble v. Commonwealth*.[13] The facts of that case are as follows:

> On February 7, 2007, a man later identified as Appellant Christopher Gamble walked into the Alexandria Drive branch of Chase Bank in Lexington with his head and face covered. Natalie Lindgren, an assistant manager, was working behind the teller window, and her manager Lynn Dowdy was standing nearby. Lindgren felt threatened by the man, and immediately pressed her silent alarm. Gamble walked to Lindgren's window, passing her a bag and a note that read, "This is a robbery. I have a gun. Quietly empty your drawer fast." Gamble also told Lindgren, "I have a gun." Lindgren testified that she believed Gamble had a gun, though she never saw one. Lindgren placed money, including "bait money," and a dye pack in the bag. As Gamble left, he told Lindgren, "You just saved your life." Gamble's hands remained in plain view the entire time, and, according to Lindgren, he never placed his hands in his pockets.[14]

The Court in *Gamble* began its analysis by distinguishing "much of our first-degree robbery caselaw" because it "primarily interprets subsection (b)" which had "little applicability to [Gamble's] case."[15] The Court noted that it "has rarely had occasion to discuss subsection (c)."[16] The Court then analyzed the facts of the case:

> Turning to the instant case, drawing all fair and reasonable inferences in favor of the Commonwealth, Gamble entered Chase Bank, and handed Lindgren a note that said, "This is a robbery. I have a gun. Quietly empty your drawer fast." Gamble also verbally stated, "I have a gun" and told Lindgren after the robbery, "You just saved your life." Gamble specifically referenced a gun, threatened to use it, and implied that he would have used it had Lindgren not cooperated. Therefore, Gamble's statements amounted to threatening the immediate use of a gun.

The Court then discussed a case that Gamble cited in support of his argument, *Williams v. Commonwealth*[17].[18] "In *Williams*, the defendant robbed a convenience store, pointed to some sort of unidentified bulge in his pocket, and cautioned to the clerk, 'Do you want your life?' The clerk testified that he believed 'maybe he ... had a weapon or something.'"[19] The *Gamble* Court then noted what this Court held in *Williams*: "Without an instrument's ever being seen, an intimidating threat albeit coupled with a menacing gesture cannot suffice to meet the standard necessary for a first-degree robbery conviction."[20] The *Gamble* Court then went on to distinguish *Williams*:

> *Williams*, however, is distinguishable from this case. First, it is not clear under which subsection of the first-degree robbery statute Williams was indicted.[21] More importantly, unlike Gamble, the defendant in *Williams* never specifically stated that he had a weapon or dangerous instrument of any sort. He simply pointed to a bulge in his pocket and asked, "Do you want your life?" By contrast. Gamble specifically stated that he had a gun, both in writing and verbally. This amounts to threatening the immediate use of a dangerous instrument. The defendant in *Williams*, by contrast, made only vague threats."[22]

The Court finally went on to uphold Gamble's conviction, finding that it was not clearly unreasonable for the jury to find Gamble guilty of first-degree robbery under KRS 515.020(1)(c).

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[13] 319 S.W.3d 375 (Ky. 2010).

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[14] *Id.* at 376.

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[15] *Id.* at 378. The Court cited several cases that it was distinguishing: *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010); *Shegog v. Commonwealth*, 142 S.W.3d 101 (Ky. 2004); *Dillingham v. Commonwealth*, 995 S.W.2d 377 (Ky. 1999); *Swain v. Commonwealth*, 887 S.W.2d 346 (Ky. 1994); *Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1976).

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[16] *Gamble*, 319 S.W.3d at 378.

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[17] 721 S.W.2d 710 (Ky. 1986).

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[18] *Gamble*, 319 S.W.3d at 379.

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[19] *Id*. (citing *Williams*, 721 S.W.2d at 710-11).

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[20] *Gamble*, 319 S.W.3d at 379 (quoting *Williams*, 721 S.W.2d at 712).

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[21] The *Gamble* Court noted the following: "The opinion refers to 'first-degree (armed) robbery,' and noted that '[t]he indictment specified that Mr. Williams committed the robbery while armed.' This suggests that Williams was indicted under KRS 515.020(1)(b). However, Williams also objected to a definition of 'dangerous instrument' in the jury instructions, which suggests that he may have been indicted under KRS 515.020(1)(c) as well." *Gamble*, 319 S.W.3d at 379 n.l4 (citing *Williams*, 721 S.W.2d at 711-13).

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[22] *Gamble*, 319 S.W.3d at 379.

That same month, this Court rendered its decision in *Lawless v. Commonwealth*.[23] We note the relevant facts:

> The Commonwealth's proof included testimony by the bank teller whom Lawless confronted and by a customer at an adjacent teller station who witnessed that confrontation. Both witnesses testified that Lawless approached the teller with the hood of her black jacket over her head and across part of her face. They both testified that she kept her right hand in the jacket pocket and with her left hand passed a note to the teller. The note demanded that the teller "hand over all the money, fast and quiet with no dye packs." The teller testified that when she was not sure how to hand over the money, Lawless ordered her to "put it in a bag." The teller then put the money into the plastic bag lining her wastebasket and gave it to Lawless. The adjacent customer testified that when he saw the teller putting money into the wastebasket-liner he realized that she was being robbed.
>
> ...
>
> Both the teller and the customer testified at trial that the fact that Lawless kept her right hand in her pocket made them think that she might have a gun. Indeed, the teller testified that that possibility terrified her and made her try to do nothing that would upset Lawless and the customer testified that not only did Lawless keep her hand in her pocket but that she made gestures as though she had a gun ... . Neither the teller nor [sic] the customer, however, saw a gun, any part of [a] gun, or any other implement for that matter.[24]

The Court in *Lawless* determined that "these facts do not justify a first-degree robbery finding under ... KRS 515.020 ... (c) and the trial court erred, therefore, when it refused to direct a verdict on that charge."[25]

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[23] 323 S.W.3d 676 (Ky. 2010).

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[24] *Id.* at 677-78.

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[25] *Id.* at 680.

Especially in accordance with *Lawless*, we are constrained to conclude that the trial court erred when it did not grant a directed verdict in favor of Lang on the first-degree robbery charge. The facts of *Lawless* mirror almost exactly what happened in Lang's case. As stated, the defendant in *Lawless* approached the teller, passed a note to the teller demanding money, and made gestures as though she had a gun.[26] Lang also approached the teller, passed a note to the teller demanding money, and the teller testified that Lang made one gesture suggesting to her that he had a gun. The defendant in *Lawless* arguably acted even more threateningly than Lang did. The Court found reversible error in the denial of a directed verdict motion in *Lawless*,[27] just as we do here.

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[26] *Id.* at 677-78.

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[27] *Id.* at 680.

When the Court in *Gamble* attempted to distinguish *Williams*, one of its distinguishing facts was that the defendant in *Williams* "never specifically stated that he had a weapon or dangerous instrument of any sort. He simply pointed to a bulge in his pocket and asked, Do you want your life?'"[28] "By contrast. Gamble specifically stated that he had a gun, both in writing and verbally."[29] "The defendant in *Williams*, by contrast, made only vague threats."[30]

[28] *Gamble*, 319 S.W.3d at 379.

[29] *Id.*

[30] *Id.*

Here, the only "threat" that Lang allegedly made was a triggering movement with his finger, which is actually less than the totality of "threats" the defendant in *Williams* made, a case in which this Court reversed the defendant's conviction.[31] Additionally, the circumstances of this case are remarkably different from those in *Gamble*, where the defendant told the teller, both in writing and verbally, that he had a gun.[32] No such statement was made by Lang, only the finger movement. And we ruled in *Lawless* that a simple gesture is insufficient to warrant a first-degree robbery conviction under KRS 515.020(1)(c).[33]

[31] *Williams*, 721 S.W.2d at 711-13.

[32] *Id.* at 376.

[33] *Lawless*, 323 S.W.3d at 679-80.

The Commonwealth points to this Court's decision in *Shegog v. Commonwealth*, where we stated, "reference to a deadly weapon coupled with a contemporaneous demand for money is sufficient to withstand a motion for directed verdict on a charge of first-degree robbery.'[34] But that statement was made in a case involving remarkably different factual circumstances:

> The evidence at trial established that Appellant entered the gas station, grabbed [a victim] and stated that he had a gun. Further, [the victim's] husband testified that he observed the robber grab his wife with one hand while keeping the other hand in his pocket. In fact, [the husband] stated that he was in the process of entering the store until he realized the robber was armed with a weapon.[35]

Nothing of this sort occurred in the case at hand.

[34] 142 S.W.3d 101, 109 (Ky. 2004).

[35] *Id.*

Based on the peculiar facts of this case in relation to our precedent, we are constrained to hold that the trial court should have granted a directed verdict in Lang's favor on the first-degree robbery charge. We therefore reverse Lang's first-degree robbery conviction and underlying sentence and vacate the PFO conviction and enhanced sentence.

C. The trial court should have conducted further review of Lang's request to make opening and closing statements himself.

Lang, who acted as his own co-counsel at trial and beginning in the early pretrial stages of this case and who, according to the Brief for the Appellant, made "[n]inety-nine percent of the motions filed in this case," alleges that the trial court violated his constitutional right to represent himself at trial by denying his motions to conduct opening statement and closing argument himself. Preservation of this issue for appellate review is undisputed, and we will review despite our reversal on other grounds because it is likely to arise in the event of a trial on remand.

"The Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution afford a criminal defendant ... the right of self-representation."[36] "Section 11 of the Kentucky Constitution also guarantees the right to hybrid representation."[37] "The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial."[38]

[36] *Allen v. Commonwealth*, 410 S.W.3d 125, 133 (Ky. 2013).

[37] *Id.* (citing *Deno v. Commonwealth*, 177 S.W.3d 753, 757 (Ky. 2005)).

[38] *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984).

But in granting criminal defendants the right to act on their own behalf at trial, the U. S. Supreme Court succinctly addressed the relationship between the criminal defendant's constitutional right of self-representation and the trial court's "inherent authority to impose measures necessary for an orderly trial"[39]: "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."[40] "Accordingly, trial courts may place certain restrictions on a defendant's right to self-representation."[41]

[39] *Nunn v. Commonwealth*, 461 S.W.3d 741, 749-50 (Ky. 2015).

[40] *Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975).

[41] *Allen*, 410 S.W.3d at 134.

In this case, the trial court denied Lang's motions for the express reason that it feared Lang would use these two stages of the trial as an opportunity to testify about his case without being under oath and without being subject to cross-examination. In response to this denial, Lang offered to write out his closing argument before commencement of the trial for the trial court to evaluate beforehand, but the trial court rejected this offer. There is no evidence in the record or allegation made by the Commonwealth that there existed other facts supporting the trial court's decision to curtail Lang's full exercise of his constitutional right of self-representation.

The trial court's fear that the jury would use statements Lang made in his opening statement and closing argument as evidence in this case is understandable but not, in our view, irrefutably dispositive of Lang's argument that he was constitutionally entitled to try his own case.

It is axiomatic in our jurisprudence that "[o]pening and closing statements are not evidence ... ."[42] "[W]hat is said in opening statement is not evidence."[43] "a closing argument ... is not a vehicle for introducing evidence ... ."[44] And the trial court could cure any defect arising out of Lang's pro se opening statement and closing argument with an admonition to the jury: "[A]ny statements made by the defendant while not on the stand[,] [] including the defendant's opening statement and closing argument[][,] are not made under oath, and should not be considered evidence in the case."[45] "We have long held that an admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition."[46] Additionally, the trial court could have cured any potential defect by allowing Lang to write out his opening and closing statements before trial and reviewing them, editing them for inappropriate and inadmissible content.

[42] *Sneed v. Burress*, 500 S.W.3d 791, 795 (Ky. 2016) (quoting *Wheeler v. Commonwealth*, 121 S.W.3d 173, 180 (Ky. 2003)).

[43] *Jefferson v. Eggemeyer*, 516 S.W.3d 325, 338 (Ky. 2017) (citing *Wheeler*, 121 S.W.3d at 180).

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

[44] *Walker v. Commonwealth*, 288 S.W.3d 729, 741 (Ky. 2009).

[45] Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 Cath. U. L. Rev. 445 (2009).

[46] *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005).

From our review of the record, we find no risk of an "abuse [to] the dignity of the courtroom," nor a violation of "relevant rules of procedural and substantive law," when the admonition we have suggested is given by the trial court to the jury and pending the trial court's review of Lang's pre-written opening and closing statements. But we acknowledge that the presence of other or additional facts showing such abuse or violation in this case may have favored the trial court's decision. If this issue arises on remand, we are confident that the trial court will adequately explore this issue and articulate the factual basis for its ruling.

II. CONCLUSION.

We hold that our precedent mandates that we reverse Lang's first-degree robbery conviction and sentence and vacate his first-degree persistent felony offender conviction and sentence and remand the case to the trial court for further proceedings in accordance with this opinion.

All sitting. Minton, C.J., Cunningham, Hughes, and Venters, JJ., concur. VanMeter, J., dissents by separate opinion in which Keller and Wright, JJ., join.

CRIMINAL LAW

KIDNAPPING WITH SERIOUS PHYSICAL INJURY

Defendant appealed as matter of right his convictions on various charges, including kidnapping with serious physical injury — AFFIRMED convictions — Defendant alleged that serious physical injury suffered by victim was inflicted before kidnapping occurred — It was not unreasonable for jury to believe from evidence that defendant, by inflicting serious physical injury on victim before specifically manifesting to her his intent to confine her, wanted victim to know or believe, through act of inflicting physical injury, that she would be unable to escape from confinement, thus intimidating victim into staying put —

Daymond L. Malone v. Com. (2017-SC-000593-MR); Jefferson Cir. Ct., Gibson, J.; Opinion by Chief Justice Minton, *affirming*, rendered 9/27/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

A circuit court jury found Daymond Malone guilty of kidnapping with serious physical injury, assault under extreme emotional disturbance, first-degree fleeing or evading, second-degree fleeing or evading, and no operator's license. The trial court sentenced Malone to seventy years in prison. Malone now brings this appeal from the resulting judgment as a matter of right,[1] raising a single issue regarding the kidnapping conviction that is a matter of first impression in Kentucky.

[1] Ky. Const. § 110(2)(b).

Malone argues that the serious physical injury suffered by the victim was inflicted before the kidnapping occurred, so the trial court erred when it instructed the jury on the crime of kidnapping with serious physical injury. We reject Malone's argument. We hold that it would not be unreasonable for the jury to believe from the evidence that Malone, by inflicting serious physical injury upon his victim before specifically manifesting to her his intent to confine her, wanted the victim to know or believe, through the act of inflicting physical injury, that she would be unable to escape from confinement, thus intimidating the victim into staying put. The trial court did not err in instructing the jury on the crime of kidnapping with serious physical injury, so we affirm the judgment.

I. BACKGROUND.

The facts of this case are mostly undisputed. Malone and the victim, Monic Pinkston, shared an intimate relationship before Pinkston decided to end it. The two remained friends leading up to the events giving rise to Malone's convictions.

Very early in the morning, Pinkston left her house to go to work. As she approached her vehicle,[2] she found Malone asleep in the backseat. Pinkston testified that she told Malone that she was "not O.K." with him staying in her car, which led to an argument between the two. Nonetheless, Pinkston drove to work with Malone in the passenger seat of the car.

[2] Malone stated that he purchased the vehicle but registered it to Pinkston because he did not have a driver's license, with the understanding that he would always have access to it.

Upon arriving at work, Pinkston told Malone to leave. After a brief period, a co-worker told Pinkston that Malone was driving off with her car. Pinkston stopped him. Pinkston testified that she told Malone she was going to call the police; but in her statement to the police, Pinkston stated that she simply told Malone to leave.

