KENTUCKY LAW SUMMARY

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

August 31, 2024
71 K.L.S. 8
Louisville, Kentucky

CASE DIGESTS

VERBATIM OPINIONS

COURT OF APPEALS

WEST Official Cites - Pages 23 and 98
Topical Index - Page 99

– Note –
All opinions reproduced in K.L.S. are full, complete and unedited majority opinions.

ARBITRATION

SCOPE OF AN ARBITRATOR'S AUTHORITY

Innovative Practice Solutions (IPS) is a management services company — Lisa Hastetter (Hastetter), Tyler Burke (Burke), and Bobby Sturgeon (Sturgeon) are its members — Commonwealth Pain Specialists, PLLC (CPS) is medical practice in Frankfort, with Dr. Lingreen as its sole member — IPS was specifically created to manage CPS — IPS and Dr. Lingreen entered into a series of contracts — Pertinent to instant action is Management Services Agreement (MSA), between CPS and IPS, and Employee Lease Agreement, between CPS and KMA Medical Group (KMA) — KMA is owned by Hastetter and would lease physicians and other staff to CPS — Dr. Lingreen and KMA entered into Employment Agreement guaranteeing Dr. Lingreen an annual salary — CPS grew to include locations in several other Kentucky cities — MSA contained arbitration clause which placed no restrictions on scope of arbitrator's authority — Like MSA, Employee Lease Agreement provided for arbitration — Arbitration clause included instructions on how arbitrator was selected; manner of proceeding; and requirement that arbitrator enter findings of fact and conclusions of law — It also prohibited arbitrator from awarding punitive damages or damages in excess of amounts provided by agreement — Arbitration clause did not place a limit on scope of subject matter of arbitration — Eventually, parties' relationship deteriorated — Hastetter discussed termination of business arrangement with Dr. Lingreen, which would require payment of large sum of money in management fees to IPS — In addition, termination would involve transfer of all CPS locations, except Frankfort office, to new medical practice, Interventional Pain & Spine Specialists (IPSS) — Hastetter also sought transfer of CPS's patient files to IPSS, despite parties' agreement that patient files would remain property of CPS — CPS and Dr. Lingreen filed instant action in Franklin Circuit Court asserting numerous tort and contract claims against Hastetter, Sturgeon, Burke, IPS, IPSS, KMA, and a medical billing group (collectively defendants) — Trial court ordered parties to arbitration pursuant to arbitration clauses of both MSA (between IPS and CPS) and Employee Lease Agreement (between KMA and CPS) — In addition to IPS, Hastetter, Burke, and Sturgeon were respondents to arbitration — CPA and Dr. Lingreen submitted their statement of claims to arbitrator that included broad array, many of which were specifically directed at individual defendants — Among other claims, CPA and Dr. Lingreen alleged RICO allegations against all respondents; RICO conspiracy against all respondents; common law fraud against Hastetter, Burke, and IPS; misappropriation of trade secrets against all respondents; breach of contract against IPS; breach of duty of good faith and fair dealing against IPS; theft by unlawful taking against Hastetter and IPS; breach of fiduciary duty against Hastetter and IPS; conversion against all respondents; and common law conspiracy against all respondents — Before final hearing, arbitrator granted partial summary judgment in favor of CPS and Dr. Lingreen as to IPS's counterclaim for breach of contract for nonpayment of management fees, concluding that claim of more than five million dollars in fees was unconscionable and contrary to law — Arbitrator held two hearings — Arbitrator granted judgment for CPS and Dr. Lingreen on following claims: breach of fiduciary duty, theft by unlawful taking, misappropriation of trade secrets, breach of contract and good faith and fair dealing as related to MSA; breach of Employment Agreement, and conversion — Arbitrator granted in part and denied in part CPS and Dr. Lingreen's fraudulent inducement claim — Arbitrator awarded CPS and Dr. Lingreen $2,892,856.44, holding defendants, including Hastetter, Sturgeon, and Burke, jointly and severally liable — CPS and Dr. Lingreen filed motion to confirm award with circuit court — Defendants filed motion to vacate or modify award — Circuit court confirmed award — Defendants appealed — AFFIRMED — A high level of deference is afforded to arbitration awards, and grounds available for vacating them are limited — Not even errors of law or fact warrant setting aside an arbitration award — The sufficiency of the evidence supporting the award is also nonreviewable — This deferential review is rooted in notion that the decision by the arbitrator is considered an extension of the parties' voluntary agreement to arbitrate — KRS 417.160(1), of Kentucky Uniform Arbitration Act (KUAA), sets forth five exclusive grounds upon which a court may vacate an arbitration award — It is a difficult task to demonstrate that an arbitrator exceeded his authority — Even an arbitrator's misapplication of KUAA itself does not constitute an excessive exercise of power — In instant action, arbitrator acted within scope of his authority and did not abuse his power under KRS 417.160(1)(c) by holding individual defendants joint and severally liable alongside IPS — MSA's arbitration clause did not limit authority of arbitrator to decide parties' dispute, and only designated location of arbitration and how arbitrator is selected — Issue of whether to assess damages against individual defendants was before arbitrator for his consideration — Several of CPS and Dr. Lingreen's claims in their statement of claims were directed at all respondents to arbitration, including individual defendants — Arbitrator's legal reasoning or his factual findings are beyond reach of Court of Appeals for review, so quality of arbitrator's factual or legal bases for assigning joint and several liability are of no consequence in instant appeal — Issue of whether liability should be assessed against individual defendants was submitted to arbitrator, which was sufficient for Court of Appeals to conclude that arbitrator did not exceed scope of his authority — Alleged partiality of arbitrator must be direct, definite, and capable of demonstration, and party asserting partiality must establish specific facts that indicate improper motives on part of arbitrator — In instant action, defendants did not point to any aspect of arbitrator's final order or arbitration proceedings which demonstrated arbitrator's partiality —

Lisa Hastetter; Bobby Sturgeon; Innovative Practice Solutions, LLC; Interventional Pain & Spine Specialists, LLC; KMA Medical Group, LLC; Medical Billing Consultants, LLC; and Tyler Burke v. Commonwealth Pain Specialists, PLLC and Dr. Richard A. Lingreen, M.D. (2023-CA-0072-MR); Franklin Cir. Ct., Wingate, J.; Opinion by Judge Acree, *affirming*, rendered 8/2/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Appellants challenge the Franklin Circuit Court's January 11, 2023 Order and Final Judgment confirming an arbitration award in favor of Appellees, Dr. Richard Lingreen and Commonwealth Pain Specialists, PLLC (CPS). Appellants argue that the Arbitrator exceeded his authority by assigning joint and several liability to individual Appellants Hastetter, Burke, and Sturgeon. They also argue the Arbitrator's final order was so flawed as to demonstrate his partiality. We disagree with both arguments and affirm.

BACKGROUND

Appellant Innovative Practice Solutions (IPS) is

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

a management services company, and Appellants Hastetter, Burke, and Sturgeon are its members. Appellee Commonwealth Pain Specialists (CPS) is a medical practice in Frankfort, and Appellee Dr. Lingreen is its sole member. IPS was specifically created to manage CPS.

IPS and Dr. Lingreen entered a series of contracts. Central to this appeal is the Management Services Agreement (MSA) between CPS and IPS, which became effective March 1, 2018. These contracts also include an Employee Lease Agreement between CPS and KMA Medical Group (KMA), a company that Hastetter owned and which would lease physicians and other staff to CPS. Dr. Lingreen and KMA entered an Employment Agreement guaranteeing Dr. Lingreen an annual salary. As Appellants describe them, these contracts placed management of CPS into the hands of IPS, leaving Dr. Lingreen free to focus on practicing medicine while remaining CPS's only shareholder. The practice grew, opening locations in Lexington, Louisville, and Bowling Green.

The MSA contains an arbitration clause which places no restriction on the scope of the authority of an arbitrator. Clause 25 of the MSA is titled "Arbitration" and states as follows:

> Any controversy, dispute or disagreement arising out of or relating to this Agreement, or the breach thereof, shall be settled exclusively by binding arbitration with one (1) arbitrator, which arbitration shall be conducted in Frankfort, Kentucky in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and judgment on the arbitration award may be entered in any court having jurisdiction thereof.

Like the MSA, the Employee Lease Agreement provided for arbitration. The arbitration clause instructed how the arbitrator was selected, the manner of proceeding, and the requirement that the arbitrator enter findings of fact and conclusions of law, among other requirements. It also prohibited the arbitrator from awarding punitive damages or damages in excess of the amounts provided by the agreement. The arbitration clause did not place a limit on the scope of the subject matter of arbitration.

The parties' relationship became contentious and now express contrasting characterizations of their history and the nature of their relationship.

According to Appellants, Dr. Lingreen exhibited a pattern of incompetence and poor judgment necessitating the business arrangement in the first place, but also resulting ultimately in its termination. Appellants describe CPS as a failing business that became profitable because of their efforts. They accuse Dr. Lingreen of behaving unprofessionally and inappropriately toward staff and patients.

Appellees describe CPS as a successful business, but its rapid growth and outstanding debt obligations led to management difficulties. Dr. Lingreen discussed his concerns with Burke and Hastetter, which yielded the MSA. Appellees believe the stiff management fees – fifty percent of CPS's gross receipts – caused the enterprise to be unprofitable.

Hastetter discussed termination of the arrangement with Dr. Lingreen, which would require payment of hundreds of thousands of dollars in management fees to IPS. Termination would also involve transfer of all CPS locations, except the Frankfort office, to a new medical practice, Appellant Interventional Pain & Spine Specialists (IPSS). Hastetter also sought transfer of CPS's patient files to IPSS, despite the parties' agreement that the patient files would remain the property of CPS.

Dr. Lingreen's salary was subsequently reduced from $300,000 annually to $100,000. Appellants claim this reduction was due, among other reasons, to Dr. Lingreen failing to meet performance benchmarks and for his operation of a medical practice outside CPS, while Appellees claim the reduction was retaliation for Dr. Lingreen not cooperating with a request to transfer patient files.

By January 1, 2020, all other doctors at CPS had left to join IPSS. Dr. Lingreen was the sole remaining physician at CPS, and Frankfort was its last location. IPS terminated the MSA with CPS on April 4, 2020.

Appellees filed suit in the Franklin Circuit Court, asserting a variety of tort and contract claims. The circuit court ordered the parties to arbitration pursuant to the arbitration clauses of both the MSA between IPS and CPS and the Employee Lease Agreement between KMA and CPS. The Dispute Resolution Service of the American Health Lawyers Association (AHLA) appointed the Arbitrator. In addition to IPS, Hastetter, Burke, and Sturgeon were respondents to the arbitration.

Appellees submitted their statement of claims to the Arbitrator that included a broad array, many of which were specifically directed at the individual Appellants. Among other claims, Appellees alleged: violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.[1] §§ 1961-1968, against all respondents; RICO conspiracy against all respondents; common law fraud against Hastetter, Burke, and IPS; misappropriation of trade secrets against all respondents; breach of contract against IPS; breach of duty of good faith and fair dealing against IPS; theft by unlawful taking against Hastetter and IPS; breach of fiduciary duty against Hastetter and IPS; conversion against all respondents; and common law conspiracy against all respondents.

[1] United States Code.

Before the final hearing, the Arbitrator granted partial summary judgment in favor of Appellees as to IPS's counterclaim – breach of contract for Appellees' nonpayment of management fees – concluding the claim of more than five million dollars in fees to be unconscionable and contrary to law.

The arbitration hearing began on November 8, 2021. The Arbitrator held an additional hearing on April 8, 2022, regarding calculation and apportionment of damages. After the hearing but prior to entry of the award, Appellants petitioned the AHLA Review Board for removal of the Arbitrator.[2] The AHLA Review Board denied the motion.

[2] Appellants argued in their petition that, due to his age, the Arbitrator was physically and mentally impaired to a degree that he was unable to perform his role as an arbitrator. They alleged the Arbitrator had trouble staying awake, had difficulty walking, and was often confused and forgetful during the hearing. They also alleged that, due to the Arbitrator's condition, he relied on a nonlawyer – a third-year law student – to render the award. However, nothing about the Arbitrator's award demonstrates he did not review the briefing, exhibits, and testimony presented before him before making his ruling. The allegations contained in Appellants' motion to disqualify the Arbitrator have no bearing in the current appeal.

The Arbitrator served the parties with the award on May 3, 2022. Therein, the Arbitrator granted judgment for Appellees for the following claims: breach of fiduciary duty, theft by unlawful taking, misappropriation of trade secrets, breach of contract and good faith and fair dealing as related to the MSA, breach of the Employment Agreement, and conversion. The Arbitrator granted in part and denied in part Appellees' fraudulent inducement claim. The Arbitrator awarded Appellees $2,892,856.44, holding Appellants – including Hastetter, Sturgeon, and Burke – jointly and severally liable.

Appellees filed a motion to confirm the award with the circuit court. Appellants filed a motion to vacate or modify the award. The circuit court denied Appellants' motion on January 3, 2023, and entered its order and final judgment confirming the award on January 11, 2023. Appellants now appeal.

ANALYSIS

A high level of deference is afforded to arbitration awards, and the grounds available for vacating them are limited. "Generally, courts may not review an arbitrator's award." *Don Booth of Breland Grp. v. K&D Builders, Inc.*, 626 S.W.3d 601, 606-07 (Ky. 2021) (citing *Taylor v. Fitz Coal Co., Inc.*, 618 S.W.2d 432, 432 (Ky. 1981)). Not even errors of law or fact warrant setting aside an arbitration award. *Id.* at 607 (citation omitted). The sufficiency of the evidence supporting the award is also nonreviewable. *Taylor*, 618 S.W.2d at 432 (citation omitted).

Our deferential review is rooted in the notion that "'[t]he decision by the arbitrator is considered an extension of the parties' voluntary agreement to arbitrate.'" *Id.* (citing M. Domke, The Law and Practice of Commercial Arbitration Secs. 33.01-34.02 (1968 & Cum.Supp. 1979)). Additionally, "when a court examines the evidence and imposes its view of the case it substitutes the decision of another tribunal for the arbitration upon which the parties have agreed, and in effect sets aside their contract." *Id.* at 433 (citing *Firemen's Fund Ins. Co. v. Flint Hosiery Mills*, 74 F.2d 533 (4th Cir. 1935), *cert. denied* 295 U.S. 748, 55 S. Ct. 826, 79 L. Ed. 1692 (1935)).

The Kentucky Uniform Arbitration Act (KUAA) supplies five exclusive grounds upon which a court may vacate an arbitration award:

> (1) Upon application of a party, the court shall vacate an award where:

> (a) The award was procured by corruption, fraud or other undue means;
>
> (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (c) The arbitrators exceeded their powers;
>
> (d) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of KRS[3] 417.090, as to prejudice substantially the rights of a party; or
>
> (e) There was no arbitration agreement and the issue was not adversely determined in proceedings under KRS 417.060 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm the award.

KRS 417.160(1). "[A]ll arbitration awards arising from agreements entered into after the effective date of the [KUAA] may only be set aside by a court pursuant to those grounds listed in the [KUAA]." *3D Enters. Contracting Corp. v. Lexington-Fayette Urb. Cnty. Gov't*, 134 S.W.3d 558, 563 (Ky. 2004).

[3] Kentucky Revised Statutes.

Appellants first argue the Arbitrator exceeded his authority by holding Hastetter, Burke, and Sturgeon jointly and severally liable under the arbitration award and, therefore, the Arbitrator exceeded his powers per KRS 417.160(1)(c). "In reviewing whether an arbitrator exceeded his powers, 'a court should look to whether the award was fairly and honestly made within the scope of the issues submitted for resolution or whether the arbitrators acted beyond the material terms of the contract.'" *Wagner v. Drees Co.*, 422 S.W.3d 281, 283 (Ky. App. 2013) (quoting *3D Enters. Contracting Corp.*, 134 S.W.3d at 561).

It is a difficult task indeed to demonstrate an arbitrator exceeded his authority. In *Don Booth of Breland Group v. K&D Builders, Inc.*, the purchaser of residential real estate sought to vacate an arbitration award, arguing the arbitrator exceeded his power under KRS 417.160(1)(c). 626 S.W.3d at 604-06. The purchaser argued the arbitrator exceeded his authority by applying the merger doctrine to conclude any discrepancies in the seller's disclosure ultimately merged into the deed; this decision extinguished the purchaser's claims for breach of contract and recission. *Id.* at 606-08. Because this issue was before the arbitrator and because the arbitrator's decision to apply the merger doctrine was an application of law, the Supreme Court of Kentucky concluded the arbitrator did not exceed his authority. *Id.* at 608. "Even if incorrect, a reviewing court's disagreement with the arbitrator's application of law does not support vacating the award under KRS 417.160, if the issue presented was within his proper scope and the award was fairly and honestly made." *Id.* at 608-09.

Even an arbitrator's misapplication of the KUAA itself does not constitute an excessive exercise of power. In *Wagner v. Drees Company*, the purchasers of a home asked the circuit court to vacate an arbitrator's order dismissing their case on statute of limitations grounds. 422 S.W.3d at 282. They argued the arbitrator exceeded his power under KRS 417.160(1)(c) because the arbitration agreement did not provide for dispositive motions and because the KUAA granted the purchasers the right to a hearing. *Id.* A panel of this Court determined the arbitrator did not exceed his authority, first because the arbitrator was granted full authority to resolve the parties' dispute, and so his decision to dismiss the purchasers' claims upon a motion to dismiss was within the scope of this authority. *Id.* at 283. Second, we determined the arbitrator acted within his powers when he would not afford the purchasers a hearing because the KUAA's guarantee of a right to be heard can be affected and even superseded by the arbitration agreement. *Id.*

Additionally, although acting beyond the material terms of an arbitration agreement is generally grounds to find the arbitrator abused his power, our jurisprudence is so deferential that, in one opinion at least, the Supreme Court found no fault with the arbitrator's disregard of contractual provisions particular to that case. In *3D Enterprises Contracting Corporation v. Lexington-Fayette Urban County Government*, a contractor sought additional compensation following delays occurring during a project to improve a public swimming pool, despite the contract including a "no-damages-for-delay" clause. *3D Enters. Contracting Corp.*, 134 S.W.3d at 559-60. The delays were a result of Lexington-Fayette's own health department requiring modifications to the project after construction already commenced. *Id.* at 560. The Kentucky Supreme Court determined a panel of arbitrators did not exceed their power in declining to enforce the no-damages-for-delay provision. *Id.* at 561. Quoting and adopting the reasoning of this Court, the Kentucky Supreme Court stated:

> The applicability of the no-damages-for-delay clause and the change orders was squarely presented to the arbitrators. They heard evidence on exceptions to the enforceability of the clause and rendered a decision based on the evidence. We disagree with the circuit court's view that the arbitrators exceeded their powers by failing to enforce the no-damages-for-delay clause.

Id.

These opinions demonstrate arbitrators hold expansive power. We conclude the Arbitrator in the instant case acted within the scope of his authority and did not abuse his power under KRS 417.160(1)(c) by holding the individual Appellants joint and severally liable alongside IPS. The MSA's arbitration clause did not limit the authority of the Arbitrator to decide the parties' dispute, and only designated the location of arbitration and how an arbitrator is selected. As in *Wagner*, the Arbitrator was afforded full authority to resolve their dispute under the MSA.

The issue of whether to assess damages against the individual Appellants, like the no-damages-for-delay clause in *3D Enterprises*, was before the Arbitrator for his consideration. Several of the claims in Appellees' statement of claims were directed at all respondents to the arbitration, including the individual Appellants. The Arbitrator's legal reasoning or his factual findings are beyond the reach of our review, so the quality of the Arbitrator's factual or legal bases for assigning joint and several liability are of no consequence to this appeal. The issue of whether liability should be assessed against the individual Appellants was submitted to the Arbitrator, which is sufficient for us to conclude he did not exceed the scope of his authority.

Appellants also argue the Arbitrator's award should be vacated because he exhibited partiality under KRS 417.160(1)(b). They argue the Arbitrator so manifestly disregarded the law that his misapplication of the law demonstrates his bias. We agree with Appellees that Appellants cannot, under the guise of an accusation of bias, present their legal arguments to this Court. "'The alleged partiality must be direct, definite, and capable of demonstration, and the party asserting it must establish specific facts that indicate improper motives on the part of the arbitrator.'" *Meers v. Semonin Realtors*, 525 S.W.3d 545, 550 (Ky. App. 2017) (quoting *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000)).

Appellants do not direct us to any aspect of the Arbitrator's final order or the arbitration proceedings which meets this definition. Instead, Appellants attempt to demonstrate bias indirectly. Appellants hope we draw the inference of bias based on the Arbitrator's alleged incorrect legal analysis, as well as the fact his award heavily favored Appellees. This is insufficient to demonstrate bias. As Appellees note, the Arbitrator did not find in favor of Appellees on every one of their claims, including their RICO claim. However, even if the Arbitrator had found in Appellees' favor on all their claims, this would not demonstrate bias and would not warrant vacating the award. We will not, as Appellants hope, engage in an impermissible review of the Arbitrator's legal analysis under the pretext of alleged bias.

CONCLUSION

Based on the foregoing, we affirm the Franklin Circuit Court's January 11, 2023 Order and Final Judgment.

ALL CONCUR.

BEFORE: THOMPSON, CHIEF JUDGE; ACREE AND A. JONES, JUDGES.

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

CRIMINAL LAW

CRIMINAL INVESTIGATION CONDUCTED BY THE OFFICE OF THE ATTORNEY GENERAL (OAG)

OAG'S AUTHORITY TO CONDUCT A CRIMINAL INVESTIGATION

GRAND JURY SUBPOENA

QUASHING OF A GRAND JURY SUBPOENA

SEALING OF THE RECORD

STANDING

VENUE

Office of the Attorney General (OAG) began investigation into employment of Jane Doe 1 and Jane Doe 2 (collectively "Does"), who were both employed by Roe LLC — At same time and in same county, Does had another employer — This employer received some of its general funding, much less than a majority, from Commonwealth — OAG's focus for investigation is potential violations of criminal laws arising out of, involving or in connection with state funds paid for services to Commonwealth or any of its political subdivisions — In June 2023, OAG issued grand jury subpoena under auspices of Franklin County Grand Jury — Subpoena was directed to John Roe (Roe), a member of Roe LLC — Subpoena sought all records on Does including but limited to personnel files, employment agreements, job descriptions, compensation agreements, payroll records, copies of W-2 or 1099's, all time and attendance information from hire date through 2022, and insurance policies held by Roe LLC for Does — OAG sought to compare employees' records for evidence that unspecified and indirect state funds paid to these employees may have been related to some malfeasance connected with their work — In July 2023, Roe and Does moved Franklin Circuit Court to quash subpoena, arguing that documents sought were not relevant to any potential criminal charges and that requiring their production would be unreasonable and oppressive — Roe and Does also moved to seal record — OAG agreed that record should be sealed — Circuit court granted motion to quash, finding that OAG had no jurisdiction over instant matter and that venue is not authorized in Franklin County — Circuit court held that subpoena was unreasonable and oppressive under RCr 7.02 — After first notice of appeal was filed, circuit court entered additional order which unsealed portion of record — OAG filed emergency motion to Court of Appeals asking for order that case remain sealed pending opinion on merits of appeal — Court of Appeals granted emergency motion — AFFIRMED trial court's order quashing subpoena, VACATED trial court's order which unsealed part of record, and REMANDED to trial court for further proceedings on sealing of record — There is tension between necessary secrecy of grand jury proceedings and public's right to know what its government is doing, which is served by access to court records — Court of Appeals determined that public issuance of instant opinion with appropriate pseudonyms for most participants will achieve proper balance — Circuit court must reassess sealing all or any part of its record — All of record in Court of Appeals except for instant opinion will remain sealed recognizing authority of circuit court to first decide, what, if any, further information should be made public — Standing to sue requires injury, causation, and redressability — Generally, criminal defendants do not have standing to inquire into grand jury investigations, but only so long as it is not the sole or dominant purpose of the grand jury to discovery facts relating to a defendant's pending indictment — Prosecutors cannot use grand jury to investigate defenses raised by an indicted criminal defendant — Pretrial and trial processes serve that purpose — A litigant may have sufficiently important, legally-cognizable interests in materials or testimony sought by a grand jury subpoena issued to another person to give litigant standing to challenge validity of that subpoena — In instant action, Does have standing to bring instant action with Roe on behalf of Roe LLC — OAG is seeking information related to Does' personal financial and tax information, which is not generally available to public — There is no other way for Does to address this potential invasion of their privacy other than to attempt to quash the subpoena addressed to one of their employers — Even if OAG was correct that Does did not have standing, Roe on behalf of Roe LLC, to whom subpoena was directed, had standing — Statutes on OAG's authority are found primarily in KRS Chapter 15 — With respect to criminal cases, OAG may assist when requested to do so by local prosecutors in "any criminal investigation or proceeding" — Other designated people, such as mayor or sheriff, may also invite OAG to investigate and prosecute crimes — OAG may not deprive local prosecutors of their authority, which includes their prosecutorial discretion — In specific context of criminal prosecutions, General Assembly gave OAG independent authority over certain types of cases — In instant action, OAG argued that subpoena was authorized under KRS 15.715(6), granting OAG authority to prosecute those who receive improper payment from state treasury — Specifically, Does were being paid by their other employer while at same time being paid by Roe LLC — Work done by Does intersected between their two employers — Whether denominated as theft or some other malfeasance with funds, investigation sought evidence about payments made by other employer which could have somehow improperly overlapped with payments made by Roe LLC — Other employer had at least a budgetary connection with Commonwealth, but is not a "political subdivision" of Commonwealth as contemplated by KRS 15.715(6) — Sources other than Commonwealth made up a large majority of other employer's budget — OAG argued that payments to Does from other employer are at least partially indirect payments from state treasury — OAG believed that this connection could lead to a crime relating to payments from state treasury and that OAG has authority in Franklin County to at least investigate such a crime under KRS 15.715(6) — Does lived and worked outside of Franklin County — Both of their employers are outside of Franklin County — Further, Does do not receive any funds directly from treasury — Does are employees and their employers, not Commonwealth, are responsible for their paychecks — Those paychecks are not issued from state treasury — Simply because employer receives some small percentage of funding from Commonwealth does not mean OAG can investigate payments by that employer which have only some theoretical and indirect connection to state funding — No one in county where Does work asked OAG to assist in investigating some crime in that other county — KRS 15.715(6) clearly states that it is not to be construed to change venue provisions presently existing under Kentucky law as of July 15, 1980 — In instant action, OAG was looking into theft or some similar crime in a county other than Franklin County — There was no indication that either of two employers claimed any improper activity by Does — Local prosecutors did not look into such charges and did not invite OAG to do so — Judicial branch has authority to regulate use of subpoenas and has authority under RCr 7.02(3) to quash them when "compliance would be unreasonable or oppressive" — Motions to quash subpoenas are subject to trial court's sound discretion and will be reversed on appeal only for abuse of that discretion — Trial court found subpoena to be "fishing expedition," in part due to fact that records sought in subpoena were same records sought but denied in previously filed civil case that had been dismissed — In order to show that compliance with a subpoena would be unreasonable or oppressive, one must show: (1) there is no reasonable possibility that category of materials government seeks will produce information relevant to general subject of grand jury's investigation; or (2) subpoena is too indefinite; or (3) compliance would be overly burdensome — In instant action, trial court did not abuse its discretion in finding subpoena to be unreasonable — Under facts, there is no sufficient nexus that can justify Franklin County Grand Jury issuing subpoenas for criminal investigation by OAG —

Com. of Kentucky, ex rel. Attorney General Russell Coleman v. Jane Doe 1; Jane Doe 2; and John Roe (2023-CA-1103-MR and 2023-CA-

1140-MR); Franklin Cir. Ct., Shepherd, J.; Opinion by Judge Easton, *affirming on Appeal 2023-CA-1103-MR and vacating and remanding on Appeal 2023-CA-1140-MR*, rendered 8/9/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

The Commonwealth filed two appeals regarding the Franklin Circuit Court's Orders of September 18, 2023, and September 27, 2023. Recognizing that the impetus for this case was by the actions of a former attorney general, rather than the current occupant of that office, we will refer to the Appellant as "OAG" for Office of the Attorney General.

In the first appeal (No. 2023-CA-1103-MR), the OAG questions an order quashing a grand jury subpoena seeking employment records from Roe LLC of two of its employees ("Jane Doe 1" and "Jane Doe 2" who we will refer to collectively as the "Does"). The circuit court determined that the OAG lacked authority to conduct the specific criminal investigation of which the subpoena was part. The circuit court additionally concluded that, even if there was a valid basis for the investigation, Franklin County was not the appropriate venue, as all alleged acts occurred in another county. The second appeal (No. 2023-CA-1140-MR) involves the circuit court's order to unseal parts of the record of the case which had been sealed previously in its entirety. We have consolidated the appeals and address both in this Opinion.

After an extensive review of the record, the parties' briefs, oral argument, and for the detailed reasons which follow, we affirm on appeal No. 2023-CA-1103-MR. We vacate on appeal No. 2023-CA-1140-MR and remand to the circuit court with directions to conduct a hearing on sealing the record to include consideration of how this Court has addressed this case.

FACTUAL AND PROCEDURAL HISTORY

This case arises from an investigation by the OAG. This investigation relates to the employment of the Does, both employed by Roe LLC. At the same time and in the same county, the Does had another employer. This other employer receives some of its general funding (much less than a majority) from the Commonwealth. The OAG's focus for this investigation is potential "'violations of the criminal and penal laws arising out of, involving or in connection with state funds' paid for 'services . . . to the Commonwealth or any of its political subdivisions.'"[1]

[1] Appellant's Brief, Page 1.

In June 2023, the OAG issued a grand jury subpoena under the auspices of the Franklin County Grand Jury. The subpoena was directed to John Roe ("Roe"), a member of Roe LLC. This subpoena sought "any and all records on [the Does] including but limited [sic] to personnel files, employment agreements, job descriptions, compensation agreements, payroll records, copies of W-2 or 1099's, all time & attendance information from hire date through 2022, [and] insurance policies held by [Roe LLC] for these employees."[2] The OAG sought to compare the employees' records for evidence that unspecified and indirect state funds paid to these employees may have been related to some malfeasance connected with their work.

[2] *Id.*

In July 2023, Roe and the Does moved the Franklin Circuit Court to quash the subpoena, claiming the documents sought are not relevant to any potential criminal charges and that requiring their production would be unreasonable and oppressive. They also moved to seal the record. The OAG agreed that the record should be sealed.

The circuit court heard oral arguments on the motion to quash on September 1, 2023. It granted the motion to quash, holding that "the Attorney General has no jurisdiction over this matter, and venue is not authorized in Franklin County."[3] The circuit court held the subpoena was unreasonable and oppressive under RCr[4] 7.02. On September 27, 2023, which was after the first notice of appeal had been filed, the circuit court entered an additional order which unsealed a portion of the record. The OAG then made an emergency motion to this Court, asking for an order that the case remain sealed pending an opinion on the merits of the appeals, which was granted.

[3] Circuit Court's Order, September 18, 2023, Page 15; Trial Record ("TR") 76.

[4] Kentucky Rules of Criminal Procedure.

ANALYSIS
No. 2023-CA-1140-MR

We choose to address the question of sealing the record first because this will dictate how we address the issues presented in this Opinion, which will be made public. In doing so, we must resolve a tension between necessary secrecy of grand jury proceedings and the right of the public to know what its government is doing, which is served by access to court records. We conclude that the public issuance of this Opinion with appropriate pseudonyms for most participants will achieve the proper balance. Our decision will then call for a reassessment by the circuit court of sealing all or any part of its record. All of this Court's record except for this Opinion will remain sealed recognizing the authority of the circuit court to first decide what, if any, further information should be made public.

"From earliest times it has been the policy of the law in furtherance of justice to shield the proceedings of grand juries from public scrutiny. Secrecy is for the protection of the witnesses and the good names of innocent persons investigated but not indicted and is to inspire the grand jurors with a confidence of secrecy in the discharge of their duties." *Greenwell v. Commonwealth*, 317 S.W.2d 859, 861 (Ky. 1958). As the OAG points out, this secrecy also prevents interference by those who learn of an investigation and seek to frustrate a legitimate investigation. This secrecy is not a constitutional guarantee but rather a strong public policy presently embodied in RCr 5.24. *Maze v. Judicial Conduct Commission*, 612 S.W.3d 793, 805-06 (Ky. 2020).

On the other side of the scales is public policy favoring transparency in government. Courts specifically are subject to constitutional guaranties of "open" courts. Ky. Const. § 11 (public trial of criminal charges) and Ky. Const. § 14 ("All courts shall be open . . . ."). Court records are presumed to be open to public inspection, and the law requires compelling reasons to seal records. *Cline v. Spectrum Care Academy, Inc.*, 316 S.W.3d 320, 325 (Ky. App. 2010). This is so even if all the parties want the records to be sealed. *See Fiorella v. Paxton Media Group, LLC*, 424 S.W.3d 433 (Ky. App. 2014).

United States Supreme Court Justice Brandeis, a Louisvillian, counseled us: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[5] Or as Patrick Henry said: "The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them."[6]

[5] Louis D. Brandeis, Other People's Money and How the Bankers Use It 92 (1914).

[6] Patrick Henry, Speech on the Federal Constitution, Virginia Ratifying Convention (June 9, 1788), *in* The Debates in the Several State Conventions on the Adoption of the Federal Constitution: Volume 3, 170 (Jonathan Elliot ed., 1836).

The approach of the circuit court was to release certain information within the record. This inevitably runs some risk of the damage an unnecessary disclosure of too much detail about a grand jury investigation may cause. It could also bring publicity and cause harm to people who have committed no crime. We intend to shine light on the legal process without adding unnecessary risk to the people investigated, who may yet be investigated regardless of the outcome of this appeal. We will be able to explain the general details sufficiently to justify the legal conclusions reached and let the public know what its government is doing without unnecessary risk to future grand jury proceedings.

The decision of the circuit court to unseal portions of the file was made after the first appeal was filed. While it is within the discretion of the circuit court to decide the question of sealing the record or any part of it, there is a question of jurisdiction for the circuit court to have acted after the first appeal was filed. *Cline*, *supra*. Because we have kept the record sealed pending this decision, we will vacate the order entered by the circuit court regarding sealing of the record and remand this issue to the circuit court for further consideration. Until the circuit court makes that decision, the circuit court record will remain sealed pursuant to our previous order.

No. 2023-CA-1103-MR

The OAG argues the circuit court made several errors in granting the motion to quash the subpoena. It claims first that the Does lack standing to challenge the subpoena. The OAG also claims the circuit court erred in its conclusion that the OAG had no legal authority to issue the subpoena. Finally, the OAG insists that Franklin County is a

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

proper venue for the investigation. We will address these purported errors one at a time.

I. The Does Have Standing to Challenge the Subpoena

The circuit court ruled that the Does have standing to challenge the subpoena. In its brief, the OAG asks this Court to reverse that ruling and to dismiss them as parties. Standing is a question of law and is reviewed *de novo*. *Tax Ease Lien Investments 1, LLC v. Commonwealth Bank & Trust*, 384 S.W.3d 141, 143 (Ky. 2012).

The OAG argues that the Does lack standing to quash the subpoena because the subpoena was directed to Roe LLC, a corporate entity which is just an employer for the individual Does and in which the individual Does have no ownership interest. The subpoena only sought employment information about employees.

"To have standing to sue in Kentucky, the basic rule is that the person must have a 'judicially recognizable interest in the subject matter of the suit.'" *Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 361 (Ky. 2016) (citing *Ashland v. Ashland FOP No. 3*, 888 S.W.2d 667, 668 (Ky. 1994)). In *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992), the United States Supreme Court established the following three requirements for standing: (1) injury, (2) causation, and (3) redressability. Kentucky adopted these requirements in *Commonwealth Cabinet for Health & Family Services, Department for Medicaid Services v. Sexton By & Through Appalachian Regional Healthcare, Inc.*, 566 S.W.3d 185 (Ky. 2018).

The first requirement for standing is that the plaintiff must have suffered an injury-in-fact. *Lujan*, *supra*, at 560. A plaintiff must demonstrate he or she has suffered a concrete and particularized injury that is either actual or imminent. *Sexton*, *supra*, at 196. This injury must be "distinct and palpable," and not "abstract" or "conjectural" or "hypothetical." *Id.* As for the last two requirements of causation and redressability, "[t]he injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision." *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984), *abrogated on other grounds by Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014).

The Commonwealth argues *Bishop v. Caudill*, 87 S.W.3d 1 (Ky. 2002), is controlling. In *Bishop*, the Kentucky Supreme Court recognized that criminal defendants *generally* do not have standing to inquire into grand jury investigations, but only "[s]o long as it is not the sole or dominant purpose of the grand jury to discover facts relating to [a defendant's] pending indictment." *Id.* at 4. In other words, prosecutors cannot use the grand jury to investigate defenses raised by an indicted criminal defendant. Pretrial and trial processes serve that purpose.

Throughout this case, the OAG relies upon the distinction between investigative power and prosecution of cases after charges have been brought. The OAG believes its investigative power is much broader than its power to prosecute charges. We should keep that distinction in mind when we consider the application of *Bishop*. In the present case, we are dealing with potential criminal defendants against whom no charges have been brought, unlike the defendant in *Bishop*.

The circuit court relied upon the right of third parties to quash grand jury subpoenas directed to others, which has been repeatedly upheld, citing *In re Grand Jury*, 111 F.3d 1066, 1073-74 (3d Cir. 1997). "It is well-established that a litigant may have sufficiently important, legally-cognizable interests in the materials or testimony sought by a grand jury subpoena issued to another person to give the litigant standing to challenge the validity of that subpoena." *Id.* at 1073. *See also Gravel v. United States*, 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972) (United States Senator allowed to move to intervene and quash subpoena directed to his assistant). "A party has standing to move to quash a subpoena addressed to another if the subpoena infringes upon the movant's legitimate interests." *United States v. Raineri*, 670 F.2d 702, 712 (7th Cir. 1982). The law recognizes a citizen's right to privacy, and a subpoena for records may become unreasonable in violation of the Fourth Amendment. *See United States v. Calandra*, 414 U.S. 338, 346, 94 S. Ct. 613, 619, 38 L. Ed. 2d 561 (1974).

We agree with the circuit court that the Does had standing to bring this action with Roe on behalf of Roe LLC. The OAG is seeking information related to the Does' personal financial and tax information, which is not generally available to the public. There is no other way for the Does to address this potential invasion of their privacy other than to attempt to quash the subpoena addressed to one of their employers. The circuit court did not err in finding the Does had standing.

Even if the OAG was correct in its standing argument as to the Does, Roe on behalf of Roe LLC, to whom the subpoena was directed, certainly had standing. The OAG demanded that Roe LLC produce its records, and it may object to any improper purpose of a subpoena directed to it. Because, at a minimum, at least one party in this action had standing to challenge the subpoena, it was appropriate for the circuit court to proceed and now for this Court to continue its review. *See Commonwealth ex rel. Beshear*, *supra*, at 369.

II. The Authority of the OAG

We sometimes hear about a "unified" prosecutorial system in Kentucky. The use of the word "unified" may be misleading. What we actually have is a cooperative system among prosecutors who are all constitutional officers of the Commonwealth. Local prosecutors, elected by their respective communities, "do not answer to the Attorney General." *Couch v. Commonwealth*, 686 S.W.3d 172, 179 (Ky. 2024).

Section 91 of the Kentucky Constitution establishes the OAG. His or her duties "shall be such as may be prescribed by law[.]" In 1936, our state government went through a thorough reorganization. The OAG lost a challenge to the limitations enacted as part of this reorganization. *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820 (Ky. 1942) (the use of the word "prescribed" gives the legislative branch the power to define what the OAG can and cannot do so long as the legislature does not effectively eliminate the office). As part of this initial reorganization, the Department of Law was created. Current statutes on the authority of the OAG are now found primarily in KRS Chapter 15.

"The Attorney General is the head of the Department of Law." KRS 15.010(1). He or she serves as the "chief law officer" for the Commonwealth and its numerous departments and agencies. KRS 15.020(1). In a civil capacity, the OAG may participate in suits to defend the provisions of our Constitution. *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974). We also find in the statutes the titles of "chief law enforcement officer" and "chief prosecutor of the Commonwealth." KRS 15.700. The OAG has many obligations in both civil and criminal matters.

When it comes to criminal cases, the OAG may assist when requested to do so by local prosecutors in "any criminal investigation or proceeding." KRS 15.190. This authority indicates the cooperative nature of the system. KRS 15.700. Other designated people, such as a mayor or sheriff, may also invite the OAG to investigate and prosecute crimes. KRS 15.200(1); *Matthews v. Pound*, 403 S.W.2d 7 (Ky. 1966). In these situations, the OAG may do what the local prosecutor may do, including issuing subpoenas. KRS 15.210. But the OAG may not deprive the local prosecutors of their authority, which includes their prosecutorial discretion. KRS 15.220; KRS 15.745.

In the specific context of criminal prosecution, the General Assembly gave the OAG independent authority over certain types of cases. For example, the OAG may prosecute cases involving identity theft. KRS 15.231. *See also Commonwealth v. Johnson*, 423 S.W.3d 718 (Ky. 2014) (statute within KRS Chapter 218A gave the OAG authority to investigate and prosecute drug related crimes).

The OAG argues that the subpoena in question here was authorized by another specific grant of authority – prosecution of those who receive improper payment from the state treasury. KRS 15.715(6) provides:

> The Attorney General shall have the duty, within the Forty-eighth Judicial Circuit, to prosecute any person who receives compensation from the Treasury of the Commonwealth of Kentucky for all violations of the criminal and penal laws arising out of, involving or in connection with state funds, or the sale or transfer of goods or services by or to the Commonwealth or any of its political subdivisions; and specifically including, but not limited to, all violations set forth in KRS Chapters 521 and 522. Nothing herein shall be construed to change the venue provision presently existing under Kentucky law as of July 15, 1980.

III. The Circuit Court Did Not Abuse its Discretion in Quashing the Subpoena

With KRS 15.715(6) in mind, we need to give some further explanation of the issues being investigated. Basically, the idea is that the Does were being paid by their other employer while at the same time being paid by Roe LLC. The work done by the Does intersected between their two

employers. Whether denominated as theft or some other malfeasance with funds, the investigation sought evidence about payments made by the other employer which could have somehow improperly overlapped with payments made by Roe LLC.

The other employer has at least a budgetary connection with the Commonwealth, but it is not a "political subdivision" of the Commonwealth as contemplated by KRS 15.715(6). While other sources make up a large majority of the other employer's budget, we may say as a hypothetical that state funds could be up to 15% of the other employer's total revenue. The OAG then reasons that any payments to the Does from the other employer are at least partially indirect payments from the state treasury. The OAG felt this connection could lead to a crime relating to payments made from the state treasury, and the OAG has authority in Franklin County to at least investigate such a crime under KRS 15.715(6).

Taking the Commonwealth's position at face value, to read KRS 15.715(6) to allow the OAG investigative authority for criminal charges under the specific facts of this case would be more than a stretch of this statute. The statute does not use the word direct nor the word indirect, but it does require a payment "from the treasury." As the circuit court pointed out with citation to many cases, this statute deals only with direct payments from the treasury in Frankfort.

> Franklin County is the seat of government and the place of payments from the State Treasury. It is not illogical, arbitrary or unreasonable to authorize prosecution at this location for offenses involving payments of state funds. The Attorney General is an appropriate officer to investigate and prosecute any person who wrongfully receives compensation from the state treasury for violations of the criminal laws of this state involving state funds along with certain other offenses enumerated within the statute.

Graham v. Mills, 694 S.W.2d 698, 700 (Ky. 1985).

The OAG provides examples of cases from Franklin County to support the OAG's authority to bring a case in Franklin County although the questionable conduct occurred outside of Franklin County. For example, the OAG cites *Hodges v. Commonwealth*, 614 S.W.2d 702 (Ky. App. 1981) and *Evans v. Commonwealth*, 645 S.W.2d 346 (Ky. 1982). But the cases the OAG references are distinguishable from the circumstances of this case. The indictments returned by the Franklin County Grand Jury addressed in these cases refer to crimes where funds from the state treasury were paid *directly to* the defendants in question from the treasury in Frankfort, whether in the form of benefits, grants, or compensation.

Hodges dealt with a deputy sheriff who made claims for mileage and expenses, which were sent to and paid by the treasury. *Hodges*, *supra*, at 703. Evans was a physician who committed fraud in order to obtain Medicaid benefits from an allocation of funds directly financed through the treasury. *Evans*, *supra*.

That is not the case for the Does. The Does do not receive any funds directly from the treasury. They are employees, and their employers, not the Commonwealth, are responsible for their paychecks. Those paychecks are not issued from the state treasury. Simply because an employer receives some small percentage of funding from the Commonwealth does not mean the OAG can investigate payments by that employer which have only some theoretical and indirect connection to state funding.

We again note the cooperative nature of our prosecutorial system. No one in the county where the Does work asked the OAG to assist in investigating some crime in that other county. The OAG's reading of the statute disregards the final sentence of the governing statute, which clearly states "[n]othing herein shall be construed to change the venue provision[s] presently existing under Kentucky law as of July 15, 1980." KRS 15.715(6). If the General Assembly intended the statute to be read as the OAG asserts, this final sentence would have been unnecessary.

We will not engage in a "parade of horribles" should the interpretation of KRS 15.715(6) of the OAG be accepted, but we will suggest one entry in such a parade. State funds are used to pay for roads. One budgeted project is for roads outside Franklin County. A contractor wins a competitive bid to work on the roads. The contractor receives payments with a direct connection to the state treasury. One of many subcontractors is paid by the contractor and then with what he received from the contractor the subcontractor commits a crime by using his pay to engage in a crime where he lives. The subcontractor might have diverted funds owed to his own subcontractors. Would the OAG come in uninvited to investigate or prosecute such a case rather than allow local prosecutors to deal with the matter under the criminal law entrusted to those local officials for prosecution? We cannot read KRS 15.715(6) so broadly. We cannot see how KRS 15.715(6) applies just because some indirect connection to state funds can possibly be shown.

This was part of the reasoning of the circuit court. The OAG was actually looking into theft or some similar crime in another county. The record contains no indication that either of the two employers claimed any improper activity by the Does. The local prosecutors did not look into such charges and did not invite the OAG to come in.

We cannot find actual support for the proposition that the general authority of the OAG means that this office may be used to investigate or prosecute any potential connection to funds provided by or regulated by the state. To the contrary, we suggest an analogy to *Commonwealth ex rel. Ferguson v. Gardner*, 327 S.W.2d 947 (Ky. 1959). The OAG may supervise administration of charitable trusts. This did not give the OAG authority to intervene in a will contest case because funds may go to such a trust. Similarly, our legislature did not clearly indicate an intention to give the OAG authority to initiate any potential criminal investigation because some indirect connection to state funding might be shown. This would be contrary to every published and unpublished case in which KRS 15.715(6) has been applied. The statute has been consistently interpreted to require a more direct payment from the treasury.

Even if the OAG was correct or only arguably mistaken in its use of KRS 15.715(6), we recognize the careful division of the powers among the legislative, judicial, and executive (of which the OAG is part) branches of our government as demanded by Ky. Const. § 28. When the OAG issues a subpoena, it utilizes the judicial branch. The judicial branch has authority to regulate the use of subpoenas and specifically has the authority to quash them when "compliance would be unreasonable or oppressive." RCr 7.02(3). This rule mirrors federal rules on the subject. FRCRP[7] 17(c)(2). Neither the federal nor state rule excludes grand jury subpoenas from its coverage.

[7] Federal Rules of Criminal Procedure.

"[M]otions to quash subpoenas are subject to the trial court's sound discretion and will be reversed on appeal only for abuse of that discretion." *Commonwealth v. House*, 295 S.W.3d 825, 828 (Ky. 2009). "The test for abuse of discretion is 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). However, "[s]tatutory construction is a matter of law which requires de novo review." *Commonwealth v. Johnson*, 423 S.W.3d 718, 720 (Ky. 2014).

Having considered the argument that the OAG advanced under KRS 15.715(6), the circuit court believed the subpoena issued to Roe LLC was a "fishing expedition" of the kind condemned in *Commonwealth v. House*, 295 S.W.3d 825, 828 (Ky. 2009).[8] The circuit court reached this conclusion in part due to the fact that the records sought in the subpoena were the same records sought but denied in a previously filed civil case that had been dismissed. We find further support for the discretion exercised by the circuit court from federal authorities.

[8] Circuit Court Order, September 18, 2023, pages 14-15; TR 75-76.

The United States Supreme Court has determined "[t]he grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297, 111 S. Ct. 722, 726, 112 L. Ed. 2d 795 (1991) (internal quotation marks and citations omitted). However, "[t]he investigatory powers of the grand jury are nevertheless not unlimited. Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass." *Id.* at 299, 111 S. Ct. at 727 (citations omitted).

Both the Kentucky rule and the federal rule grant a court authority to quash a subpoena if it determines it is unreasonable or oppressive. In order to show compliance with a subpoena would be unreasonable or oppressive it must be shown "(1) there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation; or (2) the subpoena is too indefinite; or (3) compliance would

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

be overly burdensome." *Matter of Dillon*, 824 F. Supp. 330, 333 (W.D.N.Y. 1992) (internal quotation marks omitted).

The circuit court here found that the subpoena issued was unreasonable, because there was no "allegation that state funds were used directly in any manner that would violate the penal code"[9] and that the Commonwealth provided no "citation to legal precedent that would support the theory that a crime may have been committed that is related to the personal and tax information sought[.]"[10] The circuit court's conclusion meets the Supreme Court's standard, which is "the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *R. Enterprises, Inc.*, *supra*, at 301, 111 S. Ct. at 728.

[9] Circuit Court's Order, September 18, 2023, page 14; TR 75.

[10] *Id.*

This first criterion necessarily assumes the general subject matter of the grand jury's investigation is within the proper scope of that grand jury – to investigate potential crimes which may be prosecuted in that jurisdiction. Venue still matters, as KRS 15.715(6) plainly states. In the circumstances of this case, the circuit court committed no legal error and did not abuse its discretion in quashing what it determined to be an unreasonable subpoena.

While we do not wish to overuse the hackneyed phrase of a "fishing expedition," we reiterate that the OAG was fishing in the wrong pond. The Does live and work outside of Franklin County. Both of their employers are outside of Franklin County, and their paychecks are not issued from the state treasury; they are issued by employers outside of Franklin County. There is simply no sufficient nexus that can justify a Franklin County Grand Jury issuing subpoenas for the criminal investigation by the OAG under the circumstances of this case.

CONCLUSION

On Appeal No. 2023-CA-1103-MR, we affirm the Franklin Circuit Court's order quashing the subpoena in question. On Appeal No. 2023-CA-1140-MR, we vacate the Franklin Circuit Court's order which unseals part of the record, and we remand to the circuit court for further proceedings on the sealing of the record.

ALL CONCUR.

BEFORE: ACREE, EASTON, AND GOODWINE, JUDGES.

REAL PROPERTY

DEEDS

QUITCLAIM DEED

FORECLOSURE

RIGHT OF REDEMPTION

CIVIL PROCEDURE

AMOUNT IN CONTROVERSY

AMENDMENT OF A COMPLAINT

LANDLORD AND TENANT LAW

ATTORNEY FEES

ATTORNEY FEE PROVISIONS IN RENTAL AGREEMENTS

MITIGATION OF DAMAGES FOR BREACH OF A LEASE

In 2014, investment company (company) obtained quitclaim deed for house — House was in foreclosure at that time — In September 2016, lessees entered into rental agreement with company to rent property for 12 months at $1,100 monthly — Lessees paid first month's rent and security deposit, totaling $2,200 — In December, lessees learned that property was in foreclosure and would be sold at judicial sale the following month — Following judicial sale, company exercised its right of redemption under KRS 426.530 to purchase property and obtained Commissioner's Deed in July 2017 — Lessees vacated property in May 2017 — Company filed instant action in circuit court for unpaid rent, attorney fees and costs, and damages for "wear and tear" to property — Company moved for partial summary judgment seeking unpaid rent — Lessees claimed that company had no right to lease property and collect rent before Commissioner's Deed was recorded in June 2017 — Circuit court found that company was properly vested with authority to enter into rental agreement — After hearing on damages, circuit court entered judgment awarding company $4,400 for unpaid rent, $1,000 for property damage, and $2,360 for attorney fees — Both parties appealed — AFFIRMED IN PART and REVERSED IN PART — A quitclaim deed is a valid form of conveyance and transfers whatever interest seller has — When previous owners defaulted on their mortgage, they retained ownership of property and could convey that interest via quitclaim deed; however, under quitclaim deed, purchaser takes estate subject to all disadvantages that it was liable to in hands of vendor — Law presumes notice of all incumbrances, either legal or equitable — Thus, in instant action, company took property subject to mortgage lien, but it still was property owner and entitled to lease property — For jurisdictional purposes, amount in controversy is determined based on allegations in complaint, not what a party is entitled to — Company sought $5,500 in unpaid rent and unspecified amount for property damage; therefore, company met minimum $5,000 amount in controversy required by statute — KRS 383.570(1)(c) precludes attorney fees provisions in rental agreements; however, KRS 383.660(3) provides that if tenant's noncompliance with rental agreement is willful, landlord may recover actual damages and reasonable attorney fees — Willful is defined in KRS 383.545(17) as "with deliberate intention, not accidentally or inadvertently, and done according to a purpose" — In instant action, company failed to plead any claim for attorney fees — While its tendered amended complaint stated a claim for attorney fees generally, it did not mention KRS 383.660(3) or allege any act that would authorize application of KRS 383.660(3) — Without proper notice of a claim for attorney fees under KRS 383.660(3), circuit court erred in awarding attorney fees — KRS 383.645 and KRS 383.695(4) also authorize award of attorney fees, but also require findings of willfulness or bad faith — Circuit court made no finding of willfulness or bad faith — In addition, company did not plead a claim for attorney fees under either statute — Equity does not permit award of attorney fees except as provided in KRS 383.660(3) — To make award for property damage, circuit court needed to find lessees liable for any or all property damaged testified to by company; however, circuit court's order did not state which evidence it relied upon in awarding $1,000 in damages — Remanded to circuit court to make specific findings of fact, based on evidence presented at hearing, to support its damage award — CR 15.01 provides that a party may amend his pleading only by leave of court and leave shall be freely given when justice so requires — Factors to be considered in determining whether to grant or deny leave to amend a complaint include timeliness, excuse for delay, and prejudice to opposing party — Delay alone is insufficient reason to deny a motion to amend — In instant action, company sought to amend its complaint almost four years after filing its original complaint — Amended complaint sought full eight months of rent due under rental agreement, rather than five months owed when it filed original complaint — Circuit court abused its discretion when it denied motion as untimely — Amended complaint only sought to increase damages due under rental agreement — Lessees suffered no prejudice by amendment — Lessees knew or should have known that they owed $8,800 under lease — A party claiming damages for breach of contract is obligated to use reasonable efforts to mitigate his damages — It appeared that circuit court placed burden of proof on company, rather than lessees — Company testified as to time it

took to get property ready for rent after lessees vacated it and what it did to try to find a new tenant — Based on evidence presented, circuit court erred in finding that company failed to reasonably mitigate its damages — Burden of proof was on lessees and lessees presented no evidence to contradict company's evidence — Circuit court did not abuse its discretion in not awarding costs to company —

Erin Hernandez and Juan Manuel Hernandez v. County Investments, LLC; Alan Steven Rubin; Mac Sawyers; and Ross Lerner (2023-CA-0236-MR); and *County Investments, LLC v. Erin Hernandez and Juan Manuel Hernandez* (2023-CA-0255-MR); Jefferson Cir. Ct., Edwards, J.; Opinion by Judge McNeill, *affirming in part and reversing in part*, rendered 8/9/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Erin and Juan Hernandez ("Hernandezes") appeal from a Jefferson Circuit Court judgment awarding $7,760 in damages to County Investments LLC ("County Investments") for unpaid rent, property damage, and attorney fees. County Investments cross-appeals. For the reasons below, we affirm in part and reverse in part.

In 2014, County Investments obtained a quitclaim deed for property at 1612 Lou Gene Avenue in Louisville, Kentucky, which at the time was in foreclosure. In September 2016, the Hernandezes entered into a rental agreement with County Investments to rent the property for twelve months at $1,100 monthly. The Hernandezes paid the first month's rent and a security deposit, totaling $2,200.

In December, the Hernandezes learned the property was in foreclosure and would be sold at a judicial sale the following month. At this time, they stopped paying rent. Following the judicial sale, County Investments exercised its right of redemption under KRS[1] 426.530 to purchase the property and obtained a Commissioner's Deed in July 2017. The Hernandezes vacated the property in May 2017 and County Investments filed a complaint in Jefferson Circuit Court seeking unpaid rent, attorney fees and costs, and damages for "wear and tear" to the property.

[1] Kentucky Revised Statutes.

Subsequently, County Investments moved for partial summary judgment seeking the unpaid rent. The Hernandezes argued County Investments had no right to lease the property and collect rent before the Commissioner's Deed was recorded in June 2017. Essentially, it argued County Investments' quitclaim deed, recorded after the filing of the foreclosure action, was insufficient to grant title.

The circuit court disagreed, holding County Investments "was properly vested with authority to enter into the lease agreement . . . and was entitled to collect rent . . . ." After a subsequent hearing on damages, the circuit court entered a final judgment awarding County Investments $4,400 for unpaid rent, $1,000 for property damage, and $2,360 for attorney fees. The Hernandezes moved to alter, amend, or vacate the judgment and for additional findings, which the circuit court denied. This appeal and cross-appeal followed.

The Hernandezes raise numerous allegations of error on appeal, which we will address individually. Their first argument concerns the circuit court's grant of partial summary judgment, which we review *de novo*. "The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

The Hernandezes argue the circuit court erred in determining County Investments had the right to lease the property and collect rent. They contend County Investments had no ownership interest in the property until the judicial sale in June 2017 and thus had no authority to rent the property in 2016. We disagree. The Hernandezes' brief focuses on when title passes during a judicial sale but makes little mention of County Investments' quitclaim deed acquired in 2014.

As recognized by the circuit court, a quitclaim deed is a valid form of conveyance and transfers whatever interest the seller has. *See Smith v. Graf*, 259 Ky. 456, 470, 82 S.W.2d 461, 468 (1935); *Johnson v. Johnson*, 173 Ky. 701, 705, 191 S.W. 672, 675 (1917). The Hernandezes seem to believe the quitclaim deed was null because County Investments acquired the property while it was in foreclosure; however, they have cited no case law in support. In fact, "Kentucky law has long subscribed to the 'lien theory' of mortgages and holds that 'a mortgage is a mere security for debt, and that, substantially, both at law and in equity, the mortgagor is the real owner of the property mortgaged.'" *Grafton v. Shields Mini Markets, Inc.*, 346 S.W.3d 306, 310 (Ky. App. 2011) (citation omitted). Thus, "upon default a mortgagor's interest in real property is not forfeited. Rather, the mortgagee has only a security interest, and ownership of the premises remains with the mortgagor and subject to the mortgagor's right to redeem the property . . . ." *Id.* (citation omitted).

When the previous owners defaulted on their mortgage, they retained ownership of the property and could convey that interest via quitclaim deed. However, under a quitclaim conveyance, the purchaser "takes the estate, subject to all the disadvantages that it was liable to in the hands of the vendor, and the law will presume notice of all incumbrances, either legal or equitable." *Jones v. Arthur*, 244 S.W.2d 469, 471 (Ky. 1951) (citation omitted). Therefore, County Investments took the property subject to the mortgage lien, but it still was the property owner and entitled to lease it out. *See McEwan v. EiA Properties, LLC*, 428 S.W.3d 633, 636 (Ky. App. 2014) ("[A] mortgagor generally retains the right to lease a mortgaged premises . . . ."). It later exercised its right of redemption (obtained via quitclaim deed from the mortgagor) and gained the property free from encumbrance.

The Hernandezes next claim the circuit court lacked subject matter jurisdiction because the amount in controversy was less than the minimum $5,000 required by statute. In its complaint, County Investments sought $5,500 in unpaid rent and an unspecified amount for property damage. The Hernandezes argue the maximum amount of damages sustained, if any, is $4,400 because County Investments never returned their $1,100 security deposit, and the court's award for property damage was erroneous.

However, for jurisdictional purposes, the amount in controversy is determined based on the allegations in the complaint, not what a party is entitled to. *See Jackson v. Beattyville Water Dep't*, 278 S.W.3d 633, 637 (Ky. App. 2009) ("[P]leading[s] and answers *are not proof of damages*. Rather, they merely represent the amount in controversy as required by KRS Chapters 23A and 24A and the caselaw."); *see also Montgomery v. Glasscock*, 121 S.W. 668, 668 (Ky. 1909) ("Jurisdiction in such cases depends, not upon the amount to which plaintiff shows himself entitled, but upon the amount sued for."). The circuit court properly exercised subject matter jurisdiction over County Investments' claims.

The Hernandezes also allege the circuit court's attorney fee award was contrary to KRS 383.570(1)(c), which precludes attorney fees provisions in rental agreements. Despite this prohibition, KRS 383.660(3) provides that if "noncompliance [of the tenant with the rental agreement] is willful the landlord may recover actual damages and reasonable attorney's fees." "'Willful' means with deliberate intention, not accidentally or inadvertently, and done according to a purpose." KRS 383.545(17).

Here, the Hernandezes contend, the circuit court awarded attorney fees based on the rental agreement without any finding of willfulness. However, we reverse the attorney fee award on a different basis. In *O'Rourke v. Lexington Real Estate Company, L.L.C.*, 365 S.W.3d 584 (Ky. App. 2011), a panel of this Court reversed an attorney fee award under very similar circumstances. In addition to finding no evidence of willfulness on the debtor's part to authorize an award of attorney fees under KRS 383.660(3), we held the landlord failed to properly plead a claim for attorney fees under KRS 383.660(3):

> CR[2] 8.01 provides that a claim "shall contain (a) a short and plain statement of the claim showing that the pleader is entitled to relief, and (b) a demand for judgment for the relief to which he deems himself entitled." Our review of the complaint filed herein reveals that Lexington Real Estate failed to properly plead any claim for attorney's fees, and certainly no claim under KRS 383.660(3). Although the complaint requested an award of attorney's fees in the *ad damnum* clause, it failed to state any claim for attorney's fees in the body of the complaint. CR 8.01 requires notice of the claim, and O'Rourke was not given notice of any acts or omissions alleged against him that would authorize application of KRS 383.660(3). Although KRS 383.660(3) creates a limited exception to the general rule that each party shall pay its own attorney's fees, to invoke that exception notice of the claim must be pled to join the issue. *See Pike v. George*, 434 S.W.2d 626 (Ky. App. 1968).

Id. at 587.

[2] Kentucky Rules of Civil Procedure.

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

Similarly, here, County Investments' complaint fails to plead any claim for attorney fees. While its tendered amended complaint states a claim for attorney fees generally, it did not mention KRS 383.660(3) or allege any act that would authorize the application of KRS 383.660(3). Without proper notice of a claim for attorney fees under KRS 383.660(3), the attorney fee award was erroneous.

While County Investments cites two other statutes, KRS 383.645 and 383.695(4), as authorizing an award of attorney fees, those statutes also require findings of willfulness or bad faith, which the circuit court did not find here. Further, as above, County Investments did not plead a claim for attorney fees under either statute. County Investments also claims attorney fees are proper in equity; however, this argument was expressly rejected in *O'Rourke*. *See* 365 S.W.3d at 587 ("In view of [KRS 383.570 and KRS 383.660(3)], we see no room for trial court discretion [based on equity] in this arena [(attorney fees)] except as provided in KRS 383.660(3).").

The Hernandezes next contend the circuit court failed to make sufficient findings of fact to support its property damage award.[3] "CR 55.01 clearly contemplates that damages hearings in cases where a [summary] judgment for liability has been entered should be evidentiary in nature to determine the amount of damages and establish the truth of any other allegations or evidence supporting the damage claim." *Deskins v. Estep*, 314 S.W.3d 300, 304 (Ky. App. 2010). "Kentucky Courts have concluded that proceedings of this nature are governed by CR 52.01." *Id.* (citation omitted). "The provisions in CR 52.01 are mandatory and require the court to make specific findings of fact and separate conclusions of law before rendering a judgment." *Id.* (citation omitted).

[3] The Hernandezes also challenge the sufficiency of the findings supporting the attorney fee award, but because we have determined the attorney fee award to be error, the issue is moot.

At the damages hearing, Mac Sawyers, one of County Investments' principals, testified to various property damage following the Hernandezes' tenancy, including a broken window, missing door, and ruined carpet. He further estimated the cost to repair this damage was $3,500. This estimate was based on the $5,000 County Investments paid to rehabilitate the property minus the $1,500 they typically paid to rehabilitate other properties following tenancy. He further testified that new carpet alone could cost $3,500 to $4,000. Sawyers provided no itemized costs for the various damages but testified he paid someone a lump sum to fix everything.

In its final judgment, the circuit court found that County Investments "presented sufficient evidence to support their claim that they are entitled to damages in the amount of $1,000 for damages to the property." "To perform meaningful review of a trial court's decision, this Court must be able to fully understand the facts and evidence upon which the court relied." *Patmon v. Hobbs*, 495 S.W.3d 722, 728 (Ky. App. 2016). Here, it is unclear what damage the $1,000 was awarded for. To make an award for property damage, the court needed to find the Hernandezes liable for any or all the property damage testified to by Sawyers. Yet from the order, we cannot tell which acts the circuit court believed were committed. Sawyers testified to $3,500 in repair costs and various property damage, but the court's order does not state which evidence it relied upon in awarding $1,000 in damages. Therefore, we remand for the circuit court to make specific findings of fact, based on the evidence presented at the hearing, to support its damage award.

Finally, the Hernandezes also challenge the sufficiency of the proof concerning property damage. They question Sawyers's reliability as a witness and the court's discounting of Erin Hernandez's testimony regarding the house's condition. However, "judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (citation omitted); *see also* CR 52.01 ("[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). Considering our remand for additional findings, we do not address the sufficiency of the evidence.

Turning to County Investments' cross-appeal, it argues the circuit court erred by not granting its motion to amend its complaint. County Investments filed its motion to amend almost four years after filing its original complaint. The amended complaint sought the full eight months of rent due under the rental agreement, rather than the five months owed when it filed the original complaint. The circuit court denied the motion, finding it was untimely.

CR 15.01 provides that "a party may amend his pleading only by leave of court . . . and leave shall be freely given when justice so requires." "[L]iberality in granting leave to amend is desirable, [but] the application is addressed to the sound discretion of the trial judge." *Bradford v. Billington*, 299 S.W.2d 601, 603 (Ky. 1957). Absent abuse of discretion, we will not disturb the trial court's decision. *M.A. Walker Co., Inc. v. PBK Bank, Inc.*, 95 S.W.3d 70, 74 (Ky. App. 2002) (citation omitted).

Factors to be considered in determining whether to grant or deny leave to amend a complaint include "timeliness, excuse for delay, and prejudice to the opposite party[,]" *Lawrence v. Marks*, 355 S.W.2d 162, 164 (Ky. 1961), as well as "failure to cure deficiencies by amendment or the futility of the amendment itself." *First National Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky. App. 1988). However, "delay alone is insufficient reason to deny a motion to amend." *Estes v. Kentucky Utilities Co.*, 636 F.2d 1131, 1134 (6th Cir. 1980). Here, the circuit court gave no other reason for denying the motion to amend but timeliness.

While the motion to amend was filed almost four years after the original complaint, it sought only increased damages due under the rental agreement. The Hernandezes would have suffered no prejudice by the amendment. They knew or should have known they owed $8,800 under the lease. They understood it was a one-year lease and conceded they only paid four-months' rent. The lease agreement specifically provided forfeiture of the lease "shall in no way affect any obligation or undertaking hereunder by Lessee" and "[r]eturn of the keys for the Lease Premises . . . shall in no way create or produce a cancellation or release hereunder, nor a cancellation of any monies due, or to become due . . . ." Further, the motion to amend was filed before the damages hearing; therefore, the Hernandezes had time and opportunity to present evidence and argument in opposition. Under these facts, we believe the circuit court abused its discretion in denying the motion to amend.

County Investments next argues it was entitled to the full eight months of unpaid rent owed under the rental agreement. In a breach of contract claim, the measure of damages "is that sum which will put the injured party into the same position he would have been in had the contract been performed." *Barnett v. Mercy Health Partners-Lourdes, Inc.*, 233 S.W.3d 723, 727-28 (Ky. App. 2007). In its final judgment, the circuit court found the Hernandezes "failed to honor their contractual obligation to pay monthly rent in the agreed amount of $1,100 for an 8-month period of time." But it declined to award County Investments damages for eight months of unpaid rent, finding it "failed to present evidence to demonstrate that meaningful effort was made to re-lease and mitigate their damages."

"A party claiming damages for breach of contract is obligated to use reasonable efforts to mitigate his damages." *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d 849, 852 (Ky. App. 2014) (citation omitted). "However, his efforts to minimize or avoid losses need not be unduly risky, expensive, burdensome, or humiliating." *Id.* (citing 24 *Williston on Contracts* § 64:27 (4th ed. 2010)). Further, "[t]he party committing the breach bears the burden of proving that the plaintiff failed to mitigate his damages." *Id.*

Here, it appears the circuit court placed the burden of proof on County Investments rather than the Hernandezes. Nevertheless, Sawyers testified that it took three months to get the property rental ready after the Hernandezes vacated and that County Investments spent $5,000 on the renovations. This was $3,500 more than it normally spent to prepare a property for rent. He further testified that he showed the property to about twelve to fifteen people, put out signs, and posted a link on Facebook Marketplace. Additionally, his daughter showed the property. Despite these efforts, County Investments was unable to lease the property.

Based upon this evidence, the circuit court's finding that County Investments failed to reasonably mitigate its damages was clearly erroneous. As noted above, the burden of proof was on the Hernandezes and they presented no evidence to contradict Sawyers's testimony. Based upon the court's finding that the Hernandezes breached the rental agreement, County Investments was entitled to the remaining eight months of rent due under the contract. Thus, we reverse the circuit court's award of damages for breach of contract.

Finally, County Investments argues the court erred in failing to award its costs as the prevailing party under CR 54.04. That rule provides, in relevant part, "[c]osts shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ." Thus, "while costs are allowed 'as of course' to the prevailing party, trial courts retain the authority to 'otherwise direct[],' that is, not to award costs to the prevailing party." *Lang v. Sapp*, 71 S.W.3d 133, 136 (Ky. App. 2002). We cannot say the circuit court abused its discretion in not awarding costs.

Based upon the foregoing, as to the Hernandezes' appeal, we affirm the Jefferson Circuit Court's orders in part but reverse as to the award of attorney fees and the denial of the motion for additional findings and remand for the circuit court to make written findings in support of its damage award based on the evidence presented at the hearing, including the facts and evidence which it relied upon. As to County Investments' cross-appeal, we affirm the circuit court's denial of costs but reverse its denial of County Investments' motion to amend its complaint and the court's damage award for breach of the rental agreement.

ALL CONCUR.

BEFORE: COMBS, LAMBERT, AND MCNEILL, JUDGES.

EMPLOYMENT LAW

COMMON LAW WRONGFUL DISCHARGE

EMPLOYEE'S REFUSAL TO FOLLOW EMPLOYER'S DIRECTIVE TO VIOLATE THE LAW CONCERNING VEHICLE SAFETY

Plaintiff worked for company as door and window installer — Plaintiff's duties included driving truck and trailer provided by company — Plaintiff informed his supervisors that trailer had defective brakes and brake lights requiring repair — When repairs were not made, plaintiff refused to drive vehicles — Company then terminated plaintiff's employment — Plaintiff filed instant action alleging common law wrongful discharge — Plaintiff filed amended complaint alleging that he was fired after refusing company's directive to violate law in the course of his employment — Company filed motion to dismiss under CR 12.02(f) — Trial court granted motion to dismiss — Plaintiff appealed — REVERSED and REMANDED — Kentucky is at-will employment state; therefore, employer may generally discharge an employee for good cause, for no cause, or for a cause that some might view as morally indefensible — However, there is "public policy" exception to at-will doctrine that requires: (1) discharge must be contrary to fundamental and well-defined public policy as evidenced by existing law; (2) that policy must be evidenced by a constitutional or statutory provision; and (3) decision of whether public policy asserted meets these criteria is question of law for court to decide, not question of fact — In addition, employment-related nexus should exist within public policy — Two specific types of situations have been recognized under this exception: (1) where alleged reason for discharge of employee was employee's failure or refusal to violate a law in the course of employment, and (2) when reason for discharge was employee's exercise of a right conferred by well-established legislative enactment — Instant action involves first type — KRS 189.090(1) directs that no owner shall knowingly operate or permit to be operated on a highway a motor vehicle upon which the brakes are defective — KRS 189.055 states, in part, that a person shall not operate any vehicle by law to be licensed upon a highway unless it is equipped with at least two red lights on the rear of the vehicle — Legislature made clear that brakes and brake lights are required to operate a vehicle in Kentucky — An employment-related nexus is also evident — These statutory provisions express Kentucky's public policy in favor of vehicle safety, specifically concerning brakes and brake lights — In granting motion to dismiss, trial court relied, in part, on Supremacy Clause finding that plaintiff's claim was preempted by Federal Aviation Administration Authorization Act (F4A), which preempts any state law that relates to price, route, or service of any motor carrier with respect to transportation of property — There is no clear directive that federal law supersedes relevant provisions of KRS Chapter 189, as it applies to facts and legal questions in instant action; therefore, trial court erred in relying on F4A to dismiss complaint —

Mitchel Weafer v. Heritage Installations I, LLC (2023-CA-0665-MR); Fayette Cir. Ct., Travis, J.; Opinion by Judge McNeill, *reversing and remanding*, rendered 8/9/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Appellant, Mitchel Weafer ("Weafer"), worked installing doors and windows for Appellee, Heritage Installations I, LLC ("Heritage"). His duties included driving a truck and trailer provided by Heritage. Weafer informed his supervisors that the trailer had defective brakes and brake lights requiring repair. When the repairs were not made, Weafer refused to drive the vehicles. Heritage subsequently terminated his employment.

Weafer filed suit in Fayette Circuit Court alleging common law wrongful discharge. The amended complaint alleges that he was fired after refusing Heritage's directive to violate the law in the course of his employment. Heritage filed a motion to dismiss pursuant to CR[1] 12.02(f), which was granted. Weafer appeals to this Court as a matter of right. For the following reasons, we reverse and remand.

[1] Kentucky Rules of Civil Procedure.

STANDARD OF REVIEW

"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) (citation omitted). Accordingly, "the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true." *Id.* With this standard in mind, we return to the present issue.[2]

[2] The present case discusses federal and state law, which will be referenced throughout as follows: The United States Constitution ("U.S. Const."); the United States Code Annotated ("USC"); the United States Code of Federal Regulations ("CFR"); Kentucky Revised Statutes ("KRS"); and the Kentucky Administrative Regulations ("KAR"). We also note the well-reasoned and well-cited briefs submitted by the parties, which have been most welcome in navigating these various laws.

ANALYSIS

Kentucky is an at-will employment state. Therefore, an employer may generally discharge an employee "for good cause, for no cause, or for a cause that some might view as morally indefensible." *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983) (citations omitted). However, there is a "public policy" exception to the at-will doctrine. It must be established as follows:

> 1) The discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law.
>
> 2) That policy must be evidenced by a constitutional or statutory provision.
>
> 3) The decision of whether the public policy asserted meets these criteria is a question of law for the court to decide, not a question of fact.

Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985). Furthermore, an employment-related nexus should exist within the public policy. *Id.* at 402. Two specific types of situations have been recognized under this exception:

> First, where the alleged reason for the discharge of the employee was the employee's failure or refusal to violate a law in the course of employment.
>
> Second, when the reason for the discharge was the employee's exercise of a right conferred by well-established legislative enactment.

Id. (internal quotation marks and citation omitted). The present case concerns the first situation. *See Ne. Health Mgmt., Inc. v. Cotton*, 56 S.W.3d 440, 447 (Ky. App. 2001) (holding that an employee who was fired for refusing employer's request to commit perjury satisfied the first situation described in *Grzyb*). More recently, in *Hill v. Kentucky Lottery Corporation*, the Kentucky Supreme Court applied *Cotton* and held in part that "KRS Chapter 344 does not preempt the Hills' common law claims for wrongful discharge based on the public policy against perjured testimony." 327 S.W.3d 412, 423 (Ky. 2010), *as modified on denial of reh'g* (Dec. 16, 2010). Based on these decisions, Weafer summarizes his central argument as follows:

> Considering the allegations in the amended complaint as true, as required, Heritage had no better right to direct Weafer to illegally operate the defective trailer in violation of KRS 189.055 (requiring brake lights for all motorists), KRS 189.090(1)-(2) (prohibiting defective brakes and requiring adequate brakes for all motorists), and KRS 189.080(4), KRS 281.600 and 601 KAR

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

1:005 (defining standards specific to commercial motor carriers) than the defendants in *Hill* and *Cotton* had to direct their employees to violate general perjury statutes.

In contrast, the circuit court summarized the perceived overlap of state and federal law in the present case:

> Heritage is a private motor carrier as defined by the Federal Motor Carrier Safety Administration ("FMCSA"), 49 C.F.R. 390.5, and is subject to federal motor carrier safety regulations. 49 C.F.R. 393.1(a). This includes but is not limited to, 49 C.F.R. Part 393, which regulates brakes on commercial motor vehicles. KRS 189 confirms the mandatory application of 49 C.F.R. Part 393 to Heritage. It states that a commercial motor vehicle . . . with a declared gross weight of over ten thousand (10,000) pounds must meet the federal motor carrier safety standards in 49 C.F.R. pt. 393.
>
> The Kentucky Court of Appeals has held that the protection of Kentucky's public policy exception does not extend to the violation of a federal regulation. Kentucky federal courts interpreting Kentucky wrongful discharge claims have followed suit.

(Cleaned up).[3] *See*, *e.g.*, *Shrout v. The TFE Group*, 161 S.W.3d 351, 355 (Ky. App. 2005) (citation omitted) (observing that the protection of the public policy exception "does not extend to the violation of a federal regulation"); *Barlow v. The Martin-Brower Co.*, 202 F.3d 267, 2000 WL 32027 (6th Cir. Jan. 5, 2000) (unpublished table opinion holding that federal transportation regulations could not form the basis for a wrongful discharge suit under Kentucky law). Before considering additional case law, we must first address the statutory provisions at issue.

[3] This Opinion uses "cleaned up" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 Journal of Appellate Practice and Process 143 (2017).

Weafer's complaint cites three statutes in support of his wrongful discharge claim. KRS 281.600; KRS 189.090; and KRS 189.055.[4] We will focus our analysis on the latter two provisions. KRS 189.090(1) directs that "[n]o owner shall knowingly operate or permit to be operated on a highway a motor vehicle upon which the brakes are defective." Similarly succinct, KRS 189.055 mandates that "[a] person shall not operate any vehicle by law to be licensed upon a highway unless it is equipped with . . . at least two (2) red lights on the rear of the vehicle . . . ." This language demonstrates a clear legislative intent in ensuring the safe operation of vehicles at the most basic level. Indeed, "[s]hall means shall." *Vandertoll v. Commonwealth*, 110 S.W.3d 789, 796 (Ky. 2003). Chapter 189 also contains penalty provisions. KRS 189.990 and KRS 189.993. The legislature was not silent and made it clear that brakes and brake lights are required to operate a vehicle in Kentucky. At this point in history, it is a challenge to imagine a public policy pronouncement to the contrary. An employment-related nexus is also evident. *Grzyb*, 700 S.W.2d at 402. We need not stray too far from this statutory lane to see where the rubber meets the road.

[4] 601 KAR 1:005 is also cited. However, we will not consider regulatory authority because we are directed to consider public policy "evidenced by a constitutional or statutory provision." *Grzyb*, 700 S.W.2d at 401. The complaint does not cite any federal authority.

For example, two of our sister states – with whom we share borders and thoroughfares – have recognized similar public policies. *See Lilly v. Overnight Transp. Co.*, 425 S.E.2d 214, 217 (W. Va. 1992) ("[W]e hold that a cause of action for wrongful discharge may exist under West Virginia [statutes] where an employee is discharged from employment in retaliation for refusing to operate a motor vehicle with brakes that are in such an unsafe working condition that operation of the vehicle would create a substantial danger to the safety of the public."); *Lawson v. Adams*, 338 S.W.3d 486, 498 (Tenn. Ct. App. 2010) (reversing and remanding in wrongful discharge case where "the statutes and regulations Plaintiff claims were violated establish, at a minimum, public policy that motor vehicles have properly working brakes"). Moreover, a recent unpublished case from a panel of this Court also proves instructive. *Ft. Mitchell Construction, LLC v. Justini*c, No. 2022-CA-0386-MR, 2024 WL 1335245 (Ky. App. Mar. 29, 2024).[5] In *Justinic*, the Court analyzed whether KRS 183.100 (compliance with air traffic rules), was sufficient to support Appellee's claims of wrongful termination. KRS 183.100 states in its entirety:

> No person shall operate any aircraft within the state in any form of navigation whatsoever in violation of the air traffic rules promulgated by the cabinet or the Federal Aviation Administration [(FAA)]. For enforcement purposes, cabinet personnel shall have access at all reasonable times to appropriate books, records, and logs of any person operating aircraft in the state.

[5] The parties' briefs in the present case were submitted months before *Justinic* was rendered. Therefore, neither they, nor the circuit court, had the benefit of this decision.

In analyzing this provision, the Court reasoned that "[w]e cannot agree that the statute fails to outline a well-defined policy[,]" and that "[w]e have little doubt that KRS 183.100 has a nexus to [Appellee's] employment." *Justinic*, 2024 WL 1335245, at *3. The Court ultimately concluded that "this statute expresses Kentucky's public policy in favor of air safety." *Id.* In support, the Court relied in part on *McGill v. DHL Airways, Inc.*, 12 F. App'x 247 (6th Cir. 2001) (applying KRS 183.100 and holding that the employee's termination violated public policy).

On balance, we believe that the present case is most like *Justinic*, *Lilly*, and *Lawson*. In the absence of binding Kentucky authority to the contrary, we find the reasoning advanced in these decisions to be persuasive. To be clear, however, our decision is premised upon the relevant statutory provisions themselves. And we reiterate that "[t]he decision of whether the public policy asserted meets [the necessary] criteria is a question of law for the court to decide, not a question of fact." *Grzyb*, 700 S.W.2d at 401. Therefore, any discussion of *Justinic*, *Lilly*, *Lawson*, or other nonbinding authority buttresses our decision – but does not dictate it. Accordingly, we hold that the statutory provisions cited in the present case express Kentucky's public policy in favor of vehicle safety, specifically concerning brakes and brake lights.

Finally, in granting the underlying motion to dismiss, the circuit court also relied in part on the Supremacy Clause, U.S. Const. art. VI, cl. 2. With this authority, the circuit court summarily held that Weafer's claim is preempted by the Federal Aviation Administration Authorization Act ("F4A"). More precisely, "[t]he [F4A] preempts any state law [that] relate[s] to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *California Trucking Association v. Bonta*, 996 F.3d 644, 649 (9th Cir. 2021) (citing 49 U.S.C. § 14501, Federal authority over intrastate transportation) (internal quotation marks omitted). *See also Niehoff v. Surgidev Corp.*, 950 S.W.2d 816, 821 (Ky. 1997), *cert. denied* 523 U.S. 1005 (1998) (There "is a presumption against the preemption of state regulations" considering "the historic primacy of state regulation of matters of health and safety."); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (A "court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption."); *and Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014) ("[G]enerally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations are not preempted . . . .").

Critically, no Kentucky appellate court has addressed this issue. Furthermore, we have not been presented with any other clear directive that federal law supersedes the relevant provisions of KRS Chapter 189, as it applies to the facts and legal questions at issue here. Accordingly, we reverse the circuit court's dismissal order on this issue as well.

CONCLUSION

For the foregoing reasons, we REVERSE the Fayette Circuit Court's order of dismissal and REMAND for further proceedings.

ALL CONCUR.

BEFORE: CALDWELL, ECKERLE, AND MCNEILL, JUDGES.

CRIMINAL LAW

SENTENCING

POSSESSION OF A CONTROLLED SUBSTANCE

PERSISTENT FELONY OFFENDER (PFO) ENHANCEMENT

KRS 532.080(8) specifically exempts possession crimes under KRS 218A.1415 from persistent felony offender (PFO) enhancement

— Possession of a controlled substance has a maximum sentence of three years — Trial court may impose consecutive sentences for possession if total imprisonment term does not exceed three years —

Russell T. Amboree v. Com. (2023-CA-0769-MR); Henderson Cir. Ct., Wilson, J.; Opinion by Judge Cetrulo, *vacating and remanding*, rendered 8/16/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Appellant Russell Amboree ("Amboree") appeals the Henderson Circuit Court judgment sentencing him to six years of imprisonment. After careful review, we vacate Amboree's sentence and remand for resentencing.

BACKGROUND

On April 12, 2022, a grand jury indicted Amboree for trafficking in methamphetamine, fentanyl, marijuana, and an unspecified schedule III substance. Kentucky Revised Statutes ("KRS") 218A.1412, 218A.1413, 218A.1421. Along with those four charges, the grand jury charged Amboree as a first-degree persistent felony offender ("PFO") under KRS 532.080(3). The indictment alleged that Amboree, a felon, had drugs with the intent to sell them at a racetrack in Henderson, Kentucky. Amboree pled not guilty to all charges.

Before trial, the Commonwealth moved to dismiss the schedule III substance trafficking charge.[1] The circuit court granted that motion, leaving Amboree charged with trafficking methamphetamine, fentanyl, and marijuana, as well as being a PFO. During the trial, Amboree focused his defense on mitigation. Amboree claimed that he was a drug user who hit "rock bottom." He explained that his drugs were for personal use, not for sale, and urged the jury to find him guilty of possession rather than trafficking. *See* KRS 218A.1415.

[1] The Commonwealth also moved to dismiss a "second offense" designation from Amboree's methamphetamine trafficking charge to avoid a potential issue during the penalty phase.

Amboree's defense succeeded. After the one-day trial, the jury found Amboree guilty of the lesser included offenses of two counts of possession of a controlled substance, as well as one misdemeanor charge. The circuit court also dismissed Amboree's PFO charge. For his crimes, the jury recommended a six-year prison sentence. In doing so, the jury fixed two consecutive, three-year sentences for Amboree's two felonies: possession of a controlled substance, methamphetamine, first-degree; and, possession of a controlled substance, fentanyl, first-degree.[2] KRS 218A.1415(1)(a), (c).[3]

[2] Evidence at trial revealed that fentanyl was a schedule II narcotic. KRS 218A.1415(1)(a).

[3] The jury also recommended a concurrent 45-day sentence for Amboree's possession of marijuana. KRS 218A.1422(2).

At sentencing, Amboree contested the length of his six-year sentence. He argued that a six-year sentence – two consecutive three-year terms – would "exceed the three-year maximum of the . . . possession charge." *See* KRS 218A.1415(2)(a). Such a sentence, Amboree asserted, would violate the statutory cap for consecutive sentences under KRS 532.110(1)(c). He also noted that KRS 532.080 excludes possession crimes from a sentence enhancement. In short, Amboree argued his sentences may only run consecutively for three years or less because the PFO statute would not apply to his convictions. *See* KRS 532.080(8).

The circuit court, however, ignored Amboree's argument. It instead asked, "Do you understand the jury's recommendation?" Once again, Amboree said the recommendation "exceeds the statutory limits." The circuit court repeated its question, and Amboree eventually acknowledged his recommended sentence. The circuit court then entered its judgment and sentenced Amboree to six years of imprisonment (two consecutive three-year terms). This appeal followed.

