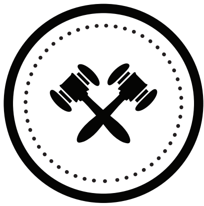

KENTUCKY LAW SUMMARY

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

April 30, 2026
73 K.L.S. 4
Louisville, Kentucky

CASE DIGESTS

VERBATIM OPINIONS

COURT OF APPEALS

WEST Official Cites - Pages 18 and 56
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– Note –
All opinions reproduced in K.L.S. are full, complete and unedited majority opinions.

FAMILY LAW

DEPENDENCY, NEGLECT OR ABUSE (DNA) ACTION

DISCOVERY

COUNTY ATTORNEY'S RESPONSIBILITY TO ENSURE ANSWERS TO DISCOVERY WERE COMPLETED BY THEIR WITNESS AND FILED WITH THE COURT

APPELLATE PRACTICE

DEFICIENCIES IN THE APPELLEE'S BRIEF

TESTIMONY BY AVOWAL

Cabinet for Health and Family Services (Cabinet) filed dependency, neglect or abuse (DNA) action against biological parents of three-month-old child — On same day action was filed, trial court granted petition placing child in emergency custody of Cabinet — During Cabinet's investigation, social worker observed a bruising-type injury on child's stomach — Father, mother, paternal grandmother, and maternal grandmother were in a caretaking role of child in last 72 hours prior to injury being observed — Social worker verified with child's primary care provider (PCP) that PCP did not suspect non-accidental trauma — PCP placed child in car seat and bruising lined up with top strap and bottom buckle — ER doctor was unable to determine cause of child's injury — Chiropractor stated that mother noticed injuries just prior to taking child to chiropractor for his appointment — Chiropractor noted that mother was cooperative and showed protective factors concerning child — Social worker verified through law enforcement that it had conducted interviews, that it would not be seeking charges, and that it was closing criminal investigation as unfounded — At temporary removal hearing, trial court entered order that Bullitt County Attorney (BCA) had not proved by a preponderance of the evidence that there were reasonable grounds to believe that child would be dependent, neglected, or abused if returned to, or left in custody of, parents; therefore, child was returned to parents' care — Trial court entered order scheduling pretrial conference for January 16, 2025 — On February 20, parents propounded to BCA a set of interrogatories, requests for production of documents, and requests for admissions — Requests for admission included requests to admit that there was no direct evidence of anyone, including parents, having abused or neglect child or subjecting child to a risk of any abuse or neglect; that Dr. Currie, who was BCA's expert witness, had not personally examined child; that Dr. Currie had not provided any plausible direct explanation for alleged non-accidental bruising of child; and that child's pediatrician believed that car seat was basis for child's bruising and that Cabinet knew this before filing instant petition — Parents mailed a copy of discovery requests to child's guardian *ad litem*; however, they did not mail a copy to Cabinet — BCA did forward a copy to attorney employed by Cabinet — Parents received no response; therefore, on April 3, parents filed motion to compel discovery and motion to deem requests for admissions admitted — Trial court held hearing on motion — At hearing, BCA maintained that it was not their job to answer interrogatories on behalf of Cabinet — Parents argued that, pursuant to statute, it is county attorney's job to prosecute the case and therefore respond to discovery requests — Trial court granted parents' motions, which included motion to deem admissions admitted — Adjudication hearing was set for September 18 — BCA filed motion to alter, amend, or vacate judge's order — Cabinet filed response agreeing with parents that it is county attorney's responsibility to prosecute case and thus respond to discovery requests — On August 5, BCA filed notice of expert witness and notice of filing in which it identified Dr. Currie as the witness they intended to call in their case-in-chief and filed photos of child, certified chiropractic records, Dr. Currie's report, and certification of custodian records — On September 5, trial court denied BCA's motion to alter, amend, or vacate noting that BCA never filed any request for a protective order or an order to limit discovery relating to parents' request — On September 18, trial court held adjudication hearing — Prior to hearing, parents filed motion *in limine* to prevent BCA from presenting any evidence due to trial court's ruling on their request for admissions — Trial court allowed BCA to call social worker who had originally filed petition and had also testified at temporary removal hearing; however, trial court disallowed testimony of Dr. Currie — In an effort to preserve Dr. Currie's testimony for appellate purposes, BCA requested on three separate occasions that she be allowed to testify by avowal — Trial court denied each request — Parents cross-examined social worker — Parents asked, ". . . after [Child] was examined in the hospital, . . . did anyone else find any issues with him other than the bruising on his abdomen?" — In response, social worker noted that Dr. Currie stated that the injuries were non-accidental — BCA then motioned to allow Dr. Currie to testify, arguing that parents opened the door to Dr. Currie's testimony — Trial court denied motion — At conclusion of BCA's evidence, parents moved for directed verdict, which trial court granted — Trial court entered written order that DNA had not been proven by a preponderance of the evidence — BCA appealed — AFFIRMED — As a preliminary issue, Court of Appeals noted that appellees' brief was deficient as it did not make ample references to specific locations in the record where each issue of law or factual statement can be located — Due to the important nature of DNA cases, Court of Appeals did not strike appellee's brief or impose sanctions, but cautioned that in the future, it may not be so lenient — Pursuant to KRS 69.210, prosecution of cases in juvenile court is the responsibility of the county attorney — DNA proceedings are quasi-criminal actions and, pursuant to KRS 620.070(1), are commenced by filing of a petition in the juvenile session of district court — Cabinet is both petitioner in a DNA case and provides a witness for the prosecution in the person of the Cabinet's social worker — In instant action, Cabinet was the witness for BCA in prosecution of the DNA case; therefore, it was BCA's responsibility to ensure answers to discovery were completed by their witness and filed with court — There is no merit to BCA's argument that parents were required to serve discovery requests on Cabinet — It was undisputed that BCA never responded to requests for admission; therefore, trial court was within its authority to deem request for admissions admitted, thereby prohibiting Dr. Currie's testimony — Attorneys often file a motion to "deem" discovery requests as admitted — While attorneys may feel more comfortable getting such a court order, it is unnecessary — Pursuant to CR 36.01, if requests for admission are not denied within the time allotted, they are admitted with no further action by the court — Trial court appropriately denied BCA's motion to permit Dr. Currie to testify under theory of "curative admissibility" — Parents' question about issues other than the bruising on child's abdomen does not allow previously disallowed evidence regarding nature of child's bruising — Court of Appeals noted the importance of avowal

PLEASE SEE NOTE ON PAGE 57 CONCERNING FINALITY OF DECISIONS DIGESTED.

practice under KRE 103(a)(2), which serves to preserve issues for appellate review —

Com. v. A.L.; Com. of Kentucky, Cabinet for Health and Family Services; D.L.; G.M., A Minor Child; N.M.; and T.M. (2025-CA-1258-ME); Bullitt Cir. Ct., Meredith, J.; Opinion by Judge Karem, *affirming*, rendered 3/20/2026. **[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 Bullitt County Attorney (the "Commonwealth" or "BCA") appeals from the Bullitt Circuit Court's adjudication order determining that the Commonwealth had not met its burden of establishing that an act of neglect or abuse had occurred by a preponderance of the evidence. After a careful review of the record, facts, and law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

G.M. ("Child") was born in August of 2024. On November 26, 2024, when Child was approximately three months old, the Cabinet for Health and Family Services (the "Cabinet") filed a petition alleging abuse or neglect of Child by the biological parents, A.L. and N.M. (the "Parents"). That same day, the trial court granted the petition placing Child in the emergency custody of the Cabinet. The petition stated in part:

> During investigation, [social worker] observed bruising type injury on [Child's] stomach area which was black and reddish in color. [Natural Father], [Natural Mother], [Paternal Grandmother] and [Maternal Grandmother] were in a caretaking role of the child in last 72 hours prior to injury being observed. [Social worker] verified with PCP [Primary Care Provider] that PCP did not suspect non accidental trauma (NAT) that PCP placed child in car seat, and that markings line up with top strap and bottom buckle. [Social worker] verified with Kosair's Children [Hospital] Downtown ER that ER Doctor was unable to make a determination of cause of injury. [Social worker] verified with PPS that PPS states that the injury was NAT. [Social worker] verified with chiropractor Dr. [Kuperus] that [Natural Mother] advised Dr. [Kuperus] of the bruising and requested an examination of the child. Dr. [Kuperus] reported that [Natural Mother] stated that [Natural Mother] observed injuries on 11/07/2024 just prior to taking [Child] to Dr. [Kuperus] for appointment on 11/07/2024, that [Natural Mother] questioned, sent pictures and text messages and video chat with [Natural Mother] and [Maternal Grandmother] to inquire of bruising. Dr. [Kuperus] reported [Natural Mother] has been cooperative and showed protective factors concerning child. [Social worker] verified through LEO that LEO has conducted interviews and that LEO will not be seeking charges and closing criminal investigation as unfounded . . . .

The circuit court appointed a Guardian *Ad Litem* ("GAL") as counsel for Child. Parents hired counsel for themselves, and the temporary removal hearing was held on December 2, 2024. Following the presentation of evidence, the trial judge entered an order finding that the Commonwealth had not proved by a preponderance of the evidence that there were reasonable grounds to believe that Child would be dependent, neglected, or abused if returned to, or left in the custody of, Parents. Child was thus returned to the care of Parents. On December 3, 2025, the court entered an order scheduling a pretrial conference for January 16, 2025.

On February 20, 2025, Parents propounded to the BCA a set of Interrogatories, Requests for Production of Documents, and Requests for Admissions with a copy mailed to the GAL. Parents did not mail a copy of the document to the Cabinet; however, the BCA forwarded a copy to the Hon. Jennifer Clay, a lawyer employed by the Cabinet.

The Request for Admissions included in pertinent part:

> <u>REQUEST NO. 1</u>: Please admit that there is no direct evidence of anyone, including the Respondents, having abused or neglected or subjecting to a risk of any abuse or neglect the child herein.
>
> <u>REQUEST NO. 2</u>: Please admit that Dr. Melissa Currie has not provided any plausible direct explanation for the alleged non-accidental bruising to the minor child.
>
> <u>REQUEST NO. 3</u>: Please admit that the child's car seat is a plausible basis for the child's bruises.
>
> <u>REQUEST NO. 4</u>: Please admit that Dr. Melissa Currie has never personally examined the child in question.
>
> <u>REQUEST NO. 5</u>: Please admit that the Respondents have been entirely cooperative with the Cabinet throughout the investigation.
>
> <u>REQUEST NO.</u> 6: Please admit that at the present time there is no reason to believe that the child would be at risk of abuse or neglect by remaining in the care and custody of the Respondents.
>
> <u>REQUEST NO. 7</u>: Please admit that the Cabinet has no concerns about the Respondents, their home, or the safety of the child at this time.
>
> . . .
>
> <u>REQUEST NO. 11</u>: Please admit that the child's pediatrician believes that the car seat was the basis for the bruising herein and that the Cabinet knew this before filing the petition herein.
>
> <u>REQUEST NO. 12</u>: Please admit that the [C]abinet has admitted that the only reason they filed the present case was because quote "they had to" as testified to by [the Cabinet].

On April 3, 2025, when no response was received, Parents filed a Motion to Compel Discovery and a Motion to Deem the Requests for Admissions Admitted. The court held a hearing regarding Parents' motion on May 1, 2025, wherein the BCA maintained that it was not their job to answer interrogatories on behalf of the Cabinet. Parents argued that, pursuant to statute, it is the job of the county attorney to prosecute the case and therefore respond to discovery requests. The trial court agreed with Parents and granted their motions which included the motion to deem the admissions admitted. An adjudication date was set for September 18, 2025.

Prior to the adjudication hearing, on May 29, 2025, the parties, along with counsel for the Cabinet, appeared before the trial court on the BCA's Motion to Alter, Amend, or Vacate the judge's order. The BCA argued Parents had an obligation to serve the Cabinet because the BCA does not represent the Cabinet. Parents reiterated that by statute the county attorney prosecutes DNA cases and is therefore the correct agency to which discovery requests should be propounded. Moreover, Parents argued that there is no alternate attorney of record for the Cabinet in this case. At the conclusion of the hearing, the trial judge allowed each party fourteen days to supplement the record stating that at the conclusion of that time the issue would be deemed submitted for a ruling.

On June 9, 2025, the Cabinet filed a Response to the BCA's arguments. They agreed with Parents that it is the responsibility of the county attorney to prosecute the case and thus respond to discovery requests. The Cabinet specifically stated:

> [E]xpecting counsel for the [Cabinet] to respond to discovery propounded upon the BCA in a juvenile case is as illogical as expecting a police officer's interagency counsel to respond to discovery requests propounded on the county attorney in its prosecution of a criminal action.
>
> Wherefore, and ascribing only genuine misunderstanding to the BCA's understanding of its role in juvenile actions and in the interest of protecting the subject child to this matter, the Cabinet requests that this Court issue an Order affording the BCA additional time to respond to any discovery requests previously propounded upon it in this matter.

Both Parents and the BCA filed replies to the Cabinet's response restating their respective positions.

On August 5, 2025, the BCA filed both its Notice of Expert Witness and Notice of Filing. In these filings, the BCA identified Dr. Melissa Currie as the witness they intended to call in their case-in-chief and filed photos of Child, certified chiropractic records, the report prepared by Dr. Currie, and the certification of custodian records.

On September 5, 2025, the trial court entered its order denying the BCA's motion to alter, amend, or vacate noting that the BCA never filed any request for a protective order or an order to limit discovery relating to Parents' request.

The DNA adjudication hearing ultimately went forward on September 18, 2025. Prior to the hearing, Parents had filed a motion *in limine* to prevent the BCA from presenting any evidence due to the trial court's ruling on their Request for Admissions. Ultimately, the trial court allowed the BCA to call the social worker who had originally filed the petition and had also testified at the temporary removal hearing. However, the trial court disallowed the testimony of Dr. Currie. In an effort to preserve Dr. Currie's testimony for appellate purposes, the BCA requested she be allowed to testify by avowal. This request was made three separate times during the trial and each time the trial judge denied it.

At the conclusion of the BCA's evidence, Parents' attorney cross-examined the caseworker.

> Parents' Attorney: After [the hospital] did all of these checks, [Child] was medically cleared. Correct?
>
> Witness: Medically cleared as in how, sir?
>
> Parents' Attorney: Let me ask it another way. Did anybody uncover any other issues with [Child] other than bruising?
>
> Witness: That you would have to ask them on that. I cannot speak to what other people may have done or not done.
>
> BCA: I'm sorry. I am not objecting. I just didn't hear what [Parents' Attorney] said. What was the question?
>
> Parents' Attorney: My question was . . . after [Child] was examined in the hospital, . . . did anyone else find any issues with him other than the bruising on his abdomen?
>
> Witness: Yes, the answer would be yes to that.
>
> Parents' Attorney: They did find other issues?
>
> Witness: You asked if anybody else found any other issues?
>
> Parents' Attorney: Yes.
>
> Witness: My answer to "anybody else" would be yes.
>
> Parents' Attorney: What were those issues?
>
> Witness: What are the issues? That . . . [Dr. Currie] states that the injuries were non-accidental.

At the end of cross-examination, based on this exchange, the BCA motioned the court to allow Dr. Currie to testify arguing that Parents opened the door stating "[Parents' attorney] asked if 'anyone else found non-accidental injury.'" The trial judge disagreed and overruled the motion.

At the conclusion of the BCA's evidence Parents made a motion for a directed verdict.[1] The trial court ruled from the bench and dismissed the case. Subsequently, the trial court put into writing on a calendar order its recitation of the evidence entered at the hearing, memorializing its decision to dismiss the case. On September 22, 2025, the trial court entered a form order, "Order Adjudication Hearing," checking the appropriate boxes indicating an adjudication hearing was held and that dependency, neglect, or abuse had not been proved by a preponderance of the evidence. This appeal by the BCA followed.[2]

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[1] As this Court explained in *Brown v. Shelton*, 156 S.W.3d 319 (Ky. App. 2004), "a directed verdict under CR 50.01 is improper in a trial by the court without a jury. [Kentucky Rules of Civil Procedure] CR 41.02(2) governs an action tried by the court without a jury. Under the provisions of CR 41.02(2), a defendant may move for dismissal after plaintiff's presentation of evidence; however, a plaintiff may not move for judgment after his presentation of evidence." *Id.* at 321.

[2] Neither party attached as exhibits to their briefs the documents in the record on which they depended for their arguments. Appellant failed to attach the trial court's calendar order detailing the testimony at the hearing. Appellees failed to include their Request for Admissions. Parties are warned, in any future litigation, they should include all documentation pertinent to this Court's review.

PRELIMINARY ISSUE

As a preliminary issue we must address the deficiencies of the brief of Appellees A.L. and N.M. RAP[3] 32(B)(3) and (4) mandate the form and style of an appellee brief and state that the appellee's brief must be in accordance with the requirements for both the appellant's statement of the case and argument. RAP 32(A)(3) and (4) require the statement of the case and argument sections of an appellant's opening brief to contain "ample references to the specific location in the record" where "each" issue of law or factual statement may be located. Though "ample" is not defined in RAP 32, we have held it means citations to the trial court record must "permeate" the brief. *Clark v. Workman*, 604 S.W.3d 616, 619 (Ky. App. 2020). This is especially true where, as here, the central issues call into question the appropriateness of the trial judge's decisions regarding evidentiary issues at trial. *Sub judice*, Appellees fail to cite to any portion of the video record of the hearings that are the subject of this appeal.

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[3] Kentucky Rules of Appellate Procedure.

RAP 10(B) specifically provides that:

> [T]he failure of a party to substantially comply with the rules is ground for such action as the appellate court deems appropriate, which may include:
>
> (1) A deficiency notice or order directing a party to take specific action,
>
> (2) A show cause order,
>
> (3) Striking of filings, briefs, record or portions thereof,
>
> (4) Imposition of fines on counsel for failing to comply with these rules of not more than $1,000,
>
> (5) A dismissal of the appeal or denial of the motion for discretionary review, and
>
> (6) Such further remedies as are specified in any applicable rule.