On her lunch break at mid-morning, Pinkston discovered Malone sleeping in the backseat of her vehicle. Pinkston told Malone that she was sick of him following her, did not want to be with him, and could not be in a relationship at this time, to which Malone responded that he loved her and wanted to be with her. Malone then asked Pinkston to take him to his cousin's house, to which Pinkston, after resisting, eventually agreed.

Upon arriving at Malone's cousin's house, Pinkston testified that Malone stated that "he was sorry he had to do this."[3] Malone then proceeded to physically assault Pinkston, inflicting three stab wounds and causing serious physical injury.[4] Malone continued to wrestle with Pinkston as he moved from the back of the car to the front seat. Pinkston testified that Malone kept her in the car and told her to drive.

[3] Pinkston admitted that she never told police Malone said this.

[4] The fact that Pinkston suffered a serious physical injury is undisputed.

Malone eventually directed Pinkston to drive to a park. During the drive, Pinkston told Malone that the car was running out of gas. Upon arriving at a gas station, Malone told Pinkston to find her debit card and pay for gas at the pump. Malone and Pinkston then engaged in another physical altercation, and Pinkston was able to escape the vehicle but not before Malone bit her left eye. When Pinkston fled the vehicle, Malone drove off, but was eventually apprehended by police.

II. ANALYSIS.

Malone alleges the trial court erred in only one way—the trial court should not have instructed the jury on kidnapping with serious physical injury, which enhances kidnapping from a Class B to a Class A felony, because the kidnapping of Pinkston did not begin until after the stabbing occurred. Specifically, Malone argues that no restraint or kidnapping commenced until Malone prevented Pinkston from exiting the vehicle *after* the stabbing and physical altercation occurred.

The parties do not dispute the preservation of this issue, but they do dispute how this Court should review this issue. "When faced with a sufficiency-of-the-evidence challenge such as . . . erroneously giving a jury instruction on a particular crime, the appellate court must determine whether, 'after viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[5] Directly taken from his brief, Malone is arguing that "there was no evidence to support that Ms. Pinkston suffered a serious physical injury *during* the kidnapping."[6] This "sufficiency-of-the-evidence challenge"[7] forms the basis for Malone's argument that the trial court erroneously instructed the jury on kidnapping with serious physical injury. So we will review this alleged error using the *Benham* standard.

[5] *Commonwealth v. Hasch*, 421 S.W.3d 349, 356-57 (Ky. 2013) (citing *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009); quoting *Commonwealth v. Benham*, 816 S.W.2d 186, 187-88 (Ky. 1991)).

[6] (emphasis in original).

[7] *Hasch*, *supra* note 6.

The trial court instructed the jury on kidnapping with serious physical injury in the following way:

> You will find the defendant guilty of Kidnapping under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> (A) That in this county on or about the 5th day of June 2014, he restrained Monic Pinkston by preventing her from exiting the vehicle by use of or threat of a knife;
>
> (B) That the restraint was without Monic Pinkston's consent;
>
> (C) That in so restraining Monic Pinkston, it was the defendant's intention to inflict bodily injury or to terrorize Monic Pinkston or another person; AND
>
> (D) That Monic Pinkston suffered a serious physical injury during the kidnapping.

Essentially, Malone argues that the stabbing and physical altercation that he inflicted upon Pinkston before he told her to drive to the park does not constitute "restraint," meaning the kidnapping cannot be said to have occurred until *after* the physical altercation, when Malone prevented Pinkston from leaving the vehicle and told her to drive to the park. Stated differently, Malone is arguing that no rational jury could believe that his infliction of a serious physical injury upon Pinkston occurred during his kidnapping of her. We find Malone's argument meritless.

> KRS 509.010 defines *restrain* to mean:
>
> [T]o restrict another person's movement in such a manner as to cause a substantial interference with his liberty by moving him from one place to another or by confining him either in the place where the restriction commences or in a place to which he has been moved without consent. A person is moved or confined "without consent" when the movement or confinement is accomplished by physical force, intimidation, or deception, or by any means, including acquiescence of a victim, if he is under the age of sixteen (16) years, or is substantially incapable of appraising or controlling his own behavior.

Inflicting serious physical injury on an individual in and of itself does not constitute kidnapping. But, as in this case, when a defendant inflicts serious physical injury before relaying any verbal or other kind of manifestation that the victim cannot leave but then relays such a manifestation after the infliction of the harm, the totality of the action "restrict[s] [the victim's] movement in such a manner as to cause a substantial interference with his liberty by . . . confining him . . . in the place where the restriction commences . . . by physical force [and] intimidation." When the act is looked at in its totality, the infliction of serious physical injury can be said to be the first step in the kidnapping, because the infliction, coupled with the command to stay put, evidences to a reasonable jury an intent to kidnap—formed before the physical harm occurred—that the defendant acted upon.

When a manifestation of confinement is relayed from the defendant to the victim after the defendant has inflicted serious physical injury on the victim, as is the case here, it is not unreasonable for the jury to believe that the defendant manifested the intent to kidnap before the infliction of serious physical injury and acted upon that intent by first attempting to weaken or immobilize the victim to more easily confine the victim. It is not unreasonable for the jury to believe that the defendant, by inflicting serious physical injury upon the victim before specifically manifesting to the victim an intent to confine, wanted the victim to know or believe, through the previous act of inflicting physical harm, that the victim would be unable to escape from confinement, thus intimidating the victim into staying put. In this way, the victim can be said to have been "restrained" because the infliction of serious physical injury, coupled with a later manifestation by the defendant to the victim that the victim is not free to leave, constitutes a restriction on the victim's ability to exercise his or her liberty of movement through physical force and intimidation.

Because this is an issue of first impression in Kentucky, we note that other jurisdictions have concluded similarly.[8]

[8] *See*, *e.g.*, *Gooch v. U.S.*, 82 F.2d 534 (10th Cir. 1936) (cert. den. *Gooch v. U.S.*, 298 U.S. 658 (1936)) (fact that the injury was inflicted in a struggle which preceded defendant forcing victim into an automobile and transporting him into another state did not preclude imposition of the death penalty, as the Court rejected the defendant's contention that the wound was inflicted "prior to the kidnapping"); *Greene v. State*, 673 S.E.2d 292 (Ga. App. 2009) (strangulation occurring before defendant moved the victim was the "first step in the kidnapping"); *Carter v. State*, 603 S.E.2d 56 (Ga. App. 2004) (Court rejecting argument that the victim was injured before kidnapping and upholding his enhanced kidnapping conviction); *James v. State*, 521 S.E.2d 465 (Ga. App. 1999) (stun gun to the face of the victim was the "first step of the kidnapping; it immobilized the victim and allowed [the defendant] and his accomplice to drag the victim into the washroom and to bind him with tape"); *People v. Earl*, 433 N.E.2d 722 (Ill. App. 1982) (beating of victim before subsequent abduction allowed kidnapping charge to be enhanced).

As such, the trial court did not err in its instructions to the jury because Pinkston did suffer a serious physical injury "during the kidnapping,"[9] as Malone's infliction of serious physical injury upon Pinkston can be said to be the "first step of the kidnapping."[10]

[9] *See* KRS 509.040(2).

[10] *See supra* note 8.

III. CONCLUSION.

Finding no error on the part of the trial court, we affirm the judgment.

All sitting. All concur.

EMPLOYMENT LAW

ARBITRATION

ARBITRATION AGREEMENT ENTERED INTO AS CONDITION OF EMPLOYMENT

FEDERAL ARBITRATION ACT (FAA)

KRS 336.700(2) is anti-employment discrimination statute that prohibits employers from conditioning employment on an agreement to, not only arbitration, but also any waiver or diminution of employee's existing or future rights or claims for benefits arising out of employment — KRS 336.700(1) defines "employer" as any person, either individual, corporation, partnership, agency or firm, that employs an employee — Employer includes state-created entities — KRS 336.700(2) only proscribes "conditioning employment" on agreement to arbitration, not act of agreeing to arbitration — Federal Arbitration Act (FAA) does not preempt KRS 336.700(2) because KRS 336.700(2) does not discriminate against arbitration agreements but rather conditioning employment on employee's agreement to arbitrate —

Northern Kentucky Area Development District v. Danielle Snyder (2017-SC-000277-DG); On review from Court of Appeals; Opinion by Chief Justice Minton, *affirming and remanding*, rendered 9/27/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Kentucky Revised Statute ("KRS") 336.700(2) prohibits employers from conditioning employment on an existing employee's or prospective employee's agreement to "waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled . . . ." When Northern Kentucky Area Development District ("NKADD") conditioned Danielle Snyder's continued employment on her agreement to arbitrate any dispute that may arise between them, that agreement violated KRS 336.700(2). As a result, the arbitration agreement between NKADD and Snyder—the enforcement of which is the basis of the case before us today—is unenforceable as a matter of state statutory law.

NKADD correctly asserts that the Federal Arbitration Act ("FAA")[1] broadly prohibits discrimination against arbitration agreements. It then argues that the FAA preempts the operation of KRS 336.700(2) under the facts of this case. But,

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

rejecting NKADD's argument, we hold that no such discrimination occurred here because KRS 336.700(2) does not prohibit arbitration agreements, limit the power of persons to enter voluntarily into arbitration agreements, or single out arbitration agreements in any way. Correctly viewed, KRS 336.700(2) is an anti-discrimination statute that prohibits employers from *conditioning employment* on an agreement to, not only arbitration, but also any waiver or diminution of the employee's existing or future rights or claims for benefits arising out of employment. So, on discretionary review, we affirm for different reasons the Court of Appeals' decision that affirmed the trial court's order denying NKADD's motion to compel enforcement of the arbitration agreement. And we remand this case to the trial court for further proceedings consistent with this opinion.

[1] 9 U.S.C. 1, et seq.

I. BACKGROUND.

NKADD is a government entity created under KRS 147A.050 et. seq. It is funded by taxpayers to administer social programs in an eight-county area of Northern Kentucky. It receives federal funds for various social programs, including an elder-abuse program, a long-term-care ombudsman program, and a family caregiver program. Additionally, using federal funds, NKADD partners with local food banks to distribute food to lower-income households and administers a small-business loan fund. It also provides employment services through its Northern Kentucky Workforce Investment Board to supply workers to businesses and participates in a regional public-private partnership working to supply employees to businesses in the Northern Kentucky-Greater Cincinnati area.

Danielle Snyder worked for NKADD as an administrative purchasing agent. While employed there, Snyder had to sign an arbitration agreement mandating arbitration of any dispute she had with NKADD. The agreement makes clear, "As a condition of employment with the District, you will be required to sign the attached arbitration agreement." Additionally, "You may revoke your acceptance of the agreement by communicating your rejection in writing to the District within five days after you sign it. However, because the agreement is a condition of employment, your employment and/or consideration for employment will end via resignation or withdrawal from the process."

Snyder filed an action in the trial court asserting claims under the Kentucky Whistleblower Act ("KWA") and the Kentucky Wages and Hours Act ("KWHA") after NKADD terminated her employment. NKADD filed a motion to stay the proceedings and compel arbitration based on the arbitration agreement. The circuit court denied NKADD's motion, and NKADD appealed.

The Court of Appeals affirmed the trial court's denial, explaining that NKADD is a creature of statute, and the wording of two Kentucky statutes, which purportedly prohibit an employer's conditioning employment on the employee's agreement to arbitrate any disputes, makes *ultra vires* any arbitration contract by NKADD forcing arbitration in this way. Therefore, the Court of Appeals reasoned, the FAA cannot compel arbitration between the parties because NKADD never had the authority to enter into an arbitration agreement in the first place, and "federal law does not pre-empt the authority of the Commonwealth to deny the authority of its [agencies] to enter into arbitration agreements."

II. ANALYSIS.

We granted NKADD's motion for discretionary review to consider whether the FAA preempts Kentucky's legislative enactment to preserve employee rights, KRS 336.700(2), because it seeks, among other broadly stated areas, to prohibit employers from conditioning employment on the employee's agreement to a contract provision mandating arbitration in the event of a dispute between them. We ultimately conclude that the statute does not run afoul of the FAA under the facts of this case. But first, we must determine whether NKADD truly does not have the power to condition employment on agreement to arbitration.

A. NKADD and its power.

"[A]dministrative agencies have no inherent authority and may exercise only such authority as may be legislatively conferred."[2] It is axiomatic that NKADD, as a state agency, only has the power that the General Assembly gives it.

[2] *Herndon v. Herndon*, 139 S.W.3d 822, 826 (Ky. 2004) (citing *Linkous v. Darch*, 323 S.W.2d 850 (Ky. 1959); *Robertson v. Schein*, 204 S.W.2d 954 (Ky. 1947)).

NKADD exists by virtue of KRS 147A.050(7). The precise legal term to describe the creature NKADD may be elusive, but the parties and the lower courts have not quibbled over the fact that NKADD is a Kentucky state agency.

Like all area development districts, NKADD is operated by state employees under KRS 147A.060 and 147A.070 and receives taxpayer funding. The governing body of NKADD, its board of directors, entirely derives its power from KRS 147A.080 and 147A.090, the statutes that detail all of the power that the General Assembly has granted to NKADD. Among other powers, the board of directors may "[m]ake and enter into all contracts or agreements necessary or incidental to the performance of its duties"[3] and "[p]erform such other and further acts as may be necessary to carry out the duties and responsibilities created by KRS 147A.050 to 147A.120."[4]

[3] KRS 147A.080(4).

[4] KRS 147A.080(12).

The text of these statutes alone does not explicitly allow NKADD to mandate agreement to arbitration as a condition of employment. At best, the power to condition employment on agreement to arbitration may be implied by the broad language used in the statutory provisions outlining NKADD's powers and responsibilities.

Regardless, we find explicit statutory limitation on the ability of NKADD to condition employment on agreement to arbitration. KRS 336.700(2) states:

> Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.

KRS 336.700(1) defines *employer* to mean "any person, either individual, corporation, partnership, agency, or firm, that employs an employee."

The parties do not challenge the applicability of KRS 336.700(2) to NKADD in this case. Indeed, KRS 147.080(10) deems an "area development district organization" a "public agency," which appears to fall within the ambit of the definition of *employer* in KRS 336.700(1), which includes "agenc[ies]."

Although one could argue that the definition of *employer* in KRS 336.700(1) appears to contemplate private, not public, entities,[5] we dealt with a similar situation in *Madison County Fiscal Court v. Kentucky Labor Cabinet*.[6] There, we considered the exact same definition of *employer*[7] for the purpose of the applicability of KRS 337.285, the wage and hour requirements for overtime pay, to public entities, including the Madison County Fiscal Court, Central Campbell County Fire District, and ten municipal corporations.[8] We concluded "municipal corporations" fell within the ambit of "corporation[s]" as included within the definition of *employer*.[9] In conformance with the spirit of *Madison County*, we find NKADD, an agency of the Commonwealth, constitutes an "agency" contemplated by the definition of *employer* in KRS 336.700(1) such that KRS 336.700(2) applies.

[5] Further evidence of this fact is the General Assembly's recent amendment of KRS 336.180(2)'s definition of *employer*, which now encompasses "public employer." KRS 336.180(2) applies to the entirety of Chapter 336 "unless the context requires otherwise." Because of the General Assembly's recent amendments, KRS 336.700(1) now appears to be superfluous if we read it to encompass "public employers." However, because the events of this case arose before the amendment, and because the parties have not raised this issue before us, we decline to entertain this argument.

[6] 352 S.W.3d 572 (Ky. 2011).

[7] *See* KRS 337.010(1)(d).

[8] *Madison County*, 352 S.W.3d at 573.

[9] *Id.* at 576.

We conclude that Kentucky state-created entities do not have the power to compel, as a condition of employment, any employee agree to arbitrate any claim, right, or benefit he or she may have against NKADD. Although NKADD appears to have broad power to enter into agreements and define the terms of those agreements, KRS 336.700(2) acts expressly prohibits NKADD from conditioning employment on an agreement to arbitrate.