STANDARD OF REVIEW

Issues of statutory construction present questions of law, requiring *de novo* review. *Commonwealth v. Gamble*, 453 S.W.3d 716, 718 (Ky. 2015) (citing *Cumberland Valley Contractors, Inc. v. Bell Cnty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007)). We review such issues anew, without deference to the circuit court's conclusions. *Lee v. Ky. Dep't of Corr.*, 610 S.W.3d 254, 257 (Ky. 2020) (citing *Cumberland Valley*, 238 S.W.3d at 647). Simply put, this Court is not bound by a circuit court's interpretation of statutes. *See id.*

Our primary function in construing statutes is to determine the General Assembly's legislative intent. *Jones v. Commonwealth*, 636 S.W.3d 503, 505 (Ky. 2021) (quoting *Beach v. Commonwealth*, 927 S.W.2d 826, 828 (Ky. 1996)); KRS 446.080(1) ("All statutes of this state shall be liberally construed . . . to promote their objects and carry out the intent of the legislature[.]"). To derive this intent, we look at the statute's plain text. *Gamble*, 453 S.W.3d at 718 (citing *Lynch v. Commonwealth*, 902 S.W.3d 813, 814 (Ky. 1995)). We take words by their ordinary meaning, assuming the General Assembly "meant exactly what it said[] and said exactly what it meant." *Richardson v. Commonwealth*, 645 S.W.3d 425, 432 (Ky. 2022) (quoting *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 648 (Ky. 2017)).

"When a statute is plain and unambiguous on its face, we are not at liberty to construe the language otherwise." *Commonwealth v. Shirley*, 653 S.W.3d 571, 577 (Ky. 2022) (citing *Whittaker v. McClure*, 891 S.W.2d 80, 83 (Ky. 1995)). We read the statute in its entirety, giving equal effect to all provisions "so that no part of the statute will become meaningless or ineffectual." *Id.* (quoting *Lewis v. Jackson Energy Co-op., Corp.*, 189 S.W.3d 87, 92 (Ky. 2005)). The General Assembly, we presume, would "not intend an absurd result." *Id.* (citing *Commonwealth, Cent. State Hosp. v. Gray*, 880 S.W.2d 557, 559 (Ky. 1994)). This Court reads the statute "in context with other parts of the law." *Id.* (quoting *Lewis*, 189 S.W.3d at 92).

ANALYSIS

On appeal, Amboree asks this Court to vacate his sentence and remand for resentencing. He contends that there is only a statutory basis to run his sentences consecutively for three years, not six. To support his case, Amboree points to the language of KRS 532.080 and the possession statute, KRS 218A.1415. He also cites our decision in *Eldridge v. Commonwealth*, 479 S.W.3d 614, 619-20 (Ky. App. 2015), which gave early insight into the relationship between possession convictions and PFO enhancements.[4]

[4] As noted, Amboree's PFO charge was dismissed, but we reference the PFO statute for ease of discussion. Chapter 532 has been held applicable to sentencing caps for PFOs as well as non-PFOs. *See Castle v. Commonwealth*, 411 S.W.3d 754, 757 (Ky. 2013).

By contrast, the Commonwealth insists that the circuit court properly sentenced Amboree. In making that argument, the Commonwealth also relies on the PFO statute, but argues that KRS 532.110(1)(c) gives the circuit court discretion to run those sentences consecutively for up to 20 years. The Commonwealth, too, cites *Eldridge*, claiming this Court already held that sentences for certain drug crimes may run consecutively with a Chapter 532 enhancement.

The question before us is whether Amboree's six-year consecutive sentence exceeds the statutory limit. It does. More generally, we must decide whether the PFO statute may enhance the maximum sentence for a possession conviction. We hold it cannot.

KRS 532.080 enhances a defendant's sentence if he is a PFO. The statute aims to strengthen Kentucky's rehabilitation efforts by imposing greater penalties on felons who recommit crimes after their release from imprisonment. *Williams v. Commonwealth*, 639 S.W.2d 788, 790 (Ky. App. 1982). To that end, the PFO statute offers prosecutors a wider sentencing range otherwise provided by the penal code. *E.g.*, KRS 532.080(6).

At the same time, these enhancements may apply to non-PFOs, like Amboree. When defendants face multiple sentences for more than one crime, KRS 532.110(1) allows the circuit courts to run those sentences concurrently or consecutively, but, there are exceptions to this discretion. *Id.* The exception that involves PFO enhancements is mentioned in Subsection (1)(c):

> The *aggregate of consecutive indeterminate terms* shall not exceed in maximum length the longest extended term which would be authorized by *KRS 532.080 for the highest class of crime* for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years[.]

KRS 532.110(1)(c) (emphasis added).

Subsection (1)(c), in other words, uses PFO enhancements as guideposts for imposing indeterminate, consecutive sentences. *Id.* Its reference to the PFO statute is simply a "yardstick"

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

for determining "the maximum allowable term of incarceration for consecutive sentences." *Castle v. Commonwealth*, 411 S.W.3d 754, 757 (Ky. 2013). As such, "a defendant does not have to be adjudicated a Persistent Felony Offender for his sentence to be determined by reference to our PFO statute." *Id.* (citation omitted).

Our Supreme Court's opinion in *Castle v. Commonwealth* best illustrates the interplay between these two statutes. Arlen Castle ("Castle") pled guilty to, among other things, rape, robbery, and sodomy. *Id.* at 755. Those crimes each carry a felony designation. *Id.* at 756. After his guilty plea, the circuit court sentenced Castle to 20 years of imprisonment for each of his four Class B felonies and five years of imprisonment for each of his two Class D felonies. *Id.* The circuit court ordered those sentences to be served consecutively, for a total of 60 years. *Id.*

On appeal, Castle argued that his maximum aggregate sentence was 50 years, and a total 60-year term violates KRS 532.110(1)(c). *Id.* The Court disagreed. *Id.* at 761. To begin, the Court referenced the enhanced sentencing range for Castle's highest class of crime – a Class B felony – under the PFO statute. *Id.* It found the maximum sentence for a Class B felony is life imprisonment. *Id.* The Court then turned to the language of KRS 532.110(1)(c). *See id.* While the maximum term under the PFO statute was life imprisonment, KRS 532.110(1)(c) itself capped Castle's total sentence at 70 years. *Id.* The Court thus held that Castle's 60-year consecutive sentence complies with the statutory cap. *Id.*

Keeping those two statutes in mind, we now return to Amboree's sentence. The jury found Amboree guilty of two felonies: possession of methamphetamine and possession of fentanyl. KRS 218A.1415(1)(a), (c). The possession statute – KRS 218A.1415 – classifies these crimes as Class D felonies. Unlike other Class D felonies, possession of a controlled substance has a shorter sentence range. KRS 218A.1415(2)(a). The typical Class D felony carries a sentencing range of one to five years. KRS 532.060(2)(d). Possession of a controlled substance, however, has a maximum sentence of three years. KRS 218A.1415(2)(a).

The Commonwealth believes the circuit court properly sentenced Amboree to a consecutive sentence of six years. To get there, it noted that Amboree's possession crimes were Class D felonies subject to a three-year maximum sentence each. *Id.* For those sentences to run consecutively, the Commonwealth quotes Subsection (6)(b) of the PFO statute, which states:

> If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which *shall not be less than ten (10) years nor more than twenty (20) years*.

KRS 532.080(6)(b) (emphasis added).

Using that 20-year "yardstick," the Commonwealth reasons that Amboree's two three-year sentences for possession may run consecutively for six years without violating the statutory cap under KRS 532.110(1)(c).

However, Subsection (8) specifically exempts possession crimes under KRS 218A.1415 from enhancement. KRS 532.080(8). Specifically, it reads:

> A conviction, plea of guilty, or Alford[5] plea under KRS 218A.1415 *shall not trigger the application of this section*, regardless of the number or type of prior felony convictions that may have been entered against the defendant. A conviction, plea of guilty, or Alford plea under KRS 218A.1415 may be used as a prior felony offense allowing this section to be applied if he or she is subsequently convicted of a different felony offense.

Id. (emphasis added).

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

This language is unambiguous, making clear that possession crimes are excluded from the 20-year maximum that Subsection (6)(b) prescribes for other Class D felonies. *Id.* Said another way, Subsection (8) prevents other provisions of the PFO statute from enhancing sentences for possession beyond the three-year limit in KRS 218A.1415(2)(a). *Id.* Because the PFO statute authorizes nothing beyond the maximum three-year sentence for possession, circuit courts may not impose consecutive sentences exceeding that length under KRS 532.110(1)(c).

Despite that exemption, the Commonwealth still contends that Amboree's consecutive sentence is lawful. Like Amboree, the Commonwealth cites our decision in *Eldridge*, 479 S.W.3d at 620, stating this issue is settled law. The Commonwealth explains that *Eldridge* "held that reduced-term drug-crimes sentences can be run consecutively" and that broad holding, it argues, encompasses Amboree's possession crimes. However, that reading of *Eldridge* is flawed.

Our analysis in *Eldridge* relied almost entirely on recent precedent, *Commonwealth v. Gamble*, 453 S.W.3d 716. Thus, we begin with *Gamble*. In *Gamble*, our Kentucky Supreme Court held that *trafficking* crimes under KRS 218A.1413 qualify for a PFO enhancement. *Id.* at 721. To reach that holding, the Court began with the plain text of the second-degree trafficking statute:

> KRS 218A.1413(2)(b)(1) carves out an exception for those first-time offenders, like Gamble, who commit this particular crime by stating that "[a]ny person who violates the provisions of subsection (1)(c) of this section shall be guilty of [] [a] Class D felony for the first offense, *except that KRS Chapter 532 to the contrary notwithstanding*, the maximum sentence to be imposed shall be no greater than three (3) years."

Id. at 719 (quoting KRS 218A.1413(2)(b)(1)) (emphasis added).

The "KRS Chapter 532 to the contrary notwithstanding" language was of particular importance. *See id.* In defining its meaning, the Court reviewed the General Assembly's amendments to Chapter 218A – the part of the penal code governing controlled substances – under House Bill ("HB") 463. *Id.* at 720-21. Most notably, the Court compared the language of the trafficking statute with the possession statute:

> HB 463 § 12 amended KRS 218A.1415, the statute proscribing first-degree possession of a controlled substance, to reflect that the maximum sentence for a first-time offense is three years despite its categorization as a Class D felony. Unlike the [trafficking in a controlled substance] TICS2 statute, *KRS 218A.1415 has much clearer language. The statute states that despite its classification as a Class D felony, first-degree possession of a controlled substance carries a "maximum term of incarceration [] no greater than three (3) years, notwithstanding KRS Chapter 532." The wording implies that no section of KRS Chapter 532 can increase the sentence beyond three years, including a PFO enhancement*. In the TICS2 statute, however, the General Assembly used the phrase "Chapter 532 to the contrary notwithstanding," which leads this Court to believe that it meant something other than the entire Chapter of KRS 532 is inapplicable. Instead, what we believe the General Assembly meant is . . . that the sentencing court must ignore the contrary penalty range for Class D felonies as detailed in KRS 532.060(2)(d) specifically, but not the PFO provision.

Id. (quoting KRS 218A.1413(2)(b)) (emphasis added).

Although the trafficking statute provides for a three-year maximum sentence, our Supreme Court held that it still qualified for enhancement. *Id.* In *Gamble*, the Court narrowly interpreted the "KRS Chapter 532 to the contrary notwithstanding" language. *Id.* (quoting KRS 218A.1413(2)(b)). That language, the Court reasoned, bars only KRS Chapter 532 provisions that are contrary to the three-year maximum sentence. *Id.* More specifically, the Court found that the language trumps the one to five year sentence range for Class D felonies under KRS 532.060(2)(d). *Id.*

Similarly, in *Eldridge*, this Court followed *Gamble* and affirmed the defendant's sentence on the same grounds. *Eldridge*, 479 S.W.3d at 620. The defendant, Michael Eldridge ("Eldridge"), pled guilty to four counts of second-degree trafficking of a controlled substance under KRS 218A.1413. The Commonwealth offered Eldridge a one-year sentence on each charge, which would be served consecutively for four years. *Id.* Eldridge repudiated, insisting that "the aggregate consecutive term of sentences for offenses with a maximum of three years' imprisonment was three years." *Id.* Because KRS 218A.1413 includes a maximum sentence of three years, Eldridge thought his trafficking crimes were not subject to enhancement. *See id.* We held that the three-year maximum sentence in the trafficking statute did not shield Eldridge from a longer consecutive sentence. *See id.* Instead, we agreed that the PFO enhancement authorizes the circuit court to run Eldridge's sentences consecutively for up to 20 years. *Id.*

We first looked at Eldridge's enhanced sentencing range for his highest class of crime, a Class D felony, under the PFO statute. *Id.* The maximum aggregate penalty range Eldridge could be sentenced to was 20 years. *Id.* (citing KRS

532.080(6)(b)). "Accordingly, the circuit court's decision to sentence Eldridge to four consecutive, one-year terms for a total of four years' imprisonment fell within the permitted sentencing range as set forth in KRS 532.110." *Id.*

Yet Amboree's case is distinguishable from *Gamble* and *Eldridge*. Amboree's sentence involves the same issue but with a different statute: KRS 218A.1415. Like the trafficking statute, the possession statute prescribes a three-year maximum sentence for crimes therein. KRS 218A.1415(2)(a). However, that three-year limit comes with much clearer language. *See id.* Recall our Supreme Court's finding in *Gamble*, which we later repeated in *Eldridge*. *Gamble*, 435 S.W.3d at 720-21; *Eldridge*, 479 S.W.3d at 619.

> Unlike the TICS2 statute, KRS 218A.1415 has much clearer language. The statute states that despite its classification as a Class D felony, first-degree possession of a controlled substance carries a "maximum term of incarceration [] no greater than three (3) years, *notwithstanding KRS Chapter 532*." (Emphasis added). The wording implies that no section of KRS Chapter 532 can increase the sentence beyond three years, including a PFO enhancement.

Gamble, 435 S.W.3d at 720-21 (quoting KRS 218A.1415(2)(a)).

On that understanding, Amboree's sentences for possession are excluded from enhancement. *See id.* As such, the circuit court may only order Amboree's possession sentences to be served consecutively if the total aggregate sentence does not exceed the three-year statutory maximum.

To summarize, Amboree's sentences may not run consecutively for six years. KRS 532.080(8) exempts sentences for possession under KRS 218A.1415 from a PFO enhancement. Circuit courts may impose consecutive sentences for possession if the total imprisonment term does not exceed three years. *See* KRS 532.110(c)(1). *Eldridge* and *Gamble* further support this. We, like our Supreme Court in *Gamble*, hold that no section of Chapter 532 may increase sentences under KRS 218A.1415 beyond three years. *Eldridge*, 479 S.W.3d at 619 (quoting *Gamble*, 435 S.W.3d at 720-21). For these reasons, we hold that Amboree's consecutive sentence of six years exceeds the three-year cap provided by law.

CONCLUSION

In light of the foregoing, we VACATE the sentence of the Henderson Circuit Court and REMAND for resentencing consistent with this Opinion.

ALL CONCUR.

BEFORE: CETRULO, L. JONES, AND LAMBERT, JUDGES.

WRONGFUL DEATH

SUIT AGAINST EMPLOYEES WITH THE CABINET FOR HEALTH AND FAMILY SERVICES FOR THE WRONGFUL DEATH OF A CHILD

QUALIFIED OFFICIAL IMMUNITY

CIVIL PROCEDURE

MOTION TO FILE A SECOND AMENDED COMPLAINT

Mother and father of child were both incarcerated — District court appointed mother's sister as child's guardian — Various issues arose requiring Cabinet for Health and Family Services (Cabinet) and Department of Community Based Services (DCBS) to become involved — Child died in house fire — Mother filed wrongful death action against numerous defendants, including Cabinet and three social workers, in their official and individual capacities — After much legal maneuvering, only remaining defendants were three social workers and unnamed individual defendants who were Cabinet employees — On October 1, 2020, mother moved for leave to file second amended complaint, which defendants opposed — On July 26, 2023, trial court entered summary judgment in favor of three social workers, in their individual and official capacities — Trial court found that social workers were engaged in exercise of discretionary governmental functions, or else acting in discretionary manner within scope of their employment, and as such, were entitled to immunity in their official capacities and qualified official immunity in their individual capacities — On August 4, 2023, mother filed motion to reconsider or alter, amend, or vacate — On September 8, 2023, mother renewed her motion for court to rule on her motion to file second amended complaint — Following a hearing on September 14, trial court denied mother's motion to alter, amend or vacated and included finality language — Trial court did not address mother's motion to file a second amended complaint — REVERSED trial court's order granting summary judgment and REMANDED for further proceedings — Qualified official immunity protects public officers and employees sued in their individual capacities from damages liability for good faith judgment calls made in a legally uncertain environment — This immunity applies only to negligent performance by a public officer or employee of (1) discretionary acts or functions; (2) in good faith; and (3) within scope of employee's authority — Trial court's order granting summary judgment did not contain any findings identifying nature or source of social workers' duties and why trial court believed these duties were discretionary — Findings need not be extensive, but they should be complete enough to enable adequate appellate review — On remand, if trial court deems it necessary, it may order additional briefing, or permit discovery, or both — Mother failed to exercise reasonable diligence to obtain ruling on her motion to file second amended complaint before it became a moot issue — Mother was silent with respect to this motion for three years — All claims were resolved prior to mother's September 8, 2023 renewed motion to file a second amended complaint; therefore, trial court properly ignored mother's motion —

Ashley V. Barnette, Individually and In Her Capacity as Administratrix of the Estate of Kamden Hunter Williams v. Angel Evans, James Hensley, and Leigha Sproles (2023-CA-1159-MR); Bell Cir. Ct., Hendrickson, Special J.; Opinion by Judge Karem, *reversing and remanding*, rendered 8/16/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Ashley V. Barnette ("Barnette"), individually and in her capacity as administratrix of the Estate of Kamden Hunter Williams, appeals from a Bell Circuit Court order granting summary judgment to Angel Evans ("Evans"), James Hensley ("Hensley"), Leigha Sproles ("Sproles"), and all employees of both the Cabinet for Health and Family Services ("Cabinet") and the Department for Community Based Services ("DCBS"). Barnette brought a negligence action against the appellees stemming from the death of her young child and she now challenges the circuit court's ruling that the appellees are shielded by qualified official immunity. Upon careful review, we reverse and remand for findings by the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Barnette's late son, Kamden Hunter Williams ("Kamden"), was born on April 9, 2015. Barnette and Kamden's putative father, Kenneth W. Williams ("Williams"), were incarcerated for various drug offenses throughout most of Kamden's life. According to Barnette's affidavit in the record, Williams was arrested in June 2015 and Barnette was arrested and jailed in August 2015. In October 2015, the Bell District Court entered an order appointing Barnette's sister, Amber North ("North"), Kamden's guardian.

On March 6, 2018, North went out and left Kamden at her apartment in the care of her friends, Jessica Sullivan and Whitney Martin. While the two were asleep, Kamden, who was about to turn three years old at the time, managed to exit the front door of the apartment. Maintenance personnel found the toddler, wandering alone wearing only a T-shirt, and notified the police. During their investigation, the police discovered marijuana in North's apartment. North told the police the marijuana belonged to her brother. The police reported the matter to the Bell County office of the DCBS.

Angel Evans was the DCBS child protective services worker assigned to conduct the investigation. According to Evans's affidavit, she went to North's apartment the same day and interviewed the police officer and the maintenance workers who found Kamden. She observed that

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

Kamden was clean and did not appear to be scared. Sullivan and Martin told her that Kamden was asleep when they arrived to babysit, and they did not realize that he was able to open the door. North admitted that she may have forgotten to lock the door when she left Kamden with her friends. She explained she accepted guardianship of Kamden, her sister's child, because his mother was in prison and no one else would take him. North herself was trying to adjust to her recent divorce, and she confessed she could not pass a drug screen and would test positive for marijuana.

Evans determined that the risk of harm to Kamden did not justify seeking an emergency custody order. Evans's first-line supervisor was out of the office, so she consulted with the Service Region Administrator Associate, James Hensley. They decided it would be appropriate to ask North to sign a prevention plan in which she would agree to be supervised by a friend or family member. North did not want any of her ex-husband's family involved, and she suggested her aunt, Amanda "Mandy" Brock ("Brock"), act as her supervisor. According to North, Brock had always helped her, and she loved Kamden. Brock agreed that North and Kamden could move into her home temporarily.

The Prevention Plan was signed by Amanda Brock, Amber North, and Angel Evans on March 6, 2018. It had three provisions: "Amber agrees to be supervised with Kamden at her Aunt Mandy's house until investigation is done[;] Amber agrees to provide a sober caretaker for Kamden at all times[;] and Amber agrees not to allow any drugs in the house with Kamden[.]"

Hensley asked Leigha Sproles, another social worker, to inspect Brock's home for any safety hazards. The home was found to be clean and appropriate; apart from a wood stove used for heat. Brock agreed to block the stove off so Kamden could not touch it. There is no evidence that anyone from DCBS checked to ensure that the stove was blocked.

On March 13, 2018, Evans learned that North had left Kamden with Brock. Brock reported that North had left and told her she would return later. Evans tried unsuccessfully to find North by going to her apartment, phoning her, and contacting her friends and family. She continued trying to locate North to no avail.

On March 30, 2018, Brock told Evans she needed to go to Lexington for a medical test and asked if Crystal Thomas ("Thomas")[1] could care for Kamden. In her affidavit, Evans states that ideally, North should have consented to this arrangement because she was Kamden's legal guardian. However, Evans could not locate her and nothing in DCBS's Standards of Practice ("SOP") indicated what to do in this situation. On April 3, 2018, Brock and Thomas came to the DCBS office with Kamden. He was clean and appropriately dressed. Brock had still not heard from North. Evans thought it was premature to ask a court to intervene and place Kamden in foster care or with a relative. She believed North would eventually return her calls because North had been leaving her messages.

[1] It is unclear from the record what relation Crystal Thomas is to any of the parties.

On April 4, 2018, Evans received a call from Brianna Perry, the sister of North's ex-husband. She expressed an interest in being a placement for Kamden. According to Evans, her first priority was to restore Kamden to his legal guardian's custody, and insufficient time had gone by for her to presume North had abandoned the child. Also, North had made it clear to Evans that she did not want her ex-husband's family involved in caring for Kamden. Evans told Perry she could not interfere with North's choice of caregiver under the circumstances because Kamden was not in state custody.

On April 10, Crystal Thomas told Evans she could no longer care for Kamden, and she expressed concern regarding his appearance while he was in Brock's care. On April 27, 2018, Evans tried to call North and Brock again about North's continued absence but was unable to reach them. She learned on April 28, 2018, that Kamden had tragically died in a fire at Brock's home. Brock had left him at the house in the care of her eleven-year-old son, awaiting the arrival of their babysitter. According to Barnette, Evans had told Brock she could leave Kamden in the care of the eleven-year-old. Brock was subsequently indicted, and a jury found her guilty of Wanton Endangerment in the 1st degree and Manslaughter in the 2nd degree, for which she is currently serving a prison sentence.[2]

[2] Information regarding the criminal case against Amanda Brock was procured by a search of CourtNet, Kentucky's litigation search engine. Judicial notice may not be taken of Kentucky CourtNet records to present as evidence in a trial. *See Marchese v. Aebersold*, 530 S.W.3d 441 (Ky. 2017). But information about the existence of charges may be referenced by an appellate court to provide perspective for the trial court proceedings. *See*, *e.g.*, *Mulazim v. Commonwealth*, 600 S.W.3d 183, 203 n.6 (Ky. 2020).

Barnette filed a wrongful death complaint on May 8, 2015, naming as defendants the Secretary and the Commissioner of the Cabinet, in their official capacities; the Cabinet; and Evans, Hensley, and Sproles, in their official and individual capacities; and unknown defendants individually and in their official capacities as social workers or other employees of the Cabinet. Barnette also filed an action with the Kentucky Board of Claims which was held in abeyance until the resolution of the circuit court action.

On May 22, 2019, the defendants removed the circuit case to federal court, which ultimately remanded the case to Bell Circuit Court. On July 27, 2020, Barnette moved to file an amended complaint to reflect what had occurred in the federal action, including the dismissal of some claims and defendants. The circuit court granted the motion on August 3, 2020. The only remaining defendants in the first amended complaint were Evans, Hensley, Sproles, and the unnamed individual defendants.

On September 3, 2020, the defendants filed a motion to dismiss or alternatively for summary judgment. They simultaneously filed a motion to stay discovery pending the court's ruling on their motion. Barnette filed a response.

The court conducted a hearing and took the motion under submission. On October 1, 2020, Barnette moved for leave to file a second amended complaint.

On November 6, 2020, the circuit judge disqualified himself and the case was assigned to a special judge.

On April 27, 2021, the defendants filed their opposition to the motion for leave to amend the complaint.

On September 9, 2021, the court entered an order holding the pending motions in abeyance while it reviewed the case law, records, and supplemental filings. One of the attorneys for the defendants was ordered to provide clarification about the Cabinet's duties, and whether they were discretionary or ministerial. The defendants filed a supplemental memorandum of law to support their motion for summary judgment on October 11, 2021.

The circuit court conducted a status hearing on June 8, 2023. The court did not rule on Barnette's motion to file a second amended complaint. On July 26, 2023, the circuit court entered summary judgment in favor of Evans, Hensley, and Sproles, in their individual and official capacities. It ruled that these defendants were public officers or employees engaged in the exercise of discretionary governmental functions, or else acting in a discretionary manner within the scope of their employment, and as such, were entitled to immunity in their official capacities and qualified official immunity in their individual capacities. The court further found that there was no showing that any of these defendants acted objectively or subjectively in bad faith; however, the court did not include finality language in its order pursuant to Kentucky Rules of Civil Procedure ("CR") 54.02. On August 4, 2023, Barnette filed a motion to reconsider or to alter, amend, or vacate, which included a request for the court to amend its order adding finality language. On September 8, 2023, Barnette renewed her motion for the court to rule on the motion to file a second amended complaint. Following a hearing on September 14, 2023, the court entered a "(Corrected) Order" denying Barnette's motion to alter, amend, or vacate and included the language, "the judgment . . . is final as a matter of law." However, neither the original summary judgment order nor the corrected order addressed Barnette's motion to file a second amended complaint. This appeal followed.

PRELIMINARY ISSUE

This Court cannot ignore Barnette's blatant failure to follow the Kentucky Rules of Appellate Procedure ("RAP") in the drafting of her appellate brief. Barnette's brief does not conform to RAP 32(A)(3) requiring citations to the record in the statement of facts. Moreover, Barnette's subsequent arguments neither provide a preservation statement nor cite to the record. RAP 32(A) reads in pertinent part:

> **(A) Appellant's Opening Brief.** An appellant's opening brief must contain the following sections, in the following order.
>
> . . .
>
> (3) A **statement of the case** consisting of a summary of the facts and procedural events relevant and necessary to an understanding

> of the issues presented by the appeal, with ample references to the specific location in the record supporting each of the statements contained in the summary.
>
> (4) An **argument** conforming to the statement of points and authorities, with ample references to the specific location in the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

Often in appellate practice, when the deficiencies of an appellant's brief are identified by the appellees, as in this case, appellants will correct those deficiencies in the reply brief. However, in the case *sub judice*, Barnette doubles down on her transgressions by stating there is no need to follow the rules.

> Citing to each individual line . . . would probably not [only] be confusing, but[,] seems to have little value. Additionally, there was really nothing to preserve for appeal. We didn't get the chance to do anything but file the Complaints and brief whether or not the case should be dismissed.

Appellate procedural rules, including those for briefing, cannot be ignored by appellate advocates. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010) (citation omitted). "They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination." *Id.* "Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, [RAP 31(H)(1)]; or (3) to review the issues raised in the brief for manifest injustice only[.]" *Id.* (citing *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990)). Because the record is small, and we have been able to determine Barnette's arguments were properly preserved, we will ignore the deficiency and proceed with the review. However, in the future, this Court may not be so tolerant, and counsel is admonished to strictly follow the rules or risk having their brief stricken and/or being held in contempt.

STANDARD OF REVIEW

In reviewing a grant of summary judgment, our inquiry focuses on "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 56.03. The trial court is required to view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *City of Brooksville v. Warner*, 533 S.W.3d 688, 692 (Ky. App. 2017) (quoting *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001)). Whether an official is entitled to qualified official immunity is a question of law that is reviewed *de novo*. *Ritchie v. Turner*, 559 S.W.3d 822, 830 (Ky. 2018) (citation omitted).

ANALYSIS

Barnette argues that the circuit court should have: (1) permitted additional discovery, (2) made more factual findings before deciding whether the defendants were entitled to qualified official immunity, and (3) ruled on her motion to file a second amended complaint.

1. ADDITIONAL DISCOVERY

As to Barnette's first argument, we disagree that the court should have permitted additional discovery.

> According to CR 56.02, a defendant "may, at any time, move with or without supporting affidavits for a summary judgment in his favor . . . ." Although a defendant is permitted to move for a summary judgment at any time, this Court has cautioned trial courts not to take up these motions prematurely and to consider summary judgment motions "only after the opposing party has been given ample opportunity to complete discovery." *Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988). Thus, even though an appellate court always reviews the substance of a trial court's summary judgment ruling *de novo*, *i.e.*, to determine whether the record reflects a genuine issue of material fact, a reviewing court must also consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling.

Blankenship v. Collier, 302 S.W.3d 665, 668 (Ky. 2010). In the case *sub judice*, the original complaint was filed on April 26, 2019, and amended on July 7, 2020. Status hearings were held on July 9, 2021; September 9, 2021; and June 8, 2023. Affidavits of Barnette, Evans, Hensley, and Sproles were placed in the record. Additionally, at the court's request, the Cabinet produced an email to Evans from Brianna Perry volunteering to foster the child. It was not until July 26, 2023 that the court granted the Motion for Summary Judgment – over four years after the filing of the initial complaint. Thus, we find the trial court gave the parties ample opportunity to respond and complete discovery before making its decision.

2. QUALIFIED IMMUNITY

Qualified official immunity is intended to protect public officers and employees sued in their individual capacities "from damages liability for good faith judgment calls made in a legally uncertain environment." *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (citation omitted). This type of immunity applies only "to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment . . . ; (2) in good faith; and (3) within the scope of the employee's authority." *Id.* (citations omitted). By contrast, "[a] government official is not afforded immunity from tort liability for the negligent performance of a ministerial act." *Patton v. Bickford*, 529 S.W.3d 717, 724 (Ky. 2016), *as modified on denial of rehearing* (Aug. 24, 2017).

"[P]romulgation of rules is a discretionary function; enforcement of those rules is a ministerial function." *Id.* (quoting *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145, 150 (Ky. 2003)). A "ministerial act or function is one that the government employee must do without regard to his or her own judgment or opinion concerning the propriety of the act to be performed." *Marson v. Thomason*, 438 S.W.3d 292, 297 (Ky. 2014) (internal quotation marks and citation omitted).

Discretionary acts, by contrast, "are those involving quasi-judicial or policy-making decisions." *Id.* Immunity is provided for discretionary acts because the "courts should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions furnish an inadequate crucible for testing the merits of social, political or economic policy." *Yanero*, 65 S.W.3d at 519.

We agree that the circuit court's order granting summary judgment did not contain any findings identifying the nature or source of the defendants' duties and why it believed these duties were discretionary. "[T]rial courts must make certain factual findings when deciding a party's entitlement to qualified official immunity, and a modicum of discovery may be necessary before the court can reasonably make the determination." *Meinhart v. Louisville Metro Government*, 627 S.W.3d 824, 829-30 (Ky. 2021). These findings need not be extensive, but they "should be complete enough to enable adequate appellate review[.]" *Id.* at 830. The Kentucky Supreme Court has emphasized that the findings "must necessarily be limited to the very narrow issues required to determine if immunity is applicable, including the actor's status as a government official; the ministerial/discretionary distinction; if the act was ministerial, was the actor negligent; and, if the act was discretionary, was it done in good faith and within the scope of the officer's authority." *Id.*

The circuit court's task in this regard was made more difficult by the lack of specificity in Barnette's pleadings, motions, and other filings, which cite numerous DCBS SOPs, without explaining which sections of these lengthy and detailed documents created specific ministerial duties pertinent to the facts of this case. Furthermore, at least two of the SOPs Barnette relies upon were substantially amended after 2018 and were not in effect at all during the relevant period.

The order granting summary judgment must be reversed and the case remanded to the circuit court. If the circuit court deems it necessary, it *may* order additional briefing, or permit discovery, or both. However, whether the trial court finds it necessary to permit additional discovery or not, it must enter a new order with findings in accordance with the standards described in *Meinhart*, *supra*.

3. BARNETTE'S MOTION TO FILE 2ND AMENDED COMPLAINT

As to Barnette's last allegation of error, we disagree that the trial judge was required to rule on her motion for leave to file a second amended complaint. However, we also disagree with the appellee's contention that the trial court "effectively overruled" Barnette's motion. Rather we find that Barnette failed to exercise reasonable diligence to obtain a ruling on her motion before it became a moot issue.

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

Barnette's original motion was filed October 1, 2020, following the defendants' September 3, 2020 motion to dismiss or, alternatively, for summary judgment. The court granted summary judgment on July 26, 2023. It was only after the court's ruling that Barnette brought the outstanding motion to the court's attention. Prior to that time, Barnette had been silent as to that motion for 3 years.

The Supreme Court opined in a similar case, *McGaha v. McGaha*, 664 S.W.3d 496, 505 (Ky. 2022), "parties who sit on their rights do so at their own peril." In *McGaha*, Damon McGaha filed suit against June McGaha, Mark McGaha, Suzanne McGaha, and Cliff McGaha, his stepmother, brother, sister, and nephew, respectively, challenging the validity of his father's will and alleging undue influence and breach of fiduciary duty by June and Mark. Suzanne and Cliff filed a joint answer denying all allegations in the complaint, making no cross-claims or counterclaims in so doing. Five years later, Damon filed a notice of dismissal noting a settlement of all claims against June and Mark. Suzanne quickly filed both a motion for leave to amend her answer to assert cross-claims and her objection to a dismissal of the action. The trial court subsequently issued an order dismissing the case as settled and denying Suzanne's motions. The Supreme Court held that:

> Suzanne sought to amend her answer in 2019 and only after Damon filed a notice of dismissal with the circuit court. As such, Suzanne's delay in litigating her claims justifies both denial of her motion for leave to amend and dismissal of the action generally.
>
> In sum, once Damon's claims against June and Mark were settled as demonstrated by the notice, there were no active claims left in this action. Upon denial of Suzanne's later-filed motion to amend answer to assert cross-claims, there were similarly no active issues for the circuit court to resolve. As a result, dismissal without prejudice was appropriate under CR 41.01(2).

Id. (footnote omitted). Similarly, in the case *sub judice*, Barnette waited too long to bring the issue to the court's attention. All claims were resolved prior to Barnette's September 8, 2023 renewed motion to file a second amended complaint: therefore, the trial court properly ignored Barnette's motion.

CONCLUSION

The order granting summary judgment is reversed and the case is remanded for further proceedings, if necessary, and the entry of factual findings by the circuit court.

ALL CONCUR.

BEFORE: CETRULO, GOODWINE, AND KAREM, JUDGES.

TORTS

TORT CLAIM FOR SPOLIATION OF EVIDENCE

Kentucky does not recognize a tort claim for spoliation of evidence, which would be based on a violation of KRS 524.100, which makes it a crime to tamper with physical evidence — Remedy for spoliation of evidence in a civil action is through evidentiary rules and missing evidence instructions —

The Estate of Katie Lynn Grisez; and Tracy Grisez, as Administrator of the Estate of Katie Lynn Grisez v. Erie Insurance Company and Elijah Stone Perkins (2022-CA-0451-MR); Taylor Cir. Ct., Spalding, J.; Opinion by Judge Acree, *affirming*, rendered 8/16/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Appellant, the Estate of Katie Lynn Grisez, appeals the Taylor Circuit Court's order dismissing Count 3 of its First Amended Complaint against Appellee, Erie Insurance Company (Erie). That count is based on a theory of liability and cause of action not recognized in Kentucky – a tort claim for spoliation of evidence. The circuit court followed *Monsanto Company v. Reed*, 950 S.W.2d 811 (Ky. 1997) (hereinafter *Monsanto*) and dismissed the count. That was a correct application of Supreme Court authority and, therefore, we affirm.

FACTS

In 2020, Katie Grisez and Elijah Perkins rode in a Utility Terrain Vehicle (UTV) in a field and struck a large sinkhole. The sinkhole tore the front wheel assembly away from the vehicle and Grisez was thrown to the ground. Her injuries were fatal.

Erie insured the UTV, took possession of it, and then sold it. It was resold for parts to a second buyer. The Estate alleges Erie, despite knowing of potential civil and criminal litigation, allowed its own paid expert to examine the vehicle before selling it, and claims its actions constitute spoliation of evidence in violation of KRS[1] 524.100, which makes it a crime to tamper with evidence.

[1] Kentucky Revised Statutes.

In Count 3, the Estate claimed KRS 446.070 authorized a private right of action against Erie for violating that criminal statute. Citing *Monsanto*, Erie moved to dismiss that count pursuant to CR[2] 12.02(f), for failing to state a claim upon which relief may be granted. The court granted Erie's motion and this appeal follows.

[2] Kentucky Rules of Civil Procedure.

STANDARD OF REVIEW

We review dismissals under CR 12.02(f) *de novo*. *Hardin v. Jefferson Cnty. Bd. of Education*, 558 S.W.3d 1, 5 (Ky. App. 2018).

ANALYSIS

The Estate says its claim is properly based on KRS 446.070, the legislative grant of a right to bring private civil actions for violations of other statutory prohibitions, including criminal statutes. We appreciate the argument.

Known as the private-right-of-action statute, KRS 446.070 says, "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." "The statute creates a private right of action in a person damaged by another person's violation of any statute that is penal in nature and provides no civil remedy, if the person damaged is within the class of persons the statute intended to be protected." *Hargis v. Baize*, 168 S.W.3d 36, 40 (Ky. 2005) (citations omitted). Put another way, "KRS 446.070 . . . creates liability by virtue of the breach of duty" owed to the plaintiff as established by any other Kentucky statute. *Collins v. Hudson*, 48 S.W.3d 1, 4 (Ky. 2001).

The "other Kentucky statute" upon which the Estate bases its tort claim is KRS 524.100. It says:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding; or
>
> (b) Fabricates any physical evidence with intent that it be introduced in the official proceeding or offers any physical evidence, knowing it to be fabricated or altered.
>
> (2) Tampering with physical evidence is a Class D felony.

KRS 524.100.

We do not deny these statutes appear to authorize the very claim the Estate asserts against Erie in Count 3. In fact, this Court embraced the Estate's identical view nearly thirty years ago when it rendered *Reed v. Westinghouse Electric Corporation, Monsanto Compan*y, No. 1993-CA-002125-MR, 1995 WL 96819 (Ky. App. Mar. 10, 1995), *discretionary review granted* (Jan. 10, 1996),[3] *rev'd sub nom. Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997) (hereinafter *Reed*).

[3] All but the caption of the Court of Appeals opinion was scrubbed from Westlaw by Supreme Court order. References to *Reed* here cite the slip opinion in the Court of Appeals archives.

In *Reed*, this Court held "that the tort of spoliation is consistent with the statutory and common law of this jurisdiction." *Reed*, No. 1993-CA-002125-MR, slip op. at 15. We further said, "If one proves the elements of [a criminal statute] and suffers an ancillary injury, then correspondingly, KRS 446.070 may be utilized to address the wrong." *Id.* at 16. But that is not the law.

Our Supreme Court reversed "the Court of Appeals[']] creation of a new cause of action for 'spoliation of evidence.'" *Monsanto*, 950 S.W.2d at 815.

> We decline the invitation to create a new tort claim. Where the issue of destroyed or missing evidence has arisen, we have chosen to remedy

the matter through evidentiary rules and "missing evidence" instructions. *See Tinsley v. Jackson*, Ky., 771 S.W.2d 331 (1989) *and Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534 (1988). The Court of Appeals recognized that only three states have adopted this tort claim. The vast majority of jurisdictions have chosen to counteract a party's deliberate destruction of evidence with jury instructions and civil penalties. Representative of this approach is *Federated Mutual Insurance Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn. 1990). We will remain among those jurisdictions and not now allow such claims for relief.

Id.

On at least two occasions, the Kentucky Supreme Court reaffirmed its preference "to remedy the matter through evidentiary rules and 'missing evidence' instructions." *Id. See Jenkins v. Commonwealth*, 607 S.W.3d 601, 609 (Ky. 2020); *University Medical Center, Inc. v. Beglin*, 375 S.W.3d 783, 788 (Ky. 2011), *as modified on denial of reh'g* (Mar. 22, 2012). *See also Johnson v. Wood*, 626 S.W.3d 543, 552 (Ky. 2021) (citing *Monsanto* for the principle that "the trial court's denial of recognition of a new tort can be remedied on direct appeal").

Monsanto does not explain why KRS 446.070 is not a proper vehicle for pursuing a private right of action for spoliation. In fact, the Supreme Court does not even cite KRS 446.070. However, this Court postulates one rationale for concluding *Monsanto* implicitly declined to recognize even a statute-based tort.

As *Hargis v. Baize* requires, "the person damaged [must be] within the class of persons the statute intended to be protected." 168 S.W.3d at 40. The Supreme Court notes there is an implied bad faith element to spoliation and that limiting the "obligation to preserve evidence to reasonable bounds . . . confines it to that class of cases where the interests of justice most clearly require it . . . ." *Swan v. Commonwealth*, 384 S.W.3d 77, 91 (Ky. 2012) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988)). In other words, sanctions and remedies for spoliation of evidence, whether statutory or procedural, do not serve to protect one party or another so much as to protect and serve "the interests of justice."

Our proposed rationale is consistent with the "majority of states that have considered whether to recognize an independent tort of spoliation [but] have rejected the concept . . . rooted in the notion that the traditional evidence-based sanctions for discovery violations and destruction of evidence sufficiently protect the interests of justice in general and the parties involved in a lawsuit."[4] Eric M. Lawson, 40 Causes of Action 2d 1, § 12 (originally published in 2009).

[4] In addition to Kentucky, the following states take this view: Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Maryland, Massachusetts, Mississippi, Montana, Nevada, New Jersey, New York, Texas, and Wisconsin. Eric M. Lawson, 40 Causes of Action 2d 1, § 12 (originally published in 2009).

The Estate expressly asks that "this Court overrule *Monsanto*." (Appellant's brief, p. 10). This, of course, we cannot do because "[t]he Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." Supreme Court Rule 1.030(8)(a). Only the Supreme Court can tell us if our proposed rationale for *Monsanto* is wrong, and the Estate can continue to pursue its argument for reversal in that higher court if it wishes. *Johnson*, 626 S.W.3d at 552.

CONCLUSION

For the foregoing reasons, this Court affirms the Taylor Circuit Court's order dismissing Count 3 of the Estate's complaint.

ALL CONCUR.

BEFORE: ACREE, GOODWINE, AND LAMBERT, JUDGES.

AUTOMOBILE ACCIDENT

BASIC REPARATIONS BENEFITS (BRB)

REPARATION OBLIGOR'S RIGHT TO SUBROGATION FOR BRBS PAID ON BEHALF OF ITS INSURED

INSURED'S CLAIM AGAINST ITS INSURANCE COMPANY (REPARATION OBLIGOR) WHERE THE INSURANCE COMPANY OBTAINED REIMBURSEMENT FOR PAID BRB FROM THE TORTFEASOR'S LIABILITY CARRIER BEFORE THE INSURED WAS FULLY COMPENSATED FOR THE DAMAGES INCURRED

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN AN INSURANCE CONTRACT

Pursuant to KRS 304.39-070 of Motor Vehicle Reparations Act (MVRA), a reparation obligor has the right to obtain reimbursement for basic reparations benefits (BRB) paid on behalf of its insured from the tortfeasor's liability insurance company; however, reparation obligor's right to subrogation is limited by KRS 304.39-140(3) — Under KRS 304.39-140(3), an injured person has priority to payments from liability insurance, and the reparation obligor, who paid BRB or Added Reparation Benefits, is subordinate thereto — Reparation obligor may only obtain reimbursement for paid BRB from tortfeasor's liability insurance if its insured is fully compensated for his damages — Where reparation obligor improperly obtains reimbursement for paid BRB from tortfeasor's liability insurance before its insured is fully compensated, reparation obligor has violated MVRA and has financially benefitted from its own malfeasance to detriment of the insured — Under these circumstances, insured has legal remedy against reparation obligor for insurer's misconduct — Thus, insured party may recover directly from its insurer (reparation obligor) such amount of the improperly received BRB reimbursement that would have been available from tortfeasor's liability carrier to compensate insured for his damages — Otherwise, available liability coverage would be diminished by reparation obligor before its insured is made whole — An insured may claim that its insurer (reparation obligor) breached the implied covenant of good faith and fair dealing in their insurance contract by obtaining reimbursement for paid BRB from a tortfeasor's liability carrier before insured is fully compensated for damages incurred —

Kenneth Jarnigan v. Allstate Property and Casualty Insurance Company (2023-CA-0333-MR); Ohio Cir. Ct., Coleman, J.; Opinion by Judge Taylor, *reversing and remanding*, rendered 8/16/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Kenneth Jarnigan brings this appeal from a March 2, 2023, Order and Judgment of the Ohio Circuit Court dismissing Jarnigan's claims against Allstate Property and Casualty Insurance Company (Allstate). We reverse and remand.

On the morning of August 15, 2017, Jarnigan was involved in a motor vehicle accident in Ohio County when his vehicle was struck by a vehicle being driven by Deborah Middleton. Jarnigan was insured by Allstate, and Middleton was insured by State Farm Mutual Automobile Insurance Company (State Farm). Jarnigan suffered significant injuries. Allstate paid basic reparation benefits (BRB) of $10,000 for medical expenses incurred by Jarnigan. Kentucky Revised Statutes (KRS) 304.39-030.

On July 19, 2019, Jarnigan and his passenger, Autumn Jarnigan, his daughter, filed a complaint against Middleton in the Ohio Circuit Court. In the complaint, it was alleged that Middleton negligently caused the accident and sought recovery of compensatory damages. Middleton filed an answer and generally denied the allegations.

Eventually, Jarnigan offered to settle with Middleton for the policy limits of bodily injury coverage in the amount of $50,000. At this time, Jarnigan was informed that his insurer (Allstate) had asserted its right to be subrogated for its payment of BRB to Jarnigan. State Farm had complied and reimbursed Allstate $9,000 from Middleton's bodily injury coverage in the amount of $50,000.[1] Neither insurance company notified Jarnigan's counsel that State Farm had paid Allstate from Middleton's liability coverage. As State Farm paid Allstate $9,000, there remained only $41,000 in bodily injury benefits under Middleton's policy. Regardless, Jarnigan and Middleton eventually reached a settlement whereby Jarnigan received the remaining $41,000 in bodily injury benefits available under the State Farm Policy, and Jarnigan released Middleton and State Farm from additional liability.

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

[1] Although Allstate Property and Casualty Insurance Company (Allstate) paid Kenneth Jarnigan $10,000 in Basic Reparation Benefits (BRB), it was only reimbursed $9,000 from State Farm Mutual Automobile Insurance Company (State Farm). According to Allstate, the $9,000 "includes accounting for the $1,000 inter-company deductible between Kentucky insurers." Allstate Brief at 1 n.1.

Jarnigan then filed a motion to amend his complaint to add Allstate as a defendant. In the amended complaint, Jarnigan alleged that Allstate could only seek to recoup paid BRB through subrogation if its insured, Jarnigan, was fully compensated for his injuries. As Jarnigan was never fully compensated for his injuries arising from the motor vehicle accident, Jarnigan claimed that Allstate's right to subrogation had not arisen; thus, Allstate was not entitled to the $9,000 reimbursement from State Farm. Jarnigan maintained that Allstate had violated the Motor Vehicle Reparations Act (MVRA) by wrongfully obtaining the $9,000 payment.[2] Additionally, Jarnigan claimed that Allstate acted in bad faith and in violation of the Unfair Claims Settlement Practices Act (UCSPA) by obtaining the $9,000 reimbursement from State Farm.

[2] The Motor Vehicle Reparations Act (MVRA) is set forth in Kentucky Revised Statutes (KRS) 304.39-010 *et seq*.

The circuit court granted the motion to file the amended complaint, and Allstate then filed a motion to dismiss the complaint. In the motion to dismiss, Allstate argued that Jarnigan was not entitled to personally receive BRB by a direct payment from Allstate and to do so, Jarnigan then would effectively receive payment of BRB in excess of the coverage available under his policy. Jarnigan filed a response and maintained that he would not be receiving another BRB payment from Allstate, but rather he was recovering monies due from State Farm that had been diverted from State Farm's liability coverage to satisfy Allstate's BRB subrogation claim. According to Jarnigan, an insurer's right to subrogation for payment of BRB only arises after the insured had been fully compensated for his injuries, which had not occurred. Jarnigan maintained that Allstate acted in bad faith by obtaining reimbursement of BRB despite having no right to do so.

In a June 2, 2022, Order, the circuit court granted Allstate's motion to dismiss. The circuit court concluded that "[a] party cannot recover under a theory of bad faith and/or violation of the UCSPA based on non-payment [sic] of Basic Reparation Benefits (BRB)" because the MVRA provided the exclusive remedy for nonpayment of BRB or for delay of payment of BRB. June 2, 2022, Order at 2. As a result, the court concluded that Jarnigan's claims based upon bad faith and upon violation of the UCSPA could not succeed and that Jarnigan failed to state a claim upon which relief could be granted. The court dismissed Jarnigan's amended complaint under Kentucky Rules of Civil Procedure (CR) 12.02.

Jarnigan then filed a motion to vacate the June 2, 2022, Order and argued that the circuit court failed to address all the claims raised in his amended complaint against Allstate. The circuit court granted the motion in an Order and Judgment entered March 2, 2023. Therein, the circuit court acknowledged that Allstate improperly obtained reimbursement of $9,000 for BRB paid to Jarnigan; nonetheless, the circuit court believed that Jarnigan's sole remedy was to seek recoupment of the $9,000 from State Farm as it wrongfully reimbursed BRB to Allstate. The circuit court stated:

> While the Court may agree with the overall contention that Allstate should not have received the repayment, the plaintiff's argument was against State Farm, not Allstate.
>
> State Farm chose to pay Allstate for the BRB payments before the right to subrogation arose. It should not have done so. Insurance companies should not be permitted [to] collude with one another to reduce the recovery of injured individuals such as the plaintiff by paying subrogation claims before the resolution of underlying cause of action. The plaintiff possessed a strong argument that State Farm's policy limits had not been reduced by State Farm's premature payment to Allstate. Rather than take the fight to State Farm and require State Farm to pay the full amount under the policy to the plaintiff, Jarnigan decided to settle his claims against Middletown and State Farm, executing a full release of those claims.
>
> As such, the Court finds that there is not a claim against Allstate for which relief may be granted. There is no statute or contractual obligation for Allstate to reimburse Jarnigan for monies it may have received improperly from State Farm.

Order and Judgment at 3-4.[3] The court ultimately determined that Jarnigan failed to set forth a claim against Allstate upon which relief could be granted and dismissed Jarnigan's amended complaint. This appeal follows.

[3] The circuit court clearly indicates that both Allstate and State Farm acted improperly and in violation of the MVRA. This finding was not challenged by a cross-appeal. The circuit court even suggested that collusion may have been involved by the companies in reimbursing the BRB payment to Allstate. This issue was not raised on appeal and has not been addressed in this Opinion.

To begin, the circuit court rendered an order dismissing Jarnigan's amended complaint pursuant to CR 12.02. Under CR 12.02, a court may dismiss an action for failure to state a claim upon which relief could be granted only if 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 Ky., Local 541, SEIU, AFL-CIO v. Ky. Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). When ruling upon a CR 12.02 motion, matters outside the pleadings may not be considered; however, if matters outside the pleading are considered, the motion must be viewed as a motion for summary judgment under CR 56. *Ferguson v. Oates*, 314 S.W.2d 518 (Ky. 1958).

In this case, the circuit court clearly considered matters outside of the pleadings; consequently, our review shall proceed under the summary judgment standard. Thereunder, summary judgment is proper where there exists no genuine issue of material fact and movant is entitled to judgment as a matter of law. CR 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482-83 (Ky. 1991). All facts and inferences therefrom are viewed in a light most favorable to the nonmoving party. *Steelvest, Inc.*, 807 S.W.2d at 482-83. Because we only examine the record below without deference to the trial court's assessment thereof, our review is *de novo*. *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010).

On appeal, Jarnigan contends that the circuit court erroneously dismissed his amended complaint against Allstate. For the reasons hereinafter stated, we agree.

There is no dispute that Jarnigan was entitled to $10,000 in BRB from Allstate and that Allstate, in fact, paid $10,000 in BRB on behalf of Jarnigan. So, this case does not center upon the late payment or the nonpayment BRB; therefore, the exclusive remedy provisions of the MVRA for the late payment or the nonpayment of BRB are inapplicable.[4] Instead, this case centers upon Allstate improperly obtaining reimbursement of $9,000 from State Farm by allegedly misusing its statutory subrogation right found in the MVRA and the proper remedy, if any, for such misuse.

[4] It is well-settled that the MVRA sets forth the exclusive remedy for the nonpayment or late payment of BRB. *Foster v. Ky. Farm Bureau Mut. Ins. Co.*, 189 S.W.3d 553, 557 (Ky. 2006).

Under the MVRA, a reparation obligor (like Allstate) has the right to obtain reimbursement for BRB's paid on behalf of its insured from the tortfeasor's liability insurance company. This statutory subrogation right is codified in KRS 304.39-070, which provides in part:

> (1) "Secured person" means the owner, operator or occupant of a secured motor vehicle, and any other person or organization legally responsible for the acts or omissions of such owner, operator or occupant.
>
> (2) A reparation obligor which has paid or may become obligated to pay basic reparation benefits shall be subrogated to the extent of its obligations to all of the rights of the person suffering the injury against any person or organization other than a secured person.
>
> (3) A reparation obligor shall have the right to recover basic reparation benefits paid to or for the benefit of a person suffering the injury from the reparation obligor of a secured person as provided in this subsection, except as provided in KRS 304.39-140(3). The reparation obligor shall elect to assert its claim (i) by joining as a party in an action that may be commenced by the person suffering the injury, or (ii) to reimbursement, pursuant to KRS 304.39-030, sixty (60) days after said claim has been presented to the reparation obligor of secured persons. The right to recover basic reparation benefits paid under (ii) shall be limited to those instances established as applicable by the

Kentucky Insurance Arbitration Association as provided in KRS 304.39-290.

(4) Any entitlement to recovery for basic or added reparation benefits paid or to be paid by the subrogee shall in no event exceed the limits of automobile bodily injury liability coverage available to the secured party after priority of entitlement as provided in this section and KRS 304.39-140(3) has been satisfied.

Upon reading KRS 304.39-070, it is clear that a reparation obligor does not possess an unfettered right to subrogation for paid BRB; rather, its right to subrogation is explicitly limited by and subject to KRS 304.39-140(3).

KRS 304.39-140(3) reads:

If the injured person, or injured persons, is entitled to damages under KRS 304.39-060 from the liability insurer of a second person, a self-insurer or an obligated government, collection of such damages shall have priority over the rights of the subrogee for its reimbursement of basic or added reparation benefits paid to or in behalf of such injured person or persons.

Under KRS 304.39-140(3), an injured person has priority to payments from liability insurance, and the reparation obligor, who paid BRB or Added Reparation Benefits, is subordinate thereto. Simply stated, the law is clear that the reparation obligor may only obtain reimbursement for paid BRB from the tortfeasor's liability insurance if its insured is fully compensated for his damages. *Fireman's Fund Ins. Co. v. Bennett*, 635 S.W.2d 482, 484 (Ky. 1981); *Wine v. Globe Am. Cas. Co.*, 917 S.W.2d 558, 565-66 (Ky. 1996); *Stovall v. Ford*, 661 S.W.2d 467, 470-71 (Ky. 1983).

The circuit court concluded that Jarnigan's only recourse was to pursue his claim against State Farm. We disagree. Where the reparation obligor (Allstate) improperly obtains reimbursement for paid BRB from the tortfeasor's liability insurance (State Farm) before its insured is fully compensated, the reparation obligor has violated the MVRA and has financially benefitted from its own malfeasance to the detriment of the insured. In this case, Allstate's misconduct was to the detriment of its own insured, Jarnigan, which was acknowledged by the court below. Under these circumstances, we believe the insured does have a legal remedy against Allstate for the insurer's misconduct. Therefore, we hold that an insured party may recover directly from its insurer (reparation obligor) such amount of the improperly received BRB reimbursement that would have been available from a tortfeasor's liability carrier to compensate the insured for his damages. Otherwise, available liability coverage would be diminished by the reparation obligor before its insured is made whole. In so doing, an insured may claim that its insurer (reparation obligor) breached the implied covenant of good faith and fair dealing in their insurance contract by obtaining reimbursement for paid BRB from a tortfeasor's liability carrier before the insured is fully compensated for the damages incurred. *Indiana Ins. Co. v. Demetre*, 527 S.W.3d 12, 26 (Ky. 2017); *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 516 (Ky. 2006); *Pearman v. W. Point Nat'l Bank*, 887 S.W.2d 366, 368 (Ky. App. 1994).[5]

[5] As opposed to other provisions of the MVRA, neither KRS 304.39-070(4) nor KRS 304.39-140(3) specifically sets forth a civil remedy for violation thereof. Arguably, the insured could bring an action based upon the insurer's violation of KRS 304.39-070(4) and KRS 304.39-140(3) of the MVRA by utilizing KRS 446.070. *Powers v. Ky. Farm Bureau Mut. Ins. Co.*, ____ S.W.3d ____, 2024 WL 3020911, at *7 (Ky. 2024); *see also State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116, 117-18 (Ky. 1988). To the extent the circuit court or the parties failed to recognize the statutory violation, this Court may resort to applicable legal authority, whether cited or not, to avoid a misleading application of law. *Cmty. Fin. Servs. Bank v. Stamper*, 586 S.W.3d 737, 740-41 (Ky. 2019).

In this case, the circuit court erred by rendering summary judgment dismissing Jarnigan's amended complaint. In Jarnigan's amended complaint, Jarnigan alleged that Allstate violated KRS 304.39-070(4) and KRS 304.39-140(3) by obtaining reimbursement of paid BRB from State Farm where Jarnigan was not fully compensated for his injuries resulting from the automobile accident. Viewing the facts most favorable to Jarnigan, we hold that Jarnigan has raised viable claims against Allstate and entry of summary judgment dismissing his claims was in error.

Therefore, for the reasons stated, we reverse the March 2, 2023, Order and Judgment of the Ohio Circuit Court and remand for proceedings consistent with this Opinion.

ALL CONCUR.

BEFORE: COMBS, L. JONES, AND TAYLOR, JUDGES.

CRIMINAL LAW

CRIMINAL ABUSE IN THE THIRD DEGREE

ACTUAL CUSTODY

KRS 508.120, which sets forth elements of criminal abuse in the third degree, states, in part, that a person is guilty of third-degree criminal abuse when he recklessly abuses another person or permits another person of whom he has "actual custody" to be abused — "Actual custody" as utilized in criminal abuse statutes is not statutorily defined — Legislature did not intend for "actual custody" to include individuals having only temporary care or control of a child; however, it must necessarily include the direct care or the direct control of a child by a defendant — In instant action, defendant was pastor at a church that ran a daycare — Employee of daycare abused infants at daycare — Several daycare employees reported abuse to defendant, but defendant did not initially act on reports despite abuse being captured on daycare's video — Eventually, a daycare employee reported abuse to a parent, who then contacted police — Defendant was not involved in caretaking for children; did not work within confines of daycare with children; had never observed any abusive conduct; and was not a supervisor of employee who abused infants — Under facts, defendant was entitled to directed verdict of acquittal upon offense of third-degree criminal abuse since defendant did not have actual custody of the children in daycare —

Paige Williams v. Com. (2023-CA-0988-MR) and *Paige Williams v. Com.* (2023-CA-0403-MR); Christian Cir. Ct., Wiggins, Special J.; Opinion by Judge Taylor, *reversing*, rendered 8/16/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Paige Williams brings Appeal Nos. 2023-CA-0403-MR and 2023-CA-0988-MR from a June 6, 2023, Trial Order and Judgment of the Christian Circuit Court following a jury verdict finding her guilty of eight counts of criminal abuse in the third degree, victim twelve years of age or less. Williams was fined a total of $500. We reverse.

In 2019, Paige Williams was indicted by a Christian County Grand Jury upon eight counts of first-degree criminal abuse, victim twelve years of age or less. Kentucky Revised Statutes (KRS) 508.100. The charges stemmed from the abuse of eight children in late 2018 and early 2019, who were being cared for at a daycare operated by First United Methodist Church (FUMC) in Hopkinsville, Kentucky. Williams was the pastor at FUMC and was depicted at the top of the daycare's organizational chart, directly above the daycare's director.[1] An employee of the daycare, Allison Simpson, was the lead teacher in the nursery room for children under one year of age. Several daycare employees reported incidents of abuse of the children to Williams that were perpetrated by Simpson. Despite reports and incidents of abuse being captured on the daycare's video recording system, Williams did not initially act on the reports of abuse. Eventually, a daycare employee reported Simpson's abuse to a parent, and the parent reported the abuse to the police. After obtaining a search warrant, police seized the hard drive of the daycare's video recording system. The video revealed eight incidents of children being abused by Simpson.

[1] First United Methodist Church (FUMC) maintained a large staff. Besides Paige Williams as head pastor, FUMC employed two associate pastors, an administrative staff, a daycare director, daycare staff, a preschool director, and preschool teachers. Additionally, FUMC had a daycare committee that oversaw the daily operation of the daycare program at FUMC. Williams attended some committee meetings but did not chair the committee. No other member of the committee was indicted.

As noted, Williams was subsequently indicted upon eight counts of criminal abuse in the first degree, victim twelve years of age or less. KRS 508.100. Following a jury trial, Williams was found guilty of the lesser included offense of criminal abuse in the third degree, victim twelve years of age or less. Williams was fined a total of $500. KRS 508.120. This appeal follows.

Williams contends the trial court erred by denying her motion for a directed verdict of acquittal upon the offenses of criminal abuse.[2]

More particularly, Williams asserts she did not have actual custody of the infants under KRS 508.120 as she was not involved in caretaking for the children, did not work within the confines of the daycare with the children, had never observed any abusive conduct, and was not a supervisor of the employee who abused the children. As she never had actual custody of the children, Williams contends that the Commonwealth failed to prove an essential element of criminal abuse.[3]

[2] Williams filed motions for directed verdict at the close of the Commonwealth's case and again at the close of all the evidence.

[3] Criminal abuse in the first degree (Kentucky Revised Statutes (KRS) 508.100), criminal abuse in the second degree (KRS 508.110), and criminal abuse in the third degree (KRS 508.120) each requires that the defendant have "actual custody" of the victim.

The standard of review upon the denial of a motion for directed verdict was articulated by the Supreme Court in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991):

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Id. at 187; Kentucky Rules of Civil Procedure (CR) 50.01.[4] Upon appellate review, the test is whether 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." *Benham*, 816 S.W.2d at 187; *see also Eversole v. Commonwealth*, 600 S.W.3d 209, 217-18 (Ky. 2020). And, as an appellate court, we must be mindful that weight and credibility of evidence are matters within the sole province of the jury. *Reynolds v. Commonwealth*, 113 S.W.3d 647, 650 (Ky. App. 2003). To the extent that statutory interpretation becomes necessary, then a question of law arises, and our review is *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000). For the reasons hereinafter set forth, we are of the opinion that Williams was entitled to a directed verdict of acquittal upon the offense of third-degree criminal abuse pursuant to KRS 508.120 as the uncontroverted evidence demonstrated that Williams did not have actual custody of the children in the daycare.

[4] Kentucky Rules of Civil Procedure 50.01 is applicable to this proceeding pursuant to Kentucky Rules of Criminal Procedure (RCr) 13.04. *See also Potts v. Commonwealth*, 172 S.W.3d 345, 348 (Ky. 2005). Williams also filed a motion for judgment of acquittal pursuant to RCr 10.24, which was denied.

When interpreting a statute, it is well established that we attempt "to discern the General Assembly's intent, and we derive that intent, if at all possible, from the language the General Assembly chose[.]" *Staples v. Commonwealth*, 454 S.W.3d 803, 816 (Ky. 2014) (internal quotation marks and citation omitted) (quoting *Hale v. Commonwealth*, 396 S.W.3d 841, 845 (Ky. 2013)). And, when interpreting a statute, the intent of the legislature is paramount and controls. Moreover, words are afforded their ordinary meaning unless a contrary intent is apparent. *Old Lewis Hunter Distillery Co. v. Ky. Tax Comm'n*, 193 S.W.2d 464, 465 (Ky. 1945).

KRS 508.120 sets forth the elements of criminal abuse in the third degree and provides, in relevant part:

> (1) A person is guilty of criminal abuse in the third degree when he recklessly abuses another person or permits another person of whom he has **actual custody** to be abused and thereby:
>
> (a) Causes serious physical injury; or
>
> (b) Places him in a situation that may cause him serious physical injury; or
>
> (c) Causes torture, cruel confinement or cruel punishment;
>
> to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.

KRS 508.120(1) (emphasis added).

From the plain language of KRS 508.120, the defendant must have actual custody of the abused child. The term "actual custody" as utilized in the criminal abuse statutes (KRS 508.100 – 508.120) is not statutorily defined but was analyzed by the Kentucky Supreme Court in *Davis v. Commonwealth*, 967 S.W.2d 574, 581 (Ky. 1998) and in *Staples v. Commonwealth*, 454 S.W.3d 803, 816 (Ky. 2014).

In *Davis*, the child's mother and Davis, her boyfriend, resided together with the child. *Davis*, 967 S.W.2d at 576. The child was repeatedly abused, over a period of time, while left in Davis's care. The child eventually died from injuries sustained from the abuse. In discussing the definition of "actual custody," the Supreme Court observed:

> "Actual custody" is not defined in the statute or in our common law. However, we do not believe the legislature intended to confine the criminal liability imposed by KRS 508.100 only to those having legal custody or guardianship of a child. While the legislature presumably did not intend to extend criminal liability to every person having temporary care or charge of a child, we have no difficulty discerning an intent to include persons, such as Davis, who reside within the same household and stand *in loco parentis* to the child.

Davis, 967 S.W.2d at 581. So, in *Davis*, the Supreme Court recognized that the legislature did not intend the term "actual custody" to include "every person having temporary care or charge of a child." *Id.* at 581.

In *Staples*, the Court was faced with determining whether Nickolas Staples, "who lived with [the child's mother] and [the child] and who regularly cared for [the child], was not the child's legal custodian and had not attained *in loco parentis* status" had a legal duty to intervene and prevent mother from seriously injuring or killing her child. *Staples*, 454 S.W.3d at 807. Both Staples and the mother were indicted upon charges of murder, either as a principal or as an accomplice, and of first-degree criminal abuse. Following a jury trial, both Staples and the mother were found guilty of the lesser included offenses of first-degree manslaughter and first-degree criminal abuse.

In discussing the term "actual custody" as used in KRS 508.120, the *Staples* Court observed:

> [A]lthough the General Assembly has not defined "actual custody," an actual custodian could be understood to include anyone who has "in fact" (actual) the "care and control" (custody) of a child. By its "plain" meaning, "actual custody" could thus include even brief, casual instances of tending to a child, but as . . . noted in *Davis*, it seems unlikely that the General Assembly meant "to extend criminal liability [for failure to protect] to every person having temporary care or charge of a child.

Staples, 454 S.W.3d at 818 (citation omitted). Thus, in *Staples*, the Court again recognized the term "actual custody" was not intended to include individuals having only temporary care or control of the child. *Id.* at 816.

Considering *Davis*, *Staples*, and the language of KRS 508.120, we believe actual custody must necessarily include the direct care or the direct control of a child by a defendant. *Davis*, 967 S.W.2d 574; *Staples*, 454 S.W.3d 803. In this case, the uncontroverted evidence indicates that Williams never exercised direct care or direct control over the children. Williams did not work within the confines of the daycare and was not involved in the caretaking aspect of the children on a daily basis. Therefore, as a matter of law, we are of the opinion that Williams did not have actual custody of the abused children within the meaning of KRS 508.120. *See Davis*, 967 S.W.2d at 581; *Staples*, 454 S.W.3d at 818-19. Accordingly, we reverse Williams' conviction upon the eight counts of criminal abuse in the third degree.

Williams' remaining contentions of error are moot.

For the foregoing reasons, we reverse the Trial Order and Judgment entered June 6, 2023, by the Christian Circuit Court.

ALL CONCUR.

BEFORE: COMBS, L. JONES, AND TAYLOR, JUDGES.

PETITIONS FOR REHEARING, ETC.

FILED AND FINALITY ENDORSEMENTS

ISSUED BETWEEN

JULY 26, 2024 AT 10:00 A.M.

AND AUGUST 16, 2024 AT 10:00 A.M.

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

PETITIONS:

Rigdon v. England, 71 K.L.S. 7, p. 51; Petition for rehearing was filed on 7/31/2024. A motion for discretionary review was filed in the Kentucky Supreme Court on 8/13/2024.

MOTIONS for extension of time to file petitions: None.

FINALITY ENDORSEMENTS:

During the period from July 26, 2024, through August 16, 2024, 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. RAP 40(G).

Adair v. Emberton, 71 K.L.S. 7, p. 33, on 8/12/2024.

General Motors, LLC v. Smith, 71 K.L.S. 7, p. 39, on 8/12/2024.

Goins v. Com., 71 K.L.S. 7, p. 42, on 8/12/2024.

H.N. v. R.H., 71 K.L.S. 7, p. 30, on 7/31/2024.

Wood v. Clewell, 71 K.L.S. 7, p. 59, on 8/12/2024.

RULINGS on petitions previously filed:

Com. v. Jones, 71 K.L.S. 7, p. 1; Petition for rehearing was denied on 7/30/2024.

Com. v. Lynch, 71 K.L.S. 7, p. 2; Petition for rehearing was denied on 8/8/2024.

OTHER: None.

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

Breedlove v. State Farm Fire and Cas. Co., 71 K.L.S. 2, p. 8—690 S.W.3d 904.

Burden, Jr. v. Com., 70 K.L.S 11, p. 1—688 S.W.3d 541.

Canafax v. Com., 70 K.L.S 7, p. 20—691 S.W.3d 296.

—END OF COURT OF APPEALS—

SUPREME COURT

ATTORNEYS

Permanently disbarred —

In re: Scott Blair (2024-SC-0260-KB); In Supreme Court; Opinion and Order entered 8/22/2024. **[This opinion and order is not final. A non-final opinion and order may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

This case is before the Court upon the Movant's, Scott Blair, KBA Member Number 88683, motion to resign from the Kentucky Bar Association (KBA) under terms of permanent disbarment. His bar roster address is 369 Cornell Avenue 2, Hazard, Kentucky 41701. Kentucky Supreme Court Rule (SCR) 3.480(3) allows for "[a]ny member who has been engaged in unethical or unprofessional conduct . . . to withdraw his membership under terms of permanent disbarment . . . ." The KBA has filed a response expressing no objection to Blair's motion. Having reviewed the record and Blair's admission of unethical conduct, we grant his motion for permanent disbarment.

On April 15, 2024, the Inquiry Commission filed a Petition for Temporary Suspension Pursuant to SCR 3.165(1)(b) & (d). However, before this Court addressed that petition, on May 10, 2024, Blair entered a guilty plea to violating 18 U.S.C. §§ 1343, 1346, Honest Services Wire Fraud, in *United States v. Blair*, 6:24-mj-06038-HAI, in the United States District Court for the Eastern District of Kentucky, Southern Division. Pursuant to SCR 3.166, Blair was automatically suspended from the practice of law in the Commonwealth the following day, May 11, 2024. He has remained suspended since that date.

According to the plea agreement, Blair admitted the following facts, which established his guilt:

(a) From in or about a date in April 2020, and continuing until in or about a date in March 2024, the Defendant knowingly and intentionally devised a scheme to fraudulently deprive the citizens of Perry County, in the Eastern District of Kentucky, of the right to the honest services of the Defendant, the elected Commonwealth Attorney, through bribery.

(b) The Defendant, in his role as the elected prosecutor was responsible for the just administration of the Commonwealth's criminal laws and owed the Commonwealth of Kentucky and its citizens a duty to perform his responsibilities free from self enrichment.

(c) The Defendant, on multiple occasions, agreed to take official actions in his role as the Commonwealth Attorney for the 33rd Judicial Circuit (encompassing all of Perry County), including but not limited to recommending probation and drug court and not recommending probation violations or sanctions for defendants he was prosecuting, in exchange for quantities of methamphetamine, procurement of methamphetamine, and sexual favors.

(d) As an example, on one occasion, the Defendant engaged in a Facebook messenger conversation with an individual who was serving a sentence of felony probation in Perry Circuit Court. When the individual expressed concerns that his probation would be violated after he missed a court date, the Defendant tried to convince the individual to come over for a sexual encounter. The Defendant assured the individual that the Defendant would not violate the individual's probation. Later messages reveal that an encounter occurred, and court records confirm that the individual's probation was not revoked.

(e) On another occasion, the Defendant agreed to recommend drug court and probation for an individual in exchange for that individual making deliveries of methamphetamine to the Defendant. On numerous occasions, the Defendant would direct that individual to pick up methamphetamine for the Defendant. Sometimes the Defendant would provide the individual money and direct him which source to go to and other times the Defendant would direct the individual where to go to pick up prepackaged methamphetamine the Defendant had already purchased. The Defendant often communicated with the individual to make these demands via Facebook messenger. Court records reflect that the individual was sentenced to a term of probation and allowed entry into drug court. The Defendant admitted that he recommended drug court and probation for this individual, and that this individual picked up methamphetamine for the Defendant on approximately fifteen (15) occasions.

(f) Facebook messenger is an internet based social media platform that utilizes wire communication to allow individuals to communicate with one another.

To this Court, Blair admits to violating SCR 3.130(8.4)(b) which states that "[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." He also admits to violating SCR 3.130(8.4)(c) which states that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Accordingly, it is hereby ORDERED:

1. Scott Blair is permanently disbarred from the practice of law in the Commonwealth of Kentucky;

2. Pursuant to SCR 3.450, Scott Blair is directed to pay all costs associated with these disciplinary proceedings in the amount of $76.50, for which execution may issue from this Court upon finality of this Opinion and Order;

3. Pursuant to SCR 3.480(4)(a), Scott Blair shall take all steps necessary and practicable to cease all forms of advertisement of his practice immediately upon entry of this Opinion and Order and shall report the fact and effect of those steps to the Director of the KBA in writing within twenty (20) days after this Opinion and Order is entered; and

4. Pursuant to SCR 3.390, if he has not already

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

done so, Scott Blair shall, within twenty (20) days from the entry of this Opinion and Order, notify all clients, in writing, of his inability to represent them; notify, in writing, all courts in which he has matters pending of his disbarment from the practice of law; and furnish copies of all letters of notice to the Office of Bar Counsel. Furthermore, to the extent possible, Blair shall immediately cancel and cease any advertising activities in which he is engaged.

All sitting. All concur.

ENTERED: August 22, 2024.

PLANNING AND ZONING

APPEAL OF A ZONING DECISION

APPELLATE PRACTICE

APPELLATE BOND REQUIREMENTS SET FORTH IN KRS 100.3471 ON APPEALS FROM THE CIRCUIT COURT

KRS 100.3471 IS UNCONSTITUTIONAL

GOVERNMENT

SEPARATION OF POWERS

LEGISLATIVE AUTHORITY TO REGULATE APPELLATE JURISDICTION

LEGISLATIVE AUTHORITY TO MANDATE APPEAL BONDS

KRS 100.3471 authorizes the circuit court to impose an appeal bond on all appeals from the circuit court in cases involving KRS Chapter 100 zoning and land use disputes — When the bond is imposed it operates as a jurisdictional requirement upon Court of Appeals, and failure to post the bond requires dismissal of the appeal; however, Kentucky Constitution § 115 guarantees every Kentucky citizen at least one right of appeal to the next highest court — Thus, KRS 100.3471 is unconstitutional since it encumbers the individual right of Kentucky citizens to at least one appeal — In so doing, it invades rule-making power of Kentucky Supreme Court and operates to strip Court of Appeals of its inherent appellate jurisdiction —Abrogated *Seiller Waterman, LLC v. Bardstown Capital Corp.* (Ky. 2022) to the extent that it conflicts with Section 115 — A literal reading of *Seiller Waterman* does not comport with the history of Kentucky Supreme Court's application of Section 115 to appeals from court judgments in cases originating in administrative actions — Where a person is in the circuit court, before a duly elected judge, exercising purely judicial power, then he is in a court as contemplated by Section 115 and he has one right of appeal to another court once a final judgment is rendered — As such, General Assembly no longer has authority to impose appeal bonds — Authority to impose such bonds was heretofore predicated on previous iterations of the Kentucky Constitution that did not guarantee a right of appeal and, in fact, explicitly declared such a right was a matter of legislative grace — That is no longer true under Section 115 — KRS 100.3471(4)(a)-(c) is manifestly unconstitutional as arbitrary since it allows for the possibility that a successful appellant pay costs and damages to an unsuccessful appellee — Discussed the 1974 Judicial Amendments — When it comes to appellate jurisdiction of Kentucky Supreme Court and Court of Appeals on a constitutional level, it is Supreme Court which exercises authority, and that authority is neither dependent upon nor constrained by General Assembly — Section 115 is unambiguous and specific over general language of Section 111(2) — Under Section 111(2), General Assembly may confer statutory right of appeal in those instances where a constitutional right of appeal does not already exist, *e.g.*, an interlocutory appeal in criminal cases for the Commonwealth — Kentucky Supreme Court then turned to the merits of the instant action — Trial court did not err in upholding Planning Commission's action to affirm certificate of demolition for the "Commonwealth Building," which was built in 1958 or 1960, and is located within H-1 Historical Overlay Zone of South Hill Historic District in Lexington — Planning Commission found that age of Commonwealth Building differed dramatically from age of buildings that formed basis for creation of South Hill Historic District and that National Historic Register of Historic Places Nominating Form did not list Commonwealth Building or its architectural style, instead referring to those styles from the 19th and 20th centuries — Thus, Commonwealth Building was not considered when establishing South Hill Historic District or considered a contributing structure at time of establishment of district — Cosmetic modifications to Commonwealth Building's exterior had rendered it not even an intact example of architecture of period in which it was constructed —

Bluegrass Trust for Historic Preservation v. Lexington Fayette Urban County Government Planning Commission; Com. of Kentucky, ex rel. Russell Coleman, Attorney General; The Residences at South Hill, LLC; and William Wilson (2022-SC-0480-DG); On review from Court of Appeals; Opinion by Justice Conley, *affirming in part and reversing in part*, rendered 8/22/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Kentucky Revised Statute (KRS) 100.3471 authorizes the circuit court to impose an appeal bond on all appeals from the circuit court in cases involving KRS Chapter 100 disputes; that is, involving zoning and land use disputes. When this bond is imposed it operates as a jurisdictional requirement upon the Court of Appeals, and failure to post the bond requires dismissal of the appeal. The constitution, however, guarantees every Kentuckian at least one right of appeal to the next highest court. Ky. Const. § 115. These cases present the question of whether KRS 100.3471 is constitutional. Striking down a statute as unconstitutional is the gravest power this Court possesses and must be exercised with great caution. When it is shown, however, that a statute on its face cannot under any circumstances be constitutionally enforced, then striking down that statute as null, void, and of no effect is the only remedy. Accordingly, we hold KRS 100.3471 is unconstitutional since it encumbers the individual right of Kentuckians to at least one appeal; and, in so doing, it invades the rule-making power of this Court and operates to strip the Court of Appeals of its inherent appellate jurisdiction. For the following reasons, we reverse the Court of Appeals but affirm the circuit court on the underlying merits.

I. Facts

Beauty, it is often said, is in the eyes of the beholder. This case raises the question of whether contribution to historical character is also in the eyes of the beholder. The Commonwealth Building, located within the H-1 Historical Overlay Zone of South Hill Historic District in Lexington, was built in 1958 or 1960.[1] The Appellants describe it as "a rare and increasingly threatened mid-twentieth century modern commercial structure[.]" The building had been owned by the Commonwealth of Kentucky until its purchase in 2017 by The Residences at South Hill, LLC (The Residences). After a year of ownership, The Residences sought a Certificate of Appropriateness from the Board of Architectural Review (BOAR) to demolish the building and erect a five-story apartment complex. The BOAR approved the certificates. Several appeals were taken from that decision by interested parties. The Residences appealed certain conditions imposed by the BOAR. The Historic South Hill Neighborhood Association (HSHNA) appealed concerning the BOAR's conclusion that there was no reasonable economic return on the property and to disallow demolition would amount to a taking of The Residences' property. Instead, the HSHNA supported demolition on the basis that the Commonwealth Building is a non-contributing structure to the historic character of South Hill. Bluegrass Trust for Historic Preservation (Bluegrass Trust) appealed the certificate for demolition outright, arguing the Commonwealth Building can provide a reasonable economic return with renovations, and that the building does contribute to the historic character of South Hill.

[1] The record is ambiguous as it states the building was constructed in 1958 but also that the South Hill Historic District was designated in 1978 and the Commonwealth Building existed for eighteen years prior.

The Planning Commission heard the appeal *de novo*. The record discloses that several expert and lay persons testified regarding the specific question of whether the Commonwealth Building is a contributing structure to the historic character of South Hill. Prior to that hearing, The Residences and HSHNA reached an agreement that they would ask the Commission to approve demolition solely on that issue of non-contribution rather than on the economic viability and taking question.[2] The

first staffer to testify was Ms. Keyu Yan. Ms. Yan testified the Kentucky Heritage Council confirmed the Commonwealth Building is not a contributing structure by federal standards, nor was the building in the process of being listed as such. She also testified an inventory from the National Register of Historic Places was submitted by the Heritage Council, describing the Commonwealth Building as a "two-story large white brick building."

[2] The HSHNA was concerned that approval of demolition based on that theory would set a dangerous precedent for other buildings not only in its historic district, but others as well.

Ms. Yan further testified the South Hill district is characterized by Federal and Greek Revival architecture, as well as Italianate and Queen Anne styles, per the H-1 Design Review Guidelines' Brief Overview of Lexington's Historic Districts and Landmarks. She also stated the 2009 Downtown Lexington Building Inventory, prepared by the Division of Historic Preservation, did not include the Commonwealth Building when describing the South Hill district. Ms. Yan concluded her testimony by recommending demolition based on the non-contributory character of the structure to the historic district.

Next, a Ms. Kerr for the Historic Preservation staff testified. She testified the State Historic Preservation Office does have the Commonwealth Building listed as a contributing structure. She further commented that the mid-twentieth century style of the Commonwealth Building is not necessarily a negative as compared to the rest of the South Hill district, as all H-1 zones contain a wide-range of architectural styles. Berry Dennis then testified, also on behalf of the Historic Preservation staff. He testified the staff did not recommend demolition to the BOAR; and to the contrary, concluded demolition would adversely affect the district. The staff concluded the Commonwealth Building is significant and contributes to the character of the district, in that the architectural design is "sadly under-appreciated and disappearing[.]"

The next to testify were attorneys for respective parties and various citizens. Both sides were supported by the various citizens, so we pass over their arguments and testimony. David Cohen, chairman of the LFUCG Historic Preservation Commission, testified the building is included in the H-1 Overlay district and does contribute to the character of the district. Finally, Jackson Oslan read a letter from the State Historic Preservation Office. This letter detailed that Office's opinion that the Commonwealth Building is a contributing structure because of its eligibility for inclusion on the National Register for Historic Places in 2018; as well as its demonstration of architectural variety and brick-and-mortar history of Lexington.

The Planning Commission voted to uphold the BOAR's decision, and issued its own findings of fact, to wit: the age of the Commonwealth Building "differs dramatically from the age of the buildings that formed the basis for the creation of the South Hill Historic District[,]" and that the National Historic Register of Historic Places Nominating Form did not list the building or its architectural style, instead referring to those styles from the 19th and early 20th centuries. Second, the mid-twentieth century design of the building is "dramatically different" from those other architectural styles. These two factors combined demonstrate the Commonwealth Building was not considered when establishing the South Hill Historic District or considered a contributing structure at the time of the establishment of the district. Third, that cosmetic modifications to the exterior, including windows, stairs, and railings over the years, had rendered the structure "not even an intact example of the architecture of the period in which it was constructed." Finally, because the building had been owned for almost its entire existence by the Commonwealth, it had undergone internal and external modifications without oversight by the BOAR. The Commission concluded,

> the building does not add to the District's sense of time and place or historical development. The building, because of its age, architecture, location and use, was never effectively part of the South Hill neighborhood. The building is simply a one-of-a-kind structure built and operated by the Commonwealth of Kentucky which has had no influence on other buildings or development within the District.

Bluegrass Trust appealed. The Fayette Circuit Court concluded the Planning Commission's action was supported by substantial evidence. After summarizing the various testimonies and evidence the circuit court opined,

> This Court agrees that BGT did present a compelling case at the hearing in support of its position. Much like a jury evaluating evidence presented to it in trial, the Planning Commission heard from all sides in this dispute and was tasked with the responsibility of weighing the information, accessing [sic] credibility and drawing reasonable inferences as it applied that to the ordinances. The party presenting the most witnesses or the only "expert" witnesses does not necessary prevail. This Court is of the belief that information, evidence and argument presented by South Hill at the Planning Commission hearing was enough to satisfy the "substantial evidence" standard that this Court must adhere to. There was enough evidence and information upon which a reasonable member of the Planning Commission could find as he/she did.

Bluegrass Trust appealed again. It is unnecessary to detail the record regarding the appeal bond, except to note that Bluegrass Trust did not post the bond and instead argued it had insufficient funds as a charitable organization to do so. The Court of Appeals concluded KRS 100.3471 is constitutional and therefore it did not have jurisdiction because of Bluegrass Trust's failure to post the ordered bond. The Court of Appeals nonetheless briefly offered in dictum that had it jurisdiction, it would affirm the trial court.

II. Standards of Review

This case presents two pure questions of law as to the constitutionality of KRS 100.3471. "It is a well established principle that 'a facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'" *Harris v. Commonwealth*, 338 S.W.3d 222, 229 (Ky. 2011) (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)). The alleged violation must be "clear, complete, and unmistakable in order to find the law unconstitutional." *Id.* (quoting *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 499 (Ky. 1998)). Questions of constitutional and statutory construction are reviewed *de novo* by this Court, and we give no deference to the lower courts. *Louisville and Jefferson Cnty. Metro. Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 535 (Ky. 2007). When interpreting both the constitution and statutes, we understand the words used in their plain and ordinary meaning. *Westerfield v. Ward*, 599 S.W.3d 738, 747 (Ky. 2019). Our task is to effectuate the intent of the framers, and it is "presumed that in framing the constitution great care was exercised in the language used to convey its meaning and as little as possible left to implication." *Id.* at 748 (quoting *City of Louisville v. German*, 150 S.W.2d 931, 935 (Ky. 1940)).

Generally, it is not within the province of this Court to question the purposes of a statute—"the propriety, wisdom and expediency of statutory enactments are exclusively legislative matters." *Hallahan v. Mittlebeeler*, 373 S.W.2d 726, 727 (Ky. 1963). Nonetheless, when it comes to the separation of powers, we have recognized the indubitable principle that "the power to declare a legislative enactment unconstitutional when its enactment violates constitutional principles is solidly within the Court's constitutional authority." *Bevin v. Commonwealth ex re. Beshear*, 563 S.W.3d 74, 82 (Ky. 2018). "To avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty." *Id.* (quoting *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 209 (Ky. 1989)). Moreover, it is the judiciary "to whom the protection of the rights of the individual is by the constitution especially confided, interposing its shield between him and the sword of usurped authority, the darts of oppression, and the shafts of faction and violence." St. George Tucker, *View of the Constitution of the United States With Selected Writings* 91, 293 (Liberty Fund, Inc., 1999). In the circumstances presented by this case, "[t]o desist from declaring the meaning of constitutional language would be an abdication of our constitutional duty." *Bevin*, 563 S.W.3d at 83.