Given the important nature of dependency, neglect, and abuse cases, we are not inclined to strike Appellees' brief in its entirety or any portions thereof nor will we impose any other sanction. Instead, we will proceed with a full review of the issues. However, we warn counsel that in the future this Court may not be so tolerant, and we admonish counsel to strictly follow the rules or risk having any future briefs stricken and/or being held in contempt.

STANDARD OF REVIEW

In DNA cases, it is the Cabinet's burden to prove it is more likely than not that the subject-children were neglected or abused. *M.C. v. Cabinet for Health and Family Services*, 614 S.W.3d 915, 921 (Ky. 2021) (footnote omitted). We will not set aside a family court's findings of fact unless they are clearly erroneous. *Id.* (footnote omitted). "A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person." *Id.* (footnote omitted). Absent an abuse of discretion, we will not disturb a family court's decision where its findings are supported by substantial evidence, and it applied the correct law. *Id.* (footnote omitted).

The family court is responsible for determining the admissibility of evidence under KRE[4] 901. *Kays v. Commonwealth*, 505 S.W.3d 260, 270 (Ky. App. 2016) (citation omitted). We review a court's decisions regarding admission of evidence for abuse of discretion. *Id.* at 269 (citation omitted). A court abuses its discretion only when its ruling is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (citation omitted).

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[4] Kentucky Rules of Evidence.

ANALYSIS

At issue in this case is the very basic question of what it means to prosecute. Is the county attorney responsible for answering discovery propounded by a respondent in a DNA case? The BCA maintains that it is not. However, our unequivocal answer is yes!

The BCA cites *G.M.A. v. Commonwealth*, 689 S.W.3d 142 (Ky. App. 2024), for the proposition that the Cabinet is a party-plaintiff in DNA cases. We agree. However, the Cabinet is in the unique position of being both the petitioner in a DNA case and providing a witness for the prosecution in the person of the Cabinet's social worker. The BCA extrapolates that designation as justification to relieve themselves of their statutory responsibilities to prosecute. *G.M.A.* makes no such finding.

Initially, we note DNA proceedings are quasi-criminal actions because the issues in such cases go to the protected constitutional right to parent a child. Cases are commenced by the filing of a petition in the juvenile session of the District Court. KRS[5] 620.070(1). KRS 620.040 outlines the investigative responsibilities of the Cabinet upon receipt of a report alleging abuse or neglect of a child. Social workers employed by the Cabinet are most often witnesses in a DNA case to provide sworn testimony regarding the results of the investigative process.

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[5] Kentucky Revised Statutes.

Legislation grants to prosecutors, in both the offices of the Commonwealth's attorney and the county attorney, the power to prosecute cases in their capacity as officers of the executive branch. KRS 15.725(1), (2). Pursuant to KRS 69.210, the prosecution of cases in juvenile court is the

responsibility of the county attorney.

> (2)(a) The county attorney shall attend to the prosecution in the juvenile session of the District Court of all proceedings held pursuant to petitions filed under KRS Chapter 610 and over which the juvenile session of the District Court has jurisdiction pursuant to KRS Chapter 610.
>
> (b) Notwithstanding paragraph (a) of this subsection, the attorneys for the Cabinet for Health and Family Services may attend to the prosecution of any case under KRS Chapter 620 upon written notice to the county attorney and judge of the District Court or family division of the Circuit Court.

KRS 69.210.

Our quest to locate Kentucky caselaw interpreting the above statute to explain in more detail the responsibilities of a prosecutor was in vain. Apparently, no such explanation has ever been required in the history of the Commonwealth. However, the American Bar Association ("ABA") outlines the universally accepted responsibilities of a prosecutor in its Fourth Edition (2017) of the Criminal Justice Standards for the Prosecution Function.[6] Although these standards specifically identify the prosecutor's role in criminal cases, they are equally attributable to quasi-criminal cases such as the case *sub judice*.

> **Part I: General Standards**
>
> **Standard 3-1.1 The Scope and Function of These Standards**
>
> (a) As used in these standards, "prosecutor" means any attorney, regardless of agency, title, or full or part-time assignment, who acts as an attorney to investigate or prosecute criminal cases or who provides legal advice regarding a criminal matter to government lawyers, agents, or offices participating in the investigation or prosecution of criminal cases. These Standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result.
>
> . . .
>
> **Standard 3-5.4 Identification and Disclosure of Information and Evidence**
>
> . . .
>
> (e) A prosecutor should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. When the defense makes requests for specific information, the prosecutor should provide specific responses rather than merely a general acknowledgement of discovery obligations. Requests and responses should be tailored to the case and "boilerplate" requests and responses should be disfavored.

Id. at 1, 27. Clearly, there is a general understanding in the legal profession that a prosecutor's responsibility includes responding to discovery requests.

[6] https://www.american bar.org/groups/criminal_justice/resources/standards/prosecution-function (last visited Mar. 18, 2026).

In the case at bar, the Cabinet was the witness for the BCA in the prosecution of the DNA case. Thus, it was the BCA's responsibility to ensure answers to discovery were completed by their witness and filed with the court. As well stated by the Cabinet;

> [E]xpecting counsel for the [Cabinet] to respond to discovery propounded upon the BCA in a juvenile case is as illogical as expecting a police officer's interagency counsel to respond to discovery requests propounded on the county attorney in its prosecution of a criminal action.

Because we find that the BCA had the responsibility to respond to discovery including requests for admissions propounded on it, we find no merit in the argument that Parents were required to serve said documents on the Cabinet. And it is undisputed that the BCA never responded to the request for admissions. Therefore, the trial court was well within its authority to deem the request for admissions admitted per its May 6, 2025 order and its denial of BCA's motion to alter, amend, or vacate entered on September 5, 2025.[7]

[7] Attorneys often file a motion to "deem" discovery requests as admitted. This adds another motion to our overcrowded court dockets. While attorneys may feel more comfortable getting a court order to show this status, it is unnecessary. If requests for admissions are not denied within the time allotted, they are admitted with no further action by the court. CR 36.01 states that the matter "is admitted." An attorney may want to document the failure to respond in the court record by filing the unanswered requests and indicating no responses were made, but no order is required. Indeed, the civil rules create a process only for obtaining a court order to alter the admitted status. CR 36.02.

Notably on August 5, 2025, prior to the hearing on BCA's motion to alter, amend, or vacate, the BCA filed both its Notice of Expert Witness and Notice of Filing. In these filings, BCA identified Dr. Melissa Currie as the witness they intended to call in their case-in-chief and filed photos of Child, certified chiropractic records, the report prepared by Dr. Currie, and the certification of custodian records.[8]

[8] Parents acknowledged on the record that they had received Dr. Currie's report although the trial court mistakenly believed they had not.

On September 18, 2025, the day of trial, Parents and their counsel appeared in person, but all other parties and witnesses appeared remotely. The court began by addressing Parents' motion *in limine* prohibiting the BCA from introducing any evidence or testimony that contradicted the facts already deemed admitted and, in any way, touched on the interrogatories and requests for production of documents that remained unanswered. Following arguments, the trial judge granted Parents' motion. This effectively and appropriately prohibited the testimony of Dr. Currie and limited the BCA to produce evidence contained within the original petition.

The court then asked, given this ruling, if the BCA was ready to proceed. The BCA announced ready and called as its witness the social worker who previously testified at the temporary removal hearing.

At the conclusion of direct examination of the social worker, Parents commenced with cross-examination as recited above. At the end of the cross-examination, the BCA motioned the court to allow Dr. Currie to testify arguing that Parents opened the door, stating, "[Parents' attorney] asked if 'anyone else found non-accidental injury.'" This was a clear misstatement of the question propounded by Parents. However, in the heat of trial, combined with the unreliable nature of remote testimony, it is understandable that the BCA misunderstood the question. But the difference between what was *actually* said and what the BCA *thought* was said is significant.

When referencing the concept of "opening the door," the BCA was presumably referring to "the doctrine of 'curative admissibility,' *i.e.*, when one party introduces improper evidence, such 'opens the door' for the other party to introduce improper evidence in rebuttal whose only claim to admission is that it explains or rebuts the prior inadmissible evidence." *Metcalf v. Commonwealth*, 158 S.W.3d 740, 746 (Ky. 2005), *as modified on denial of reh'g* (Apr. 21, 2005). "Generally stated, 'opening the door' to otherwise inadmissible evidence is a form of waiver that happens when one party's use of inadmissible evidence justifies the opposing party's rebuttal of that evidence with equally inadmissible proof." *Workman v. Commonwealth*, 687 S.W.3d 168, 172 (Ky. App. 2024) (citations omitted). The admissibility question *sub judice* focuses on whether Parents "opened the door" to allowing Dr. Currie to testify. The question "is not whether initial proof shares some common quality with proof offered in response. Rather, it is whether the latter answers the former, and whether it does so in a reasonable way without sacrifice of other important values." *Commonwealth v. Stone*, 291 S.W.3d 696, 701-02 (Ky. 2009).

When reviewing the testimony in question in this case, it is obvious that Parents' actual question, ". . . after [Child] was examined in the hospital, . . . did anyone else find any issues with him other than the bruising on his abdomen?" is very different from the question the BCA believed was asked. "[Parents' attorney] asked if 'anyone else found non-accidental injury.'" Had the Parents asked about any other witnesses' findings, Parents may have arguably "opened the door" for the trial court to allow Dr. Currie's testimony. However, a question about issues *other than the bruising on Child's abdomen* does not allow previously disallowed evidence regarding the nature of Child's bruising. The trial court appropriately denied the BCA's motion to permit Dr. Currie to testify under the theory of "curative admissibility."

Because the trial court is affirmed regarding the above evidentiary issue, the issue of whether the judge should have allowed Dr. Currie to testify by avowal is moot. However, it is imperative that trial courts understand the importance of the avowal practice under KRE 103(a)(2) which serves to preserve issues for appellate review. While trial courts may begrudge the time it takes to make

an avowal record, it is clearly a better practice to allow it. Yet it is sometimes unnecessary as the rule itself recognizes. In this case, we can tell from the context of the request to allow Dr. Currie to testify that she would have said the injuries were not accidental (even though they were apparently consistent with the straps which held the baby in a car seat). This non-accidental comment by Dr. Currie is what was volunteered by another witness. We also have a copy of Dr. Currie's report in the record. But, for proper preservation of the issues for appeal, it would not have taken but a matter of seconds for the attorney to formally offer the report of Dr. Currie and for it to be accepted specifically as avowal evidence.

CONCLUSION

For the foregoing reasons, the Bullitt Family Court's order dismissing the case is AFFIRMED.

ALL CONCUR.

BEFORE: EASTON, KAREM, AND TAYLOR, JUDGES.

ARBITRATION

MOTION TO COMPEL ARBITRATION

SUBJECT MATTER JURISDICTION

KENTUCKY UNIFORM ARBITRATION ACT (KUAA)

FEDERAL ARBITRATION ACT (FAA)

Nancy Bolton (Bolton) opened brokerage account with Fidelity Brokerage Services LLC (Fidelity) in 2009 — At that time, Bolton signed preprinted account application (Application) that stated the account is subject to an arbitration agreement as contained in the Customer Agreement — Application stated that Customer Agreement and its enforcement are governed by the laws of Massachusetts — Sometime in 2013, Bolton took steps to add her son James Hamilton (Hamilton), whom she previously listed as beneficiary, as a tenant in common on the account — Parties dispute whether Bolton completed necessary steps to add Hamilton as a tenant in common — Bolton died in 2014 — In October 2017, Hamilton, as Executor of Bolton's Estate, filed instant action against Fidelity in Pike Circuit Court, alleging that Estate sustained damages when Fidelity wrongfully denied it access to the account — In July 2018, without answering complaint, Fidelity filed motion to dismiss or in the alternative to stay and compel arbitration, citing Customer Agreement — Customer Agreement stated that agreement and its enforcement is governed by Massachusetts law and set forth arbitration agreement — Estate responded that validity of arbitration agreement was in dispute and that Fidelity had not met its burden in establishing its validity — Estate questioned whether the signature on the Application was Bolton's signature and whether Fidelity had placed the signature on the Application — In response to Fidelity's reply memorandum, Estate argued that trial court lacked jurisdiction to compel arbitration because arbitration agreement did not state where arbitration was to occur and, therefore, did not satisfy KRS 417.200 — For reasons unclear in the record, trial court did not rule on this motion — After much legal maneuvering, trial court granted Fidelity's motion on June 26, 2023, and ordered arbitration — Estate filed motion to alter, amend, or vacate the order — Trial court granted estate's motion — Fidelity appealed — AFFIRMED — Disputes concerning arbitration agreements may implicate either, or both, Kentucky Uniform Arbitration Act (KUAA) and Federal Arbitration Act (FAA) — Existence of a binding agreement to arbitration is a threshold consideration for a trial court faced with a motion to compel arbitration — State law rules of contract formation determine whether movant has met its burden to establish existence of a valid arbitration agreement — Once the movant meets the burden and presents *prima facie* evidence of a valid arbitration agreement, heavy burden of avoiding the agreement shifts to the other party — In instant action, Court of Appeals limited its scope of review to the dispositive issue of whether trial court properly determined it lacked subject matter jurisdiction to compel arbitration — Court of Appeals noted the lengthy delay in instant action and encouraged the trial court to utilize the wide latitude Kentucky courts possess in the management of its docket for a more expeditious resolution of a motion to compel arbitration — A trial court may appropriately order limited discovery on the issue of arbitrability while a motion to compel arbitration is pending — In instant action, trial court did not err in concluding that it lacked subject matter jurisdiction to enforce arbitration agreement — Under facts, Fidelity never made a formal application under KRS 417.060 to compel arbitration; rather, it appears to have consistently and intentionally confined itself to proceeding under FAA — However, Fidelity tendered Customer Agreement that indicated that "[t]his agreement and its enforcement are governed by the laws of the Commonwealth of Massachusetts" — Customer Agreement did not explicitly state that Massachusetts Arbitration Act (MAA) applied or that FAA applied — Choice-of-law provisions in Application and Customer Agreement are inconsistent with Fidelity's argument that FAA governs question of whether arbitration should have been compelled by trial court — Express terms of documents tendered by Fidelity reflect an unequivocal agreement between parties that matters related to enforcement would be governed by laws of Massachusetts without stating "except for the MAA" — Because agreement does not state that arbitration shall take place in Kentucky, trial court lacked subject matter jurisdiction to compel arbitration under KUAA — Further, since agreement does not explicitly provide that FAA applies and even indicates that another state's arbitration act applies instead, trial court did not have subject matter jurisdiction under FAA —

Fidelity Brokerage Services LLC v. Estate of Nancy Bolton (2024-CA-0514-MR); Pike Cir. Ct., Hall, J.; Opinion by Judge Caldwell, *affirming*, rendered 3/20/2026. A motion for discretionary review was filed with the Kentucky Supreme Court on 4/17/2026. **[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 Fidelity Brokerage Services LLC ("Fidelity") appeals the order of the trial court vacating its prior order to compel arbitration and finding it lacked subject matter jurisdiction to enforce the agreement.

BACKGROUND

This appeal arises from disputes regarding a brokerage account that Nancy Bolton ("Bolton") first opened with Fidelity in 2009. To open the account, Bolton signed and submitted a preprinted form account application ("Application") that Fidelity had supplied. The Application contained the following language near the space where Bolton signed:

> This account is governed by a predispute arbitration clause which is located on the last page of the Customer Agreement. I acknowledge receipt of the predispute arbitration clause.

Record on Appeal ("R.") at 18.

On the previous page of the Application, in a section titled "Signature," the following language appears:

> <u>I acknowledge that I have been furnished with a copy of the Fidelity Account Customer Agreement and that I have read, understood, and agree to be bound by its terms and conditions as they are currently in effect and as they may be amended in the future.</u>

R. at 17 (underlined emphasis in original).

Just below, the same section also contains the statement:

> **I understand that the Customer Agreement and its enforcement shall be governed by the laws of the Commonwealth of Massachusetts** . . . [and] this Agreement shall be binding upon my heirs, executors, administrators, successors, and assigns.

Id. (boldface emphasis in original).

In 2014, Bolton passed away. Sometime during 2013, she took steps to add her son, James Hamilton ("Hamilton"), whom she had previously listed as beneficiary, as a tenant in common on the account. Whether Bolton completed the necessary steps to do so before she passed away is a matter that appears in dispute by the parties.

The Pike District Court appointed Hamilton as Executor of Bolton's Estate in 2014. In October of 2017, the Estate filed suit against Fidelity in

Pike Circuit Court. There, the Estate alleged it had sustained damages after Fidelity had wrongfully denied it access to the account. In July of 2018, without answering the complaint, Fidelity filed a Motion to Dismiss or in the Alternative to Stay and Compel Arbitration, along with a memorandum in support of its motion.

Along with its motion and memorandum, Fidelity submitted exhibits which included the Application, a nine-page document titled Fidelity Account Customer Agreement ("Customer Agreement") to the trial court. On the initial page, the following language appears:

> **Disputes between you and Fidelity are settled by arbitration.**
>
> As with most brokerage accounts, the parties agree to waive their rights to sue in court, and agree to abide by the findings of an arbitration panel established in accordance with an industry self-regulatory organization.

R. at 27 (boldface emphasis in original).

On the seventh page of the Customer Agreement, there is the following language:

> **Governing Laws and Policies**
>
> **This agreement and its enforcement are governed by the laws of the Commonwealth of Massachusetts, except with respect to its conflicts-of-law provisions.**

R. at 33 (boldface emphasis in original).

The ninth and final page of the Customer Agreement contains the following language:

> **Resolving Disputes—Arbitration**
>
> This agreement contains a pre-dispute arbitration clause. Under this clause, which you agree to when you sign your account application, you and Fidelity agree as follows:
>
> . . .
>
> The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.
>
> . . .
>
> **All controversies that may arise between you and us concerning any subject matter, issue or circumstance whatsoever (including, but not limited to, controversies concerning any account, order or transaction, or the continuation, performance, interpretation or breach of this or any other agreement between you and us, whether entered into or arising before, on or after the date this account is opened) shall be determined by arbitration in accordance with the rules then prevailing of the Financial Industry Regulatory Authority (FINRA) or any United States securities self-regulatory organization or United States securities exchange of which the person, entity or entities against whom the claim is made is a member, as you may designate. . . . The designation of the rules of a self-regulatory organization or securities exchange is not integral to the underlying agreement to arbitrate.**

R. at 35 (boldface emphasis in original).

Fidelity's motion requested the trial court dismiss the Estate's claims "[p]ursuant to Rules 12.02(a), 12.02(c), and 12.02(f) of the Kentucky Rules of Civil Procedure" or, in the alternative, to stay the litigation and compel arbitration in accordance with the Federal Arbitration Act ("FAA") 9 U.S.C.[1] §§ 1 *et seq.* In Fidelity's supporting memorandum, it primarily argued the arbitration provision at issue was valid and enforceable under the FAA and that Kentucky courts were obligated to enforce such an agreement.