We therefore conclude that the General Assembly intended to forbid NKADD from having the power to condition employment on agreement to arbitration by the express language of KRS 336.700(2).[10]

[10] Our holding in this regard does nothing to displace the power of NKADD to reach a mutual agreement with an employee to arbitrate a dispute. KRS 336.700(2) only prevents *conditioning employment* on agreement to arbitration.

When a government entity acts beyond its power by violating an express statutory prohibition, its actions are said to be "ultra vires . . . and therefore . . . void."[11] KRS 336.700(2) is a direct limitation on the power of state agencies to condition employment of their state employees on agreement to an arbitration clause; in fact, this statute outright prohibits such act.[12] Because NKADD, a state agency affected by the prohibitions of KRS 336.700(2), never had the power to force Snyder to agree to arbitrate disputes arising between them as a condition of her employment, the resulting arbitration agreement is void.

[11] *Stierle v. Sanitation Dist. No. 1 of Jefferson Cty.*, 243 S.W.2d 678, 680 (Ky. 1951) (citing *Walker v. City of Richmond*, 189 S.W. 1122 (Ky. 1916); *Fabric Fire House Co. v. City of Louisa*, 69 S.W.2d 726 (Ky. 1934)).

[12] Snyder also argues that KRS 417.050(1) prohibits NKADD from conditioning employment on agreement to arbitration. However, a plain reading of that statute, coupled with the Court of Appeals' analysis in *Jacob v. Dripchak*, 331 S.W.3d 278, 279 (Ky. App. 2011), leads us to believe otherwise. The Court of Appeals in *Jacob* persuasively explained that KRS 417.050(1) only proclaims that Chapter 417, Kentucky's Uniform Arbitration Act, *does not apply* to arbitration agreements between employers and employees, not that arbitration agreements between employers and employees are outright prohibited. *Jacob*, 331 S.W.3d at 279.

B. The FAA does not preempt KRS 336.700(2) in this case.

Although we have determined that NKADD acted beyond its power when forcing Snyder to agree to arbitrate disputes arising between them as a condition of her employment, we nonetheless must determine if the FAA nullifies this conclusion because of its preemptive effect on laws discriminating against arbitration.

The U.S. Supreme Court defined the parameters of the FAA, the law at issue in this case, most recently in *Kindred Nursing Centers Ltd. Partnership v. Clark*.[13] "The Federal Arbitration Act makes arbitration agreements 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[14] [9 U.S.C. § 2] establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'"[15] "The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a "law prohibit[ing] outright the arbitration of a particular type of claim.'"[16] "And not only that: The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements."[17]

[13] 137 S.Ct. 1421 (2017).

[14] *Id.* at 1426 (quoting 9 U.S.C. § 2).

[15] *Kindred Nursing*, 137 S.Ct. at 1426 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

[16] *Kindred Nursing*, 137 S.Ct. at 1426 (citing *Concepcion*, 563 U.S. at 341).

[17] *Kindred Nursing*, 137 S.Ct. at 1426.

The broad preemptive effect of the FAA is undeniable. But we fail to see how a law, in this case KRS 336.700(2), that does not actually attack, single out, or specifically discriminate against arbitration agreements must yield to the FAA.

We cannot read KRS 336.700(2) as evidencing hostility to arbitration agreements. KRS 336.700(2) does not prevent NKADD, any state entity, or any private entity, from agreeing to arbitration. KRS 336.700(2) simply prevents NKADD from *conditioning employment* on the employee's agreement to arbitration. This is the key distinction supporting the reason the FAA does not apply to preempt KRS 336.700(2). That statute only proscribes *conditioning employment* on agreement to arbitration, not the act of agreeing to arbitration.

Moreover, KRS 336.700(2) does not single out arbitration clauses. KRS 336.700(2) prevents the conditioning of employment on an employee's agreement to waive or otherwise diminish "*any* existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled . . . ."[18] This not only means that an employer cannot force the employee to agree to arbitration on penalty of termination but also means that an employer cannot force an employee to, for example, waive all rights to file KWA claims against the employer. In this way, KRS 336.700(2) is a law of general applicability that prevents employers from conditioning employment on the employee's agreement to forego the exercise of all rights against the employer.

[18] (emphasis added).

KRS 336.700(2) is not a law that discriminates or singles out arbitration clauses. It is a law that prohibits employers from firing or failing to hire on the condition that the employee or prospective employee waive all existing rights that employee would otherwise have against the employer. More importantly, KRS 336.700(2) does nothing to discriminate against arbitration clauses—it only prevents an employer from terminating or refusing to hire an individual who refuses to agree to such a clause.

Even the broadest construction of the reach of the FAA would not allow employers to fire or hire an employee or prospective employee based on that employee's willingness or unwillingness to sign an arbitration agreement. It is true that the U.S. Supreme Court recently expanded the reach of the FAA: "[T]he Act cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]'—that is, about what it takes to enter into them . . ..A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made.'"[19]

[19] *Kindred Nursing*, 137 S.Ct. at 1428.

As stated, however, KRS 336.700(2) does not "*selectively* find[] arbitration contracts invalid"; rather, KRS 336.700(2) prevents an employer from entering into any agreement whatsoever that conditions employment on the employee's agreement to waive any and all rights against the employer. Moreover, KRS 336.700(2) does not invalidate arbitration contracts because they are arbitration contracts; KRS 336.700(2) only invalidates arbitration contracts when the employer evidences an intent to fire or refuse to hire an employee because of that employee's unwillingness to sign such a contract. This is not an attack on the arbitration agreement—it is an attack on the employer for basing employment decisions on whether the employee is willing to sign an arbitration agreement.

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

A comparison to the rule at issue in *Kindred Nursing* may be of benefit: "[A]n agent c[an] deprive her principal of an 'adjudication by judge or jury' only if the power of attorney 'expressly so provides.'"[20] The U.S. Supreme Court identified that this rule "fails to put arbitration agreements on an equal plane with other contracts" and "singl[ed] out [arbitration agreements] for disfavored treatment" because "the [Kentucky Supreme Court] nowhere cautioned that an attorney-in-fact would not need a specific authorization to, say, sell her principal's furniture or commit her principal to a non-disclosure agreement."[21] Finally, the U.S. Supreme Court noted, "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act . . . ."[22]

[20] *Id.* at 1426.

[21] *Id.* at 1427.

[22] *Id.* at 1428.

The preempted rule at issue in *Kindred Nursing* stated that a person acting under a power-of-attorney may never enter into an arbitration agreement on the principal's behalf unless the principal provides express written assent to such. The rule singled out arbitration agreements because the rule only required specific written authorization for an agent acting under a power-of-attorney to enter into an arbitration agreement and not any other type of agreement.

This is different from KRS 336.700(2). The statute does not single out arbitration agreements—it makes clear that any contract that waives or limits an employee's rights against the employer is void if employment was predicated on signing the agreement. Apart from arbitration agreements, this would include, to name a couple of examples, an agreement whereby the employee waives the ability to file a KWA claim against the employer, or an agreement that limits the amount of damages the employee can recover against the employer.

KRS 336.700(2) is not an anti-arbitration clause provision—it is an anti-employment discrimination provision. KRS 336.700(2) uniformly voids any agreement diminishing an employee's rights against an employer when that agreement had to be signed by the employee on penalty of termination or as a predicate to working for that employer. As such, we hold that the FAA does not preempt KRS 336.700(2) because it does not discriminate against arbitration agreements but rather the conditioning of employment on an employee's agreement to arbitrate.

III. CONCLUSION.

NKADD acted beyond the scope of its power when it conditioned Snyder's employment on her willingness to sign an arbitration agreement. So NKADD's act of doing so is beyond the limits of its legislative grant of authority, rendering the arbitration agreement itself void. The FAA does not mandate a contrary holding because it does not preempt KRS 336.700(2) in this case. We affirm the result reached by the Court of Appeals for the reasons stated in this opinion and remand this case to the trial court for further proceedings consistent with this opinion.

Minton, C.J., Cunningham, Hughes, Keller, Venters and Wright, JJ., sitting. All concur. VanMeter, J., not sitting.

DISCOVERY

WRIT OF PROHIBITION

LIMITATION OF DISCOVERY TO THAT WHICH IS NECESSARY TO DETERMINE WHETHER CHURCH IS ENTITLED TO ECCLESIASTICAL IMMUNITY

Church terminated employee after it learned that employee and other ministers had incorporated entity separate and apart from church — Church funds were transferred to this entity without church authorization — During disciplinary proceeding against employee, church noted that employee never intended to personally benefit from funds and that all funds were returned — After his termination, employee filed instant action against church alleging that church defamed him by reporting to independent religious news agencies and other third parties that he had "committed ethical violations" — Church filed motion for summary judgment — Employee served discovery requests on church — Church argued that employee was not entitled to discovery until trial court ruled on its ecclesiastical-abstention and ministerial-exception defenses — Disagreeing with church, trial court ordered church to respond to discovery requests — Church petitioned Court of Appeals for writ and asked Court of Appeals to consider, for first time, issue of its immunity and to dismiss underlying action on those grounds — Court of Appeals granted writ in part, finding that trial court abused its discretion in allowing broad-reaching discovery, but denied writ in part, finding that discovery related to immunity issue could proceed — Court of Appeals did not rule on immunity issue — Church appealed — AFFIRMED — Analyzed writ under exception to irreparable harm requirement for "certain special cases" — In such cases, writ is appropriate if substantial miscarriage of justice will result if lower court is proceeding erroneously and correction of error is necessary and appropriate in interest of orderly judicial administration — Church should not be subjected to broad-reaching discovery prior to immunity determination — Immunity is designed to relieve defendant from burdens of litigation — Defendant should be able to invoke immunity at earliest stage of proceedings — Discovery regarding church's immunity does not amount to substantial miscarriage of justice nor fly in face of orderly judicial administration — Kentucky Supreme Court declined to take up issue of church's immunity — Question of immunity is one of law to be determined by trial court — Order denying substantial claim of absolute immunity is immediately appealable even in absence of final judgment —

Presbyterian Church (U.S.A.) v. Hon. Brian C. Edwards (Judge, Jefferson Cir. Ct.) and Rev. Eric Hoey (2016-SC-000699-MR); On appeal from Court of Appeals; Opinion by Justice Wright, *affirming*, rendered 9/27/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Appellant, the Presbyterian Church, appeals from the Court of Appeals' order granting in part and denying in part its petition for a writ to prohibit the trial court from lifting its stay of discovery. The Court of Appeals granted the writ to the extent the trial court should limit discovery to that which was necessary to determine whether the church was entitled to ecclesiastical immunity. For the following reasons, we affirm the Court of Appeals' order.

I. BACKGROUND

The Presbyterian Ministry Agency (PMA) hired Reverend Eric Hoey as the Director of Evangelism and Church Growth. During his tenure in that position, Hoey acted with other ministers to incorporate an entity separate and apart from the church. Church funds were transferred to the newly-created entity without authorization. The church issued a written warning to Hoey regarding his actions. This warning included findings that Hoey failed to properly manage ministers under his supervision, failed to timely inform his supervisors that he incorporated the entity without authorization, and that Hoey contributed to a culture of non-compliance with PMA and church policies.

The church reported the disciplinary action to Hoey's Presbytery. That notification indicated that Hoey had known about the incorporation and approved a transfer of grant money without ensuring that the church's incorporation criteria were followed. The notification made it clear, however, that Hoey never intended to personally benefit from the funds and that all grant funds were returned. In addition to this disclosure made to the Presbytery, the church also released general information about the incorporation and dissolution of the entity to the denomination.

The church placed Hoey on paid administrative leave for more than six months before terminating his employment. After his termination, Hoey filed a complaint in Jefferson Circuit Court alleging the church defamed him by reporting to independent Presbyterian news agencies and other third parties that he had "committed ethical violations." The church filed a motion for summary judgment. Hoey did not respond to that motion, but, instead, served the church discovery requests.

At a status hearing, the church argued to the trial court that Hoey should not be entitled to discovery until the court ruled on its ecclesiastical-abstention and ministerial-exception defenses. The trial court disagreed with the church and ordered it to respond to Hoey's discovery requests within twenty days.

Following the trial court's discovery ruling, the church petitioned the Court of Appeals for a writ, arguing the trial court had essentially abrogated its immunity by forcing it to participate in discovery without first making a threshold immunity determination. The church also asked the Court of Appeals to consider (for the first time) the issue of its immunity and to dismiss the underlying action on those grounds. The Court of Appeals granted the writ in part, holding the trial court had abused its discretion in allowing broad-reaching discovery, but denied the writ insofar as it would allow discovery related to the immunity issue. The Court of Appeals did not rule on the immunity issue. The church appeals, arguing the Court of Appeals' order did not go far enough. We disagree.

II. ANALYSIS

The issuance of a writ is an extraordinary remedy, and we have always been cautious and conservative in granting such relief. *Grange Mut. Ins. v. Trade*, 151 S.W.3d 803, 808 (Ky. 2004). The standard for granting petitions for writs of prohibition and mandamus is the same. *Mahoney v. McDonald-Burkman*, 320 S.W.3d 75, 77 n.2 (Ky. 2010) (citing *Martin v. Admin. Office of Courts*, 107 S.W.3d 212, 214 (Ky. 2003)). This Court set forth that standard in *Hoskins v. Maricle*:

> A writ . . . may be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

150 S.W.3d 1, 10 (Ky. 2004). Here, there is no argument that the lower court lacked jurisdiction. Therefore, this case falls under the second class of writ, which requires that there be (1) no adequate remedy by appeal and (2) great injustice and irreparable injury.

In the present case, the church has satisfied the initial requirement of no adequate remedy by appeal, as "[o]nce the information is furnished it cannot be recalled." *Bender v. Eaton*, 343 S.W.2d 799, 802 (Ky. 1961). However, the church falls short of meeting the "great and irreparable injury" prong of that test. In *Bender*, our predecessor court stated:

> Compelling a party, in advance of trial, to produce for the benefit of his adversary information or evidence, even assuming he should not be required to produce it under the Rules, probably would not constitute 'great and irreparable injury' within the meaning of that phrase." However, . . . in a certain class of cases, of which this is one, the showing of such grievous injury is not an absolute necessity. . . . [I]f an erroneous order results in a substantial miscarriage of justice and the orderly administration of our Civil Rules necessitates an expression of our views, we may, and in the proper case should, decide the issue presented.

Id. "This Court has consistently recognized an exception to the irreparable harm requirement in 'certain special cases.'" *Ridgeway Nursing & Rehab. Facility, LLC v. Lane*, 415 S.W.3d 635, 639-40 (Ky. 2013). In such cases, this Court will entertain the petition "provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Bender*, 343 S.W.2d at 801. We review writs under the "certain special cases" exception de novo. *Grange*, 151 S.W.3d at 810.

With that precedent in mind, we will determine if a substantial miscarriage of justice will result if the trial court's ruling regarding discovery is erroneous and if the correction of that error is necessary to the orderly administration of justice.

In *St. Joseph Catholic Orphan Soc'y v. Edwards*, we examined the ecclesiastical-abstention defense; there, we held:

> Like other affirmative defenses recognized by this Commonwealth, ecclesiastical abstention operates in confession and avoidance, meaning that even assuming the plaintiffs allegations to be true, he is nonetheless not entitled to recover. So, . . . we draw an analogy to perhaps the most commonly encountered defense of confession and avoidance, qualified governmental immunity, and aver that the ecclesiastical-abstention defense is to be applied in a manner that is procedurally consistent with the application of qualified governmental immunity.