As to the underlying merits, we review this matter for arbitrariness. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). Essentially this focuses our review on "(1) action in excess of granted powers, (2) lack of procedural due process, and (3) lack of substantial evidentiary support[.]" *Id.* at 454. Nonetheless, "[i]t is possible that other apparently unrelated matters of law may be considered. Judicial review of legal questions cannot be impaired by the legislature." *Id.* at 456-57 (internal footnote omitted). While review for arbitrariness is one of the laxer standards of review employed by courts, that should not distract from the fact that this standard

> is basically founded upon the independent exercise of judicial power, and limitations imposed by the legislature will not prevail if they fail to protect the legal rights of a complaining party. As we have heretofore indicated, the courts can and will safeguard those rights when

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

> questions of law properly present the ultimate issue of arbitrary action on the part of an administrative agency.

Id. at 457. Simply put, arbitrary power cannot exist in this Commonwealth. Ky. Const. § 2. Where it does exist, it must be extinguished. When it is found, "it is the sworn duty of the court to enforce provisions of the Constitution irrespective of the consequences." *Dalton v. State Prop. and Bldg. Comm'n*, 304 S.W.2d 342, 345 (Ky. 1957).

Bluegrass Trust contends the Planning Commission engaged in a mixed question of law and fact, and that its action fundamentally concerned the interpretation of a zoning ordinance which calls for *de novo* review by this Court. We reject that argument. *American Beauty Homes* is unequivocal that *de novo* review of planning and zoning actions essentially nullifies the "steps taken before the Commission[,]" and renders the "detailed administrative process . . . a mockery." *Id.* at 455. Consequently, a *de novo* review "does not constitute a proper judicial review of this administrative action[.]" *Id.* at 456. We do agree questions of law are fit for *de novo* review, as this Court is the final authority on "what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The Commission's action, however, was not an interpretation of an ordinance but rather a determination of whether the conditions imposed by that ordinance had been met as to justify demolition. That is a question of fact reviewed for substantial evidentiary support. That standard requires only "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367 (Ky. 1971).

III. Analysis

KRS 100.3471 was passed in 2017 and represents the General Assembly's contribution to the interminable struggle against frivolous appeals. The General Assembly declared that such unnecessary appeals in KRS Chapter 100 cases burden the courts, cause loss of jobs and tax revenue, and prevent time-sensitive projects from being completed. Acts of General Assembly, Chapter 181, H.B. 72 § 2. The statute, in pertinent part, reads, "Any party that appeals the Circuit Court's final decision made in accordance with any legal challenge under this chapter shall, upon motion of an appellee as set forth in subsection (2) of this section, be required to file an appeal bond as set forth in this section." KRS 100.3471(1). Within thirty days after the filing of a notice of appeal, "any appellee may file a motion for the Circuit Court, pursuant to the jurisdictional authority established in Rule 73.06 of the Kentucky Rules of Civil Procedure, to order the appellant to post an appeal bond, which the Circuit Court shall impose, subject to the other requirements of this sections." *Id.* at (2). The circuit court must then determine whether it believes the appeal is presumptively frivolous or in good faith. If the former, then the bond the circuit court imposes is set at a maximum of $250,000. *Id.* at (3)(c). If the latter, then the maximum amount of the bond is $100,000. *Id.* at (3)(d). If a bond is ordered it must be posted within fifteen days, or the appeal must be dismissed. *Id.* at (3)(f). After the Court of Appeals' decision becomes final, "either the appellant or appellee" may seek costs and damages in the circuit court "to be paid to the appellee under the appeal bond". *Id.* at (4)(a). The costs and damages are "limited to the amount of the appeal bond." *Id.* at (4)(c).

A. Legislative Authority to Mandate Appeal Bonds

Bonds on appeal have been a part of Kentucky's history since the beginning. We have previously noted that the first act establishing the Court of Appeals in 1792 provided for a bond. *Phillips v. Green*, 155 S.W.2d 841, 843 (Ky. 1941).[3] These bonds have always been understood as a penalty or a tax. *Id.* In what appears to be the first case considering appeal bonds, the legislature's authority not only to mandate appeal bonds, but to mandate the procedures as to when, where, and how that appeal bond should be posted was upheld. *Hardin v. Owings*, 4 Ky. 214 (1808). The authority to mandate appeal bonds was predicated on legislative supremacy.

> The legislative body is the supreme power of the State, and whenever it acts within the pale of its constitutional authority, the judiciary is bound by it, and it is not competent to the latter tribunal to dispense with a regulation or requisition plainly prescribed by the former (its superior), or to say that this mode, that, or the other, is as good as the one dictated by the legislature[.]

Id. at 215. The constitutions of Kentucky as they existed prior to adoption of the 1974 Judicial Amendments all provided that the General Assembly could regulate the appellate jurisdiction of the judiciary and could grant or withhold a right of appeal. Ky. Const. Art. IV, § 2 (1799); Ky. Const. Art. IV, §§ 2; 18 (1850); Ky. Const. Art. IV, §§ 115; 132 (1891). As one opinion declared, "no one has an inherent right to appeal from a court judgment, and that the right to do so, in the absence of some constitutional provision to the contrary, rests exclusively with the Legislature, and which it may grant or withhold at its discretion." *Caddell v. Fiscal Court of Whitley Cnty.*, 79 S.W.2d 407, 408 (1935). Indeed, our predecessor court even recognized that in cases involving the constitutionality of a statute, it could do nothing if the General Assembly did not provide for an appeal—"we have no power to review except where they are brought before us within the time and in the manner prescribed by the Legislature." *Commonwealth ex rel. Dummit v. Jefferson Cnty.*, 189 S.W.2d 604, 607 (Ky. 1945).

[3] It would appear, however, that the *Phillips* court was referring to something very much akin to a supersedeas bond, if not exactly that; and as is made clear below, the appeal bond here is not analogous to a supersedeas bond.

This conception of legislative power regarding the right of appeal is no longer tenable. The constitution now declares, "In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court," with two minor exceptions not relevant to the cases at bar. Ky. Const. § 115. This language is unambiguous and "[i]t is not allowable to interpret that which needs no interpretation." *Gilbert v. Greene*, 216 S.W. 105, 108 (Ky. 1919). But these cases demonstrate that Section 115 must be explained. "Appeal to another court" presupposes that a lower court has considered the case or controversy and rendered a final judgment. In these cases, that was the circuit court. The circuit court exists by the constitution. Ky. Const. § 112. A circuit judge is a constitutional officer. Ky. Const. §§ 112; 117. A judge only exercises authority under law or equity, i.e., exercises nothing but judicial power. *American Beauty Homes*, 379 S.W.2d at 454. A court's final decisions are "judgment[s] or decree[s] . . . affecting some personal or proprietary interest defined and regulated by law[.]" *Bruce v. Fox*, 31 Ky. 447, 448 (1833). And finality is defined as "put[ting] an end to the action by declaring that the plaintiff is or is not entitled to the relief sought, and if relief is granted [the judgment] must give that relief by its own force or be enforceable without further action by the court or by process for contempt[.]" *Kentucky Heating Co. v. City of Louisville*, 198 S.W. 1150, 1152 (Ky. 1917). Once a court issues a final judgment, that judgment is appealable. CR[4] 54.02(1).

[4] Kentucky Civil Rules of Procedure.

In the case before us, the circuit court exercised a power of review of an administrative action as authorized by statute. KRS 100.347(1). That procedural hurdle does not change the fact that the circuit court is a court presupposed by Section 115. The circuit court made a final decision, affecting a personal or proprietary interest, declaring the plaintiffs either were or were not entitled to the relief they sought under law. The constitution unequivocally declares for such instances that "there shall be allowed as a matter of right at least one appeal to another court[.]" Ky. Const. § 115. In this case, that other court is the Court of Appeals.

It has been argued, however, that there is no constitutional right to appeal from the circuit court to the Court of Appeals under Section 115. The parties cite to *Seiller Waterman, LLC v. Bardstown Capital Corp.*, to argue that Section 115 only applies to "cases originating in our court system." 643 S.W.3d 68, 80 (Ky. 2022). And since this case (and others consolidated for oral argument) originated in county Planning and Zoning Commissions, Boards of Adjustment, or Boards of Architectural Review, i.e., administratively, there is no constitutional right to appeal from the circuit court's judgment. Justice Robert Jackson once observed, "[w]e are not final because we are infallible[.]" *Brown v. Allen*, 344 U.S. 443, 540 (1953). We do well to remember that now. To err is human, and when this Court used the word "originate" we misspoke. We can admit when a mistake has been made because *stare decisis* does not bind us to fallacy. *Morrow v. Commonwealth*, 77 S.W.3d 558, 559 (Ky. 2002). A literal reading of *Seiller Waterman* does not comport with the history of our application of Section 115 to appeals from court judgments in cases originating in administrative actions. Therefore, we abrogate that portion of *Seiller Waterman* to the extent it conflicts with Section 115.

More than thirty years ago, we held that an appeal from the Court of Appeals to this Court was guaranteed by Section 115 in worker's compensation cases. *Vessels by Vessels v. Brown-Forman Distillers Corp.*, 793 S.W.2d 795, 798 (Ky. 1990). Worker's compensation cases are undoubtedly administrative in nature and do not "originate" within the judiciary. *Vessels*' rationale was short and to the point. Section 115 is "unambiguous" and "presupposes that the tribunals of review and for

appeal are courts within the constitutional meaning of the word." *Id.* In other words, if a citizen has had an adjudication of his rights made by a judge, exercising judicial powers whether upon review or by appeal, then he has found himself in a court; and once a final judgment has been rendered by that court, Section 115 unambiguously guarantees one right of appeal to the next highest court. *Id.*

Vessels did not break new ground with this holding. We said as much, in so many words, in *Sarver v. Allen Cnty.*, 582 S.W.2d 40 (Ky. 1979). In that case, the Court of Appeals had suggested that its appellate jurisdiction was discretionary and not a matter of right in a case on appeal from a circuit court, which had reviewed the action of the county fiscal court. *Id.* at 43. We rejected the suggestion citing to KRS 23A.010(4)—which states direct review of an administrative decision in the circuit court is not considered an appeal but an original action—and Ky. Const. § 115. *Id.* The plain implication being that Section 115 did not apply from the fiscal court to the circuit court but does apply from the circuit court to the Court of Appeals. This is because fiscal courts traditionally exercise powers that are legislative and sometimes only quasi-judicial. *Shelton v. Smith*, 144 S.W.2d 500, 501 (Ky. 1940). The fiscal court is not a court presupposed by Section 115. *Varney v. Varney*, 609 S.W.2d 704, 705 (Ky. App. 1980). But where a person is in the circuit court, before a duly elected judge, exercising purely judicial power, then he is in a court as contemplated by Section 115 and he has one right of appeal to another court once a final judgment has been rendered.[5]

[5] RAP (1)(A) states, "[t]hese rules govern appellate procedure in all Kentucky courts, except for special statutory proceedings in the Court of Appeals." It has been suggested that this rule applies to KRS 100.3471. But it is the circuit court that conducts all the proceedings in determining the amount of a bond before the Court of Appeals renders a decision and whether to impose costs and damages after the Court of Appeals' decision has become final. The proceedings thus take place in the circuit court, not the Court of Appeals, so RAP 1(A) cannot apply.

As such, the General Assembly no longer has authority to impose appeal bonds. Even under the old rule, the General Assembly's authority to regulate appeals could be circumscribed by "some constitutional provision to the contrary . . . ." *Caddell*, 79 S.W.2d at 408. Section 115 does more than circumscribe this power—it negates it. Section 115 is an unmistakable renunciation of the old rule that no right of appeal existed but when and upon what terms the General Assembly dictated. Appeal bonds may have a useful and salutary purpose, but utility and authority are separate questions. The authority to impose appeal bonds was heretofore predicated on previous iterations of the constitution that did not guarantee a right of appeal and, in fact, explicitly declared such a right was a matter of legislative grace. *Hardin*, 4 Ky. at 215; *Caddell*, 79 S.W.2d at 408. That is no longer true under Section 115. Therefore, the authority no longer exists.

It has been argued that because the statute makes the imposition of the bond discretionary, it passes constitutional muster on a facial challenge. Though the amount of the bond may be discretionary up to certain limits, imposing a bond in and of itself is not discretionary. KRS 100.3471(2). But granting the point *arguendo*, the argument is unavailing because even if some Kentuckians may not have an appeal bond imposed, that changes nothing about the fact that some Kentuckians will have the bond imposed. It is the latter group that suffers the constitutional deprivation. If the former group does not suffer a constitutional deprivation, it is only because the circuit court did not impose the bond as the statute contemplated. In other words, the statute mandating an appeal bond would only be constitutional if an appeal bond is not imposed. That is not an argument for constitutionality. If a statute can only be constitutional in some cases by not being enforced, then it is unconstitutional in all cases when it is enforced; thus, the facial challenge succeeds.

It has also been suggested that because the amount of the bond is essentially discretionary, a trial court could impose only a *de minimis* amount on the bond. But the General Assembly's declared purpose in passing KRS 100.3471 is to discourage frivolous appeals in KRS Chapter 100 cases. Imposing a monetarily *de minimis* bond would not achieve that purpose.[6] It cannot be seriously contended then when a circuit court finds an appeal presumptively frivolous but only orders a *de minimis* bond, that such a bond will discourage the appeal. And if the circuit court concludes the appeal is in good faith, how does imposing a bond of any kind discourage a frivolous appeal? All that achieves is to penalize appellants with good faith, perhaps even meritorious claims, in like manner as bad faith actors filing frivolous appeals. The statute's *purpose* is to discourage frivolous appeals, but its *effect* is manifestly broader under a plain text reading.

[6] *De minimis* comes from the rule *de minimis non curat lex*. Translation: the law does not concern itself with trifles.

The next argument is that an appeal bond is no different than a supersedeas bond. First, supersedeas bonds are clearly within the authority of this Court as a rule of practice and procedure. RAP[7] 63. A supersedeas bond "stay[s] enforcement of the judgment" of the trial court or Court of Appeals. RAP 63(A)(1). It "maintains the status quo and protects the prevailing party's interests." *Stars Interactive Holdings (IOM) Ltd. v. Wingate*, 594 S.W.3d 181, 184 (Ky. 2020). The appeal bond of KRS 100.3471 does not stay execution of the circuit court's judgment and the successful party before the circuit court is free to act in accordance with that judgment during the pendency of appeal. In other words, a bondholder under KRS 100.3471 would have to take out a separate supersedeas bond to preserve the status quo. That fact alone refutes any analogy to supersedeas bonds.

[7] Kentucky Rules of Appellate Procedure.

It is true that KRS 100.3471(2) refers to CR 73.06—which is now RAP 63(c)—so the analogy to supsersedeas bonds is implied by the statute. But RAP 63(c) only refers to the trial court's limited retention of jurisdiction to determine the sufficiency of a supersedeas bond. The legislature plainly intended to append to that "jurisdictional authority[,]" KRS 100.3471(2), a power to impose another kind of bond, which it cannot do. Ky. Const. § 116. If the General Assembly intended the bond itself to be nothing other than a supersedeas bond, it could have said exactly that or referred to the former CR 73.04. It is now RAP 63(B)(3) which limits a supersedeas bond in cases involving disposition of property to "only [that] as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay." KRS 100.3471 simultaneously does less than our own rule by excluding the amount for use and detention of property, KRS 100.3471(3)(c) and (d); and more than our own rule by allowing the circuit court to consider the legal merits of the appeal in determining the bond amount. KRS 100.3471(3)(b).

By applying to good faith assertions of legal rights and failing to preserve the status quo, the bond of KRS 100.3471 admits to being nothing other than a price of admission to the Court of Appeals, and its only effect is to penalize Kentuckians wishing to challenge land-zoning decisions beyond the circuit court by exercising their constitutional right of appeal.

Finally, KRS 100.3471(4)(a)-(c) is manifestly unconstitutional as arbitrary. Ky. Const. § 2. Section 2 is broad enough to encompass traditional notions of due process. *Bd. of Ed. of Ashland v. Jayne*, 812 S.W.2d 129, 131 (Ky. 1991). Nothing in the statute predicates an appellee's award of costs and damages upon a successful outcome in the Court of Appeals. The statute allows an unsuccessful appellee in the Court of Appeals to return to the circuit court and seek costs and damages from the successful appellant. The only argument of merit offered against this interpretation is that it is highly unlikely a circuit judge would ever award costs and damages to an unsuccessful appellee. We agree. But that cannot save the constitutionality of these provisions. The reason we believe no circuit judge would ever impose costs and damages on a successful appellant is because such an outcome is essentially unjust. "[W]hatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary[.]" *Id.* (quoting *Ky. Milk Marketing v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985)). A successful appellant cannot be penalized for asserting his rights and pursuing his claims in a court of law; he owes nothing to an unsuccessful appellee. The Commonwealth has no legitimate interest in hindering good faith assertions of legal rights in a court of law. To the contrary, our Founding Fathers recognized the *raison d'etre* of government is the protection of rights and liberties, both personal and in property, under law. *Beard v. Smith*, 22 Ky. 430, 476-77 (1828). Even though we agree it is nigh impossible to conceive that such an outcome would ever occur, we must be cognizant that "[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." James Madison, Federalist No. 51, 319 (Rossiter, Clinton, ed., 1961). "[P]ower, lodged as it must be in human hands, will ever be liable to abuse." James Madison, *Writings*, Speech in the Virginia Constitutional Convention 824 (Library of America, 1999) (Jack N. Rakove, Ed.). Because KRS 100.3471(4)(a)-(c) allows for the possibility that a successful appellant pay costs and damages to an unsuccessful appellee, we must conclude these provisions are arbitrary.

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

B. General Assembly's Authority to Regulate Appellate Jurisdiction

Having determined KRS 100.3471 is an unconstitutional deprivation of Kentuckians' right of appeal, we must next consider that portion of the statute that mandates dismissal of an appeal when the bond is not posted as ordered. KRS 100.3471(3)(f). We have to address this issue because it is linked with the Section 115 issue. It has been argued that the constitution authorizes the General Assembly to regulate the appellate jurisdiction of the Court of Appeals under Section 111(2). If that is true in the manner now argued, then we would be required to harmonize that authority with Section 115, and thereby save the constitutionality of KRS 100.3471. This question also compels us to consider the separation of powers between the General Assembly and this Court, as head of the judicial branch. Thus, we must consider and interpret the entirety of the Judicial Amendments. *Legislative Research Com'n v. Fischer*, 366 S.W.3d 905, 913 (Ky. 2012).

The Judicial Amendments were adopted in 1974 and made effective in 1976. They were a paradigmatic shift in the relation of the judiciary to the legislature. "The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice . . . [and] shall constitute a unified judicial system for operation and administration." Ky. Const. § 109. As to this Court, the constitution provides it "shall have appellate jurisdiction only, except it shall have the power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice." Ky. Const. § 110(2)(a). Moreover, "[t]he Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice." Ky. Const. § 116.

As to the Court of Appeals, it

> shall have appellate jurisdiction only, except that it may be authorized by rules of the Supreme Court to review directly decisions of administrative agencies of the Commonwealth, and it may issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause within its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction as provided by law.

Ky. Const. § 111(2).

The import of these several provisions is that when it comes to the appellate jurisdiction of this Court and the Court of Appeals on a constitutional level, it is the Supreme Court which exercises authority; and that authority is neither dependent upon nor constrained by the General Assembly. First, the Court of Justice is one and unified with the Supreme Court as its head. The Supreme Court and Court of Appeals exercise appellate jurisdiction only (with minor exceptions). The power to govern that appellate jurisdiction is given to this Court. That this was the understanding of the 1974 Judicial Amendments was acknowledged as early as 1978—"[t]he Constitution also gives the Supreme Court the power to define its own appellate jurisdiction as well as the jurisdiction of the Court of Appeals by the enactment of rules." *Ash v. Security Nat. Ins. Co.*, 574 S.W.2d 346, 348 (Ky. App. 1978) (citing Ky. Const. §§ 110 and 116). Under Section 116 we govern the appellate jurisdiction of the Court of Appeals by the Rules of Appellate Procedure. These rules serve as a necessary protection to the substantive rights of Kentuckians, even those of constitutional import, because "without such rules those rights would smother in chaos and could not survive." *Cassetty v. Commonwealth*, 495 S.W.3d 129, 134 (Ky. 2016) (quoting *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977)). And as the case at bar readily demonstrates, under Section 110(2)(a), we govern the appellate jurisdiction of the Court of Appeals through the exercise of our own appellate jurisdiction. We need not cite the litany of cases demonstrating this Court routinely reviews lower court determinations as to the assertion or non-assertion of jurisdiction. In other words, as a general and uncontroversial proposition, it is a necessary part of this Court's appellate jurisdiction to ensure the Court of Appeals is correctly exercising its appellate jurisdiction. *See e.g.*, *Commonwealth v. Sexton*, 566 S.W.3d 185, 196-97 (Ky. 2018).

But the parties in favor of KRS 100.3471 argue that Section 111(2) provides that the Court of Appeals can "exercise appellate jurisdiction as provided by law." And this language is the authorization allowing the General Assembly to pass an appeal bond. The parties cite to, and the Court of Appeals relied upon, *Farmer v. Commonwealth*, 423 S.W.3d 690, 692 (Ky. 2014) for this proposition. *Farmer* says, "[t]he 'as provided by law' language in the second sentence of Section 111(2) authorizes the legislature to prescribe the appellate jurisdiction of the Court of Appeals." *Id.* The precise issue in *Farmer* concerned the authority and application of KRS 22A.020(4). *Id.* In the three cases *Farmer* cited for that holding this Court was also considering KRS 22A.020(4). *Commonwealth v. Bailey*, 71 S.W.3d 73, 77 (Ky. 2002); *Moore v. Commonwealth*, 199 S.W.3d 132, 138 (Ky. 2006); *Ballard v. Commonwealth*, 320 S.W.3d 69, 72-73 (Ky. 2010).

KRS 22A.020(4) grants the Commonwealth a right of appeal for interlocutory orders in criminal cases under certain conditions. Understood as a statutory grant of appellate jurisdiction, it has been repeatedly upheld as constitutional. *Ballard*, 320 S.W.3d at 73; *Commonwealth v. Burkhead*, 680 S.W.3d 877, 881 (Ky. 2023). We do not at all disturb these rulings; merely clarify their inapplicability to the cases at bar. KRS 22A.020(4) has been recognized as a statutory grant of appellate jurisdiction distinct from the constitutional right of appeal. *Moore*, 199 S.W.3d at 138. We have acknowledged that KRS 22A.020(4) is a unique benefit granted to the Commonwealth and is not applicable to criminal defendants. *Farmer*, 423 S.W.3d at 693. The cases we are now addressing are neither criminal nor interlocutory. KRS 22A.020(4) has no applicability whatsoever; thus, *Farmer* is not controlling as to whether the General Assembly may statutorily mandate dismissal of an appeal when that appeal is a matter of constitutional right. That question is answered by the constitution.

As demonstrated above, the right of appeal from a final order of a court is constitutionally protected in all cases civil and criminal.

> The constitution itself is in every real sense the supreme law . . . [and] [t]hough the legislature of a state may exercise all governmental power not denied it and may enact any law not expressly forbidden by the state or the federal constitution, where such authority has been withheld the people have declared that any act transcending that restriction or opposing that supreme law shall be void.

Jefferson Cnty. ex rel. Grauman v. Jefferson Cnty. Fisc. Court, 117 S.W.2d 918, 919-20 (Ky. 1938). When comparing the language of Section 111(2) with Section 115 we must also be mindful that "[i]nterpretation of the Constitution by rule of implication is hazardous; to be employed only in instances where the subject matter and language leave no doubt that the intended meaning may be thus reached with approximate certainty." *Commonwealth ex rel. Attorney General v. Howard*, 180 S.W.2d 415, 418 (Ky. 1944). As such, "if there be conflict [between two constitutional provisions] it is the duty of the court to uphold that provision containing express language relating to the subject, rather than to one dealing with matters in general terms." *Id.* Finally, "[t]he Constitution should not be construed so as to defeat the obvious intent of its framers if another interpretation may be adopted equally in accordance with the words and sense which will carry out the intent." *Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957).

Section 115 is unambiguous and specific over the quite general language of Section 111(2) that "[i]n all other cases, it shall exercise appellate jurisdiction as provided by law." It was the obvious intent of its framers that Section 115 should guarantee the right of appeal to another court in all cases civil and criminal with minor exceptions. The general language of Section 111(2) simply cannot be used defeat that explicit right. Instead, what Section 111(2) provides for is that the General Assembly may confer a statutory right of appeal in those instances where a constitutional right of appeal does not already exist, e.g., an interlocutory appeal in criminal cases for the Commonwealth. *Farmer*, 423 S.W.3d at 692. Section 111(2) provides no authority, however, to regulate the inherent appellate jurisdiction of the Court of Appeals granted in the self-same section. As we have noted before, jurisdiction now derives from the constitution and by filing a notice of appeal the appellant is invoking "the exercise of the inherent jurisdiction of the court as constitutionally delegated." *Johnson v. Smith*, 885 S.W.2d 994, 950 (Ky. 1994). Appellate jurisdiction is defined as "the power and authority to review, revise, correct or affirm the decisions of an inferior court, and, more particularly, to exercise the same judicial power which has been executed in the court of original jurisdiction." *Copley v. Craft*, 341 S.W.2d 70, 72 (Ky. 1960). In the cases before us, the parties were undoubtedly in a court; namely, the circuit court. And said court rendered a final judgment, i.e., a judgment affecting a personal or proprietary interest, and declaring the plaintiffs either were or were not entitled to relief they sought as regulated by law. The jurisdiction of the circuit court to review was not in doubt. KRS 100.347(1). Section 115 guarantees their right to appeal to another (i.e., next highest) court. Therefore, the Court of Appeals, properly understood, would be exercising its inherent appellate jurisdiction as provided by the constitution.

It may seem strange to predicate appellate jurisdiction in part on Section 115, but it is not unprecedented. In *Ratliff v. Fiscal Court of*

Caldwell Cnty., we considered various parts of the eminent domain condemnation statute, KRS 416.610(4) and KRS 416.620. 617 S.W.2d 36, 38-39 (Ky. 1981). This statutory scheme, in brief, allowed a circuit court to enter an interlocutory judgment on the issue of whether a condemnor had the right to take the property. *Id.* at 38. The statutes then required within thirty days of that interlocutory judgment for a bill of exceptions to be filed by the condemnee, but expressly prohibited an exception to the interlocutory judgment as to the condemnor's right to take. *Id.* at 39. Thus, it was arguable the only final judgment a condemnee could appeal was the award of damages. *Id.* at 38.

We held that Section 115 "demanded" that a condemnee have "an immediate right of appeal, which preserves the status quo," from the interlocutory judgment on the issue of the right to take because the interlocutory judgment operated to divest the condemnee of a right to ownership and possession which could not be restored to the original condition. *Id.* at 39. In so holding, however, we did not overrule the statute. Instead, we held the statutory provisions themselves were susceptible to an interpretation providing for this interlocutory appeal. We believe that the provisions of KRS 416.610(4) referring to an interlocutory judgment . . . allows an immediate, expedited appeal, by the condemnee of the question of the condemnor's right to take." *Id.*

Ratliff thus supports our understanding of Section 115. But, somewhat fortuitously, it also indirectly supports our understanding of Section 111(2). Granted that section was not at issue in *Ratliff* because the General Assembly has authority over eminent domain. Ky. Const. §§ 13; 195; 242. But the salient point is that the statute could have been read to deny a condemnee's right of appeal on the issue of whether the condemnor had a right to take. By applying Section 115's guarantee of a right of appeal, we instead interpreted the statute as creating a statutory right of appeal from an interlocutory judgment on that issue. And since appellate jurisdiction over interlocutory orders does not exist by the constitution but only by statute, civil rule, or common law, *Childers v. Albright*, 636 S.W.3d 523, 526 (Ky. 2021), this understanding of *Ratliff* harmonizes with our reading of Section 111(2) in *Farmer*.

Finally, we note that comity is not an issue here. We apply comity only when there is "gray area in which a line between the legislative prerogatives of the General Assembly and the rule-making authority of the courts is not easy to draw." *Ex Parte Auditor of Pub. Accounts*, 609 S.W.2d 682, 688 (Ky. 1980). Comity cannot apply to Section 115's grant of an individual right to appeal because that is not a provision regarding the rule-making power of this Court. So far as Section 111(2) is concerned, the ambiguity this Court had to resolve was not a result of the language of the constitution itself, but rather from a misapplication of *Farmer*. Having made the necessary clarifications, the line to be drawn in these cases is readily discernable and easily applicable.

Another reason not to grant comity is that we have previously struck down a statute[8] for violating the separation of powers, Ky. Const. §§ 27 and 28, because by imposing a monetary penalty its effect was to deter motions for discretionary review, both frivolous and meritorious, and "thereby limits or restricts the Kentucky Supreme Court in exercising its jurisdiction to review cases from lower courts. By so doing, it invades the constitutional power assigned exclusively to the Kentucky Supreme Court to 'exercise appellate jurisdiction as provided by its rules.'" *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 424 (Ky. 2005) (citing Ky. Const. § 110(2)(b)) (*overruled on other grounds by Calloway Cnty. Sheriff's Dept. v. Woodall*, 607 S.W.3d 557, 572-73 (Ky. 2020)). The rationale underlying this conclusion was that this Court had already promulgated a civil rule to deter frivolous appeals—the former CR 73.02(4)—thus, the subject matter of the statute pertained to the rules of practices and procedures of the Court. *Id.*

[8] KRS 26A.300.

In like manner, the current rules provide ample authority to the Court of Appeals to sanction frivolous appeals, and to award "just monetary sanctions and single or double costs to the opposing party." RAP 11(4). Trials courts also have authority to sanction frivolous complaints and pleadings. CR 11. Just as the statute at issue in *Elk Horn* invaded our exclusive power to define our own rules for regulating appellate procedure in this Court under Section 110(2)(b), KRS 100.3471 invades our exclusive authority to define the rules of practice and procedure in the Court of Justice. Ky. Const. § 116. The reason is demonstrated by what is lacking in KRS 100.3471. Although we need not resolve these questions now, the statute does raise several; namely, 1) is the trial court's determination that an appeal is presumptively frivolous or in good faith a finding of fact or conclusion of law? 2) Is that determination appealable and if so, when—after the bond is imposed or after the award—and how? 3) Is the trial court's determination controlling upon the Court of Appeals? 4) What degree of deference, if any, does the Court of Appeals owe the trial court's determination if a motion for sanctions under RAP 11 is filed in that court? And 5) what is the effect of the Court of Appeals disagreeing with the circuit court, e.g., if the circuit court determines an appeal is presumptively frivolous and imposes a $250,000 bond, which is paid; but then the Court of Appeals disagrees and concludes the appeal was made in good faith but nonetheless affirms the circuit court's judgment, what then is the circuit court's authority in awarding costs and damages? Can the circuit court award the full $250,000 or, since a higher court found the appeal was in good faith, should not the costs and damages be limited to the $100,000? Why should costs and damages be awarded at all if the appeal was made in good faith? As already noted, the Commonwealth has no interest in deterring or penalizing good faith claims of legal right.

All these questions, and the lack of any answers to them in KRS 100.3471, demonstrate that the deterrence of frivolous appeals, while potentially touching upon larger economic concerns, are primarily the concern of the judiciary. Our rules vest the Court of Appeals with the necessary and sufficient authority to sanction them speedily and with as little expense as possible; without involving the circuit court thereby avoiding procedural conundrums concomitant with that involvement.

C. The Underlying Merits of the Certificate of Appropriateness

Lexington-Fayette Urban County Government Zoning Ordinance 13-7(a) details that the Board of Architectural Review may issue a Certificate of Appropriateness allowing for demolition of a building within an H-1 Overlay Zone. This negates any argument that merely by being within the H-1 Overlay zone, the Commonwealth Building is entitled to protection. Instead, in order for demolition to take place the BOAR must either find the building "does not contribute to the character of, and [demolition] will not adversely affect the character of the property in a zone protected by an H-1 overlay[,]" or "[n]o reasonable economic return can be realized from the property and the denial of the application would result in the taking of the property without just compensation." *Id.* at 13-7(c)(1)(b) and (c). The principal arguments offered by Bluegrass Trust to justify a conclusion that demolition is not supported by substantial evidence is the eligibility of the Commonwealth Building to be listed on the National Register of Historic Places, and the conclusion of several expert staffers below that the Commonwealth Building does contribute to the character of South Hill Historic District, and its demolition would adversely affect that character.

As to the first argument, we can only note that eligibility to be listed as an historic landmark is not tantamount to a conclusion that a structure is an historic landmark. Whatever the aesthetic qualities mid-twentieth century architectural design might possess, the only reason demonstrated in this record for eligibility is the age of the Commonwealth Building; an age which the Commission determined was in fact a mark against it as concerns historical contribution. The Commission determined the historical character of South Hill was manifested by architectural designs from a hundred years ago or more, and that a mid-twentieth century building was a "one-of-a-kind structure" within the district that markedly stood out from the rest of the district. Moreover, the Commission also considered the original nomination form for when South Hill was designated an Historic District and found no evidence the Commonwealth Building was originally considered. Bluegrass Trust has argued that the building's historical value and contribution arise from the fact that it reflects the historical growth of Lexington. But nowhere is any statute or ordinance cited that forbids the Commission from referring to the original basis for historical designation. Without such a statute or ordinance, we believe the original reasons for historical designation are a highly relevant factor in determining whether any individual building can be considered a contributing structure.

The second argument essentially is that the expert staffers of various state and local bodies all testified the Commonwealth Building is a contributing structure and its demolition would adversely affect South Hill. The failure of the Commission to follow that expert testimony, Bluegrass Trust avers, is arbitrary and capricious. While the value of expert testimony, particularly on a subjective topic like architectural design and beauty, may be high, it is not controlling. The Planning Commission is the body ultimately empowered to make a zoning decision within the confines set by the ordinance. Nothing Bluegrass Trust cites dictates otherwise.

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

For example, Zoning Ordinance 13-7(f)(b) states, "[i]n its deliberations, the Planning Commission shall give due consideration to the decision of the Board and the finding and conclusions reflected in the Board's record and shall apply the design guidelines adopted by the Historic Preservation Commission." Due consideration means due consideration; it does not mean the Planning Commission must give controlling weight to the opinions of the Historic Preservation Commission's staff. Moreover, such opinions are not the design guidelines adopted by the Commission. Similarly, Zoning Ordinance 13-3(h) merely defines Historic Preservation Office Staff. It does not contain any language that staff opinions are controlling upon the Planning Commission. Bluegrass Trust also cites the unpublished decision of *Sanders v. Howard*, 2017-CA-001392-MR, 2018 WL 6721226 (Ky. App. Dec. 21, 2018). Aside from being unpublished authority from a lower court, we do not believe *Sanders* stands for the proposition argued for.

Bluegrass Trust believes *Sanders* holds administrative bodies must give controlling weight to expert evidence when it is unrebutted. But *Sanders* reversed a State Trooper's discipline for dishonesty predicated upon her oral statements about which prescription medications she had in her system during a police luncheon. *Id.* at *1. The Trooper later made a written disclosure of her prescription medications prior to taking a urinalysis test. *Id.* The written statement disclosed more drugs than her oral statement. *Id.* The test confirmed the Trooper had truthfully disclosed in writing all medications. *Id.* at *2. The trial court held, and the Court of Appeals affirmed, that disciplinary action based on dishonesty was not supported by substantial evidence because the Trial Board had ignored the written statement, and focused only on her oral statements which, the Court of Appeals observed, were taken out of context. *Id.* at *3. We find no mention of expert testimony in *Sanders*, nor do we believe *Sanders* was particularly focused on the urinalysis test. Instead, the Court of Appeals, and the trial court, focused on the written statement of the Trooper as being dispositive of whether or not she was dishonest. *Id.*

Expert testimony is indeed valuable and often necessary. But Zoning Ordinance 13-7(f) designates an appeal to the Planning Commission as a *de novo* hearing. The trial court was therefore correct to hold the Planning Commission is a factfinder analogous to a jury, free to give weight and credibility to witnesses as it sees fit. It is beyond the judiciary's authority to impose a standard of weight and credibility that must be assigned to experts in planning and zoning matters. Absent a statute or local ordinance dictating what weight an expert testimony must be given by Planning Commissions, we cannot conclude that a decision contrary to expert testimony is arbitrary, so long as the decision is supported by other substantial evidence. That other substantial evidence in this case is the undisputed fact that the Commonwealth Building is not an historical landmark in the federal Register; it was not included in the original nominating form for the South Hill neighborhood as an Historic District; Ms. Yan's testimony that the Kentucky Heritage Council did not consider the structure a contributing building; and multiple near-contemporaneous documents—the Design Review Guidelines and Downtown Lexington Building Inventory—from Lexington that also did not list the Commonwealth Building.

Finally, Bluegrass Trust argues the "controlling regulation" in this matter is 36 C.F.R. § 67.5. That regulation is entitled, "Standards for evaluating significance within registered historic districts[.]" First, this regulation is not controlling. Zoning Ordinance 13-3(b) merely gives a definition of Certified Local Government; it does not incorporate or otherwise instruct the Planning Commission to conform its decisions to federal regulations. But taken as instructive authority, 36 C.F.R. § 67.5(a)(2) clearly acknowledges that a particular building within an historic district can be considered non-contributing, and the regulation goes on to state,

> [o]rdinarily buildings that have been built within the past 50 years shall not be considered to contribute to the significance of a district unless a strong justification concerning their historical or architectural merit is given or the historical attributes of the district are considered to be less than 50 years old.

Id. at 67.5(c). The Commonwealth Building was less than fifty years old when South Hill was designated an Historic District. It was objectively a non-contributing structure when the Historic District was formed. And the Planning Commission concluded that the historical attributes of the district were based on architecture from the 19th and early 20th centuries. Like the circuit court, we believe Bluegrass Trust made a strong showing before the Planning Commission. But the Planning Commission obviously did not believe a strong justification had been presented demonstrating the historical or architectural value of a mid-twentieth century building to the South Hill Historic District. Bluegrass Trust, however, points to the State Historic Preservation Office, and testimony to the effect that it has the Commonwealth Building listed as a contributing structure. But 36 C.F.R. § 67.5(f) only states, "[a]dditional guidance on certifications of historic significance is available from SHPOs and NPS WASO." In brief, even the federal regulations do not assign controlling weight to designations by state preservation offices, merely referring to them for "additional guidance." Kentucky's Historic Preservation Office believes the Commonwealth Building is a contributing structure mainly due to its mid-twentieth century design. The Planning Commission, however, focused on the older designs that formed the basis for creating the South Hill Historic District in the first place, and concluded a mid-twentieth century design is "dramatically different" from the other structures in the district.

No one disputes the Planning Commission was empowered to make the decision whether the Commonwealth Building is a contributing structure to the historic character of South Hill. Historic contribution is indeed in the eyes of the beholder. That beholder in this case is the Planning Commission, not staff, regardless of their expertise. We cannot say its decision was arbitrary.

IV. Conclusion

For the aforementioned reasons, we reverse the Court of Appeals on the constitutionality of KRS 100.3471(1). We otherwise affirm the trial court's decision and uphold the Planning Commission's action to affirm the certificate of demolition of the Commonwealth Building.

All sitting. Lambert, Nickell, and Thompson, JJ., concur. VanMeter, C.J., concurs in part and dissents in part by separate opinion in which Bisig and Keller, JJ., join.

PLANNING AND ZONING

APPEAL OF A ZONING DECISION

REQUIREMENT THAT A DEVELOPER BUILD A BRIDGE AND ROAD EXTENSIONS

In 2002, property owner divided 208 acres into four separate parcels — In 2004, owner of Parcel 2 submitted plans for residential development on that parcel, including building of bridge over creek located on Parcel 2 and extension of road up to property line separating Parcels 2 and 3 — This plan was approved by Planning Commission — Planning Commission acknowledged in 2005 that bridge and road extension had not been built, but recorded final plat for Parcel 2 — Some time thereafter, LPW Redevelopment, LLC (LPW) became owner of both Parcels 2 and 3 — In 2017, LPW sought and received zone change for Parcels 2 and 3 — Final Development Plan showed bridge over creek on Parcel 2 and road being extended to connect with Parcel 3 — Certificate of Land Use Restriction was recorded for Parcel 3, but Final Development Plan was not included in that Certificate, merely referenced — No explicit language exists on Final Development Plan map that indicates owner of Parcel 3 would be obligated to build road extension and bridge, which are located almost entirely on Parcel 2 — In 2018, LPW sold Parcel 3 to Boone Development, LLC (Boone) — Significant construction activity was conducted on Parcel 3, which had been redesignated Unit 1 and Unit 2 for development purposes — At this point, city notified Boone that Boone was responsible for building road extension and bridge on Parcel 2 — Planning Commission informed Boone that it required letter of credit which included coverage for road extension and bridge — Boone protested numerous "errors," including need for coverage for road extension and bridge — Boone believed it was under no obligation to construct either — Eventually, Boone filed declaratory action seeking declaration of rights that it did not have to build road extension and bridge — After much legal maneuvering, trial court affirmed determination by Board of Adjustment (Board) that Boone was required to build road extension and bridge — Boone appealed to Court of Appeals which, after concluding that KRS 100.3471 was constitutional, dismissed appeal upon determining it was without jurisdiction to adjudicate matter as Boone had not posted required appeal bond in appropriate time — Boone appealed — Kentucky Supreme Court determined that appeal bond requirement set forth in KRS 100.3471 is unconstitutional in *Bluegrass Trust v. Lexington-Fayette Urban County Gov't*,

rendered on same day as instant action, and set forth at 71 K.L.S. 8, p. 24 — Thus, Court of Appeals erred when it found that it lacked jurisdiction to consider merits of instant appeal — In interest of judicial economy, Supreme Court exercised its supervisory authority under Section 110(2)(a) of Kentucky Constitution to resolve underlying merits — Since Planning Commission's determination was not clearly unreasonable, AFFIRMED decision of trial court — Procedural due process requires a hearing; taking and weighing of evidence if such is offered; finding of fact based upon a consideration of the evidence; and making of an order supported by substantial evidence — Procedural due process was met in instant action — When a final development plan is incorporated as part of a zone change, development plan shall be followed — Zone change and final development plan were matters of public record — Board found that Boone had, in fact, been advised of need to construct bridge — Thus, Boone had both actual and constructive knowledge of its obligation — Trial court did not err in reasoning that even though a portion of the bridge was located on land Boone did not own, bridge was covered by an easement dedicated to public use, specifically a public roadway, like water lines and sanitary sewer lines — Requiring construction of public facilities is a reasonable cost of developing land —

Boone Development, LLC; Via Vitae Development, LLC d/b/a James Monroe Homes v. Nicholasville Board of Adjustment; Harold E. Smith, Acting Chairman; Alex Lyttle, Member; Jennifer Carpenter, Member; Jim Parsons, Member; Jimmy Wells, Member; Michael Eakins, In His Official Capacity as Acting/Interim Planning Director/Administrative Officer for the City of Nicholasville Planning Commission; Paula Elder, Member; Tanya Bolton, Member; The City of Nicholasville Planning Commission; Tim Cross In His Individual Capacity and Official Capacity as Engineer for the City of Nicholasville Planning Commission; William Wayne Hayden, Member (2022-SC-0476-DG); and *Boone Development, LLC; Via Vitae Development, LLC d/b/a James Monroe Homes v. Com. of Kentucky ex rel. Russell Coleman, Attorney General; Tanya Bolton, In Her Official Capacity as a Member of the Nicholasville Board of Adjustment; Jennifer Carpenter, In Her Official Capacity as a Member of the Nicholasville Board of Adjustment; City of Nicholasville Planning Commission; Tim Cross, In His Individual Capacity and In His Official Capacity as Engineer for the City of Nicholasville Planning Commission; Michael Eakins, In His Official Capacity as Interim/Acting Planning Director/Administrative Officer for the City of Nicholasville Planning Commission; Paula Elder, In Her Official Capacity as a Member of the Nicholasville Board of Adjustment; Wm. Wayne Haden, In His Official Capacity as a Member of the Nicholasville Board of Adjustment; Alex Lyttle, In His Official Capacity as a Member of the Nicholasville Board of Adjustment; Jim Parsons, In His Official Capacity as a Member of the Nicholasville Board of Adjustment; Harold E. Smith, In His Official Capacity as Acting Chairman and Member of the Nicholasville Board of Adjustment; Nicholasville Board of Adjustment; and Jimmy Wells, In His Official Capacity as a Member of the Nicholasville Board of Adjustment* (2022-SC-0477-DG); On review from Court of Appeals; Opinion by Justice Nickell, *affirming in part and reversing in part*, rendered 8/22/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

We granted discretionary review to consider the constitutionality of the appeal bond requirement set forth in KRS[1] 100.3471. For purposes of oral argument, we consolidated this appeal with two others presenting a similar constitutional challenge. *Bluegrass Trust v. Lexington-Fayette Urban County Government*, ___ S.W.3d ___ (Ky. 2024); *RAZ, Inc. v. Mercer County Fiscal Court*, ___ S.W.3d ___ (Ky. 2024). In *Bluegrass Trust*, rendered contemporaneously with this opinion, a majority of this Court held KRS 100.3471 imposed an unconstitutional burden on the right to appeal. The reasoning of *Bluegrass Trust* applies equally to this matter and interested parties should refer to that opinion. Consequently, the Court of Appeals' determination that it lacked jurisdiction to consider the merits of the appeal was in error.

[1] Kentucky Revised Statutes.

In the interest of judicial economy, we decline to remand this matter to the Court of Appeals for further consideration, and exercise our supervisory authority under Section 110(2)(a) of the Kentucky Constitution to resolve the underlying merits of this appeal.

I. Facts

In 2002, the G.N. Miles Estate in Jessamine County, totaling 208 acres of property, was divided into four separate parcels. In 2004, the owner of Parcel 2 submitted plans for residential development on that parcel, including the building of a bridge over a creek located on Parcel 2 and extension of Williams Road up to the property line separating Parcels 2 and 3. This plan was approved by the Nicholasville Planning Commission (NPC). The NPC acknowledged in 2005 that the bridge and road extension had not been built, but nonetheless recorded the final plat for Parcel 2.

At some point afterward, LPW Redevelopment, LLC ("LPW") became the owner of both Parcels 2 and 3. In 2017, LPW sought and received a zone change for Parcels 2 and 3. A Final Development Plan/Preliminary Plat was submitted by LPW, approved by the NPC, and subsequently approved by the Nicholasville City Commission. This Final Development Plan showed a bridge over the creek on Parcel 2 and Williams Road being extended to connect with Parcel 3. A Certificate of Land Use Restriction was recorded for Parcel 3, but the Final Development Plan was not included in that Certificate, merely referenced. No explicit language exists on the Final Development Plan map that indicates the owner of Parcel 3 would be obligated to build the Williams Road extension and bridge which are located almost entirely on Parcel 2.

In 2018, LPW offered to sell Parcel 3 to Boone Development, LLC ("Boone"). The sale was completed that same year. Significant construction activity was conducted on Parcel 3, which had been redesignated Unit 1 and Unit 2 for development purposes. At this point, according to the testimony of James Monroe, owner of Boone, the City of Nicholasville and its representatives informed him that Boone was responsible for building the Williams Road extension and bridge on Parcel 2. Boone disputed this obligation and the parties engaged in further discussion.

Central to this litigation, the NPC informed Boone it required a letter of credit which included, among numerous other items, coverage for the road extension and bridge. A letter of credit is required, when deemed necessary, to ensure the developer will be responsible for the construction of improvements, rights-of-way, and any other items the city considers to be required.[2] Tim Cross, Nicholasville's City Engineer, prepared and sent Boone a spreadsheet setting forth the various improvements to be made on Unit 2 and the letter of credit amounts the NPC required to cover those improvements. Boone informed Cross the spreadsheet erroneously included improvements which had already been completed and incorrectly set out surety amounts based on figures which were grossly different from those shown on the "as-built" construction plans. Boone also protested the inclusion of amounts for the road extension and bridge as it continued to insist it was under no obligation to construct either.[3]

[2] *See* KRS 100.281(4) which requires "provision of good and sufficient surety to insure proper completion of physical improvements[.]" A surety is required for the protection of the local government and to "guarantee a developer does not start and stop construction, leaving an unfinished, deteriorating and dangerous site[.]" *Western Surety Company v. City of Nicholasville*, 552 S.W.3d 101, 109 (Ky. App. 2018).

[3] Cross subsequently admitted the spreadsheet contained flaws, but remained steadfast that the road extension and bridge were properly included.

When Boone sought to correct the perceived errors in the NPC's letter of credit requirements, especially the inclusion of the road extension and bridge, Cross told Boone that any letter of credit which did not include those two items simply would not be considered by the NPC. Boone attempted to contact various members or representatives of the NPC regarding the mistakes in the letter of credit requirements but received no response.

Boone filed a declaratory action in Jessamine Circuit Court seeking a declaration of rights that it did not have to build the Williams Road extension and bridge. The NPC argued Boone had failed to exhaust administrative remedies by not appealing its decision to the Board of Adjustment. Boone countered that the NPC had not decided anything, and the subsequent lack of communication necessitated the declaratory action. The trial court agreed with Boone and instructed the NPC to make a decision. In compliance with this order, the NPC issued a Notice of Decision that affirmed its letter of credit requirements. The Board affirmed the NPC and issued a decision setting forth 12 findings of facts.

Boone appealed and the Jessamine Circuit Court affirmed the Board. Applying a standard that

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

required Boone to show the evidence before the Board was so compelling that the Board's decision was clearly unreasonable, the trial court held the Board was exercising its proper legislative powers in hearing the appeal, and there was no denial of due process. The court then found the Board's findings were not clearly unreasonable. As to Finding 6, it held the "stream crossing"—which is a more cumbersome phrase for bridge—was "off-site storm infrastructure," and the easement allowed Boone to enter Parcel 2 to build the bridge. The trial court also concluded that, aside from the road extension and bridge, "Defendants concede that no accurate bond requirements were ever provided." Or in other words, the other items on the letter of credit aside from the road extension and bridge were conceded to be inaccurate. The trial court deemed this to be unimportant because the road extension and bridge were the main divisive issues; Boone insisted that a letter of credit be issued without them, and the NPC refused to consider that potentiality.

Boone appealed to the Court of Appeals which, after concluding KRS 100.3471 was constitutional, dismissed the appeal upon determining it was without jurisdiction to adjudicate the matter as Boone had not posted the required appeal bond in the appropriate time. Boone sought discretionary review, which we granted.

We now address the merits of the appeal and further facts will be developed as necessary.

II. Standard of Review

"Basically, judicial review of administrative action is concerned with the question of *arbitrariness*." *American Beauty Homes Corp. v. Louisville & Jefferson Cnty. Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). To determine arbitrariness, a reviewing court looks for "(1) action in excess of granted powers, (2) lack of procedural due process, and (3) lack of substantial evidentiary support[.]" *Id.* "As a general rule the yardstick of fairness is sufficiently broad to measure the validity of administrative action." *Id.* at 457.

III. Analysis

As noted at the outset, this opinion is primarily concerned with resolving the merits of the underlying dispute. Insofar as a dispute is raised as the constitutionality of the appellate bond requirement set forth in KRS 100.3471, we direct the reader to our opinion in *Bluegrass Trust*, holding that the statute impermissibly burdens the constitutional right to an appeal. *Bluegrass Trust*, ___ S.W.3d at ___ ("By applying to good faith assertions of legal rights and failing to preserve the status quo, the bond of KRS 100.3471 admits to being nothing other than a price of admission to the Court of Appeals, and its only effect is to penalize Kentuckians wishing to challenge land-zoning decisions beyond the circuit court by exercising their constitutional right of appeal[]"). We adopt that holding to resolve the constitutional claim here.

The primary point of contention remaining between the parties is whether Boone is responsible for constructing the bridge and Williams Road extension. Because the NPC's determination was not clearly unreasonable, we affirm the decision of the Jessamine Circuit Court.

Our review entails consideration of the Board's decision to uphold the NPC's determination to require a letter of credit to include the cost of the bridge to connect two parts of Williams Road. Boone raises three issues in seeking relief: (1) the Board acted in excess of its legislatively granted powers; (2) Boone was denied procedural due process; and (3) the evidence presented by Boone to the Board was so strong that denial was clearly unreasonable. The first issue is easily resolved: KRS 100.257 and KRS 100.261 provide a clear grant of power to the Board to hear appeals of the NPC.

As to the second issue, we discern no arbitrariness of the part of the Board. "Procedural due process is not a static concept, but calls for such procedural protections as the particular situation may demand." *Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 590 (Ky. 1995). "As a general rule, in an administrative setting, procedural due process merely requires 'a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon a consideration of the evidence, [and] the making of an order supported by substantial evidence[.]'" *Friends of Louisville Public Art, LLC v. Louisville/Jefferson Cnty. Metro Historic Landmarks & Pres. Dists. Comm'n*, 671 S.W.3d 209, 213 (Ky. 2023) (quoting *Hilltop Basic Res., Inc. v. Cnty. of Boone*, 180 S.W.3d 464, 469 (Ky. 2005)). Although Boone believes the Board was deficient in the amount explanation it provided, no dispute exists that the Board gave Boone a hearing, took and weighed evidence, made a finding based upon that evidence, and issued an order supported by that evidence. While we agree with the trial court that the Notice could have included more comprehensive detail, it nevertheless sufficed to make Boone aware of the Board's position relative to the bridge. The standard for procedural due process was satisfied in this instance.

The final issue is whether Boone presented such strong evidence to the Board that the record compels a conclusion the Board's decision was unreasonable and arbitrary. Where a party asserts the administrative decision lacked substantial evidentiary support, the burden is upon the moving party to show that the record compels relief in its favor. *See Gentry v. Ressnier*, 437 S.W.2d 756, 758 (Ky. 1969) (explaining issue in circuit court was not whether substantial evidence supported board's decision to deny permit, but whether evidence presented by applicants "was so strong that the denial of the permit was clearly unreasonable[]"); *Bourbon Cnty. Bd. of Adjustment v. Currans*, 873 S.W.2d 836, 838 (Ky. App. 1994) (holding denial of administrative relief to party carrying burden is arbitrary if the record contains compelling evidence mandating a contrary decision, and "[t]he argument should be that the record compels relief[]"); *REO Mech. v. Barnes*, 691 S.W.2d 224, 226 (Ky. App. 1985), overruled on other grounds by *Haddock v. Hopkinsville Coating Corp.*, 62 S.W.3d 387 (Ky. 2001) (from board of adjustment denial of a conditional use permit, "[f]or evidence to compel a different result, the proof in [applicant's] favor must be so overwhelming that no reasonable person could reach the conclusion of the Board[]").[4]

[4] This slight variation in the review of an administrative agency's factual findings is no different from our decisions in worker's compensation cases: *See Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986) (if the fact-finder finds in favor of the person having the burden of proof, the burden on appeal is only to show that there was some substantial evidence to support the decision); *cf. Gray v. Trimmaster*, 173 S.W.3d 236, 241 (Ky. 2005) (if the ALJ finds against the party having the burden of proof, the appellant must "show that the ALJ misapplied the law or that the evidence in her favor was so overwhelming that it compelled a favorable finding[]").

As noted, the Board made 12 findings of fact:

1. Various zone changes and a Final Development Plan were recommended and adopted by the [NPC] on October 23, 2017, for the development of the land formerly known as the G.N. Miles Estate Property–Phase 3, now known as Eastgate Subdivision ("Property"). The Final Development Plan ("FDP") controls the development of the Property and includes a stream crossing as part of the design.

2. Thereafter, the Nicholasville City Commission duly adopted the NPC's zone change recommendation and the FDP for to the Property by city ordinance.

3. A Certificate of Land Use Restriction, disclosing the zone changes and the existence of the FPD (sic) imposed on the Property, was recorded in the Jessamine County Clerk's office on January 24, 2018.

4. [Boone] purchased the Property on September 18, 2018. James Monroe, Boone's owner, was advised of the obligation to build a stream crossing before the purchase.

5. Boone's engineer submitted Construction Plans which were approved by NPC staff on or before February 5, 2019 and which included specifications for the construction of the stream crossing as part of the development of Eastgate that were consistent with and required by the FDP.

6. The stream crossing to be constructed will permit the extension of Williams Road from its current terminus in Phase 2 of the G.N. Miles Estate Property across Eastgate to its intersection with Sulphur Well Road. The stream crossing will be located partially on the Property and partially on land not owned by Boone (Phase 2), but within a platted drainage and utility easement on Phase 2.

7. On September 30, 2019, Boone, through James Monroe, announced its refusal to construct the stream crossing and/or bond a plat of a portion of the Property (Eastgate, Unit 2) which included the stream crossing as part of its development.

8. Boone was advised at a September 30, 2019 meeting, by Tim Cross and Dean Anness, that refusal to build and/or bond the stream crossing would result in the disapproval of the Eastgate, Unit 2 plat for recording.

9. Boone's owner, James Monroe, was notified by email on October 10, 2019, of the amount of the bond which had to be posted for the Eastgate, Unit 2 plat to cover the cost of the stream crossing.

10. The plat for Eastgate, Unit 2, submitted by Monroe on behalf of Boone, to the NPC staff was defective in that the bond amount did not include the cost of the stream crossing and the plat gave no indication of the area on the plat where the stream crossing would be situated.

11. The decisions, by Cross and Anness, to refuse recommending the recording of the Eastgate, Unit 2 plat and to fix the amount of the bond were later confirmed in writing by Cross's letter to Boone and Via Vitae Development, LLC's owner, James Monroe, dated July 7, 2020.

12. The decisions, by Cross and Anness, with regard to the Eastgate, Unit 2 plat were dictated by the Final Development Plan. For Cross and Anness to have approved the Unit 2 plat for recording with an inadequate bond would have been in direct contravention of the NPC's and the NCC's decision to adopt such plan.

The trial court extensively reviewed the Board's factual findings, the most significant of which was that LPW had submitted a Preliminary Subdivision Plat and Final Development Plan for the G.N. Miles Estate Subdivision, Unit 3 (Parcel 3) as part of a zone change request for the property. The trial court and the Board correctly held that when a final development plan is incorporated as a part of a zone change, "*this development plan shall be followed*." KRS 100.203(2) (emphasis added). Furthermore, the zone change and the final development plan were matters of public record. As noted by the Board's finding number 3: "A Certificate of Land Use Restriction, disclosing the zone changes and the existence of the FDP imposed on the Property, was recorded in the Jessamine County Clerk's office on January 24, 2018." The trial court noted Zoning Ordinance for the City of Nicholasville, Kentucky at Article 15, "Amendments," states, consistent with KRS 100.203(2): "[t]he approval of a development plan shall limit and control the issuance of all building and occupancy permits, and restrict the construction location and use of all land and structures to the conditions set forth in the plan."

Based on its analysis, the trial court further aptly concluded:

> The FDP for Phase 3 of the G.N. Miles Estate Property (referenced herein as "Eastgate Subdivision" or "Eastgate") requires the construction of a stream crossing that permits Williams Road to extend from the Phase 2 portion of the G.N. Miles Estate Property into Eastgate Subdivision, continuing on to an intersection with Sulphur Well Road. The FDP cannot be "followed" unless the stream crossing is built. It thereby controls the construction of this particular part of the infrastructure designed for Eastgate. Despite [Boone's] assertion, no regulation requires the FDP to be signed, and they cite no authority supporting their assertion. A zone change applicant submits the FDP with the zone map amendment application as an "agreed" condition; it is adopted by the NPC with the zone changes; and its existence in the NPC records and as part of the [Nicholasville City Commission]'s ordinance is all that is needed to validate it. If [Boone] had any proof that the FDP on record with the NPC was not what was agreed to by LPW as a condition of the zone change, he should have presented it to the Board at the hearing.

The trial court then noted KRS 100.3681(1) requires public filing—and hence notice—of Certificates of Land Use restrictions, which "shall indicate the type of land use restriction adopted or imposed upon the subject property . . . , including variances, conditional use permits, conditional zoning conditions, unrecorded preliminary subdivision plats, and *development plans*[.]" (Emphasis added). It further observed, based on testimony from Monroe, Boone's principal, and Jerry Woodall, a member of LPW (Boone's immediate predecessor), the Board had found Boone had, in fact, been advised of the need to construct the bridge. Not only did Boone have constructive knowledge of its obligation, it had actual knowledge.

Next, the trial court evaluated the Board's finding number 5, that Banks Engineering, the engineering firm hired by LPW for the property's development, had been continued in that role by Boone. When Banks, on its principal's (Boone's) behalf, submitted construction plans for the project, those plans recognized and provided for the bridge on multiple occasions. Boone admitted seeing the construction plans which included the bridge but did not seek to amend the plans or question their accuracy before they were reviewed and approved by the Planning Commission's staff.

Finally, the fundamental issue concerns Boone's refusal to build infrastructure—the bridge—not wholly contained within its property. The trial court considered the Board's finding number 6, which included, "[t]he stream crossing will be located partially on the Property and partially on land not owned by Boone (Phase 2), but within a platted drainage and utility easement on Phase 2." The foregoing analysis, that the FDP controls and Boone purchased the property subject to its requirements, would seem to conclusively resolve this matter. But, to the point that a portion of the bridge was located on land Boone did not own, the trial court correctly reasoned that the bridge is covered by an easement dedicated to public use, specifically a public roadway, like water lines and sanitary sewer lines.

Requiring construction of public facilities is a reasonable cost of developing land. *See Lampton v. Pinaire*, 610 S.W.2d 915, 919 (Ky. App. 1980) (holding "[p]ublic policy nevertheless requires that the one who develops his land for a profit also may be required to bear the cost of additional public facilities made necessary by the development[]"). The rationale behind this policy is that "[l]ocal governments are not obligated to develop private property, and indeed, developers must construct streets and other public improvements in a proper manner in order to hold the local government's maintenance costs to a minimum once the dedicated property has been accepted for public purposes." *Id.* Furthermore, the required bridge is partially located on Boone's property and property immediately adjacent thereto.[5]

[5] *Lexington-Fayette Urban County Government v. Schneider*, 849 S.W.2d 557 (Ky. App. 1992), does not compel the result argued by Boone. In *Schneider*, the planning commission attempted to require a developer to build a bridge which would benefit other properties. By contrast, in this case, the Williams Road connection and stream crossing were proposed by and agreed to by LPW as a condition of the zone change. As stated by the trial court, "[f]uture owners, including Boone, were put on notice of the Development Plan by way of the Certificate of Land Use Restrictions filed in the county clerk's office . . . and were required to follow it."

The only question which initially puzzled the trial court was why the NPC did not initially require LPW to post the letter of credit for the bridge as a condition of its initial approval for Parcel 2. The answer, as the trial court observed, was that the NPC agreed to let LPW, as owner of both Parcel 2 and 3, defer that required construction to Parcel 3. Boone, as successor to LPW, explicitly assumed that obligation when it purchased the property.

Because Boone's proof was not "so overwhelming that no reasonable person could reach the same decision as the Board," *REO Mechanical*, 691 S.W.2d at 226, the decision of the Jessamine Circuit Court on the merits of the underlying dispute is affirmed.

On cross-appeal, the Board argues CR[6] 4.04(7), which requires service of process on a public board be accomplished by serving a member of that board, was not satisfied in this matter. It contends Boone's service of process at the Board's listed government address rather than the personal residences of the Board members was not undertaken in good faith as required by CR 3.01, thereby depriving this Court of jurisdiction. We discern no merit to this argument because "[t]he civil rules do not apply in this type of litigation until after the appeal has been perfected." *Bd. of Adj. of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978). Thus, "the issuance of a summons cannot under the statute constitute an essential element in the filing of the appeal. It is a condition subsequent to the filing; it is procedural and not jurisdictional." *Green v. Bourbon Cnty. Joint Planning Comm'n*, 637 S.W.2d 626, 631 (Ky. 1982). Even if we were inclined (and we are not) to rule that service of process on a public board member in his or her official capacity at the publicly listed address of the board did not constitute a good faith attempt at service of process, it would not divest this Court of jurisdiction.

[6] Kentucky Rules of Civil Procedure.

The Board next contends Michael Eakins, the interim Planning Director at the time the action was filed, should have been dismissed as an unnecessary party. The trial court determined Eakins was a necessary party and refused to grant the dismissal. The Board argues Eakins was not a necessary party because he took no part in the underlying events and his participation in the appeal as acting director was superfluous since the Board was a party. CR 21 allows for the dismissal of misjoined parties "on such terms as are just." This rule allows for dismissal of unnecessary parties when appropriate. But such a dismissal is a discretionary decision, distinct from a legal conclusion that there is no claim upon which relief can be granted under CR 12.02. KRS 100.347(1) and (2) do not require individual members, in their official capacities, of boards or commissions be made a party to an appeal; only the board or commission itself is required to be a

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

party.[7] We agree Eakins is an unnecessary party but perceive no harm in the trial court failing to dismiss him as such. Thus, the trial court is affirmed. *See Drinkard v. George*, 237 Ky. 560, 36 S.W.2d 56, 58 (1930) (holding no harm in trial court's failure to hold Next Friend was unnecessary party).

[7] Boone's argument that the trial court erred in dismissing the NPC was not preserved in its motions for discretionary review and, therefore, is not considered. RAP 44(c)(5); *Indiana Ins. Co. v. Demetre*, 527 S.W.3d 12, 41 (Ky. 2017) (citing *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66, 71 (Ky. 2000)). That is of little consequence, however, because we agree with the Board that its presence as a party is sufficient to afford Boone relief in these cases.

IV. Conclusion

For the foregoing reasons, the Court of Appeals is reversed as to the constitutional question. Although the Court of Appeals did not reach the underlying merits, in the interest of judicial economy, we have chosen to exercise our supervisory authority to do so based on the record and the parties' briefs. The judgment of the Jessamine Circuit Court is affirmed in all respects as to the merits and the constitutional question.

All sitting. VanMeter, C.J., concurs in part and dissents in part by separate opinion, in which Bisig and Keller, JJ., join. Conley, J., concurs in part and dissents in part by separate opinion, in which Lambert and Thompson, JJ., concur.

PLANNING AND ZONING

APPEAL OF A ZONING DECISION

REAL PROPERTY

DEED RESTRICTIONS

RESTRICTIVE COVENANTS

WAIVER OF RESTRICTIVE COVENANTS

Paul and Linda Barnes (collectively "Barnes") sold option to purchase real estate parcel to development company, which intended to build a Dollar General on the land — Land was previously zoned R-3, residential/multi-family — In 2019, Barnes sought to have parcel rezoned to B-3, general business — Parcel is subject to deed restrictions in its chain of title from 1968 deed — Deed restrictions stated that property, or any unit thereof, shall not be used for any purpose other than farming — Further, restrictions stated, in part, that no hotels, boarding houses, any business house, retail or wholesale, shall be permitted — Fiscal court eventually approved rezoning — Neighbors appealed to circuit court and also filed declaration of rights — Issue before trial court was whether enforcement of deed restrictions had been waived — Barnes had previously erected storage units on two adjacent parcels which are subject to same restrictions and operated rental business for storage — Those two parcels had been successfully rezoned in previous years — Barnes filed motion to dismiss arguing neighbors had waived enforcement of deed restrictions — Trial court granted motion to dismiss on count concerning deed restrictions — Parties continued to litigate zoning issues — Finally, case was ripe for appeal — Neighbors appealed to Court of Appeals which, after concluding that KRS 100.3471 was constitutional, dismissed appeal upon determining it was without jurisdiction to adjudicate matter as neighbors had not posted required appeal bond in appropriate time — Neighbors appealed — Kentucky Supreme Court determined that appeal bond requirement set forth in KRS 100.3471 is unconstitutional in *Bluegrass Trust v. Lexington-Fayette Urban County Gov't*, rendered on same day as instant action, and set forth at 71 K.L.S. 8, p. 24 — Thus, Court of Appeals erred when it found that it lacked jurisdiction to consider merits of instant appeal — In interest of judicial economy, Supreme Court exercised its supervisory authority under Section 110(2)(a) of Kentucky Constitution to resolve underlying merits — HELD that, under facts, restrictive covenants were waived and that fiscal court's rezoning decision was not arbitrary — Fiscal court's authority to rezone is not constrained by private restrictive covenants; conversely, however, private restrictive covenants that pre-exist a zone change are not superseded by zone changes — Deed restrictions in instant action only permitted one use: farming — Illustrative list that follows restriction seems to merely reenforce that such uses are inconsistent with sole permitted use of farming — Restrictive covenants were violated when storage units were built in 2012 — Since 2012, neighbors made no attempt to enforce restrictive covenants — Substantial evidence supported fiscal court's decision to rezone property —

Raz, Inc.; Terrell Atwood; Virginia Bailey; Kim Carroll; Kathy Clark; Robert Clark; Kim Cooper; Evelyn Helm; Thornton Helm; Donna Major; Don Mitchell; Daniel E. Newett; Andrea B. Parrott; Gretchen Shearer; Beth Stanton; Daniel Vliek; Susan Vliek; J. Williamson; and Robert Willmott[1] *v. Mercer County Fiscal Court; Linda Barnes; Paul Barnes; Jackie Claycomb; Tim Darland; Milward Dedman; Daarik Gray; Mike Hardin; Tom Hardy; Dennis Holiday; Wayne Jackson; Adam Johnson; Jim McGlone; Mercer County Joint Planning and Zoning Commission; Ronnie Sims; Bobby Upchurch; Donnie Webb; and Com. of Kentucky ex rel. Russell Coleman, Attorney General* (2022-SC-0526-DG); On review from Court of Appeals; Opinion by Justice Nickell, *affirming in part and reversing in part*, rendered 8/22/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

[1] For purposes of this Opinion, we shall refer to the Appellants collectively as "RAZ" unless the context requires otherwise.

We granted discretionary review to consider the constitutionality of the appeal bond requirement set forth in KRS[2] 100.3471. For purposes of oral argument, we consolidated this appeal with two others presenting a similar constitutional challenge. *Bluegrass Trust v. Lexington-Fayette Urban County Government*, ___ S.W.3d ___ (Ky. 2024); *Boone Development, LLC v. Nicholasville Bd. of Adjustment*, ___ S.W.3d ___ (Ky. 2024). In *Bluegrass Trust*, rendered contemporaneously with this opinion, a majority of this Court held KRS 100.3471 imposed an unconstitutional burden on the right to appeal. The reasoning of *Bluegrass Trust* applies equally to this matter and interested parties should refer to that opinion. Consequently, the Court of Appeals' determination that it lacked jurisdiction to consider the merits of the appeal was in error.

[2] Kentucky Revised Statutes.

In the interest of judicial economy, we decline to remand this matter to the Court of Appeals for further consideration, and exercise our supervisory authority under Section 110(2)(a) of the Kentucky Constitution to resolve the underlying merits of this appeal. For the following reasons, we affirm as to the merits.

I. Facts

Paul and Linda Barnes (collectively "Barnes") are the owners of a parcel of real estate near Burgin, Kentucky, in the Herrington Lake area of Mercer County. They sold an option to purchase this parcel for $60,000 to Kentucky Lodging and Development Company, Inc., which intended to build a Dollar General on the land. The land was previously zoned R-3, residential/multi-family. In 2019, Barnes sought to have the parcel rezoned to B-3, general business. The parcel is subject to deed restrictions in the chain of title stemming from Brown and Viola Dennis to Sam Berry, dated February 20, 1968.[3]

[3] RAZ also reference a deed with the same restrictions from Arthur and Rea Ragona to the Dennis' dated April 27, 1953.

The deed restrictions at issue are stated in full:

> Said property or any unit thereof shall not be used for any purpose or purposes other than farming and in connection with such purposes no hotels, boarding houses, restaurants, fishing camps, motels, cottages for rent, club houses, gas or service stations, or any business house, retail or wholesale, shall be permitted either by the owner or owners nor shall same be assigned or subleased for any such purpose.

The Mercer County Planning and Zoning Commission could not reach a consensus on the issue of rezoning and forwarded the application to the Mercer County Fiscal Court without a recommendation. The Fiscal Court approved the rezoning. RAZ appealed to Mercer Circuit Court and also filed a declaration of rights. Of the six

counts brought by RAZ, all but Count VI addressed issues regarding the rezoning. Count VI addressed the enforcement of the deed restrictions. No dispute exists that the property is subject to the restrictions; rather, the issue before the circuit court was whether enforcement of those restrictions had been waived. Barnes had previously erected storage units on two adjacent parcels which are subject to the same restrictions and operated a rental business for storage. Those two parcels had been successfully rezoned in previous years. In 2019 Barnes filed a motion to dismiss, arguing RAZ had failed to assert the right to enforce the deed restrictions in the past, and in fact wholeheartedly approved of the storage business, such that now no restrictions could be asserted against Barnes. On November 13, 2019, the trial court granted the motion and dismissed Count VI of the complaint, holding the storage rental business was "a clear violation of the deed restrictions," and RAZ had waived enforcement of the restrictions.

The parties continued to litigate the zoning issues into 2020. Finally, the case was ripe for appeal in April 2020. For purposes of this opinion, it is unnecessary to detail the facts regarding the appeal bond, only that the Court of Appeals found KRS 100.3471 constitutional, applicable, and RAZ's failure to post said bond deprived it of jurisdiction. Nonetheless, the Court of Appeals addressed the underlying merits, expressing its opinion that had the court possessed jurisdiction it would affirm the circuit court. RAZ sought discretionary review, which we granted.[4]

[4] Barnes and Mercer County Fiscal Court argue the motion for discretionary review was untimely. This argument was made both in response to the motion for discretionary review and in briefing. However, pursuant to Kentucky Rules of Appellate Procedure (RAP) 44(J)(4), "[a] ruling by the Supreme Court granting or denying a motion for discretionary review will not be reconsidered by the Supreme Court."

We now address the merits of the appeal and further facts will be developed as necessary.

II. Standard of Review

A motion to dismiss for failure to state a claim upon which relief can be granted is reviewed *de novo*. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010).[5] It presents only a question of law. *Id.* The pleadings of the plaintiff must be taken as true. *Id.* Indeed, by filing a motion to dismiss for failure to state a claim upon which relief can be granted, the party in favor of dismissal necessarily "admits as true the material facts of the complaint." *Upchurch v. Clinton Cnty.*, 330 S.W.2d 428, 429-30 (Ky. 1959).

[5] RAZ argues the circuit court converted the motion to dismiss to a motion for summary judgment by considering evidence outside the pleadings. Our review discloses that RAZ did file such evidence through affidavits in response to the motion to dismiss, but we find no indication the trial court considered them in its analysis granting dismissal on November 13, 2019.

Similarly, "[i]nterpretation or construction of restrictive covenants is a question of law subject to *de novo* review on appeal." *Hensley v. Gadd*, 560 S.W.3d 516, 521 (Ky. 2018). Restrictive covenants are construed according to their plain language on a case-by-case basis according to "the particular terms of the instrument and the facts of the case." *Id.* (quoting *Robertson v. W. Baptist Hosp.*, 267 S.W.2d 395, 397 (Ky. 1954)). Restrictions are also interpreted according to the intention of the parties. *Id.* "Under the modern view, building restrictions are regarded more as a protection to the property owner and the public rather than as a restriction on the use of property[.]" *Brandon v. Price*, 314 S.W.2d 521, 523 (Ky. 1958).

The issue of whether RAZ waived the restrictive covenant is a question of law in this case. First, while waiver can present a factual question for a jury, when facts are undisputed then waiver is properly a question of law. *Western Auto Cas. Co. v. Lee*, 246 Ky. 364, 55 S.W.2d 1, 2 (1932). Consequently, when RAZ submitted a motion for summary judgment to the trial court on this question, the assertion that no genuine issue of fact exists became binding. *See Healthwise of Ky. Ltd. v. Anglin*, 956 S.W.2d 213, 215 (Ky. 1997); *BTC Leasing, Inc. v. Martin*, 685 S.W.2d 191, 195 (Ky. App. 1984). Finally, the general rule is that "[i]t is not a question of discretion when the enforcement of a restrictive covenant is involved in real estate and injunctive relief is the proper remedy." *Elliott v. Jefferson Cnty. Fiscal Ct.*, 657 S.W.2d 237, 239 (Ky. 1983).

III. Analysis

The particular facts of this case present two fundamental issues. First, did the circuit court err when it determined the Appellants had waived the restrictive covenants found in their deeds? Second, was the Mercer County Fiscal Court's rezoning of the land in question from R-3 to B-3 arbitrary? The Fiscal Court correctly points out that its authority to rezone is not constrained by private restrictive covenants. Conversely, however, private restrictive covenants that pre-exist a zone change are not superseded by zone changes. *Goodwin Bros. v. Combs Lumber Co.*, 275 Ky. 114, 120 S.W.2d 1024, 1025 (1938); *see also Elliott*, 657 S.W.2d at 238 (holding that changes outside a residential subdivision do not nullify internal residential covenants). Thus, the second question presented by this appeal need not be answered if we determine the covenants were not waived, because if RAZ can enforce the covenants, the Fiscal Court's action in rezoning the property is of no moment. However, for the following reasons, we hold the circuit court did not err in its decision concerning waiver and the determination of the fiscal court was not arbitrary.

A. The restrictive covenants were waived.

"[T]he right to enforce a restrictive covenant may be lost by waiver or abandonment." *Bagby v. Stewart's Ex'r*, 265 S.W.2d 75, 77 (Ky. 1954). "When the conditions imposed have been disregarded over a period of years by the owners of most or all the lots in the group . . . the courts declare them to have been abandoned by all and enforceable by none." *Goodwin Bros.*, 120 S.W.2d at 1025.

The threshold question to waiver is whether prior violations of the deed restrictions had occurred of which RAZ had knowledge and acquiesced. RAZ argues the erection of storage units is not, in fact, prohibited by the restrictive covenants because they do not constitute a retail or wholesale business. In response to this attempt to parse the restrictions such that the commercial storage units are less objectionable under the restrictions—constituting passive commercial activities as opposed to active ones involving customers coming and going—we need look no further than the initial clause of the restriction: the only permitted use is farming. The illustrative list that follows—hotels, boarding houses, etc.—seems merely to reenforce that such uses are inconsistent with the sole permitted use: farming. In fact, a close reading reveals the covenant provides no specific examples of "purposes other than farming," and merely provides the aforementioned listing as items "in connection with" those other purposes. The covenant, then, is not only offended by the construction of the businesses specifically delineated therein; rather the covenant contemplates the existence of various, undefined non-farming uses that could be violative.

Only if the commercial storage units constitute "farming," as RAZ appears to suggest, would they be permissible under the restrictions. We find this suggestion difficult to accept. The storage units are not barns used to house animals or crops or agricultural implements. Rather they are of general use, utilized for, among other things, the storage of boating equipment. Unless the record shows that the farming occurring on the restricted property involves the raising and harvesting of fish—which it does not—then no reasonable argument can be made that the storage units constitute a farming purpose.

Accordingly, the restrictive covenants applicable to the property in question were violated when the storage units were constructed in 2012. The plans for the units were never presented to the neighborhood association as required by the covenants,[6] and no action was ever taken to require approval of the units before or after construction. Since 2012, the Barnes' neighbors made no attempt to enforce the restrictive covenants. Indeed, they admit they did not object to the construction of the storage units, although they complain, belatedly, of a lack of notice. Given these facts, we conclude the circuit court did not err in determining a waiver had occurred.

[6] "[P]lans and locations of any such buildings to be erected or placed upon said property shall be approved by Chimney Rock, Inc."

This Court's decision in *Hensley v. Gadd*, 560 S.W.3d 516 (Ky. 2018) does not compel reversal, as RAZ argues. In *Hensley*, the trial court determined that incremental business activity in a residential subdivision did not impact the character of the neighborhood and enforcement of the deed restrictions had not been waived. *Id.* at 526. In this case, the circuit court came to the opposite conclusion and the character of the businesses at issue in *Hensley* differ from the storage units. In *Hensley*, the alleged waiver arose from rental properties and businesses operating out of some of the homes occupied by residents. No evidence suggested the home-based businesses invited the public to enter the neighborhood.

Similarly distinguishable is our predecessor

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

court's decision in *Hardesty v. Silver*, 302 S.W.2d 578, 581-82 (Ky. 1956), which held no waiver of deed restrictions had occurred on the basis of businesses being conducted from three *residences* in the subdivision. Again, in this case by contrast, substantial commercial buildings, *i.e.*, storage units, were erected on the adjacent lots in violation of the deed restrictions.

B. The Fiscal Court's rezoning decision was not arbitrary.

Having determined the restrictions were waived by the construction of the storage units and attendant failure to object to that construction, we next must resolve whether the decision of the Fiscal Court to rezone the subject parcel to B-3 was arbitrary. *Hilltop Basic Res., Inc. v. Cnty. of Boone*, 180 S.W.3d 464, 468 (Ky. 2005) ("[O]ur Courts [] review zoning determinations affecting individual property owners pursuant to the arbitrariness framework"). "Arbitrariness review is limited to the consideration of three basic questions: (1) whether an action was taken in excess of granted powers, (2) whether affected parties were afforded procedural due process, and (3) whether determinations are supported by substantial evidentiary support." *Id.* (citing *American Beauty Homes Corp. v. Louisville & Jefferson Cnty. Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964)).

RAZ does not allege arbitrariness as to the first and second questions so we note only that the Fiscal Court acted within the powers granted by KRS 100.213 and produced the required Findings of Fact and Conclusions of Law. Thus, we are tasked only with resolving whether its decision was supported by substantial evidence. Where a party asserts the administrative decision lacked substantial evidentiary support, the burden is upon the moving party to show that the record compels relief in its favor. *See Gentry v. Ressnier*, 437 S.W.2d 756, 758 (Ky. 1969) (explaining issue in circuit court was not whether substantial evidence supported board's decision to deny permit, but whether evidence presented by applicants "was so strong that the denial of the permit was clearly unreasonable[]"); *Bourbon Cnty. Bd. of Adjustment v. Currans*, 873 S.W.2d 836, 838 (Ky. App. 1994) (holding denial of administrative relief to party carrying burden is arbitrary if the record contains compelling evidence mandating a contrary decision, and "[t]he argument should be that the record compels relief[]"); *REO Mech. v. Barnes*, 691 S.W.2d 224, 226 (Ky. App. 1985), overruled on other grounds by *Haddock v. Hopkinsville Coating Corp.*, 62 S.W.3d 387 (Ky. 2001) (from board of adjustment denial of a conditional use permit, "[f]or evidence to compel a different result, the proof in [applicant's] favor must be so overwhelming that no reasonable person could reach the conclusion of the Board[]").

The Fiscal Court determined, in relevant part:

> 3 There has been a major shift in the physical and economic nature of the area with the addition of commercial storage units on adjacent properties and of the Boat Doctor business directly across Chimney Rock Road.
>
> 4 The existing zoning classification is inappropriate due to several neighboring parcels having a classification of B-3 as commercial business making the subject parcel unusable for residential use.
>
> . . .
>
> 6 The parcel is no longer appropriate for agricultural or open space due to neighboring parcels being rezoned from R-3 to B-3 and which now house commercial storage which have brought significant commercial and business activity as well as physical change to the area.

Our prior discussion of the circuit court's finding of waiver is directly applicable here and compels a similar result. The record reveals the Fiscal Court's determination was supported by substantial evidence. The construction of the storage units, as well as the rezoning of several neighboring parcels to a B-3 classification in 2014 and 2016 were all documented before the Fiscal Court. Although RAZ attempts to describe the storage units as constituting "farming" or being "passive" such that their existence should not affect the character of the neighborhood, we have already explained why those arguments are unconvincing. The storage units are not simply alternative uses of permissible farming construction. Rather they were constructed to be commercial and can only operate by the entry of the general public onto the land. This difference supports the Fiscal Court's conclusion that a change in the character of the neighborhood had occurred. Although RAZ may disagree with the conclusions reached by the Fiscal Court, those conclusions were supported by the record and not arbitrary.

The record discloses that the parcel in question is 2.33 acres on the corner where Ky. Hwy. 152, Ashley Camp Road, and Chimney Rock Road intersect. The immediately adjacent parcels on Chimney Rock Road contain storage units. The circuit court noted the factual findings of the Fiscal Court, a 4-3 decision, as to the reasons for the underlying zone change: a major shift in physical and economic nature of the area; neighboring parcels have a zoning of B-3, making the subject parcel unstable for residential use; and the parcel is no longer appropriate for agricultural or open space due to neighboring parcels being zoned B-3 with commercial storage units and increased commercial and business activity in the area. Because these conclusions are based on substantial evidence, we cannot say the record compels a different result. Thus, RAZ is not entitled to the relief it seeks.

IV. Conclusion

For the foregoing reasons, we reverse the Court of Appeals as to its holding regarding the constitutionality of KRS 100.3471 and affirm as to its assessment of the merits.

All sitting. VanMeter, C.J., concurs in part and dissents in part by separate opinion, in which Bisig and Keller, JJ., join. Conley, J., concurs in part and dissents in part by separate opinion, in which Lambert and Thompson, JJ., join.

ATTORNEYS

Indefinite suspension —

In re: Gerald Douglas Derossett (2024-SC-0194-KB); In Supreme Court; Opinion and Order entered 8/22/2024. **[This opinion and order is not final. A non-final opinion and order may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

This matter comes before the Court on the motion of the Office of Bar Counsel ("OBC"), pursuant to SCR[1] 3.167, to indefinitely suspend Gerald Douglas Derossett[2] from the practice of law due to his failure to file Answers to two Charges. For the following reasons, we grant the OBC's motion.

[1] Supreme Court Rule.

[2] Derossett's KBA member number is 82762 and his bar roster address is 470 Main Street, Hazard, Kentucky, 41701

The first Charge against Derossett arose as a result of his failure to perform work after being hired by Jerry and Pamela Workman to assist with filing a products liability claim. Derossett misled the Workmans, by having them believe their lawsuit was filed, that the company's insurer had waived the deadline to file a lawsuit to allow for arbitration and settlement, and that the case was not settled due to the insurer's concession to arbitrate. However, none of those representations were true. By November 2021, Derossett stopped responding to the Workmans. The underlying Bar complaint was sent by certified mail on October 11, 2023 and received approximately a week later.

The second Charge against Derossett arose as a result of his engaging in inappropriate behavior after being appointed to replace Steven Williamson's public defender. Derossett's representation began with an initial appearance on September 22, 2023. Over the course of representation, Derossett failed to file a single motion on his client's behalf and failed to provide Williamson with updates. Derossett withdrew from representation on October 27, 2023 after Williamson wrote letters to the judge accusing Derossett of inappropriate conduct. The underlying Bar Complaint was sent by certified mail October 13, 2023, and confirmation of signed receipt was returned on November 6, 2023.

On October 30, 2023, Derossett had a telephone conversation with Deputy Bar Counsel and agreed to accept service of both Complaints through email. The Complaints were sent via email on the same day and Derossett acknowledged receipt of the emailed Complaints. Derossett failed to respond to the emailed Complaints before the November 20, 2023 deadline. As a result, the OBC requested service by the Perry County Sherriff. Derossett contacted the OBC on December 4, 2023, to request an extension for the submission of his responses. Deputy Bar Counsel told Derossett to submit a response within twenty days after service of the Complaint. The sheriff's office served Derossett on December 8, 2023, but Derossett failed to submit a response.