[1] United States Code.

The Estate filed a response in opposition to Fidelity's motion, contending that the validity of the arbitration agreement was in dispute and that Fidelity had not met its burden in establishing its validity. The Estate questioned whether the signature on the Application was in fact that of Bolton and whether Fidelity placed the signature upon the Application.

Thereafter, Fidelity submitted a reply memorandum in support of its motion. On November 12, 2018, the Estate filed a responsive memorandum and argued that the trial court lacked jurisdiction to compel arbitration because the arbitration agreement did not state where arbitration was to occur and thus did not satisfy the requirements of KRS[2] 417.200. The Estate argued that any award from arbitration could prove unenforceable as a result of the lack of jurisdiction. In the alternative, the Estate argued that genuine issues of material fact existed as to whether any agreement had been made.

[2] Kentucky Revised Statutes.

For reasons that are not clear from the record, the trial court did not rule upon the motion. In late 2019, a CR[3] 77.02(2) notice issued requiring the parties to show cause why the case should not be dismissed for lack of prosecution. Fidelity submitted a memorandum requesting the trial court dismiss the matter and also renewed its motion to compel arbitration. The Estate argued otherwise; the matter remained on the active docket. Another CR 77.02(2) notice issued in March of 2021. The parties again submitted pleadings which referenced the pending motion to compel arbitration. The parties argued before the trial court at a hearing in July of 2021. Thereafter, the trial court ordered that the parties could supplement the file within ten days and rebut any supplemental filing within the following five days; otherwise, a ruling would be made in twenty days. Both parties filed supplemental memorandums. However, no order of the trial court ruling on the motion to compel arbitration followed. In August of 2022, a third CR 77.02(2) notice issued. Fidelity again renewed its motion to compel arbitration. A show cause hearing on the notice occurred in September of 2022.

[3] Kentucky Rules of Civil Procedure.

The trial court granted Fidelity's motion in an order that was entered on June 26, 2023. There, the trial court ordered the parties' dispute be determined "under the terms and conditions of the parties' Arbitration Agreement" and placed the case in abeyance pending the outcome of arbitration. R. at 190.

Thereafter, the Estate made a motion to alter, amend, or vacate the order placing the case in abeyance. The parties argued before the trial court at a hearing on August 11, 2023.

In March of 2024, two conflicting orders issued regarding the Estate's motion on the same date. One order ("the Order"), R. at 230, indicated the trial court had granted the motion. In this Order, the trial court found that the Estate had presented a question as to the existence of a contract that was for a jury to answer. However, the Order also concluded that, "even if a jury [were] to determine a valid arbitration agreement exist[s] as urged by [Fidelity], it would be unenforceable as Kentucky Courts do not have subject matter jurisdiction under *Ky. Rev. Stat. Ann. 417.200* to enforce same." Order, p. 2. The other order from March 2024 denied the motion to alter, amend, or vacate.

On April 16, 2024, the trial court ruled that the order which had denied the Estate's motion to alter, amend, or vacate was set aside, as it had been inadvertently signed and entered. The trial court further ruled the Order which granted the Estate's motion to alter, amend, or vacate would stand. Accordingly, the trial court effectively denied the motion to compel arbitration. This appeal follows.

ANALYSIS

Fidelity argues that the trial court erred by refusing to enforce the arbitration agreement. Fidelity maintains the agreement was valid and enforceable and that the Estate failed to meet its burden of establishing otherwise. Fidelity contends that the trial court abdicated its responsibility to construe the validity of the agreement when it accepted an erroneous argument by the Estate that a question as to the existence of a contract was a matter for jury determination. Furthermore, Fidelity argues, the trial court erroneously determined that, pursuant to *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009), it lacked jurisdiction to compel arbitration under the terms of the tendered agreement.

STANDARD OF REVIEW

Fidelity appeals the trial court's Order of March 27, 2024, which concluded Fidelity's tendered arbitration agreement was unenforceable. In discussing the standard of review of an order denying a motion to compel arbitration, this Court has stated:

> Ordinarily, such orders [which do not completely resolve the parties' rights in an action or contain a CR 54.02 recitation] are interlocutory and are not immediately appealable. However, an order denying a motion to compel arbitration is immediately appealable.

Golden Gate Nat'l Senior Care, LLC v. Rucker, 588 S.W.3d 868, 870 (Ky. App. 2019) (quoting *Genesis Healthcare, LLC v. Stevens*, 544 S.W.3d 645, 648–49 (Ky. App. 2017)). *See also* CR 54.01.

When reviewing an order that has denied a motion to compel arbitration, we review the trial court's legal conclusions *de novo* "to determine if the law was properly applied to the facts." *Padgett v. Steinbrecher*, 355 S.W.3d 457, 459 (Ky. App. 2011). However, factual findings of the trial court "are reviewed under the clearly erroneous standard and are deemed conclusive if they are supported by substantial evidence." *Id.*

Disputes concerning arbitration agreements may implicate either, or both, the Kentucky Uniform Arbitration Act ("KUAA"), KRS 417.045 *et seq.*, and the FAA. *Jackson v. Legacy Health Servs., Inc.*, 640 S.W.3d 728, 732 (Ky. 2022). The KUAA and the FAA govern the enforcement and effect of an arbitration agreement. *Masonic Homes of Kentucky, Inc. v. Est. of Leist By & Through Leist*, 699 S.W.3d 868, 871 (Ky. App. 2024). "Both Acts evince a legislative policy favoring arbitration agreements, or at least shielding them from disfavor." *Id.* (quoting *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 588 (Ky. 2012)).

Under either the KUAA or the FAA, a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. *Ping*, 376 S.W.3d at 590 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004)).

"[T]he existence of a binding agreement to arbitrate is necessarily a threshold consideration for a trial court faced with a motion to compel arbitration." *Jackson*, 640 S.W.3d at 732. State law rules of contract formation will determine whether the movant has met its burden to establish the existence of a valid agreement. *Ping*, 376 S.W.3d at 590; *see also Jackson*, 640 S.W.3d at 732 ("Disposition of" the determination of whether a binding agreement to arbitrate exists "implicates state law contract principles.").

After the movant meets the burden and presents *prima facie* evidence of a valid arbitration agreement, "the heavy burden of avoiding the agreement shifts to the other party." *Green v. Frazier*, 655 S.W.3d 340, 345 (Ky. 2022) (citing *Louisville Peterbilt*, 132 S.W.3d at 857).

The Scope Of Review Is Limited To The Trial Court's Dispositive Determination

In its Appellant brief, Fidelity contends that the Estate has already received the relief it seeks in its initiating complaint. We decline to address any substantive issues as to the underlying claim. The scope of interlocutory appellate review should be limited to the issue presented in the interlocutory appeal itself and should not extend to substantive issues. *Baker v. Fields*, 543 S.W.3d 575, 578 (Ky. 2018) (citing *Commonwealth v. Samaritan Alliance*, 439 S.W.3d 757, 760 (Ky. App. 2014)). "Otherwise, interlocutory appeals would be used as vehicles for bypassing the structured appellate process." *Baker*, 543 S.W.3d at 578.

Furthermore, we limit our review to the dispositive issue of whether the trial court properly determined it lacked subject matter jurisdiction to compel arbitration. The parties devote some arguments to commentary in the Order regarding jury determination as to the existence of a contract. We decline to address this as the finding is not critical to the result reached by the Order. In fact, the Order determines a jury's determination, were any questions as to contract formation here subject to such review, would make no difference to the question of the agreement's *enforceability*.

Nonetheless, we are compelled to point out here that this case has now been pending in our Court system for more than eight years. The Estate's arguments as to disputed facts concerning arbitrability remain undeveloped. It is difficult to discern specific factual allegations in dispute that the Estate asserts would be determinative of contract formation and/or arbitrability. On two occasions the case came before the trial court following notices issued pursuant to CR 77.02(2). On both occasions, the Estate filed a response. In the second, the Estate included an argument that it had not had any opportunity to conduct discovery.

Where an answer is provided following a CR 77.02(2) notice, a trial court has a wide degree of discretion in deciding whether a party has shown good cause to allow the action to remain on the court's docket. *Wildcat Prop. Mgmt., LLC v. Reuss*, 302 S.W.3d 89, 93 (Ky. App. 2009). We discern no abuse of the trial court's wide discretion in allowing the action to remain active, particularly given there was a pending motion before the trial court which ultimately turned upon interpretation of law unrelated to any factual dispute alleged by the Estate. Furthermore, Fidelity does not pursue appellate relief on this issue and alleges no abuse of discretion by the trial court in allowing the matter to remain active.

Nonetheless, our review of the record revealed no noteworthy effort by the Estate to engage in discovery on the issue of the disputed facts it alleges. The Estate was not without recourse. A trial court may appropriately order limited discovery on the issue of arbitrability while a motion to compel arbitration is pending. *Stanton Health Facilities, LP v. Fletcher*, 454 S.W.3d 312, 315 (Ky. App. 2015). However, nowhere does the record indicate that the Estate ever pursued such an order.

While, pursuant to the trial court's initial briefing schedule, Fidelity's motion to compel arbitration was deemed submitted relatively early in the case history, the Estate continued to argue that multiple factual matters relevant to formation were in dispute and remained undetermined. Nonetheless, when a party such as Fidelity moves to compel arbitration, the circuit court must "decide under ordinary contract law whether the asserted arbitration agreement actually exist[ed] between the parties and, if so, whether it appli[ed] to the claim raised in the complaint." *Fletcher*, 454 S.W.3d at 315 (citing *N. Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102 (Ky. 2010)). Going forward, we encourage the trial court to utilize the wide latitude Kentucky courts possess in the management of its docket for a more expeditious resolution of a motion to compel arbitration. *See Love v. Walker*, 423 S.W.3d 751, 758 (Ky. 2014). The setting *and enforcement* of deadlines for submission by the parties in any future disputed motion to compel arbitration, including an order of limited discovery where the trial court determines it is appropriate, would likely avoid excessive delays in the determination of whether the parties entered into a binding agreement to arbitrate. *See Fletcher*, 454 S.W.3d at 315.

The Trial Court Correctly Concluded That It Lacked Subject Matter Jurisdiction to Enforce the Arbitration Agreement

The Order concludes that the trial court is without jurisdiction to enforce the arbitration agreement because of the agreement's failure to provide that arbitration would occur in Kentucky:

> Kentucky Courts only have subject matter jurisdiction to enforce an agreement to arbitrate if the agreement provides for arbitration in this state (Kentucky). Further, the agreement must unequivocally provide for arbitration in Kentucky. *Padgett v. Steinbrecher*, 355 S.W.3d 457, 458 (Ky. App. 2011). An agreement to arbitrate that fails to include the required provision for arbitration within this state (Kentucky) is unenforceable, absent that provision. *Id.* and *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 452 (Ky. 2009).
>
> Here, Fidelity presents a Customer Agreement and the Customer Application, but neither document specifies that arbitration shall occur in Kentucky, which is required by *Padgett* and *Ally Cat*. Therefore, even if a jury were to determine a valid arbitration agreement exist[ed] as urged by Defendant, it would be unenforceable as Kentucky Courts do not have subject matter jurisdiction under *Ky. Rev. Stat. Ann. 417.200* to enforce same.

Order, p. 1–2.

Fidelity argues the trial court's determination here that it lacked jurisdiction to compel arbitration was in error, asserting that "*Ally Cat* . . . does not apply when, as here, a party seeks to compel arbitration under the FAA." This argument conflates a party *seeking* to compel arbitration under the FAA with a court's determination that an arbitration agreement is *governed* by the FAA.

KRS 417.060 provides that where a party opposing an application to arbitrate "denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised." However, Fidelity at no time made any formal application under KRS 417.060 to compel arbitration. Fidelity's motion requested the trial court dismiss the Estate's claims "[p]ursuant to Rules 12.02(a), 12.02(c), and 12.02(f) of the Kentucky Rules of Civil Procedure[.]" Fidelity's motion *did* request, in the alternative, that the trial court stay the litigation and compel arbitration in accordance. However, in that motion as well as thereafter, Fidelity appears to have consistently and intentionally confined the procedural authority under which it sought a stay to § 3 and § 4 of the FAA (9 U.S.C. §§ 3, 4).

We have recognized that 9 U.S.C. § 3 is enforceable in Kentucky state courts. *PSC Indus., Inc. v. Toyota Boshoku Am., Inc.*, 649 S.W.3d 288, 292 (Ky. App. 2022) (citing *Kodak Min. Co. v. Carrs Fork Corp.*, 669 S.W.2d 917, 919 (Ky. 1984); *North Fork Collieries, LLC*, 322 S.W.3d at 102 n.2). *Where the FAA is applicable*, the federal statute requires that a trial court, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall . . . stay the trial of the action until such arbitration has been had[.]" 9 U.S.C. § 3. However, Fidelity tendered a document which

indicated "[t]his agreement and its enforcement are governed by the laws of the Commonwealth of Massachusetts[.]"

In *Ally Cat*, the Kentucky Supreme Court held that, pursuant to KRS 417.200, the Commonwealth's courts lack jurisdiction to enforce arbitration agreements which fail to designate Kentucky as the site for arbitration. 274 S.W.3d at 455–56. Subsequently, however, in *Ernst & Young, LLP v. Clark*, our Supreme Court examined arbitration agreements which "*explicitly* require[d] that disputes be governed by the [FAA]." 323 S.W.3d 682, 687 (Ky. 2010) (emphasis added). In a footnote, the Court clarified its prior holding, stating that, "*Ally Cat* has no applicability to an arbitration agreement governed *exclusively* by the Federal Arbitration Act." *Id.* at 687 n.8 (emphasis added).

Shortly after our Supreme Court's rendering of *Ernst & Young*, in an unpublished opinion, this Court considered a trial court's order denying arbitration pursuant to *Ally Cat* and which also failed to specifically address the applicability of the FAA.[4] There, the trial court mentioned a Massachusetts choice-of-law provision in the brokerage agreement.[5] At that time, we determined that remand to the trial court for consideration of FAA was appropriate.[6] Although the choice-of-law provision in the arbitration agreement and the trial court's conclusions of law were similar to those in the present matter, that unpublished case does not provide binding precedent. RAP[7] 41(A). Furthermore, in the interim following that opinion, significant developments in our jurisprudence have occurred.

[4] *Fid. Brokerage Servs. v. Folk*, No. 2009-CA-001725-MR, 2010 WL 4295827, at *2 (Ky. App. Oct. 29, 2010) (unpublished).

[5] *Id.*

[6] *Id.*

[7] Kentucky Rules of Appellate Procedure.

Following its rendering of *Ernst & Young*, our Supreme Court has consistently held that Kentucky courts "need not consider Kentucky's Uniform Arbitration Act when the agreement[] explicitly require[s] that disputes be governed by the Federal Arbitration Act." *MHC Kenworth-Knoxville/Nashville v. M & H Trucking, LLC*, 392 S.W.3d 903, 906 (Ky. 2013) (citing *Ernst & Young*, 323 S.W.3d at 687) (internal quotation marks omitted); *see also JPMorgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902, 907 (Ky. 2014). *M & H Trucking*, 392 S.W.3d at 906 (quoting *Hathaway v. Eckerle*, 336 S.W.3d 83, 87 (Ky. 2011) (holding that where an agreement "includes a 'choice of law' provision selecting the Federal Arbitration Act as the law governing any dispute between the parties . . . the Federal Arbitration Act governs the arbitration clause")) (internal quotation marks omitted).

However, where the applicability of the FAA is disputed, a different analysis applies. In *Frankfort Medical Investors, LLC v. Thomas By & Through Thomas*, this Court reviewed the denial of a motion to compel arbitration where the agreement contained a choice-of-law provision specifying it would be "governed by and interpreted in accordance with the laws of the State of Tennessee, including the Tennessee Uniform Arbitration Act." 577 S.W.3d 484, 487 (Ky. App. 2019) (internal quotation marks omitted).

Fidelity's brief argues that the matter "clearly evidences a transaction in interstate commerce and is thus subject to the FAA." Our Supreme Court has found the FAA applies "to actions brought in the courts of this state where the purpose of the action is to enforce voluntary arbitration agreements in contracts evidencing transactions in interstate commerce." *Fite & Warmath Constr. Co. v. MYS Corp.*, 559 S.W.2d 729, 734 (Ky. 1977). Fidelity's motions sought arbitration pursuant to the FAA and made no assertion that the KUAA was applicable.

However, to the trial court as well as to this Court, Fidelity has provided no explanation or argument as to the appropriate consideration of the choice-of-law provisions within the documents it has tendered.

The facts here are similar to *Frankfort Med. Invs.*, in that there is a choice-of-law provision specifying the laws of another state. 577 S.W.3d at 487. Here, the Customer Agreement which contains the arbitration agreement specifies "[t]his agreement and its enforcement are governed by the laws of the Commonwealth of Massachusetts, except with respect to its conflicts-of-law provisions." There is a distinction to be noted from *Frankfort Med. Invs.*; in that case, the agreement not only stated that Tennessee law applied but further specified that the Tennessee Uniform Arbitration Act would be applicable. 577 S.W.3d at 487. In this case, there is a Massachusetts choice-of-law provision but no specific statement which explicitly identifies the Massachusetts Arbitration Act ("MAA") as applicable. On the other hand, there is no mention of the FAA applying to the agreement. And neither the Application nor Customer Agreement contains language suggesting the parties intended to exclude arbitration issues from the general Massachusetts choice-of-law provision.