449 S.W.3d 727, 737 (Ky. 2014). Here, the trial court would have allowed broad discovery regarding the underlying merits of the case before making a ruling as to the church's immunity. However, "[i]mmunity from suit includes protection against the 'cost of trial' and the 'burdens of broad-reaching discovery'. . . ." *Lexington-Fayette Urban Cty. Gov't v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982)). A party entitled to immunity is immune not only from liability, but also "from the burdens of defending the action." *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006).

Because the church should not be subjected to the broad-reaching discovery allowed under the trial court's order prior to an immunity determination, we affirm the Court of Appeals' denial of discovery which does not pertain to the issue of the church's immunity. "Because immunity is designed to relieve a defendant from the burdens of litigation, it is obvious that a defendant should be able to invoke [it] at the earliest stage of the proceeding. . . . [O]nce the defendant raises the immunity bar by motion, the court must proceed expeditiously." *Rodgers v. Commonwealth*, 285 S.W.3d 740, 755 (Ky. 2009). To allow such broad discovery before the trial court rules on the church's immunity would result in "a substantial miscarriage of justice . . . if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Bender*, 343 S.W.2d at 801. This is simply not the manner in which an immunity case should proceed. If immune, the church should not be subject to the burdens of defending Hoey's defamation action.

However, denying such broad discovery as to the issues underlying the merits of Hoey's defamation claim does not foreclose all discovery in this matter. The trial court's continuation with discovery regarding the church's immunity would neither amount to a substantial miscarriage of justice nor fly in the face of orderly judicial administration. The immunity issue is squarely before the trial court and we will not hinder the parties' access to discovery materials pertaining to that narrow issue. The trial court will be in the best position to control the flow of discovery. In *Kirby v. Lexington Theological Seminary*, we acknowledged that "excessive entanglement [with church doctrine] may be a real possibility during the litigation but . . . the trial judge has adequate discretion to control discovery and the flow of evidence so that if ecclesiastical matters overtake the litigation, the case can be stopped on summary judgment or simply dismissed." 426 S.W.3d 597, 619 (Ky. 2014). We do not believe very limited discovery concerning only the issue of immunity merits the extraordinary remedy of a writ. After all, our case law has made it clear: "[e]xtraordinary writs are disfavored . . . ." *Buckley v. Wilson*, 177 S.W.3d 778, 780 (Ky. 2005).

The church also asks this Court to take up the issue of the church's immunity at this juncture.[1] We decline to do so. We have held, "[t]he decision of whether immunity applies in a given situation involves the determination of the material facts; however, the question of immunity is one of law and is to be determined by the trial court." *Norton Hosps., Inc. v. Peyton*, 381 S.W.3d 286, 290 (Ky. 2012). Once the trial court rules on the church's immunity, we note that "an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). That is the proper avenue for this case to proceed. We see no need in this matter to open this Court to an issue not yet ripe for our review (and, indeed, one that may never become ripe for our review depending on the proceedings below).

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[1] The dissent would dismiss the underlying defamation claim on grounds of immunity. However, as noted above, this is a determination for the trial court. When addressing this issue, the trial court will need to determine whether Hoey's actions in approving a transfer of grant money without ensuring that the church's incorporation criteria were followed raised an issue of ecclesiastical doctrine (thus giving rise to immunity) or if they amounted to a mere failure to follow organizational procedures. The dissent would require that any action of a religious organization would be beyond judicial review without any discovery to determine whether that action was based upon ecclesiastical doctrine. As we have held:

> the ecclesiastical abstention doctrine is primarily interested in preventing any chilling effect on church practices as a result of government intrusion in the form of secular courts. But when the case merely involves a church, or even a minister, but does not require the interpretation of actual church doctrine, courts need not invoke the ecclesiastical abstention doctrine. No entanglement concern arises as a result of the mere reference of religion.

Kirby, 426 S.W.3d at 619. That is the issue here to be determined by the trial court—and the reason we hold this case should not end at this juncture.

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

Furthermore, the dissent asserts "[i]t is absurd to hold that the Church could not be sued for firing Hoey because it falsely found him in violation of Presbyterian ethical policy, while inconsistently holding that the Church can be sued for falsely saying he was fired for violating Presbyterian ethical policy." There are two problems with this position. First, discovery has not been held in this case to determine whether Hoey's actions were a violation of church doctrine or were merely a procedural mistake. Second, there is a vast difference between holding that the relationship between a minister and his congregation requires such a degree of confidence that he must be considered an at-will employee versus considering a defamation claim regarding a written publication stating that the minister acted unethically. The firing would be based upon a problem with the relationship between the minister and his congregation, whereas the written publication of the statement that the minister was unethical could destroy the minister's relationship with the public at large.

The dissent would dismiss the underlying defamation claim on grounds of immunity. However, as noted above, this is a determination for the trial court—and we should not invade that court's province. Ultimately, this case hinges on whether the lofty writ standard is met. Here, no substantial miscarriage of justice will result even assuming the trial court's ruling regarding narrow discovery relating only to the issue of immunity is erroneous. If the trial court determines that the church is immune, the inquiry need go no further. If that court determines it is not, that decision is immediately appealable. This simply does not rise to the high level necessary for this Court to grant an extraordinary writ. If the lower court proceeds erroneously, there is an adequate remedy by appeal. This case could follow the normal avenues of appeal without this Court accepting an *ordinary* immunity ruling as grounds for an *extraordinary* writ and throwing open the floodgates for such motions. This Court has provided the proper avenue for such a determination—and that is the manner in which the case should proceed.

III. CONCLUSION

We hold that the church satisfied the "certain special cases" writ criteria as to broad-reaching discovery. However, it failed to meet this lofty standard as to limited discovery the trial court may deem necessary in order to determine whether the church is immune from the present suit. Therefore, if it deems necessary, the trial court should allow that limited discovery to proceed and rule on the issue of immunity expeditiously. The case should not proceed—whether with additional discovery (apart from that the trial court deems necessary in making the immunity determination) or otherwise—until the trial court rules on the threshold immunity issue. This Court declines the church's request to determine the issue of immunity. Therefore, we affirm the Court of Appeals' judgment. The case underlying this writ action should proceed in the trial court consistent with this opinion.

All sitting. Minton, C.J., Hughes, and Keller, JJ., concur. Venters, J., dissents by separate opinion which Cunningham and VanMeter, JJ., join.

FAMILY LAW

DIVORCE

CHILD CUSTODY

CHILD SUPPORT

ATTORNEY FEES

KRS 403.220 does not require that trial court find financial disparity between parties before awarding attorney fees; rather, trial court must only consider financial resources of parties — Overruled previous cases, such as, *Neidlinger v. Neidlinger* (Ky. 2001), *Bishir v. Bishir* (Ky. 1985), *Hale v. Hale* (Ky. 1989), and *Sullivan v. Levin* (Ky. 1977), insofar as they required financial disparity in order for attorney fees to be awarded — Financial disparity is still viable factor for trial courts to consider in following KRS 403.220 and in looking at parties' total financial picture — Trial court is in best position to observe parties' conduct and tactics which waste court's and attorneys' time and has wide latitude to sanction or discourage such conduct —

Laura Faye Smith v. Jimmy Howard McGill, Jr. (2017-SC-000395-DGE); On review from Court of Appeals; Opinion by Justice Wright, *reversing and reinstating*, rendered 9/27/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

I. BACKGROUND

Appellant, Laura Faye Smith, and Appellee, Jimmy Howard McGill, married in 1994 and divorced in 2005 in Arkansas. The Arkansas trial court awarded Laura with primary residential custody of their three children, with Jimmy having unsupervised visitation. Laura subsequently moved to Kentucky and filed the decree in Jefferson Family Court in 2009.[1] The parties' custody and support action has since been in that court. The matter currently before the Court arose when Jimmy filed a motion to become the primary residential custodian of his and Laura's two youngest daughters (the oldest having already been emancipated). The Jefferson Family Court denied Jimmy's motion for primary custody in an order dated January 21, 2016.

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[1] The Kentucky and Arkansas judges teleconferenced regarding the proper jurisdiction for the case. Thereafter, the Arkansas judge allowed the parties to submit evidence before holding a hearing to determine whether it would exercise continuing, exclusive jurisdiction over the case. Both parties appeared at the hearing personally and by counsel. The Arkansas court declined "to exercise continuing, exclusive jurisdiction," as the "evidence necessary to support or disprove [Jimmy's] allegations exists in the State of Kentucky." The court went on to find that "the Children, who are located in Kentucky, should not be forced to Arkansas to hear these matters due to the necessary expense and potential disruption to the lives of the Children," and that "a more convenient forum exists" in Kentucky.

After the trial court's January 21 order, Laura made a motion for attorney's fees. On June 3, 2016, the court ordered Jimmy to pay the full amount of Laura's attorney's fees, totaling $26,352.23. Jimmy moved the court to alter, amend or vacate both the January 21 order denying him primary residential custody and the June 3 order awarding Laura's attorney's fees. On August 12, 2016, the court denied Jimmy's motion to alter, amend, or vacate its January 21 custody order. However, the court amended the June 3 order awarding attorney's fees. Upon reviewing Laura's annual income of $41,900 and Jimmy's annual income of $32,500, the court found it improper to order Jimmy to pay Laura's full attorney's fees and reduced the amount to $10,000. Jimmy appealed this order to the Court of Appeals. The Court of Appeals affirmed the trial court's decision pertaining to the custody of the children and Jimmy did not appeal that ruling to this Court. However, the Court of Appeals reversed and remanded Laura's award of attorney's fees determining that no actual disparity existed between Laura's and Jimmy's income to justify an award of attorney's fees to Laura pursuant to KRS 403.220. The Court of Appeals held that the trial court is free to issue an order for attorney's fees pursuant to CR 37, if it believes it is necessary and if the record supports such a measure. Laura asked this Court for discretionary review, which we granted. We now reverse the Court of Appeals.

II. ANALYSIS

In its order granting Laura's motion for attorney's fees, the trial court cited KRS 403.220 and *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990). Jimmy moved the court to alter, amend, or vacate its order awarding attorney's fees. In its order on Jimmy's motion, the trial court stated it was under the mistaken belief that Laura was not employed. Therefore, the court believed Laura had no income when it initially analyzed the parties' financial resources. The court then stated that Laura's annual income was actually $41,900 and Jimmy's annual income was $32,500. The order stated that "it was improper to order Respondent to pay Petitioner's full attorney's fee" and went on to quote *Gentry*, which states "many of the costs and fees were unnecessary in the sense that a good deal of the court's time and a substantial part of the costs and fees assessed could have been avoided by candor and cooperation." 798 S.W.2d at 936. Preceding the citation to *Gentry*, the court amended the award of attorney's fees to $10,000 as a more appropriate sum.

Laura asserts that "Jimmy, th[r]ough his actions, subjected not only Laura but also the Minor Children to litigation and an IFA [Issue Focused Assessment] all of which were very expensive . . . ." Laura contends that Jimmy behaved in such a way that would allow the court to sanction him through an award of attorney's fees.

In *Gentry*, the husband, Tom, argued that the trial court erred by awarding attorney's fees and costs to his wife, Kathy. This Court stated "[i]n this instance, financial inequality justifies the award, KRS 403.220. Tom's obstructive tactics and conduct, which multiplied the record and the proceedings, justify both the fact and the amount of the award." *Gentry*, 798 S.W.2d at 938. Further, "the circuit court found that a significant portion of the attorney's fees was incurred as a result of Tom Gentry's obstructive tactics and refusal to

cooperate in the proceedings." *Id.* However, much of the discussion of attorney's fees in *Gentry* seems to be based primarily upon an award of expenses pursuant to CR 37.01, which deals with discovery. The Court of Appeals held that the present case should be remanded to the trial court to determine if attorney's fees were justified pursuant to CR 37; however, the parties' arguments are not based on discovery. Therefore, that rule has no applicability here.

Laura argues that the plain language of KRS 403.220 does not require a financial imbalance for an award of attorney's fees. She insists the statute merely requires the trial court to consider the financial resources of both parties in determining the reasonable amount for attorney's fees. Jimmy contends that the requisite factors did not exist for an award of attorney's fees. Further, he contends that case law prohibits the court from awarding attorney's fees based on KRS 403.220 without a finding of disparity of income. The Court of Appeals held that: "[a]s even *Gentry* holds, an actual disparity must exist before an award based also upon a party's conduct can be made. No such disparity existed according to the evidence the trial court cited and relied upon for the award of attorney's fees to Laura." For the following reasons, we agree with Laura and hold that the trial court need not find a financial disparity before awarding attorney's fees—that it must only consider the financial resources of the parties.

For more than forty years, this Court has interpreted KRS 403.220 to require a disparity of income as the threshold requirement in awarding attorney's fees. For example, in *Sullivan v. Levin*, 555 S.W.2d 261, 263 (Ky. 1977), this Court stated "[i]n other words, the allowance is authorized by the statute [KRS 403.220] only when it is supported by an imbalance in the financial resources of the respective parties." In that case, the Sullivans divorced and reconciled, and the wife's attorney brought an action for his fees. The Court allowed the fees.

Sullivan was overruled by *Hale v. Hale*, 772 S.W.2d 628 (Ky. 1989), on the issue of whether attorney's fees could be paid directly to counsel. However, *Hale* upheld *Sullivan*'s interpretation requiring a financial imbalance in order for a court to award attorney's fees pursuant to KRS 403.220. This Court held "[t]he contention of the respondent is that KRS 403.220 is solely for the benefit of the client and not the attorney; that its purpose is simply to permit recovery of a part or all of the expenses incurred in a divorce case by a party suffering from an unfavorable financial imbalance." *Id.* at 629.

This interpretation was further upheld in *Bishir v. Bishir*, 698 S.W.2d 823, 826 (Ky. 1985). In *Bishir*, the wife was awarded attorney's fees for post-judgment proceedings. This Court held that there were sufficient findings in the record to support the award of the fee. We stated "KRS 403.220 permits a court to order a party to pay the adverse party's attorney's fees 'after considering the financial resources of both parties.' Such an order is appropriate 'only when it is supported by an imbalance in the financial resources of the respective parties.'" *Id.* (citing *Sullivan*, 555 S.W.2d at 263).

More recently, in *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001) this Court held "KRS 403.220 authorizes a trial court to order one party to a divorce action to pay a 'reasonable amount' for the attorney's fees of the other party, but only if there exists a disparity in the relative financial resources of the parties in favor of the payor." *Id.* (citing *Sullivan*, 555 S.W.2d at 263).

As detailed above, this interpretation has long stood in this Court. However, we will no longer read a requirement into the statute that is not found within its plain language. It is the job of this Court to neither make law nor set policy—and that is what these prior opinions accomplished by adding to the unambiguous words of the legislature. "In a democracy, the power to make the law rests with those chosen by the people. [A court's] role is more confined—'to say what the law is.'" *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015)(citing *Marbury v. Madison*, 5 U.S. 137, 176 (1803)). We guard against overstepping those bounds—and correct any past infractions when we revisit them. Therefore, today we overrule this line of cases insofar as they require a financial disparity in order for attorney's fees to be awarded and return to the plain language of the statute. That language requires only that the trial court consider the financial resources of the parties before awarding attorney's fees—not that a financial disparity exist.

When a statute is plain and unambiguous, we need look no further than the statutory language in interpreting it. *Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet*, 689 S.W.2d 14 (Ky. 1985) ("An unambiguous statute is to be applied without resort to any outside aids."). "This Court has repeatedly held that statutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002).

KRS 403.220 reads:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

The statutory language here is plain: after a trial court considers the parties' financial resources, it may order one party to pay a reasonable amount of the other party's attorney's fees. The statute does not require that a financial disparity must exist in order for the trial court to do so; rather, that language is a creature of case law born out of this Court's decisions—and today, we slay this forty-year-old dragon hatched from precedent.