After review of the Bar Complaints and the failure of Derossett to respond to either Complaint, the Inquiry Commission issued formal Charges against Derossett alleging violations of SCR 3.130(1.1);[3] two counts of violations against SCR 3.130(1.3);[4] two counts of violations against SCR 3.130(1.4)(a);[5] SCR 3.130(1.16)(d);[6] two counts of violations against SCR 3.130(8.1)(b);[7] and one violation of SCR 3.130(8.4)(c).[8]

[3] "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness

and preparation reasonably necessary for the representation."

[4] "A lawyer shall act with reasonable diligence and promptness in representing a client."

[5] A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

[6] 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.

[7] [A] lawyer . . . in connection with a disciplinary matter, shall not:

. . .

[] fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or 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.

[8] "It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"

The Charges for both cases were sent by certified mail on February 9, 2024. When both letters came back undelivered and returned to the Disciplinary Clerk on February 28, 2024, the OBC again sought service through the Perry County Sherriff's Office on March 6, 2024. Service was effected on April 1, 2024 and proof of service was recorded by the Disciplinary Clerk on April 19, 2024. No Answers to the charges have been received. The OBC now seeks an order indefinitely suspending Derossett from the practice of law.

We agree with the OBC that an indefinite suspension is warranted. This is not the first time that Derossett has faced disciplinary action against him. The Inquiry Commission, in February 2021, determined that Derossett violated SCR 3.130(1.3); SCR 3.130(1.4)(b);[9] and SCR 3.130(1.16)(d) due to his failure to use diligence and proper communication during the course of representing his clients. In that matter Derossett had been retained in 2015 for a land dispute. When Derossett left his law firm for the Department of Public Advocacy in 2020 with the land dispute still ongoing, he failed to inform his clients. Accordingly, Derossett was subject to a private admonition and the Inquiry Commission ordered him to attend an Ethics and Professionalism Enhancement Program. Derossett's prior actions, which justified discipline, mirrors his actions here: failure to (1) file a response, (2) adequately perform work for clients, and (3) provide diligent representation and communication. The prior instance of conduct suggests a pattern that continues with charges now leveled against Derossett.

[9] "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

The OBC, in addition, represents that it has not received any written release signed by Derossett authorizing disclosure by the Kentucky Lawyer Assistance Program, as required by SCR 3.990(1), regarding any communications he may have had with them. As a result, we are left with questions about Derossett's behavior and situation, and no answers from him. As Derossett has chosen not to participate in his disciplinary proceeding we indefinitely suspend him from the practice of law. Temporary disbarment is reasonable and necessary to protect the integrity of the process and of this Court.

ACCORDINGLY, IT IS HEREBY ORDERED as follows:

1. Respondent, Gerald Douglas Derossett, is indefinitely suspended from the practice of law in the Commonwealth of Kentucky, pursuant to SCR 3.167(1);

2. As required by SCR 3.390(2), Derossett will, within twenty (20) days after the issuance of this order of suspension, notify by letter duly placed with the United States Postal Service, all courts or other tribunals in which he has matters pending of his suspension. Further, he will inform by mail all of his clients of his inability to represent them and of the necessity and urgency of promptly retaining new counsel. Derossett shall simultaneously provide a copy of all such letters of notification to the Office of Bar Counsel. Derossett shall immediately cancel any pending advertisements, to the extent possible, and shall terminate any advertising activity for the duration of the term of suspension.

3. As stated in SCR 3.390(1), this order shall take effect on the twentieth day following its entry. Derossett is instructed to promptly take all reasonable steps to protect the interests of his clients. He shall not during the term of suspension accept new clients or collect unearned fees and shall comply with the provisions of SCR 3.130(7.50)(5).

All sitting. All concur.

ENTERED: AUGUST 22, 2024.

EMPLOYMENT LAW

POLICE OFFICER DISCIPLINE

TERMINATION OF EMPLOYMENT WITH THE LOUISVILLE METRO POLICE DEPARTMENT

PROCEDURAL DUE PROCESS

ADMISSIBILITY OF EVIDENCE BEFORE THE LOUISVILLE METRO POLICE MERIT BOARD

ADMISSION OF TRANSCRIBED WITNESS STATEMENTS WITHOUT THOSE WITNESSES BEING CALLED TO TESTIFY AT THE HEARING

ADMISSION OF EXPUNGED MATERIALS

ADMISSION OF ARREST AND CRIMINAL CHARGES WHERE THERE WAS NO CRIMINAL CONVICTION

Police officer was employed by Louisville Metro Police Department (LMPD) from November 2010 until he was fired by Chief of Police (Chief) on May 24, 2017 — Chief found officer committed three violations of LMPD Standard Operating Procedures (SOPs) 5.1.2, entitled "Obedience to Rules and Regulations" — First violation stemmed from altercation officer had with his wife on September 4, 2016 — As result of altercation, officer was arrested and charged with assault in the fourth degree, domestic violence — As condition of his bond, district court issued order prohibiting officer from having any contact with his wife — This charge was eventually dismissed — On March 29, 2017, officer's criminal case arising out of this incident was expunged — Shortly after September 4, 2016 incident, both a Professional Standards Unit (PSU) investigation and a Public Integrity Unit (PIU) investigation were initiated — PIU conducts criminal investigations of LMPD employees — PSU conducts administrative/disciplinary investigations into possible internal policy violations by LMPD employees — Meanwhile, on September 5, 2016, wife sought and obtained emergency domestic violence protective order (DVO) against officer — On September 15, 2016, DVO petition was dismissed in exchange for order prohibiting officer from having unlawful contact with wife issued in their pending divorce case — Second SOP violation stemmed from officer's contact with wife on October 6, 2016, when officer returned to marital residence while wife was there, despite being under no contact order issued in district court criminal case, which was still pending at that time — As a result, officer was arrested and charged with crimes of violation of conditions of release and harassing communication — On October 11,

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

2016, district court issued no contact order in second pending criminal case — Officer eventually pled guilty to one charge of violation of conditions of release on January 24, 2017 — Officer was sentenced to 180 days in jail, but that sentence was conditionally discharged for two years on conditions that he have no contact with wife and commit no new criminal offenses — Shortly after this incident, PSU opened second investigation — On October 7, 2016, wife sought and obtained another emergency DVO against officer — On January 30, 2017, family court found wife failed to prove domestic violence had occurred and dismissed protective order petition — Third SOP violation occurred on April 16, 2017, when officer was alleged to have sat next to wife at church and attempted to speak with her — Officer's contact violated no contact order issued as condition of his sentence stemming from his prior Violation of Conditions of Release District Court criminal case — Officer was charged with harassment based on this incident — Officer appealed his termination by chief to Louisville Metro Police Merit Board (Merit Board) — Prior to evidentiary hearing before Merit Board, officer objected to admission of materials related to September 4, 2016, incident since those materials had been expunged — Counsel for Merit Board then admonished Merit Board members not to consider officer's actual arrest or charge stemming from that incident — Officer also objected to admission of all transcribed witness statements if witnesses were not called to testify during hearing and made subject to cross-examination — Merit Board overruled this objection, but Merit Board's counsel admonished members to look at witness statements only in so far as the fact that they were part of Chief's record and not to prove charges themselves — After hearing, Merit Board found that officer had not violated SOPs during September 4, 2016, incident, but found he had violated SOP 5.1.2 on October 6, 2016, and April 16, 2017 — Merit Board found that Chief's termination of officer was justified — Jefferson Circuit Court and Court of Appeals both affirmed termination — Court of Appeals found that Merit Board erred in considering expunged materials, but that this error was harmless — Court of Appeals also held that KRS 67C.325 provides officer the right to confrontation at Merit Board hearing; therefore, admission of transcribed statements was error, but this error was harmless because there was substantial witness testimony to support Merit Board's findings — Both officer and Metro Government appealed — AFFIRMED Court of Appeals, but for different reasons — KRS 67C.325 discusses procedural due process owed to police officer brought before a merit board — KRS 67C.325 states that officer shall "have an opportunity to confront his or her accusers" — Further, upon showing of proper need, "board shall issue subpoenas to compel the attendance of witnesses" at the request of the officer or the chief — Thus, before Merit Board, officer had "opportunity" to confront his accusers by requesting that a subpoena be issued which compels his accuser's attendance at the hearing and then confronting the accuser through direct or cross-examination — KRS 67C.325 requires nothing more — KRS 67C.326(1)(h) sets forth "minimum" administrative due process rights — Merit Board did not violate officer's statutory due process rights — In addition, Merit Board did not violate officer's constitutional due process rights — Essential requirements of due process are notice and an opportunity to respond — *Mathews v. Eldridge* (1976) sets forth factors to determine how much procedural due process is required in instant action: (1) private interest that will be affected by the official action; (2) risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and (3) government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirement would entail (also referred to as "the public interest") — After weighing these factors, Kentucky Supreme Court determined that officer's due process rights were not violated when Merit Board considered sworn, transcribed witness statements — Collective bargaining agreement (CBA) between Metro Government and Fraternal Order of Police (FOP) is not relevant to officer's right to confrontation — FOP is not a party to instant proceedings — Further, violations of CBA can give rise to independent suit filed in circuit court pursuant to KRS 67C.414 — Alleged violations of CBA are not appropriately litigated in front of Merit Board — Officer argued that expungement order included not only arrest records and court records, but also (1) investigative files and documentation compiled by PIU, and (2) occurrence of, and all documents pertaining to, arrest, charging, and criminal prosecution of officer based on events of September 4, 2016 — Officer argued that placing PIU investigative materials into PSU file blatantly violated expungement statute — KRS 431.076 requires that records relating to arrest, charge, or other matters arising out of arrest or charge must be expunged — Legislature intended that expungement prevent the matter from appearing on official state-performed background checks so that the person whose record is expunged shall not have to disclose any information related to the record — LMPD's PSU files are internal employment files to which expungement statute does not apply — Information contained in PSU files is neither a criminal record nor would it appear on a state-performed background check — Thus, Merit Board did not err in considering information in PSU files that was obtained from PIU file — Officer's termination was not arbitrary merely because Chief found that officer violated SOP 5.1.2 prior to officer being criminally convicted —

Louisville/Jefferson County Metropolitan Government v. Dezmon Moore; and Louisville Metro Police Merit Board (2022-SC-0112-DG); and *Dezmon Moore v. Louisville/Jefferson County Metropolitan Government; and Louisville Metro Police Merit Board* (2022-SC-0369-DG); On review from Court of Appeals; Opinion by Justice Keller, *affirming*, rendered 8/22/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Dezmon Moore was terminated from his employment with the Louisville Metro Police Department (LMPD) after the Chief of Police determined that he had committed three violations of police department Standard Operating Procedures (SOPs). Moore appealed his termination to the Louisville Metro Police Merit Board (the Merit Board). The Merit Board concluded that Moore had committed two of the three SOP violations that the Chief had found and upheld Moore's termination. Moore then appealed to the Jefferson Circuit Court, which affirmed the Merit Board's decision. He then appealed to the Court of Appeals, which affirmed the circuit court. This Court granted the Louisville/Jefferson County Metropolitan Government's (Metro Government) Motion for Discretionary Review, as well as Moore's Cross-Motion for Discretionary Review. After a thorough review of the record and the applicable law, we affirm the Court of Appeals, although we do so for different reasons.

I. BACKGROUND

Dezmon Moore was employed as a police officer with LMPD from November 2010 until he was terminated on May 24, 2017. LMPD Chief of Police Steve Conrad terminated Moore after finding that Moore committed three violations of LMPD SOP 5.1.2 – Obedience to Rules and Regulations.

The first violation found by the Chief stemmed from an altercation Moore had with his wife Bethel Moore (Bethel) on September 4, 2016. As a result of the altercation, Moore was arrested and charged with assault in the fourth degree, domestic violence. Notably, as a condition of his bond, the Jefferson District Court issued an order prohibiting Moore from having any contact with Bethel. This charge, however, was eventually dismissed, and on March 29, 2017, Moore's criminal case arising out of the September 4, 2016, incident was expunged.

Shortly after the September 4, 2016, incident, both a Professional Standards Unit (PSU) investigation and a Public Integrity Unit (PIU) investigation were initiated. The PIU conducts criminal investigations of LMPD employees. The PSU conducts administrative/disciplinary investigations into possible internal policy violations by LMPD employees. During their investigations, the PIU and PSU interviewed various witnesses, took photographs, and collected documentary evidence.

Meanwhile, however, on September 5, 2016, the day after the above referenced altercation, Bethel sought and obtained an emergency domestic violence protective order against Moore. On September 15, 2016, the domestic violence protective order petition was dismissed in exchange for an order prohibiting Moore from having unlawful contact with Bethel issued in the couple's pending divorce case.

The second SOP violation found by the Chief stemmed from Moore's contact with Bethel on October 6, 2016, when Moore returned to the marital residence while Bethel was there, despite being under the no contact order issued in the District Court criminal case, which was still pending at that time. As a result of this incident, Moore was arrested and charged with the crimes of violation of conditions of release and harassing communication. On October 11, 2016, the Jefferson District Court issued a no contact order in this second pending criminal case. Moore eventually pled guilty to the singular charge of violation of conditions of release on January 24, 2017. He was sentenced to 180 days in jail, but that jail sentence was conditionally discharged for two years on the conditions he have no contact with Bethel and commit no new criminal offenses.

Shortly after this incident, the PSU opened a second investigation into Moore's behavior.

On October 7, 2016, the day after the above-referenced contact between Moore and Bethel, Bethel sought and obtained another emergency domestic violence protective order against Moore. On January 30, 2017, however, the Jefferson Family Court found Bethel failed to prove domestic violence had occurred and dismissed the protective order petition.

The third violation of SOP 5.1.2 found by the Chief stemmed from Moore's contact with Bethel at church on April 16, 2017, when he was alleged to have sat next to Bethel and attempted to engage her in a conversation. Moore's contact was in violation of the no contact order issued as a condition of his sentence stemming from his prior Violation of Conditions of Release District Court criminal case. He was again criminally charged with harassment based on this incident.

As stated above, the Chief terminated Moore's employment with LMPD on May 24, 2017. He reviewed both PSU files, which included all of the investigation completed by the PIU.

Moore appealed his termination to the Merit Board. The Merit Board reviews the Chief's disciplinary actions and, in termination cases, holds a public, evidentiary hearing. Prior to the Merit Board hearing, Moore objected to the admission of materials related to the September 4, 2016, incident, arguing that those materials had all been expunged. Regarding this objection, counsel for the Merit Board admonished Merit Board members not to consider Moore's actual arrest or the charge stemming from that incident. Moore also objected to the admission of all transcribed witness statements if the witnesses were not called to testify during the hearing and made subject to cross-examination. The Merit Board overruled this objection. However, the Merit Board's counsel admonished Merit Board members "to pay attention [to the witness statements] only in so far as the fact that they were part of the Chief's record in this matter and not to prove charges in and of themselves."

At the conclusion of the hearing, the Merit Board found that Moore had committed two of the three SOP violations found by the Chief. The Merit Board found that no violation of SOPs had occurred during the September 4, 2016, incident, but found that Moore had violated SOP 5.1.2 on October 6, 2016, and April 16, 2017. In a 6-to-1 vote, the Merit Board also found that the Chief's termination of Moore was justified by the two violations.

Moore then appealed his termination to the Jefferson Circuit Court pursuant to Kentucky Revised Statute (KRS) 67C.323(3)(a) and KRS 67C.326(2). To the circuit court, Moore made three primary arguments that he continues to assert to this Court. First, he argued that the Chief and the Merit Board erroneously considered expunged materials related to the September 4, 2016, incident. Second, he argued that his statutory and constitutional due process rights were violated when the Merit Board considered transcribed witness statements, while those witnesses did not testify at the hearing and were not subject to confrontation and cross-examination. Finally, he argued that LMPD improperly relied on his arrest and criminal charges, absent a criminal conviction, as bases for his termination. The Jefferson Circuit Court affirmed the Merit Board's order.

Moore then appealed to the Court of Appeals. The Court of Appeals held that the Merit Board erred in considering expunged materials, specifically arrest records and court records relating to the September 4, 2016, incident. The court held that error was harmless, however, because the expunged materials related primarily to the September 4, 2016, incident, and the Merit Board did not find an SOP violation related to that incident. The Court of Appeals also held that KRS 67C.325 provides a police officer the *right* to confrontation at a Merit Board hearing, and thus the Merit Board's admission of transcribed statements in the absence of live cross-examination of the witness was error. According to the Court of Appeals, that error too was harmless because there was substantial witness testimony to support the Merit Board's findings. Accordingly, the Court of Appeals affirmed the Jefferson Circuit Court.

Metro Government then filed a Motion for Discretionary Review with this Court, arguing that the Court of Appeals' interpretation of KRS 67C.325 regarding Moore's right to confrontation was erroneous. This Court granted that motion. Moore then filed a Cross-Motion for Discretionary Review, arguing that the Court of Appeals erred in holding that only arrest and court records were expunged and erred in holding that any error was harmless. Moore further argued that to base his termination on his arrest and criminal charges, absent a conviction, was arbitrary. We granted his cross-motion. After a thorough review of the record, the law, and arguments, we affirm the Court of Appeals, although we do so for different reasons.

II. ANALYSIS

To this Court, Metro Government argues that the Court of Appeals erred in holding that the Merit Board was prohibited from considering transcribed statements of witnesses without those witnesses being called to testify at the hearing and thus being subject to cross-examination. Moore, on the other hand, argues that the Merit Board erred in failing to exclude expunged materials from its consideration and that his termination was improperly based on his arrest and criminal charges instead of on any criminal conviction. We review each allegation in turn.

A. Standard of Review

"[J]udicial review of administrative action is concerned with the question of *arbitrariness*." *Am. Beauty Homes Corp. v. Louisville & Jefferson Cty. Plan. & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). The Circuit Court uses a "modified de novo" standard of review when reviewing actions of the Merit Board. *Crouch v. Jefferson Cnty., Ky. Police Merit Bd.*, 773 S.W.2d 461, 464 (Ky. 1988). It "allows the reviewing court to invade the mental processes of the Board to determine whether its action is not arbitrary. To determine arbitrariness, the appellate court may review the record, the briefs, and any other evidence or testimony which would be relevant to that specific, limited issue." *Id.* In reviewing for arbitrariness, the reviewing court must determine whether the questioned exercise of authority might be infirm because the action exceeded the Board's granted powers, the proceeding lacked procedural due process, or the Board's decision lacked substantial evidentiary support. *Am. Beauty Homes Corp.*, 379 S.W.2d at 456. Importantly, "[t]he appeal is not the proper forum to retry the merits." *Crouch*, 773 S.W.2d at 464.

In the case before us, all of the issues presented are questions of law. Thus, despite the above-described general standard of review, we review the issues before us de novo. *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 647 (Ky. 2017).

B. Due Process Right to Cross-Examine

Metro Government argues that Moore has no due process rights that would prevent the Merit Board from considering sworn, transcribed witness statements of individuals who were not called to testify at the hearing and, therefore, were not subject to cross-examination. Moore, on the other hand, asserts that such a right can be found in both the statutes that govern the Merit Board as well as in the Kentucky and United States Constitutions.

1. Statutory Due Process Rights

Metro Government asserts that the Court of Appeals erred in concluding that the Kentucky statutes governing Merit Board proceedings grant Moore a right to cross-examination. Metro Government specifically argues that the admission of prior sworn statements is contemplated, and even explicitly permitted, by the relevant statutes. Moore argues this Court should affirm the Court of Appeals' holding that KRS 67C.325 provides him with procedural and administrative due process rights to cross-examine witnesses against him such that the admission of transcriptions of these witnesses' prior statements was improper.

KRS 67C.325 states in full,

> Procedural due process shall be afforded to any police officer brought before the board. The officer shall be given a prompt hearing by the board, **have an opportunity to confront his or her accusers**, and have the privilege of presenting the board with evidence. The board shall have the power to issue subpoenas attested in the name of its chairman, to compel the attendance of witnesses, to compel the production of documents and other documentary evidence, and so far as practicable, conduct the hearing within the Kentucky Rules of Civil Procedure. Upon a showing of proper need, **the board shall issue subpoenas to compel the attendance of witnesses**, or to compel the

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

> production of documents and other documentary evidence for the benefits of the officer or the chief **at the request of the officer** or the chief.

(emphasis added). Moore asserts that the "opportunity to confront his or her accusers" language of KRS 67C.325 is modeled after the language of the Sixth Amendment to the United States Constitution and thus provides analogous rights. However, the Sixth Amendment provides criminal defendants with the "right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This language is markedly different from that contained in KRS 67C.325.

KRS 67C.325 makes no mention of a "right" (other than in its title), and instead, merely provides a police officer with an "**opportunity** to confront his or her accusers." The word "opportunity" is crucial in this analysis, as the remainder of that statutory section sets out how that opportunity to confront is to be provided: "[T]he board shall issue subpoenas to compel the attendance of witnesses . . . at the request of the officer." KRS 67C.325. Thus, police officers brought before the Merit Board are provided the **opportunity** to confront their accusers by requesting a subpoena be issued which compels the accuser's attendance at the hearing and then confronting the accuser through direct or cross-examination. Nothing more is required by KRS 67C.325. To interpret KRS 67C.325 in any other way would apparently result in more procedural due process rights for officers employed by LMPD than for officers employed by many other agencies within the Commonwealth.[1]

[1] The Police Officers' Bill of Rights, KRS 15.520, which applies to many of our Commonwealth's police officers, does not include similar "opportunity to confront" language. However, KRS 78.460, which provides procedural due process rights to county police officers, does include similar language.

We are mindful that we must "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 Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011). The above interpretation of KRS 67C.325 is further supported by the language contained in a related statute, KRS 67C.326(1)(h). When the two statutes are read together, it becomes even clearer that the legislature intended for sworn, transcribed witness statements to be considered by the Board even if those witnesses were not called to testify at the hearing.

KRS 67C.326(1)(h) sets forth the "minimum" "administrative due process rights" provided to police officers in proceedings in front of the Merit Board. KRS 67C.326(1)(h)2 explicitly permits the Merit Board to consider "any sworn statements or affidavits" and requires those statements to "be furnished to the police officer no less than seventy-two (72) hours prior to the time of the hearing." If the General Assembly had intended to permit the Merit Board to consider sworn statements and affidavits only if the witness was called to testify, it would have said so. We are not permitted to add words to a statute, and "a legislature making no exceptions to the positive terms of a statute is presumed to have intended to make none." *Lee v. Ky. Dept. of Corr.*, 610 S.W.3d 254, 262 (Ky. 2020) (quoting *Bailey v. Reeves*, 662 S.W.2d 832,834 (Ky. 1984)).

KRS 67C.326(1)(h) further provides that the accused police officer "may cross-examine all witnesses **called by the charging party**." KRS 67C.326(1)(h)7 (emphasis added). This right is specifically and explicitly contingent upon the witness being, in fact, "called by the charging party." Moore asserts that the LMPD's presentation of a sworn, transcribed witness statement is tantamount to the LMPD calling that witness to testify at the hearing, which in turn, triggers his right to cross-examine the witness. We find no support for this contention in either the plain language of the statute or in our Court's precedent, and it appears to be directly contrary to KRS 67C.326(1)(h)2, which, as just discussed, allows for consideration of sworn statements and affidavits.

Like KRS 67C.325, KRS 67C.326(1)(h) also provides an accused police officer the right to request a subpoena to require the attendance of witnesses at the hearing. KRS 67C.326(1)(h)6. In order for a police officer to avail himself of the "opportunity" to confront his accuser, he may need to subpoena the witness, call him or her to testify, and then cross-examine him or her. Further, police officers are explicitly provided the right to cross-examine witnesses called by the LMPD. KRS 67C.326(1)(h)7. We find nothing in the language of KRS 67C.325 or 67C.326 which provides Moore any greater right to cross-examine. Accordingly, the Merit Board did not violate Moore's statutory Due Process rights in considering sworn, transcribed witness statements even though those witnesses did not testify at the hearing and were not subject to cross-examination.

2. Constitutional Due Process Rights

Moore argues that even if the statutes do not prohibit the Merit Board from considering sworn, transcribed statements of witnesses who were not called to testify at the hearing and therefore were not subject to cross-examination, both the Kentucky and United States Constitutions do. He argues that his constitutional procedural Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Section Two of the Kentucky Constitution may be greater than those provided by the statutes and were violated when the Merit Board considered sworn, transcribed statements of witnesses who were not subject to cross-examination. He further argues that the Sixth Amendment Confrontation Clause jurisprudence should inform our Due Process analysis. He does not, however, engage in a meaningful way with the *Mathews v. Eldridge* factors which, as described below, the United States Supreme Court has stated determine the contours of procedural Due Process protections. 424 U.S. 319 (1976). Metro Government, on the other hand, would have this Court affirm the Court of Appeals' holding that Moore has no constitutional right to cross-examination.

"[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). The property rights protected by the Due Process Clause include the right to continued employment in a merit system like that established for LMPD. *See id.* at 539, 543.

"The essential requirements of due process . . . are notice and an opportunity to respond." *Dep't of Revenue, Fin. & Admin. Cabinet v. Wade*, 379 S.W.3d 134, 138 (Ky. 2012) (quoting *Loudermill*, 470 U.S. at 546). The hearing at which the individual can respond "must be 'at a meaningful time and in a meaningful manner.'" *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). However, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "[W]hat may be required under [the Due Process] Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Arnett v. Kennedy*, 416 U.S. 134, 155 (1974). Notably, it does not always require Sixth Amendment-like confrontation, as Moore suggests. To hold otherwise would elevate the rights provided at a civil administrative hearing to those provided at a criminal trial where the defendant's very liberty, or even life, is at stake.

Although our Court can interpret "the Constitution of Kentucky in a manner which differs from the interpretation of parallel federal constitutional rights by the Supreme Court of the United States[,]" when we do so, it is typically "because of Kentucky constitutional text, the Debates of the Constitutional Convention, history, tradition, and relevant precedent." *Commonwealth v. Cooper*, 899 S.W.2d 75, 77–78 (Ky. 1995). When it comes to the Due Process Clause, this Court has adopted the three-factor test found in the United States Supreme Court's decision in *Mathews v. Eldridge*, 424 U.S. 319. *Trans. Cabinet v. Cassity*, 912 S.W.2d 48, 51 (Ky. 1995).

In *Mathews*, the United States Supreme Court was tasked with determining how much procedural process was due to a Social Security disability benefit recipient prior to the termination of those benefit payments. 424 U.S. at 323. In order to do so, the Court stated that

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Since then, the *Mathews* test has become the controlling test for determining how much procedural due process is required under any given set of circumstances, and we are ever mindful that "[t]he matter comes down to the question of the procedure's integrity and fundamental fairness." *Richardson v. Perales*, 402 U.S. 389, 410 (1971). Because this Court has not yet decided how much procedural process is constitutionally due a police officer before the Merit Board, we must undertake the *Mathews* analysis today.

a. Private Interest

The first factor to be considered in the *Mathews*

test is "the private interest that will be affected by the official action[.]" *Mathews*, 424 U.S. at 335. In this case, the private interest at stake is the retention of merit employment. In *Cleveland Board of Education v. Loudermill*, the United States Supreme Court explained, "[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood." 470 U.S. at 543. That Court went on to note that "[w]hile a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Id.*

So, while the private interest in retaining employment is high, it is, perhaps, not as high as the private interest at stake in other situations. For example, the United States Supreme Court noted that the private interest in retaining welfare benefits is higher than that in retaining employment because "termination of aid pending resolution of a controversy over [welfare] eligibility may deprive an eligible recipient of the very means by which to live while he waits." *Goldberg*, 397 U.S. at 264. The private interest here is also less significant than the private interest in the retention of Social Security disability benefit payments because in the case of the loss of disability benefits, "there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss." *Mathews*, 424 U.S. at 341.

In cases such as the one before us, the private interest in retaining employment is lessened by the fact that the terminated employee has the physical ability to obtain at least temporary employment in order to mitigate some of the hardship imposed by the loss of his merit employment.

b. Risk of Erroneous Deprivation and Probable Value of Additional Safeguards

The second factor to be considered under the *Mathews* test is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards[.]" *Mathews*, 424 U.S. at 335. Here, the additional procedural safeguard that Moore seeks is live testimony and cross-examination of a witness whose statement the LMPD seeks to admit against him.

Courts have long acknowledged the "value of cross-examination in exposing falsehood and bringing out the truth" in a fact-finding endeavor. *Pointer v. Texas*, 380 U.S. 400, 404 (1965). Further, "[d]ismissals for cause will often involve factual disputes." *Loudermill*, 470 U.S. at 543. In fact, the United States Supreme Court has stated that "[p]articularly where credibility and veracity are at issue, as they must be in any [public assistance benefits] termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Goldberg*, 397 U.S. at 269. That Court went on to say that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* Notably, however, the Supreme Court used the term "opportunity" as opposed to the term "right," and the facts of *Goldberg* are highly distinguishable from the facts before us today. In *Goldberg*, the New York City Department of Social Services procedures at issue failed to provide the opportunity for any "personal appearance of the [benefits] recipient before the reviewing official, for oral presentation of evidence, [or] for confrontation and cross-examination of adverse witnesses" prior to termination of public assistance benefits. *Id.* at 259. In our case, however, as is described below, hearings before the Merit Board include personal appearance by the officer, representation by counsel, presentation of live testimony and documents, oral argument, and cross-examination of witnesses called by LMPD.

We contrast *Goldberg* with *Richardson v. Perales*. 402 U.S. 389 (1971), in which the United States Supreme Court reached a different result. In *Richardson*, the Court had to determine "whether physicians' written reports of medical examinations they have made of a disability claimant may constitute 'substantial evidence' supportive of a finding of nondisability . . . when the claimant objects to the admissibility of those reports and when the only live testimony is presented by his side and is contrary to the reports." 402 U.S. 389, 390 (1971). Although the Court relied heavily on the "underlying reliability and probative value" of the medical reports, its ultimate holding was as follows:

> We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has **not exercised his right to subpoena** the reporting physician and thereby provide himself with the **opportunity** for cross-examination of the physician.

Id. at 402 (emphasis added). The Court noted that "the claimant complains of the lack of opportunity to cross-examine the reporting physicians, [but] he did not take advantage of the **opportunity** afforded him under [the relevant regulation] to request subpoenas for the physicians." *Id.* at 404 (emphasis added). It went on to say, "[A]s a consequence [the claimant] is to be precluded from now complaining that he was denied the rights of confrontation and cross-examination." *Id.* at 405. Accordingly, despite the value of cross-examination in truth-finding, live testimony and cross-examination at a hearing are not always a prerequisite to admission of witness statements.

Moore's hearing in front of the Merit Board is distinguishable from most, if not all, of the United States Supreme Court cases cited thus far in this Opinion in one important way. The hearing that occurs in front of the Merit Board is a post-termination hearing, meaning that the police officer whose matter the Merit Board is considering has already been terminated from his employment. The hearing before the Merit Board is the last chance for fact-finding, which is different from the cited cases that analyze pre-action hearings under statutory schemes which require a full hearing post-action. *See*, *e.g.*, *Loudermill*, 470 U.S. 532. Thus, accurate fact-finding by the Merit Board is even more important.

That being said, however, the General Assembly has already provided officers with extensive procedural safeguards in matters before the Merit Board. Prior to an officer ever being terminated or going before the Merit Board, KRS 67C.321(1) requires the Chief of Police to "furnish the officer concerned with a written statement of the reasons why the described action is being taken." The officer is then "allowed a period of ten (10) days within which the officer may file a written answer to the charges and the reasons which caused her or his suspension, removal, or reduction." *Id.* If the Chief proceeds with the termination, the officer is then permitted an appeal to the Merit Board, which "shall be heard by the full board. The board shall give notice and hold a public hearing." KRS 67C.323(1).

As previously discussed, KRS 67C.325 provides officers brought before the Merit Board certain procedural due process. Under that statute, "[t]he officer shall be given a prompt hearing by the board, have an opportunity to confront his or her accusers, and have the privilege of presenting the board with evidence." KRS 67C.325. Further, at the request of the officer, "the board shall issue subpoenas to compel the attendance of witnesses, or to compel the production of documents and other documentary evidence for the benefits of the officer[.]" *Id.*

As previously discussed, KRS 67C.326 provides officers with certain "administrative due process rights." It prohibits "threats, promises, or coercions" from being "used at any time against any police officer while he or she is a suspect in a criminal or departmental matter." KRS 67C.326(1)(b). It further mandates that

> [a]ny charge involving violation of any consolidated local government rule or regulation shall be made in writing with sufficient specificity so as to fully inform the police officer of the nature and circumstances of the alleged violation in order that he may be able to properly defend himself. The charge shall be served on the police officer in writing[.]

Id. at (1)(e). Finally, KRS 67C.326(1)(h) provides a long list of administrative due process rights that "shall be the minimum rights afforded any police officer charged."[2] The officer "shall be given at least seventy-two (72) hours' notice of any hearing[.]" *Id.* at (1)(h)1. He must be provided with "[c]opies of any sworn statements or affidavits to be considered by the hearing authority and any exculpatory statements or affidavits . . . no less than seventy-two (72) hours prior to the time of any hearing[.]" *Id.* at (1)(h)2.[3] The Supreme Court has recognized that a "safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency." *Mathews*, 424 U.S. at 345–46. This access is granted in Merit Board proceedings.

[2] The General Assembly has amended KRS 67C.326, effective January 1, 2025, in a way that is seemingly beneficial for officers. For example, officers must be given twelve days' notice of a hearing and must be provided with any statements and affidavits to be considered by the Merit Board at least twelve days before the hearing. KY LEGIS 181 § 10 (2024), 2024 Kentucky Laws Ch. 181 (HB 388). This expanded time frame provides a greater

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

opportunity to effect due process.

[3] Merit Board hearing procedures require all documents to be provided to the other side at least ten days before the hearing.

Additionally, if the disciplinary action was taken based on a complaint made by an individual, the Merit Board can only consider charges made by that individual if the individual appears at the hearing. KRS 67C.326(1)(h)4. Further, "[t]he accused police officer shall have the right and opportunity to obtain and have counsel present, and to be represented by counsel[.]" *Id.* at (1)(h)5.

Regarding subpoenas, the General Assembly has provided an accused police officer in front of the Merit Board with the following rights:

> The appointing authority, legislative body, or other body as designated by the Kentucky Revised Statutes shall subpoena and require the attendance of witnesses and the production by them of books, papers, records, and other documentary evidence at the request of the accused police officer . . . . If any person fails or refuses to appear under the subpoena, or to testify, or to attend, or produce the books, papers, records, or other documentary evidence lawfully required, the appointing authority, legislative body, or other body as designated by the Kentucky Revised Statutes may report to the Circuit Court or any judge thereof the failure or refusal, and apply for a rule. The Circuit Court, or any judge thereof, may on the application compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court[.]

Id. at (1)(h)6. The police officer must also "be allowed to have presented, witnesses and any documentary evidence the police officer wishes to provide to the hearing authority, and may cross-examine all witnesses called by the charging party[.]" *Id.* at (1)(h)7. Finally, action taken by the Merit Board is then appealable to the Circuit Court, and the judgment of the Circuit Court can be appealed to the Court of Appeals. KRS 67C.323(3); KRS 67C.326(2), (3).

In weighing the second *Mathews* factor, we conclude that there is at least some risk of an erroneous deprivation of an officer's right to employment by allowing admission of sworn statements of witnesses who are not called to testify at the hearing and therefore are not subject to cross-examination. We further conclude that said risk would be somewhat mitigated by requiring those witnesses to appear in person and be subject to cross-examination before admitting their prior statements. *See Mathews*, 424 U.S. at 335. However, we also conclude that the right to cross-examine would likely have minimal value in accurate fact-finding because of the significant procedural safeguards already granted officers by the General Assembly, including notice of the hearing, right to counsel, access to the information relied upon by LMPD, and the right to subpoena witnesses. *See id.*

c. Government's Interest

The final *Mathews* factor that we must consider is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* The United States Supreme Court also described this factor as "the public interest," which includes "the administrative burden and other societal costs[.]" *Id.* at 347.

Metro Government asserts three primary interests to be considered under this factor: (1) maintenance of employee efficiency and discipline, (2) expeditious removal of unsatisfactory employees, and (3) avoidance of administrative burdens. These are all legitimate interests to be considered, although some weigh more heavily than others.

The maintenance of employee efficiency and discipline is an important interest to consider. However, Metro Government does not explain how employee efficiency will be impacted by requiring the live testimony, subject to cross-examination, of witnesses before their prior statements will be considered by the Merit Board, aside from the general increased administrative burdens that would result. Further, the importance of maintaining appropriate discipline among police officers cannot be overstated; however, because Merit Board hearings take place only after termination,[4] there is no risk that an undisciplined employee will remain on the police force while awaiting his hearing and chance to cross-examine those witnesses whose statements have been submitted to the Merit Board.

[4] The General Assembly has amended KRS Chapter 67C, effective January 1, 2025, to require Merit Board hearings to take place prior to any disciplinary action being taken under certain circumstances. KY LEGIS 181 § 10 (2024), 2024 Kentucky Laws Ch. 181 (HB 388). We make no holding regarding the weighing of the *Mathews* factors under the newly enacted legislation.

While the expeditious removal of unsatisfactory employees is also a legitimate factor to consider, it weighs very little in this case. Certainly, the quick removal of an unsatisfactory police officer, whose duty it is to uphold and enforce laws, is vital. However, additional process at the Merit Board stage would do nothing to stand in the way of that expeditious removal. As previously stated, the Merit Board hearing does not occur until after the police officer is terminated and, therefore, does not impede a quick termination. Further, because the hearing takes place post-termination of employment, there would be no additional cost imposed on the state in terms of the officer's salary while awaiting a hearing, as there would be in the case of an officer suspended with pay pending his Merit Board hearing.

Finally, Metro Government asserts a governmental interest in the avoidance of administrative burdens. This is a real and significant interest that the United States Supreme Court has stated "must be weighed." *Id.* at 348 ("[T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed."). The additional requirement that LMPD call to testify every witness the PIU or PSU interviewed so that they can be cross-examined would greatly increase the length of the Merit Board hearing. In the case at bar, for example, the hearing lasted four days even without LMPD calling those witnesses. It likely would have lasted several more if LMPD was forced to call an additional seven witnesses. That additional administrative cost and delay would result is obvious.

Aside from the interests Metro Government asserts, there are other public interests that must be considered. Society has an interest in assuring that Merit Board actions are correct and just. The cross-examination requirement for which Moore advocates is one way in which that interest could be supported. Relatedly, society, LMPD, and the officer all share an "interest in avoiding disruption and erroneous decisions[.]" *Loudermill*, 470 U.S. at 544. Finally, "[a] governmental employer has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls." *Id.* This interest is further shared by the public at large.

d. Weighing of the Mathews Factors

In summary, there are significant interests to both the individual and the public that are at stake in deciding how much process is due a terminated police officer in front of the Merit Board. However, "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Mathews*, 424 U.S. at 348. Such is the weighing in the case at bar. The police officer's interests are high and so are the public's interests. However, as previously explained, given the significant safeguards already provided by the General Assembly to officers in matters before the Merit Board, the risk of error is relatively low. Likewise, there is little probable value in increasing the safeguards in front of the Merit Board by requiring live testimony by witnesses with cross-examination prior to the admission of the witness's prior statement. Accordingly, we conclude that Moore's Due Process rights were not violated when the Merit Board considered sworn, transcribed witness statements even though those witnesses were not called to testify at Moore's hearing and therefore were not subject to cross-examination.

3. Collective Bargaining Agreement

Because the Court of Appeals held that the collective bargaining agreement (CBA) between Metro Government and the Fraternal Order of Police (FOP) supported Moore's right to confrontation, we feel compelled to address this issue. We begin by noting that the CBA is a negotiated agreement reached between Metro Government and the FOP. *See* KRS 67C.414. The FOP, however, is not and never has been a party to the proceedings before us today. Further, violations of the CBA can give rise to an independent suit filed in circuit court pursuant to KRS 67C.414, and alleged violations of the CBA are not appropriately litigated in front of the Merit Board. Accordingly, the CBA is not relevant to our analysis today, and we decline to address it further.

C. Use of Expunged Materials

In his cross-appeal, Moore argues that the Court of Appeals erred in holding that only arrest records and court records were subject to the Jefferson District Court expungement order. He asserts that the expungement order applies to both (1) the

investigative files and documentation compiled by the PIU, and (2) the occurrence of, and all documents pertaining to, the arrest, charging, and criminal prosecution of Moore based on the events of September 4, 2016. He argues that placing the PIU investigative materials into the PSU file blatantly violated the expungement statute.

As previously discussed, the criminal charges related to the September 4, 2016 incident were expunged pursuant to a Jefferson District Court order entered on March 29, 2017. That order stated,

> The above-named **offense(s) is/are expunged from the court records**. On entry of this order, the proceedings shall be deemed never to have occurred; the court shall reply to any inquiry that no record exists; and Defendant shall not have to disclose the fact of the record or any matter relating to it on an application for employment, credit, or other purpose.

(Bold in original). Regarding police and other agencies outside of the court system, the order stated,

> **The Kentucky State Police and other following agencies** [including LMPD], with custody of records relating to the arrest, charge or other matters arising out of the arrest or charge, shall expunge the record, including but not limited to: arrest records, fingerprints, photographs, index references, or other documentary or electronic data, **and shall certify to the Court on this form within sixty (60) days** of the entry of this order that the required expunging action has been completed[.]

(Bold in original). The order was entered on a form provided by the Administrative Office of the Courts, and its language closely tracks the language of the expungement statutes. KRS 431.076[5], the expungement statute relevant to Moore's circumstances, states in part,

> An order of expungement pursuant to this section shall expunge all criminal records in the custody of the court and any criminal records in the custody of any other agency or official, including law enforcement records, but no order of expungement pursuant to this section shall expunge records in the custody of the Department for Community Based Services. The court shall order the expunging on a form provided by the Administrative Office of the Courts. Every agency, with records relating to the arrest, charge, or other matters arising out of the arrest or charge, that is ordered to expunge records, shall certify to the court within sixty (60) days of the entry of the expungement order, that the required expunging action has been completed. All orders enforcing the expungement procedure shall also be expunged.

KRS 431.076(4). That same statute goes on to state,

> After the expungement, the proceedings in the matter shall be deemed never to have occurred. The court and other agencies shall delete or remove the records from their computer systems so that any official state-performed background check will indicate that the records do not exist. The court and other agencies shall reply to any inquiry that no record exists on the matter. The person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application.

KRS 431.076(6). Notably, KRS 431.079(3) defines "expungement" as "the removal or deletion of records by the court and other agencies which prevents the matter from appearing on official state-performed background checks."

[5] KRS 431.076 has been amended multiple times since Moore's expungement order was entered. However, all of the amendments to the relevant subsections of the statute apply retroactively. KRS 431.076(8).

Stated simply, Moore argues that because the entirety of LMPD's PIU file was subject to the expungement order, anything in the PSU files that came from the PIU file should also have been expunged and therefore excluded from the Merit Board's consideration.[6] Moore asserts that pursuant to KRS 431.076, the records to be expunged include "law enforcement records." He further contends that the PIU investigatory file was a criminal law enforcement record, and that all PIU records had to be expunged, including those PIU records placed in the PSU files. Metro Government and the Merit Board, on the other hand, argue that the expungement statutes do not apply to LMPD's PSU files, as they are internal employment records.

[6] Moore relies heavily on *McNabb v. Ky. Educ. Pro. Standards Bd.*, No. 2013-CA-000601-MR, 2015 WL 5096007 (Ky. App. Aug. 28, 2015). However, McNabb is an unpublished Court of Appeals decision and holds no weight with this Court. Regardless, *McNabb* is distinguishable because McNabb's teaching certificate was revoked based **solely** on a felony conviction which was eventually reversed and expunged, whereas Moore's termination was not based solely on allegedly expunged materials. *Id.* at *3.

To determine what materials should have been excluded from the Merit Board's consideration due to the expungement order, we must determine the breadth of the application of our Commonwealth's expungement statutes. "The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *MPM Fin. Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009). "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." *Shawnee Telecom Res., Inc.*, 354 S.W.3d at 551 (citing *Osborne v. Commonwealth*, 185 S.W.3d 645 (Ky. 2006). "Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history; the canons of construction; or, especially in the case of model or uniform statutes, interpretations by other courts." *Id.*

In construing a statute, we must "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." *Id.* Finally, "[a] well-established rule of statutory construction is that the courts will consider the purpose which the statute is intended to accomplish—the reason and spirit of the statute—the mischief intended to be remedied." *City of Louisville v. Helman*, 253 S.W.2d 598, 600 (Ky. 1952).

In this case, much of the language contained in KRS 431.076 is broad. The statute requires that "records **relating to** the arrest, charge, or other matters **arising out of** the arrest or charge" must be expunged. KRS 431.076(4) (emphasis added). The statute further provides that "[a]fter the expungement, the proceedings in the matter shall be deemed **never to have occurred**." KRS 431.076(6) (emphasis added). However, KRS 431.076 also includes language that appears to more clearly demonstrate the intent of the legislature in drafting the statute. The statute states that the records must be "delete[d] or remove[d] . . . **so that any official state-performed background check will indicate that the records do not exist**." *Id.* (emphasis added). This language, which is repeated in the specific definition of "expungement" provided by the legislature, clarifies the effect that the expungement is intended to have. *See* KRS 431.079(3) ("For purposes of . . . KRS . . . 431.076 . . ., 'expungement' means the removal or deletion of records by the court and other agencies which prevents the matter from appearing on official state-performed background checks."). Accordingly, the plain language of KRS 431.076 shows the legislature's intent that expungement is meant to "prevent[] the matter from appearing on official state-performed background checks" so that "[t]he person whose record is expunged shall not have to disclose" any information related to the record.

After closely analyzing the expungement statute, we agree with Metro Government and the Merit Board that LMPD's PSU files are internal employment files to which the expungement statute does not apply. Although the PSU files are in the possession of an agency subject to the expungement order, they are not themselves a "criminal record" or a "law enforcement record" of the type contemplated by the legislature in drafting the expungement statutes. *See* KRS 431.076(4). The PSU files are, for all practical purposes, personnel files, similar to ones that would be maintained by the human resources department of any other employer. Because of this very nature, material that is contained within LMPD's PSU files will never "appear[] on official state-performed background checks" regardless of the source of that material. KRS 431.079(3). Accordingly, because information contained in the PSU files is neither a criminal record nor would it appear on a state-performed background check, we conclude that it is not subject to the expungement order. Therefore, the Merit Board did not err in considering the information in the PSU files that was obtained from the PIU file.

D. Reliance on Arrest and Criminal Charges

Finally, Moore argues that basing his termination on his arrest and criminal charges, absent a conviction, was inherently arbitrary. He asserts that non-final criminal charges can never be the basis of the termination of a merit-protected employee.

Regarding the Chief's finding that Moore violated the SOP governing "Obedience to Rules and Regulations," arising out of the September incident, the Chief's pre-termination notice letter to

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

Moore stated as follows:

> In regard to Professional Standards Case 16-189, I have determined you violated Standard Operating Procedure 5.1.2 Obedience to Rules and Regulations when you were involved in a physical altercation with your wife Bethel Moore on September 4, 2016. You were arrested and charged with Assault 4th degree – Domestic Violence on September 5, 2016.

Regarding the Chief's finding that Moore violated the same SOP, arising out of the October incident, the Chief's letter stated as follows:

> You violated Standard Operating Procedure 5.1.2 Obedience to Rules and Regulations when on October 6, 2016 you violated a court order by returning to your residence and having contact with Bethel Moore. On October 7, 2016 you were arrested for Violation of Conditions of Release and Harassing Communication.

Regarding the Chief's finding that Moore yet again violated the same SOP, arising out of the April incident, the Chief's letter stated as follows:

> In regard to the Criminal Complaint Summons issued on April 18, 2017, I have determined you again violated Standard Operating Procedure 5.1.2 Obedience to Rules and Regulations when you violated a court order by initiating a verbal conversation with Bethel Moore on April 16, 2017. You were served on April 19, 2017 and charged with Harassment.

SOP 5.1.2, in turn, states,

> Members of the LMPD shall not commit any act that constitutes a violation of any of the laws and ordinances applicable in their current respective location.
>
> Members shall also obey all rules, orders, policies and procedures of the department. Members who violate any of the above may be dismissed or be subject to other punishment as directed for such a violation.
>
> All members shall abide by the Standards of Ethical Conduct, located in the Louisville Metro Government Personnel Policies (Section 1.5). . . .

Finally, KRS 67C.321(1) says that "[a]ny officer may be removed, suspended for a period not to exceed thirty (30) days, laid-off, or reduced in grade by the chief **for any cause** which promotes the efficiency of the services . . .." (emphasis added). In determining whether to set aside the Chief's termination decision, the Board looks only to whether that decision was "unjustified or unsupported by proper evidence." KRS 67C.323(1). None of the above quoted sources provide guidance as to the amount of evidentiary proof that the Chief must have in order to find a violation of an SOP, and the applicable statutes make clear that the Board may uphold the Chief's decision where it is merely supported by proper evidence. *Id.*

If we were to hold that the Chief could not terminate an employee for a violation of SOP 5.1.2 based on a violation of a law until that employee was formally convicted of the underlying offense, we would, in essence, be holding the Chief to a beyond a reasonable doubt standard of proof. Practically speaking, a holding such as that requested by Moore would also serve to prevent the Chief from finding a violation of this SOP for violation of a law until after a conviction, which, as is exemplified by this case, can take years. We refuse to require the Chief to either find a violation beyond a reasonable doubt or wait until a criminal conviction is final to find a violation. Further, it is clear from the Chief's termination letter that the Chief based his termination decision on his own findings of unlawful contact between Moore and Bethel, and not only on the fact that Moore was criminally charged for his conduct.

Accordingly, we hold that Moore's termination was not arbitrary merely because the Chief found that he violated SOP 5.1.2 prior to being criminally convicted. After reviewing the evidence admitted at Moore's hearing, the Board likewise determined that two of the SOP violations the Chief had found were supported by proper evidence. We cannot say that the Board's decision to uphold Moore's termination was arbitrary.

III. CONCLUSION

For the above-stated reasons, we affirm the decision of the Court of Appeals.

VanMeter, C.J.; Bisig, Conley, Keller, Lambert and Nickell, JJ., sitting. VanMeter, C.J.; Bisig and Lambert, JJ., concur. Conley, J., concurs in result only by separate opinion. Nickell, J., dissents by separate opinion. Thompson, J., not sitting.

EMPLOYMENT LAW

POLICE OFFICER DISCIPLINE

TERMINATION OF EMPLOYMENT WITH THE LOUISVILLE METRO POLICE DEPARTMENT

PROCEDURAL DUE PROCESS

ADMISSIBILITY OF EVIDENCE BEFORE THE LOUISVILLE METRO POLICE MERIT BOARD

ADMISSION OF TRANSCRIBED WITNESS STATEMENTS WITHOUT THOSE WITNESSES BEING CALLED TO TESTIFY AT THE HEARING

ADMISSION OF EXPUNGED MATERIALS

ADMISSION OF ARREST AND CRIMINAL CHARGES WHERE THERE WAS NO CRIMINAL CONVICTION

Police officer was employed by Louisville Metro Police Department (LMPD) in 2015 — Officer was assigned to serve as a school resource officer — On January 22, 2015, officer was involved in altercation with 13-year-old student — During altercation, officer struck student in the face — Officer subsequently arrested student, charging him with two public offenses, but failed to read student his *Miranda* rights — On January 27, 2015, officer was involved in altercation with a different student — During confrontation, officer wrapped his arms around student so tightly that student lost consciousness — Both incidents were captured on school surveillance video — Shortly after second incident, both Professional Standards Unit (PSU) investigation and Public Integrity Unit (PIU) investigation were initiated — PIU conducts criminal investigations of LMPD employees — PSU conducts administrative/disciplinary investigations into possible internal policy violations by LMPD employees — During its investigation, PIU conducted 11 witness interviews and collected videos of incidents — Once bulk of PIU investigation was completed, PSU obtained copies of all items in PIU file and incorporated those into its investigative file without conducting much independent investigation — PSU did interview officer — Officer was eventually charged with criminal offenses in both incidents — On March 20, 2015, Chief of Police (Chief) terminated officer's employment — Chief found that officer had committed four violations of department Standard Operating Procedures (SOPs) — Officer committed two violations of SOP 9.1.4, entitled "Use of Physical Force," for using more force than was necessary against both students — Officer committed one violation of SOP 10.7.2, entitled "Taking Juveniles into Custody," for failing to advise first student of his *Miranda* rights — Officer committed one violation of SOP 5.1.2, entitled "Obedience to Rules and Regulations," for engaging in conduct that led to officer's arrest — Officer appealed to Louisville Metro Police Merit Board (Merit Board) — At officer's request, Merit Board abated its proceedings until officer's criminal charges were resolved — Criminal charges against officer related to first incident were eventually dismissed with prejudice — Criminal case was expunged in January 2016 — In May 2018, officer went to trial on criminal charges stemming from second incident — Jury acquitted officer of all charges — It does not appear that officer obtained an expungement of that case — Hearing before Merit Board occurred over four days in August and October 2018 — Prior to hearing, officer objected to admission of materials related to first incident that had been taken from PIU file since those materials had been expunged — Officer also objected to admission of all transcribed witness statements if witnesses were not called to testify during hearing and made subject to cross-examination — Although Merit Board did not explicitly rule on officer's objections, it did not exclude materials or witness statements — Merit Board found officer committed three of four SOP violations found by Chief — Specifically, Merit Board did not find that officer committed violation that resulted solely from fact that he was charged criminally for incidents due to eventual exoneration and expungement

of his criminal charges — Jefferson Circuit Court and Court of Appeals affirmed — Officer appealed — AFFIRMED — Officer argued that because entirety of LMPD's PIU file was subject to expungement order, anything in PSU file that came from PIU file should also have been expunged and, therefore, excluded from Merit Board's consideration — KRS 431.076 requires that records relating to arrest, charge, or other matters arising out of arrest or charge must be expunged — Legislature intended that expungement prevent the matter from appearing on official state-performed background checks so that the person whose record is expunged shall not have to disclose any information related to the record — LMPD's PSU files are internal employment files to which expungement statute does not apply — Information contained in PSU files is neither a criminal record nor would it appear on a state-performed background check — Thus, Merit Board did not err in considering information in PSU files that was obtained from PIU file — KRS 67C.325 discusses procedural due process owed to police officer brought before a merit board — KRS 67C.325 states that officer shall "have an opportunity to confront his or her accusers" — Further, upon showing of proper need, "board shall issue subpoenas to compel the attendance of witnesses" at the request of the officer or the chief — Thus, before Merit Board, officer had "opportunity" to confront his accusers by requesting that a subpoena be issued which compels his accuser's attendance at the hearing and then confronting the accuser through direct or cross-examination — KRS 67C.325 requires nothing more — KRS 67C.326(1)(h) sets forth "minimum" administrative due process rights — Merit Board did not violate officer's statutory due process rights — In addition, Merit Board did not violate officer's constitutional due process rights — Essential requirements of due process are notice and an opportunity to respond — *Mathews v. Eldridge* (1976) sets forth factors to determine how much procedural due process is required in instant action: (1) private interest that will be affected by the official action; (2) risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and (3) government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirement would entail (also referred to as "the public interest") — After weighing these factors, Kentucky Supreme Court determined that officer's due process rights were not violated when Merit Board considered sworn, transcribed witness statements — Probable cause that an employee has violated a law is sufficient to sustain a finding by the Chief of a violation of SOP 5.1.2 — Officer's termination and subsequent upholding of that termination were not arbitrary because they were not based solely on officer's arrest and criminal charges — There were independent bases for his termination —

Jonathan Hardin v. Louisville/Jefferson County Metropolitan Government; and Louisville Metro Police Merit Board (2022-SC-0197-DG); On review from Court of Appeals; Opinion by Justice Keller, *affirming*, rendered 8/22/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Jonathan Hardin was terminated from his employment with the Louisville Metro Police Department (LMPD) after the Chief of Police determined that he had committed four violations of police department Standard Operating Procedures (SOPs). Hardin appealed his termination to the Louisville Metro Police Merit Board (the Merit Board). The Merit Board concluded that Hardin had committed three of the four SOP violations that the Chief had found and upheld Hardin's termination. Hardin then appealed to the Jefferson Circuit Court, which affirmed the Merit Board's decision. He then appealed to the Court of Appeals, which affirmed the Circuit Court. This Court granted Hardin's Motion for Discretionary Review, and after a thorough review of the record and the law, we affirm the Court of Appeals.

I. BACKGROUND

Hardin was employed by LMPD in 2015 and was assigned to serve as a school resource officer (SRO) at Frederick Law Olmsted Academy North, a school that staff members have described as "tough." On January 22, 2015, Hardin was involved in an altercation with a 13-year-old student, Shavez Pearson, during which he struck Pearson in the face. He subsequently arrested Pearson, charging him with two public offenses, but failed to read Pearson his *Miranda*[1] rights. On January 27, 2015, Hardin was involved in another altercation with a different student, Tywon Anderson, during which he wrapped his arms around Anderson so tightly that Anderson lost consciousness. Both incidents were captured on school surveillance video.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Shortly after the second incident, both a Professional Standards Unit (PSU) investigation and a Public Integrity Unit (PIU) investigation were initiated. The PIU conducts criminal investigations of LMPD employees. The PSU conducts administrative/disciplinary investigations into possible internal policy violations by LMPD employees. During its investigation, the PIU conducted eleven witness interviews. The PIU also collected the school surveillance videos of the incidents. Once the bulk of the PIU investigation was completed, the PSU obtained copies of all of the items in the PIU file and incorporated those materials into the PSU investigative file, without conducting much independent investigation. The PSU did, however, interview Hardin. Hardin was ultimately charged with criminal offenses stemming from each of the incidents.

On March 20, 2015, the Chief of Police terminated Hardin's employment with LMPD. The Chief found that Hardin committed four violations of SOPs. The Chief found that Hardin committed two violations of SOP 9.1.4, entitled "Use of Physical Force," for using more force than was reasonably necessary against both Pearson and Anderson. The Chief further found that Hardin committed one violation of SOP 10.7.2, entitled "Taking Juveniles into Custody," for failing to advise Pearson of his *Miranda* rights when taking him into custody. Finally, the Chief found Hardin violated SOP 5.1.2, entitled "Obedience to Rules and Regulations," for engaging in "conduct [that] led to [Hardin's] arrest."

Hardin appealed his termination to the Merit Board. The Merit Board reviews the Chief's disciplinary actions and, in termination cases, holds a public, evidentiary hearing. At Hardin's request, the Merit Board proceedings were abated until Hardin's criminal charges were resolved.

The criminal charges against Hardin related to the Pearson incident were eventually dismissed with prejudice. That criminal case was expunged in January 2016. In May 2018, Hardin went to trial on the criminal charges stemming from the Anderson incident, and a jury acquitted him of all charges. It does not appear that Hardin has obtained an expungement of that case. Hardin's Merit Board hearing did not take place until after both the expungement and the acquittal, as previously mentioned. The hearing took place over four days during the months of August and October 2018.

Prior to the Merit Board hearing, Hardin objected to the admission of materials related to the Pearson incident that had been taken from the PIU file, arguing that those materials had been expunged. He further objected to the admission of all transcribed witness statements if the witnesses were not called to testify during the hearing and made subject to cross-examination. Although the Merit Board did not explicitly rule on Hardin's objection, it did not exclude the materials or witness statements, and thereby effectively overruled Hardin's objections.

At the Merit Board hearing, LMPD did not call any of the witnesses who made statements to the PIU to testify. Instead, LMPD only called to testify various employees of LMPD, including the investigating PSU officer, an investigating PIU officer, Hardin's supervisor, and other supervisory officers. The school surveillance videos of the incidents were played multiple times. Hardin called three witnesses to testify on his behalf who had given statements to the PIU.

At the conclusion of the hearing, the Merit Board found that Hardin committed three of the four SOP violations found by the Chief. The Merit Board found that he committed two violations of the use of force SOP and that he violated the SOP that required him to read *Miranda* rights to juveniles who are taken into custody. The Board, however, found that he did not commit the singular violation that resulted solely from the fact that he was charged criminally for the incidents, the "Obedience to Rules and Regulations" SOP, "given the eventual exoneration and expungement of his criminal charges." Ultimately, the Board upheld the Chief's termination decision.

Hardin then appealed his termination to the Jefferson Circuit Court pursuant to Kentucky Revised Statute (KRS) 67C.323(3)(a) and KRS 67C.326(2). To the circuit court, Hardin made three primary arguments. First, he argued that the Merit Board erroneously considered expunged

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

materials related to the Pearson incident. Second, he argued that his statutory and due process rights were violated when the Merit Board considered transcribed witness statements, when those witnesses did not testify at the hearing and were not subject to confrontation and cross-examination. Finally, he argued that LMPD improperly relied on his arrest and criminal charges, absent a criminal conviction, as bases for his termination. The Jefferson Circuit Court affirmed the Merit Board's order.

Hardin then appealed to the Court of Appeals, making the same arguments he made to the circuit court. The Court of Appeals also affirmed. Hardin then sought discretionary review from this Court. After initially abating his case, we granted his motion for discretionary review.

II. ANALYSIS

To this Court, Hardin asserts the same arguments that he made to both the circuit court and the Court of Appeals. First, he argues that the Merit Board erred in failing to exclude expunged materials. Second, he argues that the Merit Board erred in considering sworn, transcribed statements of witnesses who were not called to testify at the hearing and, therefore, were not subject to cross-examination. Finally, he argues that his termination was improperly based in part on his arrest and criminal charges instead of on a conviction. We review each allegation in turn.

A. Standard of Review

"[J]udicial review of administrative action is concerned with the question of *arbitrariness*." *Am. Beauty Homes Corp. v. Louisville & Jefferson Cty. Plan. & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). The Circuit Court uses a "modified de novo" standard of review when reviewing actions of the Merit Board. *Crouch v. Jefferson Cnty., Ky. Police Merit Bd.*, 773 S.W.2d 461, 464 (Ky. 1988). It "allows the reviewing court to invade the mental processes of the Board to determine whether its action is not arbitrary. To determine arbitrariness, the appellate court may review the record, the briefs, and any other evidence or testimony which would be relevant to that specific, limited issue." *Id.* In reviewing for arbitrariness, the reviewing court must determine whether the questioned exercise of authority might be infirm because the action exceeded the Board's granted powers, the proceeding lacked procedural due process, or the Board's decision lacked substantial evidentiary support. *Am. Beauty Homes Corp.*, 379 S.W.2d at 456. Importantly, "[t]he appeal is not the proper forum to retry the merits." *Crouch*, 773 S.W.2d at 464.

In the case before us, all of the issues presented are questions of law. Thus, despite the above-described general standard of review, we review the issues before us de novo. *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 647 (Ky. 2017).

B. Use of Expunged Materials

Hardin argues that the Merit Board erroneously failed to exclude expunged materials from its consideration. As previously discussed, the criminal charges related to the Pearson incident were expunged pursuant to a Jefferson Circuit Court order entered on January 19, 2016. That order stated,

> The above-named **offense(s) is/are expunged from the court records**. On entry of this order, the proceedings shall be deemed never to have occurred; the court shall reply to any inquiry that no record exists; and Defendant shall not have to disclose the fact of the record or any matter relating to it on an application for employment, credit, or other purpose.

(Bold in original). Regarding police and other agencies outside of the court system, the order stated,

> **The Kentucky State Police and other following agencies** [including LMPD], with custody of records relating to the arrest, charge or other matters arising out of the arrest or charge, shall expunge the record, including but not limited to: arrest records, fingerprints, photographs, index references, or other documentary or electronic data, **and shall certify to the Court on this form within sixty (60) days** of the entry of this order that the required expunging action has been completed[.]

(Bold in original). The order was entered on a form provided by the Administrative Office of the Courts, and its language closely tracks the language of the expungement statutes. KRS 431.076[2], the expungement statute relevant to Hardin's circumstances, states in part,

> An order of expungement pursuant to this section shall expunge all criminal records in the custody of the court and any criminal records in the custody of any other agency or official, including law enforcement records, but no order of expungement pursuant to this section shall expunge records in the custody of the Department for Community Based Services. The court shall order the expunging on a form provided by the Administrative Office of the Courts. Every agency, with records relating to the arrest, charge, or other matters arising out of the arrest or charge, that is ordered to expunge records, shall certify to the court within sixty (60) days of the entry of the expungement order, that the required expunging action has been completed. All orders enforcing the expungement procedure shall also be expunged.

KRS 431.076(4). That same statute goes on to state,

> After the expungement, the proceedings in the matter shall be deemed never to have occurred. The court and other agencies shall delete or remove the records from their computer systems so that any official state-performed background check will indicate that the records do not exist. The court and other agencies shall reply to any inquiry that no record exists on the matter. The person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application.

KRS 431.076(6). Notably, KRS 431.079(3) defines "expungement" as "the removal or deletion of records by the court and other agencies which prevents the matter from appearing on official state-performed background checks."

[2] KRS 431.076 has been amended multiple times since Hardin's expungement order was entered. However, all of the amendments to the relevant subsections of the statute apply retroactively. KRS 431.076(8).

Stated simply, Hardin argues that because the entirety of LMPD's PIU file was subject to the expungement order, anything in the PSU file that came from the PIU file should also have been expunged and therefore excluded from the Merit Board's consideration.[3] Hardin asserts that pursuant to KRS 431.076, the records to be expunged include "law enforcement records." He further contends that the PIU investigatory file was a criminal law enforcement record, and that all PIU records had to be expunged, including those PIU records placed in the PSU file. The Louisville/Jefferson County Metropolitan Government (Metro Government) and the Merit Board, on the other hand, argue that the expungement statutes do not apply to LMPD's PSU file, as it is an internal employment record.

[3] Hardin relies heavily on *McNabb v. Ky. Educ. Pro. Standards Bd.*, No. 2013-CA-000601-MR, 2015 WL 5096007 (Ky. App. Aug. 28, 2015). However, *McNabb* is an unpublished Court of Appeals decision and holds no weight with this Court. Regardless, *McNabb* is distinguishable because McNabb's teaching certificate was revoked based **solely** on a felony conviction which was eventually reversed and expunged, whereas Hardin's termination was not based solely on allegedly expunged materials. *Id.* at *3.

To determine what materials should have been excluded from the Merit Board's consideration due to the expungement order, we must determine the breadth of the application of our Commonwealth's expungement statutes. "The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *MPM Fin. Grp., Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009). "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." *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011) (citing *Osborne v. Commonwealth*, 185 S.W.3d 645 (Ky. 2006)). "Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history; the canons of construction; or, especially in the case of model or uniform statutes, interpretations by other courts." *Id.*

In construing a statute, we must "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." *Id.* Finally, "[a] well-established rule of statutory construction is that the courts will consider the purpose which the statute is intended to accomplish—the reason and spirit of the statute—the mischief intended to be remedied." *City of Louisville v. Helman*, 253 S.W.2d 598, 600 (Ky. 1952).

In this case, much of the language contained in KRS 431.076 is broad. The statute requires that "records **relating to** the arrest, charge, or other matters **arising out of** the arrest or charge"

must be expunged. KRS 431.076(4) (emphasis added). The statute further provides that "[a]fter the expungement, the proceedings in the matter shall be deemed **never to have occurred**." KRS 431.076(6) (emphasis added). However, KRS 431.076 also includes language that appears to more clearly demonstrate the intent of the legislature in drafting the statute. The statute states that the records must be "delete[d] or remove[d] . . . **so that any official state-performed background check will indicate that the records do not exist**." *Id.* (emphasis added). This language, which is repeated in the specific definition of "expungement" provided by the legislature, clarifies the effect that the expungement is intended to have. *See* KRS 431.079(3) ("For purposes of . . . KRS . . . 431.076 . . ., 'expungement' means the removal or deletion of records by the court and other agencies which prevents the matter from appearing on official state-performed background checks."). Accordingly, the plain language of KRS 431.076 shows the legislature's intent that expungement is meant to "prevent[] the matter from appearing on official state-performed background checks" so that "[t]he person whose record is expunged shall not have to disclose" any information related to the record.

After closely analyzing the expungement statute, we agree with Metro Government and the Merit Board that LMPD's PSU file is an internal employment file to which the expungement statute does not apply. Although the PSU file is in the possession of an agency subject to the expungement order, it is not itself a "criminal record" or a "law enforcement record" of the type contemplated by the legislature in drafting the expungement statutes. *See* KRS 431.076(4). The PSU file is, for all practical purposes, a personnel file, similar to one that would be maintained by the human resources department of any other employer. Because of this very nature, material that is contained within LMPD's PSU file will never "appear[] on official state-performed background checks" regardless of the source of that material. KRS 431.079(3). Accordingly, because information contained in the PSU file is neither a criminal record nor would it appear on a state-performed background check, we conclude that it is not subject to the expungement order. Therefore, the Merit Board did not err in considering the information in the PSU file that was obtained from the PIU file.

C. Due Process Right to Cross-Examine

Hardin next argues that the Merit Board's consideration of sworn, transcribed witness statements of individuals who were not called to testify at the hearing and, therefore, were not subject to cross-examination, violated his Due Process rights. He asserts that these rights can be found both in the statutes that govern the Merit Board as well as in the Kentucky and United States Constitutions.

1. Statutory Due Process Rights

Hardin argues that KRS 67C.325 and 67C.326(1)(h) provide him with procedural and administrative due process rights to cross-examine witnesses against him such that the admission of transcriptions of these witnesses' prior statements was improper. The Merit Board and Metro Government, on the other hand, assert that the admission of sworn statements is contemplated, and even explicitly permitted, by the relevant statutes.

KRS 67C.325 states in full,

> Procedural due process shall be afforded to any police officer brought before the board. The officer shall be given a prompt hearing by the board, **have an opportunity to confront his or her accusers**, and have the privilege of presenting the board with evidence. The board shall have the power to issue subpoenas attested in the name of its chairman, to compel the attendance of witnesses, to compel the production of documents and other documentary evidence, and so far as practicable, conduct the hearing within the Kentucky Rules of Civil Procedure. Upon a showing of proper need, **the board shall issue subpoenas to compel the attendance of witnesses**, or to compel the production of documents and other documentary evidence for the benefits of the officer or the chief **at the request of the officer** or the chief.

(Emphasis added). Hardin asserts that the "opportunity to confront his or her accusers" language of KRS 67C.325 is modeled after the language of the Sixth Amendment to the United States Constitution and thus provides analogous rights. However, the Sixth Amendment provides criminal defendants with the "right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This language is markedly different from that contained in KRS 67C.325.

KRS 67C.325 makes no mention of a "right" (other than in its title), and instead, merely provides a police officer with an "**opportunity** to confront his or her accusers." The word "opportunity" is crucial in this analysis, as the remainder of that statutory section sets out how that opportunity to confront is to be provided: "[T]he board shall issue subpoenas to compel the attendance of witnesses . . . at the request of the officer." KRS 67C.325. Thus, police officers brought before the Merit Board are provided the **opportunity** to confront their accusers by requesting a subpoena be issued which compels the accuser's attendance at the hearing and then confronting the accuser through direct or cross-examination. Nothing more is required by KRS 67C.325. To interpret KRS 67C.325 in any other way would apparently result in more procedural due process rights for officers employed by LMPD than for officers employed by many other agencies within the Commonwealth.[4]

[4] The Police Officers' Bill of Rights, KRS 15.520, which applies to many of our Commonwealth's police officers, does not include similar "opportunity to confront" language. However, KRS 78.460, which provides procedural due process rights to county police officers, does include similar language.

We are mindful that we must "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 Res., Inc.*, 354 S.W.3d at 551. The above interpretation of KRS 67C.325 is further supported by the language contained in a related statute, KRS 67C.326(1)(h). When the two statutes are read together, it becomes even clearer that the legislature intended for sworn, transcribed witness statements to be considered by the Board even if those witnesses were not called to testify at the hearing.

KRS 67C.326(1)(h) sets forth the "minimum" "administrative due process rights" provided to police officers in proceedings in front of the Merit Board. KRS 67C.326(1)(h)2 explicitly permits the Merit Board to consider "any sworn statements or affidavits" and requires those statements to "be furnished to the police officer no less than seventy-two (72) hours prior to the time of the hearing." If the General Assembly had intended to permit the Merit Board to consider sworn statements and affidavits only if the witness was called to testify, it would have said so. We are not permitted to add words to a statute, and "a legislature making no exceptions to the positive terms of a statute is presumed to have intended to make none." *Lee v. Ky. Dept. of Corr.*, 610 S.W.3d 254, 262 (Ky. 2020) (quoting *Bailey v. Reeves*, 662 S.W.2d 832, 834 (Ky. 1984)).

KRS 67C.326(1)(h) further provides that the accused police officer "may cross-examine all witnesses called by the charging party." KRS 67C.326(1)(h)7. This right is specifically and explicitly contingent upon the witness being, in fact, "called by the charging party." *Id.* Hardin asserts that the LMPD's presentation of a sworn, transcribed witness statement is tantamount to the LMPD calling that witness to testify at the hearing, which in turn, triggers his right to cross-examine the witness. We find no support for this contention in either the plain language of the statute or in our Court's precedent, and it appears to be directly contrary to KRS 67C.326(1)(h)2, which, as just discussed, allows for consideration of sworn statements and affidavits.

Like KRS 67C.325, KRS 67C.326(1)(h) also provides an accused police officer the right to request a subpoena to require the attendance of witnesses at the hearing. KRS 67C.326(1)(h)6. In order for a police officer to avail himself of the "opportunity" to confront his accuser, he may need to subpoena the witness, call him or her to testify, and then cross-examine him or her. Further, police officers are explicitly provided the right to cross-examine witnesses called by the LMPD. KRS 67C.326(1)(h)7. We find nothing in the language of KRS 67C.325 or 67C.326 which provides Hardin any greater right to cross-examine. Accordingly, the Merit Board did not violate Hardin's statutory Due Process rights in considering sworn, transcribed witness statements even though those witnesses did not testify at the hearing and were not subject to cross-examination.

2. Constitutional Due Process Rights

Hardin next argues that even if the statutes do not prohibit the Merit Board from considering sworn, transcribed statements of witnesses who were not called to testify at the hearing and therefore were not subject to cross-examination, both the Kentucky and United States constitutions do. He argues that his constitutional procedural Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Section Two of the Kentucky Constitution may be greater than those provided by the statutes and were violated when the Merit Board considered sworn, transcribed statements of witnesses who were not subject to cross-examination. He further argues that the Sixth

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

Amendment Confrontation Clause jurisprudence should inform our Due Process analysis. He does not, however, engage in a meaningful way with the *Mathews v. Eldridge* factors which, as described below, the United States Supreme Court has stated determine the contours of procedural Due Process protections. 424 U.S. 319 (1976).

"[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). The property rights protected by the Due Process Clause include the right to continued employment in a merit system like that established for LMPD. *See id.* at 539, 543.

"The essential requirements of due process . . . are notice and an opportunity to respond." *Dep't of Revenue, Fin. & Admin. Cabinet v. Wade*, 379 S.W.3d 134, 138 (Ky. 2012) (quoting *Loudermill*, 470 U.S. at 546). The hearing at which the individual can respond "must be 'at a meaningful time and in a meaningful manner.'" *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). However, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "[W]hat may be required under [the Due Process] Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Arnett v. Kennedy*, 416 U.S. 134, 155 (1974). Notably, it does not always require Sixth Amendment-like confrontation, as Hardin suggests. To hold otherwise would elevate the rights provided at a civil administrative hearing to those provided at a criminal trial where the defendant's very liberty, or even life, is at stake.

Although our Court can interpret "the Constitution of Kentucky in a manner which differs from the interpretation of parallel federal constitutional rights by the Supreme Court of the United States[,]" when we do so, it is typically "because of Kentucky constitutional text, the Debates of the Constitutional Convention, history, tradition, and relevant precedent." *Commonwealth v. Cooper*, 899 S.W.2d 75, 77–78 (Ky. 1995). When it comes to the Due Process Clause, this Court has adopted the three-factor test found in the United States Supreme Court's decision in *Mathews v. Eldridge*, 424 U.S. 319. *Trans. Cabinet v. Cassity*, 912 S.W.2d 48, 51 (Ky. 1995).

In *Mathews*, the United States Supreme Court was tasked with determining how much procedural process was due to a Social Security disability benefit recipient prior to the termination of those benefit payments. 424 U.S. at 323. In order to do so, the Court stated that

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Since then, the *Mathews* test has become the controlling test for determining how much procedural due process is required under any given set of circumstances, and we are ever mindful that "[t]he matter comes down to the question of the procedure's integrity and fundamental fairness." *Richardson v. Perales*, 402 U.S. 389, 410 (1971). Because this Court has not yet decided how much procedural process is constitutionally due a police officer before the Merit Board, we must undertake the *Mathews* analysis today.

a. Private Interest

The first factor to be considered in the *Mathews* test is "the private interest that will be affected by the official action[.]" *Mathews*, 424 U.S. at 335. In this case, the private interest at stake is the retention of merit employment. In *Cleveland Board of Education v. Loudermill*, the United States Supreme Court explained, "[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood." 470 U.S. at 543. That Court went on to note that "[w]hile a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Id.*

So, while the private interest in retaining employment is high, it is, perhaps, not as high as the private interest at stake in other situations. For example, the United States Supreme Court noted that the private interest in retaining welfare benefits is higher than that in retaining employment because "termination of aid pending resolution of a controversy over [welfare] eligibility may deprive an eligible recipient of the very means by which to live while he waits." *Goldberg*, 397 U.S. at 264. The private interest here is also less significant than the private interest in the retention of Social Security disability benefit payments because in the case of the loss of disability benefits, "there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss." *Mathews*, 424 U.S. at 341.

In cases such as the one before us, the private interest in retaining employment is lessened by the fact that the terminated employee has the physical ability to obtain at least temporary employment in order to mitigate some of the hardship imposed by the loss of his merit employment.

b. Risk of Erroneous Deprivation and Probable Value of Additional Safeguards

The second factor to be considered under the *Mathews* test is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards[.]" *Mathews*, 424 U.S. at 335. Here, the additional procedural safeguard that Hardin seeks is live testimony and cross-examination of a witness whose statement the LMPD seeks to admit against an officer.

Courts have long acknowledged the "value of cross-examination in exposing falsehood and bringing out the truth" in a fact-finding endeavor. *Pointer v. Texas*, 380 U.S. 400, 404 (1965). Further, "[d]ismissals for cause will often involve factual disputes." *Loudermill*, 470 U.S. at 543. In fact, the United States Supreme Court has stated that "[p]articularly where credibility and veracity are at issue, as they must be in any [public assistance benefits] termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Goldberg*, 397 U.S. at 269. That Court went on to say that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* Notably, however, the Supreme Court used the term "opportunity" as opposed to the term "right," and the facts of *Goldberg* are highly distinguishable from the facts before us today. In *Goldberg*, the New York City Department of Social Services procedures at issue failed to provide the opportunity for any "personal appearance of the [benefits] recipient before the reviewing official, for oral presentation of evidence, [or] for confrontation and cross-examination of adverse witnesses" prior to termination of public assistance benefits. *Id.* at 259. In our case, however, as is described below, hearings before the Merit Board include personal appearance by the officer, representation by counsel, presentation of live testimony and documents, oral argument, and cross-examination of witnesses called by LMPD.

We contrast *Goldberg* with *Richardson v. Perales*. 402 U.S. 389 (1971), in which the United States Supreme Court reached a different result. In *Richardson*, the Court had to determine "whether physicians' written reports of medical examinations they have made of a disability claimant may constitute 'substantial evidence' supportive of a finding of nondisability . . . when the claimant objects to the admissibility of those reports and when the only live testimony is presented by his side and is contrary to the reports." 402 U.S. at 390. Although the Court relied heavily on the "underlying reliability and probative value" of the medical reports, its ultimate holding was as follows:

> We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has **not exercised his right to subpoena** the reporting physician and thereby provide himself with the **opportunity** for cross-examination of the physician.

Id. at 402 (emphasis added). The Court noted that "the claimant complains of the lack of opportunity to cross-examine the reporting physicians, [but] he did not take advantage of the **opportunity** afforded him under [the relevant regulation] to request subpoenas for the physicians." *Id.* at 404 (emphasis added). It went on to say, "[A]s a consequence [the claimant] is to be precluded from now complaining that he was denied the rights of confrontation and cross-examination." *Id.* at 405. Accordingly, despite the value of cross-examination in truth-finding, live testimony and cross-examination at a hearing is not always a prerequisite to admission of witness statements.

Hardin's hearing in front of the Merit Board is distinguishable from most, if not all, of the United States Supreme Court cases cited thus far in this Opinion in one important way. The hearing that occurs in front of the Merit Board is a post-termination hearing, meaning that the police officer whose matter the Merit Board is considering has already been terminated from his employment. The hearing before the Merit Board is the last chance for fact-finding, which is different from the cited cases that analyze pre-action hearings under statutory schemes which require a full hearing post-action. *See*, *e.g.*, *Loudermill*, 470 U.S. 532. Thus, accurate fact-finding by the Merit Board is even more important.

That being said, however, the General Assembly has already provided officers with extensive procedural safeguards in matters before the Merit Board. Prior to an officer ever being terminated or going before the Merit Board, KRS 67C.321(1) requires the Chief of Police to "furnish the officer concerned with a written statement of the reasons why the described action is being taken." The officer is then "allowed a period of ten (10) days within which the officer may file a written answer to the charges and the reasons which caused her or his suspension, removal, or reduction." *Id.* If the Chief proceeds with the termination, the officer is then permitted an appeal to the Merit Board, which "shall be heard by the full board. The board shall give notice and hold a public hearing." KRS 67C.323(1).

As previously discussed, KRS 67C.325 provides officers brought before the Merit Board certain procedural due process. Under that statute, "[t]he officer shall be given a prompt hearing by the board, have an opportunity to confront his or her accusers, and have the privilege of presenting the board with evidence." KRS 67C.325. Further, at the request of the officer, "the board shall issue subpoenas to compel the attendance of witnesses, or to compel the production of documents and other documentary evidence for the benefits of the officer[.]" *Id.*

As previously discussed, KRS 67C.326 provides officers with certain "administrative due process rights." It prohibits "threats, promises, or coercions" from being "used at any time against any police officer while he or she is a suspect in a criminal or departmental matter." KRS 67C.326(1)(b). It further mandates that

> [a]ny charge involving violation of any consolidated local government rule or regulation shall be made in writing with sufficient specificity so as to fully inform the police officer of the nature and circumstances of the alleged violation in order that he may be able to properly defend himself. The charge shall be served on the police officer in writing[.]

Id. at (1)(e). Finally, KRS 67C.326(1)(h) provides a long list of administrative due process rights that "shall be the minimum rights afforded any police officer charged."[5] The officer "shall be given at least seventy-two (72) hours' notice of any hearing[.]" *Id.* at (1)(h)1. He must be provided with "[c]opies of any sworn statements or affidavits to be considered by the hearing authority and any exculpatory statements or affidavits . . . no less than seventy-two (72) hours prior to the time of any hearing[.]" *Id.* at (1)(h)2.[6] The Supreme Court has recognized that a "safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency." *Mathews*, 424 U.S. at 345–46. This access is granted in Merit Board proceedings.

[5] The General Assembly has amended KRS 67C.326, effective January 1, 2025, in a way that is seemingly beneficial for officers. For example, officers must be given twelve days' notice of a hearing and must be provided with any statements and affidavits to be considered by the Merit Board at least twelve days before the hearing. KY LEGIS 181 § 10 (2024), 2024 Kentucky Laws Ch. 181 (HB 388). This expanded time frame provides a greater opportunity to effect due process.

[6] Merit Board hearing procedures require all documents to be provided to the other side at least ten days before the hearing.

Additionally, if the disciplinary action was taken based on a complaint made by an individual, the Merit Board can only consider charges made by that individual if the individual appears at the hearing. KRS 67C.326(1)(h)4. Further, "[t]he accused police officer shall have the right and opportunity to obtain and have counsel present, and to be represented by counsel[.]" *Id.* at (1)(h)5.

Regarding subpoenas, the General Assembly has provided an accused police officer with the following rights:

> The appointing authority, legislative body, or other body as designated by the Kentucky Revised Statutes shall subpoena and require the attendance of witnesses and the production by them of books, papers, records, and other documentary evidence at the request of the accused police officer . . . . If any person fails or refuses to appear under the subpoena, or to testify, or to attend, or produce the books, papers, records, or other documentary evidence lawfully required, the appointing authority, legislative body, or other body as designated by the Kentucky Revised Statutes may report to the Circuit Court or any judge thereof the failure or refusal, and apply for a rule. The Circuit Court, or any judge thereof, may on the application compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court[.]

Id. at (1)(h)6. The police officer must also "be allowed to have presented, witnesses and any documentary evidence the police officer wishes to provide to the hearing authority, and may cross-examine all witnesses called by the charging party[.]" *Id.* at (1)(h)7. Finally, action taken by the Merit Board is then appealable to the circuit court, and the judgment of the circuit court can be appealed to the Court of Appeals. KRS 67C.323(3); KRS 67C.326(2), (3).

In weighing the second *Mathews* factor, we conclude that there is at least some risk of an erroneous deprivation of an officer's right to employment by allowing admission of sworn statements of witnesses who are not called to testify at the hearing and therefore are not subject to cross-examination. We further conclude that said risk would be somewhat mitigated by requiring those witnesses to appear in person and be subject to cross-examination before admitting their prior statements. *See Mathews*, 424 U.S. at 335. However, we also conclude that the right to cross-examine would likely have minimal value in accurate fact-finding because of the significant procedural safeguards already granted officers by the General Assembly, including notice of the hearing, right to counsel, access to the information relied upon by LMPD, and the right to subpoena witnesses. *See id.*

c. Government's Interest

The final *Mathews* factor that we must consider is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* The United States Supreme Court also described this factor as "the public interest," which includes "the administrative burden and other societal costs[.]" *Id.* at 347.

Metro Government asserts three primary interests to be considered under this factor: (1) maintenance of employee efficiency and discipline, (2) expeditious removal of unsatisfactory employees, and (3) avoidance of administrative burdens. These are all legitimate interests to be considered, although some weigh more heavily than others.

The maintenance of employee efficiency and discipline is an important interest to consider. However, Metro Government does not explain how employee efficiency will be impacted by requiring the live testimony, subject to cross-examination, of witnesses before their prior statements will be considered by the Merit Board, aside from the general increased administrative burdens that would result. Further, the importance of maintaining appropriate discipline among police officers cannot be overstated; however, because Merit Board hearings take place only after termination,[7] there is no risk that an undisciplined employee will remain on the police force while awaiting his hearing and chance to cross-examine those witnesses whose statements have been submitted to the Merit Board.

[7] The General Assembly has amended KRS Chapter 67C, effective January 1, 2025, to require Merit Board hearings to take place prior to any disciplinary action being taken under certain circumstances. KY LEGIS 181 § 10 (2024), 2024 Kentucky Laws Ch. 181 (HB 388). We make no holding regarding the weighing of the *Mathews* factors under the newly enacted legislation.

While the expeditious removal of unsatisfactory employees is also a legitimate factor to consider, it weighs very little in this case. Certainly, the quick removal of an unsatisfactory police officer, whose duty it is to uphold and enforce laws, is vital. However, additional process at the Merit Board stage would do nothing to stand in the way of that expeditious removal. As previously stated, the Merit Board hearing does not occur until after the police officer is terminated and, therefore, does not impede a quick termination. Further, because the hearing takes place post-termination of employment, there would be no additional cost imposed on the state in terms of the officer's salary

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

while awaiting a hearing, as there would be in the case of an officer suspended with pay pending his Merit Board hearing.

Finally, Metro Government asserts a governmental interest in the avoidance of administrative burdens. This is a real and significant interest that the United States Supreme Court has stated "must be weighed." *Id.* at 348 ("[T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed."). The additional requirement that LMPD call to testify every witness the PIU or PSU interviewed so that they can be cross-examined would greatly increase the length of the Merit Board hearing. In the case at bar, for example, the hearing lasted four days even without LMPD calling those witnesses. It likely would have lasted several more if LMPD was forced to call an additional seven witnesses. That additional administrative cost and delay would result is obvious.