There are other provisions to consider. One within the Customer Agreement states that arbitration would occur: "in accordance with the rules then prevailing of the Financial Industry Regulatory Authority (FINRA) or any United States securities self-regulatory organization or United States securities exchange of which the person, entity or entities against whom the claim is made is a member, as you may designate." However, the agreement also states that this "designation of the rules of a self-regulatory organization or securities exchange is not integral to the underlying agreement to arbitrate."

Our Supreme Court has stated that "choice of law provisions are generally valid in arbitration clauses[.]" *Hathaway*, 336 S.W.3d at 87. However, the sole question before this Court is whether arbitration should have been compelled by the trial court. We examine the choice-of-law provisions in the Application and Customer Agreement only because they are inconsistent with Fidelity's argument that the FAA governs that question. Certainly, the arbitration agreement here cannot be said to "*explicitly* require that disputes be governed by the [FAA]." *Ernst & Young*, 323 S.W.3d at 687 (emphasis added). Moreover, the Customer Agreement containing the arbitration agreement specifies that "[t]his agreement *and its enforcement* are governed by the laws of the Commonwealth of Massachusetts[.]" R. at 33 (emphasis added). Accordingly, we cannot conclude that the documents tendered by Fidelity reflect an agreement by the parties that enforcement of the arbitration agreement would be governed *exclusively* by the FAA. *See Ernst & Young*, 323 S.W.3d at 687 n.8 ("*Ally Cat* has no applicability to an arbitration agreement governed *exclusively* by the Federal Arbitration Act.") (emphasis added).

The Supreme Court of the United States has stated that:

> [I]n cases falling *within a court's jurisdiction*, the [FAA] makes contracts to arbitrate "valid, irrevocable, and enforceable," so long as their subject involves "commerce." And this is so whether an agreement has a broad reach or goes just to one dispute, and whether enforcement be sought in state court or federal.

Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 582, 128 S. Ct. 1396, 1402, 170 L. Ed. 2d 254 (2008) (emphasis added) (citations omitted).

Nonetheless, as the Supreme Court also recognized, parties "may contemplate enforcement under state statutory or common law[.]" *Hall St. Assocs.*, 552 U.S. at 590, 128 S. Ct. at 1406. And while the United States Supreme Court has "held that the FAA pre-empts state laws which require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration[,]" it has also determined that "it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478–79, 109 S. Ct. 1248, 1255–56, 103 L. Ed. 2d 488 (1989) (internal quotation marks omitted).

> Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, . . . so too may they specify by contract the rules under which that arbitration will be conducted.

Id. at 479, 109 S. Ct. at 1256 (citation omitted).

The Court further determined in *Volt* that:

> Where . . . the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, . . . we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

489 U.S. at 479, 109 S. Ct. at 1256 (citation omitted).

The Order here makes the determination that the arbitration agreement tendered by Fidelity was unenforceable because neither the Customer

Agreement nor the Application specified that arbitration would occur in Kentucky. Relying on *Padgett* and *Ally Cat*, the trial court determined that, as a Kentucky court, it lacked subject matter jurisdiction to enforce any arbitration agreement, pursuant to KRS 417.200.

The Order does not explicitly conclude that the FAA is inapplicable as to governing enforcement because of the parties' contractual agreement that the laws of Massachusetts would instead apply. However, we may affirm a trial court for any reason supported by the record. *Univ. Med. Ctr., Inc. v. Beglin*, 375 S.W.3d 783, 799 (Ky. 2011); *see also Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009) ("[A]n appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result.").

Fidelity argues that the Estate did not meet its heavy burden to establish that the arbitration agreement was not enforceable, citing *M & H Trucking*, 392 S.W.3d at 906. The *M & H Trucking* decision resulted from a choice-of-law provision that specifically designated the FAA as the governing law, unlike here. *Id.* (citing *Hathaway*, 336 S.W.3d at 87). Here, Fidelity did not tender an arbitration agreement "governed *exclusively* by the Federal Arbitration Act." *Ernst & Young*, 323 S.W.3d at 687 n.8 (emphasis added). Instead, by their express terms, the documents tendered by Fidelity reflected an unequivocal agreement between the parties that matters related to enforcement would be *governed by the laws of Massachusetts without stating "except for the Massachusetts Arbitration Act (MAA)*." (The only exception stated to the applicability of Massachusetts law was for conflict-of-law provisions.)

The MAA provides that:

> An initial application shall be made to the superior court for the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise the application shall be made in the county where the adverse party resides or has a place of business or, if he has no residence or place of business in this state, to the superior court for any county. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

Mass. Gen. Laws Ann. ch. 251, § 17 (West).

This language tracks closely to that of Tennessee Code Annotated (T.C.A.) § 29-5-318 as it stood when *Frankfort Med. Invs.* was rendered.[8] 577 S.W.3d at 487–88. Furthermore, as used in the Venue statute of the MAA, the definition of "court" is limited to a court in Massachusetts. *See* Mass. Gen. Laws Ann. ch. 251, § 16 (West) ("The term 'court' means any court of competent jurisdiction of this state."); *see also Frankfort Med. Invs.*, 577 S.W.3d at 488 ("The circuit court held [that]: '[t]he definition of "court" is limited to that of a court of Tennessee, which, of course, this Court is not.'").

[8] At the time of this writing, the Venue statute for the Tennessee Arbitration Act is found at T.C.A. § 29-5-328 (West).

As with *Frankfort Med. Invs.*, the overlapping statutory language likewise rendered the trial court here without subject matter jurisdiction to compel arbitration, as the agreement reflects an election by the parties to proceed under the MAA rather than under the FAA as regards matters of enforceability. 577 S.W.3d at 488.

This agreement here fails to specify that arbitration would occur in Kentucky and does not state that arbitration is governed by the FAA. Instead, it indicates that matters related to enforcement would be governed by Massachusetts law. Assuming the MAA applies, it would dictate that any arbitration take place in that state.

> Yet, KRS 417.200 requires that the arbitration take place in Kentucky. "When the issue arises prior to the arbitration hearing, as it has in this case, and the agreement upon which arbitration is sought fails to comply with the literal provisions of KRS 417.200, the courts of Kentucky are, pursuant to KRS 417.200, without jurisdiction to enforce the agreement to arbitrate." *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 455–56 (Ky. 2009). *See also Padgett*, 355 S.W.3d at 462 ("Accordingly, unless an arbitration clause or agreement explicitly states the arbitration is to be conducted in Kentucky, Kentucky courts lack jurisdiction to compel arbitration.").

Frankfort Med. Invs., 577 S.W.3d at 488.

Here, Fidelity tendered to the trial court an agreement with no explicit indication it would be governed by the FAA but, rather, containing a choice-of-law provision pointing to Massachusetts law for matters of enforcement. Because the agreement does not state that arbitration shall take place in Kentucky, the trial court correctly concluded that it lacked subject matter jurisdiction to compel arbitration under the KAA. *See Ally Cat*, 274 S.W.3d at 455–56. Moreover, because the agreement does not explicitly provide that the FAA applies and even indicates that another state's arbitration act applies instead, we cannot conclude that the trial court had subject matter jurisdiction under the FAA. *See Ernst & Young*, 323 S.W.3d at 687; *M & H Trucking*, 392 S.W.3d at 906. Under these facts, we conclude that the trial court's subject matter jurisdiction "is governed by the [KUAA] and . . . not the statutes and constitutional provisions delineating the general subject matter jurisdiction of the circuit court." *Artrip v. Samons Const., Inc.*, 54 S.W.3d 169, 171 (Ky. App. 2001) (citing *Tru Green Corporation v. Sampson*, 802 S.W.2d 951, 953 (Ky. App. 1991)).

Thus, we discern no reversible error in the trial court's denying the motion to compel arbitration for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, the Order of the Pike Circuit Court is affirmed.

CETRULO, JUDGE, CONCURS.

ECKERLE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CHILDCARE PROVIDERS

COVID-19

AMERICAN RESCUE PLAN

CONTRACTS

ADMINISTRATIVE LAW

CONTRACTS WITH CHILDCARE PROVIDERS UNDER THE AMERICAN RESCUE PLAN

KENTUCKY MODEL PROCUREMENT CODE (KMPC)

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

PROMISSORY ESTOPPEL

NEGLIGENCE

To mitigate the impact of COVID-19 pandemic, federal government enacted the American Rescue Plan, which among other things, made funds available for states to distribute to childcare providers — Cabinet for Health and Family Services (Cabinet) distributed those funds in Kentucky — Cabinet entered into contracts with childcare providers which required providers to provide monthly data sheets to Cabinet via third-party, Public Consulting Group (Group) — Plaintiff ran six childcare centers — Plaintiff entered into identical contracts for each of those centers with Cabinet — Contract required plaintiff to complete a monthly data sheet and send it to Group by the 5th of each month — Contract conditioned payment to plaintiff on plaintiff meeting contractual requirements — Plaintiff filed instant action against Cabinet and Group alleging that Cabinet, via Group, had previously accepted late timesheets but improperly withheld a $217,503 quarterly payment in July 2022 because plaintiff's April 2022 timesheet was, by plaintiff's own admission, submitted tardily — Plaintiff claimed that data sheet submission process was confusing and fraught with problems — Plaintiff raised claims against each defendant for breach of contract, promissory estoppel, and negligence — Cabinet and Group each filed motion to dismiss for failure to state a claim upon which relief may be granted — Trial court granted both motions — Plaintiff appealed — AFFIRMED — Plaintiff's breach of contract claims against Group fail because complaint does not allege existence of any contract(s) between plaintiff and Group — Further, plaintiff is not a third-party beneficiary of agreements between Cabinet and Group — Plaintiff did not provide contracts between Cabinet and Group and complaint did not mention what terms in any such contracts make plaintiff an intended third-

party beneficiary of those agreements — KRS 45A.245 waives sovereign immunity for actions arising under contracts with Commonwealth, including Cabinet; however, trial court did not err in dismissing plaintiff's breach of contract claims against Cabinet because plaintiff failed to first raise claims to Secretary of the Finance and Administration Cabinet, as required in KRS 45A.230 — Plaintiff failed to exhaust her administrative remedies before seeking judicial relief — Plaintiff did not show that any of the recognized exceptions to exhaustion requirement applied in instant action — Trial court properly dismissed plaintiff's promissory estoppel claims against Cabinet and Group — Plaintiff did not identify a promise made to plaintiff by Cabinet or Group or how plaintiff acted or declined to act in reliance upon that promise — Trial court properly dismissed negligence claim against Group since plaintiff did not explain how or why Group purportedly owed to her duties alleged in complaint — Plaintiff failed to raise her negligence claims against Cabinet in Board of Claims prior to bringing them in trial court; therefore, plaintiff failed to exhaust her administrative remedies and trial court properly dismissed her negligence claim against Cabinet —

Jessica Saner; Butler Learning Center, LLC; Hebron Learning Center, LLC; Highlands Heights Learning Center, LLC; Independence Learning Center, LLC; Taylor Mill Learning Center, LLC; and Walton Learning Center, LLC v. Com., Cabinet for Health and Family Services and Public Consulting Group (2025-CA-0234-MR); Franklin Cir. Ct., Shepherd, J.; Opinion by Judge L. Jones, *affirming*, rendered 4/3/2026. **[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).]**

Jessica Saner and her six childcare centers (collectively Saner) appeal from the Franklin Circuit Court's dismissal of their claims against the Commonwealth of Kentucky, Cabinet for Health and Family Services (Cabinet), and Public Consulting Group (Group) for failure to state claims upon which relief may be granted. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

To help mitigate the impact of the COVID-19 pandemic, the federal government enacted the American Rescue Plan. Among other matters, that legislation made funds available for states to distribute to childcare providers. The Cabinet was responsible for distributing those funds in Kentucky. The Cabinet entered into contracts with childcare providers which required the providers to provide monthly data sheets to the Cabinet via a third-party, the Group.

Specifically, in relevant part, the apparently identical contracts between each of Saner's six childcare centers and the Cabinet provided:

> 5. The Provider receiving the American Rescue Plan funds must complete a monthly data sheet and send it to the third party vendor by the 5th of each month. The data sheet will include data on enrollment, staff turnover, and other key data points.
>
> . . .
>
> 8. Each payment is conditioned upon the Provider meeting the requirements of this Agreement . . . .
>
> 26. There are no third-party beneficiaries, express or implied, to this Agreement.
>
> . . .
>
> 28. Nothing contained herein shall be construed to waive the inherent sovereign immunity of the Commonwealth of Kentucky.

Trial Court Record (R.) at 23-26.

According to Saner's complaint, the monthly data sheet submission process was "confusing" and "fraught with problems and issues from almost the beginning. . . ." R. at 9. The gist of Saner's complaint alleges that the Cabinet, via the Group, had previously accepted late timesheets but improperly withheld a $217,503.00 quarterly payment in July 2022 because Saner's April 2022 timesheet was, by her own admission, submitted tardily. Saner then filed the complaint at hand against the Cabinet and the Group, raising claims against each for breach of contract, promissory estoppel, and negligence.

The Cabinet and the Group each filed a motion to dismiss Saner's complaint for failure to state a claim upon which relief may be granted. *See* Kentucky Rule of Civil Procedure (CR) 12.02. The trial court granted both motions in one order.[1] Saner then filed this appeal.

[1] In that same order the trial court also denied Saner's motion to amend her complaint, holding that the proposed amended complaint "cannot cure the deficiencies in the original Complaint." R. at 262. Saner's proposed amended complaint appears to be identical, or nearly so, to the original complaint. In any event, Saner has not directly challenged the denial of her motion to file an amended complaint.

II. ANALYSIS

As a preliminary matter, we note Saner's brief does not contain a statement showing whether (and, if so, how) she preserved any of the issues in her brief for appellate review. RAP 32(A)(4) requires the argument section of an appellant's opening brief to "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." As we have explained, "[o]ur Supreme Court has strictly mandated compliance with the preservation statement requirements in briefs since its inception under the prior Kentucky Rules of Civil Procedure." *W.I.S. v. K.M.B.*, 722 S.W.3d 569, 576 (Ky. App. 2025) (internal quotation marks and citations omitted). While RAP 31(H)(1) allows us to strike a brief which fails "to substantially comply with the requirements of these rules[,]" we have elected to proceed with review and not sanction Saner for this deficiency as the trial record is modest and neither Appellee has raised the issue in their briefs. However, we remind all parties of the importance of including preservation statements and caution them of the risk that a future panel of this Court may not exercise such leniency.

Furthermore, "[w]e have considered the parties' extensive arguments and citations to authority but will discuss only the arguments and cited authorities we deem most pertinent, the remainder being without merit, irrelevant, or redundant." *Schell v. Young*, 640 S.W.3d 24, 29 n.1 (Ky. App. 2021).

A. Standard of Review

As our Supreme Court has explained:

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

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010) (internal quotation marks, ellipsis, and citations omitted).

B. Breach of Contract

The elements of a breach of contract claim are "1) existence of a contract; 2) breach of that contract; and 3) damages flowing from the breach of contract." *Metro Louisville/Jefferson Cnty. Government v. Abma*, 326 S.W.3d 1, 8 (Ky. App. 2009).

1. The Group

The entirety of the breach of contract claims against the Group in Saner's complaint is that the Cabinet "breached the Agreements by making it impossible for [Saner] to comply with an essential term of the Agreements, through Defendant Cabinet's own negligence and that of its third-party vendor, [the Group]." R. at 17. Saner's breach of contract claims against the Group fail because the complaint does not allege the existence of any contract(s) between Saner and the Group. *Nave v. Feinberg*, 539 S.W.3d 685, 691 (Ky. App. 2017) ("Nave's claim for breach of contract must fail because no contract existed between her and Dr. Feinberg and Rouse.").

We also reject Saner's hazy argument that she is a third-party beneficiary of the agreements between the Cabinet and the Group. In Kentucky:

> a third party for whose benefit a contract is made may maintain an action thereon; however, he must have been a party to the consideration or the contract must have been made for his benefit, and the mere fact that he will be incidently benefited by the performance of the contract is not sufficient to entitle him to enforce it.

Ball v. Cecil, 148 S.W.2d 273, 274 (Ky. 1941).

Even accepting the assertions in Saner's complaint as true, her third-party beneficiary argument fails. Saner has not provided the contract(s) between the Cabinet and the Group and the complaint does not mention what terms in any such contracts make Saner an intended third-party beneficiary of those agreements. Consequently, Saner has not adequately pleaded a viable third-party beneficiary claim for relief. *Ball*, 148 S.W.2d at 274.

2. The Cabinet

The Cabinet asserts it is immune from Saner's breach of contract claims. Sovereign immunity is "an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity." *Louisville Arena Authority, Inc. v. RAM Engineering & Const., Inc.*, 415 S.W.3d 671, 679–80 (Ky. App. 2013) (internal quotation marks and citations omitted). As we have held, "the Cabinet is a statutorily created agency performing an integral function of state government. Thus, the Cabinet is entitled to the protection of sovereign immunity." *Commonwealth v. Samaritan All., LLC*, 439 S.W.3d 757, 761 (Ky. App. 2014).

However, that is not the end of the matter because "KRS [Kentucky Revised Statute] 45A.245 expressly waives sovereign immunity for actions arising under contracts with the Commonwealth." *Id.* at 762. KRS 45A.245 provides in relevant part:

> (1) Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. Any such action shall be brought in the Franklin Circuit Court and shall be tried by the court sitting without a jury. All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth.

As our Supreme Court has held, "KRS 45A.245 is an unqualified waiver of immunity in all cases based on a written contract with the Commonwealth . . . ." *University of Louisville v. Rothstein*, 532 S.W.3d 644, 647 (Ky. 2017).

Nonetheless, the trial court properly dismissed Saner's breach of contract claims against the Cabinet because Saner failed to first raise them to the Secretary of the Finance and Administration Cabinet. KRS 45A.230 provides that:

> Prior to the institution of any action in a court concerning any contract, claim, or controversy, the secretary of the Finance and Administration Cabinet is authorized, subject to any limitations or conditions imposed by regulations, to settle, compromise, pay, or otherwise adjust the claim by or against, or controversy with, a contractor relating to a contract entered into by the Finance and Administration Cabinet on behalf of the Commonwealth or any state agency, including a claim or controversy based on breach of contract . . . .