While financial disparity is no longer a threshold requirement which must be met in order for a trial court to award attorney's fees, we note that the financial disparity is still a viable factor for trial courts to consider in following the statute and looking at the parties' total financial picture. Here, the trial court did just what the statute directs—it considered the financial resources of the parties. Admittedly, the court was erroneous in its first consideration, as it believed Laura was unemployed when it made its initial ruling awarding her attorney's fees. However, the trial court corrected this error when it amended that order to award Laura only $10,000 in fees. In its second order, the trial court specifically discussed and listed the parties' incomes.

Because the trial court followed the dictates of the statute, it did not err in its award of attorney's fees. We agree with the portion of *Gentry* which holds, "[t]he amount of an award of attorney's fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct." 798 S.W.2d at 938. The trial court was certainly in the best decision to observe the lack of candor and cooperation which led to the accrual of many of the fees in this case—which it noted in its order.

Because the trial court acted within its discretion when assessing attorney's fees against Jimmy after considering the parties' financial resources, we reverse the Court of Appeals and reinstate the trial court's judgment.

III. CONCLUSION

For the foregoing reasons, we overrule the above cited line of cases requiring trial courts to find a financial disparity before awarding attorney's fees, reverse the Court of Appeals, and reinstate the judgment of the Jefferson Family Court.

All sitting. All concur.

CRIMINAL LAW

VOIR DIRE

PROCEEDING WITH VOIR DIRE WHEN DEFENDANT IS UNABLE TO BE PRESENT

SELF-DEFENSE

IMMUNITY FROM PROSECUTION

Defendant was found guilty of two counts of murder — Defendant appealed as matter of right — REVERSED, VACATED, AND REMANDED — Trial court committed reversible error when it conducted voir dire when defendant was unable to be present due to illness — Defense counsel objected to proceeding with voir dire without defendant's presence — There was no indication that defendant waived his constitutional right to be present and participate in jury selection — Defendant has right to be present at any stage of criminal proceeding that is critical to its outcome if his presence would contribute to fairness of procedure — Error was not harmless beyond a reasonable doubt — Trial court did not err in determining that defendant was not entitled to immunity under KRS 503.085 — Trial court found conflicting evidence as to whether defendant's use of deadly force was justified — Trial court had substantial basis for

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denying defendant's motion for immunity —

William Truss v. Com. (2016-SC-000337-MR); Jefferson Cir. Ct., McDonald-Burkman, J.; Opinion by Justice Wright, *reversing, vacating, and remanding*, rendered 9/27/18. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

A Jefferson Circuit Court jury convicted Appellant, William Truss, of two counts of murder. In accordance with the jury's recommendation. Truss was sentenced to life without the possibility of parole for twenty-five years. Truss now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Truss asserts six claims of error in his appeal: (1) the trial court improperly conducted voir dire when Truss was unable to be present, (2) the trial court erred in failing to instruct the jury on intoxication and extreme emotional disturbance, (3) the trial court erred in disallowing certain opinion testimony, (4) the Commonwealth performed improper impeachment, (5) the trial court erred in not allowing evidence about questions Truss asked after the shooting, and (6) the trial court erred when it failed to grant immunity pursuant to KRS 503.085(1). Only the first and the sixth issues need be addressed, as the court abused its discretion by proceeding with voir dire without Truss present. For the following reasons, we reverse Truss's convictions and corresponding sentence and remand to the trial court.

I. BACKGROUND

Truss was indicted on two counts of capital murder for shooting and killing two individuals, Menchester Bray and Derek Slade. We will discuss the events surrounding the murders below as required for our analysis.

Truss's trial commenced in March 2016 with voir dire beginning on March 4, 2016. Since this was a capital murder case, the court conducted individual questioning of the potential jurors to death qualify the jury. At the start of the voir dire proceedings on March 9, Truss's attorney informed the court that Truss had not been transported from the jail due to illness.

Truss's attorney asked for a continuance until the next day when he hoped Truss may be able to participate. The following exchange ensued between counsel and the trial judge:

> Judge: We're in a real situation here. This is individual voir dire in a capital murder case.
>
> Defense: I understand your honor.
>
> Judge: And, and I would like to be able to accommodate him. Um, however, 1 have, uh, I don't know, 24, 50, no, I have about 30 people coming today, roughly, um, all scheduled at a particular time. Uh, [prosecutor], do you have any comments.
>
> Prosecutor: I request that we proceed.
>
> Judge: I certainly do not want this to be an issue later. Um, apparently, he's not going to feel better in an hour. Uh, and I don't know if he's going to be better tomorrow. If he has what we've all in here had, it's not quick. Any comments further?
>
> Defense: Only that we don't know the nature of the illness. Um, but we can presume of course we've all been hacking and coughing and it might have something to do with that. But we haven't heard whether he's been to medical or whether he's been diagnosed with anything. Um, so we are unaware of the nature of the illness—
>
> Judge: Well, he is certainly entitled to be present at every stage of the proceedings and this is an important one and he has been present. Um, his illness is unfortunate in that it's not a, a proceeding I can just delay. Uh, does anybody have any, uh, I know I'm asking off the top of your head, any authority for the court to, um, I mean, I, I, I just want to be, I don't want this to come back as the reason that there's an issue later, I really don't, no one does. Um, I—
>
> Defense: Judge, I'm worried what the jury will think when they don't see Mr. Truss here. I think that that's really—
>
> Judge: They can know he's ill. Um, to me that's—
>
> Defense: Well, that, put that aside, also his right to be here, of course—
>
> Judge: And I understand that, and he's unable to or unwilling, but unable is what the court is going with.
>
> Defense: That's what we understand.
>
> Judge: Um, I don't know that I have any option but to proceed because, again, uh, of, the fine-tuned timing of all this, so—
>
> Defense: If, let me add your honor, if it's a matter of, of balancing, uh, I'm not up on the case law, I wasn't prepared to deal with this today. But, I don't think the severity of the charge or the inconvenience to the jurors rises to the level of overcoming his right to be here. I'd just like to put that on the record because I haven't done the research—
>
> Judge: Right.
>
> Defense: —that would be what my gut would tell me.
>
> Judge: Right.
>
> Defense: Uh, and by asking the court for an admonition or an instruction or something along those lines, which the court might. I think be more appropriate if the court would do it at the beginning of each group after they've watched the video or something along those lines. By asking for that and the court granting that, isn't a waiver, I guess, of the, of the argument that I—
>
> Judge: Right.
>
> Defense: —that I've made to the court.
>
> Judge: And if Mr. Truss is feeling better, of course he can come at any time. The defendants aren't required to be here. Uh, I know he wants to be here, but, I mean, this was, I, I just, I don't, have the luxury to grant any motion to reassign these 30 people today because of our schedule. So, if the defense would like, I will certainly, each group will know that Mr. Truss is ill and cannot be with us today. But hopes, hope is, he'll be back Friday. And that's the big thing. He needs to be back Friday for sure.

The court denied defense counsel's motion for a continuance and proceeded with this day of voir dire without Truss being present. On this day, the thirty-one jurors were questioned individually regarding their views on the available penalties—including death. Based on these questions, sixteen of the thirty-one jurors were excused. The remaining fifteen jurors (along with 39 other jurors remaining after two previous days of individual voir dire) returned the next day for general voir dire. The case proceeded to trial, and Truss was convicted of two counts of murder and sentenced to life without parole for 25 years.

II. ANALYSIS

A. Voir Dire

Truss argues that, in conducting voir dire outside his presence, the trial court denied his rights pursuant to the Fourteenth Amendment to the United States Constitution, Section 11 of the Kentucky Constitution, and RCr 8.28.

On the day in question. Truss did not have a personal presence in the courtroom while the jurors were being questioned regarding the death penalty. Due to Truss's absence, he was unable to assist his counsel in evaluating the jurors. Though the potential jurors were only asked questions pertaining to the penalty phase. Truss had a constitutional right to be present and able to participate on this day of jury selection. Further, there is no indication in the record that Truss waived this right. His counsel objected to the proceeding of voir dire.

Because this alleged error impacted Truss's Fourteenth Amendment right to Due Process, we are bound by the holdings of the Supreme Court of the United States as to this federal constitutional issue.

The United States Supreme Court held in *Kentucky v. Stincer* that "[a] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." 482 U.S. 730, 745 (1987). Further, the Court in *Lewis v. United States* held "the defendant's 'life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors.'" 146 U.S. 370, 373 (1892).

We also find two United States Court of Appeals' decisions instructive. First, in *United States v. Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968), the Second Circuit held "there is no way to assess the extent of the prejudice, if any, a defendant might suffer by not being able to advise his attorney during the impaneling of the jury." Furthermore, in *United States v. Gordon*, 829 F.2d 119 (D.C. Cir. 1987), the D.C. Circuit held that a defendant's complete absence from the impaneling of his jury was in violation of the defendant's rights.

In *Gordon*, the defendant remained in a holding cell throughout the entire jury selection process

upon the request of his attorney. He entered the courtroom once the jury had been impaneled. Gordon was convicted and subsequently moved for a new trial alleging that his absence from the jury selection process violated his right to be present at all stages of his trial. The Court of Appeals held that Gordon had a right to be present that had not been waived and his total absence from the proceedings resulted in a reasonable possibility of prejudice. *Gordon* held that a defendant has a constitutional right to be present at voir dire as presence at jury selection had a "'reasonably substantial'" relation to his "'opportunity to defend against the charge.'" *Gordon*, at 124 (citing *United States v. Gagnon*, 470 U.S. at 526 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934))). "That . . . presence at voir dire was substantially related to his defense is indicated by the fact that he had no opportunity "to give advi[c]e or suggestion[s] . . . to . . . his lawyers." *Gordon*, 829 F.2d at 124 (quoting *Snyder*, 291 U.S. at 106). "During voir dire, for example, 'what may be irrelevant when heard or seen by [defendant's] lawyer may tap a memory or association of the defendant's which in turn may be of some use to his defense.'" *Id.* Further, "[a] defendant's presence at jury selection is also necessary so that he may effectively exercise his peremptory challenges." *Id.*

Truss has a constitutional right to be present at jury selection. These due process rights were violated when voir dire was commenced in his absence. We hold, consistent with the holding in *Crutcher*, there is no way to assess the extent of prejudice that Truss may have endured by not being able to assist his counsel in the impaneling of the jury on this day. The court erred when it declared Truss was unable to attend and proceeded with voir dire in his absence. We must now determine if that error requires reversal.

In *Chapman v. California*, the Supreme Court of the United States held that before a federal constitutional error can be held harmless, the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. 386 U.S. 18, 24 (1967). Therefore, having held the trial court erred in conducting voir dire in Truss's absence, we must now determine if that error was harmless beyond a reasonable doubt.

In *Staples v. Commonwealth*, this court stated, "[h]armless error analysis applied to a constitutional error, . . . involves considering the improper evidence in the context of the entire trial and asking whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 454 S.W.3d 803, 826-27 (Ky. 2014) (internal quotations omitted). Put differently, we have also stated that an error may not be deemed harmless beyond a reasonable doubt unless "there is no reasonable possibility that it contributed to the conviction." *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009).

Here, the trial court's error does not fit within the narrow scope of harmless beyond a reasonable doubt. By being absent on the day in question. Truss was unable to assist his counsel in evaluating potential jurors. We can only speculate as to the extent that Truss would have assisted his counsel on this day of voir dire and the impressions and information that he might have gleaned which may have affected the exercise of his preemptory challenges.

As the Second Circuit noted in *Cohen v. Senkowski*, 290 F.3d 485, 489-90 (2d Cir. 2002):

> the defendant's "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors." *Lewis v. United States*, 146 U.S. 370, 373, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). As the Supreme Court recognized in *Snyder*, it is in the defendant's "power, if present, to give advice or suggestion or even supersede his lawyers altogether" at *voir dire*. 291 U.S. at 106, 54 S.Ct. 330.

Moreover, the Court in *Lewis* pointed out that

> we must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.

146 U.S. at 376.

In the present case. Truss was harmfully deprived of this right pertaining to the thirty-one jurors that were questioned in his absence.

The Commonwealth argues that because the questions pertained only to the death qualification of the jurors on the day Truss missed and his participation would have been minimal, any violation of his rights was harmless. However, as noted. Truss had a right to be present at every critical stage of the proceeding and this Court is not apt to determine the extent of prejudice that conducting this voir dire may have had on Truss's conviction. His rights were violated even had his participation been minimal. Truss being present during group voir dire the following day does not rectify the violation of his rights—or remove any harm. He missed an entire day of observing jurors' reactions to questions dealing with his very life or death. We cannot speculate as to whether a juror's body language or mannerisms would have led him to ask for a juror to be stricken for cause, or to have used a peremptory strike.

Further, the Commonwealth cites *Soto v. Commonwealth*, 139 S.W.3d 827, 851 (Ky. 2004) asserting that Truss failed to articulate any harm that he suffered as a result of missing an entire day of individual voir dire. However, Truss did argue the harm suffered: a violation of his rights by missing a critical stage of the proceeding. In *Soto*, five jurors were excused due to hardship excusals on their juror qualification forms outside the defendant's presence. Two jurors were also excused for situational bias. There, we held the error was harmless. The jurors excused in *Soto* are distinguishable from the jurors excused in the case at hand. Soto could not have contributed any additional information regarding the two jurors excused for situational bias, and the five jurors excused for hardship were within the trial judge's discretion and those excusals were not required to be made in open court or in the presence of or in consultation with any parties or their counsel. *Id.* at 852. (*citing Caudill v. Commonwealth*, 120 S.W.Sd 635 (Ky. 2003)). Truss had a constitutional right to be at this day of voir dire and could have contributed to the jury-selection process in which more than half of the jurors present that day were excused.

The Commonwealth also cites *Cantrell v. Commonwealth*, 288 S.W.3d 291, 297 (Ky. 2009), in support of its contention that any error in Truss's case was harmless beyond a reasonable doubt. In that case, Cantrell arrived to the second day of trial late—but within a couple minutes of the start of a police officer's testimony. This Court held that Cantrell's absence was harmless beyond a reasonable doubt. These facts are distinguishable from the case at hand, as Cantrell was absent for a couple of minutes of witness testimony, during which the witness was merely answering background questions, whereas Truss was absent from an entire day of jury selection in which sixteen jurors were excused.

We are not in the position to speculate as to the interactions Truss may have had on this day. To say that the court's error was harmless beyond a reasonable doubt would be an injustice to Truss and deprive him of his constitutional rights.

B. Immunity

Truss argues that the trial court committed reversible error when it failed to grant immunity pursuant to KRS 503.085(1).[1] While we will not "revisit whether there was probable cause" in cases in which "a jury has already convicted the defendant—and, thus, found [his actions were] unlawful beyond a reasonable doubt" if we find no flaw with that conviction, that is not the case here. *Ragland v. Commonwealth*, 476 S.W.3d 236, 246 (Ky. 2015). In the present case. Truss "has indeed shown his conviction to be flawed due to the . . . errors discussed above." Therefore, we must "address the merits of his immunity claim, which would preclude the prosecution from going forward on remand were this Court to find error in the trial court's denial of immunity." *Id.*

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[1] KRS 503.085(1) reads in pertinent part; "A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force . . . ." The statutes referenced above pertain to the justifiable use of physical force against another.

In the present case, the trial court issued an order denying Truss's immunity claim. The court stated that it reviewed the discovery materials, which included an investigative letter, search warrants for the vehicle involved and the defendant, DNA analyses, autopsy results for both victims, firearm examination results, photographs, the 911 tape, the statement of Bernard Murph,[2] and Truss's statements. The trial court found that conflicting evidence existed as to whether Truss's use of deadly force was justified.

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[2] Bernard Murph was a witness at trial and a friend of the parties. He was present with Truss, Bray, and Slade on the night the murders occurred.