Aside from the interests Metro Government asserts, there are other public interests that must be considered. Society has an interest in assuring that Merit Board actions are correct and just. The cross-examination requirement for which Hardin advocates is one way in which that interest could be supported. Relatedly, society, LMPD, and the officer all share an "interest in avoiding disruption and erroneous decisions[.]" *Loudermill*, 470 U.S. at 544. Finally, "[a] governmental employer has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls." *Id.* This interest is further shared by the public at large.

d. Weighing of the Mathews Factors

In summary, there are significant interests to both the individual and the public that are at stake in deciding how much process is due a terminated police officer in front of the Merit Board. However, "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Mathews*, 424 U.S. at 348. Such is the weighing in the case at bar. The police officer's interests are high and so are the public's interests. However, as previously explained, given the significant safeguards already provided by the General Assembly to officers in matters before the Merit Board, the risk of error is relatively low. Likewise, there is little probable value in increasing the safeguards in front of the Merit Board by requiring live testimony by witnesses with cross-examination prior to the admission of the witness's prior statement. Accordingly, we conclude that Hardin's Due Process rights were not violated when the Merit Board considered sworn, transcribed witness statements even though those witnesses were not called to testify at Hardin's hearing and therefore were not subject to cross-examination.

D. Reliance on Arrest and Criminal Charges

Finally, Hardin argues that basing his termination on his arrest and criminal charges, absent a conviction, was inherently arbitrary. He asserts that non-final criminal charges can never be the basis of the termination of a merit-protected employee. Metro Government, on the other hand, argues that the Chief's termination of Hardin's employment was not based solely on the non-final criminal charges but instead was based on the facts underlying the incidents. It further argues that because the Merit Board did not uphold the Chief's finding of a violation of SOP based on the criminal charges, the issue is moot.

Regarding the Chief's finding that Hardin violated the SOP governing "Obedience to Rules and Regulations," the Chief's pre-termination notice letter to Hardin stated as follows:

> You violated Standard Operating Procedure 5.1.2 Obedience to Rules and Regulations when your conduct led to your arrest on February 3, 2015. You were arrested for Assault 4th Degree, Official Misconduct 1st Degree (2 counts), False Swearing, Assault 1st Degree, and Wanton Endangerment 1st Degree. The above charges were brought against you regarding your interactions with two juveniles on two different occasions, January 22, 2015 and January 27, 2015 at Frederick Law Olmsted Academy North. The events leading to your arrest were captured on the school surveillance cameras. There is probable cause for your arrest for your actions concerning the above juveniles.

SOP 5.1.2, in turn, states,

> Members of the LMPD shall not commit any act that constitutes a violation of any of the laws and ordinances applicable in their current respective location.
>
> Members shall also obey all rules, orders, policies and procedures of the department. Members who violate any of the above may be dismissed or be subject to other punishment as directed for such a violation.
>
> All members shall abide by the Standards of Ethical Conduct, located in the Louisville Metro Government Personnel Policies (Section 1.5). . . .

Finally, KRS 67C.321(1) says that "[a]ny officer may be removed, suspended for a period not to exceed thirty (30) days, laid-off, or reduced in grade by the chief **for any cause** which promotes the efficiency of the services . . .." (emphasis added).

None of the above quoted sources provide guidance as to the amount of evidentiary proof that the Chief must have in order to find a violation of an SOP. If we were to hold that the Chief could not terminate an employee for a violation of SOP 5.1.2 based on a violation of a law until that employee was formally convicted of the underlying offense, we would, in essence, be holding the Chief to a beyond a reasonable doubt standard of proof. Practically speaking, a holding such as that requested by Hardin would also serve to prevent the Chief from finding a violation of this SOP for violation of a law until after a conviction, which, as is exemplified by this case, can take years. We refuse to require the Chief to either find a violation beyond a reasonable doubt or wait until a criminal conviction is final to find a violation. Probable cause that an employee has violated a law is sufficient to sustain a finding by the Chief of a violation of SOP 5.1.2.

We are further persuaded that the Chief's termination of Hardin and the Merit Board's subsequent upholding of that termination were not arbitrary because they were not based solely on Hardin's arrest and criminal charges.[8] There were other independent bases for his termination. In fact, a violation of SOP 5.1.2 was only one of four SOP violations found by the Chief, and the Merit Board, in fact, found no violation of this SOP "given the eventual exoneration and expungement of [Hardin's] criminal charges." Nevertheless, the Merit Board, after a hearing and deliberation, upheld the Chief's termination decision, and this was not arbitrary.

[8] This is the determinative distinguishing factor between the facts of Hardin's case and the facts of the Court of Appeals opinions, *Commonwealth, Transp. Cabinet v. Woodall*, 735 S.W.2d 335 (Ky. App. 1987), and *Vaden v. Louisville Civil Service Bd.*, 701 S.W.2d 150 (Ky. App. 1985), on which he heavily relies.

Accordingly, we hold that Hardin's termination was not arbitrary merely because the Chief found that he violated SOP 5.1.2 due to his arrest and criminal charges.

III. CONCLUSION

For the above-stated reasons, we affirm the decision of the Court of Appeals.

VanMeter, C.J.; Conley, Keller, Lambert, Nickell and Thompson, JJ., sitting. VanMeter, C.J.; Lambert and Nickell, JJ., concur. Conley and Thompson, JJ., concur in result only by separate opinion. Bisig, J., not sitting.

JUDGES

JUDICIAL MISCONDUCT

REMOVAL FROM OFFICE

JUDICIAL CONDUCT COMMISSION (JCC)

GOVERNMENT

SEPARATION OF POWERS

JCC LACKS THE AUTHORITY TO PERMANENTLY REMOVE A JUDGE FROM JUDICIAL OFFICE

CHARGE OF JUDICIAL MISCONDUCT IN RELATION TO A JUDGE'S EXERCISE OF HIS/HER CONTEMPT POWERS

While Kentucky Constitution § 121 grants the Judicial Conduct Commission (JCC) the authority to retire, suspend, or remove a judge, Section 109 places the authority to impeach an elected official solely in the hands of the legislature — Thus, while JCC has the authority to remove a judge for the remainder of his or her term, its power under Section 121 does not include the permanent removal from office —

Permanent removal of a state official elected by the people must be the result of actions taken by a body of representatives also elected by the people: the legislature — Kentucky Supreme Court clarified the use of judicial misconduct charges for the alleged abuse of judge's contempt powers — An individual who has been held in contempt, and believes that ruling to be erroneous, should first seek review of the ruling with an appellate court, not JCC — In the absence of an appellate court ruling that a judge has improperly exercised his/her powers of contempt and in the absence of an allegation that a judge has made erroneous rulings that were "gross and persistent," JCC is precluded by SCR 4.020(2) from charging a judge with misconduct in relation to the exercise of his/her contempt powers —

James T. Jameson v. Judicial Conduct Commission (2022-SC-0496-RR); In Supreme Court; Opinion by Justice Lambert, *affirming in part and reversing in part*, rendered 8/22/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

This matter involves an appeal from a ruling of the Judicial Conduct Commission (JCC), which charged and found Judge James "Jamie" Jameson guilty of seven counts of misconduct. The JCC ordered that Judge Jameson be permanently removed from office as a circuit judge for the 42nd Judicial Circuit.

For the reasons provided herein, we hold that the JCC failed to carry its burden of proof in relation to some, but not all, of the misconduct alleged under Counts I and III and that it failed to prove all allegations of misconduct under Counts IV, V, and VI. We further hold that based on the misconduct proven under Counts I, II, III, and VII, Judge Jameson's removal from office was appropriate, but that the JCC does not have the authority to permanently remove a judge from office.

I. FACTUAL AND PROCEDURAL BACKGROUND

For context, we will begin with an overview of some of the uncontested facts of this case. This section of the opinion does not cover all of Judge Jameson's alleged misconduct, which is discussed in greater detail in Section II(E) below.

In 2015, Judge Jameson became a circuit court judge for the 42nd Judicial Circuit which is comprised of Marshall and Calloway Counties. Soon after, he identified two ongoing problems within his judicial circuit. The first was that nearly all of his criminal docket involved cases either directly or tangentially related to substance use disorder (SUD), yet he believed defendants did not have sufficient access to SUD treatment. The second problem was overcrowding in the county jails and the accompanying cost to the counties associated with housing defendants awaiting trial.

By November 2017, Judge Jameson had begun developing a potential plan of attack to address these issues. Primarily, he intended to form a community corrections board under KRS[1] 196.700, *et seq*, and thereafter create a 501(c)(3) non-profit funding arm for the board. The non-profit arm of the board would in turn fund the construction of a 100-bed in-patient SUD treatment facility to serve the 42nd Circuit. In addition, he wanted to ensure that more criminal defendants could be placed on ankle monitors as a bond condition by utilizing a more affordable ankle monitor provider than the providers being used at that time. To that end, in August 2017 Judge Jameson began discussions with Ed Brennen, a regional sales representative for Track Group, an ankle monitor manufacturing company. On December 19, 2018, Judge Jameson directed a meeting with several local officials during which he lauded both the affordability of Track Group's services as well as the superior design of the ankle monitors they produced.

[1] Kentucky Revised Statute.

On November 21, 2018, Judge Jameson sent an email to legal counsel for the Administrative Office of the Courts (AOC) seeking guidance on two pertinent issues. One, whether it would be appropriate for a CCB formed pursuant to KRS Chapter 196 to be involved in activities related to pretrial supervision, and two, whether it would be appropriate for circuit court clerks to collect the fees associated with a pretrial ankle monitoring program. Counsel for AOC responded on December 4 with a memorandum stating that its "office [had] not found any guidance in KRS Chapter 196 or elsewhere in either statutory or case law" concerning "the authority of [a] Community Corrections Board regarding the handling of funds associated with pretrial releasees and GPS monitoring" and it therefore could not "provide definitive answers." Concerning the question of whether circuit court clerks should collect fees associated with a pretrial ankle monitoring program, AOC's response was: "No, we do not recommend it." Judge Jameson never sought an opinion from the Judicial Ethics Committee about these issues.

Less than a month later, on December 31, 2018, Judge Jameson filed the Articles of Incorporation for the "42nd Judicial Circuit Community Corrections Board" (CCB). The Articles stated that Judge Jameson was the CCB's incorporator, registered agent, and one of three board members. The other two board members were Don Cherry, Judge Jameson's father-in-law and Calloway County Fiscal Court member, and Dave Berndt, a local philanthropist that Judge Jameson met at the Kentucky Opry. The mailing address for the CCB's principal office was the Marshall County Judicial Building, the location of Judge Jameson's primary judicial chambers. The CCB received its 501(c)(3) non-profit status from the Internal Revenue Service three months later in March 2019.

Also in March 2019, Judge Jameson made voluntary appearances before the Marshall and Calloway County Fiscal Courts and advised those bodies that the then-existing process of placing criminal defendants on ankle monitors violated the law. At that time, defendants in the 42nd Circuit who were ordered to be on an ankle monitor would directly contract with a private ankle monitoring company. Neither Marshall County nor Calloway County had a contract with an ankle monitoring company. Judge Jameson advised the fiscal courts that KRS 67.372 and KRS 67.374 required that, one, in order for a judge to place an individual on an ankle monitor the county must first have a contract with an ankle monitor provider and, two, that the contract between the county and the ankle monitor provider must be selected via a public bidding process.

Acting on Judge Jameson's advice, the Calloway County Fiscal Court decided to issue a public request for proposal (RFP) seeking bids for an ankle monitor service contract.[2] The RFP was prepared by the Calloway County Attorney, Bryan Ernstberger. On May 11, 2019, prior to the issuance of the RFP, Judge Jameson sent Ernstberger an email containing "recommendations for terms to be included in the RFP." The email included an attached memorandum with several suggested "ankle monitor requirements." The suggestions included in that memorandum were listed, verbatim, in the RFP that was ultimately issued by the fiscal court. Additionally, on July 7, 2020, Judge Jameson sent Ernstberger an email that included an attachment titled "Ankle Monitor Program RFP by Ernstberger (edit 1).docx[.]" The accompanying message from Judge Jameson said, "Attached is the final version of the RFP. While this document does not cover every piece of equipment that will be made available to the counties, it gets the job done so we can move forward. Please let me know if you have any questions." Each page of the draft RFP attached to that email was virtually identical to the RFP later issued by the fiscal court.

[2] While the RFP was issued by the Calloway County Fiscal Court, it is this Court's understanding that the company who submitted the winning bid would provide services to both Calloway and Marshall Counties pursuant to an interlocal agreement in accordance with KRS 67.372(7) ("Agreements between counties for monitoring services may, with the approval of their governing bodies, be consummated by a contract signed by all counties party thereto or by an interlocal cooperation agreement[.]").

The Calloway Fiscal Court issued the RFP on July 21, 2020. The CCB submitted its responsive bid on July 27, which included a cover letter signed by "Jamie Jameson, Director, 42nd Community Corrections Board." Ernstberger reviewed the three bids that were submitted in response to the RFP and recommended to the fiscal court that the CCB's bid be selected. Acting at least in part on Ernstberger's recommendation, the fiscal court selected the CCB's bid on August 19, 2020. The CCB's ankle monitoring program was implemented in the 42nd Circuit sometime in late fall of 2020.

The CCB's ankle monitoring program functioned as follows. Judge Jameson, whose court was the only court of general jurisdiction in the 42nd Circuit, would decide whether a qualifying criminal defendant should be placed on an ankle monitor as a condition of his or her bond. If so, the defendant would enter into a "Monitoring Services Agreement" with the CCB that detailed the defendant's responsibilities, including payment amounts, under the agreement. The signature block of that document provided places for the defendant and "James Jameson, Correction's Board President and Director" to sign and date.

Participants in the ankle monitor program were then monitored by the CCB's Director of GPS

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

Services, Christine Pickett. Pickett was a third-year law student doing an unpaid externship in Judge Jameson's office when he asked her to take the position;[3] she had no prior experience in that kind of work. Pickett was a contract employee of the CCB and received compensation. She was responsible for monitoring all program participants and would receive real-time violation notifications for things like strap tampers, low battery alerts, entry of a defendant into an exclusion zone, or the departure of a defendant from an inclusion zone. Judge Jameson, 911 dispatch, two individuals from Track Group, and Dominik Mikulcik, Judge Jameson's staff attorney, also received instantaneous violation notifications.

[3] When Pickett's externship ended on May 31, 2021, Madison Dorris took the position. Dorris had been an intern from Murray State in Judge Jameson's office during the spring 2021 semester and took the position after her internship ended. The manner in which the program ran did not change once Dorris became the Director of GPS Services.

Most of the violation alerts that occurred were resolved between Pickett and the participant, but if the issue could not be resolved or if the violation was classified as "high risk" she would issue a "notice of violation" report. A violation report provided a factual account of the alleged violation and would either state the CCB's intention of revoking the participant's monitor or request a summons or a warrant. Most violation reports did not result in the immediate issuance of an arrest warrant. But, on some occasions, Judge Jameson directed the circuit court clerk's office to issue an arrest warrant upon receipt of a violation report. The defendant would then be taken into custody and Judge Jameson would set a bond violation hearing for the next available docket date. Judge Jameson never issued an arrest warrant based solely on a participant's failure to pay his or her ankle monitoring fees.

Against the recommendation of AOC's legal counsel, the Marshall and Calloway Circuit Clerks collected the fees from defendants participating in the CCB's ankle monitor program. After collecting the fees, the clerks would write a monthly check to the CCB. Those funds were then distributed amongst various entities via checks signed by Judge Jameson. The clerks' offices did not receive a fee for providing these services.

In addition to the funds raised by the ankle monitoring program, which were scant, the CCB sought to raise funds by applying for grant money and fundraising. On March 17, 2021, Judge Jameson submitted a grant application with the Kentucky State Corrections Commission[4] on behalf of the CCB seeking $25,000.00 to increase the hourly pay of the CCB's Director of GPS Services. The grant application explained that paying the Director of GPS Services with the requested grant money, as opposed to funds from the ankle monitoring program, would allow more funds from the program to be funneled towards building an SUD treatment facility. The corrections commission ultimately denied funding.

[4] *See generally* KRS 196.702; KRS 196.710.

As for fundraising, Judge Jameson and the CCB partnered with The Fletcher Group, a 501(c)3 nonprofit corporation founded by former Kentucky Governor Ernie Fletcher and his wife, Glenna. The Fletcher Group's purpose is to, *inter alia*, provide assistance with building SUD treatment centers in rural areas and is funded through federal grant money. On July 15, 2020, Judge Jameson attended a meeting with The Fletcher Group wherein it agreed to assist him in his endeavor to fund the construction of an SUD treatment facility. The plan to build the facility was christened "the Re-Life project." A website for the Re-Life project where donations could be made was created, and the Fletcher Group helped organize and hold a fundraiser for the Re-Life project on May 20, 2021. Judge Jameson presented a PowerPoint during the "educational" half of the event regarding local SUD issues. The fundraiser and the Re-Life program were also promoted via radio ad and emails which we address in greater detail below.

This brings us to the JCC proceedings now before us. On June 21, 2021, a disgruntled participant in the CCB's ankle monitoring program filed a judicial complaint against Judge Jameson.[5] On October 15, 2021, the JCC held an informal hearing with Judge Jameson pursuant to Supreme Court Rule (SCR) 4.170(2). Judge Jameson prepared a written statement for that informal hearing that addressed the judicial complaint and discussed, generally, his involvement with the CCB and the GPS program. A week after the informal hearing a second JCC complaint was filed by a different participant in the ankle monitoring program.[6] After several months of further investigation, the JCC issued a notice of formal proceedings and charges and an amended notice of proceedings and charges on June 13, 2022, and July 21, 2022, respectively. Both the notice and the amended notice alleged the same four counts of misconduct related to the CCB, the Re-Life project, the ankle monitoring program, Judge Jameson's courtroom conduct, acts of retaliation, and the solicitation of campaign contributions.[7]

[5] The complaint itself, filed by Amber Fralix, was not included in the record before us. However, it appears that on June 9, 2021, the Director of GPS Services issued a violation report for Fralix based on her "failure to properly communicate with the CCB." That violation report was then sent to Judge Jameson via email who then emailed the Marshall County Circuit Clerk's Office and requested that an arrest warrant be issued for Fralix.

[6] The second complaint, filed by Tina Mull, was not included in the record. Unlike Fralix, Mull's violation report is also not in the record. On October 8, 2021, Judge Jameson emailed the Marshall County Circuit Clerk's Office requesting that an arrest warrant be issued for Mull based on "a GPS violation."

[7] The only difference between the original notice of formal proceedings and the amended notice of formal proceedings appears to be their distribution lines, as Judge Jameson obtained new counsel after the original notice was filed.

After a temporary removal hearing the following month, the JCC voted 3-2 to temporarily remove Judge Jameson from office pending the outcome of a final hearing. Judge Jameson filed a writ of prohibition in this Court against the enforcement of the JCC's temporary suspension order. This Court ruled that the temporary suspension order was *void ab initio* due to the JCC's failure to comply with SCR 4.120, which mandates that "the affirmative vote of at least 4 members shall be required for the suspension. . .of a judge for good cause." *See Jameson v. Jud. Conduct Comm'n*, 2022-SC-0454-OA (Ky. Oct. 31, 2022). However, this Court did not rule on Judge Jameson's writ of prohibition until after his final hearing before the JCC.

In the interim, following Judge Jameson's temporary removal but prior to the final hearing, the JCC issued a second amended notice of formal proceedings and charges. The second amended notice added two counts of misconduct that alleged, respectively, that Judge Jameson had attempted to dissuade his judicial staff from complying with a JCC subpoena duces tecum issued after his temporary removal and that he failed to adhere to the terms of his temporary removal by contacting his judicial staff and using judicial resources. Three days later, the JCC filed its third and final amended notice of proceedings and charges. The third amended notice added one count of misconduct which alleged that Judge Jameson had coerced a public radio station manager at Murray State University (MSU) into not pursuing a story about a security video of Judge Jameson walking around the Marshall County courthouse in his underwear. The conversation between the station manager and Judge Jameson had occurred earlier in the year, but the station manager did not inform the JCC of the alleged misconduct until after he learned of its investigation into Judge Jameson.

Following a four-day final hearing the JCC found Judge Jameson guilty of seven counts of misconduct, and unanimously voted to have him permanently removed from office. Judge Jameson appealed the JCC's findings of fact, conclusions of law, and order to this Court. After review, we remanded the case to the JCC and ordered that it supplement its findings of fact. The JCC then issued a supplemental findings of fact, conclusions of law, and final order that incorporated its original findings of fact, conclusions of law, and order. The JCC's rulings and recommendations are now before us for review.

Additional facts are discussed below as necessary.

II. ANALYSIS

A. Standard of Review

The JCC is required to prove the substance of its charges by clear and convincing evidence. SCR 4.160. "[C]lear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people[.]" *Gentry v. Jud. Conduct Comm'n*, 612 S.W.3d 832, 846 (Ky. 2020). This Court must accordingly accept the JCC's findings and conclusions unless they are clearly erroneous, i.e., unreasonable. *Id.* at 840. "By rule, on any judge's appeal, we have broad power to 'affirm, modify or set aside in whole or in part the order of the Commission, or to remand the action to the Commission for further proceedings.'" *Id.* (citing SCR 4.290(5)).

B. Judge Jameson's arguments concerning the JCC's temporary suspension hearing and temporary suspension order are moot.

Judge Jameson has raised several arguments in relation to the JCC's temporary removal hearing and its order temporarily removing him from office. As discussed, *supra*, this Court previously held that the JCC's order temporarily removing Judge Jameson was *void ab initio* because it was not supported by the required number of votes under SCR 4.120. We accordingly hold that these arguments are moot and consequently decline to address them.

C. Pursuant to SCR 4.020, the JCC lacked jurisdiction to pursue claims against Judge Jameson for the alleged abuse of his contempt powers, but it did not lack jurisdiction to pursue its other claims against him based solely on a lack of a finding that Judge Jameson acted in bad faith.

Judge Jameson asserts that the JCC lacked jurisdiction to pursue any of the charges against him because there was no evidence that any of his misconduct was committed in bad faith. In support of this argument, he cites SCR 4.020(2), which states that "[a]ny erroneous decision made in good faith shall not be subject to the jurisdiction of the Commission." Judge Jameson contends that in order for the JCC to have jurisdiction over alleged misconduct by a judge, that judge must have committed the misconduct in bad faith.

Recently, in *Maze v. Judicial Conduct Commission*, this Court reiterated the long-standing meaning of this rule, stating: "This section's purpose is to merely make clear that normal legal decisions made by a judge, in her judicial role as a judge, are not subject to review by the Commission; instead litigants and lawyers are required to abide by appellate processes to contest erroneous decisions." 612 S.W.3d 793, 804 (Ky. 2020). In support, the *Maze* Court relied upon *Nicholson v. Judicial Retirement & Removal Commission*, rendered over four decades prior, which first articulated the reason for the addition of subsection (2)'s[8] language to SCR 4.020:

> The purpose of this addition was to make explicit that which we recognized to be implicit in our constitution and the rule. In a state which has an elected judiciary incompetence which is not gross and persistent can be safely left to elimination at the ballot box. Error can be adequately corrected by the appellate courts. Any other approach to the problem would destroy judicial independence by causing judges to keep one eye on their reversal rate and the other on the Commission. Both judicial eyes should be trained on the just disposition of the case at hand and not on the welfare of the sitting judge.

562 S.W.2d 306, 310 (Ky. 1978). Accordingly, SCR 4.020(2) does not provide Judge Jameson with a total jurisdictional shield for extrajudicial acts of misconduct alleged in this case as he claims. However, as we discuss in Section II(E)(3)(b) below, this rule prohibited the JCC from pursuing charges against him in relation to the alleged abuse of his contempt powers.

[8] Then subsection (d).

D. The inclusion of lay persons on the JCC is not unconstitutional.

Judge Jameson next argues that permitting lay persons to serve on the decision-making arm of the JCC violates the due process rights protected by the Constitutions of both the United States and the Commonwealth. However, the Kentucky Constitution itself provides the requirements for the composition of the JCC, and it states:

> Subject to rules of procedure to be established by the Supreme Court, and after notice and hearing, any justice of the Supreme Court or judge of the Court of Appeals, Circuit Court or District Court may be retired for disability or suspended without pay or removed for good cause by a commission composed of one judge of the Court of Appeals, selected by that court, one circuit judge and one district judge selected by a majority vote of the circuit judges and district judges, respectively, one member of the bar appointed by its governing body, **and two persons, not members of the bench or bar, appointed by the Governor**. The commission shall be a state body whose members shall hold office for four-year terms. Its actions shall be subject to judicial review by the Supreme Court.

Ky. Const. § 121 (emphasis added). The inclusion of laypersons on the JCC accordingly does not violate the Kentucky Constitution.

Moreover, Jameson does not explain how the inclusion of laypersons on the JCC runs afoul of the U.S. Constitution by depriving him of due process.[9] "As did the [U.S.] Supreme Court in *Powell v. Alabama*, [287 U.S. 45 (1932)], we consider due process as embodying those fundamental principles of liberty and justice which lie at the base of our civil and political institutions." *Ditty v. Hampton*, 490 S.W.2d 772, 774 (Ky. 1972).

[9] Judge Jameson's argument also states that the inclusion of laypersons on the JCC violates the separation of powers doctrine but fails to elaborate on that contention.

In *Ditty*, Kentucky's then highest Court addressed whether due process entitled a criminal defendant in a police court[10] to have his or her case presided over by a judge who was a licensed attorney. *Id.* at 774-76. It held:

> Due process, as regards the tribunal hearing a case, usually has been considered to require only that the tribunal be fair and impartial. The function of the court is not to defend the accused, or to represent him, but to decide fairly and impartially. . . [T]he judge is not one of the accused's adversaries, and is not there either to defend or to prosecute him. So the fact that the accused needs a lawyer to defend him does not mean that he needs to be tried before a lawyer judge.
>
> Long before *Gideon v. Wainwright*, [372 U.S. 335 (1963)], it was recognized that both in civil and in criminal cases a party who could and did employ counsel was entitled as a matter of due process to be heard by that counsel. Yet it never was suggested that there was a concomitant right to a lawyer judge. To the contrary, in *Morrissey v. Brewer*, [408 U.S. 471 (1972)], the Supreme Court held that in a parole-revocation proceeding, due process required only a 'neutral and detached' hearing body, members of which need not be judicial officers or lawyers.
>
> [. . .]
>
> The inescapable conclusion is that traditional concepts of fundamental fairness do not require that an accused be tried by a lawyer judge, and that the staffing of police courts by laymen judges does not offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Id. at 774-775 (internal citations and quotation marks omitted).

[10] *See* KRS 26.010, *et seq.*, "Police Courts" (repealed).

Although police courts such as the one at issue in *Ditty* no longer exist, the notions that due process usually requires only that a tribunal be "fair and impartial" and that a layperson's service as a member of a tribunal "does not offend some principle of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental" remain extant. Indeed, our reliance in *Ditty* on *Morrissey v. Brewer* regarding parole revocation proceedings requiring, *inter alia*, "a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers" remains good law. *See Jones v. Bailey*, 576 S.W.3d 128, 138 (Ky. 2019) (quoting *Morrissey*, 408 U.S. at 489). Moreover, in criminal trials where the stakes are arguably higher than in any other form of litigation, the fact-finding body is typically composed entirely of lay persons charged with applying sometimes complicated legal standards to a set of proven facts.

Based on the foregoing discussion, this Court can discern no reason why the inclusion of lay persons on JCC panels violates the principles of due process embodied in either the U.S. Constitution or the Kentucky Constitution.

E. Sufficiency of the Evidence

Before we address the substance of the JCC's charges against Judge Jameson we are compelled to note that, although we previously remanded this case to allow the JCC to supplement its findings of fact and conclusions of law, JCC's manner of analysis is deficient as will be noted herein. In the interest of finally having a resolution in this case, we choose to not remand it again and instead seek to provide guidance to the JCC moving forward. We urge the JCC to, when applicable, engage in the application of relevant case law and statutes to support its conclusions. Moreover, the JCC should explain in greater detail how an alleged act of misconduct violated a given rule. The JCC is further encouraged to cite to specific portions of testimony to support a given fact finding rather than the entirety of an individual's testimony.

1) Count I

Under Count I, the JCC found Judge Jameson guilty of several varying acts of misconduct that can

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

be distilled into the following: (a) Judge Jameson created the CCB for an improper purpose; (b) Judge Jameson, or persons under his direct supervision, developed procedures, local rules, and forms for the operation of the CCB's ankle monitoring program without the approval of the Chief Justice; (c) Judge Jameson improperly appeared before two legislative bodies (the Marshall and Calloway Fiscal Courts) and injected himself into public bidding process in a manner that constituted the rigging of a public bid; (d) Judge Jameson engaged in the direct solicitation of funds for the Re-Life project; and (e) Judge Jameson submitted a grant application for an improper purpose and attempted to use the prestige of his office to influence a grant process. We will address each finding in turn.

(a) Judge Jameson created the CCB for an improper purpose.

The JCC found that Judge Jameson's purposes in creating the CCB—funding the construction of an SUD treatment center and running a pre-trial ankle monitoring program—were improper under KRS 196.700 to KRS 196.735, the statutes governing community corrections programs and community corrections boards. A discussion of what community corrections programs and community corrections boards are, as well as their corresponding statutory purposes, is therefore necessary.

The Kentucky State Corrections Commission (the commission) is a statutory entity created by KRS 196.701. The twenty-three-member commission was created "[t]o develop and implement a statewide strategic plan for the state and community corrections programs[.]" KRS 196.701(1). The commissions functions are, *inter alia*, conducting statewide assessments of community corrections programs, awarding grant monies to qualifying community corrections programs, and reviewing community corrections program plans to ensure compliance with the statewide strategic plan. *See generally* KRS 196.702. The goals of the statewide strategic plan include ensuring that public safety is maintained while implementing a community corrections program, reducing local commitments to the department of corrections, reducing recidivism rates, and reducing probation and parole revocations. KRS 196.702(4)(a)-(d).

A community corrections program is "a local government agency, private nonprofit, or charitable organization" within a judicial circuit which "shall perform" one or more of the following:

> (a) Prepare community penalties plans;[11]
>
> (b) Directly provide, arrange, or contract with public and private agencies for sentencing services for offenders; and
>
> (c) Monitor the progress of offenders placed on community penalty plans or who receive sentencing services through provisions of KRS 196.700 to 196.735[.]

KRS 196.700(2)(a)-(c). The exclusive statutory purposes of the commission and community corrections programs are to:

> (1) Provide the judicial system with sentences to be used in lieu of incarceration;
>
> (2) Develop community-based sentencing alternatives to incarceration for certain individuals convicted of a felony;
>
> (3) Monitor and enforce the payment of restitution to victims of crime and the community through financial reimbursement, community service, or both;
>
> (4) Stimulate local involvement in community corrections programs to assure that they are specifically designed to meet the needs of the sentencing court and the community; and
>
> (5) Reduce expenditures of state funds by increasing community-based sentencing, reducing the rate of recidivism, and reducing revocations of probation and parole.

KRS 196.705(1)-(5). To serve these purposes, community corrections programs are "responsible for providing services for targeted offenders,"[12] i.e., "persons charged with or convicted of one (1) or more felonies who under application of law are eligible for probation or suspension of sentence."[13] The services provided by community corrections programs to targeted offenders shall include one (1) or more of the following:

> (a) Preparing detailed community penalty plans for presentation to the prosecution, the sentencing judge, and by the offender's attorney.
>
> (b) Providing treatment, punishment, management, supervision, rehabilitation, mentoring, employment, and other services to targeted offenders, or contracting or arranging with public or private agencies for services for targeted offenders, as described in the community corrections plan.
>
> (c) Monitoring the progress of offenders under community penalty plans.

KRS 196.715(1)(a)-(c).

[11] A community penalty plan is "a plan presented in writing to the sentencing judge which provides a detailed description of and rationale for the targeted offender's proposed sentence to a community corrections program or to one (1) or more special programs, conditions of probation, community punishments, or sanctions in lieu of lengthy incarceration[.]" KRS 196.700(4).

[12] KRS 196.715.

[13] KRS 196.700(8) (defining "targeted offenders").

Community corrections boards are created by community corrections programs "to provide direction and assistance to the community corrections program in the design, implementation, and evaluation of the community corrections program plan."[14] KRS 196.725. A community corrections board must be organized as a nonprofit corporation pursuant to KRS Chapter 273, and "shall consist of not less than eight (8) members[.]" *Id.* The eight members of the board "shall include, insofar as possible, judges, Commonwealth's attorneys, defense attorneys, crime victims or survivors, community leaders, social workers, law-enforcement officers, probation officers, and other interested persons." *Id.* The duties of a community corrections board "shall include, but are not limited to, the following: (1) Development and recommendation of an annual budget for the community corrections program; (2) Selection of new or additional board members; (3) Arranging for a private and independent annual audit; and (4) Development of procedures for contracting for services." *Id.*

[14] A community corrections program plan is "a written plan for the development, implementation, operation, and improvement of a community corrections program." KRS 196.700(3).

In this case, we note that there was no evidence that a community corrections program existed prior to the creation of the "42nd Judicial Circuit Community Corrections Board," nor was there any evidence that the 42nd Circuit's CCB was established by a community corrections program. *See* KRS 196.725. Judge Jameson alone filed the CCB's articles of incorporation as its incorporator, registered agent, and one-third of its board of directors. In addition, the articles of incorporation state that mailing address for the principal office of the CCB was the address of the Marshall County Courthouse and it was undisputed that the CCB's business was conducted from Judge Jameson's Marshall County judicial chambers. It was also undisputed that the CCB never had eight board members as required by KRS 196.725 during the span of time at issue in this case.

Throughout these proceedings Judge Jameson has continually argued that the 42nd Circuit's CCB was not a community corrections board pursuant to KRS 196.700, *et seq*, and was instead simply a nonprofit corporation that used the name "community corrections board." He therefore contends that the CCB was not required to comply with the foregoing statutes. But the record demonstrates that, prior to the JCC's investigation, Judge Jameson repeatedly represented that the CCB was formed in accordance with the applicable statutes. For example, when he contacted legal counsel for AOC in November 2018 for advice concerning whether the CCB could run a pre-trial ankle monitoring program and whether circuit clerks could handle funds associated with the program, he stated that "I, along with other local leaders, have formed a community corrections board for our judicial circuit pursuant to KRS 196[.]" In addition, his cover letter for the CCB's responsive bid to the Calloway Fiscal Court's RFP said, "[o]ur organization is a statutory entity formed pursuant to KRS 196.725 whose membership, by statute, consists of judges, Commonwealth's attorney, licensed attorneys, community leaders and elected officials, law-enforcement officers, and other interested persons." This Court consequently finds no merit in his argument that he never intended his CCB to be formed under KRS 196.700, *et seq.*

Moreover, based on the plain language of the applicable statutes, the legislature intended community corrections programs to be focused on implementing *post-conviction* sentencing alternatives that have the potential to reduce long term incarceration rates and on providing services that allow qualifying individuals with a felony conviction to return to and remain in their communities. It further appears that community corrections boards are meant to serve in an advisory

and administrative capacity to a given community corrections program. Nothing in this Court's review of KRS 196.700 to KRS 196.735 suggests that a community corrections board should be involved in providing *pre-trial* ankle monitoring services to defendants that are ordered to be monitored as a bond condition. Concerningly, Judge Jameson himself appeared to reach the same conclusion prior to filing the CCB's articles of incorporation. In his December 2018 letter to counsel for AOC he noted that

> KRS 196 sets out what a community corrections board is and its purpose, in general. That chapter clearly directs that grant monies delved out by [the Commission] should be used consistent with the purposes set out in KRS 196.720. All of those purposes appear to be related to post-conviction incarceration relief of some form.

Yet despite this acknowledgement, he persisted with his plan forming a CCB that was in violation of KRS Chapter 196 in both the manner it was formed and in its overall purposes and goals.

We likewise find no support in the relevant statutes for Judge Jameson's belief that a proper function of a community corrections board could be funding the construction of an SUD treatment facility. As noted, by statute, the purpose of a community corrections board is "to provide direction and assistance to the community corrections program in the design, implementation, and evaluation of the community corrections program[,]" and its statutory duties include things such as recommending the program's budget, selecting new board members, arranging for annual audits, and developing procedures for contract services. KRS 196.725. As laudable as the goal may be, we simply cannot extrapolate from these advisory and administrative statutory purposes that community corrections boards were ever meant to raise funds for the construction of an SUD treatment facility.

Based on the foregoing, we hold that the JCC's finding that Judge Jameson created the 42nd Circuit's CCB for an improper purpose was supported by clear and convincing evidence.

(b) Judge Jameson, or persons under his supervision, developed procedures, local rules, and forms for the operation of the ankle monitoring program without the approval of the Chief Justice.

The JCC next found that Judge Jameson or persons under his supervision developed procedures, local rules, and forms for the operation of the CCB ankle monitoring program without the approval of the Chief Justice. Judge Jameson acknowledged as much during questioning by the JCC panel:

> **JCC Panel:** Did you ever get a set of local rules from the chief justice approved to allow you to do this [ankle monitoring] program?
>
> **Jameson:** I've sent two different sets in since I've been judge, neither one has been responded to in any way form or fashion.
>
> **JCC Panel:** So you never got approval, and you realize in order to have a valid set of local rules they have to be approved by the Chief Justice.
>
> **Jameson:** I understand.
>
> . . .
>
> **JCC Panel:** So you realize in order to have a program like this and run something like this you have to have the approval of the court of justice which means the chief justice.
>
> **Jameson:** Mhm (affirmative).
>
> **JCC Panel:** And you never did, right? These forms you were going to use and all this other stuff were never approved by the Chief, correct?
>
> **Jameson:** Correct.

SCR 1.040(3) directs in pertinent part that "[n]o local rules shall be of binding effect unless in writing, approved by the Chief Justice, and filed with the Supreme Court Clerk[.]" In addition to running the ankle monitoring program itself, the CCB also developed documents such as the "monitoring services agreement" and the "notice of violation" report, both non-AOC forms, that were utilized for the program. Based on the foregoing, we hold that the JCC's finding was supported by clear and convincing evidence.

(c) Judge Jameson improperly appeared before a legislative body and unethically affected the fairness of a public bidding process, but he did not engage in "bid rigging."

The JCC next found that Judge Jameson's appearances before the Marshall and Calloway County fiscal courts in March 2019 were improper and that he later used his position as judge to rig the public bidding process for those counties' ankle monitoring contract.

Judge Jameson testified several times that upon taking office he became dissatisfied with the existing ankle monitoring provider and procedure. Criminal defendants who were ordered to participate in GPS monitoring as a bond condition contracted directly with a private company, as the counties did not have a direct contract with an ankle monitor provider. Defendants were being charged approximately twenty dollars per day for monitoring services, making it unfeasible for most people, particularly those that were indigent, to use its monitors. In addition, Judge Jameson believed there were issues with both the speed and manner in which violations of ankle monitor conditions were being reported and the quality of the monitors being used, which were made of plastic.

According to the written statement Judge Jameson prepared for the JCC's informal hearing, he asked one of his law school interns "to look into the issue of provision of GPS devices: what the law was on the issue, if there was any, and then, look for an alternative solution for the provision of [those] devices." The intern's search found Track Group, and Judge Jameson met with a regional sales representative for Track Group for the first time on August 16, 2017. As a result of his discussions with that representative, he learned that Track Group could provide its services for a lower cost than the current providers and that its ankle monitor was made of "hardened steel."

In March 2019, Judge Jameson voluntarily appeared before the Calloway and Marshall County Fiscal Courts. He told the fiscal courts that he had an intern research ways to potentially lower the cost of ankle monitor services and that the intern found a company that was both a manufacturer of ankle monitors and a provider of monitoring services making its prices "extremely low." He further told them that a representative from the company was available to answer any questions the fiscal courts may have about the company's services and pricing. We note that Judge Jameson never identified Track Group by name during his presentation.

Judge Jameson also told the fiscal courts that their existing ankle monitoring process was illegal pursuant to KRS 67.372 and KRS 67.374. Specifically, he advised that the judicial system within a county is not permitted to place someone on an ankle monitor unless and until the county has a contract with an ankle monitor provider and that the contract for those services must come from a public bidding process. While discussing that the existing ankle monitoring process also did not have a sliding scale of payment responsibility for indigent defendants, Judge Jameson promoted his nonprofit corporation as an entity that could run the ankle monitoring program. He said:

> So, how do you come up with a contract where a judge gets to decide whether or not somebody has to pay a fee and how much is paid and then someone on the other side can count on still covering their costs and hopefully making some money. So what I had proposed to a couple of folks was we've recently created a community corrections board which is a statutory structure. . . And one of the things that our community corrections board specifically could do is be the contracting entity between the manufacturer or provider and the defendant themselves and that would be a way to do the reduced fees for the indigent and have the higher fee for the non-indigent individuals. I don't know how else to work that and keep the lower sort of numbers we were hoping to get.

After Judge Jameson's presentation was concluded, the fiscal court voted to move forward with public bidding process to obtain an ankle monitoring contract.

The Kentucky Code of Judicial Conduct, Canon 3, commands that "[a] judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office." Rule 3.2 then directs, in its entirety, that:

> A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:
>
> (A) in connection with matters concerning the law, the legal system, or the administration of justice;
>
> (B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or
>
> (C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity.

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

Comment [1] to Rule 3.2 explains that "[j]udges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials." However, Comment [2] cautions that

> [i]n appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

Accordingly, solely by way of example, if Judge Jameson had not been involved with the CCB and did not have a pre-existing relationship with Track Group, his appearances before the fiscal courts likely would have been permissible under Rule 3.2(A). He, as a sitting judge with special knowledge of these issues, had concerns about the existing ankle monitoring process and believed from his review of two statutes that the counties were violating the law. Under such circumstances, his presentation could have been considered a matter "concerning the law, the legal system, or the administration of justice[.]" Notwithstanding, even under such assumed facts, Judge Jameson should have been more cautious with his legal conclusions and made it clear to the fiscal courts that his interpretation of the relevant statutes could have been mistaken. This Court has been unable to locate any appellate court decision interpreting KRS 67.372 and KRS 67.374 to mandate a county to have an ankle monitoring contract in place before its court system may order an individual to be on an ankle monitor.[15] Judge Jameson should have therefore included the caveat that this is an unsettled area of the law rather than represent that his personal legal conclusions were correct.

[15] As the correctness of this legal conclusion has not been fully briefed or argued, and because such a ruling could impact other counties of the Commonwealth, it would not be appropriate for this Court to opine on it in this case. But it is important to note that the relevant statutes on this issue appear to be in conflict. KRS 67.372 and KRS 67.374 are housed under KRS Chapter 67 titled "County Government (Fiscal Courts and County Commissioners)." And the statues under Chapter 67 use permissive language around the subject of an ankle monitoring contract. *See*, *e.g.*, KRS 67.372 ("Any county or combination of counties **may** operate a global positioning monitoring system program. . ."); KRS 67.374(2) ("A county or combination of counties **electing** to participate in a global positioning monitoring system program shall. . .") (emphasis added). Yet the statues under KRS Chapter 431 and KRS Chapter 533 concerning ankle monitoring seem to require a county contract. *See*, *e.g.*, KRS 533.250(2)(a) ("[A] court ordering pretrial diversion may order the person to: Participate in a [GPS] monitoring system program through the use of a **county operated program** pursuant to KRS 67.372 and KRS 67.374. . ."); KRS 431.520(5)(a) ("During all or part of a person's period of release pursuant to this section, order the person to participate in a [GPS] monitoring system program **operated by a county** pursuant to KRS 67.370 and 67.374. . .") (emphasis added). At any rate, Judge Jameson's appearances before the fiscal courts were unethical in this case regardless of the accuracy of his legal conclusions.

Moving away from theoretical and into what actually occurred, Judge Jameson was the CCB's incorporator, was one of its three board members, and the CCB operated out of his judicial chambers. Based on his own statements to the fiscal courts, he clearly had an interest in having the CCB run the ankle monitoring program and wanted Track Group to be the ankle monitor services provider. Consequently, going before the fiscal courts in his capacity as a circuit court judge was inappropriate as he remained prohibited under Rule 3.2, Comment [2] from "using the prestige of office to advance [his] or others' interests" and from "engaging in extrajudicial activities that would appear to a reasonable person to undermine [his] independence, integrity, or impartiality." We therefore hold that the JCC's finding that his appearances before the fiscal courts were unethical was supported by clear and convincing evidence.

Next, concerning the bidding process itself, two months after Judge Jameson's appearances before the fiscal courts, he sent an email and an attached memorandum to Ernstberger, the Calloway County Attorney who prepared the RFP, with the subject line "Information regarding RFP for ankle monitoring services." The email read:

> My office has put together the following detailed information regarding the statutory requirements to have a proper GPS ankle monitoring system in place. We have also included in the attached document recommendations for terms to be included in the RFP, or at least, any final contract. I am submitting this for your review in hopes of having an RFP forthwith in order to begin addressing our large jail populations. Please advise if you need any additional information at all.

The section labeled "How program should function" in the attached memorandum stated, in pertinent part:

> Consistent with the presentations made to both the Marshall & Calloway County fiscal courts and discussions with all effected agencies, it is believed that the following should be included in the RFP:
>
> 1. **Ankle monitoring requirements.** That the RFP should also dictate that the provider make available ankle monitors that have all of the provisions as the Relialert XC3 manufactured by Track Group as well as the accompanying high risk offender bracelet equivalent to the Track Group 'Securecuff'[.]
>
> [. . .]
>
> 3. [. . .] Any contractor must also provide a victim alert system that can be operated via any smartphone by an alleged victim of criminal activity, and that system must work in conjunction with the offender's monitoring device in such a manner to alert the alleged victim of the presence of the offender within a specified distance of the offender. This technology should be substantially similarly (sic) to the "Empower" software provided by Track Group.
>
> [. . .]
>
> 6. **Alcohol monitoring device.** The contractor must also make available, at the request of the monitoring agency, a reasonable number of electronic devices similar in purpose to the "BACtrack" mobile device manufactured by Track Group.

On August 21, 2019, Judge Jameson emailed an example of a bid he received from Total Court Services, a different ankle monitor service provider, to Ed Brennen, Track Group's Regional Sales Representative. Judge Jameson requested that Brennen "[edit] out the lines that would prevent Track Group from being able to meet the RFP and send it back to me[.]" Brennen responded with an email and an attachment including "the specs [they] discussed[.]" That email exchange was then forwarded by Judge Jameson to Ernstberger on September 17, 2019.

On January 13, 2020, Judge Jameson sent an email to Brennen with an attachment titled "Ankle Monitor Program RFP prepared by Ernstberger.docx." The email read: "We FINALLY have a rough draft of an RFP directed at utilizing your products. I have attached it for your review. Please review closely to ensure that this RFP will not disqualify track group from bidding." On July 7, 2020, Judge Jameson sent an email to Ernstberger with an attachment titled "Ankle Monitor Program RFP prepared by Ernstberger (edit 1).docx."

> Attached is the final version of the RFP. While this document does not cover every piece of equipment that will be made available to the counties, it gets the job done so we can move forward. Please let me know if you have any questions. If not, please let me know when your respective county governments will be posting the RFP and any further developments.

Every page of the RFP attached to that email was essentially identical to the RFP issued by the fiscal courts. For example, the RFP issued specified, in accordance with the memorandum Judge Jameson sent to Ernstberger in May 2019, that the provider "must make available ankle monitors that have all of the minimum capabilities as the Relialert XC3 ankle monitor manufactured by Track Group" as well as an "accompanying high risk offender bracelet similar to the Track Group 'Securecuff" and must be able to make available upon request "a reasonable number of electronic devices similar in purpose to the 'BACtrack mobile' device manufactured by Track Group."

It was undisputed that no other potential bidders were permitted to suggest specifications regarding the language of the RFP, nor were they able to review and edit the RFP prior to its issuance. Indeed, a representative from Ensite, one of the providers that had been providing ankle monitoring services to defendants, contacted Judge Jameson on March 4, 2019, prior to either of his fiscal court appearances, and expressed Ensite's interest in continuing its ankle monitoring services for the counties and wanted to discuss "what the county might need to be included in a contract." Judge

Jameson responded,

> I have made the fiscal courts aware of the statutory requirements with regard to having ankle monitor services that are not currently being met. It is my understanding that, in order to provide those services, the county will be having to make some changes. I will be doing a presentation tomorrow on the subject. Where it goes from there remains to be seen. Thank you for reaching out.

Later, on July 29, 2020, eight days after the RFP was issued, Buddi US, LLC, a different ankle monitor company, sent a letter to the Calloway County Judge Executive concerning the RFP. In it, Buddi questioned whether the intent of the court was to receive competitive proposals from interested vendors because the fiscal courts had "listed requirements that are specific to a device that is manufactured and available by only one Original Equipment Manufacturer." After noting some of the specifications listed in the RFP, Buddi opined:

> These are specific to one vendor in the entire industry and as it is currently written, the RFP uses words like must and shall in describing requirements that indicate alternative functionality will not be considered. This means that no one but Track Group or their value-added resellers can submit a responsive proposal.

After receiving a response to its inquiries from Ernstberger, Buddi decided it "[wouldn't] make sense for Buddi to submit a response" to the RFP.

After being the driving force behind the fiscal court's decision to issue an RFP, Judge Jameson made suggestions directly to the county attorney responsible for preparing the RFP on what ankle monitor specifications should be listed therein, specifically, that only bidders who could provide equipment manufactured solely by Track Group would be considered. Judge Jameson also got to view the draft RFP and edit it before sending it back to the county attorney as "the final version." Judge Jameson did all of this with knowledge that his corporation, the CCB, would submit a responsive bid to the RFP that would utilize the Track Group monitor specifications that he suggested Ernstberger put in the RFP.

Based on the foregoing, we agree with the JCC's conclusion that Judge Jameson's unethically interfered with a public bid. However, we disagree with the JCC's conclusion that his conduct constituted "bid rigging" as that term is defined by the Kentucky Model Procurement Code. KRS 45A.325 defines bid rigging as "agreement or collusion **among bidders or prospective bidders** which restrains, tends to restrain, or is reasonably calculated to restrain competition by agreement to bid at a fixed price, or to refrain from bidding, or otherwise[.]" (Emphasis added). As explained by the U.S. Department of Justice, "In simple terms, bid rigging is fraud which involves bidding. It is an agreement among competitors as to who will be the winning bidder. Bid rigging occurs when a purchaser solicits bids to purchase goods or services. The bidders agree in advance who will submit the winning bid." *Preventing And Detecting Bid Rigging, Price Fixing, And Market Allocation In Post-Disaster Rebuilding Projects*, https://www.justice.gov/atr/preventing-and-detecting-bid-rigging-price-fixing-and-market-allocation-post-disaster-rebuilding (last accessed Aug. 2, 2024).

Here, there was no collusion amongst multiple bidders to determine the successful bid in advance. Rather, in what this Court must imagine is an extremely rare set of circumstances, a single bidder, the CCB, had exclusive insider access to the process of preparing the purchaser's RFP. The CCB, via Judge Jameson, used that insider access to ensure that its bid was tailor made to meet the RFP. While this conduct certainly unethically affected the fairness of a public bidding process and created the appearance of impropriety, it did not constitute bid rigging.

(d) Judge Jameson engaged in the direct solicitation of funds for the Re-Life project.

The JCC found that Judge Jameson "personally coordinated funding activities through the CCB and engaged in direct solicitation of contributions to fund construction of the [SUD] treatment facility." Rule 3.7 directs, in pertinent part:

> (A) Subject to the requirements of Rules 3.1 and 3.4, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:
>
> (1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;
>
> (2) personally soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority;
>
> […]
>
> (4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, even if the event serves a fundraising purpose, but may not personally engage in direct solicitation of contributions[.]

The JCC findings first state that Judge Jameson "personally coordinated funding activities through the CCB." Although the JCC does not expound further on this finding, we discern from elsewhere in its opinion that it is referring to Judge Jameson's actions in aiding the Fletcher Group with planning the fundraiser event held on May 20, 2021. Rule 3.7(A)(1) clearly states that a judge may assist a charitable, nonprofit organization "in planning related to fund-raising[.]" Consequently, to the extent the JCC found Judge Jameson committed misconduct by participating in the planning of the May 2021 Re-Life fundraising event, we disagree and will not consider that alleged misconduct when determining an appropriate sanction.

The JCC's findings go on to state that Judge Jameson engaged in the direct solicitation of contributions through the Re-Life website, a radio ad promoting the Re-Life fundraiser, and through emails. We address each in turn.

As previously noted, after the Fletcher Group became involved with Judge Jameson's goal of building an SUD treatment facility a website was created for the Re-Life project. Screenshots from the website were entered into evidence demonstrating that the website requested donations and that donations could be made on the site. Under a section titled "OUR HISTORY," the website read: "Re-Life is the dream of Marshall & Calloway County Circuit Court Judge, Jamie Jameson. Born out of a desire to address the overwhelming public health crisis in Benton, Murray, and all surrounding communities caused by substance abuse." And, under a section of the website titled "OUR TEAM," the website read:

> Judge Jameson chairs the 42nd Judicial Circuit Community Corrections Board, Inc., that is served by board members who make up our local criminal justice system, community service providers, and concerned citizens who have been personally impacted by SUD, or are aware of the seriousness of the problem and want to prevent SUD from changing [paragraph is cut off].

The JCC found that Judge Jameson "directed the creation of the Re-Life website for the CCB for the sole purpose of soliciting online donations." However, the JCC cites only the website itself as proof of this assertion and does not provide any citation to the video record that would support it. Judge Jameson testified that the Fletcher Group set up the website, and the JCC presented no evidence to rebut that claim. Of course, if the JCC had offered evidence demonstrating that Judge Jameson was responsible for the creation of the website or had directed that it be created, its finding of direct solicitation could be upheld. But, absent that proof, this Court cannot say that its finding was supported by clear and convincing evidence.

Next, a radio ad promoting the fundraiser began running locally on May 14, 2021. In the ad, an unknown male who was not Judge Jameson announced, in pertinent part, "On May twentieth, there's an informational forum and fundraiser for the Re-Life Project to bring a 100-bed in-patient drug treatment facility to the area. Former Governor Ernie Fletcher's Recovery Kentucky Group has teamed up with Judge Jamie Jameson and other leaders to help make this happen." The ad then played a brief pre-recorded statement from Governor Fletcher. The JCC found that "Judge Jameson was featured" in the ad. But, to be clear, only Judge Jameson's name and title were used.

Rule 3.7(A)(4) states that a judge may participate in activities sponsored by charitable nonprofit organizations, such as the Fletcher Group, and that a judge's participation in such activities may include "permitting his or her title to be used in connection with an event of such an organization or entity, even if the event serves a fundraising purpose, but may not personally engage in direct solicitation of contributions[.]" Accordingly, there was nothing unethical about Judge Jameson allowing his title to be used in connection with the Fletcher Group's fundraising event so long as the ad did not involve Judge Jameson's personal solicitation of contributions. At no point during the radio ad does Judge Jameson make "a direct

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

request. . . for financial support[.]" SCR 4.300, Terminology (defining "personally solicit"). We therefore hold that the JCC's finding that Judge Jameson engaged in the direct solicitation of financial contributions through the radio ad was not supported by clear and convincing evidence.

The final two findings of solicitation each related to emails Judge Jameson sent in relation to the Re-Life program and fundraiser. On May 10, 2021, before the Re-Life fundraiser was held, a program supervisor with the Department of Specialty Courts sent out a mass email to hundreds of people announcing an upcoming drug court graduation to be held on May 20. Judge Jameson "piggybacked" off the drug court email recipient list and sent an email to that list that stated:

> I would like to add that on the same night as graduation, we are hosting an informational/ fundraising event for the Re-Life Project. This is a joint venture of our local Community Corrections Board (which is also a 501(c)(3)) and the Fletcher Group, Inc., a nonprofit headed by former Governor Ernie Fletcher to bring a 100 bed long term [SUD] treatment and job skills facility to our circuit! . . . Please come and learn about just how devastating this problem is in our community and our plan to take it on! If you would like more info on this project, please go to www.re-life.us. This is the project website. It is not complete, but has more information about the project.

Rule 3.7 permits a judge to assist in the planning related to a fundraising event,[16] allows a judge's title to be used in connection with a fundraising event, and allows a judge to appear, speak, or receive an award or other recognition at a fundraising event.[17] However, nothing in Rule 3.7 allows a judge to "host" or personally promote a fundraising event. Comment [3] provides some guidance:

> Mere attendance at an event, whether or not the event serves a fund-raising purpose, does not constitute a violation of paragraph (A)(4). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

We accordingly agree with the JCC's finding of misconduct insofar as the rules of judicial ethics did not permit Judge Jameson to host a fundraising event, nor was he permitted to personally promote a fundraising event.

[16] Rule 3.7(A)(1).

[17] Rule 3.7(A)(4).

Last, a flyer was made to promote the Re-Life project. The full color flyer included a three- and one-half inch by two- and one-half inch headshot of Judge Jameson in his robe in the top right-hand corner. The body of the flyer stated: "With $2.7 million already pledged, we need just $3 million more to provide the recovery facilities our community needs to stop the cycle of reincarceration. Your generous donation can make a difference! –Kentucky 42nd Circuit Court Judge James Jameson[.]" Below that, the flyer said, "BE THE CHANGE. DONATE TODAY!" and provided contact information for the CCB. Below the CCB's contact information, the flyer stated that "[t]he 42nd Judicial Circuit Community Corrections Board is a 501c3 non-profit charity. Donations may be tax deductible."

Judge Jameson was confronted with the flyer during the JCC's final hearing and claimed that it was created by the Fletcher Group and that he had never seen it before that day. Counsel for the JCC later challenged Judge Jameson's claim that he had never seen the flyer by showing him an email he sent to a local attorney on May 10, 2021, that said, *inter alia*, "Attached is a one page promotional flyer that gives the general info regarding the project." The email also provided information about the "informational event/fundraiser" held for the Re-Life project on May 20. The promotional flyer was attached to the email, and the title for the attachment read "CALLOWAY AND MARSHALL COUNTY DONATION FLYER WITH JUDGE JAMESON PHOTO (March 9 V2).pdf[.]" Upon being confronted with the email Judge Jameson asserted, and continues to assert before this Court, that the email was something he "quickly forwarded" without looking at the attached flyer.

We hold that the JCC's finding that flyer constituted a personal solicitation of funds was supported by clear and convincing evidence. The flyer featured a photograph of Judge Jameson and a quote credited to him as "42nd Circuit Court Judge James Jameson" stating that an additional $3 million in funds were needed and that "[y]our generous donation can make a difference." This was clearly a direct request for financial support. Judge Jameson claimed that he never looked at the promotional flyer before sending it as an email attachment, but that is beside the point. As a judge he had a duty to conduct himself in a manner that avoided impropriety or the appearance of impropriety. Canon 1, Rule 1.2. This duty included taking the time to review a document that included "JUDGE JAMESON" and "DONATION FLYER" in its title before sending it to another person. Thus, he was responsible for the content of the attachment which he forwarded to others as a direct solicitation for donations.

(e) Judge Jameson submitted a grant application for an improper purpose.

The JCC's final findings of misconduct under Count I were that "Judge Jameson submitted a grant application to the Kentucky Department of Corrections seeking funding for an improper purpose on behalf of the CCB despite not qualifying with laws governing community corrections boards[,]" and that the use of his name on the grant application was "a blatant abuse of power in attempting to use the prestige of his office to influence a grant process operated by an executive branch agency in Kentucky."

As previously discussed, in March 2021, Judge Jameson filed a grant application with the State Corrections Commission, a division of the Department of Corrections, seeking funds to increase the hourly pay of the CCB's Director of GPS Services. Pursuant to KRS 196.710(1) the commission is vested with the authority to "award grants to community corrections programs in accordance with the policies established by KRS 196.700 to 196.735," i.e., the statutes governing community corrections programs and community corrections boards as explained *supra*. "Grants shall be awarded to community corrections programs whose community corrections program plans meet the requirements set forth in KRS 196.720 and which, in the commission's judgment, promise to meet the goals set forth in KRS 196.700 to 196.735." KRS 196.710(2).

As explained in Section II(E)(1)(a) of this Opinion, Judge Jameson's CCB was created for a purpose and in a manner that did not satisfy the statutory requirements of KRS 196.700, *et seq*. And, under KRS 196.710, grant money may only be awarded by the commission to community corrections programs that meet the plan requirements of KRS 196.720 and that will serve the policies established by KRS 196.700 to KRS 196.735. We accordingly agree with the JCC that it was legally impermissible for Judge Jameson to seek funding from the commission for any reason, including the purpose of increasing the pay of the CCB's director of GPS services. Notwithstanding we disagree with the JCC that Judge Jameson's act of simply putting his title of "circuit judge" on the grant application constituted a "blatant abuse of power" and, without more evidence, we cannot agree that doing so was an attempt to use the prestige of his office to influence a grant process.

However, the JCC found that Judge Jameson violated: **Canon 1, Rule 1.1:** "A judge shall comply with the law, including the Code of Judicial Conduct"; **Canon 1, Rule 1.2:** "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"; **Canon 1, Rule 1.3:** "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so"; **Canon 2, Rule 2.1:** "The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities"; **Canon 2, Rule 2.4(B):** "A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment"; **Canon 3, Rule 3.1(A):** "[W]hen engaging in extrajudicial activities, a judge shall not participate in activities that will interfere with the proper performance of the judge's judicial duties"; **Canon 3, Rule 3.1(C):** "[W]hen engaging in extrajudicial activities, a judge shall not participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality"; **Canon 3, Rule 3.1(D):** "[W]hen engaging in extrajudicial activities, a judge shall not engage in conduct that would appear to a reasonable person to be coercive"; **Canon 3, Rule 3.2:** "A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except in connection with matters concerning the law, the legal system, or the administration of justice; [or] in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties"; and **Canon 3, Rule 3.7(A)(4):** "Subject to the requirements of Rules 3.1 and 3.4, a judge may participate in activities . . .sponsored by or on behalf of. . .charitable . . . organizations not conducted for profit, including but not limited to the following

activities: appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, even if the event serves a fundraising purpose, but may not personally engage in direct solicitation of contributions."

Based upon our extensive review of Count I discussed above, we agree that Judge Jameson violated the foregoing judicial canons and rules.

2) Count II

The misconduct charged under Count II solely concerned the implementation and operation of the CCB's ankle monitoring program. The JCC found that Judge Jameson was the appointing authority for Kentucky Court of Justice (KCOJ) employees that he utilized to perform duties on behalf of the CCB, including drafting documents for the CCB, overseeing the GPS monitoring program, and reporting violations of the ankle monitoring program directly to him.[18] The JCC further found that Judge Jameson received direct notifications of alleged ankle monitor violations and, on more than one occasion, issued arrest warrants for ankle monitor program participants upon receipt of a notice of violation reports from CCB employees who were not KCOJ employees. Finally, the JCC found that Judge Jameson improperly ordered defendants who appeared before him in circuit court to participate in an ankle monitoring program run by the CCB, a corporation for which he held the titles of president and director and participated in its finances.

[18] The JCC cites to, but does not discuss, the testimonies of Dominik Mikulcik, Christine Pickett, Sarah Gipson, and Landon Norman, in support of this contention. But, to clarify, neither Gipson, Judge Jameson's administrative assistant, nor Norman, his staff attorney, ever testified that they performed any work for the CCB or the ankle monitoring program.

Dominik Mikulcik was one of Judge Jameson's staff attorneys and was a KCOJ employee. Although the CCB's articles of incorporation were filed by Judge Jameson, the document states: "This instrument was prepared by: Dominik Mikulcik, Staff Attorney to Judge James T. Jameson." Mikulcik initially asserted his Fifth Amendment right to remain silent regarding any work he performed in relation to the CCB, but he ultimately acknowledged doing legal research on ankle monitoring and community corrections programs during his employment with Judge Jameson and at Judge Jameson's direction.

Christine Pickett was never a KCOJ employee. Rather, she was initially a third-year law student doing an unpaid externship with Judge Jameson. Pickett testified that during her time as an extern, Mikulcik asked her to prepare a spreadsheet for participants in the CCB's ankle monitoring program that covered, "what payments they had made thus far, how much they owed, [and] when their next payment was going to be." Pickett said she compiled the spreadsheet over a weekend and not during her extern hours. Mikulcik reviewed the document and then showed it to Judge Jameson, who immediately offered Pickett the position of director of GPS services for the CCB.

Pickett testified that Judge Jameson was her direct supervisor in her role as director of GPS services and that she was compensated via checks, at least some of which were signed by Judge Jameson. Her duties as director included monitoring participants in the ankle monitoring program; collecting money from the clerks paid by the participants; keeping track of how much money participants in the program had paid; directly communicating with defendants, the jails, and Track Group; and helping victims set up the Empower application[19] on their phones.

[19] The Empower application, provided by Track Group, works in conjunction with a defendant's ankle monitor to inform an alleged victim if the defendant is near them.

Concerning the ankle monitoring program itself, Pickett testified that after a defendant was ordered by Judge Jameson to be placed on an ankle monitor either she or Mikulcik would prepare the monitoring services agreement for the defendant and deliver it to the jailer. After the defendant was placed on an ankle monitor, Pickett was responsible for monitoring the individual and ensuring they compiled with the monitoring services agreement. In addition to Pickett, Judge Jameson, Mikulcik, two Track Group employees, and 911 dispatch received immediate notifications of violation alerts from the Track Group electronic monitoring program. Pickett would contact a defendant as soon as she received a violation alert. For less serious alerts, such as a low battery, Pickett would resolve the issue with the defendant herself. For more serious alerts, such as a defendant attempting to cut their ankle monitor off or being near the alleged victim, she would contact law enforcement and Judge Jameson, if he did not contact her first. Neither the commonwealth's attorney nor the defendant's attorney would be contacted at the time an alleged violation was occurring, but, if a violation report was issued, they were sent a copy of the report after the situation with a defendant had been resolved. Pickett initially created a form to be used as the CCB's violation report. Judge Jameson reviewed the form and suggested changes which Pickett incorporated resulting in the form that the CCB issued when a violation occurred.

The JCC also presented evidence from three criminal cases in which Judge Jameson directed the circuit clerk's office to issue a bond violation warrant for a participant in the GPS monitoring program.

On April 13, 2021, Pickett sent Judge Jameson an email that read: "[Trever Tucker] has missed payments for his ankle monitor and has failed to communicate with the Corrections Board on numerous occasions. The Community Corrections Board is requesting a warrant." It appears that a notice of violation report was sent as an attachment to the email, but the report itself was not included in the record before us. On the same day, Judge Jameson forwarded Pickett's email and violation report to the Marshall County Circuit Clerk's Office with the message "Please issue a bond violation warrant." Two days later Judge Jameson forwarded Pickett's email and attachment again, this time to the Marshall County Circuit Clerk's Office and Chris Freeman, an individual from Marshall County 911 dispatch, with a message that said, "This is our first ankle monitor violation. Please issue a bond violation warrant. Chris, I spoke with Chief Reynolds already about this. The plan is to get him today if possible before he knows about the warrant, etc."

On June 10, 2021, Madison Dorris, Pickett's successor as the CCB's director of GPS services, emailed Judge Jameson a violation report for Amber Fralix. Judge Jameson forwarded the violation report to the Marshall County Circuit Clerk's Office with a message stating "Please issue a warrant for Ms. Fralix." And, on October 8, 2021, Judge Jameson sent an email directly to the Marshall Circuit Clerk's Office that read, "We need to issue an arrest warrant for Tina Mull based on alleged bond condition violations. Specifically, a GPS violation. This is time sensitive. Please issue immediately." That email did not include a notice of violation report.

Finally, it was undisputed that as a circuit court judge, Judge Jameson had the responsibility of deciding whether a defendant should be released on bond and whether a condition of that bond should include participation in GPS monitoring. Once he made that ruling, he would require qualifying defendants to enter into an agreement to pay the CCB, of which Judge Jameson was the president, incorporator, and one third of the board, for the privilege of using the ankle monitor. The JCC also presented evidence that, despite Judge Jameson presiding over cases where he ordered defendants to pay the CCB, he signed checks on behalf on the CCB that were distributed to, for example, Pickett, the Marshall and Calloway Sheriffs Offices, the Marshall County Detention Center, Marshall County 911, the Calloway County Fiscal Court, and Track Group. Although Judge Jameson was never accused of mishandling or misusing any CCB funds, the appearance of impropriety this process created was blatant and extreme and Judge Jameson himself conceded its impropriety. Accordingly, the JCC proved his allegation by clear and convincing evidence.

Based on the foregoing, the JCC also presented clear and convincing evidence that Mikulcik, a KCOJ employee for whom Judge Jameson was the appointing authority, drafted the CCB's articles of incorporation, conducted legal research for the benefit of the CCB, prepared monitoring services agreements for participants in the ankle monitoring program, and received real time violation alerts for participants in the ankle monitoring program. And, while Pickett was not a KCOJ employee, she was hired by Judge Jameson to be an employee of a corporation for which he served as president. Pickett was therefore subject to Judge Jameson's direction and supervision. The JCC's evidence demonstrated that Pickett was primarily responsible for monitoring the participants in the CCB's program and that she sent notice of violation reports directly to Judge Jameson, who then issued arrest warrants for the violations.

The JCC further proved by clear and convincing evidence that Judge Jameson received direct notifications of ankle monitor violation alerts and, on at least three occasions, ordered arrest warrants to be issued upon receipt of a violation report from Pickett or Dorris, who were both employees of a corporation for which Judge Jameson served as

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

president. We want to be clear for the benefit of other judges in the Commonwealth that, under normal circumstances, KRS 431.520(9) permits a judge to order the arrest of a defendant upon being advised that a defendant has not complied with the conditions of his or her release, and that statute does not specify from whom that information must come. *See also* RCr 4.42(1) ("If at any time following the release of the defendant and before the defendant is required to appear for trial the court is advised . . . that the defendant has not complied with all conditions imposed upon his or her release, the court having jurisdiction may order the defendant's arrest[.]"). However, under the set of highly unusual circumstances presented by this case, it was not appropriate or ethical for Judge Jameson to issue arrest warrants based solely on information that came from an employee of his own corporation.

The JCC found that Judge Jameson violated the following rules of judicial conduct in relation to Count II: **Canon 1, Rule 1.1:** "A judge shall comply with the law, including the Code of Judicial Conduct"; **Canon 1, Rule 1.2:** "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"; **Canon 1, Rule 1.3:** "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so"; **Canon 2, Rule 2.1:** "The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities"; **Canon 2, Rule 2.2:** "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially"; **Canon 2, Rule 2.4(B):** "A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment"; **Canon 2, Rule 2.9(C):** "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed"; **Canon 2, Rule 2.12(A):** "A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code"; **Canon 3, Rule 3.7(6)(a):** "[A] judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities: serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity will be engaged in proceedings that would ordinarily come before the judge[.]"

Based on the JCC's findings of fact, which we hold were supported by clear and convincing evidence, we agree that Judge Jameson violated the foregoing rules of judicial conduct.

3) Count III

Under Count III the JCC found, broadly, that "Judge Jameson mismanaged his courtroom, engaged in acts of retaliation, and deviated from acceptable standards of judicial conduct." Count III then covers varied allegations of misconduct that can be broken down into four general allegations: (1) that Judge Jameson violated the principles of constitutional separation of powers by ordering individuals to participate the ankle monitoring program provided by the CCB; (2) that Judge Jameson abused his contempt powers and otherwise displayed behavior towards persons in his courtroom that was not patient, dignified, or courteous; (3) that Judge Jameson pressured an attorney who regularly appeared before him in court to file a bar complaint against another attorney; and (4) that Judge Jameson engaged in two acts of retaliation.

(a) Judge Jameson violated the constitutional principles of separation of powers.

The JCC first found under Count III that Judge Jameson violated the doctrine of separation of powers by ordering individuals to participate in pre-trial ankle monitoring services provided by a corporation for which he served as president and one third of the board. It is important to note that the JCC's charging documents never explicitly charged Judge Jameson with a separation of powers violation under Count III. Rather, the notice of formal proceedings and charges state that Judge Jameson "deviated from acceptable standards of judicial conduct including but not limited to. . . ." Nevertheless, based on the discussion of the evidence provided under Count II, the evidence was clear and undisputed that Judge Jameson, an elected judicial branch official, ordered defendants that appeared before him to participate in the ankle monitoring program ran by the CCB, a corporation for which Judge Jameson was the president and one third of the board. The supervision of defendants who have been conditionally released from custody is traditionally an executive branch function. We therefore hold that the JCC's finding was supported by clear and convincing evidence even though it failed to explicitly charge a separation of powers violation.

(b) Under the specific facts in this case, the JCC was without jurisdiction to pursue charges against Judge Jameson for the alleged abuse of his contempt powers.[20]

[20] As with the JCC's allegation that Judge Jameson violated the doctrine of separation of powers, this Court is concerned that the JCC's charging documents do not specifically allege that Judge Jameson abused his contempt powers under Count III. However, each of the video records concerning the abuse of contempt allegations were played at Judge Jameson's temporary removal hearing without objection. He therefore had actual notice of these allegations and was able to present a defense in relation to them during the final hearing. Hoefle or Goard themselves filed a judicial complaint against Judge Jameson and neither individual testified during the JCC's proceedings.

The JCC next alleges under Count III that Judge Jameson abused his contempt powers against a man named Richard Hoefle in January 2018 and against Marshall County Deputy Jailer Sean Goard in November 2020.[21] Judge Jameson held Hoefle in direct criminal contempt after he made several outbursts during a hearing on the Commonwealth's motion to void his granddaughter's pretrial diversion. Deputy Jailer Goard was held in civil contempt for his failure to honor a court order issued by Judge Jameson to accept a defendant into the jail's custody after she arrived at her sentencing hearing under the influence of methamphetamine. This Court's review of the video records concerning Hoefle and Goard does not bear out the JCC's finding that Judge Jameson conducted himself in a manner that was not patient, dignified, and courteous in his interactions with Hoefle and Goard. And, there is no evidence of record that Hoefle or Goard appealed Judge Jameson's findings of contempt to an appellate court, nor is there any evidence that Hoefle or Goard themselves filed a judicial complaint against Judge Jameson and neither individual testified during the JCC's proceedings.

[21] The JCC also cites the cases of Danny Dale and William McAlpin in its factual summary of this issue but does not make any findings of fact in relation to those cases. This Court therefore will not consider them.

As noted *supra*, SCR 4.020(2) states that "[a]ny erroneous decision made in good faith shall not be subject to the jurisdiction of the Commission." This Court has previously expounded "that 'erroneous decision' is a term of art which refers to *judicial* decisions made by judges in the course of their official duties." *Summe v. Jud. Ret. & Removal Comm'n*, 947 S.W.2d 42, 48 (Ky. 1997). And, that the purpose of SCR 4.020(2) is to ensure that errors made by judges in their official capacities that are not "gross and persistent" could be solved via the appellate process rather than sanctions by the JCC. *See Nicholson*, 562 S.W.2d at 310. This rule accordingly serves the limitation set out in Scope [5] of SCR 4.300, which directs that "[t]he Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions." The judges who serve in our district and circuit courts make hundreds of rulings every week and have innumerable encounters with the individuals present in their courtrooms. In accordance with the foregoing principles, they should remain free to make potentially erroneous rulings in good faith without having "to keep one eye on their reversal rate and the other on the Commission." *Nicholson*, 562 S.W.2d at 310.

A judge's discretion to exercise his or her contempt powers in particular is "nearly unlimited,"[22] because that power goes to the heart of a judge's ability to maintain order in his or her courtroom and to sanction willful disobedience to their orders. Indeed, the only previous instances of the JCC attempting to sanction a judge for the exercise of their contempt powers are *Gormley v. Judicial Conduct Comm'n*, 332 S.W.3d 717 (Ky. 2010) and *Hinton v. Judicial Retirement and Removal Comm'n*, 854 S.W.2d 756 (Ky. 1993), *overruled on other grounds by Gormley v. Judicial Conduct Commission*, 332 S.W.3d 717 (Ky. 2010).

[22] *Meyers v. Petrie,* 233 S.W.3d 212, 215 (Ky. App. 2007) (citing *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky.App.1986)).

In *Hinton*, Judge Hinton presided over the trial of Patrick Huron, who was accused of murder. 854 S.W.2d at 757. Virgil and Shirley Dermon, a married

couple, were present at the time of the murder and Virgil's gun was the murder weapon. *Id.* The couple hired Anderson, an attorney, to represent them as witnesses in the case. *Id.* During the trial, Judge Hinton was informed that Virgil would be claiming his Fifth Amendment right not to testify, and that Shirley was refusing to testify under a claim of spousal privilege. *Id.* Judge Hinton ostensibly held Shirley in contempt based on her refusal to testify. *Id.* The following day, when Anderson discovered Shirley was being held in contempt, there was a bench conference and following a two-minute exchange about it, Judge Hinton held Anderson in contempt and sentenced him to three days in jail; he was released later that day. *Id.* at 757-58.

Anderson did not appeal Judge Hinton's ruling to hold him in contempt, but he thereafter filed a judicial complaint with the JCC. *Id.* at 758. The JCC found that Judge Hinton committed misconduct by summarily jailing Anderson for contempt and ordered that he be publicly reprimanded. *Id.* at 757-58. This Court reversed the JCC's ruling and set it aside; it reasoned:

> It is the responsibility of the trial judge to maintain control of the courtroom and sometimes that must be done by a legitimate exercise of the contempt power.
>
> The decision by Judge Hinton not to permit Anderson to appear on behalf of the witnesses after Anderson had failed to comply with local rules of procedure by filing an entry of appearance or pretrial motion was not arbitrary. His subsequent decision to hold Anderson in contempt was the result of judicial discretion; there was no abuse of discretion. **The proper remedy for correcting an alleged abuse of discretion is by appeal**. Anderson, as a nonparty contemner, could have sought review by means of appeal but he did not do so.

Id. at 759 (emphasis added).

In *Gormley*, there was a scheduled hearing before Judge Gormley on a *pro se* motion by a wife to modify the no contact provision of a domestic violence order previously entered against her husband. 332 S.W.3d at 721. The parties, though represented, arrived for the hearing without counsel. *Id.* While the parties were waiting in the hallway, the bailiff informed Judge Gormley that the husband spoke to the wife and tried to get her to leave the courthouse. *Id.* Judge Gormley called the parties into the courtroom and—without informing the husband that it was a criminal contempt hearing, that he had the right to counsel, that he had the right to remain silent, and that his statements could be used against him—proceeded to hold an indirect criminal contempt hearing. *Id.* Judge Gormley called one witness to discuss the contact made in the hallway and did not allow the husband to question the witness. *Id.* Judge Gormley also questioned the husband under oath, who admitted the contact in the hallway as well as contacting the wife at her home the previous night at her request. *Id.* Following the hearing, Judge Gormley held the husband in criminal contempt and sentenced him to six months imprisonment. *Id.*

The husband appealed Judge Gormley's ruling to the Court of Appeals, which reversed and remanded "for an appropriate evidentiary hearing concerning all the allegations of contempt." *Id.* The JCC later charged and found Judge Gormley guilty of several counts of misconduct, including a count related to the misuse of her contempt powers. *Id.* This Court affirmed the JCC's ruling and rejected Judge Gormley's claim that SCR 4.020(2) shielded her from being found guilty of misconduct. *Id.* at 726. The JCC first found that Judge Gormley's ruling was legally wrong, as summary proceedings are not an appropriate means to hold someone in indirect criminal contempt. *Id.* It went on to hold that she also acted in bad faith:

> Finding Judge Gormley clearly erred on the law is only the first half of the analysis. Judge Gormley, citing SCR 4.020(2), asserts that she made the decision in good faith and cannot be subject to the Commission's jurisdiction for good faith, but erroneous, decisions. To err is human. Our present Kentucky Constitution, Section 115, recognizes that a judge may err by providing most judgments are subject to at least one appeal. **A party that believes the judge erred has the right to appellate review to seek a change in the judgment—that is judicial review. If the judge erred, the judgment can be corrected**. Incompetent judges can be eliminated at the ballot box.
>
> Judicial misconduct is different. The Judicial Conduct Commission's review is not focused merely on the judge's findings, conclusions, and ultimate judgment, but on the judge's demeanor, motivation, or conduct in following (or in not following) the law.
>
> The Commission conducted its review and concluded the errors in Count I were so egregious that Judge Gormley could not claim the errors were made in good faith. We believe Judge Gormley's handling of the matter, together with the egregious rulings, displayed a bias or preconception or a predetermined view against the husband so as to impugn the impartiality and open-mindedness necessary to make correct and sound rulings in the case. In other words, we agree with the Commission's implicit finding that Judge Gormley acted in bad faith.

Id. at 726-27 (emphasis added). The *Gormley* Court went on to hold that "a judicial officer may be sanctioned if the judge committed at least one serious, obvious, egregious legal error that is clearly contrary to settled law." *Id.* at 728. This was the portion of the opinion that overruled *Hinton*, which the *Gormley* Court interpreted to hold that a judge must engage in a pattern of misconduct before he or she could be sanctioned by the JCC. *Id.* at 727.

The common thread running through *Hinton* and *Gormley* is that an individual who has been held in contempt, and believes that ruling to be erroneous, should first seek review of the ruling with an appellate court, not the JCC. Given Scope [5] of SCR 4.300's directive that the rules of judicial conduct "should not be interpreted to impinge upon the essential independence of judges in making judicial decisions[,]" a clear standard is necessary. We accordingly hold that, in the absence of an appellate court ruling that a judge has improperly exercised his or her powers of contempt and in the absence of an allegation that a judge has made erroneous rulings that were "gross and persistent," the JCC is precluded by SCR 4.020(2) from charging a judge with misconduct in relation to the exercise of his or her contempt powers.

In this case, neither Hoefle nor Goard appealed the very distant in time rulings made by Judge Jameson which found them to be in contempt, and there has been no appellate court ruling that he abused his discretion by exercising his contempt powers against them. The JCC was therefore without jurisdiction to charge Judge Jameson with misconduct in relation to the abuse of his contempt powers.

(c) Judge Jameson pressured an attorney to file a bar complaint against another attorney.

Judge Jameson has consistently maintained throughout these proceedings that the judicial complaints filed against him were the result of a political conspiracy to harm his reputation and ensure he would not win his bid for re-election. Lisa DeRenard, a local solo practitioner, testified that on January 19, 2022, she was approached by a local public defender, Amy Harwood-Jackson. Both attorneys regularly practiced in Judge Jameson's court. According to DeRenard, Harwood-Jackson engaged in a "hateful rant" about Judge Jameson and told DeRenard that she and a few other people intended to file multiple judicial complaints against Judge Jameson. Harwood-Jackson further told DeRenard that they were looking for someone neutral to make a Facebook post about the number of complaints against him. DeRenard declined to do so.

On May 4, 2022, a "flustered" and "upset" Judge Jameson called DeRenard and informed her that multiple judicial complaints had been filed against him and asked her what she knew about them. DeRenard then recounted the conversation she had with Harwood-Jackson in January to him. DeRenard testified that Judge Jameson was upset with her for not telling him about her conversation with Harwood-Jackson sooner and explained:

> I felt like he was guilt tripping me about not telling him back in January or February or March or April and he was telling me that what I needed to do was file a bar complaint against [Harwood-Jackson]. That if I couldn't file a bar complaint to at least contact the commission and let the commission know about this situation[.]

DeRenard testified she was "horrified" at Judge Jameson's request to file a bar complaint against Harwood-Jackson and that she did not want to do that, but she feared not doing anything because she still had clients with pending cases before him. DeRenard elected to contact the JCC's investigator and gave a statement.

The JCC's finding that Judge Jameson attempted to pressure DeRenard into filing a bar complaint against Harwood-Jackson was accordingly supported by clear and convincing evidence.

(d) Judge Jameson engaged in two acts of retaliation.

The JCC last alleged under Count III that Judge Jameson engaged in two acts of retaliation. The circumstances surrounding these acts of retaliation are discussed in more detail under Count VII below which we hold was supported by clear and convincing evidence. For our purposes here, the evidence clearly demonstrated that, after a rumor began spreading concerning security footage of Judge Jameson walking around the Marshall

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

County courthouse in his underwear, he engaged in acts of retaliation against two individuals in relation to that video.

The first individual was Chad Lampe, a radio station manager at MSU. After the radio station filed an open records request for access to the security footage, Judge Jameson called the president of MSU and informed him about the open records request. Judge Jameson then asked Lampe to call him and told Lampe during that call that he had already spoken with the president and that the president was not happy about the open records request. Lampe testified that he was later made to give an accounting of his conversation with Judge Jameson to his direct supervisor and MSU's provost, who answers only to the president. Lampe testified that he soon after left his employment with MSU and that, although the situation that occurred with Judge Jameson was not the sole reason he left, it "accelerated [his] departure."

The second individual was Sergeant Jeff Daniel, the head of security for the Marshall County courthouse. After the rumor about the security footage began to spread, Judge Jameson became convinced that Sergeant Daniel was the individual that informed media outlets of its existence. Judge Jameson first complained to the sheriff's department about Sergeant Daniel in an attempt to have him removed from the Marshall County courthouse. The sheriff's department treated Judge Jameson's request as an official complaint and investigated Sergeant Daniel. It found no evidence of wrongdoing and informed Judge Jameson that he could not be removed absent a finding of misconduct. When that did not work, Judge Jameson complained to the sheriff that he feared Sergeant Daniel might plant evidence in his office or "do something" in his courtroom. The sheriff testified that, based on Judge Jameson's continued complaints, he reassigned Sergeant Daniel. Although the sheriff continued to believe Sergeant Daniel had not and would not commit such misconduct, he was forty-five days out from retirement and was a "chain of command" officer who would not fight the decision to reassign him.

Based on the foregoing, the JCC's finding that Judge Jameson engaged in two acts of retaliation was supported by clear and convincing evidence.

The JCC found that Judge Jameson violated the following rules of judicial conduct in relation to Count III: **Canon 1, Rule 1.1:** "A judge shall comply with the law, including the Code of Judicial Conduct"; **Canon 1, Rule 1.2:** "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"; **Canon 2, Rule 2.2:** "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially"; **Canon 2, Rule 2.3(A):** "A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice"; **Canon 2, Rule 2.3(B):** "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so"; **Canon 2, Rule 2.4(B):** "A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment"; **Canon 2, Rule 2.8(B):** "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control."[23]

[23] To clarify, while Judge Jameson did not violate this rule in relation to Hoefle or Goard, it was undignified of him to ask DeRenard to file a bar complaint against Harwood-Jackson. His actions concerning Sergeant Daniel were likewise undignified.

We agree with the JCC's findings that Judge Jameson violated the foregoing canons and rules under Count III, save for two. First, there was no evidence that Judge Jameson violated Canon 2, Rule 2.3(A). Comment [2] to Rule 2.3 provides that:

> Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

The JCC presented no evidence that Judge Jameson displayed such bias or prejudice in the performance of his judicial duties. In that vein, Canon 2, Rule 2.3(B) also forbids a judge to display bias or prejudice in the performance of their judicial duties and further forbids them to engage in harassment. Comment [3] to Rule 2.3 defines harassment as "verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." Again, the JCC presented no evidence that Judge Jameson engaged in such conduct.

4) Count IV

Under Count IV, the JCC found by a vote of 5-0 that "Judge Jameson used his influence and the prestige of his judicial office to pressure persons to donate to or support his political campaign," and that this finding was supported by the testimonies of Lisa DeRenard and Landon Norman. The JCC found that Judge Jameson improperly solicited campaign donations from DeRenard during a December 15, 2021, phone call and thereafter contacted her on "several other occasions in March of 2022" requesting her attendance at campaign events and seeking additional financial support. The JCC noted that DeRenard felt pressured to donate because she had pending felony criminal cases in Judge Jameson's court. The entirety of the JCC's findings concerning Norman were that "Landon Norman testified that during his initial interview for the position of staff attorney for the 42nd Judicial Circuit, the subject of Judge Jameson's campaign was raised. Mr. Norman testified that, in response to the subject, he indicated he would be glad to assist with Judge Jameson's campaign."