Saner has not cited any authority which exempts the breach of contract claims from the provisions of KRS 45A.230. Therefore, we must consider the language in KRS 45A.235 providing that if a breach of contract claim against the Commonwealth "is not resolved by mutual agreement, the secretary of the Finance and Administration Cabinet, or his designee, shall promptly issue a decision in writing . . . . The decision shall be final and conclusive unless fraudulent, or unless the contractor sues pursuant to KRS 45A.245."

Though the statutes contain stilted language, their overall impact is clear: breach of contract claims must generally be submitted to the Secretary of the Finance and Administration Cabinet before a party may seek judicial relief against the Commonwealth for the alleged breach. As we explained:

> KRS Chapter 45A, Kentucky's Model Procurement Code, provides that claims or controversies arising under contracts between and among the Commonwealth and its contractors shall be resolved by the written decision of the Secretary of the Finance and Administration Cabinet or his designee. KRS 45A.235. **Following an adverse decision**, an aggrieved party may file a civil action on the contract against the Commonwealth in Franklin Circuit Court. KRS 45A.245(1). The action is to be tried by the court sitting without a jury.

Geupel Constr. Co., Inc. v. Commonwealth of Kentucky Transp. Cabinet, 136 S.W.3d 43, 46 (Ky. App. 2003) (emphasis added).

Saner filed this action against the Cabinet without having first presented the breach of contract claims to the Secretary of the Finance and Administration Cabinet. Therefore, we agree with the trial court that Saner failed to exhaust her administrative remedies before seeking judicial relief.

"[E]xhaustion of administrative remedies is required prior to resort[ing] to the courts." *Kentucky State Police v. Scott*, 529 S.W.3d 711, 716 (Ky. 2017). A court lacks jurisdiction to resolve claims when a party has not exhausted his or her administrative remedies, unless one of the three narrow exceptions to the exhaustion requirement applies. *Id.*

The three exceptions are: "(1) a party demonstrates the futility of continuing the administrative process, (2) a statute authorizes direct judicial relief, and (3) a party challenges the constitutionality of a particular regulation or statute on its face." *Id.* Saner argues that the pandemic meant it would have been futile for her to seek administrative relief, but she does not adequately explain that assertion. The COVID-19 pandemic upended life for everyone, but Saner has not adequately explained how the pandemic made it inherently futile for her to present her breach of contract claims to the Secretary of the Finance and Administration Cabinet. Moreover, Saner does not cite to specific language in the American Rescue Plan requiring participating states to allow parties receiving those funds to sue a state in state court without first exhausting administrative remedies.

Finally, the authorities cited by Saner are materially distinguishable. We decline to unnecessarily lengthen this Opinion by discussing each of them. By way of representative example, the federal cases cited by Saner generally involve determining whether a state may be sued in federal court without its consent. That issue involves interpretation of the Eleventh Amendment, unlike the case at hand.

In sum, Saner did not exhaust her administrative remedies and has not shown that any of the recognized exceptions to the exhaustion requirement are applicable. Therefore, we affirm the trial court's dismissal of Saner's breach of contract claims against the Cabinet.

C. Estoppel

Saner's second claim is based on promissory estoppel. The doctrine of promissory estoppel is that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Sawyer v. Mills*, 295 S.W.3d 79, 89 (Ky. 2009) (internal quotation marks and citations omitted).

1. The Group

We readily affirm the dismissal of Saner's promissory estoppel claims against the Group.[2] First, Saner has not identified a promise made to Saner by the Group. Saner's complaint alleges that the monthly data collection process was confusing and frustrating, but Saner does not denote a specific, tangible promise made by the Group to Saner. For example, Paragraph 63 of Saner's complaint only generically states that "Defendants made false promises and representations of fact to Plaintiffs." R. at 17. Second, Saner similarly has not alleged with specificity what actions she took, or declined to take, in reliance upon any promise made by the Group. For example, Paragraph 65 of Saner's complaint only vaguely states that "Defendants' false promises and representations of fact induced action and/or forbearance on the part of [Saner]." *Id.*

[2] The trial court did not explain why it dismissed the estoppel or negligence claims against the Group. However, findings of fact are not at issue when ruling on motions to dismiss under CR 12.02, *Fox*, 317 S.W.3d at 7, and "we are authorized to affirm the lower court's decision for any reason supported by the record." *Greene v. White*, 584 S.W.3d 299, 304 (Ky. App. 2019). Therefore, we do not need to remand the case to the trial court to make findings as the record and applicable law show that the estoppel and negligence claims against the Group must fail.

Even Saner's brief on appeal does not specify a promise made by the Group nor how Saner acted, or declined to act, in reliance upon that promise. Instead, after reciting the elements of the claim and the standard of review, she simply states: "As clearly laid out, [the Group] deals with 'sustainability payments' (pursuant to Jessica Cain, M.Ed[.] Program Manager, ARPA [American Rescue Plan Act] Funding Division of Child Care Department of Community Based Services) and would be a significant injustice to [Saner] if the promise was not enforced in this matter." Appellants' Brief, p. 9. Without identifying a promise Saner allegedly

relied on, she fails to state a claim for promissory estoppel upon which relief may be granted. We affirm the dismissal of the promissory estoppel claims against the Group.

2. The Cabinet

The promissory estoppel claims against the Cabinet suffer from the same fatal defects as those against the Group. Saner has not pointed to a specific promise made by the Cabinet nor what act she took, or refrained from taking, pursuant to that promise. In addition, "it must be remembered that only in exceptional circumstances is estoppel invocable against a governmental agency." *Urban Renewal and Community Development Agency of Louisville v. International Harvester Co. of Del.*, 455 S.W.2d 69, 72 (Ky. 1970). Saner has not adequately alleged exceptional circumstances allowing her to present estoppel claims against the Cabinet. We affirm the dismissal of the estoppel claims against the Cabinet.

D. Negligence

"In general, negligence claims require proof that the defendant owed the plaintiff a duty, that the defendant breached that duty, and that the plaintiff suffered a harm that was proximately caused by the breach." *Walmart, Inc. v. Reeves*, 671 S.W.3d 24, 26 (Ky. 2023).

1. The Group

Paragraphs 69 and 70 of Saner's complaint allege the Group and the Cabinet "owed a duty to [Saner] to provide a reliable data sheet submission system" and a duty "to provide reliable and accurate communications with Plaintiffs regarding the status of their data sheet submissions." R. at 18. The Group argues it had no duty towards Saner. Saner does not explain how, or why, the Group purportedly owed to her the duties alleged in the complaint. As previously explained, Saner did not have a contract with the Group and Saner has not cited another specific authority which imposed a duty upon the Group towards Saner. We affirm the dismissal of Saner's negligence claims against the Group.

2. The Cabinet

The Cabinet argues the trial court properly dismissed the negligence claims against it because Saner failed to exhaust her administrative remedies. The Cabinet would typically have sovereign immunity over Saner's negligence claims, for which she seeks monetary damages, unless the General Assembly has waived that immunity. As our Supreme Court has held, "sovereign immunity protects the state from judicial relief affecting funds in the State Treasury that are the State's money." *Long v. Department of Revenue*, 718 S.W.3d 868, 886 (Ky. 2025) (internal quotation marks and citations omitted). However, the General Assembly has waived sovereign immunity, to an extent, by creating the Board of Claims, *Letcher County Board of Education v. Hall*, 671 S.W.3d 374, 380 (Ky. 2023), and that entity has "exclusive jurisdiction of negligence claims against the Commonwealth . . . ." *Long*, 718 S.W.3d at 886 n.15. *See also* KRS 49.060; 49.070.

However, Saner did not raise her negligence claims in the Board of Claims prior to bringing them in circuit court. As with her breach of contract claims, she therefore has not exhausted her administrative remedies. For the same basic reasons we discussed when affirming the dismissal of the breach of contract claims due to Saner's failure to exhaust administrative remedies, we reject Saner's arguments that it was futile or not feasible for her to present her negligence claims to the Board of Claims. We affirm the dismissal of Saner's negligence claims.

III. CONCLUSION

For the foregoing reasons, the Franklin Circuit Court is affirmed.

ALL CONCUR.

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

VAPOR PRODUCTS

HOUSE BILL (HB) 11, WHICH CONCERNS VAPOR PRODUCTS CONTAINING NICOTINE

HB 11 IS CONSTITUTIONAL

House Bill (HB) 11 became effective on January 1, 2025 — Subject of HB 11 is vapor products containing — HB 11 specifically permits the sale of the following types of products: (1) those authorized by Food and Drug Administration (FDA), or (2) products for which the manufacturer has received an FDA "safe harbor" certification — HB 11 also omits language from Kentucky statutes that previously treated vapor products as distinct from nicotine products — As a result of HB 11, some vendors were restricted in selling vapor products — Those vendors and vaping industry trade groups filed instant action against Commonwealth and various officials challenging constitutionality of HB 11, arguing that HB 11 violates Section 51 and Section 2 of Kentucky Constitution — Defendants filed motion to dismiss for failure to state a claim upon which relief can be granted — Trial court granted motion to dismiss — Plaintiffs appealed — AFFIRMED — Section 51 states, in part, that no law enacted by General Assembly shall relate to more than one subject and that this subject shall be expressed in the title — HB 11 was titled "AN ACT relating to nicotine products," although it also references "other substances" throughout the legislation, including unauthorized products and non-nicotine vaping products — In general, if the title is sufficient to furnish "a clue to its contents," then Section 51 is not violated — HB 11's reference to "other substances" is not used in a manner outside of the context of the bill, but rather to logically indicate what is unauthorized — Thus, Section 51 has not been violated — HB 11 does not violate Section 2 of Kentucky Constitution or due process clause of 14th Amendment because General Assembly's decision to permit sale of only certain nicotine vapor products is related to a legitimate state interest and is well within scope of General Assembly's police power over health and safety of Kentucky citizens —

723 Vape, Inc.; Kentucky Hemp Association, Inc.; Kentucky Vaping Retailers Association, Inc. d/b/a Kentucky Smoke Free Association; OP Murse Holdings, LLC; and Smokin D's Vapor and Lounge LLC v. Allyson Taylor, In Her Official Capacity as Commissioner of the Kentucky Department of Alcoholic Beverage Control; Com. of Kentucky; and Michael G. Adams, In His Official Capacity as Kentucky State Treasurer (2024-CA-1060-MR); Franklin Cir. Ct., Wingate, J.; Opinion by Judge McNeill, *affirming*, rendered 4/3/2026. **[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 case arises from legislation enacted by the General Assembly as House Bill 11 ("HB 11"). It was signed into law by the Governor and became effective on January 1, 2025. The subject of HB 11 is vapor products containing nicotine. It specifically permits the sale of the following types of products: 1) those authorized by the federal Food and Drug Administration ("FDA"), or 2) products for which the manufacturer has received an FDA "safe harbor" certification. HB 11 also omits language from Kentucky statutes that previously treated vapor products as distinct from nicotine products. As a result of HB 11, some vendors were restricted in selling vapor products. They are collectively referred to herein as Appellants.[1]

[1] Appellants also include vaping industry trade groups.

Appellants filed suit in Franklin Circuit Court contesting HB 11 as violative of the Kentucky Constitution. Appellees are the Commonwealth of Kentucky, Secretary of State Michael G. Adams, and the Commissioner of the Kentucky Department of Alcoholic Beverage Control, Allyson Taylor. Secretary Adams and Commissioner Taylor are represented in their official capacities.

The circuit court granted Appellees' motion to dismiss for failure to state a claim. Appellants appeal to this Court as a matter of right. For the following reasons, we AFFIRM.

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.*

ANALYSIS

Appellants argue that dismissal was improper, and that HB 11 violates Sections 51 and 2 of the Kentucky Constitution. Each provision will be discussed in turn. Section 51 of the Kentucky Constitution states:

> No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published at length.

Appellants generally argue that HB 11 violates Section 51 of the Kentucky Constitution because, while titled "AN ACT relating to nicotine products," it also references "other substances" throughout the legislation. This includes unauthorized products and non-nicotine vaping products. Therefore, Appellants allege that this violated the "one subject" requirement of Section 51. However, Appellees correctly cite that, as a general matter, "if the title is sufficient to furnish 'a clue to its contents,' the constitutional provision is not violated." *Talbott v. Laffoon*, 79 S.W.2d 244, 247 (Ky. 1934) (citation omitted). *See also Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 443-44 (Ky. 1986). In addressing this first argument, the circuit court reasoned as follows:

> HB 11's reference to "other substances" is not used in a manner outside of the context of the bill, but rather to logically indicate what is unauthorized. The Court agrees with [Appellees] that what is unauthorized is germane and naturally connected to what is authorized—specific nicotine vapor products. It is reasonable and practical to include both authorized and unauthorized products in a bill and the inclusion of "unauthorized products" is not "distinct and wholly disconnected." *Grayson Cnty. Bd. Of Edu.* [*v.*] *Casey*, 157 S.W.3d 201, 208 (Ky. 2005). The purpose of Section 51's title and one (1) subject requirement is to prevent "surprise and fraud." *Id.* Because the title "furnish[es] general notification of the general subject in the act," HB 11 does not violate Section 51 of the Kentucky Constitution. *Collins*, 709 S.W.2d at 443.

In support of their arguments on appeal, Appellants provide an interesting and meticulously cited history of the vapor industry, its products and concerns. However, Appellants have not presented this Court with any binding legal authority that would necessitate reversal. Therefore, in consideration of the arguments and authority presented, we affirm on this issue.

Section 2 of the Kentucky Constitution states that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Appellants allege that HB 11 is arbitrary and thus violates Section 2 of the Kentucky Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[2] In addressing this argument, the circuit court reasoned as follows:

> In applying Section 2, the Kentucky Supreme Court has held that "[w]hatever is contrary to democratic ideals, customs and maxims is arbitrary." *Kentucky Milk Marketing v. Kroger Co.*, 691 S W 2d 893, 899 (Ky. 1985). "Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary." *Id.* "When economic and business rights are involved, rather than fundamental rights, substantive due process requires that a statute be rationally related to a legitimate state objective." *Stephens v State Farm Mutual Automobile Ins. Co.*, 894 S.W.2d 624, 627 (Ky. 1995).
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> . . . .
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> [T]he Court holds that HB 11 does not violate Section 2 of the Kentucky Constitution or the Due Process Clause of the Fourteenth Amendment because, HB 11 is not arbitrary and the General Assembly's decision to permit only the sale of FDA approved nicotine vapor products or products granted a safe harbor certification by the FDA is related to a legitimate state interest and is well within the scope of the General Assembly's police power over the health and safety of the Commonwealth's citizens.

The court's reasoning is sound. And the case law advanced by Appellants in support of their argument here is tangential and unpersuasive. *E.g.*, *Lawrence v. Pelton.*, 413 F. Supp. 3d 701, 714 (W.D. Mich. 2019); and *Planned Parenthood Great Northwest v. Cameron*, 603 F. Supp. 3d 501, 517-18 (W.D. Ky. 2022). *See also Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana & Kentucky, Inc. v. Cameron*, No. 22-5832, 2023 WL 3620977, at *3 (6th Cir. May 24, 2023) (vacating the district court's injunction orders and remanding to the district court to dismiss as moot). In the absence of binding legal authority to the contrary, reversal is not required. Therefore, in consideration of the arguments, authority, and supplemental case law filed by Appellants, we affirm on this issue.

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[2] Appellants specifically argue that HB 11 violates Section 2 because it requires compliance with a non-existent standard. More precisely, Appellants allege that "no FDA regulatory pathway exists for vaping products which either do not contain nicotine, contain hemp-derived or marijuana-derived cannabinoids, or substances like *Nixodine* for which no FDA regulatory pathway exists." In addition to potential federal preemption concerns, Appellants do not provide any additional details regarding this specific allegation or explain what legal remedy this Court may lawfully impose to cure this alleged injury. And to the extent that the Fourteenth Amendment to the United States Constitution provides any additional or different basis for argument or remedy than does Section 2, it was either not specifically addressed by the trial court or is otherwise insufficiently developed in the present appeal.

CONCLUSION

Based on the foregoing, the Franklin Circuit Court's dismissal order is hereby AFFIRMED.

ALL CONCUR.

BEFORE: CALDWELL, MCNEILL, AND TAYLOR, JUDGES.