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The standard of review of a denial of a defendant's motion to dismiss for immunity from prosecution under KRS 503.085 is whether the trial court had a "substantial basis" for finding probable cause to conclude that the defendant's use of force was unlawful. *Ragland*, 476 S.W.3d at 246 (*citing Commonwealth v. Lemons*, 437 S.W.3d 708, 715 (Ky.2014)). We hold the trial court had a substantial basis for denying Truss's motion for immunity. Truss, Bray, and Slade were the only individuals in the vehicle when the officers arrived, and the car had been pulled into a grassy area in an apparently intentional manner. Bray and Slade had been shot and killed, with gunshot wounds to the head (Bray suffered one gunshot wound to the head and Slade suffered one gunshot wound to the head and another to the neck), and Truss had elements associated with gunshot residue on his hands.

Further, one firearm and three shell casings (all from the same firearm) were located in the vehicle. Bray and Slade's DNA was found on Truss, and Truss suffered no injuries. Immediately after the shooting. Truss called 911 and stated he had fired some shots. Notably, he did not state anything about the victims attacking him. Murph witnessed Truss, Bray, and Slade get into the vehicle. Murph further testified that Truss had been drinking, and that after the shooting Truss had told him that he had woken up in the vehicle, wasn't sure where he was, and felt in his pockets and believed his money was missing. Murph stated that Truss told him that he shot Bray and Slade.

The foregoing constitutes a substantial basis for finding probable cause and denying Truss's motion for immunity. Therefore, the trial court did not err in determining that Truss was not entitled to immunity under KRS 503.085.

III. CONCLUSION

For the foregoing reasons, we reverse the circuit court, vacate the associated sentence, and remand this matter to the circuit court for a new trial in which Truss is present during all critical stages of the proceeding. Having reversed on this issue and addressed Truss's immunity argument, we need not address the additional allegations of error, as they are dependent upon the facts which will be developed on retrial.

All sitting. All concur.

TORTS

NEGLIGENCE

NEGLIGENCE PER SE

COMMON LAW NEGLIGENCE CLAIM

COMPLIANCE WITH KOSHA REGULATIONS

EMPLOYEE v. INDEPENDENT CONTRACTOR

INDEPENDENT CONTRACTOR INJURED FROM FALL FROM ROOF WHILE TRIMMING TREES

CIVIL PROCEDURE

APPELLATE PRACTICE

APPELLATE REVIEW OF DENIAL OF MOTION FOR SUMMARY JUDGMENT

APPELLATE REVIEW OF DENIAL OF MOTION FOR DIRECTED VERDICT

Auslander Properties, LLC (LLC) owned residential and commercial real estate — Sole owners of LLC were Steve Auslander (Auslander) and his wife — Auslander managed business and performed ordinary tasks of landlord — Auslander also performed some basic maintenance and repair work on LLC's properties, but arranged for others to perform more demanding tasks — One of LLC's tenants complained of tree limbs hanging over building — Auslander contacted plaintiff, who was experienced handyman and had occasionally performed maintenance and repair work for LLC — Plaintiff had experience in trimming trees and had trimmed trees while working from rooftop — Plaintiff decided best way to trim trees was from roof of building — Plaintiff brought his own ladder and tools — Auslander assisted plaintiff by pulling rope to guide limb's fall — After successfully trimming first tree, plaintiff stepped from roof's solid shingled surface onto section of decorative wooden rafters that was not designed to support his weight — Plaintiff fell 11 feet onto concrete surface and was severely injured — Plaintiff filed suit against LLC alleging that it was negligent for breaching common law duties owed by landowner to invitees on property and negligent per se because LLC failed to comply with Kentucky Occupational Safety and Health Act (KOSHA) regulations requiring employers to provide safety equipment for employees working at heights above 10 feet — Trial court overruled parties' motions for summary judgment on negligence per se claim — Jury found for LLC on common law negligence claim; however, jury found for plaintiff under negligence per se theory — Court of Appeals affirmed trial court's conclusion that LLC was employer under KOSHA and, therefore, subject to KOSHA regulations, and that plaintiff was within scope of persons protected by KOSHA — REVERSED AND REMANDED — LLC is entitled to dismissal of negligence per se claim — As preliminary matter, Kentucky Supreme Court first addressed several procedural issues — LLC's notice of appeal following entry of judgment in trial court shows that it appealed from final judgment and trial court's orders denying LLC's motions for summary judgment and directed verdict — General rule is that order denying motion for summary judgment is not appealable — Further, such a denial is not reviewable on appeal from final order or judgment where question considered is whether or not there exists a genuine issue of material fact — However, exception to general rule applies where: (1) facts are not in dispute; (2) only basis of ruling is a matter of law; (3) there is denial of motion; and (4) there is entry of final judgment with appeal therefrom — In short, when material facts were not genuinely disputed and summary judgment was denied purely as matter of law, order denying summary judgment is properly reviewable on appeal from adverse final judgment, same as any other interlocutory ruling by trial court on question of law — Aforementioned elements are met in instant action — Plaintiff was working more than 10 feet off ground and he was not provided safety equipment to prevent his fall — Plaintiff's status as employee or independent contractor was matter of law — LLC's only basis for summary judgment was that KOSHA regulations pertaining to employees working from heights did not apply because LLC was not "employer" and plaintiff was independent contractor — Trial court denied LLC's motion and LLC appealed from final judgment — Similarly, LLC's motion for directed verdict with respect to negligence per se claim was purely based on argument of law pertaining to applicability of KOSHA regulations, with which LLC admittedly did not apply — LLC's failure to move for jnov did not waive its right to any appellate relief other than retrial — If LLC was entitled to dismissal of plaintiff's negligence per se claim due to inapplicability of KOSHA regulations, LLC is not subsequently deprived of that remedy because it failed to move for jnov — KOSHA imposes, in part, duty on employer to furnish his employees with place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm to employees — Plaintiff acknowledged at trial that he was independent contractor, rather than employee of LLC — Record confirms that he was independent contractor — Plaintiff alleged that since Auslander was employee of LLC, LLC was employer for purposes of KOSHA — Record did not indicate that Auslander was employee of LLC — Member of LLC conducting business and performing work as agent of LLC does not automatically become employee of LLC — Employer subject to KOSHA regulations for

protection of its own employees is also bound to comply with same regulations for benefit of independent contractor performing on employer's premises same work as employer's employees — However, when employer engages services of independent contractor for task alien to core function of employer's business, employer is relying on special expertise and ability of contractor to know and obey applicable safety standards of that activity — In instant action, plaintiff was independent contractor performing specialized service not typically associated with routine functions of LLC's property rental business — Responsibility for complying with safety laws applicable to that specialized work was on plaintiff — LLC had no duty of compliance; therefore, plaintiff's negligence per se claim fails as matter of law — Plaintiff was not entitled to directed verdict on his common law negligence claim — In context of premises liability claim, landowner is not liable to independent contractor for injuries sustained from defects or dangers that independent contractor knows or ought to know — Only when defect or danger is hidden or known to owner, and neither known to contractor, nor such as he ought to know, is landowner liable for contractor's injuries absent warning — Evidence did not conclusively establish that roof presented any hidden danger or unreasonable risk of harm —

Auslander Properties, LLC v. Joseph Herman Nalley; Mary Nalley; Stephanie Nalley; Jewish Hospital; St. Mary's Healthcare, Inc., d/b/a Frazier Rehab Institute; and University Medical Center, Inc., d/b/a University of Louisville Hospital (2016-SC-000099-DG); On review from Court of Appeals; Memorandum Opinion of the Court, *reversing and remanding*, rendered 9/27/18. On 9/27/18, the Kentucky Supreme Court granted the petition for rehearing; withdrew the original opinion, which was rendered on 6/14/18, and set forth at 65 K.L.S. 6, p. 37; and reissued the opinion as set forth below. The Kentucky Supreme Court also corrected the original opinion, which had incorrectly identified Appellees Jewish Hospital, St. Mary's Healthcare, Inc. d/b/a Frazier Rehab Institute, and University Medical Center, d/b/a University of Louisville Hospital as sharing counsel in common with the Nalleys. The new opinion corrects the alignment of counsel. **[This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]**

Appellant, Auslander Properties, LLC (the LLC), appeals from a Court of Appeals' decision affirming a judgment of the Nelson Circuit Court in favor of Appellee, Joseph Herman Nalley (Nalley).[1] Nalley was awarded compensatory damages for serious personal injuries he sustained while working on a roof at property owned by the LLC. Consistent with the rulings of the trial court, the Court of Appeals determined that the LLC was an "employer" and was, therefore, subject to certain employee safety regulations promulgated pursuant to KRS Chapter 338, the Kentucky Occupational Safety and Health Act (KOSHA), and the federal Occupational Safety and Health Act (OSHA); and that the LLC had violated duties owed to Nalley under KOSHA. Upon discretionary review, for reasons stated below, we reverse the Court of Appeals and remand the case to the Nelson Circuit Court for dismissal of Nalley's claim.

[1] Stephanie Nalley; Mary Nalley; University Medical Center, Inc. D/B/A University of Louisville Hospital; Jewish Hospital; and St. Mary's Healthcare, Inc. D/B/A Frazier Rehab Institute are also appellees.

I. FACTUAL AND PROCEDURAL BACKGROUND.

At the time of Nalley's injury, the LLC owned three residential properties and a two-tenant commercial building in Bardstown, Kentucky, and one residential property in Louisville. Steve Auslander (Auslander), a retired dentist, and his wife were the sole members of the LLC and they had no employees. Auslander managed the business, performing the ordinary tasks of a landlord such as keeping the books, collecting rent, paying bills, communicating with tenants, and negotiating leases. He performed some basic maintenance and repair work on the LLC's properties, and he arranged for others to perform more demanding tasks.

When one of the LLC's Bardstown tenants complained that tree limbs overhanging the building were causing a problem, Auslander contacted Nalley. Nalley was an experienced handyman who had occasionally performed maintenance and repair work for the LLC. His experience included trimming trees for other property owners, and he had done so while working from a rooftop. He had also built porches and additions on homes, including building a garage and porch on his own home. Additionally, he had painted houses working from ladders. So, Auslander hired Nalley to remove the offending branches from three trees.

After viewing the job to be done, Nalley determined that the roof of the building provided the best approach to the branches he needed to cut. He brought his own ladder and his own tools. Nalley climbed to the roof with his saw. He tied a rope to the limb he intended to cut and dropped the end of the rope to the ground. As Nalley sawed the limb, Auslander assisted by pulling the rope to guide the limb's fall. No problem was encountered with the first tree. However, while working on the second tree, Nalley stepped from the roofs solid shingled surface onto a section of decorative wooden rafters that was not designed to support his weight. Consequently, he fell eleven feet onto a concrete surface and sustained severely disabling injuries, including fractures to his spine and traumatic brain injury.

Nalley filed suit alleging the LLC was negligent in breaching the common law duties owed by a landowner to invitees on the property. He also alleged that the LLC was negligent per se because it failed to comply with KOSHA regulations requiring employers to provide safety equipment for employees working at heights above 10 feet.[2] The trial court overruled the parties' competing motions for summary judgment on the negligence per se claim. The case was ultimately submitted to the jury on both theories of liability.

[2] Nalley asserted violations of KOSHA regulation 803 KAR 2:015 Section 3 and OSHA regulation 29 C.F.R. 1910.23.

With respect to the common law negligence claim, the jury answered special interrogatory instructions determining that: 1) the cosmetic nature of the exposed decorative rafters was either obvious to, or was known by, Nalley; and 2) in the exercise of ordinary care, the LLC should not have anticipated that Nalley might rely upon the load-bearing capability of the decorative rafters and fall as a result thereof.

The jury also determined by special interrogatory instructions the largely uncontested material facts pertaining to Nalley's KOSHA claim. Specifically, the jury found that Nalley was working at a height of more than 10 feet when he fell; that the LLC had not provided safety equipment that would have prevented his fall; and that the lack of such equipment was a substantial factor in causing Nalley's injuries. Consistent with those findings, the trial court entered judgment for Nalley.

The Court of Appeals affirmed the trial court's conclusion that the LLC was an "employer" as defined by KOSHA, and was, therefore, subject to KOSHA regulations, and that Nalley was within the scope of persons protected by the KOSHA regulations applicable to the LLC. The Court of Appeals relied primarily upon *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005), and *Pennington v. MeadWestvaco Corp.*, 238 S.W.3d 667 (Ky. App. 2007).

While the appeal was pending, this Court decided *McCarty v. Covol Fuels No. 2, LLC*, 476 S.W.3d 224 (Ky. 2015). In a footnote, the Court of Appeals factually distinguished *McCarty* from the instant case and noted that *McCarty* did not implicate KOSHA.

Nalley argued in the Court of Appeals that the LLC had not effectively preserved its argument against the applicability of the KOSHA regulations. Because that court decided and rejected the LLC's argument on the merits, it declined to address the preservation issue. On discretionary review, Nalley reasserts his preservation argument. Since it is potentially dispositive, we address it first.

II. THE LLC PROPERLY APPEALED THE DENIAL OF SUMMARY JUDGMENT SEEKING REVERSAL OF THE TRIAL COURT JUDGMENT.

Nalley raises a number of procedural grounds upon which he contends this Court should dismiss the LLC's appeal. He notes that the LLC fails to specify whether its appeal was taken from the trial court's order denying summary judgment or the trial court's failure to grant its motion for a directed verdict. With respect to the former, Nalley argues that the order denying the LLC's motion for summary judgment is not appealable. With respect to the latter, Nalley argues that because the LLC failed to follow up its directed verdict motion with a post-trial motion for judgment notwithstanding the verdict (JNOV), the only appellate relief available is a new trial.

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We are persuaded by neither of those arguments. The LLC's notice of appeal following entry of judgment in the trial court plainly shows that it appealed from the final judgment and the trial court's orders denying the LLC's motions for summary judgment and directed verdict.

In support of its claim that the LLC is improperly attempting to appeal the denial of a summary judgment motion, Nalley cites a familiar line of cases following *Gumm v. Combs*, 302 S.W.2d 616 (Ky. 1957). "An order denying a motion for summary judgment is not *appealable*. Nor is such a denial *reviewable* on an appeal from a final order or judgment where the question considered is whether or not there exists a genuine issue of a material fact." *Id.* at 616-617 (internal citations omitted). *Gumm* and its progeny further explain the exception to that general rule:

> [T]here is an exception to the general rule found in [*Gumm*] and subsequently approved in *Loy v. Whitney*[3] and *Beatty v. Root*[4]. The exception applies where: (1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom. Then, and only then, is the motion for summary judgment properly reviewable on appeal under *Gumm*.

Transportation Cabinet, Bureau of Highways v. Leneave, 751 S.W.2d 36, 37 (Ky. App. 1988); *see also Abbott v. Chesley*, 413 S.W.3d 589, 602 (Ky. 2013).

[3] 339 S.W.2d 164 (Ky. 1960).

[4] 415 S.W.2d 384 (Ky. 1967).

The four elements comprising the exception are clearly met here. First, the facts material to Nalley's negligence per se claim are not in genuine dispute and, although they were submitted to the jury, the findings were never in doubt. Nalley was working more than 10 feet off the ground and he was not provided safety equipment to prevent his fall. Second, Nalley's status as an employee or an independent contractor was clearly a matter of law. The LLC's only basis for summary judgment was that the KOSHA regulations pertaining to employees working from heights did not apply because the LLC was not an "employer" and Nalley was an independent contractor. Third, the trial court denied the LLC's motion. And fourth, the LLC appealed from a final judgment.

A fair synthesis of the *Gumm* rule provides that when the material facts were not genuinely disputed and summary judgment was denied purely as a matter of law, an order denying summary judgment is properly reviewable on an appeal from an adverse final judgment, the same as any other interlocutory ruling by the trial court on a question of law. 302 S.W.2d at 617. Thus, we conclude that the denial of the summary judgment motion was a proper basis for the LLC's appeal.