Based on the foregoing, the JCC found that Judge Jameson violated Canon 1, Rule 1.1;[24] Canon 1, Rule 1.2;[25] Canon 1, Rule 1.3;[26] and Canon 4, Rule 4.1(A)(8).[27] After thorough review, we hold that the factual record is insufficient to uphold the JCC's findings of misconduct under Count IV and dismiss it in its entirety.

[24] "A judge shall comply with the law, including the Code of Judicial Conduct."

[25] "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

[26] "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

[27] "Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not . . . personally solicit or accept financial or in-kind campaign contributions other than through a campaign committee authorized by Rule 4.4[.]" We note that the JCC's supplemental order lists this as a violation of "Canon 4, Rule 4.8," which does not exist. Based on context and the language in the order, we discern that the JCC intended to list Rule 4.1(A)(8).

We begin with Judge Jameson's alleged misconduct of asking Lisa DeRenard to support his campaign. DeRenard testified that Judge Jameson called her on her personal cellphone on December 15, 2021. He first asked after her wellbeing, as a devastating tornado had recently hit the area. He then informed her that someone had filed to run against him in the upcoming election. DeRenard testified about the conversation as follows:

> I asked who [was running against him], and he told me the name of the person and said that he needed support, and he was asking me for my support. . . He did describe to me what his goals were in the future for continuing treatment for people who are criminally accused, you know, basically telling me what he's running on for his campaign. But I got from the conversation that he was very hurt that someone was running against him, that he really loves his job, and that he needed support. And I said, "Well you say support, what do you mean by that? Are you asking for money?" And he kind of laughed and said, "Well, yeah, that would help."

Later, on cross-examination concerning the December 2021 phone call, DeRenard testified as follows:

> **Counsel:** The person that brought up whether money was involved was you.
>
> **DeRenard:** Yes.

> **Counsel:** [Judge Jameson] did not say, "Hey Lisa I need you to give me money."
>
> **DeRenard:** No, he did not use that term he said support.

DeRenard agreed with Jameson's counsel that "support" could mean many things apart from a financial contribution.

During the December 2021 conversation, DeRenard told Judge Jameson that she could only afford to donate $250 at that time but if she could afford to donate additional money later, she would. Judge Jameson requested that she send the money to his campaign committee and gave her the contact information to do so. DeRenard testified that she interpreted his request to mean a financial contribution and felt as though she could not decline his request because she had clients with pending felony criminal cases in his court. She further stated that she would not have otherwise donated to his campaign, nor anyone else's campaign, at that time because she had been financially affected by the tornado, it was ten days before Christmas, and her young grandchild had recently contracted COVID.

Despite the JCC finding that Judge Jameson called DeRenard "several" times in March 2022, DeRenard only testified about two phone calls that occurred that month. DeRenard testified that the first phone call, on March 4, concerned yard signs and an upcoming campaign event at Pagliai's Pizza in Murray. DeRenard testified that Judge Jameson asked her if she wanted a yard sign during the March 4 phone call. She said she told him that it would be futile to put a yard sign in the yard of her home because she lived on a dead-end street but offered to put one in her office window where it would be seen by more people. DeRenard testified she was unable to go to the event at Pagliai's, so she donated an additional $250 through Judge Jameson's campaign website.

DeRenard then testified that later in March, on an unspecified date, Judge Jameson called her again and requested her attendance at a different campaign event at Marcella's Kitchen in Benton. She also claimed that during this call Judge Jameson asked her to ask her office building's landlord if he could place a larger sign at an intersection on the building's property. She claimed that on the same day he requested this, she spoke with her landlord who approved of the sign being placed.

Finally, DeRenard testified about an email she received from Judge Jameson's campaign committee promoting the Marcella's Kitchen event. The flyer stated that $250 was a minimum contribution and $900 was an average contribution. Based on that flyer she donated an additional $400 so that she would be considered an "average" donor. She also attended the Marcella's Kitchen event and gave an impromptu speech in support of Judge Jameson at the event.

The primarily applicable judicial rule to address this alleged misconduct is SCR 4.1(A)(8) which states that "(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not . . . personally solicit or accept financial or in-kind campaign contributions other than through a campaign committee authorized by Rule 4.4[.]" The "terminology" section of SCR 4.300 defines "personally solicit" as "a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, social media, or any other means of communication."

Preliminarily, we note that there was evidence of record that contradicted DeRenard's version of events. Included in the evidentiary record is a screenshot of three text messages DeRenard sent Judge Jameson on March 3, the day before she claimed the first call in March 2022 occurred. The first text message from DeRenard in that exchange said she had asked her landlord that day if Judge Jameson could place a sign on the building's property and that her landlord approved. The second text message provided her "personal email contact where [she] would want to receive info on events[.]" And the third said, "I am requesting a yard sign to put in my window please let me know if I would need to pick it up and if so where. Thanks. Lisa DeRenard." In addition, on March 6, DeRenard and Judge Jameson's wife exchanged several Facebook messages. In one of those messages DeRenard said, "[H]ope you got my message that [my landlord]. . . approves of Jamie putting his signs there and I need a yard sign for my office window."

More importantly, based on DeRenard's own testimony, Judge Jameson did not make a direct request for a financial campaign contribution. Rather, he asked for her "support," and she brought up the subject of a monetary contribution. The question, then, is whether it was ethical for Judge Jameson to not reject her suggestion that she make a financial contribution to his campaign and thereafter direct her to send the funds to his campaign committee. We hold that it was.

While there is no published case law addressing this specific set of circumstances, we note that the facts of this case are not like those of *Alred v. Commonwealth, Judicial Conduct Comm'n*, 395 S.W.3d 417 (Ky. 2012) or *Gentry*, *supra*, both of which affirmed a JCC finding that a judge had personally solicited money.

In *Alred*, Judge Alred had filed a complaint against Kentucky Utilities (KU) with the Public Service Commission. 395 S.W.3d at 444. He later decided to dismiss the complaint and contacted counsel for KU on the phone to inform him or her of his intention. *Id.* During that phone call "he urged counsel for KU to agree to donate $12,500 for playground equipment at the elementary school that [his] children attended." *Id.* This Court affirmed the JCC's finding that "Judge Alred personally solicitated (sic) the donation from counsel for KU." *Id.* In *Gentry*, this Court upheld the JCC's finding that Judge Gentry, a family court judge, coerced members of her GAL[28] panel to donate the maximum amount to her campaign. 612 S.W.3d at 836. As Judge Gentry stipulated to this misconduct, the factual details are omitted from the *Gentry* Opinion. But the JCC found that based on Judge Gentry's testimony and the totality of the evidence "she had clear expectations of the level of participation by her panel members as to . . . money contributed . . . and insufficient participation led to retaliation." *Id.*

[28] Guardian ad litem.

Moreover, in *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015), the United States Supreme Court addressed a First Amendment challenge to Florida Canon of Judicial Conduct 7C(1), which is substantially similar to SCR 4.1(A)(8).[29] The Court concluded that the canon served a compelling state interest in preserving the integrity of the judiciary and was not overly restrictive because it

> restricts a narrow slice of speech . . . Canon 7C(1) leaves judicial candidates free to . . . write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, "Please give me money." They can, however, direct their campaign committees to do so.

Id. at 452. Indeed, Comment [5] to SCR 4.1 directs that "[t]hese Rules do not prohibit candidates from campaigning on their own behalf."

[29] The Florida Canon states that candidates for judicial office "'shall not personally solicit campaign funds . . . but may establish committees of responsible persons' to raise money for election campaigns." 575 U.S. at 433.

Accordingly, there was nothing unethical about Judge Jameson contacting DeRenard and asking for her "support." Further, there is nothing in the rules of judicial ethics that required him to reject DeRenard's offer of a monetary donation in response to his request for support. Apart from requesting a monetary donation, the rules only prohibited him from personally accepting a financial donation, which he did not do. Rather, it was undisputed that he directed DeRenard to send her donation to his campaign committee. While we understand and acknowledge DeRenard's testimony that she felt pressured to make a monetary donation, it would be inappropriate to conclude that Judge Jameson committed misconduct based solely on DeRenard's subjective belief that he meant a financial contribution when her own testimony was that he only requested her "support."[30]

[30] Although it was not directly addressed by the JCC, we further note for clarity that there was nothing unethical about the flyer for the Marcella's Kitchen campaign event providing recommended contributions, as that flyer states that the event was "organized and carried out by the Committee to Re-Elect Judge Jamie Jameson" and was emailed to DeRenard by Judge Jameson's wife.

Next, concerning Landon Norman, one of Judge Jameson's staff attorneys, we reiterate that the JCC found Judge Jameson to have violated, *inter alia*, SCR 4.1(A)(8), which prohibits the personal solicitation of campaign contributions, and note that the "terminology" section of SCR 4.300 defines "contribution" as "both financial and in-kind contributions, such as . . . volunteer services . . . which, if obtained by the recipient otherwise, would require a financial expenditure." Therefore, Judge Jameson's alleged misconduct, if proven, could have fallen under this rule. But an equally if not more applicable rule, which the JCC did not address, is Rule 4.1(A)(10), which states: "Except as permitted by law, or by Rules 4.2, 4.3, and 4.4,

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

a judge or a judicial candidate shall not . . . use court staff, facilities, or other court resources in a campaign for judicial office[.]" Comment [11] to Rule 4.1 explains that "Paragraph A(10) does not prohibit court staff from using their own time, while not being paid as court staff, to assist in a campaign for judicial office consistent with Part III of the Administrative Procedures of the Kentucky Court of Justice, Personnel Policies."

In a May 24, 2024, letter from Norman to the JCC he explained the context of the conversation with Judge Jameson and his personal desire to work on his judicial campaign. In it, he wrote:

> During my initial interview for [the position of staff attorney], held on May 5, 2021, Judge Jameson and I discussed in depth the campaign and the election process. The Conversation arose from my degree from Georgetown College. I expressed that I had a great interest in politics and elections. . . At the time of the interview, Judge Jameson did not have a challenger in the upcoming election. However, we discussed the potential scenario where he did, in fact, have an opponent. The possibility of gaining insight into how to successfully operate a campaign was invaluable to me with regard to any personal future political aspirations. It was at this time that Judge Jameson indicated that, if desired, I could participate on his campaign committee. Judge Jameson specified that this would be on a volunteer basis and would be separate from the duties as Staff Attorney for the 42nd Judicial Circuit. I jumped at the opportunity without hesitation. . . I do not recall a single incident in which I have been asked to perform campaign tasks during the workday. It has always been understood, per numerous conversations with Judge Jameson and I, that campaign projects are separate from my duties as a staff attorney. I have always consented to participating in any campaign tasks. Any suggestion otherwise is meritless.

Norman's subsequent testimony before the JCC regarding this issue was entirely consistent with his letter. Specifically, he testified as follows in response to questioning by the JCC panel:

> **JCC Panel:** And do you help judge on his campaign?
>
> **Norman:** I do.
>
> **JCC Panel:** And did he ask you to do that, or did you volunteer?
>
> **Norman:** I volunteered. That was one of my main talking points in the interview for the job. I had a background in political science from Georgetown so I have an interest in politics, and he told me that it would be an election year in my time here. From the very beginning I said I would be happy to help him with his campaign because it's a great experience for whatever I do later on down the road.

Norman further testified that none of his work for Judge Jameson's campaign was done during his work hours as a staff attorney.

Thus, the evidence concerning Norman did not prove by clear and convincing evidence that Judge Jameson made a direct request that Norman provide volunteer work for his campaign in violation of SCR 4.1(A)(8). Rather, Norman was made aware of Judge Jameson's judicial campaign and volunteered to help, on his own time, due to his personal interest in politics and a desire to acquire knowledge on how to run a campaign. For the same reasons, Judge Jameson also did not run afoul of SCR Rule 4.1(A)(10).

Based on the foregoing, the JCC did not prove by clear and convincing evidence that Judge Jameson committed the misconduct it alleged under Count IV. This Court therefore orders that Count IV be dismissed and will not consider the alleged misconduct under Count IV in deciding an appropriate sanction.

5) Count V

The JCC found under Count V that Judge Jameson "repeatedly attempted to obstruct justice and impede the [JCC's] authority to investigate the charges against him. Specifically, that Judge Jameson intimidated and attempted to interfere with his judicial staff complying with a [JCC] subpoena." The JCC's findings were as follows:

> On September 21, 2022, upon request by Counsel for the [JCC], the Commission issued a subpoena for Kentucky Court of Justice [(KCOJ)] records. . . Judge Jameson's counsel was provided a copy of the subpoena upon service.
>
> On September 26, 2022, Judge Jameson contacted his administrative support specialist Sarah Gipson via telephone to discuss the subpoena. In short, Judge Jameson instructed his judicial staff to act in contradiction to their duties and responsibilities as AOC employees, specifically by calling the office and telling the staff not to turn over any subpoenaed documents and to call him if anyone came to the office to pick up the documents.[31]

The JCC found that this alleged misconduct violated Canon 1, Rule 1.1;[32] Canon 1, Rule 1.2;[33] Canon 1, Rule 1.3;[34] and Canon 2, Rule 2.12(A).[35]

[31] Citation to the record and footnotes omitted.

[32] "A judge shall comply with the law, including the Code of Judicial Conduct."

[33] "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

[34] "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

[35] "A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code."

Upon this Court's review of the record, there was not clear and convincing evidence that Judge Jameson told his judicial staff not to comply with the JCC's subpoena. Further, the evidence showed that Judge Jameson's primary concern was ensuring that non-responsive, confidential documents in his office not be turned over because they contained documents he had been working on in response to the JCC's charges against him.

Gipson testified that on September 26, 2022, after the subpoena had been issued, Judge Jameson called her while she was in the office gathering responsive documents to the subpoena. She testified that "[t]he documents in his office were what he asked me not to turn over, essentially, that that's what [the JCC] was not allowed to have." During her direct examination, when asked how the call made her feel, she testified:

> I took it that he did not want me to comply with that request, at least until he worked on something with his attorney. I was under a court order from that subpoena, so I felt like I needed to comply even though he basically asked me not to. He never said the words 'don't comply,' but that's what I understood him to be asking me.

On cross-examination, Gipson again confirmed that Judge Jameson never told her not to comply with the subpoena:

> **Counsel:** And I've wrote down, listening to your testimony, he never told you not to comply with that subpoena.
>
> **Gipson:** That's correct. He never said those words.
>
> **Counsel:** He never told you that you are not to comply with the subpoena.
>
> **Gipson:** That's correct, not in those words.
>
> **Counsel:** Well, anything else might have been your interpretation of those words, but he never uttered those words.
>
> **Gipson:** Right.

Landon Norman stated at least twice during his testimony before the JCC that Judge Jameson never told him not to comply with the subpoena. Rather, Judge Jameson's only concern was that the confidential documents in his office that he had been working on in response to the JCC's charges against him not be turned over. This was further supported by an email sent to Gipson and Norman from AOC's Deputy General Counsel on September 27 which said:

> I spoke with Judge Jameson yesterday regarding the record production the KCOJ is undertaking. I think he had been provided some inaccurate or incomplete information about our record production, so I wanted to make sure you all understood what we've asked of you with respect to document production. You do not need to produce any document that is not responsive to the JCC's subpoena. We do not want any document that is personal or otherwise unrelated to the scope defined by the JCC's subpoena. **With respect to any document or record that has been boxed up from Judge Jameson's office, we do not need the document scanned unless it is responsive to the subpoena** and those boxes should not be removed from that office in response to this subpoena or for any other reason while the JCC case is pending. Judge Jameson was relieved to know that

> you all would be reviewing the documents for responsiveness before producing them **and that the boxes in his office would not be removed**.

(Emphasis added). Gipson responded to the email: "Thank you! Judge Jameson called our office yesterday and asked that I not turn those things over so I really appreciate that clarification."

To be sure, it was wholly improper for Judge Jameson to contact his judicial staff at that time because the JCC's temporary removal order had not yet been voided. But the misconduct of contacting his judicial staff while subject to the JCC's temporary removal order was charged under Count VI below. The misconduct alleged under Count V was that Judge Jameson "repeatedly attempted to impede and obstruct" the JCC's investigation by intimidating and attempting to interfere with his judicial staff's compliance with the JCC's subpoena. Neither Gipson nor Norman testified that Judge Jameson told them not to comply with the subpoena and, in fact, both stated multiple times that he *did not* tell them not to comply with the subpoena. Gipson testified before the JCC that she interpreted what Judge Jameson said during the September 26 phone call to mean that she should not comply with the entirety of the subpoena, even though she acknowledged he never said those words. But the email response she sent to counsel for AOC the day after her conversation with Judge Jameson demonstrated that, at that time, she understood his request to mean the boxes of confidential, non-responsive documents in his office.

Also included under Count V, the JCC found that Judge Jameson's staff attorney Landon Norman felt threatened by a Facebook post made by Judge Jameson's wife during the time that Norman was cooperating with the JCC's investigation. The post said, in pertinent part, "[W]hile persons are free to state their opinion, YOU CAN BE SUED FOR STATING FACTS THAT ARE NOT TRUE. There is already a long list of people that fall in that category and will have to face their recklessness when all is said and done." As it was undisputed that Judge Jameson did not make this post, he cannot be found to have committed misconduct for posting it. While SCR 2.12(A) directs that "[a] judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this rule[]" there is no concomitant duty that applies to a judge's spouse. Moreover, Norman testified that he does not have a Facebook account. This Court therefore fails to see how the post could have been intended by Judge Jameson as a direct threat towards Norman meant to intimidate him into non-compliance with the JCC's investigation.

Based on the foregoing, the JCC failed to prove the allegations in Count V by clear and convincing evidence. This Court therefore orders that Count V be dismissed and will not consider the alleged misconduct under Count V in determining an appropriate sanction.

6) Count VI

Count VI alleged that Judge Jameson failed to adhere to the terms of the JCC's temporary suspension order by contacting his judicial staff and availing himself of judicial resources. In addition to contacting two members of his staff, as discussed in Count V, the JCC also alleged that Judge Jameson continued to use his AOC email and computer.

However, as previously discussed, the JCC's temporary suspension order was declared *void ab initio* by this Court because it was not supported by the minimum number of votes that SCR 4.120 requires. Accordingly, any alleged misconduct based on Judge Jameson's failure to adhere to that order is now moot. The JCC itself acknowledges that Count VI is moot and that it therefore did not consider Count VI determining its recommended discipline. This Court will likewise not consider it.

7) Count VII

Count VII alleged acts of misconduct in relation to a security video of Judge Jameson recorded in the Marshall County courthouse. In particular, his attempt to coerce MSU's radio station manager into not pursuing a story about the video, and his retaliatory acts against a courthouse security officer who he believed released the video.

The video, captured on February 11, 2022, at approximately 6:35 am, depicted Judge Jameson walking downstairs from his chambers to an employee entrance in a t-shirt, boxers, and socks. After a short interaction with his wife and two children at the employee entrance, he walked back up the stairs toward his office. A short time later one of the building's janitors walked down the same flight of stairs. A rumor soon began to spread amongst courthouse employees about the judge walking around the courthouse in his underwear. This rumor eventually made its way to Marshall County Judicial Center Lead Court Security Sergeant Jeff Daniel. As head of security, one of Sergeant Daniel's duties was to investigate unusual occurrences in the courthouse. He therefore pulled a copy of the video and brought it to the attention of his administration; it was determined that nothing criminal occurred. The rumor then spread, as rumors often do, beyond the walls of the courthouse and two open record requests were filed for access to the video. One request was filed by an individual from WPSD, a television station in Paducah, and the second was filed by WKMS, an MSU public radio station. Both of the requests were denied by AOC prior to April 11, 2022.

On April 11, 2022, Judge Jameson emailed Chad Lampe, the station manager of MSU's radio station and asked Lampe to call him. On the following day, Lampe called Judge Jameson. Lampe testified that their conversation went as follows:

> The conversation started off nice and fine. . . And then he inquired about the open records request. He mentioned to me that the request also had received an appeal after the denial, which I don't believe that was the case, that we did appeal. And then the judge had mentioned that he had already called Dr. Jackson, the university president, and that he was not happy.

Judge Jameson then conceded to Lampe that there likely was a video of him walking around the courthouse in his underwear. He explained that he sometimes works late and sleeps on a couch in his office, and that the video in question would show his wife dropping off one of their children so that Judge Jameson could take the child to a medical appointment that day. Lampe testified that

> [Judge Jameson] had also mentioned that he wanted to make sure that it wasn't going to be a story and I told him that I don't make the decision on stories, our news director and our journalists make the decision because we have a firewall for those editorial decisions. And he wanted me to assure him that it wouldn't be a story.

Lampe told Judge Jameson he would call the news director and inform him that, based on what the judge had told him about the video, it did not appear to rise to the level of a news story. The news director agreed, and Lampe called Judge Jameson a second time to inform him that they did not intend to pursue the story and asked him to inform the university president of that decision. When counsel for the JCC asked Lampe if he believed Judge Jameson was trying to intimidate him by telling him that the university's president was not happy about the open records request he responded, "Oh certainly."

Lampe was later instructed by his supervisor, the Dean of MSU's College of Business, to detail the conversation he had with Judge Jameson in an email to MSU's Provost, who answers only to the university's president. Lampe did so in an email dated April 14, 2022, that recounted in pertinent part:

> WKMS requested to view the footage via the FOIA[36] request with [AOC], the request was denied. There has been no appeal by WKMS. Judge Jameson emailed me on Monday evening asking me to call him. I did, first thing Tuesday. We discussed the request. . . He said he called Bob Jackson about the request, before he called me. I asked that he call Dr. Jackson back to explain that there would be no story. He wanted me to confirm that there would be no story, and I called our News Director to confirm there would be no story, then I called [Judge Jameson] back and informed him there would be no story. . . [T]his isn't a story for us, and it was solved on Tuesday of this week and would have been solved without a call to Dr. Jackson.

Lampe left his employment with MSU two months later. He testified that, although the incident with Judge Jameson was only one of several factors that led to his resignation, "it accelerated [his] departure." He brought the incident to the attention of the JCC voluntarily once he learned of the JCC's investigation because he felt that Judge Jameson's actions were unethical.

---

[36] Freedom of Information Act.

During the same week of April 11, 2022, Judge Jameson sought to affect the employment of Sergeant Daniel for engaging in the investigation that uncovered the video. Even though part of Sergeant Daniel's duties included investigating unusual events and happenings in the judicial center, Judge Jameson was adamant in his testimony before the JCC that Sergeant Daniel's review of the video was outside the scope of his duties. Judge Jameson went so far as to testify that his conclusion was supported by AOC policy and that AOC was "not very happy" with Sergeant Daniel's actions. This claim was not borne out by the evidence.

On or around April 12, 2022, the same day Judge Jameson first spoke with Lampe, he sent

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

texts to Marshall County Sheriff Eddie McGuire to complain about Sergeant Daniel. Those texts said:

> Need to talk about Sergeant Daniel.
>
> I need him out of the building if possible. He is using state resources to sit, on what I believe is work time, to review security videos to see if he can find anything that can make me look bad and then is either by himself or in coordination with one or two clerks, calling media sources and making a news tip regarding the contents of the security videos which, as you know, are confidential. He is doing this in support of my opponent. You can imagine how that makes me feel. I'd really like to talk to you about it before I take any action.

When Sheriff McGuire did not respond to this text immediately, Judge Jameson sent a substantially identical text to the sheriff's chief deputy. The chief deputy understood Judge Jameson's texts to be a complaint against a law enforcement officer pursuant to KRS 15.520(3)(a)[37] and began a formal investigation. A formal investigation report dated April 13 concluded that the complaints against Sergeant Daniel were unfounded, and that a change in his position could not be made absent proof of misconduct. The report further noted that Sergeant Daniel "lives outside the county and cannot vote for either candidate and in fact is planning on retiring before the election and would not be working with whoever wins."

[37] KRS 15.520(3)(a) provides that "[a]ny complaint taken from a citizen alleging misconduct on the part of any officer shall be taken as follows . . . If the complaint alleges criminal activity by an officer, the allegations may be investigated without a signed, sworn complaint of the citizen[.]"

After Judge Jameson's complaint against Sergeant Daniel failed to bring about his removal from the courthouse, he persisted in his attempts by telling Sheriff McGuire that he was afraid Sergeant Daniel might "plant evidence" or "do something in his courtroom." These subsequent complaints succeeded in having Sergeant Daniel removed from the courthouse, as the sheriff reassigned him to the general investigation division. The sheriff explained that although he had no reason to believe Judge Jameson's concerns would come to fruition, Sergeant Daniel only had 45 days left until his retirement and that he was an "old school," "chain of command" officer that would not attempt to fight the decision to reassign him. He further testified that he would not have reassigned Sergeant Daniel but for Judge Jameson's complaints.

Based on the foregoing, the JCC found that Judge Jameson violated **Canon 1, Rule 1.1:** "A judge shall comply with the law, including the Code of Judicial Conduct"; **Canon 1, Rule 1.2:** "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"; **Canon 1, Rule 1.3:** "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

Based on our review of the record, we hold that the JCC proved by clear and convincing evidence that Judge Jameson committed the misconduct alleged under Count VII and violated Rule 1.1, Rule 1.2, and Rule 1.3.

F. Appropriate Sanction

As a final matter, we must determine whether the JCC's ruling to permanently remove Judge Jameson from office was appropriate.

We begin with the issue of whether the JCC had the authority to permanently remove Judge Jameson from office. The JCC's supplemental findings and order states:

> It is the [JCC's] conclusion and ruling that Judge Jameson is unfit for the judicial office he currently holds and is equally unfit to serve in judicial office in the indeterminate future. Therefore, the [JCC] hereby reaffirms is ORDER that Judge Jameson be, and here by is, REMOVED from judicial office for the term he then held, and that this same unfitness disqualifies judge Jameson from holding office in the indefinite future. The Commission believes it has a good faith basis under *Gordon v. Judicial Conduct Commission*, [655 S.W.3d 167, 172 (Ky. 2022)], to find and conclude that Judge Jameson should be permanently removed from judicial office because the totality of the clear and convincing evidence presented at the Temporary Suspension Hearing and Final Hearing and as set forth herein establishes that he was unfit and remains unfit for judicial office.

Despite the quoted language above, the JCC argues on appeal to this Court that its order does not state that he is disqualified from ever holding public office again, but rather is limited to him being prohibited from seeking election to the office of judge for the 42nd Judicial Circuit. The JCC therefore contends that its decision does not encroach upon the legislature's impeachment powers.

While this Commonwealth's Constitution grants the JCC the authority to retire, suspend, or remove a judge,[38] it places the authority to impeach an elected official solely in the hands of the legislature by simply stating that "[t]he impeachment powers of the General Assembly shall remain inviolate." Ky. Const. § 109. In particular, the House of Representatives has the sole power of impeachment, and all impeachments must be tried by the Senate. Ky. Const. §§ 66, 67. The Governor and all civil officers are subject to impeachment "for any misdemeanors in office; but judgment in such cases shall not extend further than removal from office, and disqualification to hold any office of honor, trust or profit under this Commonwealth[.]" Ky. Const. § 68.

[38] Ky. Const. § 121.

While we acknowledge that the JCC now claims its only intention was to prevent Judge Jameson from holding the office of judge for the 42nd Judicial Circuit, nothing about the language of its order is so limited. And, while the JCC certainly had the authority to remove Judge Jameson for the remainder of his term,[39] this Court has never addressed whether a judge's removal may extend beyond that period either for an indefinite period or permanently. The JCC's reliance on *Gordon* is somewhat puzzling, as Judge Gordon was not permanently removed from office, nor does that opinion address whether permanent removal from office is a sanction that is available to the JCC. Regardless, to interpret the JCC's removal power under Section 121 to include permanent removal from office encroaches upon the impeachment powers vested solely in our legislature. The only safe harbor when interpreting foundational governmental roles is a "strict [adherence] to the separation of powers doctrine,"[40] a bedrock principle provided for explicitly by our Constitution.[41] Ky. Const. §§ 27, 28. In accordance with those principles, we conclude that the permanent removal of a state official elected by the people must be the result of actions taken by a body of representatives also elected by the people: our legislature.

[39] *Kentucky Judicial Conduct Com'n v. Woods*, 25 S.W.3d 470 (Ky. 2000) (holding that "the remedy of removal disqualifies a former judge from judicial office for at least the remainder of the current term.").

[40] *Diemer v. Commonwealth, Transp. Cabinet, Dept. of Highways*, 786 S.W.2d 861, 864 (Ky. 1990).

[41] Ky. Const. §§ 27, 28.

With that established, we must decide whether Judge Jameson's removal from office was an appropriate sanction. "Typically, removal stems from a deliberate course of action or numerous examples of separate violations of the Code of Judicial Conduct." *Gordon*, 655 S.W.3d at 193 (citing *Gentry*, 612 S.W.3d at 847). Judge Jameson's misconduct in this case certainly meets that standard.

To summarize, the evidence demonstrated by clear and convincing evidence that Judge Jameson committed numerous, intentional, and varied acts of misconduct across four counts of misconduct. Under Count I, the JCC proved that Judge Jameson created the CCB in a manner and for a purpose that did not comply with the statutory mandates surrounding community corrections programs and boards; that he, or persons under his direct supervision, developed local rules and procedures concerning the operation of a pre-trial ankle monitoring program without the approval of the Chief Justice; that he made improper appearances before two legislative bodies; that he improperly interfered with and affected the fairness of a public bidding process; that he engaged in two acts of direct solicitation of donations to the Re-Life project; and that he submitted an application for grant money on behalf of the CCB for an improper purpose.

Under Count II, the JCC proved that Judge Jameson used at least one of his KCOJ employees to perform work for the CCB; that he received direct notifications for violation alerts and on more than one occasion issued arrest warrants upon receipt of a notice of violation report from an employee of his corporation; and that, in his capacity as judge, he ordered individuals to participate in an ankle monitoring program that in turn required participants to pay his nonprofit corporation for the privilege of using the ankle monitor while he was simultaneously involved with the corporation's

finances.

Under Count III, the JCC proved that Judge Jameson violated the doctrine of separation of powers by ordering defendants to participate in an ankle monitoring program in his judicial capacity and thereafter being an integral part of monitoring those defendants, a function that is traditionally exclusive to the executive branch; that he pressured an attorney who regularly practiced before him to file a bar complaint against another attorney that regularly practiced before him; and that he engaged in two acts of retaliation.

Finally, under Count VII, the JCC proved that Judge Jameson acted in a manner that did not promote public confidence in the integrity of the judiciary, created the appearance of impropriety, and abused the prestige of his office to advance his personal interests by having a security officer reassigned from the Marshall County courthouse and by pressuring a radio station manager not to pursue a story about an embarrassing video of him.

The foregoing misconduct involved numerous violations of several canons and rules of judicial conduct including: Canon 1, Rule 1.1; Canon 1, Rule 1.2; Canon 1, Rule 1.3; Canon 2, Rule 2.1; Canon 2, Rule 2.2; Canon 2, Rule 2.4(B); Canon 2, Rule 2.9(C); Canon 2, Rule 2.12(A); Canon 2, Rule 2.8(B); Canon 3, Rule 3.1(A); Canon 3, Rule 3.1(C); Canon 3, Rule 3.1(D); Canon 3, Rule 3.2; Canon 3, Rule 3.7(A)(4); and Canon 3, Rule 3.7(A)(6)(a).

Judge Jameson's misconduct and violations of the canons "[were] not isolated but [constituted] a pattern of repeated conduct over an extended period of time . . . and in a variety of ways." *Gordon*, 655 S.W.3d at 194. It is also significant that, prior to the JCC proceedings addressed herein, Judge Jameson appeared before the JCC three times between January 2016 and June 2021. According to the JCC, the 2016 complaint "raised strikingly similar issues involving an out-patient [SUD] treatment program, the judge's use of social media to endorse that program, his active participation in the program, his ordering defendants to participate the program, and family members involved in running the program." That complaint resulted in no disciplinary action but the JCC's letter announcing its decision cautioned Judge Jameson to pay particular attention to Canon 1, Rule 1.3; Canon 2, Rule 2.4; and Canon 4, Rule 4.1(A)(2)-(3). The second and third complaints, ostensibly, resulted in private reprimands.

Based on the foregoing, we agree that the removal of Judge Jameson from office was an appropriate sanction.

III. CONCLUSION

Based on the foregoing, the JCC's findings of fact, conclusions of law, and order and its supplemental findings of fact, conclusions of law, and order are affirmed in part and reversed in part.

VanMeter, C.J.; Bisig, Conley, Keller, Lambert and Thompson, JJ., sitting. Conley and Keller, JJ, concur. Thompson, J., concurs with separate opinion. VanMeter, C.J., concurs in part and dissents in part by separate opinion, in which Bisig, J. joins. Bisig, J., concurs in part and dissents in part by separate opinion. Nickell, J., not sitting.

ELECTIONS

BALLOT ACCESS AS A CANDIDATE IN THE MAY 2024 DEMOCRATIC PRIMARY ELECTION FOR THE STATE REPRESENTATIVE FOR THE 40th HOUSE DISTRICT

DISQUALIFICATION OF A CANDIDATE

SIGNATORIES ON A CANDIDATE'S NOMINATING PETITION

On December 22, 2023, incumbent Representative Nirumpama Kulkarni (Kulkarni) signed her notification and declaration seeking the Democratic Party nomination for the 40th House District — Two individuals signed nomination papers under oath as registered voters of Democratic Party; however, one of those individuals was actually registered as a Republican at time she signed document — Kulkarni filed her nomination papers on January 2, 2024 —Deadline for filing nomination papers was January 5, 2024 — On January 8, Democratic Party leadership informed Kulkarni that one of her signatories was a registered Republican — Republican signatory changed her party affiliation to Democrat on January 8 and Kulkarni's registration was officially processed on January 10 — Secretary of State subsequently certified Kulkarni's name for inclusion on ballot — On March 18, 2024, former state Representative Dennis Horlander (Horlander) filed petition seeking to disqualify Kulkarni because she did not comply with requirement that two registered voters of Democratic Party sign her nomination papers — Trial court found that Horlander had standing to challenge Kulkarni's qualifications due to his status as a qualified voter — Trial court declined to disqualify Kulkarni — Court of Appeals reversed and remanded with instructions to disqualify Kulkarni — Kentucky Supreme Court granted discretionary review and allowed Democratic primary election to occur as scheduled on May 21, 2024 — Supreme Court enjoined Jefferson County Board of Elections, Kentucky Board of Elections, and Kentucky Secretary of State from certifying results of election pending further orders — Kulkarni won primary with 78% of vote — AFFIRMED — KRS 118.125(2) requires timely filing of a notification and declaration containing signatures of not less than two registered voters of same party from district or jurisdiction from which candidate seeks nomination — Provisions in KRS 118.125(2) are plain, unambiguous, and mandatory — Requirements necessarily contemplate that two registered voters must be members of same party as candidate at the time they sign notification and declaration — Substantial compliance is not sufficient — Legislature did not intend to supersede *Morris v. Jefferson Cnty. Clerk* (Ky. 1987) through 1990 Amendments to KRS 118.125 — Material defects in a candidate's nomination papers cannot be corrected or amended after filing deadline —

Nirupama Kulkarni v. Dennis Horlander; Bobbie Holsclaw, As Chair of the Jefferson County Board of Elections; Kentucky Board of Elections; and Michael Adams, Kentucky Secretary of State (2024-SC-0215-DGE); On review from Court of Appeals; Opinion by Justice Nickell, *affirming*, rendered 8/22/2024. An order was previously entered in this action on 6/7/2024, and amended on 6/11/2024, and is set forth at 71 K.L.S. 6, p. 28. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

For a candidate's name to appear on a partisan primary ballot, KRS[1] 118.125(2) requires the timely filing of a notification and declaration[2] containing the signatures of "not less than two (2) registered voters of the same party from the district or jurisdiction from which the candidate seeks nomination." Former state Representative Dennis Horlander[3] alleged incumbent Representative Nirupama Kulkarni failed to satisfy this requirement and filed a petition in Jefferson Circuit Court, pursuant to KRS 118.176, challenging her qualifications to appear on the Democratic primary ballot for the office of State Representative for the 40th House District. The trial court denied the petition and allowed Representative Kulkarni to remain on the ballot. The Court of Appeals reversed holding Representative Kulkarni was disqualified for failure to obtain the requisite number of signatures. We granted discretionary review.

[1] Kentucky Revised Statutes.

[2] Although KRS 118.125 specifically denominates this document as a "notification and declaration," the term "nomination papers" appears elsewhere throughout KRS Chapter 118. Because the meaning of these terms is identical, we use them interchangeably. *See* Opinion of the Attorney General (OAG) 05-008 ("The context implies that 'notification and declaration' and 'nomination papers' are interchangeable."). We further note "[a]n attorney general's opinion is highly persuasive, but not binding on the recipient." *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. App. 1991).

[3] As determined by the trial court, Horlander's standing to challenge Representative Kulkarni's qualifications is predicated on his status as a qualified voter. *See* KRS 118.176(2).

Recognizing the necessity for an expeditious ruling, this Court entered an order on June 6, 2024, announcing that a majority voted to affirm the decision of the Court of Appeals. We now render this opinion to explain the reasoning pertinent to that order and limit our consideration to the issues presented in Representative Kulkarni's motion for discretionary review: (1) whether Horlander had the right to appeal the denial of his petition by the trial court; and (2) whether the 1990 Amendments to KRS 118.125 superseded our decision in *Morris v. Jefferson Cnty. Clerk*, 729 S.W.2d 444 (Ky. 1987).

FACTS AND PROCEDURAL HISTORY

The underlying facts are not in dispute. On

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

December 22, 2023, Representative Kulkarni signed her notification and declaration seeking the Democratic Party nomination for the 40th House District. The text of the notification and declaration appears on a preprinted form issued by the Kentucky State Board of Elections which consists of a single sheet containing two sections. The first section pertains to the candidate's qualifications followed by a jurat.[4] The second section concerns the voters' qualifications followed by a jurat.

[4] "[A] jurat is a simple statement that an instrument is subscribed and sworn to or affirmed before a proper officer without the further statement that it is the act or deed of the person making it." *Matthews v. Commonwealth*, 163 S.W.3d 11, 25 (Ky. 2005) (quoting 1A C.J.S. *Acknowledgements* § 2 (June 2004)).

Sharon D. LaRue and Catherine Morton Ward signed the nomination papers under oath as registered voters of the Democratic party. Their signatures were affixed beneath the statement, "we solemnly swear that we are registered voters and members of the same Party and are from the district or jurisdiction from which the candidate seeks nomination[.]" LaRue, however, was a registered Republican at the time she signed the document.[5]

[5] As to whether this mishap occurred through ignorance, accident, mistake or otherwise, we cannot speculate. The present record provides no insight into LaRue's state of mind at the time she signed the nomination papers and we express no opinion in connection therewith.

Representative Kulkarni filed her nomination papers with the Secretary of State on January 2, 2024, three days before the filing deadline expired on January 5, 2024. On January 8, 2024, Democratic Party leadership brought the issue of LaRue's party affiliation to Representative Kulkarni's attention. LaRue changed her party affiliation to Democrat on the same day and her registration was officially processed on January 10, 2024. On January 17, 2024, the Kentucky Secretary of State certified Representative Kulkarni's name for inclusion on the ballot.

On March 18, 2024, Horlander filed a petition seeking to disqualify Representative Kulkarni because she did not comply with the requirement that two registered voters of the Democratic Party sign her nomination papers. The trial court declined to disqualify Representative Kulkarni in an opinion and order entered on April 25, 2024. In reaching its conclusion, the trial court applied a standard of substantial compliance after interpreting the 1990 amendments to KRS 118.125 to have effectively superseded the decision of this Court in *Morris*.

On direct appeal, the Court of Appeals reversed and remanded with instructions for the trial court to disqualify Representative Kulkarni. The Court of Appeals rejected Representative Kulkarni's argument that it lacked jurisdiction to consider Horlander's appeal and further determined Morris was still good law. Thus, it concluded the trial court erred by applying a standard of substantial compliance.

This Court granted discretionary review and allowed the Democratic primary election to occur as scheduled on May 21, 2024. We further enjoined the Jefferson County Board of Elections, the Kentucky Board of Elections, and the Kentucky Secretary of State from certifying the results of the election pending further orders of this Court. Representative Kulkarni overwhelmingly won the primary election garnering seventy-eight percent of the vote.

LAW AND ANALYSIS

I. COURT OF APPEALS PROPERLY EXERCISED JURISDICTION

As a threshold jurisdictional matter, Representative Kulkarni argues Horlander had no right to appeal the trial court's determination that she was a bona fide candidate.[6] We disagree.

[6] "A 'bona fide' candidate means one who is seeking nomination in a primary or election in a special or regular election according to law." KRS 118.176(1).

Citing *Gibson v. Thompson*, 336 S.W.3d 81 (Ky. 2011), Representative Kulkarni contends KRS 118.176(4) limits the right to appeal to situations where the trial court disqualifies a candidate. We do not read the statute or *Gibson* so narrowly.

KRS 118.176(4) provides:

> If the court finds the candidate is not a bona fide candidate it shall so order, and certify the fact to the board of elections, and the candidate's name shall be stricken from the written designation of election officers filed with the board of elections or the court may refuse recognition or relief in a mandatory or injunctive way. The order of the Circuit Court shall be entered on the order book of the court and shall be subject to a motion to set aside in the Court of Appeals. The motion shall be heard by the Court of Appeals or a judge thereof in the manner provided for dissolving or granting injunctions, except that the motion shall be made before the court or judge within five (5) days after the entry of the order in the Circuit Court, and may be heard and tried upon the original papers, and the order of the Court of Appeals or judge thereof shall be final.

Gibson merely held that an unsuccessful challenger to a candidate's bona fides cannot obtain expedited appellate review via the special motion procedure outlined in KRS 118.176(4). *Id.* at 83. Moreover, we explicitly recognized an order dismissing a bona fides challenge for lack of standing "is a final and appealable order." *Id.* We view the reasoning of *Gibson* to apply equally to situations where, as here, the trial court denies a challenge on the merits.

In the present matter, Hollander timely filed a notice of appeal from the trial court's order denying his petition. We deem this procedure to have adequately invoked the Court of Appeals' jurisdiction.

II. REPRESENTATIVE KULKARNI IS DISQUALIFIED FOR FAILURE TO COMPLY WITH KRS 118.125(2)

A. STANDARD OF REVIEW

At the outset, it must be recognized that the present appeal concerns a pre-election challenge to a candidate's qualifications to appear on the ballot as opposed to an election contest which "obviously is a post-election procedure, involving an election that has been held[.]" *Stephenson v. Woodward*, 182 S.W.3d 162, 168 (Ky. 2005) (quoting *Fletcher v. Wilson*, 495 S.W.2d 787, 791 (Ky. 1973)). Thus, "[c]ases dealing with election contests—that is, disputes involving not the qualifications of a candidate but the validity of the election itself—are inapplicable to this matter." *Id.* (citing *Taylor v. Beckham*, 108 Ky. 278, 56 S.W. 177 (1900)).

We further emphasize that Kentucky law has long empowered the legislature "to impose such reasonable conditions and tests as to party membership or affiliation, as shall entitle those seeking party nominations to get their names upon their party ballots as candidates." *Hager v. Robinson*, 154 Ky. 489, 157 S.W. 1138, 1142 (1913). The constitutional validity of the requirements contained in KRS 118.125 have not been questioned here. This appeal presents an issue of statutory interpretation, which is purely a matter of law subject to de novo review. *Commonwealth v. Love*, 334 S.W.3d 92, 93 (Ky. 2011). Thus, "the [legal] conclusions reached by the lower courts are entitled to no deference." *Id.*

When this Court is called upon to interpret the meaning of a statute, our foremost duty "is to determine and effectuate legislative intent[.]" *Kindred Healthcare v. Harper*, 642 S.W.3d 672, 680 (Ky. 2022) (quoting *Sweasy v. Wal-Mart Stores, Inc.*, 295 S.W.3d 835, 838 (Ky. 2009)). Indeed, "[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[.]" KRS 446.080(1). We must ascertain "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." *Kindred*, 642 S.W.3d at 680 (quoting *Wilson v. Commonwealth*, 628 S.W.3d 132, 140 (Ky. 2021)). However, "the principle that the statute is to be liberally construed does not mean that its provisions can be ignored." *Middletown Engineering Co. v. Main Street Realty, Inc.*, 839 S.W.2d 274, 277 (Ky. 1992).

As a general matter of interpretation, courts demand strict compliance with mandatory statutory provisions while directory provisions are subject to substantial compliance. *Knox Cnty. v. Hammons*, 129 S.W.3d 839, 843 (Ky. 2004). To determine "whether [a] provision is mandatory or directory, we depend 'not on form, but on the legislative intent, which is to be ascertained by interpretation from consideration of the entire act, its nature and object, and the consequence of construction one way or the other.'" *Id.* (quoting *Skaggs v. Fyffe*, 266 Ky. 337, 98 S.W.2d 884, 886 (1936)). "In other words, 'if the directions given by the statute to accomplish a given end are violated, but the given end is in fact accomplished, without affecting the real merits of the case, then the statute is to be regarded as directory merely.'" *Id.*

We recognize the longstanding principle that uncertainty or doubt in statutory language "should be resolved in favor of allowing the candidacy to continue." *Heleringer v. Brown*, 104 S.W.3d 397, 403 (Ky. 2003). However, where ballot access provisions are unambiguous and clear, this Court has consistently "require[d] strict compliance with election statutes." *Barnard v. Stone*, 933 S.W.2d 394, 395 (Ky. 1996); *Morris*, 729 S.W.2d at 444; *Thomas v. Lyons*, 586 S.W.2d 711, 716 (Ky. 1979). Moreover, we will not apply the doctrine of substantial compliance to excuse noncompliance with the governing statutory requirements. *Fletcher v. Wilson*, 500 S.W.2d 601, 606 (Ky. 1973).

B. THE CURRENT PROVISIONS KRS 118.125(2) ARE UNAMBIGUOUS AND MANDATORY

Representative Kulkarni's primary argument centers on the effect of the 1990 Amendments to KRS 118.125 following our decision in *Morris*. Before addressing the import of these amendments, however, our review must commence with the present version of the statute because "[t]he starting point in discerning [legislative] intent is the existing statutory text and not the predecessor statutes." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (internal citation omitted).

As currently enacted, KRS 118.125 sets forth the procedure and form which a candidate must complete to have his or her name appear on a primary ballot:

> (1) Except as provided in KRS 118.155, any person who is qualified under the provisions of KRS 116.055 to vote in any primary for the candidates for nomination by the party at whose hands he or she seeks the nomination, shall have his or her name printed on the official ballot of his or her party for an office to which he or she is eligible in that primary, upon filing, with the Secretary of State or county clerk, as appropriate, at the proper time, a notification and declaration.
>
> (2) The notification and declaration shall be in the form prescribed by the State Board of Elections. It shall be signed by the candidate and by not less than two (2) registered voters of the same party from the district or jurisdiction from which the candidate seeks nomination. Signatures for nomination papers shall not be affixed on the document to be filed prior to the first Wednesday after the first Monday in November of the year preceding the year in which the office will appear on the ballot. The notification and declaration for a candidate shall include the following oath:
>
> > "For the purpose of having my name placed on the official primary election ballot as a candidate for nomination by the ——— Party, I, ——— (name in full as desired on the ballot as provided in KRS 118.129), do solemnly swear that my residence address is ——— (street, route, highway, city if applicable, county, state, and zip code), that my mailing address, if different, is ——— (post office address), and that I am a registered ——— (party) voter; that I believe in the principles of the ——— Party, and intend to support its principles and policies; that I meet all the statutory and constitutional qualifications for the office which I am seeking; that if nominated as a candidate of such party at the ensuing election I will accept the nomination and not withdraw for reasons other than those stated in KRS 118.105(3); that I will not knowingly violate any election law or any law relating to corrupt and fraudulent practice in campaigns or elections in this state, and if finally elected I will qualify for the office."
>
> The declaration shall be subscribed and sworn to before an officer authorized to administer an oath by the candidate and by the two (2) voters making the declaration and signing the candidate's petition for office.
>
> (3) When the notice and declaration has been filed with the Secretary of State or county clerk, as appropriate, and certified according to KRS 118.165, the Secretary of State or county clerk, as appropriate, shall have the candidate's name printed on the ballot according to the provisions of this chapter, except as provided in KRS 118.185.
>
> (4) Titles, ranks, or spurious phrases shall not be accepted on the filing papers and shall not be printed on the ballots as part of the candidate's name; however, nicknames, initials, and contractions of given names may be acceptable as the candidate's name.

The provisions of KRS 118.125(2) are plain and unambiguous. The requirement is clear: a notification and declaration "shall be signed by the candidate and by not less than two (2) registered voters of the same party from the district or jurisdiction from which the candidate seeks nomination." This Court has generally interpreted the word "shall" to connote a mandatory sense unless the context of a statute requires otherwise. KRS 446.010(39); *Cabinet for Health & Fam. Servs. ex rel. Child Support Enforcement v. B.N.T.*, 651 S.W.3d 745, 750 (Ky. 2022). We have previously explained that "[i]n common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command and . . . must be given a compulsory meaning." *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 89 (Ky. 2018) (quoting *Vandertoll v. Commonwealth*, 110 S.W.3d 789, 795-96 (Ky. 2003)). In short, "[s]hall means shall." *Id.*

Moreover, the phrase "[i]t shall be signed by . . . voters of the same party" necessarily contemplates that the two registered voters must *be* members of the same party as the candidate *at the time* they sign the notification and declaration; not that they will become members of the same party at some indeterminate point in the future. In interpretating an analogous signature requirement contained in KRS 118.315(2), this Court construed the language "[i]t shall be signed . . . by registered voters from the district or jurisdiction from which the candidate seeks nomination" to be "sufficiently explicit and unambiguous to require its literal application." *Barnard*, 933 S.W.2d at 395. We perceive the reasoning of *Barnard* to be sound and equally applicable to the present appeal.

Our interpretation that a voter must be qualified at the time of signing a notification and declaration under KRS 118.125(2) finds additional support in the requirement that "[t]he declaration shall be subscribed and sworn to before an officer authorized to administer an oath by the candidate and by the two (2) voters making the declaration and signing the candidate's petition for office." When an election statute contains an oath requirement, "[t]he purpose . . . is to bind the conscience and secure the truth of the statement under the influence of the sanctity of a religious obligation or calling upon God to witness what is avowed to be the truth."[7] *Asher v. Sizemore*, 261 S.W.2d 665, 666 (Ky. 1953). Such a sworn statement pertains to objective facts whose verity or falsehood must perforce be determined in reference to the circumstances existing at the time the statement was made. Indeed, Kentucky law embodies "the policy of discouraging all . . . falsehoods made under oath, even where there has been no substantial impairment of the administration of justice." *Commonwealth v. Stallard*, 958 S.W.2d 21, 25 (Ky. 1997) (quoting Official Commentary to KRS 523.040)).

[7] We observe the law does not require an oath or affirmation to take any particular form so long as the "witness shall first undertake a solemn obligation to tell the truth." *Gaines v. Commonwealth*, 728 S.W.2d 525, 526 (Ky. 1987); see also KRS 454.170.

Further, this Court cannot disregard the failure to comply with the signature requirement as a technical irregularity or mere error in form. A primary purpose of ballot access statutes is to preserve the integrity of the nomination process. *See Barnard*, 933 S.W.2d at 395. Mandatory signature requirements "ensure that the voters who sign a petition are eligible to vote for that candidate."[8] *Stoecklin v. Fennell*, 526 S.W.3d 104, 107 (Ky. App. 2017) (quoting *Hoffman v. Waterman*, 141 S.W.3d 16, 18 (Ky. App. 2004)). Moreover, legislative "tests of party loyalty and party membership appl[y] with equal force to electors voting in and candidates voted for in primary elections; and, whether applied by legislative enactment to the one class or the other, they are equally reasonable." *Hager*, 157 S.W. at 1146. Our predecessor Court observed the purpose of Kentucky's original primary election law was "to purify the politics of the state, by preventing frauds and wrongdoing in making nominations[.]" *Id.* We believe this reasoning continues to illuminate the substantive public purpose underlying KRS Chapter 118 as a whole and forecloses the application of substantial compliance to KRS 118.125(2) in particular.

[8] Representative Kulkarni also argues a signing voter need not necessarily be eligible to vote for the candidate in the primary election for which the candidate is proposed so long as the voter is a member of the same of the party as the candidate and otherwise satisfies the residency requirement. Curiously, under KRS 116.055, the last day to change party affiliation to vote in the 2024 primary was December 31, 2023, yet the filing deadline for the candidate's nomination papers was January 5, 2024. Thus, it is arguable whether the requirements of KRS 118.125(2) could be satisfied where a voter changed his or her party affiliation after the deadline for switching parties to vote in the upcoming primary but before the candidate's filing deadline. But those are not the facts of this case, and we leave this question for another day.

Thus, we hold there is no defense of substantial compliance for the failure to strictly adhere to the clear and firm legislatively-enacted filing

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

requirements entitling Kentucky candidates to ballot access. Continued strict judicial enforcement of such legislative enactments serves as an indispensable foundation for continued election integrity, partisan accountability, and public trust. Absent judicial imposition of a strict compliance standard, the intended meaning and protective impact of the legislature's statutory language would be diluted, becoming meaningless and ineffectual. Transforming such well-defined statutory requirements into mere suggestions by judicial fiat would blur election transparency, invite irregular enforcement, and damage public trust.

C. 1990 AMENDMENTS TO KRS 118.125 DID NOT SUPERSEDE *MORRIS*

Representative Kulkarni seeks to avoid a strict interpretation of the signature requirements contained in KRS 118.125 by arguing that the 1990 amendments effectively superseded *Morris*. Specifically, she contends these amendments compel the conclusion that the signature requirement is now a directory provision subject to substantial compliance. We disagree.

As acknowledged by the parties and lower courts, our decision in *Morris* involved strikingly similar facts. In *Morris*, the candidate sought the Democratic Party nomination for the office of Commonwealth's Attorney. 729 S.W.2d at 444. At the time the candidate's nomination papers were filed, one of the two required voters was not a registered member of the Democratic Party. *Id*. at 445. After the filing deadline had passed, the voter properly registered. *Id.*

A challenge to the candidate's qualifications followed. *Id.* The trial court denied the challenge and ruled the candidate had substantially complied with the statutory requirements. *Id.* The Court of Appeals "reversed the trial court and ordered [the candidate's] name stricken from the ballot." *Id.* On discretionary review, this Court affirmed the Court of Appeals. *Id.*

We rejected the argument that a candidate's qualifications are determined as of the date of the primary election as opposed to the filing deadline and explained:

> The affidavit required by K.R.S. 118.125(3) must be signed by two electors who *are* (not who may thereafter become) members of the party to which the candidate belongs. We interpret this to mean that at the time the affidavit is signed and the nomination papers filed, the affiant must be a voter registered to vote as a member of the party to which the candidate belongs. In effect, [the candidate] filed his nomination papers and attached thereto only one valid affidavit of an elector who was a member of the party to which he belonged. He did not comply with the statute.

Id. at 445-46. This Court further refused to excuse non-compliance with the statutory requirements under the guise of substantial compliance:

> It is true that a candidate would be hard pressed to determine the truth of some of the allegations in the required affidavit, but the question of whether [the signing voter] was a registered voter could easily have been checked in the office of the county court clerk when the nomination papers were filed. The law places the duty upon the candidate to support his nomination papers with the affidavits of two electors. On a matter which can be so easily determined as whether or not an individual is registered to vote, there is no excuse for the candidate to claim that the affiant claimed to be registered to vote.
>
> The statute, with regard to the supporting affidavits of electors, is plain. It requires two affiants, and it is easy to comply with. An affidavit of only one elector is not a substantial compliance with the statute.

Id. at 446.

Representative Kulkarni emphasizes the result in *Morris* hinged on this Court's interpretation of the phrase "at the time of filing" and the present tense of the word "are" in the sentence "[a]t the time of filing his notification and declaration, the candidate shall file therewith an affidavit of two (2) reputable electors who are members of the party to which the candidate belongs[,]" which was contained in the 1987 version of KRS 118.125(3). She further asserts the removal of this specific language by the 1990 Amendments manifestly reflects the legislature's intent to remove the timing component and that the requirements of KRS 118.125 otherwise be interpreted as directory, rather than mandatory. Representative Kulkarni maintains any contrary interpretation would render the 1990 Amendments meaningless in violation of the well-established rule that "[w]here a clause in an old enactment is omitted from the new one, it is to be inferred that the Legislature intended that the omitted clause should no longer be the law." *Inland Steel Co. v. Hall*, 245 S.W.2d 437, 438 (Ky. 1952).

We are unconvinced the legislature intended to supersede *Morris* through the 1990 Amendments to KRS 118.125. To be sure, the amendments must be accounted for and given effect. However, Representative Kulkarni's reading is untenable because it requires this Court to focus on certain words and phrases in isolation without consideration of the legislative changes in the context of the amended statute as a whole. *See Kindred Healthcare*, 642 S.W.3d at 680 (applying rule that the entire statute must be interpreted "in context without distorting its intended meaning by focusing on a single sentence, clause, or phrase.").

At the time *Morris* was decided in 1987, KRS 118.125 contained two separate filing requirements. The first requirement pertained only to the notification and declaration of the candidate under KRS 118.125(2) and specifically prescribed the necessary form. The second requirement related to the affidavit of electors under KRS 118.125(3) which provided in pertinent part, "[a]t the time of filing his notification and declaration, the candidate shall file therewith an affidavit of two (2) reputable electors who are members of the party to which the candidate belongs." Under KRS 118.125(4), the notification and declaration and the accompanying affidavits were permitted to "be on the same or separate sheets, but shall be filed together."

In 1990, three years after the *Morris* decision, the General Assembly continued a comprehensive overhaul of Kentucky's election laws.[9] 1990 Ky. Acts. ch. 48 (S.B. 47). By this Act, the legislature created KRS 116.037 and KRS 118.775; repealed KRS 116.049, KRS 116.075, and KRS 119.135; and amended numerous other existing statutes.

[9] We note the prior legislative session of 1988 also resulted in wide-ranging changes to Kentucky's election laws. 1988 Ky. Acts ch. 341 (S.B. 268). Indeed, the year 1987 was a time of "election reform fervor[.]" John W. Hays, *PACS in Kentucky: Regulating the Permanent Committees*, 76 Ky. L.J. 1011, 1012 (1988). The reform-minded sentiment of the day was largely attributed to public outcry following "[a]n eight-day series of articles relative to election fraud [that] appeared in the Louisville Courier-Journal in October of 1987." Legis. Rsch. Comm'n., *Foreword to Final Rep. of the Special Comm'n. on Election Reform*, Rsch. Rpt. No. 240 (Ky. Dec. 1988). "The articles documented abuses in the areas of vote buying and selling; campaign contributors who subsequently received state jobs; appointments or contracts; the increasing influence of political action committees; illegal cash contributions; the enforcement role of the Registry of Election Finance; and the rapidly increasing cost of campaigns." *Id.*

Pertinent to KRS 118.125, the legislature reenacted Subsection (1) without change. 1990 *Ky. Acts.* ch. 48 at § 39. Additionally, the separate affidavit requirement under Subsection (3) was eliminated and merged into the amended Subsection (2), which created a single notification and declaration form:

> The notification and declaration shall be in **the form prescribed by the State Board of Elections. It shall be signed by the candidate and by not less than two (2) registered voters of the same party from the district or jurisdiction from which the candidate seeks nomination. The notification and declaration shall include the** following **oath** [~~form~~]:
>
> . . .
>
> The declaration shall be subscribed and sworn to by the person making it [,] before an officer authorized to administer an oath.

Id. Subsection (4) was also amended to remove the phrase "[t]he nomination and declaration and the accompanying affidavits may be on the same or separate sheets, but shall be filed together," and was otherwise reenacted as the new Subsection (3) to provide:

> **When the nomination and declaration has been** [~~so~~] filed with the proper officer, and certified according to KRS 118.165, the officer shall have the candidate's name printed on the ballot according to the provisions of this chapter, except as provided in KRS 118.185.

Id.

In context, it is evident that the 1990 Amendments to KRS 118.125 involved more than the mere reenactment of the former affidavit requirements without the phrase "at the time of filing" and the single word "are." Instead, the notification and declaration and the affidavit requirements were merged into a unified form whose timing was governed by Subsection (1) which conditioned a candidate's entitlement to ballot access "upon filing, with the proper officer at the proper time, a notification and declaration." 1990 *Ky. Acts.* ch. 48 at § 39. The combination of

these separate requirements obviated the need to specify the time for filing the voters' signatures in relation to the candidate's filing because both requirements are satisfied simultaneously by the placement of each of the signatures onto a single form. Based on a plain language reading, we construe the 1990 amendments to KRS 118.125 to reflect the legislature's intent to retain the essential, substantive requirements of the prior law while simplifying the administrative procedure.[10]

[10] While the parties dispute the extent to which a post-enactment statement made by a co-sponsor of the 1990 Amendments sheds light on the proper interpretation of KRS 118.125, we need not consider this issue because our holding is based on a plain language reading of the statute. *Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011) ("Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history [and] the canons of construction[.]").

Moreover, we perceive the semantic changes in the amended statute to have resulted from the dictates of logic and grammar as opposed to the conversion of a mandatory requirement into a directory provision. In this light, the retention of the phrase "at the time of filing" and the word "are" in the amended version of KRS 118.125(2) would have amounted to mere surplusage. Thus, we conclude the 1990 amendments are consistent with the reasoning of our decision in *Morris*.

D. MATERIAL DEFECTS CANNOT BE CORRECTED OR AMENDED AFTER THE FILING DEADLINE

Representative Kulkarni further contends disqualification is improper because LaRue changed her party affiliation prior to the certification of Representative Kulkarni's name to the ballot by the Secretary of State. We disagree and hold material defects in a candidate's nomination papers cannot be corrected or amended after the filing deadline.

Entitlement to ballot access depends "*upon filing*, with the Secretary of State or county clerk, as appropriate, *at the proper time*, a notification and declaration." KRS 118.125(1) (emphasis added). As relevant here, the proper time for filing refers to KRS 118.165(2) which sets forth the deadline for the filing of nomination papers:

> Candidates for offices to be voted for by the electors of more than one (1) county, and for members of Congress and members of the General Assembly, *shall file their nomination papers* with the Secretary of State not earlier than the first Wednesday after the first Monday in November of the year preceding the year the office will appear on the ballot and *not later* than the first Friday following the first Monday in January preceding the day fixed by law for holding the primary. Signatures for nomination papers shall not be affixed on the document to be filed prior to the first Wednesday after the first Monday in November of the year preceding the year in which the office will appear on the ballot. *All nomination papers shall be filed no later* than 4 p.m. local time at the place of filing when filed on the last date on which the papers may be filed. (Emphases added).

Kentucky law has long regarded the deadline for the filing of nomination papers as mandatory. *Hallon v. Center*, 102 Ky. 119, 43 S.W. 174, 175-76 (1897), overruled on other grounds by *Fannin v. Cassell*, 487 S.W.2d 919 (Ky. 1972). In view of the legislature's repeated use of the word "shall" in connection with the time of filing, we perceive no basis to interpret the current version of KRS 118.165(2) otherwise.

Concomitant with the mandatory filing deadline, the traditional rule is that material defects in nomination papers cannot be corrected or amended after the deadline has expired. *Fletcher*, 500 S.W.2d at 606-07 (rejecting argument "that 'supplemental' nomination papers filed . . . in correct form, six days after the deadline for filing, may be accepted as curing the defects in his original papers."); *Bd. of Ed. v. Fiscal Court*, 485 S.W.2d 752, 753 (Ky. 1972) ("The insufficient petitions could not be made sufficient by such late action (not only after the time for filing had expired but after the matter had been appealed to the circuit court)."); *Evans v. Hill*, 314 Ky. 61, 234 S.W.2d 297, 298 (1950) (rejecting candidate's attempt to correct nomination papers where fatal error discovered after filing deadline); OAG 85-67 ("[O]nce the deadline for filing has lapsed, under KRS 118.365, the filing papers of the candidate cannot be changed or corrected."); 26 Am. Jur. 2d *Elections* § 217 (2024) ("Where the defect in a [nomination] petition is fatal, and the time for filing has expired, amendment of the petition is properly refused."); 29 C.J.S. *Elections* § 243 ("A nomination petition which is invalid cannot be amended after the time for filing it has passed as by correcting a defective acknowledgment, supplying an omission from the jurat of a designating petition, adding names to the petition, or correcting the name of the district for which the nomination was made.").

A material defect results from the failure to comply with a mandatory requirement in contrast to a mere technical defect arising from the failure to observe a directory requirement. *Skaggs*, at 98 S.W.2d 886 ("A proceeding not following a mandatory provision of a statute is rendered illegal and void, while an omission to observe or failure to conform to a directory provision is not."). Mere technical defects may generally be cured by amendment, "but material errors or omissions cannot be corrected, particularly after the time for filing has expired." 29 C.J.S. *Elections* § 243. We discern nothing in the applicable statutes to justify a departure from the well-established law on this subject.

Compliance with the signature requirement under KRS 118.125(2) is mandatory and, therefore, material. It is undisputed that Representative Kulkarni's nominating papers were insufficient at the expiration of the filing deadline. Consequently, we cannot deem her subsequent efforts to have cured this material defect.

CONCLUSION

Kentucky law places the burden on the candidate to ensure the statutory requirements to gain access to the ballot have been satisfied. *Morris*, 729 S.W.2d at 446. It is not unreasonable or unduly harsh to demand strict compliance with clearly enacted legislative mandates for ballot access. Assuring one's required election filings are compliant is among the first duties of anyone intent upon seeking public office. Where, as here, one's own political party was capable of expeditiously ascertaining the inaccuracy of a voter's claimed affiliation by reference to readily available public records after the passing of a filing deadline, a vigilant office-seeker could have similarly confirmed the veracity of a voter's representation prior to filing, thereby avoiding any challenge or disqualification.

In discharging our fundamental duty to declare what the law is, we remain mindful of the impact on the rights of the voters and reiterate the sentiments aptly expressed by the *Stephenson* majority:

> This Court is deeply respectful of the electoral process and its very fundamental role in the functioning of a true democracy. We are equally sympathetic to those citizens who voted in the election herein disputed. However, we cannot ignore that an election may only be considered legitimate when the statutory procedures governing the process are followed and constitutional mandates are respected.

182 S.W.3d at 173. "[T]he legislature has delegated authority to the judiciary to determine the qualifications of a candidate for public office; that alone is the issue to which we have confined our decision." *Id.* at 174.

Because LaRue was not a member of the same party as the candidate at the time she signed the nomination papers, Representative Kulkarni did not comply with the signature requirement under KRS 118.125(2), and we must conclude the failure to do so is fatal to her candidacy. Thus, we need not address Horlander's alternative arguments for disqualification. Consequently, "the effect of the disqualification of a candidate subsequent to the election is that no election has occurred and the true and legitimate will of the people has not yet been expressed." *Stephenson*, 182 S.W.3d at 173. Furthermore, when a nomination is invalidated and it is impractical to strike the candidate's name from the ballot, the provisions of KRS 118.212 shall be observed. *Barnard*, 933 S.W.2d at 396.

For the foregoing reasons, the decision of the Court of Appeals is hereby affirmed.

All sitting. VanMeter, C.J.; Conley, Keller, Lambert and Nickell, JJ., concur. Thompson, J., concurs in part and dissents in part by separate opinion in which Bisig, J., joins. Bisig, J., dissents by separate opinion in which Thompson, J., joins.

WORKERS' COMPENSATION

PERMANENT PARTIAL DISABILITY (PPD) BENEFITS

WORK-RELATED BACK INJURY WITH PSYCHOLOGICAL OVERLAY

PROVISIONAL MAXIMUM MEDICAL IMPROVEMENT (MMI) OPINION

Claimant worked for Labcorp as a phlebotomist — Claimant was injured when

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

shelving unit fell on his head — Claimant sustained acute injuries to his lower back which required surgical intervention — Several doctors evaluated claimant — Dr. Lanford assessed 24% permanent impairment rating relative to back injury, apportioning 5% to pre-existing injuries and 19% to work-related injury — Dr. Barefoot agree with Dr. Lanford's ratings — Dr. Best opined that all of claimant's back issues were pre-existing and assessed Lumbar DRE Category III 10% impairment — Dr. Barefoot reviewed Dr. Best's opinion, but did not change his previous assessment — Dr. Sivley evaluated claimant's psychological complaints and issued a report — Prior to work injury, claimant had participated in one or two counseling sessions during his mid-20's for relationship issues, but otherwise had no psychiatric history — Dr. Sivley diagnosed claimant with adjustment disorder with mixed anxiety and depressed mood, moderate to severe — Dr. Sivley diagnosed Class II impairment range, but refrained from providing a percentage of impairment because he was unsure if claimant had attained maximum medical improvement (MMI) as he had not received any treatment for his mental health issues — Several weeks later, Dr. Sivley provided addendum to his report assessing 20% impairment rating for claimant's psychological condition upon concluding that claimant had reached MMI as he was unable to obtain payment from Labcorp for mental health treatment — Dr. Trivette performed medical evaluation on behalf of Labcorp — Dr. Trivette found that claimant did not demonstrate significant psychiatric impairment resulting from work injury and that claimant did not suffer mental disorder which would prevent performance of his work duties — Dr. Trivette assessed 0% impairment rating — ALJ determined claimant had suffered work-related injury and awarded claimant medical expenses and permanent partial disability (PPD) benefits — For back injury, ALJ rejected Dr. Best's determination that all of claimant's symptoms resulted from pre-existing condition, but nevertheless accepted his 10% impairment assessment as most appropriate — Agreeing with a portion of Dr. Barefoot's assessment, ALJ determined that 5% of claimant's impairment was attributable to pre-existing active condition, leaving 5% impairment rating for work-related back injury — ALJ also determined that claimant suffered work-related psychological impairment, and awarded benefits based upon 20% impairment rating assessed by Dr. Sivley — Workers' Compensation Board and Court of Appeals affirmed — AFFIRMED — ALJ as finder of fact has authority to determine quality, character, and substance of evidence presented — ALJ has sole discretion to decide whom and what to believe, and may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from same witness or same adversary party's total proof — On appellate review, standard of review is whether factual findings were clearly erroneous, *i.e.*, unreasonable under the evidence presented — Both Dr. Sivley and Dr. Best issued reports grounded in and conforming to *Guides* in reaching their conclusions — Dr. Sivley's contingent finding of MMI was premised on claimant not receiving mental health treatment, which Labcorp refused and for which claimant was unable to pay — Such provisional MMI opinions have been held to be consistent with *Guides* and can serve as substantial evidence justifying award of benefits — ALJ weighed conflicting medical testimony, determined quality, character and substance of evidence, and assessed what ALJ believed to be appropriate impairment rating — ALJ's decision was supported by substantial evidence and was not clearly erroneous —

Laboratory Corp of America v. Hunter Smith; John McCracken, ALJ; and Workers' Compensation Board (2023-SC-0479-WC) and *Hunter Smith v. Laboratory Corp of America and John McCracken, ALJ and Workers' Compensation Board* (2023-SC-0484-WC); On appeal from Court of Appeals; Opinion by Justice Nickell, *affirming*, rendered 8/22/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Laboratory Corp of America ("Labcorp") has appealed from the decision of the Court of Appeals which affirmed a decision of the Workers' Compensation Board ("Board") affirming an Administrative Law Judge's ("ALJ") Opinion and Order awarding Hunter Smith permanent partial disability ("PPD") benefits for a work-related back injury with psychological overlay. Labcorp asserts the Court of Appeals and the Board erred by affirming the ALJ's adjudication of Smith's psychological injury which it contends was improperly based on a conditional impairment rating. Smith has cross-appealed, alleging the ALJ improperly adjudicated the permanent impairment rating relative to his back injury. Following a careful review, we affirm.

FACTS AND PROCEDURAL HISTORY

Smith was employed by Labcorp as a phlebotomist. The events precipitating this workers' compensation claim occurred on January 27, 2021, when a shelving unit fell onto Smith's head, knocking him to the ground. He sustained acute injuries to his lower back which required surgical intervention. On April 4, 2021, Dr. Gregory Lanford performed a Left L4-5 hemilaminectomy, medial facetectomy, diskectomy, and foraminotomy. The surgery was not successful at alleviating Smith's symptoms, with Dr. Lanford noting during follow-up visits that Smith had burning pains in his legs exacerbated by standing and walking, mechanical back pain, urinary urgency, urinary leakage, back stiffness, and inability to sleep. Dr. Lanford ultimately assessed a 24% permanent impairment rating relative to the back injury, apportioning 5% to pre-existing injuries and 19% to the work-related injury. He recommended Smith not engage in prolonged standing or walking, refrain from repetitive climbing of stairs, and never work from ladders, scaffolds, or unprotected heights. Dr. Lanford indicated Smith would need to sit and rest periodically for relief of his pain.

Dr. Jules Barefoot examined Smith on November 10, 2021. At that time, Smith had complaints of lower back pain radiating to his thigh, numbness in his leg, and burning pain in his calf, all worsened with walking. Dr. Barefoot also noted urinary urgency and dribbling and difficulty sleeping due to back and leg pain. Smith freely admitted to experiencing prior back issues but Dr. Barefoot indicated no surgery or restrictions had been recommended prior to the work injury. Although some of Smith's prior medical records noted active back pain, others did not, including a physical therapy report issued two days prior to the work injury. Dr. Barefoot's recommended restrictions mirrored those given by Dr. Lanford. Additionally, utilizing the ROM[1] method Dr. Barefoot agreed with Dr. Lanford that Smith's permanent impairment rating was 24%, with 19% attributable to the work injury and 5% to pre-existing active impairment.

[1] Range-of-motion.

Dr. Michael Best performed a medical examination and records review on behalf of Labcorp. Dr. Best disagreed with the other physicians, noting Smith was uncooperative, confrontational, and displayed significant magnification of his symptoms. Dr. Best opined all of Smith's back issues were pre-existing before the workplace incident, relying on information contained in the physical therapy note issued two days prior to the shelf collapse. He further believed Dr. Barefoot had ignored the appropriate method of assessing an impairment, instead finding Smith has a Lumbar DRE[2] Category III 10% impairment, all of which he attributed to a pre-existing active condition.

[2] Diagnosis-related estimate.

Dr. Barefoot subsequently reviewed Dr. Best's report and opined Dr. Best had misread Smith's physical therapy note to say Smith had active back pain two days before the workplace incident when, in fact, Smith had reported no pain or tenderness and exhibited normal movements. Dr. Barefoot stood firm in his previous impairment assessment and was unswayed by Dr. Best's opinions. Dr. Barefoot noted his belief the ROM method was indicated as the appropriate assessment tool, but did not challenge Dr. Best's use of the DRE method as medically inappropriate or improper.

Dr. Robert Sivley evaluated Smith's psychological complaints and issued a report on January 5, 2022. Prior to the work injury, Smith had participated in one or two counseling sessions during his mid-20's for relationship issues, but otherwise had no psychiatric history. Following a battery of psychological tests, Dr. Sivley diagnosed Smith with adjustment disorder with mixed anxiety and depressed mood, moderate to severe. Although Dr. Sivley diagnosed a Class II impairment range, he refrained from providing a percentage of impairment because he was unsure if Smith had attained maximum medical improvement ("MMI") as he had not received any treatment for his mental health issues. Several weeks later, Dr. Sivley provided an addendum to his report assessing a

20% impairment rating for Smith's psychological condition upon concluding Smith had reached MMI as he was unable to obtain payment from Labcorp for mental health treatment.

Dr. Amy Trivette performed a medical evaluation of Smith on behalf of Labcorp on June 6, 2022. Because she is not a psychologist and cannot administer psychological tests, Dr. Trivette engaged Dr. Martine Turns to conduct the examination and testing. In reviewing the results, Dr. Trivette concluded Smith was genuine in some responses but in others showed a degree of symptom exaggeration and over-reporting of symptoms which were not fully accounted for by his medical records. She believed the inconsistencies made reliance on Smith's accounts of his condition suspect. Dr. Trivette found Smith did not demonstrate significant psychiatric impairment resulting from the work injury nor did he suffer a mental disorder which would prevent performance of his work duties. Thus, upon concluding Smith did not have a psychological impairment relative to his work injury, Dr. Trivette assessed him a 0% impairment rating.

After considering all of the evidence, the ALJ issued an opinion, award, and order on July 15, 2022. The ALJ determined Smith had carried his burden of establishing a compensable work-related injury. The ALJ awarded Smith medical expenses and permanent partial disability benefits. For the back injury, the ALJ rejected Dr. Best's determination that all of Smith's symptoms resulted from a pre-existing condition, but nevertheless accepted his 10% impairment assessment as the most appropriate. Agreeing with a portion of Dr. Barefoot's assessment, the ALJ determined 5% of Smith's impairment was attributable to a pre-existing active condition, thus leaving a 5% impairment rating for the work-related back injury. The ALJ also concluded Smith suffered work-related psychological impairment, and awarded benefits based upon the 20% impairment rating assessed by Dr. Sivley.

Labcorp appealed to the Board, asserting the ALJ improperly relied on Dr. Sivley's impairment rating because Smith had not attained MMI at the time the rating was assigned. It contended only Dr. Trivette's findings constituted reliable and substantial evidence of Smith's psychological impairment. Smith cross-appealed, arguing the ALJ improperly admitted Dr. Best's report into evidence and further misapplied the AMA *Guides*[3] when determining whether to use the impairment rating of Dr. Barefoot or Dr. Best as the two used differing methods of ascertaining the extent of Smith's back injury. The Board affirmed. Both parties appealed to the Court of Appeals, reasserting the same arguments presented to the Board. The Court of Appeals affirmed. This appeal and cross-appeal followed.

[3] American Medical Association *Guides to the Evaluation of Permanent Impairment*, Fifth Edition.

STANDARD OF REVIEW

Review from an ALJ's decision on a workers' compensation claim proceeds on three levels. *Lexington Fayette Urb. Cnty Gov't v. Gosper*, 671 S.W.3d 184, 199 (Ky. 2023). "The Board performs the first level of review[,]" as set forth in KRS 342.285, and functions essentially to correct error, "though without the power of constitutional review." *Id.* The Court of Appeals performs the second level of review from the decisions of the Board pursuant to KRS 342.290 with the purpose of correcting 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." *Id.* (quoting *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)). Further review by this Court is available "as a matter of right under Section 115 of the Kentucky Constitution[,]" and is meant 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 200 (quoting *W. Baptist*, 827 S.W.2d at 688). Thus, we "will not simply 'third guess' the decisions of the Board and the Court of Appeals upon the same evidence." *Id.*

In determining disputed issues of fact, "the ALJ as 'the finder of fact . . . has the authority to determine the quality, character and substance of the evidence presented.'" *Id.* at 198 (quoting *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985)). Additionally, "an ALJ has sole discretion to decide whom and what to believe, and 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 adversary party's total proof." *Id.* (quoting *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009)). On appellate review, "the standard of review is whether the [factual] finding was 'clearly erroneous,' meaning 'unreasonable under the evidence presented.'" *Id.* at 199 (quoting *Letcher Cnty. Bd. of Educ. v. Hall*, 576 S.W.3d 123, 126 (Ky. 2019)). However, we review "questions of law and the application of law to facts under the de novo standard." *Id.*

ANALYSIS

Labcorp contends the ALJ's reliance on Dr. Sivley's impairment rating for Smith's psychological injury was misplaced and the Board and Court of Appeals erred in affirming such reliance based on Labcorp's belief the rating was conditional and therefore could not constitute substantial evidence justifying an award of benefits. Dr. Sivley opined Smith might not be at MMI because he had not yet undergone any mental health treatment. In the absence of such treatment, however, Dr. Sivley indicated Smith was at MMI and assessed an impairment rating. Labcorp argues Dr. Sivley's reports contain internal inconsistencies and, because he did not believe Smith was at MMI, he was prohibited by the *Guides* from assigning any impairment rating whatsoever.[4] Labcorp asserts the ALJ should have concluded Smith did not carry his burden of showing a psychological impairment or, alternatively, should have relied on the 0% impairment rating assessed by its expert, Dr. Trivette.

[4] Contrary to Rules of Appellate Procedure (RAP) 41, Labcorp cites numerous unpublished opinions of the Court of Appeals in support of its position when there are published opinions of this Court addressing the point of law being argued (*see* RAP 41(A)(3)) and without clearly stating the opinions are not binding authority (*see* RAP 41(A)(4)). In one instance, Labcorp even cites to an opinion of the Court of Appeals which was subsequently appealed to this Court, and we issued an opinion, thereby rendering the decision of the Court of Appeals non-final, non-binding, completely without precedential value, and otherwise wholly improper for citation. Because of the clear violation of RAP 41, we shall ignore any citations to those opinions, and any related arguments, in our review. Counsel is cautioned to refrain from such infractions in the future.

On cross-appeal, Smith argues the ALJ misread and misapplied the *Guides* relative to when a physician should use the ROM method instead of the DRE method for assessing an impairment rating. He further contends the ALJ erred in utilizing portions of the opinion of Dr. Best to determine an impairment rating for his back injury. Smith claims that because Dr. Best did not believe Smith suffered a work-related injury, he could not offer any opinion regarding an impairment rating, and the ALJ was thus precluded from relying on his report.

The arguments presented by both parties to this Court are identical to those raised and rejected below. No new or novel questions of law are presented, no precedents warrant reconsideration,[5] and no constitutional issues are in play. Rather, at bottom, each party simply insists the ALJ chose the wrong expert opinion in reaching its decision on an impairment rating. Both cite the rule that a physician's opinion pertaining to an impairment rating must be based on the AMA *Guides*, *Jones v. Brasch-Barry Gen. Contractors*, 189 S.W.3d 149, 153 (Ky. App. 2006), and contend the opinions of their opponent's expert physician were reached in violation of the rule. However, for an impairment rating to be properly based on, or "*grounded* in the *Guides* is not to require a *strict adherence* to the *Guides*, but rather a *general conformity* with them." *Plumley v. Kroger, Inc.*, 557 S.W.3d 905, 912 (Ky. 2018). Moreover, we have long recognized "[t]he proper interpretation of the *Guides* and the proper assessment of an impairment rating are medical questions." *Id.* at 913 (quoting *Kentucky River Enters., Inc. v. Elkins*, 107 S.W.3d 206 (Ky. 2003)). Ultimately, "this Court's only prerogative is to evaluate the ALJ's decision to ensure that it is not contrary to the evidence." *Id.*

[5] We note Labcorp asks us to overrule *Martin County Coal Co. v. Goble*, 449 S.W.3d 362 (Ky. 2014), as an outlier in workers' compensation jurisprudence. However, the issue in *Goble* with which it disagrees is consistent with other published authority, including *Tokico (USA), Inc. v. Kelly*, 281 S.W.3d 771 (Ky. 2009), and *Miller v. Go Hire Employment Development, Inc.*, 473 S.W.3d 621 (Ky. App. 2015). We discern no reason to reconsider *Goble* at this juncture.

Both Labcorp and Smith set forth their views of the evidence as supportive of their respective positions. However, contrary to their assertions, both Dr. Sivley and Dr. Best issued reports *grounded* in and conforming to the *Guides* in reaching their conclusions.

Dr. Sivley's contingent finding of MMI was premised on Smith not receiving mental health

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

treatment—for which Labcorp refused, and Smith was unable, to pay. Such provisional MMI opinions have been held to be consistent with the *Guides* and can serve as substantial evidence justifying an award of benefits. *See Tokico (USA), Inc.*, 281 S.W.3d at 775-776 ("The need for additional treatment does not preclude a finding that a worker is at MMI."); *Go Hire*, 473 S.W.3d 633 (holding an ALJ can reasonably infer from contingent impairment ratings that claimant is at MMI where physician knows no treatment has been provided, none will be forthcoming, and condition will be static absent treatment).

Dr. Best utilized the DRE method which is the principal methodology used to evaluate a claimant with a distinct injury. *Guides*, Sec. 15.2, p. 379. Although the ROM method may also be used under certain criteria, no medical evidence was presented indicating Dr. Best's use of the DRE method was medically improper or in violation of the *Guides*. Importantly, Dr. Barefoot's review of Dr. Best's report did not directly question his methodology, but merely disagreed with his ultimate conclusions. Additionally, although Dr. Best did not believe it was work related, he clearly acknowledged Smith had a disabling low back injury for which an impairment rating was appropriate. As noted by the Board, "assigning of an impairment rating analyzes the condition of the individual, and whether the rating relates to conditions pre-injury or caused by the injury is a separate matter."

While both parties seek a different outcome based upon their assessment of the evidence, it is axiomatic that

> [a]lthough a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. *McCloud v. Beth–Elkhorn Corp.*, Ky., 514 S.W.2d 46 (1974). The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. *Special Fund v. Francis*, [708 S.W.2d 641, 643 (Ky. 1986)].

Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48, 52 (Ky. 2000). Here, the ALJ weighed the conflicting medical testimony, determined the quality, character, and substance of the evidence, and assessed what it believed to be an appropriate impairment rating. "An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof." *Go Hire*, 473 S.W.3d at 629.

The ALJ's decision, which was affirmed by the Board and the Court of Appeals, may not have been the only possible outcome, but it is not unplausible. The parties have offered nothing new to this Court which has not already been analyzed by the lower tribunals. Thus, "[t]he present appeal fails to reach beyond the threshold for routine affirmance." *W. Baptist*, 827 S.W.2d at 688. Our review of the record does not convince us that the evidence compelled a different result. The ALJ's decision was supported by substantial evidence, was not clearly erroneous, and therefore should not be disturbed. Additionally, "the fact remains that the Workers' Compensation Board and the Court of Appeals have provided adequate appellate review, and the view they took of the evidence is neither patently unreasonable nor flagrantly implausible. The case before us does not merit further appellate oversight." *Id.*

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is affirmed.

All sitting. All concur.

ATTORNEYS

Probated suspension with conditions —

In re: Christopher James Mills (2024-SC-0261-KB); In Supreme Court; Opinion and Order entered 8/22/2024. **[This opinion and order is not final. A non-final opinion and order may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Christopher James Mills moves this Court, pursuant to Supreme Court Rule (SCR) 3.480(2), to impose a negotiated sanction of a probated suspension with conditions for his violation of the Rules of Professional Conduct. The Kentucky Bar Association (KBA) has no objection to Mill's motion. For the following reasons, the motion is granted, and the following sanctions imposed.

I. FACTS

Mills was admitted to the practice of law in this Commonwealth on May 1, 2009. His KBA membership number is 92926. His bar roster address is listed as 201 Court Square, PO Box 568, Barbourville, Kentucky 40906.

In early May of 2021, Summer Valladares Williams, a Florida resident, hired Mills to help with resolving ownership of a piece of property in Knox County that had belonged, in part, to her late father who died intestate. Mills suggested filing a quiet title action. They agreed to a fee of $4,000.00 for the quiet title action, which Williams paid him on June 1, 2021. Mills performed a title search and visited the property before realizing that Williams had not probated her father's estate, which he advised her to do. They agreed on a fee of $1,000.00 for the probate actions to be paid in installments. Mills prepared probate forms and emailed them to Williams. On July 2, 2021, Williams traveled to Kentucky from Florida to visit the property and found an oil well. Mills and Williams exchanged several emails that month, resulting in her signing probate documents for her father's estate.

On August 17, 2021, Williams paid Mills the first installment of $250.00 towards the cost of the probate action. Williams emailed Mills on August 18, 2021, and asked him to check the property for squatters because she was concerned that someone was illegally removing minerals from the property. Movant visited the property a second time on September 11, 2021, and saw no squatters but he did not see the oil well.