GAMBLING

HOUSE BILL (HB) 594, WHICH AMENDED THE DEFINITIONS OF "GAMBLING" AND "GAMBLING DEVICE" IN KRS 528.010 TO MAKE SKILL-BASED AMUSEMENT GAMES ILLEGAL

HB 594 IS CONSTITUTIONAL

CIVIL PROCEDURE

MOTION TO INTERVENE

House Bill (HB) 594 amended definitions of "gambling" and "gambling device" in KRS 528.010 to make skill-based amusement games illegal in Kentucky — Several entities that operate electronic skill-based games and devices in Kentucky, including ARKK Properties, LLC (collectively "ARKK") and two individual game players filed instant complaint and petition for declaration of rights and injunctive relief against Attorney General — These games, also referred to as "gray games" or "gray machines" are found in convenience stores, restaurants and truck stops that retain the generated revenue, and were made illegal in HB 594's amendment of KRS 528.010 — General Assembly did carve out several categories of game devices that are excluded from the definition of an illegal gambling device — Instant action involves a game with the trade name of Burning Barrel (Game), which is an electronic, video-style, skill-based game — ARKK alleges that outcome of Game is entirely and exclusively based on the skill of the player, rather than on chance — Churchill Downs, Inc. (CDI) sought to intervene as a defendant pursuant to CR 24.01 (intervention by right) and CR 24.02 (permissive intervention) — Separately, Kentucky Downs, LLC and ECL Corbin, LLC (collectively "Kentucky Downs") sought to intervene as defendants pursuant to CR 24.01 and CR 24.02 — Trial court denied motions to intervene under both rules; however, trial court reserved the right to revisit this issue if Attorney General did not choose to appeal an unfavorable outcome and permitted CDI and Kentucky Downs to file *amicus curiae* briefs — Kentucky Downs appealed this order — CDI did not appeal — Trial court denied ARKK's motion for temporary injunction — Eventually, trial court granted Attorney General's motion for summary judgment on ARKK's claims of free speech, arbitrariness, equal protection, special legislation, impairment of contracts, takings, and separation of powers — ARKK appealed, but narrowed issues on appeal to its due process, equal protection, and free speech claims — AFFIRMED — Rational basis analysis is proper standard for review of due process claim, equal protection claim, and free speech claim — Legislature has the power to prohibit, regulate and classify all forms of gambling — Legislature exercised its police powers to amend definition of a

PLEASE SEE NOTE ON PAGE 57 CONCERNING FINALITY OF DECISIONS DIGESTED.

gambling device for the legitimate purpose of preventing harmful effects to society that result from unregulated gambling devices — HB 594 was not an arbitrary exercise of legislature's police power — ARKK failed to establish threshold requirement in its equal protection claim that gray machines, like Game, are similarly-situated to lawful devices or activities, including video games for entertainment, e-sports devices, and mobile sports betting devices — HB 594 targets the conduct of gambling; therefore, it represents a content-neutral law — Game does not reach the level of expressive activity that would entitle it to protection as free speech — Since Court of Appeals affirmed trial court's ruling in favor of Attorney General on the merits, it did not need to address the merits of Kentucky Downs' interlocutory appeal from trial court's order denying its motions to intervene —

Kentucky Downs, LLC and ECL Corbin, LLC v. ARKK Properties, LLC; B.J. Novelty, Inc.; The Cue Club, LLC; Home Run, LLC; MFPalmInvestments, LLC; Vincent Milano; Tanya Milano; POM of Kentucky, LLC; Attorney General Russell Coleman; and Churchill Downs, Inc. (2023-CA-1150-MR) and *ARKK Properties, LLC; B.J. Novelty, Inc.; The Cue Club, LLC; Home Run, LLC; MFPalmInvestments, LLC; Vincent Milano; Tanya Milano; and POM of Kentucky, LLC v. Russell Coleman, In His Official Capacity as Attorney General of the Com. of Kentucky; Kelly Stephens, In Her Official Capacity as Clerk of the Supreme Court; and Kathryn Marshall, In Her Official Capacity as Franklin Circuit Court Clerk* (2024-CA-0875-MR); Franklin Cir. Ct., Shepherd, J.; Opinion by Chief Judge Thompson, *affirming*, rendered 2/27/2026, and ordered not to be published. The opinion was ordered to be published on 4/10/2026. **[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).]**

These two appeals arise from a challenge to the constitutionality of House Bill (H.B.) 594, 2023 Ky. Acts, Ch. 4, which amended the definitions of "gambling" and "gambling device" in Kentucky Revised Statutes (KRS) 528.010 to make skill-based amusement games illegal in Kentucky. The first appeal is from an interlocutory appeal denying a motion to intervene, and the second appeal is from the summary judgment declaring the amendments in H.B. 594 to be constitutional. Having considered the record, the parties' respective arguments in their excellent briefs, the *amicus curiae* brief, and the applicable case law, we affirm.

The underlying matter began on March 23, 2023, with the filing of a complaint[1] and petition for declaration of rights and for injunctive relief in the Franklin Circuit Court against the Attorney General of Kentucky in his official capacity.[2] Plaintiffs ARKK Properties, LLC; B.J. Novelty, Inc.; The Cue Club, LLC; Home Run, LLC; MFPalmInvestments, LLC;[3] Vincent Milano; Tanya Milano; and POM of Kentucky, LLC (collectively, ARKK)[4] operate or play (Vincent and Tanya Milano) electronic skill-based games and devices in the Commonwealth of Kentucky.[5] These games, also referred to as "gray games" or "gray machines," are found in convenience stores, restaurants, and truck stops that retain the generated revenue, and were made illegal in the version of KRS 528.010 amended by H.B. 594.

[1] ARKK filed an amended complaint on April 10, 2023, as detailed in footnote 7.

[2] At the time the complaint was filed, Daniel Cameron was the Attorney General. The Attorney General is now Russell Coleman.

[3] This party's name is spelled incorrectly in both notices of appeal. The correct spelling is MFPalmInvestments, LLC.

[4] Federal Post No. 313, The American Legion, Department of Kentucky, Inc., was also named as a plaintiff in the original complaint. It moved to be voluntarily dismissed, which was granted in July 2023.

[5] POM is a Wyoming limited liability company authorized to do business in Kentucky. It is the developer, manufacturer, owner, distributor, operator, and possessor of electronic skill-based gaming devices within Kentucky that have or will be banned and made illegal by the amendments in H.B. 594, including the Burning Barrel game.

In H.B. 594, the Legislature expanded the definitions of "gambling" and "gambling device" in KRS 528.010(7) to make skill-based games illegal:

(a) "Gambling device" means:

1. Any so-called slot machine or any other machine or mechanical device which when operated may deliver, as a result of the application of any element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of any element of chance, any money or property;

2. Any mechanical or electronic device permanently located in a business establishment, including a private club, that is offered or made available to a person to play or participate in a simulated gambling program in return for direct or indirect consideration, including but not limited to consideration paid for Internet access or computer time, or a sweepstakes entry, which when operated may deliver as a result of the application of any element of chance, regardless of whether the result is also partially or predominantly based on skill, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of any element of chance, regardless of whether the result is also partially or predominantly based on skill, any money or property; or

3. Any other machine or any mechanical, electronic, or other device, including but not limited to roulette wheels, gambling tables and similar devices, designed and manufactured primarily for use in connection with gambling and which when operated may deliver, as the result of the application of any element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of any element of chance, any money or property; or

4. Any electronic, computerized, or mechanical contrivance, terminal, machine, or other device that:

a. Requires the direct or indirect payment of consideration which may include and shall not be limited to the insertion of a coin, currency, ticket, token, or similar object, or by depositing funds with the operator or owner of the device, to operate, play, or activate a game; and

b. Offers games the outcomes of which are determined by any element of skill of the player and may deliver or entitle the person playing or operating the device to receive cash, cash equivalents, or gift cards or vouchers, billets, tickets, tokens, or electronic credits to be exchanged for cash or to receive merchandise or something of value, whether the payoff is made automatically from the device or manually.

The Legislature then carved out in subsection (b) several categories of game devices that met the definition in subsection (a) but were excluded from the definition of an illegal gambling device:

(b) The following shall not be considered gambling devices within this definition:

1. Devices dispensing or selling combination or French pools on licensed, regular racetracks during races on said tracks;

2. Devices dispensing or selling combination or French pools on historical races at licensed, regular racetracks as lawfully authorized by the Kentucky Horse Racing Commission [now "Kentucky Horse Racing and Gaming Corporation"];

3. Electro-mechanical pinball machines specially designed, constructed, set up, and kept to be played for amusement only. Any pinball machine shall be made to receive and react only to the deposit of coins during the course of a game. The ultimate and only award given directly or indirectly to any player for the attainment of a winning score or combination on any pinball machine shall be the right to play one (1) or more additional games immediately on the same device at no further cost. The maximum number of free games that can be won, registered, or accumulated at one (1) time in operation of any pinball machine shall not exceed thirty (30) free games. Any pinball machine shall be made to discharge accumulated free games only by reactivating the playing mechanism once for each game released. Any pinball machine shall be made and kept with no meter or system to preserve a record of free games played, awarded, or discharged. Nonetheless, a pinball machine shall be a gambling device if a person gives or promises to give money, tokens, merchandise, premiums, or property of any kind for scores, combinations, or free games obtained in playing the pinball machine in which the person has an interest as owner, operator, keeper, or otherwise; or

4. Devices used in the conduct of charitable gaming;

5. Coin-operated amusement machines;

6. Devices used for wagering exempted from the application of this chapter pursuant to KRS 436.480;

7. Devices used in e-sports competitions; or

8. Devices used in skill-based contests, provided such devices do not meet the definition of gambling devices in paragraph (a) of this subsection[.]

KRS 528.010(7)(b).

At issue in the suit is a game with a trade name of Burning Barrel (the Game), which is an electronic, video-style, skill-based game where the result and outcome, ARKK alleged, are based entirely and exclusively on the skill of the player rather than upon chance.[6]

[6] In a motion filed in the underlying action, ARKK further described the Game as follows:

> The Game is a currency or token-operated skill-based video game that offers three levels of play: a preview screen, a tic-tac-toe-style 3x3 grid puzzle with various audio-visual themes ("Wild Card"), and a colorful ["Simon"] style memory game ("Follow Me"). The player purchases credits to play the Game and sees a preview screen of a particular Wild Card game from which the player decides whether to commit credits to play. The player may preview dozens of puzzles and use skill to decide which puzzle is winnable, selecting the puzzle that the player wants to play. On every play, either the skillful player will solve the puzzle and win a prize of more than the funds committed to play, or the Game will direct the player to the "Follow Me" level. "Follow Me" is a memory game that requires the player to repeat one particular 20-part sequence of multi-colored dots, beginning with only the first dot in the sequence, then the first and second dot, and so on until all twenty dots in the sequence have been repeated. The skilled player who correctly repeats the sequence wins more than one hundred percent of the funds committed to play the Game. The combination of the preview phase, Wild Card, and Follow Me gives the skilled player the opportunity to win a prize of *over* one hundred percent of the funds committed with every play.

In the complaint, ARKK sought a declaration of rights that the amendment in H.B. 594 was unconstitutional as it violated its rights of freedom of speech, due process, and equal protection; its rights against special legislation, the impairment of contracts, and the taking of property without just compensation; and separation of powers. ARKK also sought a temporary and permanent injunction against the Attorney General, law enforcement, prosecutors, government officers, and administrative agencies authorized to enforce Kentucky's laws, to enjoin them from enforcing the amendment against it and other similarly-situated persons or entities.[7]

[7] The Attorney General filed a notice to transfer the action to a different circuit court through random selection pursuant to KRS 452.005, specifically the newly enacted amendment in Senate Bill (S.B.) 126, Act of Mar. 29, 2023, ch. 131, 2023 Ky. Acts 774 (the venue transfer amendment). ARKK filed a motion to decline transfer as well as an amended complaint naming Kelly Stephens, in her official capacity as Clerk of the Supreme Court of Kentucky, and Kathryn Marshall, in her official capacity as Franklin Circuit Court Clerk, as defendants. In the amended complaint, ARKK added claims seeking a declaration that the venue transfer amendment was unconstitutional and injunctive relief to prevent any action taken under this amendment. The circuit court stayed ruling on ARKK's motion pending further direction from the Supreme Court of Kentucky and directed the parties to file the necessary pleadings with the Supreme Court to seek a determination by that Court on the issue. In an opinion rendered October 26, 2023, the Supreme Court ultimately concluded that the venue transfer amendment in "S.B. 126 is an unconstitutional encroachment by the legislative branch of government on the constitutionally conferred judicial powers of this Court and is not to be extended comity" and remanded the matter to the circuit court for denial of the Attorney General's request to transfer pursuant to S.B. 126. *ARKK Properties, LLC v. Cameron*, 681 S.W.3d 133, 145 (Ky. 2023).

Churchill Downs, Inc. (CDI) filed a motion in May 2023 seeking to intervene as a defendant in the action either as a matter of right or permissively pursuant to Kentucky Rules of Civil Procedure (CR) 24.01 and 24.02, respectively, stating that it had a substantial stake in the dispute because it offered lawful gaming options to Kentucky residents, including physical gaming machines, in-person wagering, and an online wagering platform. Gray machines, if allowed to continue without regulatory oversight or taxation, it argued, would "pose a direct and unfair threat to CDI's lawful gaming businesses, which are closely regulated and subject to governmental oversight and taxation." ARKK objected to the motion. The court heard arguments on May 24, 2023, after which it directed further action from the parties.

Kentucky Downs, LLC, and ECL Corbin, LLC, filed a separate motion to intervene as defendants pursuant to CR 24.01 and 24.02 in September 2023. Kentucky Downs and ECL Corbin are two of the nine racetracks licensed to offer pari-mutuel wagering in Kentucky. Kentucky Downs offers pari-mutuel wagering on live, simulcast, and historical horse racing (HHR), while ECL Corbin offers this wagering on live racing and HHR. We shall refer to these two parties, collectively, as "Kentucky Downs" for ease of understanding. As CDI argued in its motion, Kentucky Downs stated that it had an interest in ensuring that Kentucky's gambling laws were enforced and a right to protect its business interests from unfair or illegal competition. ARKK again objected to intervention.

In an order entered September 26, 2023, the circuit court denied the motions to intervene under both Rules. Under CR 24.01 (intervention by right), the movants failed to demonstrate that their interests were directly related to this action, as they were regulated providers of a different type of gambling, or that their interests were not adequately represented. Under CR 24.02 (permissive intervention), the movants had not identified a statute conferring a conditional right to intervene or asserted that they had an interest or claim in common with the litigants. The court specifically held that "[m]ere economic competition is inadequate to provide standing." However, the circuit court reserved the right to revisit this issue if the Attorney General did not choose to appeal an unfavorable outcome, and the court permitted CDI and Kentucky Downs to file *amicus curiae* briefs. Kentucky Downs appealed this order (Appeal No. 2023-CA-1150-MR), while CDI did not choose to do so.[8]

[8] During the pendency of this appeal, the circuit court issued its final judgment on the merits of the underlying action, which was also appealed. This Court opted to delay its consideration of the earlier appeal and consider both appeals at the same time.

Meanwhile, the underlying matter continued. Prior to the entry of the ruling on the intervention motions, ARKK moved the court for a temporary injunction, and the court scheduled a bench trial/hearing for October 16, 2023. The Attorney General moved the court to exclude Dr. Raymond Pastore (who would testify about e-sport video games) and Dr. Olaf Vancura (who would testify about the relative amount of chance and skill present in the Game) as expert witnesses pursuant to Kentucky Rules of Evidence (KRE) 702. He argued that their testimony was not relevant to the single issue before the court; *i.e.*, whether H.B. 594's amendment to KRS 528.010 was facially constitutional. In late September 2023, Kentucky Downs filed a motion to stay the litigation until its appeal from the denial of the motion to intervene was decided. ARKK objected. The Attorney General filed a cross-motion for continuance, noting discovery issues, the appeal of the intervention ruling, and the unresolved venue issue.

The court scheduled a pretrial conference for October 9, 2023, where the parties could discuss the pending motions. It entered an amended scheduling order the following day. The court scheduled ARKK's motion for a temporary injunction to be heard on October 16th; ordered the Attorney General to file a response to the motion for injunctive relief, "which the parties have agreed to also treat as a summary judgment motion under CR 56," along with any cross-motion for summary judgment; denied Kentucky Downs' motion to stay; addressed briefing issues; and reserved ruling on the motion to exclude expert witness testimony pending its ruling on the summary judgment motions. The Attorney General filed a combined response to ARKK's motion for a temporary injunction/motion for partial summary judgment and a cross-motion for partial summary judgment, arguing that ARKK could not overcome the presumption of H.B. 594's constitutionality. KRM Wagering, LLC (KRM),[9] moved for leave to file an *amicus curiae* brief, and CDI later filed an *amicus curiae* brief.

[9] KRM offers pari-mutuel wagering on HHR, like CDI, Kentucky Downs, and ECL Corbin.

The court held the hearing as scheduled on

October 16, 2023, where ARKK introduced testimony from Dr. Vancura (who was asked to review the Game and determine, in his opinion, whether it was predominately skill or chance- based; he determined it was predominately skill-based) and Rick Goodling (who is the National Director of Compliance for Pace-O-Matic and provided the foundation for the introduction of a video depicting the Game). ARKK also introduced the affidavit of Dr. Pastore, which included his report on e-sports.

On November 13, 2023, the circuit court denied ARKK's motion for temporary injunction pursuant to CR 65.04. It concluded that while ARKK had presented a substantial question on the merits, it had not established that public interest and a balance of the equities supported relief. The court also found that ARKK had shown the existence of "a serious question warranting trial on the merits" as to whether the Game qualified as protected speech and whether it was "gambling." Thereafter, ARKK moved the court to vacate the previously ordered briefing schedule and assign the matter for a trial on the merits. The Attorney General and Kentucky Downs disagreed in their respective responses. In an order entered November 29, 2023, the circuit court extended the briefing deadlines by 30 days and reserved its ruling on the motion to hold the pending motion for summary judgment in abeyance during discovery. By order entered December 19, 2023, the circuit court kept the current scheduling order deadlines in place.

In its response to the Attorney General's cross-motion for summary judgment (and in support of its own motion), ARKK argued that the Attorney General's motion was improper due to the existence of material issues of the disputed facts. It argued that the resolution of H.B. 594's ban on skill-based games furthers a legitimate governmental interest, which stated "whether the ban is within the constitutional limits of the police power as being substantially related to the health, safety, morals, or general welfare of the public." To answer this question, the court would need to determine whether the Game was a game of skill; whether H.B. 594's ban on skill games is substantially related to the health, safety, morals, or general welfare of the public, in light of Kentucky's current gaming environment; and whether the Legislature's motivation for the amendment was economic protectionism. It went on to discuss the various legal arguments.

On June 28, 2024, the circuit court entered an order granting summary judgment to the Attorney General on ARKK's claims of free speech, arbitrariness, equal protection, special legislation, impairment of contracts, takings, and separation of powers. ARKK appealed from the final summary judgment (Appeal No. 2024-CA-0875-MR).

APPEAL NO. 2024-CA-0875-MR

We shall first address ARKK's appeal from the summary judgment as our holding in that appeal will necessarily affect our review of Kentucky Downs' interlocutory appeal. And as the Attorney General noted in its brief, ARKK has narrowed the issues on appeal to its due process, equal protection, and free speech claims. It did not choose to seek review of the circuit court's ruling related to its special legislation, contracts, takings, or separation of powers claims, which are therefore waived.