Nalley also contends that the LLC cannot seek appellate relief from the trial court's failure to grant its motion for a directed verdict because the LLC failed to state grounds for the motion with sufficient specificity to present the issue to the trial court. Upon review of the record, we are satisfied that the LLC's motion for directed verdict was plainly understood to be based, among other things, upon the same rationale as its motion for summary judgment. The trial court was fully apprised of the issue being raised.

Next, citing *Eades v. Stephens*[5] and *Flynn v. Songer*,[6] Nalley asserts that by failing to move for judgment notwithstanding the verdict (JNOV) under CR 50.02, the LLC waived its right to any appellate relief other than a retrial. We do not disagree with the principle for which those cases are cited but they are not applicable here. The limiting principle described in *Eades* and *Songer* does not constrain the appellate court to ordering a retrial when other procedural avenues properly before it authorize more complete relief, such as dismissal of the underlying claim.

[5] 302 S.W.2d 117, 120 (Ky. 1957).

[6] 399 S.W.2d 491, 493 (Ky. 1966).

Like its earlier motion for summary judgment, the LLC's motion for a directed verdict, with respect to the negligence per se claim, was not based upon disputed evidentiary issues to be resolved by the jury. It, too, was purely based upon an argument of law pertaining to the applicability of KOSHA regulations with which the LLC admittedly did not comply. If the LLC was entitled to the dismissal of Nalley's negligence per se claim due to the inapplicability of the KOSHA regulations, it is not subsequently deprived of that remedy because it failed to move for JNOV. The LLC's summary judgment motion arguing for dismissal based upon a matter of law rather than the non-existence of disputed material facts properly preserved the right on appeal to demand dismissal of the negligence per se claim. A motion for judgment notwithstanding the verdict was not necessary for the preservation of a remedy otherwise available through another issue on appeal. *See Gumm*, 302 S.W.2d 616.

Nalley raises other procedural points as grounds for dismissing the LLC's appeal, including the LLC's failure to secure an express ruling of the trial court denying its directed verdict motion and presenting arguments for reversal on appeal not pressed at an earlier stage in the litigation. We need not address the intricacies of these procedural arguments. It is clear that the LLC preserved its right to appeal the trial court's application of KOSHA regulations and its judgment of liability based thereon.

III. AUSLANDER PROPERTIES, LLC IS ENTITLED TO DISMISSAL OF THE NEGLIGENCE PER SE CLAIM.

KOSHA was enacted for the purpose of "preventing any detriment to the safety and health of all employees, both public and private, covered by this chapter, arising out of exposure to harmful conditions and practices at places of work." KRS 338.011. KRS 338.031(1)(a) imposes a duty on "each employer" to furnish "his employees with employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Subsection (b) of that statute requires employers to "comply with occupational safety and health standards promulgated under this chapter." The same duties are imposed verbatim under OSHA, 29 U.S.C. Section 654(a). As defined by KRS 338.015(1), "employer" means "any entity for whom a person is employed."

The LLC asserts that the Court of Appeals' opinion must be reversed because, having no employees, Auslander Properties, LLC could not be an "employer" as defined by KRS 338.015(1). The LLC further asserts that even if it is an "employer" generally subject to KOSHA, it is subject only to the specific regulations applicable to its function as a landlord and property owner, which does not include the regulations cited by Nalley for the protection of independent contractors working on rooftops or other high places. All grounds for reversal cited by the LLC involve matters of law which we review de novo. *Penix V. Delong*, 473 S.W.3d 609, 612 (Ky. 2015).

Nalley acknowledged at trial that he was an independent contractor rather than an employee of the LLC, and the relevant facts in the record all confirm that point. He argues, as the trial court concluded, that the LLC was an employer for KOSHA purposes because Auslander was an "employee" personally performing the work needed to conduct the LLC's property rental business.

We do not accept Nalley's characterization of Auslander's status. Nothing in the record suggests that Auslander was an employee of his own LLC. The employer-employee relationship is a familiar and well-established species of agency relationship. It carries with it a wide range of specific legal obligations applicable in circumstances far beyond the KOSHA regulations now before us. We decline to stretch the traditional conception of that relationship so that Auslander may be deemed an employee of the LLC. A member of an LLC conducting business and performing work as an agent of the LLC does not automatically become an employee of the LLC.[7]

[7] *See* KRS 275.135(1). We also note that a member of an LLC may elect whether to be classified as an employee for workers' compensation purposes but need not do so. KRS 342.012(1).

This determination alone does not resolve the issue before the Court. We allow that circumstances could arise in which an LLC with no employees is, nevertheless, bound to comply with certain KOSHA regulations inherently applicable to the core function of the LLC's business. We make no attempt to define those circumstances, but we remain open to the possibility that they exist.

Correspondingly, Nalley's status as an independent contractor rather than an employee of the LLC does not automatically defeat his claim. We recognized in *Hargis v. Baize* that an employer

subject to KOSHA regulations for the protection of its own employees is also bound to comply with the same regulations for the benefit of an independent contractor performing on the employer's premises the same work as the employer's employees. 168 S.W.3d at 43. Consequently, in *Hargis*, a lumber mill operator was negligent per se for failing to provide KOSHA protections to an independent contractor performing the same job of hauling and unloading logs as its own employees. *Hargis* rests largely upon the rationale expressed by the Sixth Circuit Court of Appeals in *Teal V. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984), holding that the OSHA (or KOSHA) regulations applicable to an employer's own employees are equally applicable to employees of independent contractors working on the premises doing the same kind of work. *Hargis* added that protections owed to employees of an independent contractor under *Teal* are also owed to the independent contractor himself.

In *Teal*, an employee of an independent contractor fell from a ladder at a DuPont plant. The ladder was affixed to the structure for use by DuPont employees. The *Teal* court held that the injured worker was within the class of workers that the OSHA ladder regulations were intended to protect, and that DuPont was already subject to those regulations for its employees using ladders at that workplace. *Id* at 805.

Together, *Teal* and *Hargis* make it clear that an employer's KOSHA responsibility can extend beyond its own employees to include others, such as independent contractors and their employees. The *Teal/Hargis* extension, however, is governed by a limiting rule explained in *Ellis v. Chase Communications, Inc.*, 63 F.3d 473 (6th Cir. 1995), and further addressed by this Court in *McCarty v. Covol Fuels No. 2, LLC*.

In *Ellis*, an independent contractor's employee fell to his death while painting a television tower owned by Chase Communications. Unlike the worker in *Teal*, who was entitled to the same workplace protections that DuPont already owed to its employees on that site, there was no evidence in *Ellis* that climbing the television tower for any purpose was a function ever performed by any employees of Chase Communications. 63 F.3d at 478.

The Court of Appeals addressed a similar issue in *Pennington v. MeadWestvaco Corp.*: whether the owner of a manufacturing plant was responsible for complying with specific KOSHA regulations applicable to the work of a subcontractor's employee performing renovation work at the plant. The *Pennington* court applied the analysis of *Ellis v. Chase Communications*, noting that Chase Communications "was not considered an 'employer' with respect to the tower site so as to render it subject to OSHA requirements. The particular safety violation at issue was not one for which Chase Communications would normally be responsible in the usual course of its operations." 238 S.W.3d at 671.

In *McCarty*, an employee of a commercial garage door contractor was killed while installing a heavy garage door at a building under construction at the site of a coal mine. The worker's estate brought a wrongful death action claiming that the mine operator was negligent per se because it permitted the garage door installation to proceed despite a lack of compliance with regulations generally applicable to large garage door installations and regulations pertaining to coal mine safety.

We explained in *McCarty* that it was unreasonable to expect a coal mine operator to inspect the safety habits of independent contractors installing a garage door and be otherwise knowledgeable about "the special techniques, requirements, and hazards of the various construction trades" such as commercial garage door installations. 476 S.W.3d at 232-233. Indeed, we noted that an employer's unfamiliarity with the hazards and regulations of work activities beyond its core function was "a major reason for using specialized outside contractors instead of in-house laborers." *Id.* at 232.

We agree that when an employer sends its own employees into harm's way to perform *any* task regardless of the nature of the business, the employer must apprise itself of, and comply with, any safety regulation applicable to that task. The law requires such compliance. But when the employer engages the services of an independent contractor for a task alien to the core function of the employer's business, the employer is relying upon the special expertise and ability of the contractor to know and obey the applicable safety standards of that activity.

In *Hargis*, the independent contractor was injured at the employer's workplace, performing work that was an ordinary part of the employer's sawmill operation and was regularly performed by the employer's own workers. In contrast, the injured workers in *Ellis* and *McCarty*, respectively, were engaged in work not ordinarily associated with Chase Communications' television communications services or Covol Fuels' coal mining operation. Like the workers in *Ellis* and *McCarty*, Nalley was an independent contractor performing a specialized service not typically associated with the routine functions of the LLC's property rental business.

The Court of Appeals accepted Nalley's argument that cutting away high branches from the tops of trees was an ordinary component of the LLC's business as an owner and manager of rental property. We disagree. Certainly, some basic aspects of routine landscape maintenance fall within the core functions of managing and renting real estate, but specialized work like climbing rooftops and ladders, or climbing into the tree itself, to cut branches requires specialized knowledge and skills beyond what is reasonably expected of an ordinary property rental business.

An employer who uses a specialized independent contractor rather than his own employees to perform those activities properly relies upon the contractor's skill and superior knowledge of the risks inherent in the work and the safety equipment and techniques required by applicable regulations for minimizing those risks. The LLC was not in the tree trimming business and it was not an employer of tree trimmers, rooftop workers, or workers using ladders for whom it must comply with KOSHA's standards designed to prevent falls from ladders and rooftops. As succinctly stated in *Pennington v. MeadWestvaco Corp.*: "If an independent contractor undertakes duties unrelated to the normal operations of an employer, the responsibility for violation of safety standards associated with those separate functions falls upon the independent contractor." 238 S.W.3d at 672 (citing *Ellis*, 63 F.3d 473).

The Court of Appeals distinguished *Pennington* based upon what it perceived as Auslander's control and supervision of the work being done by Nalley. Its characterization of Auslander's involvement in Nalley's work is not supported by the record. Auslander assisted Nalley by providing an extra set of hands to handle the detached branches, but Nalley decided how, when, and where he would cut the branches and where he would stand while doing so. Auslander did not control the manner and method of Nalley's work.

At the time of his injury, Nalley was an independent contractor rather than an employee of the LLC, and he was performing specialized work unrelated to the normal operations of the LLC's property rental business. The responsibility for complying with safety laws applicable to that specialized work was upon Nalley. Since the LLC had no duty of compliance, Nalley's negligence per se claim fails as a matter of law.

Finally, the LLC argues that the trial verdict should be reversed because of the improper admission of testimony by Nalley's expert witness. Based upon our disposition of the other issues, we need not address the merits of this argument.

IV. NALLEY WAS NOT ENTITLED TO A DIRECTED VERDICT ON HIS COMMON LAW NEGLIGENCE CLAIM.

Nalley also argues that the trial court judgment should be affirmed based upon his alternative common law negligence claim. Specifically, Nalley contends that he was entitled to a directed verdict on that claim because "undisputed testimony reveal[ed] that the condition of the roof presented an unreasonable risk of harm" and that "Auslander knew about the danger and admitted he did not at least warn of it, and [Nalley] fell as a result."

A motion for a directed verdict should be granted only if "there is a complete absence of proof on a material issue or if no disputed issue of fact exists upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998). In determining whether the trial court erred in failing to grant a motion for a directed verdict, the reviewing court "must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify." *Lovins v. Napier*, 814 S.W.2d 921, 922 (Ky. 1991). "The decision of the trial court will stand unless it is determined that 'the verdict rendered is palpably or fragrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice.'" *Indiana Insurance Company v. Demetre*, 527 S.W.3d 12, 25 (Ky. 2017) (quoting *Lewis v. Bledsoe Surface Mining Co*., 798 S.W.2d 459, 461 (Ky. 1990)). In addition, "the considerations governing a proper decision on a motion for judgment notwithstanding the verdict are exactly the same as those . . . on a motion for a directed verdict." *Cassinelli v. Begley*, 433 S.W.2d 651-52 (Ky. 1968).

With those standards in mind, we reject Nalley's characterization of the evidence and conclude that the trial court did not err in denying Nalley's motion for a directed verdict. In the context of a premises liability claim, a landowner is not liable to an

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independent contractor for injuries sustained from defects or dangers that the independent contractor knows or ought to know of. *Owens v. Clary*, 75 S.W.2d 536, 537 (Ky. 1934).[8] Only when "the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know," is the landowner liable for the contractor's injuries absent a warning. *Id.* at 537.

[8] In *Brewster v. Colgate-Palmolive Co.*, this Court reaffirmed the rule stated in *Owens* concerning the duty owed by landowners to independent contractors. 279 S.W.3d 142, 143 n.l, 144 (Ky. 2009).

Contrary to Nalley's claim, the evidence presented at trial does not conclusively establish that the roof presented any hidden danger or an unreasonable risk of harm. Instead, the jury heard Auslander testify that, although the portion of the roof at issue was not designed to be weight-bearing, he did not think he "would ever mistake that for a roof." In addition, when asked whether she believed the roof was dangerous or misleading, the LLC's expert engineer explained that "It's an arbor. It's this open area at the roof. No, I don't think that it's misleading at all. It's these two by six boards on their ends, two foot apart . . . ." She further testified that "anyone with any type of construction knowledge would hesitate to—to step on it just because it's these little one and a half inch boards up in the air out there."

This testimony cannot reasonably be construed as "undisputed testimony" that the portion of the roof at issue "presented an unreasonable risk of harm," or that Auslander knew about any hidden danger that the roof allegedly posed. Rather, at a minimum, this testimony would allow reasonable minds to differ as to whether the roof constituted a defect or hidden danger or whether Nalley ought to have known of the alleged hidden danger. Because this testimony places issues of material fact in dispute, Nalley's motion for a directed verdict was properly denied.

Similarly, this testimony provided a sufficient basis for the jury's findings that "the cosmetic (i.e. not weight-bearing) nature of the exposed roof rafters" was either known or obvious to Nalley; Auslander should not have anticipated that Nalley might rely on the load-bearing capabilities of the cosmetic rafters and fall from the roof; the work area upon which Nalley stood was in a reasonably safe condition; and Steve Auslander did not fail to exercise ordinary care for the safety of Nalley.

In sum, the LLC presented sufficient evidence at trial to create disputed issues of material fact upon which reasonable minds could differ. Likewise, the jury's special verdict findings were fully supported by that evidence. Accordingly, the trial court did not err in denying a directed verdict on Nalley's common law negligence claim.

V. THE TRIAL COURT'S INSTRUCTIONS ON NALLEY'S COMMON LAW NEGLIGENCE THEORY WERE CORRECT.

Nalley also argues that even if this Court concludes that a directed verdict was not appropriate, a new trial is nonetheless warranted because the trial court's jury instructions on the common law negligence claim were flawed. Nalley claims that the trial court's instructions misstated the law applicable to premises-liability claims between a landowner and invitee and that he is entitled to bare bones instructions instead.

Specifically, Nalley takes issue with instruction number 5. That instruction, in part, provided:

> *Instruction No. 5*
> *(Negligence)*
>
> State whether you are satisfied from the evidence as follows:
>
> A. Because of the nature of the activity and the potential for distraction, in the exercise of ordinary care Auslander Properties, LLC should have anticipated that Herman Nalley might fall from the roof during the course of his work.
>
> B. Because of the nature of the work being performed and the potential for distraction, the work area upon which Herman Nalley stood was not in a reasonably safe condition for use by him.