Mills filed the probate actions on December 12, 2021. In April of 2022, Williams emailed him twice asking for updates but did not receive a response. On April 28, 2022, Mills emailed Williams asking her to sign documents so that he could proceed with the Master Commissioner's sale of her late father's property. Williams responded that she did not want the property sold and wanted to proceed with the quiet title action as soon as possible. Mills continued with the probate action by preparing affidavits of descent and a deed but never filed a quiet title action.

Williams emailed Mills on July 14, 24, and 26, 2022. She received a response on July 27, 2022. Williams also emailed Mills on August 24, 2022; September 1, 6, 15, and 23, 2022; and October 3, 2022, without receiving a response.

On October 4, 2022, Mills attended court to finalize the probate of Williams' father's estate. The following day, Williams executed a deed conveying the property from the estate to herself. Mills recorded the deed and the affidavits of descent on October 13, 2022, and mailed copies to Williams. She emailed Mills asking for a tracking number for the documents Mills had mailed to her. Mills did not respond. Williams emailed Mills again on January 5, 2023, asking for a refund for the quiet title actions that Mills never filed.

Prior to filing the complaint, Williams attempted to reach a resolution with Mills. Williams emailed him on January 5, 2023, asking Mills to refund $3,250.00 of the amount she paid for the quiet title action and giving him permission to apply $750.00 of the amount she paid to the unpaid balance she owed for the probate action. Mills did not respond. Williams filed a bar complaint on January 25, 2023. In Mills' response, he referred to an email dated April 28, 2022, from Williams wherein she agreed that she would not owe him any additional money.

In Williams' supplemental comments, she attached her original April 28, 2022, email. There were several significant alterations to the copy which Mills sent to the Office of Bar Counsel. Mills added (1) language indicating that he and Williams previously discussed proceeding with a Master Commissioner's sale and (2) language indicating that Williams would not owe him anything further. Mills also deleted the language regarding the $4,000.00 payment for the quiet title action and changed the language regarding who discovered the oil well on the property.

As a result of the ensuing Bar complaint, the KBA Inquiry Commission charged Mills with violations of SCR 3.130(1.3) (failure to act with diligence and promptness); SCR 3.130(1.4)(a) (failure to keep his client reasonably informed and failure to comply with reasonable requests for information); SCR 3.130(1.16)(d) (failure to return unearned fees when the representation terminated); and SCR 3.13(3.3)(a) (knowingly making a false statement of fact to a tribunal or offering evidence which the lawyer knows to be false).

Mills admits to all charges. Mills requests that this Court impose a thirty-day suspension, probated for one year subject to conditions, including successful completions of the Ethics and Professionalism Enhancement Program (EPEP) offered by the KBA Office of Bar Counsel, and restitution in the amount of $3,250.00 to Summer Valladares Williams.

II. ANALYSIS

Pursuant to SCR 3.370(10), Mills and the KBA have agreed to a negotiated sanction of a 30-day

suspension, probated for one year subject to conditions. As support for its negotiated sanction the KBA cites a number of cases involving violations of some of the same provisions of the Rules of Professional Conduct in which this Court has imposed similar discipline upon attorneys.

In *Kentucky Bar Ass'n v. Edwards*, 123 S.W.3d 912 (Ky. 2004), this Court issued a conditional public reprimand against an attorney for violating SCR 3.130(1.3), SCR 3.130(1.4) (a) and (b), SCR 1.130(1.16)(d), and SCR 3.130(3.2). *Id.* at 913. The attorney failed to serve the defendant in a personal injury case for over a year; failed to give his client timely notice of his scheduled deposition; and failed to appeal the summary judgment against his client or notify him of the adverse ruling until the time to file an appeal had passed. *Id.* at 912-13. This Court's order granted the Office of Bar Counsel (OBC) permission to request that the sanction be converted to a 45-day suspension if the attorney violated any of this Court's conditions. *Id.* at 013-14. Mills violated three of the same Rules as Edwards, although his conduct did not cause the same degree of potential harm to his client; however, the fact that Mills submitted false evidence to the Inquiry Commission requires a more severe sanction than a public reprimand.

In *Price v. Kentucky Bar Association*, 677 S.W.3d 465 (Ky. 2023), this Court imposed a thirty-day suspension, probated for one year, on an attorney whose violations included SCR 3.130(1.3) and SCR 1.310(1.4)(a)(3). *Id.* at 468-69. Price was also charged with violating SCR 3.130(8.4)(c) for misrepresentations he made to his client, as well as to the Department of Veterans Affairs' Office of General Counsel which was pursuing a lien against his client's settlement proceeds. *Id.* at 467. This Court noted that Price, like Mills, had no prior discipline; admitted to all counts of the charges against him; took responsibility for his conduct; and cooperated with the consensual discipline process. *Id.* at 468.

This Court has previously suspended attorneys who violated SCR 3.120(3.2)(a) as Mills did here. In *Kentucky Bar Ass'n v. Orr*, 350 S.W.3d 427, (Ky. 2011), this Court imposed a 61-day suspension for violating SCR 3.130(3.3)(a)(2), SCR 3.130(3.3)(a)(3), and one count of engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation after Orr created and filed fictitious credit counseling certificate without his client's knowledge in a bankruptcy case. *Id.* at 427. His fraud upon the court lasted for weeks before he finally admitted that the Bankruptcy Trustee's suspension of the false document was well-grounded. *Id.* In his report to the Kentucky Bar Association Board of Governors, the Trial Commissioner found that Orr's conduct was of a character which brings the legal profession into disrepute. *Id.* at 429.

Finally, in *Kentucky Bar Association v. Smith*, 671 S.W.3d 277 (Ky. 2023), this Court accepted the Board's recommendation of a three-year suspension, retroactively applied to the date on which the Inquiry Commission issued the charge, for violating SCR 3.130(3.3)(a)(1), SCR 3.310(3.3)(a)(2), SCR 3.130(8.4)(c), and SCR 3.130(3.4)(c). *Id.* at 281. In order to avoid suspension of her law license for failure to earn enough continuing legal education, Smith filed an Emergency Motion for Revocation of Suspension with this Court on February 4, 2019. *Id.* at 278. She attached a falsified certificate of attendance at a Kentucky Law Update to an equally fraudulent affidavit filed in support of her motion. *Id.* In her Answer to the Inquiry Commission Charge, issued on November 4, 2019, she denied any wrongdoing. *Id.*

Unlike the attorneys in *Orr* and *Smith*, Mills has admitted that his sanctions violated the Kentucky Rule of Professional Responsibility; has engaged with Office of Bar Counsel in negotiating a mutually acceptable sanction; and has accordingly filed a motion asking this Court to impose said negotiated sanction without objection.

Having reviewed the record and relevant caselaw, we agree that a 30-day suspension, probated for one year subject to conditions is an appropriate sanction.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. Mills has violated SCR 3.130(1.3), 1.130(1.4)(a), 1.31(1.16)(d), and 3.130(3.3)(a).

2. Mills will be suspended for a period of thirty (30) days, that suspension to be probated for one year subject to the conditions defined below.

3. Mills shall not commit any crimes, including misdemeanors or felonies, or have any further disciplinary cases.

4. Mills shall timely pay his Kentucky Bar Association dues.

5. Mills shall satisfy all continuing legal education requirements.

6. Mills shall attend, at his expense, the Ethics and Professional Enhancement Program (EPEP), separate and apart from his fulfillment of any other continuing legal education requirements, within twelve months after entry of this Order.

7. Mills shall complete EPEP by passing the exam given at the end of the program.

8. Mills shall not attempt to claim any CLE credit for attending EPEP.

9. Mills shall pay restitution in the amount of $3,250.00 to Summer Valladares Williams. He is directed to pay a minimum of $300.00 towards this total every month beginning thirty days (30) after entry of this Order. Further, Mills shall provide contemporaneous proof, in the form of copies of the payment instrument, to the Office of Bar Counsel. Restitution must be paid in full prior to the termination of the one-year probation period.

If Mills violates any of the terms of probation stated in this Order within one year of the date of this Order, or receives a charge of professional misconduct during the one-year probationary period, the Office of Bar Counsel may file a motion with the Court requesting the issuance of a show-cause order directing Mills to show cause, if any, as to why the thirty-day suspension should not be imposed. If, at the expiration of the one-year probationary period, Mills has complied with the above terms, the suspension and all terms of his probation shall be terminated.

All sitting. VanMeter, C.J.; Bisig, Conley, Keller, and Nickell, JJ., concur. Thompson, J., concurs in result only. Lambert, J., dissents without opinion.

ENTERED: AUGUST 22, 2024

EQUINE LAW

CONTRACTS

CONTRACT REQUIREMENTS FOR PAYMENT OF A COMMISSION, FEE, GRATUITY, OR ANY OTHER FORM OF COMPENSATION IN CONNECTION WITH THE SALE OF A HORSE UNDER KRS 230.357(11)

QUANTUM MERUIT

CIVIL PROCEDURE

APPELLATE PRACTICE

PRECEDENTIAL VALUE OF DEPUBLISHED OPINIONS OF THE COURT OF APPEALS

In January 2016, horse trainer (trainer) entered into contract with owner of horse farm to train her horse "Darling" — According to trainer, in exchange for his services, he would receive monthly training fee, monthly room and board fees, as well as 12% of every purse Darling won — Trainer received monthly fees and his share of prize money as each became due during relevant period — Owner passed away in August 2018 and her heirs decided to sell her racing horses — Trainer's services were terminated — When trainer discovered heirs intention to sell Darling, trainer first alleged an additional term of his oral contract with owner by sending letter to heirs — In letter, trainer alleged that he and owner had discussed several times a 5% commission fee for himself if Darling was ever sold, but owner had refused to sell — After Darling was sold in November 2018, trainer sent heirs invoice for $175,000, which was 5% commission of sale price — Heirs refused to pay commission — Trainer filed instant action for breach of contract and breach of implied in fact contract, as well as claim of *quantum meruit* — There is no dispute that agreement for 5% commission was never documented in a signed writing — Heirs filed motion for summary judgment, arguing that KRS 230.357(11), "Equine Statute of Frauds," applied — Trial court granted summary judgment to heirs — Court of Appeals reversed — REVERSED — KRS 230.357(11) states, in part, that no contract or agreement for payment of a commission, fee, gratuity, or any other form of compensation in connection with any sale, purchase, or transfer of an equine shall be enforceable by

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

way of action or defense unless the contract or agreement is in writing and is signed by the party against whom enforcement is sought and recipient of compensation provides written bill of sale for transaction — KRS 230.357(11) applies in instant action as trainer is seeking a commission, a fee, or some other form of compensation — Trial court found that there was oral agreement, but refused to enforce terms of 5% commission because it was not evidenced by signed writing as required by KRS 230.357(11) — Trainer seeks to enforce contract for $175,000 in cash as commission in connection with sale of horse, which KRS 230.357(11) prohibits unless evidenced by a writing — To allow recovery in *quantum meruit* would give trainer $175,000, and, thereby, defeat requirements in KRS 230.357(11) — Because of KRS 230.357(11), principles of equity do not allow for implying a contract at law in instant action — Kentucky Supreme Court noted that depublished opinions, as opposed to ordinary not-to-be published opinions, the citation of which is governed by RAP 41, have zero precedential value — Reasons why Supreme Court may depublish an opinion of the Court of Appeals are various, and known only to Supreme Court — All that is known is that Supreme Court does not want a particular opinion to be binding on trial courts or other Court of Appeals panels — Supreme Court has seen something in those opinions that did not merit discretionary review, "but may work mischief if followed by other courts" — The entire depublished opinion should be limited strictly to parties concerned and not cited as persuasive authority in other cases — Supreme Court discouraged reliance on depublished opinions —

Normandy Farm, LLC v. Kenneth McPeek Racing Stable, Inc. (2022-SC-0552-DG); On review from Court of Appeals; Opinion by Justice Conley, *reversing*, rendered 8/22/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

This matter comes before the Court upon discretionary review from the Court of Appeals which reversed the summary judgment of the Fayette Circuit Court. The trial court determined that KRS[1] 230.357(11) applied to bar Kenneth McPeek Racing Stable's (McPeek) claim for a 5% commission on the sale of a horse called Daddy's Lil' Darling. The Court of Appeals reversed, holding KRS 230.357(11) only applied to buyers, sellers, and their agents, of horses when involved in transactions for horses. Since McPeek's commission was not for any services rendered for the sale of Daddy's Lil' Darling, but only for services rendered in training the horse prior to the sale, the Court of Appeals determined KRS 230.357(11) has no application to the case at bar. Upon review, we reverse the Court of Appeals and reinstate the summary judgment of the trial court.

[1] Kentucky Revised Statutes.

I. Facts and Procedural Posture

In January 2016 McPeek entered into an oral agreement with the late Nancy Polk, owner of Normandy Farms, LLC, to train Daddy's Lil' Darling ("Darling" or "the horse"). According to McPeek, in exchange for his services he would receive a monthly training fee, monthly room and board fees, as well as 12% of every purse that Darling won. No party disputes that McPeek received monthly fees and his share of the prize money as each became due during the relevant period. But Nancy Polk passed away in August 2018 and her heirs decided to sell Normandy's racing horses. McPeek's training services were terminated.

Darling was a darling on the track, winning the American Oaks, as well as placing second in the Kentucky Oaks and Breeder's Cup. She won a total of $1,335,305 in prize money in her racing career. But excellence demands its own prize as well—Darling's ankles wore out and racing was no longer viable for her. Normandy determined to sell her as a broodmare and contracted Gainesway Sales as consignor for auction. The horse fetched $3,500,000 in November 2018.

McPeek discovered Normandy's intention prior to the sale and at this time first alleged an additional term of his oral contract with Polk by sending a letter to her heirs. In that letter, McPeek represented that he and Polk had several times discussed a 5% commission fee for himself if Darling was ever sold but Polk had steadfastly refused to sell, instead preferring to keep Darling as her own broodmare. The letter is informal and is just as much a letter of condolence for the loss of their mother, as it is a legal document informing them of a contractual term he expected to be fulfilled by Normandy. Only after the sale in November 2018 was an invoice sent to Normandy for 5% commission of the $3,500,000 sale price, or $175,000.

Normandy refused to pay the commission and litigation followed. McPeek brought claims for breach of contract and breach of implied in fact contract, as well as a claim of *quantum meruit*. There is no dispute that the agreement for the 5% commission from any sale of Darling was never documented in a signed writing or otherwise memorialized in a writing. McPeek has asserted that his website contains that term but there is no evidence that Polk ever saw that term on his website, much less assented to it orally. In brief, the only evidence for the existence of a contract for a 5% commission fee upon the sale of the horse is McPeek himself.

Normandy brought a motion for summary judgment in December 2021. That motion argued KRS 230.357(11) is a statute of frauds which requires a signed writing evidencing the agreement for any form of compensation connected with a horse sale. The lack of a signed writing, Normandy asserts, bars enforcement of the contract, even if an oral contract existed. Normandy also argued KRS 230.357(11) barred all of McPeek's claims, and that there was no factual basis for an equitable award in *quantum meruit* because he was indisputably paid for his training services. In response, McPeek argues the statute only imposes restrictions on purchasers and sellers when buying or selling an equine. He argues that his commission is not connected with the sale of a horse but is instead remuneration for his training services. In brief, McPeek argues he was contracted for training services and the 5% commission is for those training services, not for the sale of a horse. He also argues that an implied in fact contract for the 5% commission is not barred because a jury could find that the parties were acting in accordance with the terms found on his website. Finally, he argues a statute of frauds does not bar a claim in *quantum meruit*.

The trial court granted summary judgment to Normandy in January 2022. It concluded KRS 230.357(11) barred McPeek's claims after detailing that the "crux" of the dispute was whether the 5% commission fee is viewed as a term for training services or is one in connection with the sale of a horse. After citing the plain-text meaning rule of statutory construction, the trial court determined KRS 230.357(11) applied because "[t]his is a commission in connection with the sale of a horse as plainly understood." The trial court rejected McPeek's citation to the depublished case of *Thoro-Graph, Inc. v. Lauffer*, Nos. 2010-CA-000891-MR and 2010-CA-000914-MR, 2012 WL 5038254 (Ky. App. Oct. 19, 2012), *discretionary review denied and ordered not to be published* (Aug. 21, 2013). The trial court concluded *Thoro-Graph*'s discussion of KRS 230.257(11) was "cursory" and "entirely dicta" and unpersuasive; moreover, because unpublished, was not binding upon it. The trial court also granted summary judgment as to the claim for *quantum meruit*. Notably, however, it rejected the argument that KRS 230.357(11) bars such a claim outright. Instead, the trial court held that because the statute applied, there would need to be exceptional circumstances justifying equitable relief. It then properly cited to the elements for a claim of *quantum meruit* but concluded McPeek's case was not exceptional because he received his monthly training fees and 12% prize money from Darling's winnings.

On appeal, the Court of Appeals reversed. The Court of Appeals cited all twelve provisions of KRS 230.357 and concluded, "this statute requires that a seller and buyer of a horse, or their agents, must have a written agreement, signed by both, for the sale, purchase, or transfer of a horse." It further stated the statute

> only covers agreements to sell, purchase, or transfer horses between a buyer and a seller, or their agents. The statute requires receipts and bills of sale, neither of which would be available for the agreement between Appellant and Appellee. The agreement at issue in this case was an agreement to train horses. It was an agreement for services, not an agreement to sell a horse.
>
> Appellant would receive various fees and commissions in exchange for his services. One such fee would only arise should the horse be sold. Even though the commission revolved around the sale of a horse, it was still a fee for services, not a fee for the selling or purchasing of a horse. In other words, the agreement between Appellant and Appellee was not an agreement in "connection with any sale, purchase, or transfer of an equine[.]" KRS 230.357(11). Appellee was not selling a horse to Appellant and Appellant was not seeking to purchase a horse from Appellee.

The court then commented that it believed

Thoro-Graph supported its holding and summarized that case in three paragraphs before concluding its opinion. Discretionary review was sought by Normandy Farms and was granted. We now consider the merits of the appeal and further facts will be developed as necessary.

II. Standards of Review

Summary judgment may be granted when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[2] 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted." *Id.* at 482. A motion for summary judgment at the trial court, and on appeal, presents only a question of law thus, we review *de novo* and give no deference to the lower courts. *Patton v. Bickford*, 529 S.W.3d 717, 723 (Ky. 2016).

[2] Kentucky Civil Rules of Procedure.

Statutory construction also presents a *de novo* question of law. *Blackaby v. Barnes*, 614 S.W.3d 897, 901 (Ky. 2021). To that end,

> it is imperative that we give the words of the statute their literal meaning and effectuate the intent of the legislature. We have repeatedly stated that we '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.' *Cosby v. Commonwealth*, 147 S.W.3d 56, 59 (Ky. 2004). And the intent of the General Assembly 'shall be effectuated, even at the expense of the letter of the law.' *Commonwealth v. Rosenfield Bros. & Co.*, 118 Ky. 374, 80 S.W. 1178, 1180 (1904).

Samons v. Ky. Farm Bureau Mut. Ins. Co., 399 S.W.3d 425, 429 (Ky. 2013). These two rules of statutory construction—the plain-meaning rule and whole-text rule—are seemingly at odds here which is not unprecedented. But, as *Samons* rightly notes, the intent of the legislature is the lodestar by which we are guided. No interpretation of a statutory text can be called correct if it has not the General Assembly's purpose at its beginning and end.

Lastly, "[a] contract implied by law allows for recovery *quantum meruit* for another's unjust enrichment." *Perkins v. Daugherty*, 722 S.W.2d 907, 909 (Ky. App. 1987). Importantly, however, a contract implied at law "is not based upon a contract but [is] a legal fiction[.]" *Id.* It is a contract implied at law because a court has determined the circumstances of the case are such that a contract should be implied to allow the plaintiff recovery. "[I]f a determination is made by processes of legal reasoning from, or of interpretation of the legal significance of, the evidentiary facts, it is a conclusion of law." *Schultz v. Gen. Elec. Healthcare Financial Serv. Inc.*, 360 S.W.3d 171, 175 (Ky. 2012) (quoting *Poyner v. Lear Siegler, Inc.*, 542 F.2d 955, 959 (6th Cir. 1976)). Because the decision to imply a contract at law depends on an interpretation of the legal significance of facts, it is also question of law reviewed *de novo*.

III. KRS 230.357

This is the first time KRS 230.357 has come before this Court for interpretation. The background to the passage of this law and its underlying purpose is as follows.

> In 2004, billionaire California wine-maker Jess Jackson began buying thoroughbred horses, and purchased a large farm in Central Kentucky. Concerned with what he perceived to be dubious practices in the thoroughbred business, he sued several equine professionals for fraud, and in 2006 lobbied the Kentucky legislature to pass a statute that purported to address some of these practices.

Frank T. Becker, *Non-Uniform Statutes Governing the Sale of Horses*, 8 Ky. J. Equine, Agric. & Nat. Resources L. 1, 5 (2016) (internal footnote omitted). Another commentator, however, has noted that the "dubious practices"—mainly, dual agency—were of worldwide concern in the horse racing profession, and not just a picadillo of Mr. Jackson's. R. Kelley Rosenbaum, *Mucking Out the Stalls: How KRS § 230.357 Promises to Change Custom and Facilitate Economic Efficiency in the Horse Industry*, 95 Ky. L.J. 997, 998 (2007). "In January of 2006, the Horse Owners Protective Association (HOPA), was formed to address fraudulent business practices in the horse industry. Later that year, HOPA successfully urged the Kentucky legislature to enact KRS § 230.257." *Id.* The statute was amended the next year. Acts of General Assembly, 2007 c 103, § 1, eff. 6-26-07. That amendment provided the specific provision at issue here,

> (11) No contract or agreement for payment of a commission, fee, gratuity, or any other form of compensation in connection with any sale, purchase, or transfer of an equine shall be enforceable by way of an action or defense unless:
>
> (a) The contract or agreement is in writing and is signed by the party against whom enforcement is sought; and
>
> (b) The recipient of the compensation provides a written bill of sale for the transaction in accordance with subsections (2)(a) and (3) of this section.

KRS 230.357(11).

Prior to the Court of Appeals' decision now under consideration, only two cases, both unpublished, addressed this statute. One, *Lane's End Stallions, Inc. v. Raphaelson*, No. CIV.A. 5:10-360-KKC, 2011 WL 310237, at *5-*6 (E.D. Ky. Jan. 28, 2011), does not concern the specific provision at issue and is substantially different on its facts, therefore we will not consider it. The other, *Thoro-Graph, Inc. v. Lauffer*, Nos. 2010-CA-000891 and 2010-CA-000914, 2012 WL 5038254 (Ky. App. Oct. 19, 2012), *discretionary review denied and ordered not to be published* (Aug. 21, 2013), was cited by the Court of Appeals below as supporting its interpretation of KRS 230.357.

Preliminary to our discussion of the statute, we take this opportunity to make clear to bench and bar that depublished opinions—as opposed to ordinary not-to-be-published opinions, the citation of which is governed by RAP[3] 41—have zero precedential value. The reasons why this Court may exercise its authority to depublish an opinion of the Court of Appeals are various and, more importantly, known only to this Court; and even then, imperfect. All that is known from such an order is that this Court does not want a particular opinion to be binding on trial courts or other Courts of Appeal panels. This Court has seen something in them that did not merit discretionary review but may work mischief if followed by other courts. The rule of thumb is that the entire opinion should be limited strictly to the parties concerned and not cited as persuasive authority in other cases. That being said, McPeek relies heavily upon *Thoro-graph* for support so we will consider its reasoning but reliance upon depublished opinions is discouraged.

[3] Kentucky Rules of Appellate Procedure.

KRS 230.357 has two principal features. First, Section 2 requires the sale, purchase, or transfer of an equine to be accompanied by a written bill of sale, disclosing the purchase price, and signed by both seller and buyer, or their authorized agents. KRS 230.357(2)(a)-(b). KRS 230.357(3) applies when a sale is effected through an auction. Sections 4 through 7 are devoted to prohibiting and regulating transactions for horses involving dual agents. None of these are at issue here so we will not consider them in depth. But the Court of Appeals looked to these several provisions to conclude that the overall purpose of KRS 230.357 was to regulate the sales of equines between buyers, sellers, or their agents; and therefore, because McPeek was not an agent involved with securing the sale of Darling, KRS 230.357(11) did not apply to his case.

We certainly endorse the rule that "courts have a duty to construe statutes, not isolated provisions." *Brown-Forman Corp. v. Miller*, 528 S.W.3d 886, 894-95 (Ky. 2017) (quoting *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)). And we commend the Court of Appeals for attempting to uphold this duty. But courts also have a duty to interpret and enforce a statute according to its plain-text meaning. *Barnett v. Central Kentucky Hauling, LLC*, 617 S.W.3d 339, 341 (Ky. 2021). "Only if the language is unclear do we consider the legislatures' unspoken intent, the statute's purpose, and the broader statutory scheme." *Id.* at 341-42. "Where the words used in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as it is written." *Griffin v. City of Bowling Green*, 458 S.W.2d 456, 457 (Ky. 1970). The misstep in the Court of Appeals' analysis is that it used an overall purpose to interpret words, rather than discern the purpose from the words used. The clearest expression of purpose is the language of the statute itself. *Bell v. Bell*, 423 S.W.3d 219, 223 (Ky. 2014). "It is not a proper use of the [whole-text] canon to say that since the overall purpose of the statute is to achieve x, any interpretation of the text that limits the achieving of x must be disfavored." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 168 (2012). By the same token, the Court of Appeals reasoned that because the overall purpose of KRS 230.357 is to

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

combat the problems of dual agency in horse sales, KRS 230.357(11) must be *limited* to only buyers, sellers, and their agents for horse sales. But the plain language of KRS 230.357(11) contains no such limiting language and speaks more broadly; it is unambiguous, and we must take the General Assembly at its word.

The breadth of the provision is established in its first part, wherein it states it applies to any contract or agreement "for payment of a commission, fee, gratuity, or *any* other form of compensation *in connection with any sale*, purchase, or transfer of an equine . . . ." KRS 230.357(11) (emphasis added). A commission, as used in this statute, is "a sum or percentage allowed to an agent for his services." I The American College Encyclopedic Dictionary, Commission 242 (1958). A fee is defined as "[a] charge or payment for labor or services, esp. professional services." Black's Law Dictionary, Fee 758 (11th Ed., 2019). A gratuity is defined, under the archaic word gratification, as "[a] voluntarily given reward or recompense for a service or benefit." *Id.* at 845. And compensation is defined as "remuneration and other benefits received in return for services rendered[.]" *Id.* at 354. Subsection 11 applies to all forms of payment, recompense, reward, or any other kind or form of compensation "in connection with any sale, purchase, or transfer of an equine . . . ." KRS 230.357(11). McPeek is seeking a commission, a fee, or some other form of compensation.

The Court of Appeals, and McPeek in briefing, contend that the "in connection with" language actually means "an agreement to sell a horse." And because McPeek was not involved in the sale of Darling and his commission was not and could not be for any work done in procuring or achieving that sale, the statute cannot apply. But applying the statute in this manner is to construe it as if it read

> No contract or agreement for payment of a commission, fee, gratuity, or any other form of compensation *for* any sale, purchase, or transfer of an equine shall be enforceable by way of an action or defense unless . . . .

It is not a subtle change, and it drastically alters the scope of the provision. There is a discernable and unignorable difference between any form of compensation *in connection with* the sale of an equine, and any form of compensation *for* the sale of an equine. If the General Assembly intended to limit KRS 230.357(11) only to the latter, then it quite easily could have done. Instead, it chose the former and expressed its intent to prohibit the enforceability of any agreement for any form of compensation in connection with the sale of an equine except under certain defined conditions.

"Connection" is defined as "1. An act connecting. 2. The state of being connected . . . 4. Association; relationship . . . 6. Union in due order or sequence of words or ideas." I The American College Encyclopedic Dictionary, Connection 256 (1958). McPeek demands 5% commission in connection with the sale of Darling, an equine. This is obvious. By his own admission, he would not be entitled to the $175,000 unless Darling was sold. His 5% commission depends upon the purchase price when she was sold. The commission McPeek desires is connected with the sale of Darling; it is related to the sale of Darling; it is dependent upon and sequentially follows as a condition precedent the sale of Darling. It is impossible to say this commission is not connected with the sale of an equine. The Court of Appeals was forced to acknowledge this by conceding the commission "revolved around" the sale of a horse. Only by interpreting the language "in connection with any sale, purchase or transfer" to mean "for the sale, purchase, or transfer" can we escape the force of reason. That, however, would be rewriting the statute and "[i]t is well settled law that a court may not add language to the written law to achieve a desired result." *Fox v. Grayson*, 317 S.W.3d 1, 8 (Ky. 2010).

The dissent somehow concludes that a horse sale is *immaterial* to an oral contractual provision for 5% of the sale price of the horse. This flies in the face of blackletter law and elementary reasoning. Law tells us that the horse sale is a condition that must occur prior to receipt of a percentage of the sale price—"[a] condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." Restatement (Second) of Contracts § 224. Aristotle teaches us that "If A, then B" is a logical proposition in which B is consequent from the occurrence of A. Aristotle, *Posterior Analytics, in* The Basic Works of Aristotle 110, 116 (McKeon, Richard, ed., 2001) ("[A] thing consequentially connected to anything is essential."). That makes A—the horse sale—essential. Being both material under law and essential under reason, the horse sale is "in connection with" the 5% commission because the latter is united to the former in a necessary sequence of chronological occurrences—if there is no horse sale, there cannot be any 5% commission under any circumstances. If a contract stipulates "If A, then B" then A and B are causally related under the contract. How one thing can be causally related to another thing but simultaneously not be "in connection with" it is a conundrum the dissent must solve but fails to do.

The dissent has also postulated various potential agreements that may be implicated by our ruling. First, courts cannot create ambiguity in statutory texts. *Milner v. Dept. of Navy*, 562 U.S. 562, 574 (2011). Tenuous hypotheticals, such as whether taking a taxi to a horse sale falls under the statute, have precisely that function. But not all the hypotheticals are meritless. For example, one hypothetical postulated is a veterinarian who treats a horse with remuneration for said services to be a percentage of the sale of the horse. Did the General Assembly intend to cover that specific arrangement when it passed KRS 230.357(11)? Perhaps not, but the language of the statute would reach such a scenario. The dissent fails to reckon with the fact that the contract itself is what provides the necessary connection. If a veterinarian contracts A—treating the horse—in return for B—a percentage of the price the horse is sold for—then the contract establishes that the veterinarian services are in connection with the horse sale. It is an irreducible fact that the contract makes A and B causally related, thus "in connection with" one another: but for A, no B. And if the horse is never sold? Then the veterinarian suffers the consequences of making a ridiculous contract.[4] *Matthis v. O'Brien*, 126 S.W. 156, 158 (Ky. 1910) ("The law will not interfere . . . to the relief of those who with their eyes open understandingly and freely make a bad bargain.").

[4] The dissent's other two points are that KRS 230.357(11) is a poor fit with KRS 230.357(7) under our interpretation. The answer: the two provisions do not need to fit. The latter provision applies to violations of KRS 230.357(4)-(6). Lastly, the dissent cites the title of KRS 230.357. But it is firmly established that

> headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, *matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles*. Factors of this type have led to the wise rule that *the title of a statute and the heading of a section cannot limit the plain meaning of the text*.

Brotherhood of R.R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 528-29 (1947) (emphasis added). This rule is particularly apt since we know that KRS 230.357(11) was a later amendment to the chapter; thus, it is unreasonable to look to the heading as an interpretive guide over plain statutory text.

Next, the relevant language states the agreement for any form of compensation must be in connection with a sale, purchase, or *transfer* of an equine. This language takes the section beyond sales and purchases because "transfer" means

> [a]ny mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance. The term embraces every method—direct or indirect, absolute or conditional, voluntary or involuntary—of disposing of or parting with property[.]

Black's Law Dictionary, Transfer 1803 (11th Ed., 2019). By confining KRS 230.357(11) to only buyers and sellers, or their agents, in transactions for the sale of a horse, the Court of Appeals' reasoning renders the word transfer superfluous; indeed, null. By including the word transfer the General Assembly intended the statute to apply to any situation where a party seeks to enforce an agreement for any form of compensation in connection with the disposing of a property interest in an equine.[5] This is consistent with our interpretation of the general statute of frauds that prohibits enforcing any unwritten contract "for the sale of real estate[,]" KRS 371.010(6), but which we have held applies "so long as there is a purpose to transfer title to land[.]" *Adamson v. Adamson*, 635 S.W.3d 72, 78 (Ky. 2021). We are not familiar with the ins-and-outs of the horse racing profession, and it may be that agreements for compensation connected with transfers of a property interest in an equine that are not strictly speaking a sale are comparatively rare. But that is of no moment. The General Assembly used plain language, and it may legislate upon the rare occurrence as much as it can upon the common.[6]

[5] Nor does the term "bill of sale" contradict this conclusion but supports it. "We typically define words according to their ordinary meanings when interpreting statutes, but that general rule yields

when a word or phrase has a technical meaning within the law." *Caldwell v. Chauvin*, 464 S.W.3d 139, 151 (Ky. 2015). "Bill of sale" is a legal term of art defined as "[a]n instrument for conveying title to personal property, absolutely or by way of security." Black's Law Dictionary, Bill of sale 205 (11th Ed., 2019). "[W]hen a written document of any sort is used to effect the transfer, the document is called technically a 'bill of sale.'" *Id.* (quoting Albert Gibson, Arthur Weldon & H. Gibson Rivington, *Gibson's Conveyancing* 302 (14th ed. 1933)).

[6] Subject of course to the constitutional prohibition upon special and local legislation. Ky. Const. § 59.

Finally, the Court of Appeals reasoned that because KRS 230.357(11)(b) contains the provisio that "[t]he recipient of the compensation provides a written bill of sale for the transaction in accordance with subsections (2)(a) and (3) of this section[,]" that the statute cannot apply to McPeek because McPeek never received, nor would have received, a bill of sale. In other words, because McPeek would not have access to the evidence demanded by the statute prior to instituting his lawsuit, the statute could not apply to him. That is an odd exegetical method. Courts do not interpret statutes based on the facts of a particular case. Instead, we interpret statutes based on their words then determine whether the statute applies to the facts. Subsection (11)(b) is an evidentiary requirement, and it applies only to cases where a plaintiff is seeking to enforce an agreement for any form of compensation in connection with the sale, purchase, or transfer of an equine. KRS 230.357(11). In other words, the scope of applicability is determined by subsection (11) and it does apply here.

Subsection (11)(b) appears to be strenuous evidentiary burden, especially for someone in McPeek's position but we do not believe it so high as to be arbitrary or effectively bar access to the courts. Subsection (11) says "No contract or agreement . . . shall be enforceable by way of action or defense unless . . . ." It does not say "no action shall be commenced" or "no action shall be maintained." In brief, McPeek did not need to provide a bill of sale to file his lawsuit or otherwise have it in possession at the commencement of the lawsuit. "Provides" means "to furnish or supply." II The American College Encyclopedic Dictionary, Provide 975 (1958). CR[7] 26.02(1) allows a party to obtain materials from the adverse party that is relevant to the subject matter of the litigation and is admissible evidence or is calculated to lead to admissible evidence.[8] The bill of sale for Darling is obviously relevant and admissible. By obtaining the bill of sale through discovery, McPeek would then provide it to the trial court and satisfy subsection (11)(b).[9]

[7] Kentucky Rules of Civil Procedure.

[8] CR 34.03 also allows a party to obtain documents from those persons not a party to the litigation.

[9] This is consistent with our repeated affirmation that summary judgment motions should not even be considered by trial courts until the opposing party has had an adequate opportunity for discovery. *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010).

Thus, KRS 230.357(11) applies to McPeek and the facts of this case. The trial court correctly held so and summary judgment is proper because the agreement he sought to enforce was not evidenced by a writing signed by Polk, the owner of Normandy Farms at the time the contract allegedly was made. This summary judgment applies to both his breach of contract claim and breach of contract implied in fact claim. A contract implied in fact simply looks to the circumstances, conduct, and acts of the parties, other than verbal expressions, to evince the formation of a contract. *Kellum v. Browning's Adm'r*, 21 S.W.2d 459, 465 (Ky. 1929). But KRS 230.357(11) does not allow the enforcement of a contract for any form of compensation in connection with the sale of an equine unless it is evidenced by a signed writing, therefore McPeek's claim fails in the absence thereof.

As for *Thoro-graph*, we find that opinion particularly unavailing as persuasive authority in this case, aside from what we stated earlier regarding depublished opinions. Thoro-graph, Inc. provided advice to prospective buyers of racehorses. *Thoro-Graph, Inc. v. Lauffer*, No. 2010-CA-000891-MR, 2012 WL 5038254, at *1 (Ky. Ct. App. Oct. 19, 2012). In 2008, Kirk, on behalf of a joint venture, contacted Thoro-graph's owner, Brown, for his services. *Id.* A few months later, Brown recommended the purchase of Rachel Alexandria for $1.2 million. *Id.* Lauffer, another member of the joint venture, then spoke with Brown directly. *Id.* When informed of his fee rates, Brown declined to accept them and said they would be a problem. *Id.* An agreement between the joint venture and Brown could not be reached because of the fee rates. *Id.* at *2. Lauffer, in his own name, then purchased a 50% interest in Rachel Alexandria. *Id.* Lauffer later filed a declaratory action seeking a judicial determination that he was not contracted or otherwise obliged to pay Brown any fees concerning the acquisition of Rachel Alexandria. *Id.* The trial court concluded no contract ever existed between Brown and Lauffer but that Brown was entitled in *quantum meruit* to $25,000 for the services he did provide that Lauffer subsequently took advantage of in making the purchase. *Id.*

Both parties appealed, but the issue concerning this case is Lauffer's argument that KRS 230.357(11) applied, and the trial court should have awarded summary judgment to him pursuant to that statute. The Court of Appeals held "that the statutes do not apply to this case. The question before the trial court involved recovery of a fee for advice. It was not in 'connection with any sale, purchase, or transfer of an equine.'" *Id.* at *5 (quoting KRS 230.357(11)). Based on the analysis provided above, we reject that rationale.[10] A "bloodstock agent" as Brown was serving as, providing services to a potential buyer on the acquisition of an equine, who then acts upon that advice to purchase a proprietary interest in that equine, is generally a contract or agreement in connection with the sale, purchase, or transfer of an equine.[11] The ultimate conclusion of *Thoro-graph*, however, was essentially correct because KRS 230.357(11) only applies to a "contract or agreement" for any form of compensation in connection with the sale, purchase, or transfer of a horse. The trial court in *Thoro-graph* concluded no contract or agreement ever existed between Lauffer and Brown; and then it implied a contract at law to award $25,000 to Brown in *quantum meruit*.

[10] We agree with the trial court below that the absence of any kind of contract or agreement in *Thoro-graph* rendered the Court of Appeals' analysis dicta because there was no contract or agreement for it to apply the statute to. It could have simply relied on the absence of a contract to not apply KRS 230.357(11).

[11] McPeek has argued that *Thoro-graph* represents a known judicial interpretation of a statute and therefore the failure of the General Assembly to amend the statute since 2012 is persuasive evidence that it agrees with the Court of Appeals' interpretation of KRS 230.357(11). We reject that argument first because it is a depublished case. Second, "unpublished cases as a rule are not meant to be cited as official pronouncements of what the law is[.]" *Taylor v. Commonwealth*, 671 S.W.3d 36, 42 (Ky. 2023). Therefore, unreported cases do not put the General Assembly on notice to change a statute because they have no binding precedential authority. RAP 41. Finally, *Thoro-graph*'s discussion of KRS 230.357(11) was dicta and not an authoritative statement of the law in its own right.

In contrast, the trial court below did find there was an oral agreement but refused to enforce the term for a 5% commission because it was not evidenced by a signed writing as required by KRS 230.357(11). This is made clear on pages 6-8 of the trial court's opinion and order which granted summary judgment explicitly on the basis that the contract was not evidenced by a signed writing; rejected the application of an exception to the statute of frauds (discussed in greater detail in Section IV) based on the fact that KRS 230.357(11) does not contain a one-year provision, rather than on the absence of any agreement; and finally, it stated *quantum meruit* could not be awarded except for exceptional circumstances because McPeek was alleging a contract "deemed unenforceable" by the "equine statute of frauds," i.e., KRS 230.357(11).

To conclude, we are not insensible to some concerns that this ruling, and the statute upon which it is based, may disrupt the horse racing profession and the time-honored custom of handshake agreements. Horses and horse racing are an indelible part of Kentucky and in that sense belong to all Kentuckians for "[t]o be born in Kentucky is a heritage; to brag about it is a habit; to appreciate it is a virtue."[12] Nonetheless, horses and horse racing are also economic concerns and, on that point, the General Assembly's authority to regulate the profession is paramount and unquestionable—"[s]haping public policy is the *exclusive* domain of the General Assembly." *Caneyville Vol. Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 807 (Ky. 2009) (emphasis added). "We 'ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed.'" *Revenue Cab. v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (quoting *Flying J Travel Plaza v. Commonwealth of Ky., Transp. Cab., Dep't of Highways*, 928 S.W.2d 344, 347 (Ky. 1996)). This Court has no license to ignore the plain text meaning of a statute simply because some prefer a different policy outcome that it believes

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

is more conducive to the General Assembly's latently expressed intent. If, upon rendition of this opinion, the General Assembly concludes that it has misspoken, then it is free to amend the statute accordingly.

[12] A quote of Paducah's own Irving S. Cobb, quoted in Kentucky Progress Commission, II Kentucky Progress Magazine 48 (1929).

IV. Quantum Meruit

There are several species of *quantum meruit* claims, and the particular one at issue here is of the class historically known as *indebitatus assumpsit*. *Quantum meruit* "is an equitable remedy invoked to compensate for an unjust act, whether it is harm done to a person after services are rendered, or a benefit is conferred without proper reimbursement." *Lofton v. Fairmont Specialty Ins. Managers, Inc.*, 367 S.W.3d 593, 597 (Ky. 2012). A claim of *quantum meruit* necessarily posits that no contract exists between the parties—where a contract does exist, *quantum meruit* is barred and the terms of the contract prevail. *Vanhook Enterprises, Inc. v. Kay and Kay Contracting, LLC*, 543 S.W.3d 569, 574 (Ky. 2018). Thus, it is legal question whether to imply a contract in law because such a contract "is created not by any promise or mutual assent of the parties but is imposed by law on the party irrespective of, and sometimes in violation of, his intention." *Fayette Tobacco Warehouse Co. v. Lexington Tobacco Brd. of Trade*, 299 S.W.2d 640, 643 (Ky. 1956).[13] It is a "legal fiction . . . where the circumstances are such that under the law of natural and immutable justice there should be a recovery as though there had been a promise. Under such circumstances, common-law courts have supplied the fiction of the promise in order to permit the remedy." *Id.* (quoting *Clark v. People's Savings & Loan Ass'n of De Kalb County*, 46 N.E.2d 681, 682 (In. 1943)).

[13] It is curiosity of law that *quantum meruit* seems to sound in equity though originally derived from the common law. *Fayette Tobacco*, 299 S.W.2d at 643-44. In truth it is an action at law. Though it invokes the equitable power of a court that is only because the common law courts' embrace of actions in assumpsit, finally resolved by the seminal *Slade's Case*, (1598) 4 Co Rep 92b, 76 ER 1074 (1602), "reflected the common law courts' efforts to move into the Chancellor's equitable territory." Judy Beckner Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DePaul L. Rev. 399, 423 (1992).

Therefore, *quantum meruit* claims present two basic questions: first, are the circumstances such that natural justice demands a contract be implied though the parties may never have intended there to be one; and second, what is the value of the services rendered under this implied contract? When the underlying facts and the measure of value is undisputed, summary judgment is appropriate. That is met here since the underlying facts of McPeek's services are undisputed, and the measure of those services—$175,000—is not disputed. Normandy does not dispute the measure, only that it is owed; in other words, it disputes that the circumstances are such that a contract be implied by law.

As part of that argument, Normandy asserts KRS 230.357(11) is a statute of frauds that bars enforcement of a *quantum meruit* claim. McPeek argues to the contrary. The trial court declined to imply a contract in law, but no fair reading of its opinion leads to the conclusion that it refused to do so because the statute of frauds barred it. Instead, the trial court concluded that the existence of the statute of frauds meant exceptional circumstances had to exist to imply a contract at law. The Court of Appeals failed to analyze this conclusion in any depth. At best, it merely quoted *Thoro-graph* for the proposition that a statute of frauds does not bar a *quantum meruit* claim. But since the trial court did not make such a legal conclusion, that hardly suffices to reverse the trial court.

The general rule regarding the statute of frauds and *quantum meruit* was stated in *Head v. Shwartz's Ex'r*, that

> [t]he rule that part performance operates to take a contract out of the provisions of the statute of frauds so as to permit its enforcement, notwithstanding the absence of a signed writing evidencing the contract, has never been approved or followed in this jurisdiction. On the contrary we have repudiated it, as will be seen from the cases *of Gault v. Carpenter*, 187 Ky. 25, 218 S.W. 254 [(1920)], and *Rhinehart v. Kelley*, 145 Ky. 470, 140 S.W. 653 [(1911)]. But to that nonaccepted rule we have adopted an exception with reference to that provision of our statute of frauds requiring that agreements not to be performed within one year from the making thereof to be in writing, so as to give the contract effect and enforceability where one of the parties has fully performed his part and the other one has by its terms a longer time than one year in which to perform his part[.]

202 S.W.2d 623, 624-25 (Ky. 1947). The Court later seemed to depart from that rule in *Louisville Trust Co. v. Monsky*, 444 S.W.2d 120 (Ky. 1969). But a year later the Court clarified *Monsky* by saying

> we held that quantum meruit could not be used to avoid the statute of frauds [in that case]. . . but to regard that as a general proposition is an erroneous overstatement. It is generally held that part-performance not amounting to full performance on one side does not in general take a contract out of the one-year provision.

Butturoff v. United Electric Laboratories, Inc., 459 S.W.2d 581, 587 (Ky. 1970). *Buttoroff* did not overrule *Monsky*. From that fact it is evident that there is no bright-line rule that a statute of frauds bars a *quantum meruit* claim but neither is there a bright-line rule that *quantum meruit* claims are not barred by a statute of frauds.

Notably, however, the general statute of frauds in Kentucky, KRS 371.010, does not apply here under the rule that specific statutes control over general statutes. *Abel v. Austin*, 411 S.W.3d 728, 738 (Ky. 2013). KRS 230.357(11) is undoubtedly the more specific statute. The trial court also correctly noted that statute has no similar one-year provision as found in KRS 371.010(7). "We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." *Dept. of Revenue, Fin. and Admin. Cabinet v. Wyrick*, 323 S.W.3d 710, 713 (Ky. 2010). The absence of a one-year provision in KRS 230.357(11) prohibits importing an exception from the general statute of frauds dependent upon its one-year provision.

Although McPeek has relied upon *Shwartz* and *Buttoroff*, the cases are unavailing here. *Schwartz* simply reaffirms Kentucky's adherence to the rule that where one party to a contract has fully performed and the other party's performance is capable of being performed longer than a year from the time of the contract, then the statute of frauds is not a bar to enforcing said contract. 202 S.W.2d at 623-24. Such a rule obviously depends upon KRS 371.010(7) and there is no analogous one-year provision in KRS 230.357(11), therefore *Schwartz* cannot apply. *Buttoroff* clarified *Monsky* but in so doing relied upon the Restatement (Second) of Agency § 468 (1958). 459 S.W.2d at 587. Section 468 has three paragraphs, the first one not applying here because of the lack of a one-year provision. But it states further,

> (2) If a statute provides that a person employing another for a specified purpose shall not be liable to the other for compensation although the other renders the promised performance, unless the employer has signed a memorandum in writing, a person has no duty to pay to another whom he orally employs for such purpose either the promised compensation or the reasonable value of services rendered.
>
> (3) Except as stated in Subsection (2), an agent who has partially or fully performed a contract which is not enforceable because a memorandum thereof has not been signed is entitled to the fair value of services rendered if the principal refuses to perform the contract or to sign a memorandum.

Restatement (Second) of Agency § 468 (1958). McPeek is plainly a person employed by another for a specific purpose, and KRS 230.357(11) is plainly a statute prohibiting enforcement of an agreement "for any other form of compensation" that is not evidenced by a written instrument signed by the employer. The exception of paragraph three, as Comment C of Section 468 explains, refers to the general rule that a contract unenforceable by a statute of frauds does not bar restitution if said restitution can be had by some other means not prohibited by the statute of frauds. *See generally* Restatement (Second) of Agency § 355 (1958); *see also Schwartz*, 202 S.W.2d at 625. But no such alternative restitution can be had here. McPeek is seeking to enforce a contract for $175,000 in cash as a commission in connection with the sale of the horse, which KRS 230.357(11) prohibits unless evidenced by a writing. To allow recovery in *quantum meruit* would give him—$175,000 in cash. The statute would be defeated.

Since a statute of frauds exists here and no other form of restitution is available, paragraph two applies, and the statute of frauds is a good defense to bar the *quantum meruit* claim.[14] "To allow any recovery under the situation described in paragraph (2) of the section would defeat the very purpose of the statute [of frauds]." *Buttoroff*, 459 S.W.2d at 587. *Quantum meruit* claims are only allowable when "in accord with the purpose of the statute [of frauds] rather than a defeat of it." *Id.* Courts must consider whether the recovery sought would defeat the purpose of the statue of frauds. If so, the statute applies, and the claim is defeated. If not, then a *quantum meruit* claim prevails.[15]

[14] This conclusion necessarily rejects the other pertinent part of *Thoro-graph*, No. 2010-CA-000891-MR, 2012 WL 5038254, at *5. *Thoro-graph* misconstrued *Buttoroff* by failing to consider the totality of its reasoning regarding the statute of frauds and *quantum meruit* claims.

[15] An illustrative example of this is found in *Schwartz*, where the Court held that an action to recover remuneration upon an oral contract in the form of real property could not be maintained because of the statute of frauds, but "if the promisee has performed the contract by pendering [sic] the required services, a contract to pay the reasonable value of the services rendered is implied and an action will lie against the personal representative of the decedent on a *quantum meruit* to recover the value of the services." 202 S.W.2d at 625. In other words, the specific performance of payment in the form of land was barred, but payment in the form of cash would not defeat the statute of frauds therefore a *quantum meruit* claim was actionable.

Finally, because of the existence of KRS 230.357(11), principles of equity do not allow for implying a contract at law in this case. It is an ironclad rule that "law trumps equity." *Seeger v. Lanham*, 542 S.W.3d 286, 295 (Ky. 2018). "Courts of equity may no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law." *Kaufman v. Kaufman's Adm'r*, 166 S.W.2d 860, 867 (Ky. 1942).

V. Conclusion

McPeek brought three different claims seeking to recover a 5% commission on the sale price of Daddy's Lil' Darling as a form of compensation for his training services. KRS 230.357(11) bars enforcement of any contract for any form of compensation in connection with the sale of horse unless that contract is evidenced by a written instrument signed by the party against whom enforcement is sought. McPeek admits there is no written instrument evidencing this contract. Therefore, the statute bars all his claims. To apply equity in this case would be contrary to the expressed public policy of the General Assembly which courts cannot do. The Court of Appeals is reversed, and trial court's summary judgment is reinstated.

Bisig, Conley, Keller, Lambert, Nickell and Thompson, JJ., sitting. Lambert, Nickell, and Thompson, JJ., concur. Bisig, J., dissents by separate opinion, in which with Keller, J., joins. VanMeter, C.J., not sitting.

ATTORNEYS

Indefinite suspension —

In re: Richard Davis Null (2024-SC-0197-KB); In Supreme Court; Opinion and Order, entered 8/22/2024. **[This opinion and order is not final. A non-final opinion and order may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Richard Davis Null, Kentucky Bar Association (KBA) Number 87271, was admitted to the practice of law in the Commonwealth of Kentucky on April 24, 1998. His bar roster address is listed as 535 Broadway, Paducah, Kentucky.

Null has most recently been charged in File No. 23-DIS-0093 and 23-DIS-0176 with seven violations of our Supreme Court Rules of Professional Conduct for which the Board of Governors unanimously recommended a two-year suspension to run consecutively to discipline previously ordered by this Court. For reasons stated below, we decline to follow the Board's recommendation and instead indefinitely suspend Null from the practice of law.

I. FACTS AND PROCEDURAL BACKGROUND

This most recent case involves two separate disciplinary actions.

A. File 23-DIS-0093

Samantha Messenger filed a bar complaint against Null relative to a child custody matter in which she paid Null $3,000.00. Null appeared on Messenger's behalf at two hearings in Calloway County and three juvenile proceedings in McCracken District Court but stopped returning Messenger's calls in early 2023. On September 15, 2023, the Inquiry Commission filed a four-count Charge against Null alleging violations of Supreme Court Rules (SCR) 3.130(1.3); SCR 3.130(1.4)(a)(3) and (4); SCR 3.130(1.16)(d); and SCR 3.130(8.4)(c).

B. File 23-DIS-0176

Donelle and Roman Bledsoe retained Null in January 2021, to defend them regarding criminal charges in Marshall County and paid Null a total of $6,300.00. Null appeared at six hearings on their behalf prior to the trial court ordering a status hearing for March 28, 2023. The Bledsoes stated that when they reached Null by phone to discuss the March hearing, Null informed them that he was retired. The Bledsoes later discovered that Null was in fact suspended and filed both a bar complaint and a claim with the Client Security Fund for the money they had paid him for their representation. On September 15, 2023, the Inquiry Commission filed a three-count Charge against Null alleging violations of SCR 3.130(1.3); SCR 3.130(1.16)(d); and SCR 3.130(8.4)(c).

C. Attempts to Locate Null and Recommended Discipline

Both Charges were sent by certified mail to Null's bar roster address on September 15, 2023, but were returned as unclaimed. The Charges were then forwarded to the McCracken County Sheriff on October 13, 2023, but that office was unable to serve Null at either his bar roster address or at an alternate address in Paducah. The McCracken County Sheriff later provided the Office of Bar Counsel with an alternate address of 5619 PGA Boulevard, Apartment 1224, Orlando, FL 32839 for Null. A second certified mailing was sent to that address but returned with a notation of "Return to Sender, Not Deliverable as Addressed, Unable to Forward" on November 27, 2023.

Given Null's failure to comply with SCR 3.035(1) and keep the KBA informed of an address at which he could be "communicated with by mail," Null had to be constructively served via the KBA Executive Director on December 11, 2023, pursuant to SCR 3.035(2) which permits appointment of the Executive Director as the member's agent for service of process after "reasonable efforts have been made to achieve actual service of the document upon the member[.]" The record further reflects that the Executive Director fully complied with the requirements of SCR 3.035(2)(b) through (d).

Null never answered the Charges or made any appearance in the underlying actions. The Charges were consolidated and submitted to the Board of Governors as a default case pursuant to SCR 3.210(1). The Board of Governors, with one recusal, unanimously determined that Null was guilty of each of the seven counts of professional misconduct alleged against him and recommended that Null "be suspended for two (2) years, to run consecutively to previous discipline; make restitution in the amount of $3,000.00 to Samantha Messenger; make restitution in the amount of $6,300.00 to Donella and Roman Bledsoe; and pay costs[1] associated with this action."

[1] Calculated and certified by the Disciplinary Clerk in the amount of $740.17.

II. PRIOR DISCIPLINARY ACTIONS

This latest case is only the most recent in an extensive history of disciplinary actions regarding Null.

On September 26, 2013, we suspended Null for sixty-one days, probated for two years, on the conditions that he pay restitution in the amount of $400, contact the Kentucky Lawyers Assistance Program (KYLAP) for an evaluation and not receive any new disciplinary charges during the probation period. *Null v. Ky. Bar Ass'n*, 408 S.W.3d 76 (Ky. 2013).

Eight new disciplinary actions were filed against Null and resolved by our December 15, 2022, Opinion and Order (as modified on March 23, 2023). *Null v. Ky. Bar Ass'n*, 2022-SC-0422-KB, 2022 WL 19330699 (Ky. Dec. 15, 2022) (unpublished). In that case, Null was suspended from the practice of law for one year, 180 days of which were to be served, and the balance of 185 days to be probated for two years, subject to a number of conditions including: (a) refunding unearned fees to six former clients; (b) attending the Ethics and Professionalism Enhancement Program (EPEP); (c) attending the Trust Account Management Program (TAMP); (d) paying all costs imposed in the action; and (e) notifying all current clients and courts in which he had matters pending of his suspension.

On April 26, 2023, the KBA made a motion for this Court to enter a show cause order against Null for violating the conditions of his probation and on May 19, 2023, this Court entered an Order to Show Cause directing Null to show cause why the 185-day probated portion of his one-year suspension should not be imposed for his failures to conform with this Court's prior order.

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

Null filed no pleadings or documentation whatsoever in conformity with the Order to Show Cause and on August 24, 2023, we entered our Opinion and Order which imposed the previously probated portion of Null's suspension, stating:

> The 185-day suspension, previously probated, is now imposed on Richard Davis Null as a suspension from the practice of law due to his failure to show cause and his failure to comply with the terms of his probation as provided for in this Court's Opinion and Order dated December 15, 2022. This 185-day suspension is in addition to the 180-day suspension previously imposed by this Court and now constitutes a total suspension of one year, all in conformity with our December 15, 2022 Opinion and Order as modified on March 23, 2023.

Null v. Ky. Bar Ass'n, 677 S.W.3d 344 (Ky. 2023).

In addition to the foregoing, Null's KBA records show one private reprimand from this Court dated April 15, 2008, and four private reprimands from the Inquiry Commission over the period of July 8, 2019, to March 9, 2022.

III. ANALYSIS

Null's present location is unknown to both the KBA and this Court. It appears from the record before us that Null decided to effectively, and permanently, cease observing the Rules of Professional Conduct and cease complying with the direct orders of this Court once his initial term of temporary suspension became effective on December 15, 2022.

While the Board of Governors has recommended that Null be subject to a two-year suspension, given Null's prior disciplinary actions, his current suspension, the abandonment of his former clients, and his complete disregard for the orders of this Court and the rules of practice in this Commonwealth, we have determined that Null should be suspended from the practice of law *indefinitely* pursuant to SCR 3.167(1) which states:

> The Court may in its discretion, *sua sponte*, or on motion by the Office of Bar Counsel, suspend the Respondent from the practice of law for an indefinite period of time in cases in which the Respondent has failed to file an answer to a Charge pursuant to SCR 3.164, or having answered, has thereafter failed to participate in the disciplinary process.

We do not regard this as a final adjudication of the matter. Null's indefinite suspension shall remain in effect pending further review by this Court upon his motion for a final determination in this case which includes an accounting for both his failure to respond in this current matter and his failures to abide by the prior orders of this court, upon a motion of the Kentucky Bar Association for a final disposition, upon the presentation of additional charges against Null, or upon the Court's own initiative.

ORDER

ACCORDINGLY, IT IS ORDERED THAT:

1. Richard Davis Null is suspended from the practice of law indefinitely;

2. All prior orders of this Court, including but not limited to those concerning the refunding of money by Null to each of his former clients, remain in full force and effect;

3. As required by SCR 3.390, Null will, if he has not already done so, within 10 days after issuance of this order of suspension from the practice of law for more than 60 days, notify, by letter duly placed with the United States Postal Service, all courts or other tribunals in which he has matters pending, and all clients of his inability to represent them and of the necessity and urgency to promptly obtain new counsel. Null shall simultaneously provide a copy of all such letters of notification to the Office of Bar Counsel;

4. Null shall immediately cancel any pending advertisements, to the extent possible, and shall terminate any advertising activity for the duration of the term of suspension;

5. Null is instructed to promptly take all reasonable steps to protect the interests of his clients. He shall not, during the term of suspension, accept new clients or collect unearned fees, and he shall comply with the provisions of SCR 3.130(7.50); and

6. In accordance with SCR 3.450, Null is directed to pay all costs associated with these disciplinary proceedings in the amount of $740.17, for which execution may issue from this Court upon finality of this Opinion and Order.

VanMeter, C.J.; Bisig, Conley, Lambert, Keller, and Thompson, JJ., sitting. All concur. Nickell, J., not sitting.

ENTERED: August 22, 2024.

ATTORNEYS

Suspended from the practice of law —

In re: Brittany Lawryn Oliver (2024-SC-0098-KB); In Supreme Court; Opinion and Order entered 8/22/2024. **[This opinion and order is not final. A non-final opinion and order may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Brittany Lawryn Oliver, Kentucky Bar Association (KBA) Number 93218, was admitted to practice law in the Commonwealth of Kentucky on October 23, 2009.[1] Oliver is currently suspended from the practice of law pursuant to Supreme Court Rule (SCR) 3.167. In this default case under SCR 3.210, the KBA Board of Governors (Board) recommends this Court find Oliver guilty of violating SCR 3.130(1.3), 3.130(1.4), 3.130(1.16), and 3.130(8.1), and suspend her from the practice of law for 181 days. The Board also recommends that Oliver be required to attend and successfully complete the Ethics and Enhancement Professionalism Program (EPEP), participate in the Kentucky Lawyers Assistance Program (KYLAP), refund unearned fees to the complainants, and pay the costs of this proceeding. Because neither party filed notice for this Court to review the Board's decision, we adopt the Board's recommendation pursuant to SCR 3.370(10).

[1] Oliver's bar roster address is P.O. Box 1134, Campton, Kentucky 41301.

FACTS AND PROCEDURAL HISTORY

This proceeding stems from Oliver's representation of three couples who retained her to pursue filing bankruptcy actions in 2021.

KBA File 22-DIS-0134

On October 23, 2023, this Court indefinitely suspended Oliver in this disciplinary matter. *Ky. Bar Ass'n v. Oliver*, 681 S.W.3d 75 (Ky. 2023). Manuel and Barbara Puckett hired Oliver in August 2021 to represent them in pursuing Chapter 7 bankruptcy. They brought relevant documents to Oliver and paid a representation fee of $1,200. In their Clients' Security Fund application, the Pucketts report that after hiring Oliver, they called her "from time to time" but she did not respond. The Pucketts also stated that Oliver contacted them through her secretary to terminate representation and return their file in December 2021 without having filed the bankruptcy action and without returning their legal fees. Oliver's secretary told the Pucketts that Oliver was no longer representing clients due to depression and illness. When they picked up their file, Oliver's secretary told the Pucketts that Oliver would contact them about refunding their legal fees.

At the time the Pucketts filed their Bar Complaint on May 24, 2022, they had hired another attorney to represent them. At that time, they had neither been contacted by Oliver nor received a refund of their legal fees. Oliver responded to the Bar Complaint and affirmatively declared she had no knowledge of the Pucketts, any of the matters they described in their complaint, and had never represented them. On August 18, 2022, the U.S. Bankruptcy Court for the Eastern District of Kentucky determined that Oliver had not rendered any legal services to the Pucketts and ordered Oliver to refund their $1,200 legal fees, which Oliver refunded on August 25, 2022.

The Inquiry Commission issued a four-count Charge against Oliver. Count I alleges violation of SCR 3.130(1.3) for failing to reasonably and promptly represent the Pucketts because she took no action related to the bankruptcy matter. The Board of Governors noted discrepancies in what the Inquiry Commission reported in the Charge and what Pucketts explained in their Bar Complaint and Clients' Security Fund Application. In the Charge, the Inquiry Commission explained that the Pucketts stated that communication with Oliver was very difficult, then ceased altogether and that they were unable to ever speak with Oliver when terminating representation. As a result, the Pucketts sought to terminate Oliver's representation and obtained new counsel. Conversely, in the Complaint and application, the Pucketts reported that Oliver's secretary contacted them to terminate representation and return their file, at which point the Pucketts hired a new attorney. The Board opined that despite uncertainty regarding the source of the contradictory information, Oliver nonetheless failed to reasonably and promptly represent the Pucketts.

Count II charges Oliver with violation of SCR 3.130(1.4)(a) because she was unreachable by the

Pucketts when they sought information about their case. Count III charges Oliver with violation of SCR 3.130(1.16)(d) for failing to return the $1,200 fee for almost a year after representation was terminated and only doing so after an order from the United States Bankruptcy Court. Count IV charges Oliver with violating SCR 3.130(8.1) because Oliver's verified response to the Bar Complaint asserting she had no knowledge of the Pucketts and never represented them appeared false given that she later refunded them $1,200 as ordered by the Bankruptcy Court. Oliver did not contact the Office of Bar Counsel to correct any earlier misstatements.

The Inquiry Commission unsuccessfully attempted service upon Oliver at her bar roster address. After another unsuccessful attempt to serve Oliver via Sheriff, Oliver was ultimately served by service upon the Executive Director pursuant to SCR 3.035 on January 11, 2023. Oliver did not file an answer to the Charge. On January 19, 2024, this disciplinary proceeding came before the Board as a default case pursuant to SCR 3.210. After deliberation, a majority of the Board found Oliver guilty under all counts.[2]

[2] The votes for this disciplinary matter were as follows: Counts I and II – 18 guilty, 0 not guilty; Count III – 17 guilty, 1 not guilty; Count IV – 15 guilty, 3 not guilty.

KBA File 22-DIS-0135

On October 23, 2023, this Court indefinitely suspended Oliver in this disciplinary matter. *Ky. Bar Ass'n v. Oliver*, 681 S.W.3d 77 (Ky. 2023). Brian and Brenda Caudill hired Oliver in April 2021 to represent them in pursuing Chapter 7 bankruptcy. They provided Oliver with relevant documents and paid a $1,200 representation fee. In their Bar Complaint, the Caudills reported that Oliver closed her office in 2021 without ever having filed their bankruptcy action and that in December 2021, Oliver's secretary contacted them to pick up their documents. In their Clients' Security Fund application, the Caudills stated Oliver's secretary told them Oliver was closing her office due to depression. At the time they filed their Bar Complaint, the Caudills had not received a refund of the representation fee. On August 18, 2022, the U.S. Bankruptcy Court ordered Oliver to refund the representation fee which she did one week later.

The Inquiry Commission issued a three-count Charge against Oliver. Count I alleged violation of SCR 3.130(1.3) for failure to reasonably and promptly represent the Caudills because Oliver took no action related to their bankruptcy matter. Similar to the disciplinary matter involving the Pucketts, the Board noted that in the Caudills' Client Security Fund application, the Caudills stated Oliver's secretary contacted them to terminate representation and relayed that Oliver was closing her office due to illness, not that they discovered Oliver's office was closed or had to seek the return of their documents as outlined in the Inquiry Commission Charge. In any event, the Board concluded that Oliver failed to reasonably and promptly represent the Caudills in their bankruptcy matter.

Count II charges Oliver with violating SCR 3.130(1.16)(d) because Oliver did not refund the Caudills their $1,200 fee for nearly a year following termination of representation and only did so after the Bankruptcy Court Order. Count III charges Oliver with violating SCR 3.130(8.1) because Oliver's verified response to the Bar Complaint asserting she had no knowledge of the Caudills and never represented them appeared false given that she later refunded them $1,200. Oliver did not contact the Office of Bar Counsel to correct any earlier misstatements.

The Inquiry Commission unsuccessfully attempted service upon Oliver at her bar roster address. After another unsuccessful attempt to serve Oliver via Sheriff, Oliver was served by service upon the Executive Director pursuant to SCR 3.035 on January 11, 2023. Oliver did not file an answer to the Charge. After deliberation, a majority of the Board found Oliver guilty under all counts.[3]

[3] The votes for this disciplinary matter were as follows: Counts I – 18 guilty, 0 not guilty; Count II – 17 guilty, 1 not guilty; Count III – 15 guilty, 3 not guilty.

KBA File 22-DIS-0211

On October 23, 2023, this Court indefinitely suspended Oliver in this disciplinary matter. *Ky. Bar Ass'n v. Oliver*, 681 S.W.3d 59 (Ky. 2023). Dexter and Zella Kidd hired Oliver in May 2021 to represent them in pursuing Chapter 7 bankruptcy. The Kidds provided Oliver with relevant documents and paid a $1,200 representation fee. In their Clients' Security Fund application in October 2022, the Kidds stated that they received a call from Oliver's secretary who informed them Oliver was closing her practice, instructed them to pick up their file, and advised that their refund would be mailed to them. After weeks passed without receiving their refund, the Kidds attempted to contact Oliver, but her phone number was disconnected. In June 2022, the Kidds hired another attorney, Tammy Howard, to represent them in filing a bankruptcy action. Howard reported the incident with Oliver to the KBA. There are discrepancies between the timing of events as reported by Howard in her email to the KBA and the Kidds in their Clients' Security Fund application. But in any event, the Kidds still have not been refunded their representation fee.

The U.S. Bankruptcy Court for the Eastern District of Kentucky ordered Oliver to refund the $1,200 fee and when she did not comply, the Court ordered her to appear at hearings in November and December 2022. Oliver failed to appear at either hearing or refund the fee. On December 29, 2022, the Bankruptcy Court suspended Oliver from practice in that Court and days later the U.S. District Court for the Eastern District of Kentucky reciprocally suspended Oliver from practice in that court.

The Inquiry Commission issued a four-count Charge against Oliver. Count I alleges violation of SCR 3.130(1.3) for failing to reasonably and promptly represent the Kidds in the bankruptcy matter. Count II charges Oliver with violating SCR 3.130(1.4) by keeping the Kidds ill-informed about the status of their bankruptcy matter and being impossible to contact. Count III alleges violation of SCR 3.130(1.16)(d) for abandoning the Kidds' case and failing to return the $1,200 fee despite being so ordered by the bankruptcy court. Count IV charges Oliver with violating SCR 3.130(8.1)(b) for failing to respond to the Inquiry Commission Complaint.

Oliver was personally served with the Complaint on November 14, 2022 but failed to respond or otherwise contact the KBA. Oliver was also personally served with the Charge but did not respond. After deliberation, the Board found Oliver guilty on all counts in the Charge.[4]

[4] The votes for this disciplinary matter were as follows: Counts I and II – 18 guilty, 0 not guilty; Count III – 17 guilty, 1 not guilty; Count IV – 18 guilty, 0 not guilty.

Because Oliver failed to answer any of the Charges, these disciplinary matters were submitted to the Board as a default case. The Board considered her lack of disciplinary history (outside of discipline related to the matters at hand, such as being suspended by the United States Bankruptcy Court), aggravating and mitigating factors, and relevant authority. The Board recommends that Oliver be found guilty in all counts in each disciplinary matter and be suspended from the practice of law for 181 days. In addition, the Board recommends that Oliver be required to complete the Ethics and Enhancement Professionalism Program, participate in KYLAP, and refund the Kidds their $1,200 fee in addition to paying the costs of these proceedings. Neither party filed notice, pursuant to SCR 3.370(8), for this Court to review the Board's decision. Therefore, we adopt the decision of the Board pursuant to SCR 3.370(10). The Board cites *Kentucky Bar Association v. Matthews*, 283 S.W.3d 741 (Ky. 2009) to support the recommended 181-day suspension. In Matthews, an attorney was suspended for 181 days for multiple counts of misconduct stemming from two disciplinary matters, including failure to keep a client informed about the status of a matter, failure to act with reasonable diligence and promptness in representing a client, and failure to respond to a lawful demand for information from a disciplinary authority. *Id.* at 742. Like Oliver, the attorney failed to respond to the Charge. *Id.*

In *Kentucky Bar Association v. Quisenberry*, 250 S.W.3d 308 (Ky. 2008), an attorney was suspended for 181 days for violating similar rules as Oliver, including failing to communicate with her client, failing to refund a fee, and failing to respond to a lawful demand for information from an admissions or disciplinary authority. Similarly, in *Kentucky Bar Association v. Stevenson*, 2 S.W.3d 789, 790 (Ky. 1999), an attorney was suspended for 181 days in a default case after failing to file a lawsuit as requested by a client, keep the client apprised of the status of her claim, and respond to a lawful demand for information. These cases demonstrate that a 181-day suspension is an appropriate sanction.

ACCORDINGLY, the Court ORDERS:

(1) Respondent, Brittany Lawryn Oliver, is adjudged guilty on all counts and hereby is suspended from the practice of law for one hundred and eighty-one (181) days from the date of this Opinion and Order;

(2) Because Oliver's suspension exceeds 180 days, she must fulfill all relevant requirements under SCR 3.502 for reinstatement;

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

(3) Pursuant to SCR 3.390, Oliver, if she has not already done so, shall, within twenty days from the entry of this Opinion and Order, notify all clients in writing of her inability to represent them, and notify all courts in which she has matters pending of her suspension from the practice of law, and furnish copies of said letters to the Office of Bar Counsel; Pursuant to SCR 3.390(2), Oliver shall, to the extent possible, immediately cancel and cease any advertising activities in which she is engaged;

(4) During the time of her suspension, Oliver shall not accept new clients or collect unearned fees;

(5) If she has not already done so, Oliver shall immediately refund $1,200.00 to the Kidds;

(6) Oliver shall attend, at her expense, and successfully complete the Ethics and Enhancement Professionalism Program (EPEP);

(7) Oliver shall participate in the Kentucky Lawyer Assistance Program (KYLAP) on such terms and conditions as set by KYLAP; and

(8) In accordance with SCR 3.450, Oliver is directed to pay all costs associated with these disciplinary proceedings, in the amount of $898.16, for which execution may issue from this Court upon finality of this Opinion and Order.

All sitting. All concur.

ENTERED: August 22, 2024

CRIMINAL LAW

POSTINCARCERATION SUPERVISION UNDER KRS 532.043

REINCARCERATION FOR VIOLATING THE TERMS OF POSTINCARCERATION SUPERVISION

SENTENCING

INMATE'S ABILITY TO EARN STATUTORY SENTENCE CREDITS UNDER KRS 197.045 DURING THE PERIOD OF THE INMATE'S REINCARCERATION FOR APPLICATION TOWARD THE REMAINDER OF THE INMATE'S IN-CUSTODY SENTENCE

Inmates who have been reincarcerated for violating the terms of their postincarceration supervision (to which they had been sentenced in accord with KRS 532.043) may earn statutory sentence credits under KRS 197.045 during the period of their reincarceration for application toward the remainder of their in-custody sentences —

Darrie Rushin v. Com. (2023-SC-0194-DG); On appeal from Court of Appeals; Opinion by Justice Thompson, *reversing*, rendered 8/22/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

We granted discretionary review to determine whether inmates, who have been reincarcerated for violating the terms of their postincarceration supervision (to which they had been sentenced in accord with Kentucky Revised Statutes (KRS) 532.043), may earn statutory sentence credits under KRS 197.045 during the period of their reincarceration for application toward the remainder of their in-custody sentences.

As a matter of first impression, we hold sentence credits apply to reduce the period of reincarceration inmates are serving due to a violation of their postincarceration supervision and therefore reverse the opinion of the Court of Appeals.

I. FACTUAL AND LEGAL BACKGROUND

Darrie Rushin was indicted by a Jefferson County grand jury on charges of first-degree burglary; first-degree sodomy; first-degree attempted rape; first-degree unlawful imprisonment; public intoxication; and being a first-degree persistent felony offender (PFO I). He pled guilty to amended charges of second-degree burglary and second-degree sodomy in addition to the original charges of first-degree attempted rape, first-degree unlawful imprisonment, and public intoxication. Pursuant to the plea agreement, the PFO I charge was dismissed.

On April 2, 2014, the trial court accepted Rushin's guilty plea and imposed a total sentence of seven years' imprisonment in accordance with the Commonwealth's recommendation. Additionally, the trial court sentenced Rushin to register as a sex offender and,

> [p]ursuant to KRS 532.043, . . . to *a five-year period of post incarceration supervision* after expiration of his sentence or completion of parole, to be supervised by Probation and Parole under the authority of the Parole Board. Any violation shall be reported by Probation and Parole to the Parole Board, which may act to reincarcerate the Defendant pursuant to KRS 532.043 and KRS 532.060.

While incarcerated, Rushin completed his sex offender treatment program (SOTP) and was then entitled to apply his earned credits toward release. On December 19, 2018, the remainder of Rushin's seven-year sentence was discharged and he was released to begin the five-year period of postincarceration supervision.

After Rushin violated the terms of his supervision by absconding, he was reincarcerated on January 2, 2020, to complete the remainder of the postincarceration supervision period in prison.

In May 2021, Rushin requested the Department of Corrections (DOC) to review his sentence calculation arguing he had been wrongfully denied sentence credit that would reduce the length of his reincarceration. The DOC denied Rushin's request, and his subsequent administrative appeal was also denied. Rushin thereafter filed a motion in his underlying criminal case seeking declaratory and injunctive relief.[1] DOC moved to dismiss the claim on separation-of-powers grounds, arguing the trial court lacked authority to review DOC's actions in connection with Rushin's supervision. In a summary order, the trial court dismissed the claim. On direct appeal, the Court of Appeals concluded the trial court improperly dismissed the petition, but nonetheless affirmed on other grounds, holding Rushin was not entitled to relief as a matter of law.[2] We granted discretionary review.

---

[1] As the Court of Appeals noted, an inmate's challenge to sentence calculation and custody credits is usually accomplished via a separate civil action. *Smith v. O'Dea*, 939 S.W.2d 353, 355 (Ky. App. 1997); KRS 454.415. However, because the DOC participated at all stages of the current dispute without raising any procedural or jurisdictional arguments beyond its separation-of-powers argument, and because we perceive the courts below to have properly exercised subject-matter jurisdiction, we agree with the Court of Appeals that review on the merits is appropriate.

[2] The DOC has not pursued its separation-of-powers argument in its brief before this Court. Therefore, we consider the issue to be abandoned. *See Middleton v. Commonwealth*, 198 Ky. 625, 249 S.W. 777 (1923).

As an initial matter, we must determine whether to dismiss this appeal as moot. From the record, it appears Rushin was scheduled to be released from prison on December 26, 2023. Kentucky caselaw defines "[a] 'moot case' [as] one which seeks to get a judgment . . . upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a *then* existing controversy." *Morgan v. Getter*, 441 S.W.3d 94, 98-99 (Ky. 2014) (quoting *Benton v. Clay*, 192 Ky. 497, 233 S.W. 1041, 1042 (1921)). Challenges to the terms of probation, parole, or supervised release are generally moot once the underlying sentence has expired. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

However, the mootness doctrine is not without exceptions, and we have previously determined an otherwise moot challenge to the constitutionality of the post-incarceration supervision statute was justiciable as being "capable of repetition, yet evading review." *Jones v. Commonwealth*, 319 S.W.3d 295, 296-97 (Ky. 2010). We also observed "the short duration of [post-incarceration supervision] and the length of time required to fully litigate the issue" satisfied the elements of the "capable of repetition, yet evading review" exception to the mootness doctrine. *Id.* We agree with the reasoning of *Jones* in this instance; this appeal is not moot. We now address to the merits of Rushin's appeal.[3]

[3] Rushin also argued his appeal is justiciable under the public interest exception. However, as we have determined the exercise of jurisdiction is proper under the "capable of repetition, yet evading review" exception, we need not address this argument.

II. ANALYSIS

Rushin argues he was entitled to earn credits under KRS 197.145 during the period of his reincarceration. He contends the Court of Appeals misinterpreted the applicable statutes by disregarding, as mere dicta, this Court's statement in *McDaniel v. Commonwealth*, 495 S.W.3d 115,

119 n.3 (Ky. 2016), which noted the initial term of imprisonment and the subsequent period of postincarceration supervision are two parts of a single sentence.

The legislature possesses the sole authority to "make[] the laws, deciding what is a crime and the amount of punishment to impose for violations thereof." *Jones*, 319 S.W.3d at 299. Similarly, "credit against a prisoner's sentence is a matter of statute." *Kentucky Dept. of Corrections v. Dixon*, 572 S.W.3d 46, 49 (Ky. 2019). Thus, "[s]tatutory construction principles are front and center in this case[.]" *Id.*

It is axiomatic that "[o]ur goal in statutory interpretation is to carry out the intent of the legislature." *Bloyer v. Commonwealth*, 647 S.W.3d 219, 224 (Ky. 2022). See also KRS 446.080(1). To this end, we must construe "each statute to give effect to its plain meaning and unambiguous intent without rendering any part meaningless." *A.H. v. Louisville Metro Gov't.*, 612 S.W.3d 902, 908 (Ky. 2020). Resort to the canons of construction or other extrinsic evidence of the legislature's intent is appropriate "[o]nly if the statute is ambiguous or otherwise frustrates a plain reading[.]" *Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011). Further, "[w]e presume the General Assembly intended neither an absurd nor an unconstitutional statute." *A.H.*, 612 S.W.3d at 908.

Because questions of statutory interpretation are purely matters of law, our standard of review is *de novo*. *Id.*

A. Sentences Which Include Periods of Postincarceration Supervision

Postincarceration supervision is a novel statutory creation that does not fit perfectly within the traditional categories of probation and parole as they relate to the underlying judgment of conviction and sentence. *McDaniel*, 495 S.W.3d at 120. When KRS 532.045 was originally enacted, it referred to postincarceration supervision as "conditional discharge" which operated as "a sort of probation/parole hybrid." *McDaniel*, 495 S.W.3d at 120. We explained further, "[l]ike parole, the defendant's discharge came after judicial proceedings had ceased and jurisdiction expired, and the conditions of discharge were specified by the Department of Corrections. *Id.*

As with probation revocation proceedings, conditional discharge proceedings were assigned to prosecutors and the courts. KRS 532.043(5). *Id.* However, this hybrid approach was untenable and in *Jones*, 319 S.W.3d at 295, we held the prior version of KRS 532.043(5) was unconstitutional because it violated the separation of powers doctrine. Particularly, the *Jones* Court determined conditional discharge (now postincarceration supervision) was "akin to parole or an extension of parole." 319 S.W.3d at 298. Thus, the commitment of parole-like revocation proceedings to the judiciary improperly encroached upon the sphere of executive authority. *Id.* at 299. Nevertheless, we opined the legislature could, "consistent with the separation of powers doctrine, create a form of conditional release with terms and supervision by the executive branch." *Id.*

In response to *Jones*, "the General Assembly . . . changed the name from 'conditional discharge' to 'postincarceration supervision,' and amended subsection 5 of KRS 532.043 to provide for Parole Board, rather than judicial, oversight of revocations."[4] *McDaniel*, 495 S.W.3d at 120.

[4] 2011 Kentucky Laws Ch. 2 (HB 463) § 91 (effective March 3, 2011).

As currently enacted, KRS 532.043 mandates a five-year period of postincarceration supervision for various sexual offenses "[i]n addition to the penalties authorized by law[.]" Postincarceration supervision commences after the offender has been released from imprisonment through the expiration of sentence or has completed parole. KRS 532.043(1)(a)-(b).

In turn, KRS 532.043(4) authorizes the Division of Probation and Parole to supervise those offenders during their period of postincarceration supervision. Should an offender violate the terms of postincarceration supervision, KRS 532.043(5) requires the Division of Probation and Parole to report the violation in writing and to provide notice of the violation to the Parole Board who, in turn, must "determine whether probable cause exists to revoke the defendant's postincarceration supervision and *reincarcerate* the defendant as set forth in KRS 532.060." (Emphasis added).

KRS 532.060(3) defines the relationship between a convicted felon's "initial sentence," postincarceration supervision, and reincarceration, and sets forth the consequences for the revocation of supervision:

> For any felony specified in KRS Chapter 510, KRS 530.020, 530.064(1)(a), or 531.310, *the sentence shall include* an additional five (5) year period of postincarceration supervision which shall be added to the maximum sentence rendered for the offense. During this period of postincarceration supervision, if a defendant violates the provisions of postincarceration supervision, the defendant may be *reincarcerated* for:
>
> (a) The remaining period of his *initial sentence*, if any is remaining; and
>
> (b) The entire period of postincarceration supervision, or if the *initial sentence* has been served, for the remaining period of postincarceration supervision.

(Emphases added).

Therefore, while KRS 532.043(1) describes postincarceration supervision as being imposed upon a defendant "in addition" to other "penalties authorized by law[,]" KRS 532.060(3) goes on to contemplate a *single* sentence which is made up of both an "initial sentence" and a period of postincarceration supervision which may result in reincarceration. Thus, the word "sentence" cannot be interpreted in isolation and must be applied in the context of the statutory scheme as a whole. *See Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005).

When read together, these statutes evince the legislature's intent that a sentence imposed for certain sexual offenses is to be composed of two discrete, but interrelated, parts: an initial term of imprisonment which is to be followed by a mandatory five-year period of postincarceration supervision (by the Division of Probation and Parole) which, if violated, can result in reincarceration.

This Court has recognized as much in the context of double jeopardy noting,

> [postincarceration supervision], of course, although an addition to the term-of-years sentence either bargained for (as in these cases) or imposed by the jury, is ***not*** a "second" punishment imposed in the course of a "second" jeopardy, as disallowed by the Double Jeopardy Clause, but is merely a portion of a single sentence imposed in the course of the original jeopardy.

McDaniel, 495 S.W.3d at 119 n.3 (emphasis added).

The Court of Appeals reasoned this was dicta within the full context of the opinion. We have determined it to be a considered and correct statement of the law. *See Cawood v. Hensley*, 247 S.W.2d 27, 29 (Ky. 1952).

Moreover, the reasoning of *McDaniel* is supported by the interpretation of KRS 532.043 in *Jones*, which perceived postincarceration supervision to be parole-like in nature. 319 S.W.3d at 299. We are convinced the interpretations of KRS 532.043 in *McDaniel* and *Jones* are sound, apply their reasoning to the present appeal, and determine that the period of time Rushin was reincarcerated for violating the terms of his postincarceration supervision was a part of his original "sentence."

B. Statutory Credits

Having determined Rushin's initial term of imprisonment and the period of his postincarceration are two parts of a single sentence, we turn to whether he is entitled to credits under KRS 197.045 during any period of reincarceration served for violations occurring during his postincarceration supervision period. We hold that statutory sentence credits apply to this situation.

The primary issue here is whether the General Assembly, without specifically stating, decided to exclude a certain class of inmates from the ability to earn any credits towards the remainder of their sentence. The DOC's position is that inmates who find themselves back in prison for violating terms of their postincarceration supervision (for which they were sentenced pursuant to KRS 532.042) cannot earn any credits under KRS 197.045.

KRS 197.045 states in full:

> (1) Any person *convicted and sentenced to a state penal institution*:
>
> (a) *Shall* receive a credit on his or her sentence for:
>
> 1. Prior confinement as specified in KRS 532.120;
>
> 2. Successfully receiving a High School Equivalency Diploma or a high school diploma, a college degree, a completed

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

vocational or technical education program, or a correspondence postsecondary education program which results in a diploma or degree, as provided, defined, and approved by the department in the amount of ninety (90) days per diploma, degree, or technical education program completed;

3. Successfully completing a drug treatment program, evidence-based program, or any other promising practice or life skills program approved by the department, in the amount of not more than ninety (90) days for each program completed. The department shall determine criteria to establish whether a life skills or promising practice program is eligible for sentence credits. Programs shall demonstrate learning of skills necessary for reintegration into the community to minimize barriers to successful reentry. Approval of programs shall be subject to review by the cabinet; and

(b) *May* receive a credit on his or her sentence for:

1. Good behavior in an amount not exceeding ten (10) days for each month served, to be determined by the department from the conduct of the prisoner;

2. Performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations and programs, awarded at the discretion of the commissioner in an amount not to exceed seven (7) days per month; and

3. Acts of exceptional service during times of emergency, awarded at the discretion of the commissioner in an amount not to exceed seven (7) days per month.

(Emphasis added).

The DOC's position makes no distinction between the types of credits discussed in KRS 197.045 and therefore must be read to prohibit a reincarcerated inmate like Rushin from acquiring *any* credits in *any* category.

Credits under KRS 197.045 fall under two umbrellas: (1) mandatory credits which an inmate "*shall receive*" under (1)(a)1-3 for completion of various educational programs, various life skills, "promising practice" and drug programs; and (2) discretionary credits an inmate "*may receive*" under (1)(b)1-3 for good behavior, meritorious service in connection with institutional operations and programs, or exceptional service during times of emergency.