Our review of an order granting summary judgment is as follows:

> Summary judgment is to be cautiously applied and should not be used as a substitute for trial. Granting a motion for summary judgment is an extraordinary remedy and should only be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. The trial court must review the evidence, not to resolve any issue of fact, but to discover whether a real fact issue exists. This review requires the facts be viewed in the light most favorable to the party opposing summary judgment. . . . Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists. So we operate under a de novo standard of review with no need to defer to the trial court's decision.

Shelton v. Kentucky Easter Seals Soc., Inc., 413 S.W.3d 901, 905 (Ky. 2013) (internal quotation marks and footnotes omitted).

As we conduct our review, we shall keep in mind the high burden ARKK must meet to establish its claim that H.B. 594 is unconstitutional:

> As a general principle of jurisprudence, it is well established that duly adopted legislation is entitled to a presumption of validity. All statutes shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. KRS 446.080. Our constitution is a limitation on the broad exercise of power rather than a grant of specific power to the legislature. The General Assembly may enact laws which are not expressly or impliedly prohibited by the Constitution of Kentucky and the Constitution of the United States. . . . Our only function is in the interpretation of the acts of the other branches of government in the light of the Constitution, existing legal precedents and the legislation itself.

Hayes v. State Property and Bldgs. Comm'n, 731 S.W.2d 797, 799 (Ky. 1987).

I. DUE PROCESS CLAIM

ARKK asserts that the circuit court erred in granting summary judgment to the Attorney General and dismissing its Section 2 due process claim for two reasons. First, it argues that, in its analysis of the constitutional limits of police power, the circuit court failed to consider whether the ban on certain skill-based games has a real and substantial relationship to the health, safety, morals, or general welfare of the public under the current conditions and demands of society. Second, it argues that genuine issues of material fact remain to be decided by a fact-finder. The Attorney General contends that there are no fact issues that would preclude summary judgment and that H.B. 594 survives rational basis review.

"Section 2 of the Kentucky Constitution prohibits the arbitrary exercise of power by state government. In order to pass constitutional muster, a statute must be rationally related to a legitimate state objective." *Pigeons' Roost, Inc. v. Commonwealth*, 10 S.W.3d 133, 135 (Ky. App. 1999) (citing *Lost Mountain Mining v. Fields*, 918 S.W.2d 232 (Ky. App. 1996)). The Supreme Court of Kentucky described the rational-basis analysis, albeit in an equal protection context, in *Steven Lee Enterprises v. Varney*, 36 S.W.3d 391, 395 (Ky. 2000), relying upon the United States Supreme Court's decision in *Heller v. Doe by Doe*, 509 U.S. 312, 319-21, 113 S. Ct. 2637, 2642-43, 125 L. Ed. 2d 257 (1993), quoted below:

> We many times have said, and but weeks ago repeated, that rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." . . . Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." . . . For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. . . . Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. . . . Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." . . . Instead, a classification "must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts* that could provide a rational basis for the classification." . . .
>
> . . . . Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" . . . "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."

We agree with the Attorney General that the rational basis analysis is the proper review to use here and that a heightened standard is not required. *See Zuckerman v. Bevin*, 565 S.W.3d 580, 595 (Ky. 2018) ("[A] statute that merely affects social or economic policy . . . is subject to a less searching form of judicial scrutiny, *i.e.* the rational basis test." (Internal quotation marks omitted).)

First, ARKK contends that there are two factual issues to be decided: 1) whether the current conditions and demands of society make the Legislature's decision to ban select skill games by labeling them as gambling is beyond police power; and 2) whether the Legislature's decision to ban skill-based games like the Game was motivated by economic protectionism (here, a desire to protect the horse racing industry's HHR games rather than a desire to protect the public's general welfare). We agree with the Attorney General that there are no genuine issues of material fact to be decided that would preclude a rational basis review.

In *Bloyer v. Commonwealth*, 647 S.W.3d 219, 226 (Ky. 2022), the Supreme Court of Kentucky described the burden a plaintiff has, also in the context of equal protection claims:

> We utilize the rational basis test to decide equal

protection claims which do not involve a suspect class or interfere with fundamental rights. *Mobley v. Armstrong*, 978 S.W.2d 307, 309 (Ky. 1998). "[T]he burden is on the party claiming a violation of equal protection to establish that the statutory distinction is without a rational basis." *Id.* Bloyer mischaracterizes and misconstrues the rational basis test by attempting to shift the burden to the Commonwealth "to prove that it was rational to treat children that have the same characteristics as [Bloyer] the same way as an adult offender." Statutes are presumed to be constitutional and the Commonwealth has no burden to produce evidence supporting the rationality of any statutory classifications. *Commonwealth v. Howard*, 969 S.W.2d 700, 703 (Ky. 1998).

In *Zuckerman*, 565 S.W.3d at 596, the Supreme Court of Kentucky emphasized that:

> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.

(Quoting *Heller v. Doe by Doe*, *supra*.) Based on these holdings, we must reject ARKK's argument that any genuine issues of material fact are left to be decided.

Turning to the merits of this argument, we must first recognize the long-standing statement of the law in *Commonwealth v. Kentucky Jockey Club*, 238 Ky. 739, 38 S.W.2d 987, 993-94 (1931):

> For nearly half a century the General Assembly and the Court of Appeals have proceeded upon the general understanding that the whole subject of betting and gaming was within the power of the Legislature to prohibit, regulate, or classify, prohibiting in part and permitting in part, according to its view of the public policy to be enforced.

Having considered the parties' excellent arguments and the circuit court's order on this issue, we shall adopt the reasoning of the circuit court:[10]

> ARKK asserts HB 594 arbitrarily exceeds the scope of the legislature's police powers authority because it engages in economic protectionism rather than being rationally related to any substantial public purpose. Relying on the reasoning from [*Bruner v. City of Danville*, 394 S.W.2d 939 (Ky. 1965),] and [*Jasper v. Commonwealth*, 375 S.W.2d 709 (Ky. 1964)], ARKK asserts that no substantial public purpose was served by the banning of its games when the legislature simultaneously authorized mobile sports betting. Further, ARKK asserts that the police power can never be used to ban any game of skill, since gambling can only occur in games of chance.
>
> However, the Court is reluctant to endorse the reasoning that the police powers can never extend to games of skill. The term 'game of skill' is a term of art specifically defined by the legislature. The legislature certainly had the authority to previously enact the 'dominant factor' test that classified games of skill and chance based on which element predominantly determined the game's outcome. It stands to reason that if the legislature had the authority to enact the previous dominant factor test, it also has the authority to amend or clarify its definition of a game of skill. The Court rejects the idea that the plenary police powers of the legislature to define and regulate games of skill have been abrogated simply because it previously enacted a different definition.
>
> This Court is further persuaded by the arguments of the Attorney General that HB 594 was not an arbitrary exercise of the police powers simply because the definition of a game of skill was amended in the same session the General Assembly passed mobile sports betting. The Attorney General correctly highlights that the Court's police powers analysis for arbitrariness will turn on whether there is a rational relation between HB 594's exercise of the police power and some legitimate governmental interest. Here, the Attorney General clearly argues the legislature exercised its police powers to amend the definition of a gambling device for the legitimate purpose of preventing the harmful effects to society that result from unregulated gambling devices.
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> Specifically, the Attorney General highlighted how Burning Barrel and other unregulated gambling devices are harmful as a matter of law (*see Commonwealth v. Stars Interactive Holdings (IOM) Ltd.*, 617 S.W.3d 792, 804 (Ky. 2020)) and fact. It further explained how gray machine games like Burning Barrel operate untaxed and unregulated, and further fail to provide mandatory precautions to prevent underage gambling or problem gambling. This stands in stark contrast to legal gambling operators who are obliged to abide by the strict precautions related to underage and problem gambling.
>
> Most importantly, however, the Attorney General persuasively cited to the *Jockey Club* case that held the legislature has the power to prohibit, regulate, and classify all forms of gambling. The Attorney General persuasively explained that the Legislature has a long history of regulating pinball games under state gambling laws, even though there were plenty of arguments to be made that pinball was predominantly based on skill rather than chance.
>
> It is of no consequence to the Court's analysis that the legislature decided to enact mobile sports betting in the same legislative session it enacted HB 594. *Jockey Club* reaffirms the authority of the legislature to prohibit, regulate, and classify all forms of gambling, and the legislature was not acting arbitrarily in exercising its long-standing authority to regulate gambling when it enacted HB 594. Because the public welfare at the time of this action is served by HB 594's clarification of the definition of a gambling device, the legislature properly exercised its police powers to amend the gambling device definition, and the clarification of the definition was rationally related to the legitimate interest in preventing the harms of unregulated gambling.
>
> The Court is persuaded by *Jockey Club*, and the long history of regulating pinball machines, that HB 594 is not an arbitrary exercise of the police power.

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[10] We have substituted "ARKK" for "Plaintiff" and made corresponding alterations for subject/verb agreement for ease of understanding, as well as minor edits for consistency.

Accordingly, we hold that the circuit court did not commit any error in granting summary judgment to the Attorney General on ARKK's due process claim.

II. EQUAL PROTECTION CLAIM

ARKK contends with this argument that HB 594's ban on skill games violates equal protection because it arbitrarily singles out such games for a ban while allowing other types of games to operate. The Supreme Court of Kentucky described such claims as follows:

> The 14th Amendment to the United States Constitution requires persons who are similarly situated to be treated alike. . . . Statutes are presumed to be valid and those concerning social or economic matters generally comply with federal equal protection requirements if the classifications that they create are rationally related to a legitimate state interest. Sections 1, 2, and 3 of the Kentucky Constitution provide that the legislature does not have arbitrary power and shall treat all persons equally. A statute complies with Kentucky equal protection requirements if a "reasonable basis" or "substantial and justifiable reason" supports the classifications that it creates. Analysis begins with the presumption that legislative acts are constitutional.

Durham v. Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008) (citations in footnotes omitted). And as with the previous analysis, a rational basis review applies here. *See Bloyer*, 647 S.W.3d at 226 ("We utilize the rational basis test to decide equal protection claims which do not involve a suspect class or interfere with fundamental rights.").

We agree with the circuit court and the Attorney General that ARKK failed to establish the threshold requirement that gray machines, like the Game, are similarly-situated to lawful devices or activities, including video games for entertainment, e-sports devices, and mobile sports betting devices. The Attorney General correctly asserts that the lawful devices and activities are "subject to meaningful limits[,]" unlike the Game at issue here. Such limits include finding coin-operated amusement machines in children's establishments and limiting the value of the prizes offered, the competition against other players component of an e-sport competition, and the licensing requirements in digital sports wagering.

Accordingly, the circuit court did not err in granting summary judgment on ARKK's equal protection claim.

III. FREE SPEECH CLAIM

For its third argument, ARKK asserts that the circuit court erred in determining that there were no

disputed facts as to whether the Game was a video game and by concluding that a rational basis review applied, rather than strict scrutiny. Again, we agree with the Attorney General that summary judgment was proper.

In *McDonald v. Ethics Committee of the Kentucky Judiciary*, 3 S.W.3d 740, 743 (Ky. 1999), the Supreme Court of Kentucky addressed free speech rights and confirmed that both state and federal precedent may be considered, explaining:

> [T]he Kentucky Constitution provides protection no greater than but co-extensive with the First Amendment to the United States Constitution[.] [We therefore] consider both state and federal precedent in our analysis of movants' claim[.]
>
> The right to free speech is not absolute and states are permitted to regulate it within certain limitations if the regulation is within the public interest. Necessarily, examination of a free speech claim requires a determination of the level of scrutiny proper for a particular restriction.

(Citations omitted.)

"Ratified in 1791, the First Amendment provides that Congress shall make no law abridging the freedom of speech. Above all else, the First Amendment means that government generally has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 591 U.S. 610, 618, 140 S. Ct. 2335, 2346, 207 L. Ed. 2d 784 (2020) (internal quotation marks and citation omitted). The *Barr* Court then observed that the applicable precedents would allow

> the government to constitutionally impose reasonable time, place, and manner regulations on speech, but the precedents restrict the government from discriminating in the regulation of expression on the basis of the content of that expression. Content-based laws are subject to strict scrutiny. By contrast, content-neutral laws are subject to a lower level of scrutiny.

Id. (internal quotation marks and citations omitted). We agree with the circuit court and the Attorney General that HB 594 targets the conduct of gambling, and it therefore represents a content-neutral law that would be subject to a lower level of scrutiny.

ARKK contends that the Game constitutes a protected video game. On the other hand, the Attorney General, while he does not dispute that some video games are protected, asserts that is not the case here. The United States Supreme Court has addressed video games that would be protected:

> Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, esthetic and moral judgments about art and literature are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.

Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790, 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708 (2011) (internal quotation marks, ellipses, and citation omitted). In this case, we agree with the Attorney General that the Game does not reach the level of expressive activity that would entitle it to protection as free speech. It is not enough that "[p]layers receive entertainment and intellectual excitement from their skillful play" and that it "contains audio-visual themes within each title" as ARKK urges this Court to conclude.

Accordingly, the circuit court did not err in granting summary judgment to the Attorney General on ARKK's free speech claim.

APPEAL NO. 2023-CA-1150-MR

We shall now consider Kentucky Downs' appeal from the order denying the motions to intervene pursuant to CR 24.01 or CR 24.02. In denying these requests to intervene, the circuit court concluded that Kentucky Downs had neither demonstrated that it had a direct, substantial interest in the litigation, nor that the Attorney General would not adequately represent that interest. In addition, the circuit court stated that it reserved the right to revisit the ruling should the Attorney General choose not to appeal an unfavorable ruling and permitted the filing of *amicus curiae* briefs as well as access to discovery. The circuit court ultimately ruled in favor of the Attorney General on the merits, and we have affirmed that judgment. Accordingly, there is no need to address the merits of this interlocutory appeal, and we therefore affirm.

CONCLUSION

For the foregoing reasons, the above-styled appeals are affirmed.

ALL CONCUR.

BEFORE: THOMPSON, CHIEF JUDGE; EASTON AND ECKERLE, JUDGES.

PETITIONS FOR REHEARING, ETC.

FILED AND FINALITY ENDORSEMENTS

ISSUED BETWEEN

MARCH 13, 2026 AT 10:00 A.M.

AND APRIL 17, 2026 AT 10:00 A.M.

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

PETITIONS:

Reynolds v. Blair, D.O., 73 K.L.S 3, p. 26; Petition for rehearing was filed on 3/25/2026.

MOTIONS for extension of time to file petitions: None.

FINALITY ENDORSEMENTS:

During the period from March 13, 2026, through April 17, 2026, 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. Brock, 73 K.L.S. 1, p. 51, on 3/30/2026. The Court of Appeals denied a petition for rehearing and modified the opinion on 2/27/2026.

Edwards v. Edwards, 73 K.L.S. 3, p. 14, on 4/10/2026.

Fain v. Com., 73 K.L.S. 3, p. 16, on 4/6/2026.

Hines v. Kentucky Parole Bd., 72 K.L.S. 6, p. 4, on 3/17/2026. The Kentucky Supreme Court denied discretionary review on 3/11/2026.

Hutchens v. John Hancock Life Ins. Co., 72 K.L.S. 5, p. 41, on 3/18/2026. The Kentucky Supreme Court denied discretionary review on 3/11/2026.

Kentucky Bluegrass Experience Resort v. Woodford Cty. Bd. of Adjustments, 72 K.L.S. 7, p. 17, on 4/17/2026. The Kentucky Supreme Court denied discretionary review on 4/15/2026.

Krallman v. Krallman, 73 K.L.S. 3, p. 11, on 3/30/2026.

Motter v. Motter, 72 K.L.S. 9, p. 24, on 4/16/2026. The Kentucky Supreme Court denied discretionary review on 4/15/2026.

Schneider v. Buttermilk Shopping Center, LLC, 72 K.L.S. 10, p. 17, on 4/6/2026. The Court of Appeals denied a petition for rehearing on 11/5/2025.

RULINGS on petitions previously filed: None.

OTHER: None.

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

Andes Roofing, LLC v. Rusnak, 72 K.L.S. 11, p. 53—726 S.W.3d 13.

Boone Cty. Clerk v. McLaughlin, 72 K.L.S. 5, p. 1—727 S.W.3d 662.

Bradshaw v. Capital Community Economic/ Industrial Dev. Auth., 72 K.L.S. 12, p. 1—727 S.W.3d 684.

Com. v. Stokes, 72 K.L.S. 11, p. 56—726 S.W.3d 1.

Gleason v. Magna Wave, Inc., 72 K.L.S. 12, p. 26—727 S.W.3d 714.

Long v. Long (now Scruggs), 72 K.L.S. 11, p. 45—726 S.W.3d 659.

Pennie v. Mohamed, 72 K.L.S. 8, p. 14—720 S.W.3d 606.

Professional Learning Institute, LLC v. Com., Kentucky Real Estate Auth., 72 K.L.S 12, p. 19—727 S.W.3d 670.