Nalley argues that "the jury found that the LLC had breached its duty because it answered in the affirmative [to instruction 5A] that the nature of [Nalley's] work on the roof created the 'potential for distraction' and 'Auslander Properties, LLC should have anticipated that Herman Nalley might fall from the roof during the course of his work." Thus, Nalley contends, the additional inquiry in 5B—asking whether the work area in question was in a reasonably safe condition—was unnecessary and only served to confuse the jury. Essentially, Nalley argues that the inquiry should have stopped after 5A, because the jury's affirmative answer to that instruction would necessarily mean a breach of duty had occurred.

"Whether a jury instruction misrepresents the applicable law is purely a question of law, which [this Court] review[s] de novo." *Maupin v. Tankersley*, 540 S.W.3d 357, 360 (Ky. 2018) (citing *Sargent v. Shaffer*, 467 S.W.3d 198, 204 (Ky. 2015)). While Kentucky law encourages the use of bare-bones instructions, they are not required.[9] Rather, "the question herein is whether the instructions misstated the law by failing to sufficiently advise the jury 'what it [had to] believe from the evidence in order to return a verdict in favor of the party who [had] the burden of proof.'" *Office, Inc. v. Wilkey*, 173 S.W.3d 228, 229 (Ky. 2005) (quoting *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 824 (Ky. 1992) (alterations in original)). It is within the trial court's discretion to deny a requested instruction, and its decision will not be reversed absent an abuse of discretion." *Id.* (citing *King v. Ford Motor Co.*, 209 F.3d 886, 897 (6th Cir. 2000)).

[9] *See CSX Transp., Inc. v. Moody*, 313 S.W.3d 72, 82 (Ky. 2010) (citing *Lumpkins v. City of Louisville*, 157 S.W.3d 601 (Ky.2005); *Young v. J.B. Hunt Transportation, Inc.*, 781 S.W.2d 503, 506 (Ky.l989); *Drury v. Spalding* 812 S.W.2d 713, 718 (Ky. 1991)) (explaining that "Kentucky state courts take a bare bones' approach to jury instructions, . . . leaving it to counsel to assure in closing arguments that the jury understands what the instructions do and do not mean," but, "regardless of what form jury instructions take, they must state the applicable law correctly and neither confuse nor mislead the jurors.").

We think Nalley's argument misstates the law applicable to premises liability claims between landowners and invitees and that the trial court's instructions were sufficient. Nalley relies on a long line of cases in which this Court discusses the difference between duty and breach as it relates to foreseeability. The most applicable of these cases, and the one on which Nalley most heavily relies, is *Shelton v. Kentucky Easter Seals Soc,. Inc.* 413 S.W.3d 901 (2013).[10]

[10] Nalley also cites, as a part of this line of cases. *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015); *Dick's Sporting Goods, Inc. v Webb*, 413 S.W.3d at 891 (Ky. 2013); and *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385 (2010). We similarly find the trial court's instructions to be consistent with those opinions.

In *Shelton*, this Court held that, contrary to the traditional approach, the open-and-obvious nature of a hazardous condition does not eliminate a landowner's general duty of ordinary care. *Id.* at 911-12. "Rather, in the event that the defendant is shielded from liability, it is because the defendant fulfilled its duty of care and nothing further is required." *Id.* at 911. It follows, we explained, that "[t]he obviousness of a condition is a 'circumstance' to be factored under the standard of care." *Id.*

Thus, despite the obvious nature of a hazardous condition, a landowner may still be liable to an invitee in certain circumstances. Notably, liability may result where the landowner "ha[d] reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious or will forget what he has discovered . . . ." *Id.* at 907.

Nalley points to this language to support his argument that the jury, by answering in the affirmative to instruction 5A, necessarily found that Auslander breached the standard of care and that a second instruction asking whether the work area was in a reasonably safe condition for use was unnecessary and confusing to the jury.

Shelton, however, did not dictate that liability will *automatically* result simply because it is foreseeable that the invitee may be harmed because a distraction would cause him to forget about the danger. Rather, the court specifically noted that "when a defendant 'should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger'"—when, for example, the invitee is likely to not discover or forget about the dangerous condition because of a distraction—"liability may be imposed on the defendant as a breach of the requisite duty to the invitee depending on the circumstances." *Id.* at 915 (quoting *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 389 (2010)).

That is, liability may still be imposed in this situation "*if reasonable care is not exercised*." *Id.*

Therefore, although the jury answered in the affirmative to instruction 5A, the jury could still conclude, based on the circumstances, that Auslander did not breach its duty owed to Nalley. Put another way, the liability inquiry could not simply end with instruction 5A; the instruction in 5B was needed.

In sum, we conclude that the jury instructions did not misstate Kentucky law, and the trial court did not abuse its discretion in failing to grant Nalley's request to substitute his own proposed jury instructions. Therefore, the trial court did not err in using its own jury instructions.

IV. CONCLUSION.

For the reasons set forth above, we reverse the opinion of the Court of Appeals and remand this case to the Nelson Circuit Court for entry of a final judgment dismissing Nalley's claim.

All sitting. All concur.

SUPREME COURT RULINGS

DEPUBLISHING OPINIONS OF

THE COURT OF APPEALS

Camacho v. Com., 65 K.L.S. 6, p. 1; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/19/18.

Com. v. Albright, 65 K.L.S. 4, p. 28; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/19/18.

Fields v. Benningfield, 65 K.L.S. 3, p. 4; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/19/18.

Gonzalez, II v. Johnson, 65 K.L.S. 4, p. 24; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/19/18.

Hammond v. Little, 65 K.L.S. 3, p. 50; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/19/18.

Isaacs v. Sentinel Insurance Company Limited, 65 K.L.S. 2, p. 10; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/19/18.

Kinney, M.D. v. Maggard, M.D., 65 K.L.S. 3, p. 27; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/19/18.

Kordenbrock v. Kentucky Department of Corrections, 65 K.L.S. 4, p. 33; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/19/18.

Marshall v. Montaplast of North America, Inc., 65 K.L.S. 5, p. 4; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/19/18.

Morton v. Tipton, 65 K.L.S. 7, p. 17; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/19/18.

Neal v. Floyd, IV, M.D., 65 K.L.S. 5, p. 7; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/19/18.

Snodgrass v. Com., 64 K.L.S. 11, p. 34; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/19/18.

PETITIONS FOR REHEARING, ETC.

FILED AND FINALITY ENDORSEMENTS

ISSUED BETWEEN

AUGUST 16, 2018 AT 10:00 A.M.

AND SEPTEMBER 27, 2018 AT 10:00 A.M.

(Cases previously digested in K.L.S.)

PETITIONS:

American Mining Insurance Company v. Peters Farms, LLC, 65 K.L.S. 8, p. 35; Petition for rehearing was filed on 9/6/18.

C.W. Hoskins Heirs v. Wells, 65 K.L.S. 8, p. 48; Petition for rehearing was filed on 9/4/18.

Cummings v. Com., 65 K.L.S. 8, p. 59; Petition for rehearing was filed on 9/6/18.

Kentucky Board of Medical Licensure v. Strauss, M.D., 65 K.L.S. 8, p. 76; Petition for rehearing was filed on 9/6/18.

MOTIONS for extension of time to file petitions: None.

RULINGS on petitions previously filed:

Auslander Properties, LLC v. Nalley, 65 K.L.S. 6, p. 37; Petition for rehearing was granted on 9/27/18. The opinion rendered on 6/14/18 was withdrawn and a new opinion was issued in lieu thereof. The new opinion is set forth at 65 K.L.S. 9, p. 78.

Baumann Paper Company, Inc. v. Holland, 65 K.L.S. 6, p. 40; Petition for rehearing was denied on 9/27/18. The opinion was modified on 9/27/18. Said modification did not affect the holding. Finality endorsement was issued on 9/27/18.

Com., Finance and Administration Cabinet v. Interstate Gas Supply, Inc., 65 K.L.S. 3, p. 62; Petition for rehearing was denied on 9/27/18. Finality endorsement was issued on 9/27/18.

Jeter v. Com., 65 K.L.S. 6, p. 62; Petition for rehearing was denied on 9/27/18. Finality endorsement was issued on 9/27/18.

FINALITY ENDORSEMENTS:

During the period from August 16, 2018, through September 27, 2018, the following finality endorsements were issued on opinions which were designated to be published. The following opinions are final and may be cited as authority in all the courts of the Commonwealth of Kentucky. CR 76.30.

Baumann Paper Company, Inc. v. Holland, 65 K.L.S. 6, p. 40; Petition for rehearing was denied on 9/27/18. The opinion was modified on 9/27/18. Said modification did not affect the holding. Finality endorsement was issued on 9/27/18.

Bowling v. Com., 65 K.L.S. 8, p. 37, on 9/6/18.

Brown, Jr. v. Com., 65 K.L.S. 8, p. 42, on 9/6/18.

PLEASE SEE NOTE ON PAGE 85 CONCERNING FINALITY OF DECISIONS DIGESTED.

Com. v. Douglas, 65 K.L.S. 8, p. 52, on 9/6/18.

Com. v. Lane, 65 K.L.S. 8, p. 55, on 9/6/18.

Com., Finance and Administration Cabinet v. Interstate Gas Supply, Inc., 65 K.L.S. 3, p. 62; Petition for rehearing was denied on 9/27/18. Finality endorsement was issued on 9/27/18.

Cox v. Com., 65 K.L.S. 8, p. 56, on 9/6/18.

Daugherty v. Taylor, 65 K.L.S. 8, p. 60, on 9/6/18.

Elliot, Jr. v. Com., 65 K.L.S. 8, p. 62, on 9/6/18.

Inquiry Commission v. Kenniston, 65 K.L.S. 8, p. 63, on 8/28/18.

Jacobi v. Holbert, 65 K.L.S. 8, p. 65, on 9/6/18.

Jeter v. Com., 65 K.L.S. 6, p. 62; Petition for rehearing was denied on 9/27/18. Finality endorsement was issued on 9/27/18.

Johnson v. Com., 65 K.L.S. 8, p. 69, on 9/6/18.

Kelly v. Com., 65 K.L.S. 8, p. 71, on 9/6/18.

KBA v. Harris, 65 K.L.S. 8, p. 76, on 8/28/18.

King v. Com., 65 K.L.S. 8, p. 81, on 9/6/18.

Little v. Com., 65 K.L.S. 8, p. 89, on 9/6/18.

McCoy v. Com., 65 K.L.S. 8, p. 92, on 9/6/18.

McCoy Elkhorn Coal Corp. v. Sargent, 65 K.L.S. 8, p. 96, on 9/6/18.

Nami Resources Company, LLC v. Asher Land and Mineral, Ltd., 65 K.L.S. 8, p. 98, on 9/6/18.

Norfolk Southern Railway Company v. Johnson, 65 K.L.S. 8, p. 104, on 9/6/18.

Pollitt v. Public Service Commission of Kentucky, 65 K.L.S. 8, p. 105, on 8/28/18.

Porter v. KBA, 65 K.L.S. 8, p. 106, on 8/28/18.

Roach v. Kentucky Parole Board, 65 K.L.S. 8, p. 107, on 9/6/18.

Stanziano-Sparks v. KBA, 65 K.L.S. 8, p. 109, on 8/28/18.

DISCRETIONARY REVIEW:

MOTIONS granted:

Fields v. Benningfield, 65 K.L.S. 3, p. 4; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/19/18.

Gonzalez, II v. Johnson, 65 K.L.S. 4, p. 24; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/19/18.

Isaacs v. Sentinel Insurance Company Limited, 65 K.L.S. 2, p. 10; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/19/18.

Kinney, M.D. v. Maggard, M.D., 65 K.L.S. 3, p. 27; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/19/18.

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Neal v. Floyd, IV, M.D., 65 K.L.S. 5, p. 7; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of CR 76.28(4) on 9/19/18.

MOTIONS denied:

Alexander v. Com., 65 K.L.S. 5, p. 11; Motion for discretionary review was denied on 9/19/18.

Camacho v. Com., 65 K.L.S. 6, p. 1; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/19/18.

Com. v. Albright, 65 K.L.S. 4, p. 28; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/19/18.

Fraley v. Zambos, M.D., 65 K.L.S. 3, p. 6; Motion for discretionary review was denied on 9/19/18.

Hammond v. Little, 65 K.L.S. 3, p. 50; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/19/18.

Kordenbrock v. Kentucky Department of Corrections, 65 K.L.S. 4, p. 33; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/19/18.

Lewis v. Fulkerson, 64 K.L.S. 10, p. 3; Motion for discretionary review was denied on 9/19/18.

Officer v. Blankenship, 65 K.L.S. 7, p. 11; Motion for discretionary review was denied on 9/19/18.

Snodgrass v. Com., 64 K.L.S. 11, p. 34; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/19/18.

MOTIONS filed:

Brank v. Com., 65 K.L.S. 7, p. 34, on 8/20/18.

Catholic Health Initiatives, Inc. v. Wells, 65 K.L.S. 8, p. 13, on 9/11/18.

Com. v. Martin, 65 K.L.S.3, p. 14, on 6/26/18.

Fraley v. Zambos, M.D., 65 K.L.S. 3, p. 6, on 4/27/18.

Grady v. Com., 65 K.L.S. 5, p. 3, on 8/16/18.

Hernandez v. Com., 65 K.L.S. 8, p. 25, on 9/12/18.

Normandin v. Normandin, 65 K.L.S. 6, p. 15, on 8/24/18.

Simms v. Estate of Blake, 65 K.L.S. 5, p. 22, on 9/10/18.

Smoot v. Com., 65 K.L.S. 7, p. 51, on 8/27/18.

Williams v. City of Glasgow, Kentucky, 65 K.L.S. 8, p. 32, on 8/28/18.

MOTIONS for extension of time to file motions for discretionary review: None.

OTHER:

Baumann Paper Company, Inc. v. Holland, 65 K.L.S. 6, p. 40; Petition for rehearing was denied on 9/27/18. The opinion was modified on 9/27/18. Said modification did not affect the holding. Finality endorsement was issued on 9/27/18.

Harms v. Chase Home Finance, LLC, 65 K.L.S. 5, p. 14; Motion to dismiss discretionary review was granted on 8/10/18.

KBA v. Butler, 65 K.L.S. 8, p. 75; Movant filed motion for clarification on 8/27/18.

Mullins v. Rural Metro Corp., 65 K.L.S. 8, p. 27; A notice of appeal was filed on 9/7/18.

Pearson v. Pearson, 65 K.L.S. 4, p. 26; Joint motion to dismiss discretionary review was granted on 8/10/18.

Taylor v. McCoy Elkhorn Coal Corporation, 65 K.L.S. 7, p. 61; A notice of appeal was filed on 9/10/18.

WEST Official Cites on Supreme Court opinions upon which Finality Endorsements have been issued:

Com. v. B.H., 65 K.L.S. 6, p. 42—548 S.W.3d 238.

Com. v. Thompson, 65 K.L.S. 6, p. 45—548 S.W.3d 881.

Davidson v. Com., 65 K.L.S. 6, p. 49—548 S.W.3d 255.

KBA v. Gallaher, 65 K.L.S. 6, p. 65—547 S.W.3d 517.

KBA v. Kenniston, 65 K.L.S. 6, p. 66—547 S.W.3d 520.

KBA v. Niehaus, 65 K.L.S. 6, p. 67—547 S.W.3d 523.

KBA v. Stutsman, 65 K.L.S. 6, p. 68—547 S.W.3d 515.

Merz v. KBA, 65 K.L.S. 6, p. 69—547 S.W.3d 764.

Muncie v. Wiesmann, 65 K.L.S. 6, p. 70—548 S.W.3d 877.

Paris v. KBA, 65 K.L.S. 6, p. 71—547 S.W.3d 766.

—END OF SUPREME COURT—

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