We should note the mandatory language of "*shall receive a credit*" explicitly demonstrates that our legislature determined that the executive branch (under which our DOC exists) would have no discretion whatsoever when it came to inmates (who have not been specifically excluded from KRS 197.045) earning credits for the varying educational programs in which they might participate while in the custody of our state prisons. The term "shall" does *not* mean "may" and is mandatory language. *Woods v. Commonwealth*, 305 S.W.2d 935 (Ky. 1957); *O'Bryan v. Massey-Ferguson*, 413 S.W.2d 891 (Ky. 1966).

Even under the second category of credits (those which the DOC "may" award to an inmate), while the term "may" implicates discretion being vested in the DOC, such does not mean that the DOC was granted *carte blanche* and would be permitted to withhold or take away credits in a manner that could be determined to be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Statutory construction principles are front and center in this case because credit against a prisoner's sentence is a matter of statute, not of any other inherent or constitutional right. "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979); *see Huff v. Commonwealth*, 763 S.W.2d 106, 108 (Ky. 1988) (citations omitted). To that end, when faced with issues of statutory interpretation we "must interpret the statute according to the plain meaning of the act *and* in accordance with the legislative intent." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002) (emphasis added).

Our sentencing statutes, either singular or as a whole, do not segregate inmates who are serving an initial term in prison imposed by a trial court, from those inmates who are in prison as ordered by DOC for a violation of their postincarceration supervision (which was itself originally imposed by the trial court).

KRS 532.060(3) itself is explicitly clear that postincarceration supervision is not separate from but is included within "the sentence." Unless there is a clear statutory exception, every inmate while in the custody of the DOC, and who can only be there pursuant to a sentence, should be treated the same for purposes of KRS 197.045. Once Rushin violated the terms of his postincarceration supervision, and was reincarcerated, he, *like all other inmates*, should have been afforded the opportunity to earn credits towards the remainder of his prison sentence.

At the time of his original sentencing, Rushin's postincarceration supervision period as mandated by KRS 532.043 was ordered by the trial court to be served only after (hence the name) he had served his initial sentence and was no longer in the custody of (but remained under the supervision of) DOC. However, that original sentence also carried with it—and contemplated—the distinct *potentiality* of reincarceration if Rushin did not fully comply with the conditions of his supervised release as "supervised" by the Division of Probation and Parole, and if that occurred would be subject to reincarceration by the Probation and Parole Board (itself a division of the DOC).

The "idea" of granting of credits to inmates existed in our laws well before any consideration was given to singling out certain crimes for postincarceration supervision and potential reincarceration. KRS 197.045 was enacted in 1956. Initially, the statute only concerned credits for "good time," but it has evolved over the last almost seventy years to include the credits for the educational and behavioral courses as well as meritorious service we find in the statute today. However, and most importantly, the language applying the statute to "[*a*]*ny person convicted and sentenced to a state penal institution* . . ." has remained constant throughout every amendment to the statute since.

Correspondingly, KRS 532.060 ("Sentence of imprisonment for felony; postincarceration supervision") was not passed into law until 1974, and KRS 532.043 which requires "postincarceration supervision for certain felonies" did not exist in any form until 1998. There can be no legal presumption that our legislature's failure to go back and amend a separate statute, KRS 197.045,—to explicitly *include* a new "class" of inmate created much later by KRS Chapter 532—meant that the legislature intentionally determined to *exclude* such inmates from the credits system.

Under the DOC's interpretation, inmates serving time in prison, not for a new crime but for violating the terms of their postincarceration supervision, cannot receive credits, while their fellow inmates who may be guilty of the most violent and heinous crimes, can enjoy the full benefit of the credit system being applied towards their sentences. This conclusion is illogical when the purposes of sentencing laws are examined. Our interpretation of the application of KRS 197.145 must incorporate a recognition of the clearly enunciated goals of our other criminal statutes and recognition of the fact that while credits are an obvious benefit to the inmate who wants to secure early release from confinement, they also serve the interests of the prisons which utilize the credits and programs to encourage the types of behaviors which offer a safer environment in the prisons for both the inmates and staff.

KRS 196.032 "Department's [of Corrections] objectives" states:

The primary objectives of the department shall be to maintain public safety and hold offenders accountable while *reducing recidivism and criminal behavior and improving outcomes for offenders* under its supervision. The department shall create and implement policies and programs to achieve these objectives.

(Emphasis added).

The credit system found in KRS 197.145 is a key component in serving society as a whole as a means of reducing recidivism and criminal behavior. It was, and is, up to our legislature to enact sentence credit statutes allowing for an inmate's early release because such statutes serve the public-interest purposes of both rehabilitation and deterrence. *See Greenholtz*, 442 U.S. at 7-8; *Fowler v. Black*, 364 S.W.2d 164 (Ky. 1963) ("Since the benefit that a prisoner may receive under [KRS 197.045] is a matter of legislative grace, the General Assembly could impose such conditions as it deems best for society,").

Our interpretation of the discrete terminology found in KRS 197.145 should be guided by these clearly stated policy goals. To this end, there are no statutory, substantive, or fundamental differences between an inmate in prison under an "initial sentence" imposed by a judge and his cellmate who is there because the DOC ordered his reincarceration. Both are serving a sentence. Both inmates are confined and in the custody of the DOC to serve their sentences.

Additionally, our General Assembly has

provided clear provisions when there is any modification of when such credit can be earned and if inmates are excluded from acquiring credit, this is explicitly provided in statutory language. For example, KRS 439.3401(5) states: "A violent offender shall only be awarded credit on his or her sentence authorized by KRS 197.045(1)(a)1."[5] Another example is contained in KRS 197.045(4), which provides the requirement that sex offenders must complete SOTP before they are entitled to apply earned credits.

[5] The statute was amended by 2024 Kentucky Laws Ch. 174 (HB 5) to replace a previous provision in KRS 439.3401(4) stating:

> A violent offender shall not be awarded any credit on his sentence authorized by KRS 197.045(1)(b)1. In no event shall a violent offender be given credit on his or her sentence if the credit reduces the term of imprisonment to less than eighty-five percent (85%) of the sentence.

Since inmates like Rushin are not *excluded* from the credits system set forth in KRS 197.045, they must be included within its operation. Any other result is totally contrary to our legislature's overarching rehabilitative goals.

III. CONCLUSION

The DOC's interpretation of KRS 532.043 and KRS 197.045 is contradicted by the express language of the statutes and is contrary to the overarching societal goals set forth in of our sentencing laws. Statutory sentence credits are not in place strictly to benefit inmates; this system serves the interests of the other prisoners, prison staff, and society.

When our legislature fails to explicitly exclude a class of inmates from the benefits of sentencing credits, KRS 197.045 should be read to achieve the broadest application. We are confident that if our interpretation is not in line with the General Assembly intent, it will amend our statutes to exclude this subset of prisoners from earning either some or all types of credits. However, until that time, our principles of statutory construction do not merit excluding such inmates from earning any credits.

Accordingly, the decision of the Court of Appeals is reversed. All sitting. VanMeter, C.J.; Conley and Keller, JJ., concur. Nickell, J., dissents by separate opinion in which Bisig and Lambert, JJ., join.

CRIMINAL LAW

SEXUAL ABUSE IN THE FIRST DEGREE

JURY SELECTION

FAILURE TO ADMINISTER AN OATH TO THE VENIRE

ADMISSIBILITY OF EVIDENCE

PERMITTING MINOR VICTIMS TO TESTIFY OUTSIDE OF DEFENDANT'S PRESENCE VIA CLOSED CIRCUIT TELEVISION

LACK OF CONTINUOUS AUDIO CONTACT BETWEEN THE DEFENDANT AND DEFENSE COUNSEL WHILE DEFENSE COUNSEL IS IN A SEPARATE ROOM WITH THE MINOR VICTIMS DURING THE VICTIMS' TESTIMONY

EFFECTIVE ASSISTANCE OF COUNSEL

COMMONWEALTH'S FAILURE TO PROVIDE DEFENDANT WITH DEFENDANT'S "CHIRP" MESSAGES IN A TIMELY MANNER

Defendant appealed as a matter of right his convictions on two counts of sexual abuse in the first degree — Victims were defendant's minor granddaughters — AFFIRMED convictions — Trial court's failure to administer traditional voir dire oath to prospective jurors does not constitute error — At no point during voir dire did trial court administer an oath to panel of prospective jurors — Neither of parties objected to trial court's failure to administer such an oath — While it has long been traditional practice in Kentucky that prospective jurors take an oath or make an affirmation prior to voir dire, there is no rule in Kentucky law that requires trial court to administer an oath to the venire — Nevertheless, Kentucky Supreme Court recognized the value in the voir dire oath and suggested that the continued administration of such an oath or affirmation is best practice in courts of Kentucky — Trial court did not abuse its discretion in permitting victims to testify outside of defendant's presence via closed circuit television — Trial court permitted victims to testify in chambers with only trial court, Commonwealth's Attorney, and defense counsel present — Defendant and jury remained in courtroom and watched victims testify via closed circuit television — KRS 421.350(2) restricts criminal defendant's confrontation rights where a child under 12 years of age is alleged victim of a sex crime — KRS 421.350(2) requires that trial court make a finding that "compelling need" exists for such restrictions — Compelling need is substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by defendant's presence — In determining whether compelling need exists, trial courts should consider age and demeanor of child witness; nature of offense; and likely impact of testimony in court or facing defendant — Trial court's finding of compelling need and resulting decision to permit child witness to testify outside presence of defendant is reviewed for abuse of discretion — In instant action, trial court held hearing prior to granting Commonwealth's motion *in limine* requesting that victims be permitted to testify outside of courtroom — Trial court heard testimony from victims' mother regarding victims' inability to testify in defendant's presence — Trial court also heard testimony from defendant that he had been around victims on multiple occasions leading up to trial and that victims did not appear to be afraid of him and wanted to be around him — Mother acknowledged that victims wanted to see defendant prior to his trial — Despite evidence to contrary, trial court was presented with unambiguous testimony from victims' mother indicating that each victim would struggle to articulately testify aloud in defendant's presence — Victims were ages 9 and 11 at time of trial and were expected to testify against one of their closest family members — Under facts, trial court did not abuse its discretion in permitting them to testify outside of courtroom — Defendant was not deprived of effective assistance of counsel while defense counsel was in chambers during victims' testimony — Trial court permitted defendant to write down questions during victims' testimony and permitted defense counsel to confer with defendant after victims testified — Defense counsel was permitted to ask victims more questions after conferring with defendant — Defendant did not suffer "complete denial" of assistance of counsel in instant action even though trial court failed to ensure that he maintained constant audio contact with his attorney during examination of witnesses — Defendant's opportunity to consult with his counsel before dismissing victims as witnesses ensured that defendant received effective assistance of counsel — Kentucky Supreme Court noted that trial courts employing procedures under KRS 421.350 should always attempt to foster an open communication between defense counsel and defendant and that requests for leave to consult with one another should be liberally granted — Trial court did not abuse its discretion in crafting a remedy to Commonwealth's discovery violation — On first day of trial, defendant notified trial court that Commonwealth had recently produced 167 pages of "Chirps," which are a means of communication between jail inmates and their friends and family that are similar to text messages, which defendant sent while he was incarcerated and awaiting trial — Defense counsel noted that it had received Chirps 15 hours before trial began — Commonwealth stated that it did not intend to introduce all 167 pages of discovery and

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

noted that defendant had received some of Chirps multiple days before trial — At hearing, Commonwealth stated that it only planned to introduce two Chirps, one that defendant sent on February 23, 2022 and one that he sent on March 1, 2022 — Commonwealth stated that it had produced March Chirp eight days prior to trial — Defense counsel stated that he was away from his office for a number of days when March Chirp was produced and he was responsible for not reviewing it in a timely manner — Commonwealth conceded that it produced remaining Chirps, including February Chirp, the day before trial — Trial court ruled that February and March Chirps were admissible, but excluded remaining pages of Chirps — Prior to making its ruling, trial court offered defendant more time during lunch break to assess Chirps — Trial court was persuaded to admit Chirps, at least in part, by fact that they were evidence of defendant's own prior statements — If a party does commit a discovery violation under RCr 7.24(1), trial court has discretion to fashion the remedy — Considering that February and March Chirps were merely a few paragraphs long and the length of time they were available to defendant, trial court did not abuse its discretion in declining to exclude them from evidence — Trial court offered defendant more time during lunch hour to review them, with understanding that Commonwealth would not introduce them until later in the afternoon — At time Commonwealth sought to admit them, trial court asked defendant if he objected to their admission — Defense counsel responded in the negative — Defendant did have access to February and March Chirps during overnight break between first and second days of trial — Kentucky Supreme Court noted that it did not place as much weight as trial court did on the fact that the evidence sought to be admitted was evidence of defendant's own prior statements — Instant holding should not be construed as to grant Commonwealth license to withhold defendant's own incriminating statements in violation of discovery rules when those statements appear minor to its case or easily digestible for the defense — Trial court did not err in denying defendant's motion for directed verdict — There was sufficient evidence of sexual contact —

Dennis Keith Sims v. Com. (2023-SC-0119-MR); Casey Cir. Ct., Murphy, J.; Opinion by Justice Keller, *affirming*, rendered 8/22/2024. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

A Casey County jury convicted Dennis Keith Sims of two counts of sexual abuse in the first degree. The Casey Circuit Court sentenced Sims to twenty years' imprisonment, consistent with the jury's recommendation. This appeal followed as a matter of right. *See* Ky. Const. § 110(2)(b). Having reviewed the record and the arguments of the parties, we affirm the Casey Circuit Court.

I. FACTS AND BACKGROUND

Sara[1] lived in an apartment in Casey County with her two daughters, nine-year-old D.C. and seven-year-old Z.C. Sara's father, Dennis Keith Sims, lived in an apartment across the street. In November 2020, Sara contracted COVID-19 and sent her daughters to stay with Sims at his apartment for an indefinite period of time while she recovered. D.C. and Z.C. had previously stayed with Sims multiple times. Sims lived in a one-bedroom apartment that was minimally furnished, and he slept in a full-sized bed. Sara expected that D.C. and Z.C. would sleep in that bed with Sims while he cared for them. Sara developed bronchitis after recovering from COVID-19, and the girls did not return to their home at Sara's apartment until January 2021.

[1] To protect the identity of the minor victims in this case, we refer to their mother simply as "Sara." We will refer to the minor victims as D.C. and Z.C.

When the girls returned home from their time at Sims's apartment, Sara noticed that D.C. was not as "active" as she normally was. Sara testified at Sims's trial that D.C. did not want to be around a lot of people, that she wore baggy clothes, that she would stay in her room, and that she stopped hugging people. Sara testified that D.C. eventually told her that "something" had happened while she stayed at Sims's apartment. Sara testified that D.C. did not share all of the details about what had happened at Sims's apartment because she did not want to talk about it. Sara also testified that she did not want to speak about the subject either because she did not want D.C.'s allegations to be true. However, Sara did testify that after speaking with D.C. she "knew that it had to be reported," but she could not be the one to make a report. She testified that she "couldn't say what [Sims] did or didn't. I couldn't be responsible for him being in trouble for it." Sara contacted one of the elders of her church who spoke with D.C. over the phone and then contacted authorities. Sara was then contacted by Child Protective Services, and the girls were interviewed at the Children's Advocacy Center in March 2021. According to a Forensic Interview Summary prepared by a social worker at the Children's Advocacy Center, D.C. told her interviewer that Sims had taken her pants off in bed and touched her butt with his hand. According to the same summary, D.C. also told her interviewer that she had seen Sims touch and rub her sister Z.C.'s butt.

Kentucky State Police Trooper Billy Begley was assigned to investigate the case in February 2021. Trooper Begley eventually interviewed Sims on August 31, 2021. In that interview, Sims maintained that he did not molest D.C. or Z.C., but he did admit that he had permitted them to sleep naked with him in his bed on one occasion. Sims told Trooper Begley that he got out of the shower and both girls told him that they intended to sleep naked that night. Sims stated that he told the girls to put their clothes on, but they were jumping on his bed, making noise, goofing off, and fooling around. When Trooper Begley asked Sims whether he had touched either one of the girls on their butt or their vagina, Sims replied, "I probably did. I mean like I said they were just goofing off." When Trooper Begley asked Sims whether either of the girls had touched him on his penis or butt, Sims replied, "I'm sure they did, but I don't remember everything that happened." Sims also maintained that after he let D.C. and Z.C. sleep in his bed naked, he took them home the next morning and told them they could not come back to his house.

In January 2022, Sims was eventually indicted and charged with two counts of sexual abuse in the first degree—one count corresponding to each girl. According to Sara, it was only when an officer came to her house with a warrant for Sims's arrest that Sims revealed to her that he had been interviewed by police and that he had permitted D.C. and Z.C. to sleep naked in his bed. Sara testified that Sims told her Z.C. was the one that wanted to sleep naked, that she kept asking, and finally D.C. and Sims caved to Z.C.'s request and all three of them slept naked in Sims's bed together.

At Sims's two-day trial in November 2022, the trial court permitted D.C. and Z.C. to testify in chambers outside of Sims's presence. Z.C. testified that she was nine years old at the time of trial. Z.C. testified that she remembered staying with Sims at his apartment while her mother was sick. Z.C. testified that while she was there, Sims touched the middle of her butt with his hand outside of her underwear. Z.C. testified that she was asleep but woke up when Sims touched her, and that she felt "weird" when Sims did this. Z.C. testified that she did not think Sims touched her on purpose and that she thought he might have been asleep at the time because she heard him snoring. Z.C. also testified that she did not remember ever asking Sims to sleep naked in his bed.

D.C. testified that she was 11 years old at the time of trial. She testified that Sims touched her "down there" on her "veevee" when she was in bed. She testified that Sims had touched her on the inside and outside of her underwear on more than one occasion. D.C. testified that this "felt wrong." D.C. also testified that Sims had touched her on the inside of her body. D.C. testified that she also saw Sims touch Z.C. on her "bad spot" and she tried to get Z.C. to sleep next to her in bed so Z.C. would not have to sleep next to Sims. She also testified that all three of them had slept naked in Sims's bed on one occasion. D.C. testified that she could see Sims's "bad spot" when he slept naked and that it looked "small and disgusting." She also testified that Sims once tried to pull her hand to his "bad spot," and she pulled her hand back. Z.C. testified that she slept on the kitchen floor one night because she did not want to be in the bedroom.

Sims testified in his own defense. He testified that he was 71 years old at the time of trial. He testified that one night while he was watching D.C. and Z.C., he got out of the shower and the girls were both already naked. Sims testified that Z.C. told him they were going to sleep naked, and he responded that they were not and that they should get into bed. Sims testified, however, that he "gave into them" like he always does and just told the girls to be quiet and go to bed. He confirmed that Z.C. and D.C. did not have their clothes on when they got into bed. Sims testified that he had shorts on in bed until Z.C. jerked them down and he pulled them back up. Sims also testified that it was not possible to sleep through the night without touching one another because his bed was too small. Sims explained the prior statements he made to Trooper Begley about touching the girls by testifying that he meant he "could have" touched them while they all slept in

bed together. Sims testified that he had previously suffered a "mini stroke" that affected his memory. Sims maintained that he never deliberately touched D.C. and Z.C and they never deliberately touched him.

The jury convicted Sims of both counts of sexual abuse in the first degree and recommended that he serve the maximum 20-year sentence of imprisonment. The Casey Circuit Court sentenced Sims in accordance with the jury's recommendation. Sims now appeals to this Court and alleges several errors occurred throughout his trial that should warrant a reversal of his convictions.

Further facts will be developed below as necessary.

II. ANALYSIS

On appeal, Sims alleges five reversible errors occurred during his trial. First, Sims argues that the trial court failed to administer an oath to the prospective jurors prior to voir dire, and that the trial court's failure to swear in the venire constitutes a reversible error. Second, Sims argues that the trial court abridged his Sixth Amendment right to confront the witnesses against him by erroneously permitting D.C. and Z.C. to testify in chambers outside of his presence. Sims also argues that he was improperly separated from, and unable to communicate with, his attorney during the examination of these witnesses. Third, Sims alleges that the Commonwealth committed a discovery violation by failing to timely proffer evidence of text messages, or "Chirps," that Sims had sent to his daughter Sara while he was incarcerated. Sims argues that the trial court abused its discretion in admitting this evidence. Fourth, Sims alleges that the trial court improperly excluded testimony from Trooper Begley concerning a Child Protective Services investigation into D.C.'s and Z.C.'s allegations. Last, Sims argues that the Commonwealth failed to present sufficient evidence at trial to warrant a conviction of sexual abuse in the first degree as it pertained to Z.C., and the trial court erred in denying his motion for a directed verdict of acquittal.

This Court now affirms the Casey Circuit Court.

A. The trial court's failure to administer an oath to the venire does not constitute error.

On the first day of Sims's trial, the trial court spent most of the morning in chambers with the parties discussing various pre-trial motions on the record. Shortly after 1 p.m., the court was called to order, and the clerk called 32 names to comprise the venire panel of prospective jurors. After the venire panel was seated, the trial court offered some information about the case, introduced the parties, read the indictment, and began some preliminary voir dire examination of its own. The Commonwealth began its voir dire examination around 1:35 p.m., and the defense undertook its own voir dire examination around 2:45 p.m. After voir dire was completed, the jury was seated, and the trial court administered the petit jury oath to the chosen jurors around 3:51 p.m. *See* KRS 29A.300. At no point prior to voir dire did the trial court administer an oath to the panel of prospective jurors; nor did either of the parties object to the trial court's failure to administer such an oath. Sims now argues on appeal that the trial court's failure to swear in the prospective jurors with an oath was a structural error that requires reversal of his convictions. Because no rule of Kentucky law requires the trial court to administer an oath to the venire, we affirm the trial court.

An "oath" is "[a] solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound to a promise." *Oath*, Black's Law Dictionary (11th ed. 2019). The making of oaths has been a common practice throughout the history of the American judicial system, and some traditional oaths still underpin legal proceedings in this Commonwealth today. Members of the judiciary and the bar are constitutionally required to take an oath to support the Constitution of the United States and the Constitution of this Commonwealth before discharging their duties. Ky. Const. § 228. Before testifying, witnesses are required by statute to "declare that the witness will testify truthfully, by oath or affirmation[.]" KRE 603. The officers in charge of the jury "must be sworn to keep the jurors together, and to suffer no person to speak to, or communicate with, them on any subject connected with the trial, and not to do so themselves." RCr 9.68. Even jurors themselves are statutorily required to "swear or affirm" that they will "impartially try the case between the parties and give a true verdict according to the evidence and the law, unless dismissed by the court[.]" KRS 29A.300.

Similarly, it has long been the traditional practice in this Commonwealth—and throughout the country—that prospective jurors take an oath or make an affirmation, prior to voir dire. *See*, *e.g.*, *Miller v. Commonwealth*, 262 S.W. 579 (Ky. 1924) ("A solemn oath is administered to prospective jurors, and they are then subjected to the voir dire examination to bring to light any facts that may constitute grounds for challenge for cause."). The precise form of the voir dire oath or affirmation varies across American jurisdictions, but the common impetus among these oaths is to impart on prospective jurors an obligation to truthfully answer questions regarding their qualifications as a juror. *See*, *e.g.*, Fla. R. Crim. P. 3.300 ("Do you solemnly swear (or affirm) that you will answer truthfully all questions asked of you as prospective jurors, so help you God?"). Indeed, the Old French term "voir dire" means "to speak the truth." *Voir Dire*, Black's Law Dictionary (11th ed. 2019). The voir dire examination itself is a means to protect the criminal defendant's Sixth Amendment right to an impartial jury by

> exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984).

Despite the importance of the voir dire process, and the continued tradition of administering the voir dire oath in this Commonwealth, this Court can ascertain no applicable rule of law that would *require* prospective jurors to take an oath of truthfulness prior to voir dire. The same can be said for the federal court system. *United States v. Wiman*, 875 F.3d 384, 386 (7th Cir. 2017) ("We have found no rule or decision requiring that a venire be administered an oath."). The lack of a voir dire oath requirement in this Commonwealth is particularly telling considering the plethora of oaths discussed, *supra*, that are required by statute, constitution, or court rule. In the absence of any legal authority requiring otherwise, this Court must conclude that a failure to administer the traditional voir dire oath to prospective jurors does not constitute error. We do, however, recognize the value in the voir dire oath, and suggest that the continued administration of such an oath or affirmation is the best practice in the courts of this Commonwealth.

B. The trial court did not abuse its discretion in permitting D.C. and Z.C. to testify outside of Sims's presence.

Prior to trial, the Commonwealth filed a motion in limine requesting that D.C. and Z.C. be permitted to testify outside of the courtroom—and outside of Sims's presence—via closed circuit television. Sims opposed the motion and argued that allowing the children to testify outside of his presence would impermissibly violate his constitutional right to confrontation. The trial court held a hearing on the matter and heard testimony from the children's mother, Sara, as well as from Sims, regarding the children's alleged inability to testify in front of Sims. The trial court ultimately granted the Commonwealth's motion and permitted D.C. and Z.C. to testify in chambers with only the trial court, the Commonwealth's Attorney, and defense counsel present. Sims and the jury remained in the courtroom and watched D.C.'s and Z.C.'s testimony via closed circuit television. Sims now argues on appeal that the trial court abused its discretion in permitting the children to testify in chambers.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Constitution of this Commonwealth similarly guarantees the defendant the right "to meet the witnesses face to face." Ky. Const. § 11. In interpreting our own constitutional provision regarding confrontation, this Court has before stated that Section 11's requirement is congruent with that of the United States Constitution. *Commonwealth v. Willis*, 716 S.W.2d 224, 227 (Ky. 1986). The right to confront, however, is "not absolute and may be limited to accommodate legitimate competing interests," like the Commonwealth's interest in safeguarding "the physical and psychological well-being of child abuse victims." *Sparkman v. Commonwealth*, 250 S.W.3d 667, 669 (Ky. 2008); *Maryland v. Craig*, 497 U.S. 836, 853 (1990).

In situations where a child under 12 years of age is the alleged victim of a sex crime, the legislature of this Commonwealth has accordingly restricted the criminal defendant's confrontation rights by enacting KRS 421.350(2):

> The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

> proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

The statute, however, "does not provide a blanket process for taking the testimony of every child witness by TV simply because testifying may be stressful." *George v. Commonwealth*, 885 S.W.2d 938, 941 (Ky. 1994). The United States Constitution requires that the state first make "an adequate showing of necessity" before it abridges the defendant's right to confrontation by procuring the testimony of a child witness via use of a one-way closed circuit television. *Craig*, 497 U.S. at 855.

> The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, *i.e.*, more than "mere nervousness or excitement or some reluctance to testify[.]"

Id. at 855–56 (citations omitted). In consonance with that requirement, Kentucky's statute requires the trial court to make a finding that a "compelling need" exists for such procedures. KRS 421.350(2).

The statute defines a "compelling need" as "the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence." KRS 421.350(5). In determining whether a compelling need exists that would warrant testimony from a child to be taken outside of the defendant's presence, this Court has previously instructed trial courts to consider "the age and demeanor of the child witness, the nature of the offense and the likely impact of testimony in court or facing the defendant." *Danner v. Commonwealth*, 963 S.W.2d 632, 634 (Ky. 1998) (quoting *Willis*, 716 S.W.2d at 230).

A trial court's finding of compelling need and its resulting decision to permit a child witness to testify outside the presence of the defendant is reviewed for an abuse of discretion. *Danner*, 963 S.W.2d at 634 (Ky. 1998). "The test for abuse of discretion is 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).

Here, the trial court heard sufficient testimony from D.C.'s and Z.C's mother, Sara, regarding the girls' inability to testify in Sims's presence. Sara testified that the girls would not be able to testify near Sims because "they don't want to say anything that will get him in trouble." Sara elaborated with testimony indicating that the girls would not be able to effectively communicate in Sims's presence: "D.C. will just sit there and cry, and Z.C. will mumble and stick her hands in her mouth. They're also embarrassed by it, so they don't want to say it out loud." Sara also testified that D.C. had told her that she could not testify against Sims. Sara testified that D.C. is "already hurt by it, so having to talk about it . . . it's going to hurt her even more."

The trial court also heard competing testimony from Sims. He testified that he had been around D.C. and Z.C. on multiple occasions in the months leading up to his trial. He testified that D.C. had not appeared to be afraid of him and that Z.C. always wanted to be around him. Sara also acknowledged in her testimony that the girls had indeed wanted to see Sims prior to his trial.

Despite any evidence to the contrary, the trial court *was* presented with unambiguous testimony from D.C.'s and Z.C.'s mother indicating that each of the girls would struggle to articulately testify aloud in Sims's presence. Accordingly, we cannot say that the trial court's finding that a compelling need existed to procure the testimony of those witnesses in chambers was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945. The trial court did not abuse its discretion. These minor victims—age 9 and 11 at the time of trial—were not only expected to testify against their alleged abuser, but against one who was among their closest family members. We cannot second-guess the trial court's conclusion that whatever trauma would be occasioned by such face-to-face testimony would indeed rise to the level of "serious emotional distress." KRS 421.350(5).

C. Sims was not deprived of the effective assistance of counsel while briefly separated from his defense counsel.

Just prior to D.C.'s and Z.C.'s testimony in the trial court's chambers, Sims objected that he would be separated from, and thus unable to communicate with, his defense counsel during the examination of those witnesses. The trial court overruled Sims's objection and stated that it would permit Sims to take notes on the witnesses' testimony using pen and paper while he was seated in the courtroom, and that he could confer with his counsel during D.C.'s and Z.C.'s testimony. The trial court specifically told defense counsel that, "[Sims] can have a notebook and pen out here. After you all question the children, I'll give you an opportunity to come and confer with him and ask more questions if you have more." Sims now argues on appeal that the Sixth Amendment guaranteed him the right to maintain "constant audio contact" with his attorney during D.C.'s and Z.C.'s testimony.

We surmise that any constitutional error occasioned by a denial of constant communication with one's counsel would most appropriately be couched as a violation of the defendant's right to the effective assistance of counsel. The Sixth Amendment states that, "In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence." U.S. Const. amend. VI. "It has long been recognized that the right to counsel is the right to the *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970) (emphasis added).

As support for his contention that he maintained a right to be in constant audio contact with his attorney during the examination of witnesses, Sims relies most predominantly on two of this Court's prior decisions involving the implementation of the procedures in KRS 421.350. Nearly 40 years ago, in *Commonwealth v. Willis*, 716 S.W.2d 224 (Ky. 1986), this Court considered the constitutionality of a prior version of KRS 421.350 as it existed at the time. In holding that the statute did not run afoul of the Confrontation Clause, this Court expressed concern that in employing the statute the

> Commonwealth should be required to persuade the trial judge that such is reasonably necessary and provide the technical details whereby the testimony will be taken with the child screened from the sight and hearing of the defendant **while at the same time the defendant can view and hear the child and maintain continuous audio contact with defense counsel.**

Willis, 716 S.W.2d at 227 (emphasis added). The issue of whether constant audio contact with one's attorney is essential to the right of effective assistance of counsel, however, was not before this Court in *Willis*. A review of our decision in that case further makes clear that we failed to support our conclusory statement with any meaningful legal reasoning. As such, we do not treat *Willis* as binding precedent on the issue of whether constant audio contact with one's attorney is essential to maintain the effective assistance of counsel. *See Cawood v. Hensley*, 247 S.W.2d 27, 29 (Ky. 1952) ("A statement in an opinion not necessary to the decision of the case is obiter dictum.").

Roughly 15 years later, in *Price v. Commonwealth*, 31 S.W.3d 885 (Ky. 2000), this Court was tasked with considering whether a trial court had properly complied with the procedures set forth in KRS 421.350 so as to preserve the defendant's constitutional rights. During the testimony of an alleged minor victim, the defendant was excluded from the courtroom and required to view the witness's testimony on a monitor in another room. *Id.* at 892. The defendant was given a legal pad and a pen with which to take notes, and was advised that if he wished to consult directly with his attorney he should notify the bailiff, who would then notify the judge. *Id.* The judge would then stop the trial and permit the attorney to leave the courtroom to consult with the defendant. *Id.* On appeal, the defendant placed directly before the Court the issue of whether his Sixth Amendment right to the effective assistance of counsel was violated when he was denied "continuous audio contact" with his counsel. *Id.* at 893. This Court held that error occurred when

> Appellant was not in continuous audio contact with his defense counsel. No argument is

> made that the technology to accomplish this purpose is unavailable. If that argument were made, the response would have to be that the statutory procedure is unavailable until and unless the technology is available. (Apparently, it is available in Maryland. *Maryland v. Craig*, *supra*, at 842, 110 S.Ct. at 3161.)

Id. at 894.

In *Price*, it appears that this Court did condition the constitutional use of the procedures prescribed in KRS 421.350 on the defendant's ability to remain in "continuous audio contact with his defense counsel." *Id.* However, this Court, again, failed to support its holding with any thorough legal analysis. The only support for our limited holding appears to be that the state of Maryland ensured the use of continuous audio contact technology in its own statutory scheme related to child witness testimony. *See Craig*, 497 U.S. at 841–42. The issue of whether the defendant's lack of continuous audio contact with his attorney violated his right to effective assistance of counsel was *not* before the Supreme Court in *Craig*. We, therefore, assign little precedential value to our conclusory holding in *Price*.

Instead, we undertake our own analysis and hold today that Sims did not suffer a "complete denial" of the assistance of counsel where the trial court failed to ensure that he maintained constant audio contact with his attorney during the examination of witnesses. Sims's opportunity to consult with his counsel before dismissing D.C. and Z.C. as witnesses ensured that he received the effective assistance of counsel.

"In the vast majority of cases, to succeed on a claim of ineffectiveness of counsel, a defendant must show: (1) deficient representation by counsel, and (2) resulting prejudice to the defense." *Commonwealth v. Tigue*, 459 S.W.3d 372, 384 (Ky. 2015) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel." *United States v. Cronic*, 466 U.S. 648, 658–59 (1984). Where the government completely denies the defendant the assistance of counsel "at a critical stage of his trial" it violates his rights under the Sixth Amendment and renders his trial unfair. *Id.* at 659. "[A] complete denial of counsel occurs in one of two situations: 'when counsel [is] either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.'" *Tigue*, 459 S.W.3d at 385 (quoting *Cronic*, 466 U.S. at 659 n.25).

Relevant to the issue at hand, the Supreme Court has held that a trial court's obstruction of the defendant's communication with his counsel can result in an unconstitutional denial of the right to effective assistance of counsel. *Geders v. United States*, 425 U.S. 80, 91 (1976). In *Geders*, the Supreme Court considered the constitutional implications of a trial court order that barred the criminal defendant from having any communication with anyone, including his counsel, during an overnight recess between his own direct and cross-examination. *Id.* at 82. The trial court's attempt to limit improper influences on the defendant's testimony was plainly at odds with the defendant's constitutional right to consult with his counsel during the course of trial. *Id.* at 88–91. Despite recognizing the trial court's broad authority to sequester witnesses, the Supreme Court held that the "sustained barrier to communication" between the defendant and his attorney impermissibly burdened the defendant's Sixth Amendment right to effective assistance of counsel during a time when the accused would normally confer with his counsel. *Id.* at 91.

When faced with a similar case involving a shorter 15-minute bar on attorney-client communication between the defendant's direct and cross-examination, the Supreme Court, however, held that the government had not deprived the defendant of the effective assistance of counsel. *Perry v. Leeke*, 488 U.S. 272, 284 (1989). The Supreme Court stated that the defendant, like any other witness, did not enjoy a constitutional right to consult with his counsel while he was testifying, and that "it was appropriate to presume that nothing but the [defendant's] testimony" would be discussed during such a short, 15-minute recess. *Id.* Relevantly, the Supreme Court distinguished its prior holding in *Geders* by reasoning that any communications between the defendant and his attorney during the 17-hour overnight recess in *Geders* "would encompass matters that go beyond the content of the defendant's own testimony—matters that the defendant *does* have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." *Id.* (emphasis added). The Supreme Court stated that the criminal defendant generally has the "right to unrestricted access to his lawyer for advice on a variety of trial-related matters." *Id.*

The Supreme Court, however, has never interpreted the Sixth Amendment to guarantee the right to constant, continuous, or contemporaneous contact with one's counsel at all stages of trial. In fact, few courts have ever had occasion to consider the constitutional ramifications of a trial court's interference with the defendant's ability to consult with his counsel, and those decisions that have addressed the subject are not binding on this Court.

This Court, examining the issue itself for the first time, is cognizant of the Sixth Amendment concerns occasioned by the statutory procedures of KRS 421.350. During D.C.'s and Z.C.'s testimony, the statute permitted that Sims remain in the courtroom, unable to contemporaneously communicate with his defense counsel who was in another room. Such an arrangement is unquestionably a departure from the typical trial procedure whereby the defendant remains seated at the counsel table, in close proximity to his attorney, as counsel for both parties examine the witness.

Even during a conventional trial, however, we could hardly expect the criminal defendant to *always* maintain constant, continuous, or contemporaneous audio contact with his counsel. There are of course times when counsel will routinely be separated from, or unable to immediately communicate with the defendant, for instance: when counsel approaches the bench, when counsel addresses the jury, or even when counsel takes the lectern to question a witness. The criminal defendant's ability to communicate in real-time with his counsel is regularly obstructed throughout trial, and the trial court's limited restriction in this case is not materially different.

Despite the limited barrier to his contemporaneous communication with his counsel, we are certain that Sims did not suffer a complete denial of his right to effective assistance of counsel, because the trial court aptly afforded Sims an adequate opportunity to communicate with his counsel. Although KRS 421.350 did not require so, the trial court provided Sims the means to take notes as well as the opportunity to consult with his counsel during the witnesses' testimony. The video record is unclear as to whether Sims or his counsel actually availed themselves of this opportunity, but the record does reveal that the trial court at least once explicitly requested that defense counsel return to the courtroom to confer with Sims before dismissing a witness.

What communication Sims and his counsel might have had if they were not otherwise separated *during* the actual direct and cross-examination of the witnesses cannot be known, but we are certain that delaying that communication until a break in examination is not the kind of presumptively prejudicial error the Supreme Court spoke of in *Cronic*. 466 U.S. at 658–59. Whatever matters pertaining to his defense that Sims may have sought to discuss with his counsel could have certainly been meaningfully addressed when counsel returned to the courtroom. However, we must make clear that trial courts employing the procedures available to them under KRS 421.350, should always attempt to foster an open communication between defense counsel and defendant; requests for leave to consult with one another should be liberally granted.

Here, we cannot say that Sims's Sixth Amendment right to the effective assistance of counsel guaranteed that he be in constant audio contact with his counsel during D.C.'s and Z.C.'s testimony. The trial court did not violate Sims's Sixth Amendment rights.

D. The trial court did not abuse its discretion in crafting a remedy to the Commonwealth's discovery violation.

On the first day of trial, after the jury had been seated, Sims brought the trial court's attention to an alleged discovery violation. Sims's defense counsel stated that the Commonwealth had recently produced 167 pages of "Chirps"[2] that Sims had sent while he was incarcerated and awaiting trial. Defense counsel objected to the fact that he had allegedly received these discovery documents 15 hours before trial and did not have time to discuss them with his client. The Commonwealth stated that it did not intend to introduce all 167 pages of the discovery into evidence and maintained that Sims had received some of the discovery multiple days before trial.

[2] Chirps are a means of communication between jail inmates and their friends and family that are similar to text messages.

The following day, the trial court again heard arguments from the parties regarding the admission of Sims's Chirp messages. The Commonwealth stated that it planned to introduce two Chirps—one that Sims had sent on February 23, 2022, and one that he had sent on March 1, 2022.[3] The February

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

Chirp reads as follows:

> Good morning. Shanna is in Columbia one hour behind us. Please call her and explain I cant afford a lawyer and tell her how Im in here because of a stroke and
>
> didnt have the ability tp think right. I have never hurt the girls and I never wpuld have if they had not started the whole thing. I am sorry it happened. I lov
>
> them and if I cant be arpund them it will break their heart and mine. Let me know you have talked to her or what is going on. I love you guys.

The March Chirp reads as follows:

> Tell [D.C.] I am sorry about this. My mind isnt right and I didnt have control of myself. It is not her falt and she should not feel bad over it. I love her.
>
> It hurts me when she cries. I ho
>
> Pe she doesnt blame herself for me being in here

[3] We will refer to these messages collectively as the "February and March Chirps."

The Commonwealth contended that it had produced the March Chirp on November 9, 2022—eight days prior to trial. Sims's defense counsel stated that he was away from his office for a number of days when the March Chirp was produced, and he was responsible for not reviewing it in a timely manner. He specifically stated that, "I wasn't here . . . I mean, I can't object to that. I may not have been in my office, but I'm responsible for that." The Commonwealth conceded that it had produced the remaining Chirps, including the February Chirp, the day before trial.

The trial court, after hearing the arguments of the parties, ruled that the February and March Chirps were admissible at trial, but excluded the remaining pages of Chirps. Prior to making its ruling, the trial court also offered Sims more time during the lunch break to assess the Chirps. The trial court was persuaded to admit the Chirps, at least in part, by the fact that they were evidence of Sims's own prior statements. The trial court stated on the record that Sims could not be surprised by his own statements. Sims now argues on appeal that the Commonwealth was required to produce the February and March Chirps more than a day in advance of trial—pursuant to Kentucky Rule of Criminal Procedure (RCr) 7.24(1) and local Adair and Casey Circuit Court Rule 8.1b—and that the trial court erred in failing to exclude the Chirps from evidence.

RCr 7.24(1) states in part:

> Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth[.]

As a preliminary matter, this Court is unsure as to whether Sims ever made a "written request" for the kind of discovery materials contemplated by RCr 7.24(1). No such request appears in the written record. Further, no discovery order issued by the trial court appears in the written record. Without such a developed record, it is difficult for this Court to state definitively whether the Rules of Criminal Procedure placed the Commonwealth under any affirmative obligation to produce the discovery materials that Sims now contends were admitted in error.[4] Regardless, in their briefs, both parties seem to operate under the assumption that the Commonwealth had an obligation to produce the February and March Chirps and that at least the February Chirp was untimely produced. For purposes of this analysis only, we will assume that the Commonwealth *did* commit a discovery violation in contravention of RCr 7.24(1) by failing to timely disclose the February and March Chirps. Even assuming so, this Court cannot say that the trial court abused its discretion by admitting the February and March Chirps into evidence.

[4] We are aware, however, that some jurisdictions, by local rule, require that some discovery materials be *affirmatively* produced absent a written request from the defendant. *See*, *e.g.*, KY R JEFFERSON CIR CT Rule 803 (The Commonwealth may provide discovery to the Defendant on the day of arraignment, but shall provide no later than ten (10) days prior to the first pretrial conference, the following . . . Written or recorded statements or confessions made by the Defendant(s), or copies thereof, that are known by the attorney for the Commonwealth or its agents[.]). In his brief, Sims references local Adair and Casey Circuit Court Rule 8.1b, which states: "The Commonwealth Attorney is to provide discovery to the Defendant's Attorney at least 7 days prior to the pre-trial conference." We assume that the 29th Judicial Circuit has followed suit of other jurisdictions that require the Commonwealth to make *affirmative* discovery disclosures.

If a party does commit a discovery violation under RCr 7.24(1), the criminal rules leave the remedy for such a violation to the discretion of the trial court. RCr 7.24(11) states that when a party fails to comply with RCr 7.24, the trial court may "direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances." Accordingly, the exclusion of the two February and March Chirps was but one potential remedy left to the discretion of the trial court. We review the trial court's ruling remedying the discovery violation for an abuse of that discretion. *Stieritz v. Commonwealth*, 671 S.W.3d 353, 368 (Ky. 2023) (citing *Gray v. Commonwealth*, 203 S.W.3d 679, 685 (Ky. 2006)). A trial court abuses its discretion when its "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

Taking into consideration the relative length of the two February and March Chirps—a mere few paragraphs—and the length of time they were available to Sims prior to their admission, we cannot say that the trial court abused its discretion in declining to exclude them from evidence despite any untimely production. Rather than exclude the two Chirps from evidence, the trial court offered Sims more time during the lunch hour to review them, with the understanding that the Commonwealth would not seek to introduce them until later in the afternoon. Further, immediately after the trial court made its ruling on the admissibility of the Chirps, the video record likewise reveals that the Commonwealth furnished the defense with a hard copy of the Chirps, and Sims and his defense counsel can be seen conferring at counsel table. It would be another five hours before the Commonwealth actually sought to admit the Chirps—over 48 hours after Sims first had access to them. We note that when the Commonwealth did finally seek to admit the Chirps into evidence, the trial court asked Sims whether he had any objection to their admission, and defense counsel responded in the negative. We also emphasize that Sims did have access to the February and March Chirps during the overnight break between the first and second days of trial, and the Commonwealth had stated that it did not intend to admit all 167 pages of Chirps it had given the defense.

We do take this opportunity, however, to make clear that we do not place as much weight as the trial court did on the fact that the evidence sought to be admitted was evidence of Sims's own prior statements.

> That the statements were Appellant's own is immaterial. The premise underlying RCr 7.24(1) is not only to inform the defendant that he has made these statements, as he should be clearly aware, but rather to inform the defendant (and to make sure his counsel knows) that the Commonwealth is aware that he has made these statements.

Chestnut v. Commonwealth, 250 S.W.3d 288, 297 (Ky. 2008).

Our holding should not be construed as to grant the Commonwealth license to withhold the defendant's own incriminating statements in violation of the discovery rules when those statements appear minor to its case or easily digestible for the defense. Rather, "[t]he overarching purpose of our criminal discovery rules is to prevent '[a] cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused.'" *Stieritz*, 671 S.W.3d at 368 (quoting *James v. Commonwealth*, 482 S.W.2d 92, 94 (Ky. 1972)). Our holding, however, is rooted in the reality that those same discovery rules entrust the trial court, as gatekeeper of the evidence, with the discretion to fashion a fair and just remedy to discovery violations. We cannot say that the trial court's remedy was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

E. Sims did not properly preserve his argument regarding the exclusion of hearsay testimony.

Sims next alleges that the trial court committed a reversible error when it excluded evidence from Trooper Begley's testimony that it deemed to be hearsay. We review the trial court's evidentiary rulings for an abuse of discretion. *Goodyear Tire*

& Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

On Sims's cross-examination of Trooper Begley, defense counsel inquired into whether Trooper Begley had communicated with any of the social workers from Child Protective Services who had previously investigated D.C.'s and Z.C.'s allegations against Sims. Trooper Begley stated that he had received a report from Child Protective Services, and that he "may have talked to them off and on." According to Trooper Begley, those social workers also attended D.C.'s and Z.C.'s interviews at the Children's Advocacy Center, as did he. Defense counsel continued along a line of questioning concerning Child Protective Services and the following exchange occurred:

> **Defense counsel**: Alright. And you also considered not only the forensic interview down there, but you also considered social workers at . . . Children's Advocacy Center or social workers, their investigation?
>
> **Trooper Begley**: We work side by side. Yes, sir.
>
> **DC**: Alright. Now the allegations were considered by the social workers . . .

At this point, the Commonwealth objected on hearsay grounds and argued that Trooper Begley could not testify as to what the social workers considered. A bench conference ensued. While approaching the bench, defense counsel stated that "the jury needs to hear what the social workers investigated." At the bench conference, defense counsel stated that the social workers who investigated D.C.'s and Z.C.'s allegations had "unsubstantiated" those allegations. We assume that this statement is the statement that defense counsel sought to admit via Trooper Begley's testimony. Defense counsel also stated that he wanted to know whether Trooper Begley had considered the social workers' report. The trial court responded that Trooper Begley could not state that the social workers had unsubstantiated the girls' allegations. In response, defense counsel argued that the Commonwealth had a duty to protect the innocent, and that he failed to call the social workers as witnesses. Defense counsel stated that he thought the social workers needed to be at the trial to testify. However, defense counsel admitted that he also had not subpoenaed those potential witnesses. At the conclusion of the bench conference, the trial court stated that there was no way to get into what the social workers had said, but defense counsel could ask Trooper Begley what he had considered during his own investigation. This Court interprets the trial court's statements at the bench conference as ruling that the defense could not elicit hearsay testimony from Trooper Begley repeating what the social workers had said in their report, including the conclusion of that report.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c). Hearsay is generally inadmissible at trial. KRE 802. Out of court statements that are *not* offered for their truth, however, are considered non-hearsay and may be admissible at trial. Sims now contends on appeal that he was attempting to elicit the social workers' prior, out of court statements from Trooper Begley, not for their truth, but to prove that Trooper Begley was aware of these statements and his own investigation was "one-sided" by virtue of his failure to consider the statements. We conclude, however, that Sims failed to properly make this argument before the trial court, and we decline to entertain the argument now on appeal. "[S]pecific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal." *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011), *abrogated on other grounds by Nami Res. Co., L.L.C. v. Asher Land and Mineral, Ltd.*, 554 S.W.3d 323 (Ky. 2018).

At no point during the parties' bench conference did defense counsel make a precise argument that he was attempting to offer the social workers' statements in their report for some reason other than the truth of the matter asserted—that the children's allegations were unsubstantiated. Rather, it appears to this Court that defense counsel took issue with the Commonwealth's decision not to call those witnesses to testify. If it was, in fact, defense counsel's intention to introduce the social workers' out of court statements for some other purpose than their truth, we certainly cannot fault the trial court for not recognizing that legal issue among defense counsel's arguments. We cannot say that the trial court's decision to exclude this evidence was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

F. The trial court did not err in denying Sims's motion for a directed verdict.

Sims next argues that the trial court erred in failing to grant his motion for a directed verdict of acquittal as to the charge of sexual abuse in the first degree that pertained to Z.C. Sims specifically argues that the Commonwealth failed to present sufficient evidence of the essential element of "sexual contact."

This Court made its directed verdict standard clear in *Commonwealth v. Benham*:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purposes of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

816 S.W.2d 186, 187 (Ky. 1991). "So long as the Commonwealth produces more than a mere scintilla of evidence to support the charges, a defendant's motion for directed verdict should be denied." *Taylor v. Commonwealth*, 617 S.W.3d 321, 324 (Ky. 2020). "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." *Benham*, 816 S.W.3d at 187.

"A person is guilty of sexual abuse in the first degree when . . . [h]e or she subjects another person to sexual contact who is incapable of consent because he or she . . . [i]s less than twelve (12) years old[.]" KRS 510.110(1)(b)2. At the time of Sims's trial, "sexual contact" was defined as, "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]" KRS 510.010(7) (2021) (prior to the 2023 amendment).

Relevant to whether the Commonwealth presented sufficient evidence that Sims had touched Z.C.'s "sexual or other intimate parts," Z.C. testified at trial that Sims touched her "butt" with his hand on two different occasions while she slept in his bed. Z.C. specified that Sims touched her "right in the middle" of her butt. Z.C. also testified that she thought she was wearing only her underwear when Sims touched her, and that he touched her on the outside of her underwear. Z.C. testified that Sims's contact with her butt lasted "like two seconds."

Z.C.'s own testimony was supported in part by D.C. who testified that she saw Sims touch Z.C.'s "bad spot" while the three were in bed together. The jury was also presented with a summary of D.C.'s Forensic Interview at the Children's Advocacy Center in which D.C. stated that she saw Sims touch and rub Z.C.'s butt.

The jury also heard several potentially incriminating statements that Sims himself had made during his recorded interview with Trooper Begley. When Trooper Begley asked Sims whether he had touched either of the girls on their butt or vagina, Sims responded, "I probably did. Like I said they were just goofing off." When Trooper Begley later asked Sims again whether he had touched either one of the girls or both, Sims responded, "Probably. Yeah." When Trooper Begley asked Sims a third time whether he had touched either one of the girls on their butt or vagina, Sims responded that he did not know.

As previously stated, KRS 510.010(7) required the Commonwealth to prove that the defendant touched the victim "for the purpose of gratifying the sexual desire of either party." Relevantly, Z.C. testified that she could not tell whether Sims was asleep at the time he touched her butt, but she thought he was asleep because she heard him snoring. When asked whether Sims touched her on purpose, Z.C. responded she did not think so, "but it might be." Z.C. did testify, however, that the incidents woke her up and that it was "uncomfortable" and "felt weird" when Sims touched her butt.

D.C. testified that when she witnessed Sims touch Z.C., he was positioned in the middle of the bed. D.C. further testified that she attempted to get Z.C. to sleep next to her on the side of the bed so that Sims would have to go over her to touch Z.C. According to D.C., she did this because she wanted to protect her sister. The summary of D.C.'s Forensic Interview also reveals that she told her interviewer that she did not like when she saw Sims touch Z.C., and that "she tries to forget about it and think it is a dream because she does not like it." We also emphasize that D.C. told her forensic interviewer that Sims not only touched Z.C.'s butt, but that he also rubbed her butt. From this evidence, the jury could have certainly inferred that Sims acted purposefully with the intent to touch Z.C.'s butt.

There was also other testimony admitted at trial

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

that was relevant to prove Sims acted purposefully when he touched the girls. D.C. testified that Sims once tried to pull her hand toward his "bad spot," and she pulled it back. D.C. also testified that on at least one occasion Sims touched her inappropriately and she thought he was awake. Confronted with evidence of multiple purposeful acts of inappropriate touching, it would not have been unreasonable for the jury to infer that when Sims touched Z.C.'s butt he did so intentionally, for the purpose of gratifying his sexual desire. *Id.*

We conclude that the above evidence amounted to more than the "scintilla" of inculpatory evidence needed to defeat Sims's motion for a directed verdict at the trial court. *Taylor*, 617 S.W.3d at 324. It would then follow that we cannot say it would be "clearly unreasonable" for the jury to have found Sims guilty of sexual abuse in the first degree. *Benham*, 816 S.W.3d at 187. The trial court did not err in denying Sims's motion for a directed verdict of acquittal.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Casey Circuit Court.

All sitting. VanMeter, C.J.; Bisig, Nickell and Thompson, JJ., concur. Lambert, J., concurs in result only by separate opinion in which Conley, J., joins.

ATTORNEYS

Reinstated to the practice of law —

In re: Ryan Richard Stith (2024-SC-0290-KB); In Supreme Court; Opinion and Order entered 8/22/2024. **[This opinion and order is not final. A non-final opinion and order may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Ryan Richard Stith was admitted to the practice of law in the Commonwealth of Kentucky on May 1, 2018. His Kentucky Bar Association (KBA) number is 97935, and his bar roster address is 541 Skyview Lane, Lexington, Kentucky 40511. Stith has been suspended from the practice of law in the Commonwealth since October 29, 2020. He now applies for reinstatement pursuant to Kentucky Supreme Court Rule (SCR) 3.502. The Character and Fitness Committee (Committee) has unanimously recommended reinstatement with conditions. We agree with and adopt the Committee's recommendation.

I. BACKGROUND

On February 13, 2020, the Inquiry Commission charged Stith with violating the following Supreme Court Rules: SCR 3.130(1.1) for failing to provide competent representation to four of his immigration clients; SCR 3.130(1.3) for failing to perform the work for which he was hired and for failing to file various documents on or before their court ordered deadlines; SCR 3.130(1.4)(a)(3) for failing to keep his clients informed about the status of their immigration cases; and SCR 3.130(8.1)(b) for failing to respond to the bar complaint against him. Stith failed to respond to the charge and was indefinitely suspended pursuant to SCR 3.380(2) on October 29, 2020. *Ky. Bar. Ass'n v. Stith*, 612 S.W.3d 930 (Ky. 2020).

On August 26, 2021, this Court found Stith guilty of the four violations contained in the charge. *Ky. Bar Ass'n v. Stith*, 627 S.W.3d 929, 932 (Ky. 2021). We suspended him for an additional 61 days and ordered that he enter into and comply with a Kentucky Lawyer Assistance Program (KYLAP) Agreement, repay client fees, complete the Ethics and Professionalism Enhancement Program (EPEP), and pay all costs of the proceeding. *Id.*

On October 20, 2021, the KBA Office of Bar Counsel (OBC) filed an Objection to Automatic Reinstatement in Stith's case. OBC alleged that Stith had failed to comply with the Continuing Legal Education (CLE) requirement per SCR 3.685(1), had failed to pay costs to the KBA, and had failed to enter into a KYLAP Agreement. The KBA provided a letter from the KYLAP Director dated October 21, 2021, that stated Stith had "ceased communications" with KYLAP personnel. Stith has yet to be reinstated to the practice of law in Kentucky.

Despite his initial failure to comply with the terms of his suspension, Stith entered into a three-year KYLAP Agreement on March 14, 2022. After a self-reported return to use of alcohol, Stith entered into an Amendment to his KYLAP Agreement on December 15, 2022, which modified its terms to require Stith to attend and complete a sixteen-week treatment program. Stith attended an Intensive Outpatient Treatment Program (IOP) from December 2022 through February 2023. During his treatment, he was tested for drug and alcohol use at the treatment facility; therefore, KYLAP testing was suspended. According to the record, Stith tested negative the entire time he was in IOP and has continued to test negative since then.

On April 24, 2023, Stith applied for reinstatement to the practice of law pursuant to SCR 3.502 and submitted his required documents. On September 26, 2023, the application file and all supporting documentation, including his disciplinary records, were received at the Kentucky Office of Bar Admissions. Stith's application indicates that he is compliant with CLE requirements pursuant to SCR 3.685(1). Stith's former employer, who filed the initial bar complaint against Stith, provided a sworn affidavit stating that Stith had been a salaried employee and had not received client fees in the matter for which he received discipline and therefore should not be required to repay those fees. Stith's application included a Memorandum from Executive Director John Meyers which stated that there are no pending disciplinary actions against Stith, that Stith is not the subject of any claims against the Clients' Security Fund, and that KBA costs had been paid in full. The application also includes a statement from the KBA Accounting Department stating that if Stith's application for reinstatement is approved, Stith will be required to pay the current fiscal year membership dues, as well as any costs incurred during the reinstatement process.

On February 20, 2024, the KYLAP Director sent a letter to Chief Bar Counsel and General Counsel for the Committee, stating that Stith remained "100% compliant" with his KYLAP Agreement. The Director noted that Stith had been consistently testing negative for any alcohol or drug use and that there were "no issues" as related to his sobriety. On May 16, 2024, the Director sent a supplemental letter in which she noted Stith's continued sobriety and successful compliance with his KYLAP obligations during the first quarter of 2024.

On April 26, 2024, OBC, represented by Chief Bar Counsel, notified the Committee that, pursuant to SCR 3.502, it did not request a hearing regarding Stith's Application for Reinstatement. The Committee then considered Stith's matter at its April 30, 2024 business meeting. After considering all information, the Committee voted unanimously to recommend reinstatement, with the requirement that Stith be conditionally admitted to the practice of law and be required to comply with the current Amended KYLAP Agreement, with quarterly monitoring reports provided to OBC and the Committee by KYLAP personnel. The Committee further recommended that the period of conditional admission run concurrently with the Amended KYLAP Agreement, which was executed on December 15, 2022, and is scheduled to end on December 15, 2025. The Committee recommended that if Stith fails to comply with the Amended KYLAP Agreement, the Committee or Bar Counsel should be permitted to extend the period of conditional admission and monitoring or take other appropriate action.

II. DISCUSSION

SCR 3.502(1) prohibits any former member of the KBA who has been suspended for 181 days or more from resuming the practice of law until he is reinstated by this Court. The Applicant has the burden "to prove by clear and convincing evidence that he/she possesses the requisite character, fitness and moral qualification for re-admission to the practice of law." SCR 3.502(5). After the OBC investigates the application, the matter proceeds to the Committee to conduct a hearing. *Id.* at (6). A formal hearing is not required, however, "if the Applicant, Office of Bar Counsel, and a majority of the Committee all agree . . . that based upon the record, the Applicant has met his/her burden and should be reinstated to practice. In that event, the matter shall proceed directly from the Committee to the Court for its review." *Id.* at (6)(a). "Either party may file a notice of appeal of the Committee's report . . . . If no notice of appeal is timely filed, the entire record shall be forwarded to the Court for entry of a final order pursuant to SCR 3.370(9)." *Id.* at (6)(d).

SCR 3.370(9) allows this Court to "review the decision" of the Committee. If we choose to do so, each party is permitted to file a brief. *Id.* However, if we do not choose to "review" the Committee's recommendation, we "shall enter an order adopting" the Committee's recommendation. *Id.* at (10).

Having reviewed the record before us and the Committee's recommendation, we elect not to review the recommendation and hereby adopt the Committee's recommendation under SCR 3.370(10).

ACCORDINGLY, IT IS HEREBY ORDERED that Ryan Richard Stith's Application for Reinstatement to the KBA pursuant to SCR 3.502 is approved, subject to the following conditions:

1. Stith is conditionally readmitted to the practice of law conditioned on his continued compliance

with his current Amended KYLAP Agreement, with quarterly monitoring reports provided to OBC and the Committee by KYLAP personnel.

2. The period of Stith's conditional admission shall run concurrently with his Amended KYLAP Agreement, which was executed on December 15, 2022, and is set to end on December 15, 2025. If Stith fails to comply with the Amended KYLAP Agreement, the period of conditional admission and monitoring could be extended by the Committee and Bar Counsel, or other appropriate action may be taken.

3. Pursuant to SCR 3.503(5), Stith is directed to pay all costs associated with this reinstatement proceeding in the amount of $136.97. These costs should be paid from the deposit against costs. If these costs exceed the deposit paid by Stith, he shall pay any additional costs. If there is any amount remaining after the KBA has recovered its costs, this amount will be refunded to Stith.

4. This Order of Reinstatement is contingent upon payment of any outstanding bar dues, CLE compliance, and payment of the costs in this action.

All sitting. All concur.

ENTERED: August 22, 2024.

ATTORNEYS

Probated suspension —

In re: Barry Nathaniel Sullivan (2024-SC-0196-KB); In Supreme Court; Opinion and Order entered 8/22/2024. **[This opinion and order is not final. A non-final opinion and order may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Barry Nathaniel Sullivan moves this Court to enter a negotiated sanction pursuant to Supreme Court Rule (SCR) 3.480(2) to resolve a pending disciplinary proceeding against him. The Kentucky Bar Association (KBA) has no objection. After consideration, we conclude that the proposed sanction is adequate but revise the amount of refund owed to Sullivan's former client and the repayment terms. We note preliminarily that Sullivan, KBA Member Number 91634, was admitted to the practice of law on July 30, 2006. His bar roster address is 1612 Reidinger Ridge, New Albany, Indiana 47150.

BACKGROUND

Shayana Fields hired Sullivan in 2018 to assist Jonathan Davis in administering her late grandmother's estate. Ruthan Fields attempted to execute a will prior to her death naming Davis, her financial advisor, as administrator of her future estate. Due to errors with the signatures, Ruthan's will was invalidated and she died intestate in June 2018. Ruthan was survived by her only child, Christopher Fields, and his only child, Shayana. Sullivan met with Davis, Christopher, and Shayana shortly after Ruthan died and asked them to sign affidavits requesting that Davis be appointed administrator and that Ruthan's wishes for the disposal of her assets, as expressed prior to her death, be honored.

At the time of her death, Ruthan owned a house and a car of minimal value.[1] She had previously owned annuities, which were transferred to Shayana outside of her estate prior to her death, and she maintained a life insurance policy with Christopher and Shayana named as beneficiaries. These assets had an estimated value of $308,000. Due to his inexperience in handling estate matters, Sullivan incorrectly included assets which passed outside the estate and estimated the estate's total value to be $378,000. He further misconstrued Kentucky Revised Statute (KRS) 395.150 in determining the percentage of the estate's value that could be paid to the representative as compensation. Therefore, he informed Shayana that he required a $32,000 non-refundable retainer to assist Davis in handling the estate that had assets worth approximately $70,000 when it entered probate. There was no written agreement or any document explaining the basis for his fees.

[1] Because Ruthan died intestate, her real property immediately passed by operation of law to her son, Christopher, as her heir-at-law, and was not properly an estate asset subject to administration and/or probate. *Turner v. Perry Cnty. Coal Corp.*, 242 S.W.3d 658, 660 (Ky. App. 2007).

Davis messaged Shayana on September 5, 2018, and instructed her to write a $32,000 check to Sullivan's IOLTA account. The money Shayana wired came from Shayana's portion of Ruthan's life insurance policy proceeds. Sullivan filed a probate petition in Fayette District Court on September 12, 2018, and on September 17, 2018, he paid JT Davis Asset Management, LLC $9,060 out of the retainer in his IOLTA account. The probate court appointed Davis as administrator of Ruthan's estate on October 24, 2018. However, Davis failed to file an estate inventory within two months as required by KRS 395.250. Sullivan filed for an extension of time on Davis's behalf, and the probate court granted Davis until February 1, 2019, to file the inventory. Subsequently, the probate court issued a show cause order against Davis for his continued failure to file an estate inventory. Davis also took no steps to resolve the notices of claim filed against Ruthan's estate by her creditors.

During the same time period, Sullivan received notice from Ruthan's former employer of a motion to reopen a worker's compensation claim adjudicated in 2000. The sole issue was determining responsibility for bills from a hospital stay in 2017. Sullivan claims that he discussed entering his appearance on behalf of the estate with Davis, Christopher, and Shayana due to his expertise in this area of the law, and they all agreed.

Sullivan paid JT Asset Management an additional $2,540.53 from the funds in his IOLTA account on March 21, 2019, for a total payment of $12,140.53. The record discloses no basis or reason for the payment of this fee. And, as noted, the minimal value of the estate subject to administration would have entitled Davis to a nominal fee, absent court approval of extraordinary services. KRS 395.150. At this time, the relationship between Ruthan's son and granddaughter began to deteriorate due to conflict over the distribution of her assets. Shayana petitioned for an emergency protective order from Christopher, and Christopher hired his own attorney and filed a motion to have Davis and Sullivan removed as estate representatives on April 8, 2019. While these matters were pending, Sullivan formally entered his appearance in the workers' compensation case.

The probate court entered an agreed no contact order between Shayana and Christopher on May 9, 2019, and a second order replacing Davis and Sullivan with the Public Administrator. Davis was also ordered to submit a full accounting of the estate within thirty days. Sullivan sent the Public Administrator the few documents in his possession and mentioned that he was still representing the estate in the worker's compensation matter. When Shayana learned that Davis and Sullivan were no longer handling Ruthan's estate, she attempted to contact them to determine whether she was owed a partial refund of the $32,000 retainer.

Meanwhile, Sullivan participated in three telephonic conferences related to the workers' compensation case before the Administrative Law Judge (ALJ) who entered an order finding in favor of Ruthan's former employer regarding the responsibility for medical bills relating to her 2017 hospital stay. The ALJ's order, dated June 28, 2019, directed all attorneys to submit their fees for approval within thirty days pursuant to KRS 342.320. Sullivan failed to do so.

The Public Administrator submitted the first and final settlement in Ruthan's estate on July 8, 2019. Ruthan's house passed to Christopher via an affidavit of descent and her car was returned to the lienholder. The Public Administrator deemed the estate insolvent and notified the creditors who had filed a claim against the estate that there were no assets from which their claims could be paid. The estate was closed on January 22, 2020. In November 2020, Shayana hired an attorney to help her contact Davis and Sullivan after discovering that Sullivan's phone was disconnected. Her attorney was able to contact Davis, who responded with hostility, and refused to help her locate Sullivan.

Shayana filed a Bar Complaint against Sullivan on December 28, 2020, seeking an accounting and a refund of the unearned portion of her retainer. In his response, Sullivan maintained he did not owe Shayana anything because she agreed to allow him to bill his customary hourly rate for the worker's compensation matter against the retainer she paid him in the estate case. Shayana categorically denies this conversation ever occurred, and there is no written documentation to support Sullivan's claim. Regardless, Sullivan was barred from collecting in the worker's compensation matter because he failed to submit his fees to the ALJ for approval.

Shayana also disputed the billing statement Sullivan provided the Office of Bar Counsel. For example, one of the dates given by Sullivan for a meeting with Davis, Shayana, and Christopher was before Ruthan's funeral and Shayana is certain that she did not meet with anyone related to her grandmother's estate so quickly after her passing. Sullivan, who no longer had access to the billing and time management software used while he was providing legal services in these matters, attempted to reconstruct his billable hours, which may account for some of the discrepancies.

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

As a result of the Bar Complaint, the Inquiry Commission of the KBA issued a six-count Charge against Sullivan. Sullivan responded to the Charge on April 12, 2021. Count I alleges violation of SCR 3.130(1.5)(a) for charging an unreasonable fee. Although he asserts his errors regarding the estimated value of the estate and percentage he was entitled to collect as compensation were unintentional, Sullivan acknowledges that his actions violated this rule. Count II alleges violation of SCR 3.130(1.15)(e) for withdrawing unearned fees from his IOLTA account. Sullivan requests that Count II be dismissed. SCR 3.130(1.15)(e) provides: "[e]xcept for advance fees as provided in 1.5(f), a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." Although Sullivan made an almost-immediate payment to Davis for his services, he contends insufficient evidence exists to conclude that he withdrew fees payable to himself from his IOLTA account before they were earned. The KBA has no objection to dismissal of this Charge.

Count III alleges violation of SCR 3.130(1.16)(d) for failure to refund unearned fees when the representation was terminated. Sullivan acknowledges that Shayana was owed a refund of $16,359.47 upon termination of his representation. Count IV alleges violation of SCR 3.130(3.4)(c) for knowingly disobeying an obligation under the rules of a tribunal. Sullivan admits that he was required to have the ALJ approve his fees in the workers' compensation matter and that he failed to submit a request for fee approval after being ordered to do so. Count V alleges violation of SCR 3.130(8.1)(a) for knowingly making a false statement of material fact in connection with a disciplinary proceeding and Count VI alleges violation of SCR 3.130(8.4)(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Sullivan admits there is sufficient evidence to conclude that he falsely represented the agreement between himself and Shayana for him to apply funds from the estate retainer case towards his legal services in the worker's compensation matter.

Sullivan now asks this Court to impose a negotiated sanction of a 181-day suspension, probated for three years, subject to conditions. The KBA has no objection to the proposed discipline.

ANALYSIS

The negotiated sanction rule provides that "[t]he Court may consider negotiated sanctions of disciplinary investigations, complaints or charges" if the parties agree. SCR 3.480(2). Upon receiving a motion under this Rule, "[t]he Court may approve the sanction agreed to by the parties, or may remand the case for hearing or other proceedings specified in the order of remand." Id. Thus, acceptance of the proposed negotiated sanction falls within the discretion of this Court.

Case law supports the imposition of the sanction Sullivan proposes. In *Chewning v. Kentucky Bar Association*, 605 S.W.3d 332, 333 (Ky. 2020), an attorney pled guilty to criminal attempt to commit eavesdropping, a Class A misdemeanor, and the Inquiry Commission issued a two-count Charge. The attorney admitted to violating two rules of professional conduct, and the Court accepted his proposed sanction of a thirty-day suspension, probated for two years, with conditions. *Id*. at 334.

In *Kentucky Bar Association v. McMahon*, 337 S.W.3d 631, 632 (Ky. 2011), this Court accepted a negotiated sanction of a 181-day suspension, probated for two years, with conditions for violations of two rules. The attorney admitted he improperly provided financial assistance to his client, in violation of SCR 3.130(1.8)(e), and failed to act with reasonable diligence and promptness in representing his client, which violated SCR 3.130(1.3). *Id.* at 633.

Kentucky Bar Association v. Cook, 281 S.W.3d 290, 291 (Ky. 2009) involved two disciplinary cases in which Attorney Cook failed to submit answers to discovery requests and failed to respond to trial court orders, resulting in a claim being dismissed with prejudice. In addition, the client's numerous attempts to contact Cook were unsuccessful and Cook improperly retained an unearned portion of a fee. *Id.* Cook also filed untimely responses throughout the disciplinary proceedings. *Id.* Cook admitted to violating the rules and the Court imposed a two-year suspension, thirty days to serve with the remainder probated for two years and ordered KYLAP supervision. *Id.* at 292.

Similarly, in *Bamberger v. Kentucky Bar Association*, 36 S.W.3d 758 (Ky. 2001), Attorney Bamberger failed to respond to his client's requests for information and did not take reasonable measures to finalize the client's divorce proceedings. Bamberger admitted to violating two rules of professional conduct and, as a result, agreed to a thirty-day suspension, probated for one year, with conditions. *Id.* at 758-59.

These cases are all similar to Sullivan's in that multiple rules were violated and the Court accepted a probated suspension. In addition to caselaw, the ABA Standards for Imposing Lawyer Sanctions support the proposed discipline. While Sullivan has previously received two private admonitions, was charged with multiple offenses, submitted false evidence or false statements of fact during the disciplinary process, and has substantial experience in the practice of law, he has admitted his violations of the rules and displays remorse for his actions. The proposed sanction of a 181-day suspension, probated for three years, is consistent with the sanctions this Court outlined herein for similar conduct.

However, we disagree with the amount of refund owed to Shayana. Sullivan relied on KRS 395.150 to justify the $3,500 fee he paid himself, but that statute applies only to the fiduciary's fee. The probate petition Sullivan filed listed the estate's assets as a piece of real property, a vehicle, two IRAs, and a life insurance policy totaling an estimated $382,000. Sullivan admits he mistakenly believed that Kentucky law allowed personal representatives to collect 10% of the value of the estate as a fee. In fact, KRS 395.150 only allows the personal representative of an estate to collect a fee of 5% of the value of the estate, plus 5% of the income collected by the executor or the administrator for the estate. Furthermore, Sullivan was not the executor or the personal representative of the estate, and the only item actually included in the estate was the vehicle. The 5% should have applied to Davis's fee, not Sullivan's.

Ultimately, Sullivan paid Davis $12,140.53 for performing no work as administrator of the estate. Davis did not submit an estate inventory by November 24, 2018, as required by law. Even after receiving an extension of time to file the inventory and receiving a show case order against him for failure to file the estate inventory, Sullivan paid Davis an additional sum of $2,540.53. Davis never filed an estate inventory. Now, Sullivan seeks to retain $3,500 of the $32,000 Shayana paid.

While Sullivan did some work in the estate matter and provided a recreated version of his accounting in response to a request from Bar Counsel, the time spent in the estate matter was spent misdirecting his client. While an attorney can charge fees for work performed, and indeed Sullivan documented time spent performing legal services, his time was not appropriately spent, and the services performed did not function for the benefit of his client. Sullivan has a duty to be competent pursuant to SCR 3.130(1.1), and a duty to safekeep and properly account for a client's property pursuant to SCR 3.130(1.15). He clearly violated both rules by grossly overpaying Davis.

In sum, Sullivan is entitled to retain $500 for the initial work he performed in the probate matter and is therefore required to reimburse Shayana $31,500.

CONCLUSION

After review, we agree that a 181-day suspension, probated for three years with conditions, is appropriate discipline.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. Barry Nathaniel Sullivan, KBA Member Number 91634 is hereby suspended for 181 days, probated for three years, for his violation of SCR 3.130(1.5)(a), 3.130(1.16)(d), SCR 3.130(3.4)(c) and 3.130(8.1)(a), and SCR 3.130(8.4)(c) in KBA file 20-DIS-0251. Count II, alleging violation of SCR 3.130(1.15)(e), is dismissed.

2. The suspension is probated for three years on the following terms and conditions:

   a. Sullivan shall have no more disciplinary charges filed against him.

   b. Sullivan shall not commit any crimes, including misdemeanors and felonies.

   c. Sullivan shall timely pay his KBA membership dues.

   d. Sullivan shall timely satisfy all continuing legal education requirements.

   e. Sullivan shall attend, at his expense, and successfully complete the Ethics and Professionalism Enhancement Program and the Trust Account Management Program offered by the Office of Bar Counsel, separate and apart from his fulfillment of any other continuing legal education requirement, within twelve months after entry of this Order.

3. Sullivan shall pay restitution in the amount of $31,500.00 to Shayana Fields. He is directed to pay a minimum of $1,000.00 towards this sum

every ninety days beginning ninety days from the entry of this Order. Sullivan shall provide contemporaneous proof, in the form of copies of the payment instrument, to the Office of Bar Counsel. The restitution sum must be paid in full within one year of the date of entry of this Opinion and Order.

4. If Sullivan violates the terms of probation within three years from the date of this Order, the Kentucky Bar Association may file a motion with the Supreme Court requesting the issuance of a show cause order directing Sullivan to show cause, if any, why the three-year suspension should not be imposed.

5. In accordance with SCR 3.450, Sullivan is directed to pay all costs associated with these disciplinary proceedings against him, said sum being $180.56, for which execution may issue from this Court upon finality of this Opinion and Order.

All sitting. All concur.

ENTERED: August 22, 2024

ATTORNEYS

Temporary suspension —

In re: Ronald Coleman Taylor, Jr. (2024-SC-0165-KB); In Supreme Court; Opinion and Order entered 8/22/2024. **[This opinion and order is not final. A non-final opinion and order may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Pursuant to SCR[1] 3.165(1)(b) and (d), the Inquiry Commission of the Kentucky Bar Association petitions this Court to enter an order temporarily suspending Respondent, Ronald Coleman Taylor, Jr. ("Taylor"), from the practice of law in the Commonwealth of Kentucky. Taylor was admitted to the practice of law in Kentucky on October 17, 2008. His KBA number is 92699, and his bar roster address is 2260 Francis Ln., Cincinnati, Ohio 45206.

[1] Kentucky Supreme Court Rule.

The Inquiry Commission argues temporary suspension is warranted because there is probable cause to believe Taylor poses a substantial threat of harm to his clients or to the public, and/or that he does not have the physical or mental fitness to continue to practice law. Taylor has failed to file any response to the Inquiry Commission's Petition for Temporary Suspension.

In its Petition, the Inquiry Commission sets forth the following factual basis for its request for a temporary suspension. Taylor worked for the Law Offices of Blake Maislin, Esq. ("Maislin Law Office") until he was fired in September 2023 for belligerent behavior toward clients and other employees. According to Maislin Law Office, after leaving his employment Taylor showed up unannounced and physically threatened employees on several occasions.

On the afternoon of April 8, 2024, while Maislin Law Office employees were assembled outside to see a solar eclipse, Taylor drove up blaring loud music, exited his vehicle, and pulled a baseball bat and either an axe or a hatchet from his trunk. According to affidavits filed with the Inquiry Commission's Petition, Taylor stood in the middle of the road and began to scream in a threatening and hostile manner for Blake Maislin to come outside and face him. Taylor had shaved his head and his face was covered with markings. Taylor yelled that he had his "war paint" on and was "ready to do this." Maislin was not with the group of employees or in the building at the time.

The assembled employees retreated into the building while Taylor's former assistant Teresa Mounce approached and spoke with him. Law enforcement was called. Taylor eventually drove away quickly with his tires squealing before police could arrive. Five to ten minutes later he drove by again slowly but did not stop or say anything.

On the same day, Taylor's wife obtained an emergency order of protection ("EPO") against Taylor. The District Court also entered an order requiring Taylor to surrender firearms.

That same evening around 9:40 pm, Taylor began to text Mounce. In the texts, he stated:

> I'm a Blackfeet Warrior. You want to do work? **I will take scalps.**
>
> I was praying that Blake would come out. I was praying that he would choose the bat since he likes baseball, **so I could execute my plan and take his scalp and drink his blood in front of you while I raged like a deranged starving cornered vengeful beast that prayed on its predator.**
>
> Bring it 300 like the Romans, The Trojans. The warriors. Every single person in my family ever besides my dad who had asthma and was disqualified from Vietnam, has been military, marines, navy, Air Force, green berets, rangers, naval gunners, nuclear engineers on submarines, police officers, MPs, snipers, scout snipers, covert officers, advanced lead, intelligence, no pilots unfortunately. That was my goal and why I joined air force ROTC, in hopes of becoming an Aviator. Even if it was flying a cargo ship, that I parlayed into what Stacy's husband does.
>
> So don't think that the jew whose dad was a judge and family was in the trucking industry, who I outweigh by 40 lbs of muscle, who I shaved my head in preparation for would ever have a chance in warfare.
>
> I drew a bulls on on my Adams Apple and jugular in case he chose the hatchet, but that would have fucking seriously pissed me off because **I couldn't take scalps until I brained him with that bat.**
>
> The bat can reach out. So I didn't consider it a disadvantage.
>
> He pissed himself in his office.
>
> **There is another device called a Molotov cocktail that I think would be tremendously effective during like a big mediation, bring some innocents into it, to exponentially heighten the mother fucking horror.**

(Emphasis added).

On April 10, 2024, Maislin filed a formal bar complaint against Taylor in which he alleges Taylor has previously admitted to a drinking problem. He also states that Taylor's behavior "reveals a very real, immediately dangerous and violent psychosis." On April 15, 2024, Maislin informed the Office of Bar Counsel he had received information Taylor had checked into a rehabilitation facility but then checked himself out.

The Inquiry Commission therefore petitions this Court pursuant to SCR 3.165(1)(b) and (d) for entry of an order temporarily suspending Taylor from the practice of law. SCR 3.165(1)(b) permits the temporary suspension of an attorney if it "appears that probable cause exists to believe that [the] attorney's conduct poses a substantial threat of harm to his clients or to the public." SCR 3.165(1)(d) permits the temporary suspension of an attorney if it "appears that probable cause exists to believe that [the] attorney is mentally disabled or is addicted to intoxicants or drugs and probable cause exists to believe he/she does not have the physical or mental fitness to continue to practice law."

This Court has reviewed the uncontroverted allegations of the Inquiry Commission and agrees that probable cause exists to believe Taylor's conduct poses a substantial threat of harm to his clients or to the public. We further agree that probable cause exists to believe that Taylor is mentally disabled or is addicted to intoxicants or drugs and does not have the physical or mental fitness to continue to practice law. As such, we agree with the Inquiry Commission that his license to practice law should be temporarily suspended pursuant to SCR 3.165(1).

ACCORDINGLY, IT IS HEREBY ORDERED as follows:

1) Ronald Coleman Taylor, Jr. is temporarily suspended from the practice of law in the Commonwealth of Kentucky, effective upon the entry date of this Opinion and Order, pending further Orders from this Court;

2) Disciplinary proceedings against Taylor may be initiated by the Inquiry Commission pursuant to SCR 3.160, unless already begun or unless Taylor resigns under terms of disbarment;

3) Pursuant to SCR 3.165(5), Taylor shall, within twenty (20) days from the date of the entry of this Opinion and Order, notify in writing all clients of his inability to provide further legal services and furnish the Director of the Kentucky Bar Association with copies of all such letters; and

4) Pursuant to SCR 3.165(6), Taylor shall immediately, to the extent reasonably possible, cancel and cease any advertising activities in which he is engaged.

All sitting. All concur.

ENTERED: August 22, 2024

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

SUPREME COURT RULINGS

DEPUBLISHING OPINIONS OF

THE COURT OF APPEALS

Aldava v. Baum, 71 K.L.S. 4, p. 27; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of RAP 40(D)(2) on 8/14/2024.

Calhoun v. Tall Oak, LLC, 71 K.L.S. 4, p. 14; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 8/14/2024.

Marcum v. U.S. Bank, 70 K.L.S. 10, p. 17; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 8/14/2024.

Williams v. Cabinet for Health and Fam. Servs., 71 K.L.S. 2, p. 1; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 8/14/2024.

PETITIONS FOR REHEARING, ETC.

FILED AND FINALITY ENDORSEMENTS

ISSUED BETWEEN

JULY 24, 2024 AT 10:00 A.M.

AND AUGUST 22, 2024 AT 10:00 A.M.

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

PETITIONS: None.

MOTIONS for extension of time to file petitions: None.

RULINGS on petitions previously filed:

Com. v. Ullman, Jr., 71 K.L.S. 4, p. 41; Petition for rehearing was denied on 8/22/2024. Finality endorsement was issued on 8/22/2024.

Conn v. Kentucky Parole Bd., 71 K.L.S. 4, p. 50; Petition for rehearing was denied on 8/22/2024. Finality endorsement was issued on 8/22/2024.

FINALITY ENDORSEMENTS:

During the period from July 24, 2024, through August 22, 2024, 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. RAP 40(G).

Com. v. Ullman, Jr., 71 K.L.S. 4, p. 41; Petition for rehearing was denied on 8/22/2024. Finality endorsement was issued on 8/22/2024.

Conn v. Kentucky Parole Bd., 71 K.L.S. 4, p. 50; Petition for rehearing was denied on 8/22/2024. Finality endorsement was issued on 8/22/2024.

DISCRETIONARY REVIEW:

MOTIONS granted:

Aldava v. Baum, 71 K.L.S. 4, p. 27; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of RAP 40(D)(2) on 8/14/2024.

MOTIONS denied:

Burns v. Aistrop, 71 K.L.S. 2, p. 13; Motion for discretionary review was denied on 8/14/2024.

Calhoun v. Tall Oak, LLC, 71 K.L.S. 4, p. 14; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 8/14/2024.

Marcum v. U.S. Bank, 70 K.L.S. 10, p. 17; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 8/14/2024.

Williams v. Cabinet for Health and Fam. Servs., 71 K.L.S. 2, p. 1; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 8/14/2024.

MOTIONS filed:

Alvarez v. Allstate Property and Cas. Ins. Co., 71 K.L.S. 7, p. 24; Motion for discretionary review was filed on 7/30/2024.

Carpenter v. Saunders, M.D., 71 K.L.S. 7, p. 36; Motion for discretionary review was filed on 8/12/2024.

Com. v. Elmore, 71 K.L.S. 7, p. 25; Motion for discretionary review was filed on 7/29/2024.

Estate of Fuson v. Mercy Reg'l Emergency Med. Sys., LLC, 71 K.L.S. 7, p. 48; Motion for discretionary review was filed on 8/12/2024.

Kutter v. Kutter, 71 K.L.S. 7, p. 27; Motion for discretionary review was filed on 7/26/2024.

Link v. Link, 71 K.L.S. 7, p. 44; Motion for discretionary review was filed on 8/12/2024.

LP Louisville Herr Lane, LLC v. Buckaway, 71 K.L.S. 5, p. 51; Motion for discretionary review was filed on 8/9/2024.

Rigdon v. England, 71 K.L.S. 7, p. 51; Motion for discretionary review was filed on 8/13/2024. A petition for rehearing was filed in the Court of Appeals on 7/31/2024.

Wilson v. England, 71 K.L.S. 7, p. 54; Motion for discretionary review was filed on 8/12/2024.

MOTIONS for extension of time to file motions for discretionary review: None.

OTHER: None.

WEST Official Cites on Supreme Court opinions upon which Finality Endorsements have been issued: None.

—END OF SUPREME COURT—

FINALITY OF DECISIONS

When using K.L.S. with respect to decisions which are not yet final, care should be taken to give the case status, as, for example, hypothetically, "*Doe v. Roe*, Ky., 27 K.L.S. 54, p. 14 (11/3/80), petition for rehearing pending." Non-final opinions, orders, or opinions and orders may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. Rules of Appellate Procedure (RAP) 40(H). As to finality in civil and criminal matters *see* RAP 40 and related provisions. *See also* the K.L.S. listings of petitions for rehearing filed and finality endorsements issued on cases previously digested.

Kentucky Law Summary
5105 Rushing Water Road
Louisville, KY 40241-5018
502-475-1904
www.kentuckylawsummary.com

CUMULATIVE TOPICAL INDEX TO VOL. 71

References are to issue number and page of 71 K.L.S.

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

PLEASE SEE NOTE ON PAGE 98 CONCERNING FINALITY OF DECISIONS DIGESTED.

Separation of powers; Legislative authority to regulate appellate jurisdiction; Legislative authority to mandate appeal bonds - 8:24

Appeal of a zoning decision; Real property; Deed restrictions; Restrictive covenants; Waiver of restrictive covenants - 8:34

Appeal of a zoning decision; Requirement that a developer build a bridge and road extensions - 8:30

Zoning map amendment; Annexation; Appeal of a zoning decision; Amendment of a city's comprehensive plan - 4:14