—END OF COURT OF APPEALS—

SUPREME COURT

JUDGES

IMPEACHMENT OF A JUDGE

GOVERNMENT

SEPARATION OF POWERS

HOUSE OF REPRESENTATIVE'S ISSUANCE OF ARTICLES OF IMPEACHMENT AGAINST A CIRCUIT COURT JUDGE

DUE PROCESS

CIVIL PROCEDURE

EMERGENCY RELIEF

SUPERVISORY WRIT

Judge Julie Muth Goodman is a duly elected judge currently serving the Fourth Division of the 22nd Circuit Court in Fayette County — On January 28, 2026, Clerk of House of Representatives received petition from Killian Timoney (Timoney), a former member of the Kentucky House of Representatives, calling for Judge Goodman's impeachment — No affidavit accompanied the petition — The basis for Timoney's petition was his allegation that Judge Goodman abused her judicial discretion and authority in six cases over which she presided — Timoney was not a party in any of those cases — Five of those cases remain pending within the judicial branch — Impeachment petition was referred to the House Impeachment Committee — Judge Goodman then responded to the petition — A hearing was held on March 16, 2026 — House Impeachment Committee heard testimony from Judge Goodman and two other witnesses — Timoney did not testify — On March 20, 2026, House of Representatives issued Articles of Impeachment against Judge Goodman via House Resolution (HR) 124 — The Senate then scheduled a trial on the impeachment articles — On March 11, while impeachment proceedings were still pending in House of Representatives, Judge Goodman filed a motion for a temporary injunction in Franklin Circuit Court seeking to enjoin House of Representatives from proceeding with her impeachment — Trial court denied this motion on March 19 — Judge Goodman then sought relief with Court of Appeals pursuant to RAP 20(B) and emergency relief from trial court's order pursuant to RAP 20(D) — Court of Appeals denied motion for emergency relief — Judge Goodman then filed a motion for emergency relief in Supreme Court under RAP 20(F) — Judge Goodman also filed a petition for a supervisory writ which requested consolidation with her RAP 20(F) motion for consideration on the merits — Petition for supervisory writ sought a declaration that HR 124 constituted an encroachment upon the powers of the Judicial Branch; that it was a violation of the separation of powers doctrine; and that it violated her right to due process of law — Judge Goodman further requested that HR 124 and the articles of impeachment issued be declared void *ab initio* — GRANTED petition for supervisory writ, declaring HR 124 and current impeachment proceedings void *ab initio*; and DECLARED motion for emergency injunctive relief moot — The Kentucky Constitution § 109 vests power of impeachment solely with General Assembly — Impeachment proceedings may be initiated either by the House of Representatives *sua sponte* and without a petition under KRS 63.020, or upon a petition by "any person" under KRS 63.030(1) — Where impeachment proceedings are initiated via petition by a person, there are statutory requirements that must be satisfied for the petition to be valid and proceed — The petition must be signed by the petitioner, and verified by his own affidavit and the affidavits of such others as he deems necessary — In instant action, Timoney signed and dated his petition, but petition did not include a sworn or verified affidavit from anyone — In addition, Timoney was not placed under oath during House Impeachment Committee's hearing on the matter to attest to the allegations contained in his petition — In enacting KRS 63.030, Legislature decided as a matter of public policy that a petition for impeachment must be verified by an affidavit — In instant action, Legislature violated its own rule in entertaining a petition for impeachment that did not follow this statutory mandate — Thus, impeachment petition was invalid on its face — Further, facially invalid petition for impeachment did not allege that Judge Goodman committed any impeachable offenses — Allegations of misconduct should have instead been addressed solely by the Judicial Conduct Commission (JCC) — The Kentucky Constitution § 68 states that the Governor and all officers shall be liable to impeachment "for any misdemeanors in office" — In a footnote, the Kentucky Supreme Court noted that because the petition and charge in the instant action are not constitutionally sound, it did not need to analyze whether elected judges are civil officers under § 68; however, it noted that typically civil officers are appointed officials and not elected — The Legislature itself has stated that impeachment is a "tool to remove from office public officials who act with true perfidy—far outside the bounds of decency or sound government" — Unsworn allegations in instant facially invalid impeachment petition contain no allegation of misconduct that rose to this extreme level of misconduct — Instead, allegations against Judge Goodman stemmed from a disagreement regarding the manner in which she exercised her constitutional authority as a circuit court judge to decide justiciable cases brought before her — If there is a disagreement over the exercise of that authority, a litigant has the right to an appeal, and either Supreme Court or Court of Appeals will have exclusive jurisdiction over that appeal — In five out of the six cases mentioned in the petition for impeachment, Judge Goodman's erroneous actions were corrected via the appellate process — In the remaining case, her refusal to recuse was corrected by Supreme Court's KRS Chapter 26A oversight — An individual's disagreement with a judge's ruling, or even the fact that a judge's ruling has been deemed an abuse of discretion by an appellate court, no matter how scathingly, does not and cannot constitute a misdemeanor in office — Judges must remain free to exercise the constitutional authority bestowed upon them by the electorate to decide the cases and controversies before them without fear that a legally incorrect ruling or even an appellate finding of abuse of discretion will result in the extreme sanction of impeachment — The Kentucky Supreme Court noted that JCC is currently conducting proceedings to consider whether Judge Goodman's conduct warrants action — The Kentucky Supreme Court clarified that it did not conclude that the Legislature can never impeach a sitting judge, citing *Com. v. Tartar* (Ky. 1951) and *Jameson v. Judicial Conduct Comm'n* (Ky. 2024) — Section 68 of the Kentucky Constitution and KRS 63.030 provide for impeachment of officers, which would include judges — Further, the Kentucky Supreme Court did not hold that JCC proceedings and impeachment proceedings, under the right factual circumstances, are mutually exclusive — However, it concluded that it is only the rarest of circumstances in which a sitting judge has committed either an actual, indictable crime or an offense in office constituting the most reprehensible moral turpitude that the Legislature is permitted to veer into the judge removal lane which is, under most circumstances, reserved solely for the Judiciary — Those circumstances are not present in instant action — Thus, Legislature has intruded on the authority of both the Supreme Court, and the Judicial Branch at large, and the constitutionally empowered JCC in entertaining impeachment proceedings against a sitting judge based solely on rulings that, right or wrong, were within her discretion to make — Impeachment hearing did not afford Judge Goodman due process — At the time of the House Impeachment Committee's hearing, five of the six cases remained active — As impeachment hearings are public proceedings, Judge Goodman was unable to explain or defend any of the actions she took in those cases without violating SCR 4.300(2.10)(A) — Judge Goodman's inability to defend herself by providing any explanation for her actions does not comport with procedural due process — Judge Goodman would face irreparable harm in the absence of the issuance of a supervisory

writ — If impeached, Judge Goodman will be removed from office; disqualified from ever holding an office of honor, trust, or profit in the Commonwealth again; and stripped of the retirement benefits she has accrued — here exists no means by which Judge Goodman may appeal her impeachment — Issue presented in instant action is a constitutional issue, not a political one; thus, it is justiciable —

Julie Muth Goodman v. Jason Nemes, In His Official Capacity as Chair of the House of Representatives Impeachment Committee; David Osbourne, In His Official Capacity as Speaker of the House of Representatives; Killian Timoney; and Russell Coleman, In His Official Capacity as Attorney General of the Commonwealth of Kentucky (2026-SC-0122-I); On review from Court of Appeals; and *Julie Muth Goodman v. Jason Nemes, In His Official Capacity as Chair of the House of Representatives Impeachment Committee; David Osbourne, In His Official Capacity as Speaker of the House of Representatives; Killian Timoney; Hon. Phillip J. Shepherd, J., Franklin Cir. Ct.; and Russell Coleman, In His Official Capacity as Attorney General of the Commonwealth of Kentucky* (2026-SC-0124-OA); In Supreme Court; Opinion and Order by Chief Justice Lambert, *granting petition for supervisory writ and declaring motion for emergency injunctive relief moot*, entered 4/6/2026. **[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).]**

Julie Muth Goodman is a duly elected judge who currently serves the Fourth Division of the 22nd Circuit Court in Fayette County. On January 28, 2026, the Clerk of the House of Representatives received a four-page petition from Killian Timoney, a former member of the Kentucky House of Representatives, calling for Judge Goodman's impeachment. It was not accompanied by an affidavit. The basis for Mr. Timoney's petition was his allegation that Judge Goodman abused her judicial discretion and authority in six cases over which she presided. He was not a party in any case of which he complained against her. Five of those cases remain pending within the judicial branch.

The impeachment petition was referred to the House Impeachment Committee on January 29, 2026. After Judge Goodman responded to the petition, a hearing was held on March 16, 2026. The House Impeachment Committee heard testimony from Judge Goodman and two other witnesses, neither of whom was Mr. Timoney. On March 20, 2026, the Kentucky House of Representatives issued Articles of Impeachment against Judge Goodman via House Resolution 124 (H.R. 124). The Senate is currently scheduled to hold a trial on the impeachment articles in the coming days.

On March 11, 2026, while her impeachment proceedings were still pending in the House of Representatives, Judge Goodman filed a motion for, *inter alia*, a temporary injunction in Franklin Circuit Court seeking to enjoin the House of Representatives from proceeding with her impeachment. That motion was denied by the circuit court on March 19, 2026, after which Judge Goodman sought relief from the circuit court's order with the Court of Appeals pursuant to RAP[1] 20(B) and emergency relief from the circuit court's order pursuant to RAP 20(D). The Court of Appeals denied her motion for emergency relief, and she thereafter filed a motion for emergency relief in this Court pursuant to RAP 20(F). She also filed a petition for a supervisory writ which requested consolidation with her RAP 20(F) motion for consideration on the merits. Her supervisory writ petition seeks a declaration that H.R. 124 constituted an encroachment upon the powers of the Judicial Branch, that it was a violation of the separation of powers doctrine, and that it violated her right to due process of law. She further requests that H.R. 124 and the articles of impeachment issued against her be declared void *ab initio*.

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[1] Kentucky Rule of Appellate Procedure.

For the reasons that follow, we hereby invoke our inherent "power to issue all writs necessary in aid of [our] appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice[,]" and issue the following supervisory writ granting Judge Goodman's petition to declare H.R. 124 and the current impeachment proceedings against her void *ab initio*. Ky. Const. § 110(2)(a).

In *Commonwealth v. Carman*, this Court explained that "[a]s Section 110(2)(a) of the Constitution contains a provision which grants the Supreme Court supervisory control of the Court of Justice, virtually any matter within that context would be subject to its jurisdiction[,]" and that "the Court should exercise its supervisory power sparingly, and, generally only in cases where no other court has power to proceed." 455 S.W.3d 916, 922-23 (Ky. 2015) (internal quotation marks omitted). As the Legislature is attempting to supersede our authority to both supervise and correct, when warranted, the behavior of sitting judges, as well as the means by which the Judicial Branch addresses ordinary error correction through the appellate process, our authority to issue supervisory writs pursuant to Section 110 in "aid of [our] appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice" is properly invoked.

The General Assembly is hereby enjoined from any further proceedings in the current impeachment action against Judge Goodman. As we are granting her writ petition, her request for emergency relief pursuant to RAP 20(F) is rendered moot.

1) The impeachment petition was invalid on its face.

The Kentucky Constitution vests the power of impeachment solely with the General Assembly. Ky. Const. § 109. Impeachment proceedings may be initiated either by the House of Representatives *sua sponte* and without a petition, KRS[2] 63.020, or upon a petition by "any person." KRS 63.030(1). When, as here, impeachment proceedings are initiated via petition by a person, there are statutory requirements that must be satisfied for the petition to be valid and proceed. Namely, the petition must be "signed by [the petitioner], verified by his own affidavit and the affidavits of such others as he deems necessary[.]" KRS 63.030(1). Here, although Mr. Timoney signed and dated his petition for impeachment, the petition did not include a sworn or verified affidavit from anyone. Moreover, Mr. Timoney was not placed under oath during the House Impeachment Committee's hearing on the matter to attest to the allegations contained in his petition.

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[2] Kentucky Revised Statute.

KRS 63.030 is not a rule established by this Court; it was enacted by the Legislature. The Legislature decided as a matter of public policy that a petition for impeachment must be verified by an affidavit. The Legislature violated its own rule in entertaining a petition for impeachment that did not follow this statutory mandate. This in and of itself is a fundamental, fatal flaw in the impeachment proceedings against Judge Goodman, and the Legislature itself has previously acknowledged this. The House Impeachment Committee that oversaw the proceedings against former Kentucky Attorney General Daniel Cameron stated in its report recommending that no further action be taken that the petition "[failed] to satisfy the requirements of KRS 63.030(1)" and could therefore be dismissed.[3] The Committee went on to say that "[t]he Petition's shortcomings are not just technical violations: they disregard the safeguards that ensure that impeachment is fair to the accused and comports with the rule of law." This Court could not agree more.

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[3] *The Impeachment Committee's Report and Recommendation that No Further Action be Taken Concerning the Impeachment of Attorney General Daniel Cameron* (2021), https://apps.legislature.ky.gov/CommitteeDocuments/343/13227/Committee%20Report%20and%20Recommendation%20-%20AG%20Daniel%20Cameron.pdf.

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2) The facially invalid petition for impeachment did not allege that Judge Goodman committed any impeachable offenses. The allegations of misconduct should have instead been addressed solely by the Judicial Conduct Commission.

Kentucky's Constitution explicitly states that "[t]he Governor and all civil officers[4] shall be liable to impeachment for any misdemeanors in office[.]" Ky. Const. § 68. However, it also provides that

> 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. The commission referred to

by Section 121 is colloquially referred to as the Judicial Conduct Commission (JCC). As impeachment proceedings by the Legislature and judge removal proceedings by the JCC are both provided for by our Constitution, impeachment proceedings do not have inherent precedence over JCC proceedings. The question before us is accordingly whether the Legislature's actions in entertaining the impeachment petition against Judge Goodman violated the separation of powers doctrine by intruding on the Judicial Branch's authority to address the specific allegations of misconduct levied against her therein.

[4] Because the petition and charge are not constitutionally sound, we are not analyzing whether elected judges are civil officers under Section 68. We note that typically civil officers are appointed officials and not elected.

The Legislature itself has stated that impeachment is a "tool to remove from office public officials who act with true perfidy—far outside the bounds of decency or sound government."[5] A review of the unsworn allegations contained in the facially invalid impeachment petition against Judge Goodman demonstrates that no allegation of misconduct rose to this extreme level of misconduct. The allegations were therefore inappropriate for review by the Legislature as "misdemeanors in office" and should have instead been addressed via the well-established appellate process and constitutionally provided judicial discipline proceedings within the Judicial Branch. Briefly stated, the impeachment petition alleged the following:

1) In *Commonwealth v. Cornell Denmark Thomas, II*, 21-CR-00336, Judge Goodman dismissed an indictment of one count of murder and one count of leaving the scene of an accident involving a death. This ruling was later reversed by the Court of Appeals.

2) In *Commonwealth v. Domonick Donte Jones*, 23-CR-00394, Judge Goodman ignored the Commonwealth's recommended sentence of five years' imprisonment and sentenced the defendant to probation. This ruling was later reversed by the Court of Appeals.

3) In *Commonwealth v. James Harvey Hendron*, 18-CR-01084, Judge Goodman reversed a jury conviction based on a finding of prosecutorial misconduct. This ruling was later reversed by the Court of Appeals.

4) In *Gregory Simpson v. Abigail Caudill, Warden*, 23-CR-02878, Judge Goodman released an individual from prison who still had twenty-one years remaining on a forty-two-year sentence. This ruling was later reversed by the Court of Appeals.

5) In *Kenneth Ain, MD v. University of Kentucky*, 23-CI-03018, Judge Goodman refused to recuse herself. This Court later granted a motion to disqualify her under KRS 26A.015.

6) In *Caitlin Huff, et al. v. University of Kentucky, et al.*, 23-CI-01684, Judge Goodman found that the University of Kentucky was not entitled to be dismissed from the suit on the basis of sovereign or governmental immunity. This ruling was later reversed by the Court of Appeals.

[5] *Order Dismissing Petition to Impeach* (2021), https://apps.legislature.ky.gov/CommitteeDocuments/343/13227/Rep.%20Goforth%20Petition%20Dismissal.pdf. We note that this order was signed by the Committee's Chairman, Rep. Jason Nemes.

At bottom, each of the allegations against Judge Goodman for the foregoing actions stemmed from a disagreement regarding the manner in which she exercised her constitutional authority as a circuit court judge to decide justiciable cases brought before her. Ky. Const. § 112. If there is a disagreement over the exercise of that authority, a litigant has the right to an appeal, Ky. Const. § 115, and either this Court or the Court of Appeals will have exclusive jurisdiction over that appeal. Ky. Const. §§ 110, 111. Indeed, in five out of the six cases mentioned above Judge Goodman's erroneous actions were corrected via the appellate process, and in the remaining case her refusal to recuse was corrected by this Court's KRS Chapter 26A oversight. But, crucially, an individual's disagreement with a judge's ruling, or even the fact that a judge's ruling has been deemed an abuse of discretion by an appellate court (no matter how scathingly), does not and cannot constitute a misdemeanor in office.

Judges must remain free to exercise the constitutional authority bestowed upon them by the electorate to decide the cases and controversies before them without fear that a legally incorrect ruling or even an appellate finding of abuse of discretion will result in the extreme sanction of impeachment. As the United States Supreme Court has explained:

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction. . . This immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.

Pierson v. Ray, 386 U.S. 547, 553–54 (1967) (internal quotation marks omitted).

Moreover, if an individual believes that a judge's incompetence is sufficiently gross and persistent so as to constitute misconduct, that individual should not seek redress with the Legislature except in the most extraordinary of circumstances. As noted, the JCC is the entity endowed with the constitutional authority to have a sitting judge "removed for good cause[.]" Ky. Const. § 121. And the JCC and this Court are the only two entities that have the authority to opine on whether a judge has violated the Code of Judicial Conduct.[6] Notably, the JCC is currently conducting proceedings to consider whether Judge Goodman's conduct warrants action. Available sanctions in JCC proceedings range from a private reprimand to removal from office.

[6] The JCC has acted to remove judges on multiple occasions and this Court has upheld their removal in *Jameson v. Judicial Conduct Comm'n*, 701 S.W.3d 236 (Ky. 2024); *Gordon v. Judicial Conduct Comm'n*, 655 S.W.3d 167 (Ky. 2022); *Gentry v. Judicial Conduct Comm'n*, 612 S.W.3d 832 (Ky. 2020); *Alred v. Commonwealth, Judicial Conduct Comm'n*, 395 S.W.3d 417 (Ky. 2012); *Starnes v. Judicial Ret. & Removal Comm'n*, 680 S.W.2d 922 (Ky. 1984); and *Wilson v. Judicial Ret. & Removal Comm'n*, 673 S.W.2d 426 (Ky. 1984).

Historically, when judges were appointed in Kentucky, there were two methods of removal of judges who violate either the law criminally or by violation of the Code of Judicial Conduct. Prior to 1976, judges could be removed by either impeachment or removal by address of the Legislature. *See* Shawn D. Chapman, *Removing Recalcitrant County Clerks in Kentucky*, 105 Ky. L.J. 261, 299 (2017). Although it must be observed that *never* in the history of this Commonwealth's 233 years of statehood has a judge been removed from office via impeachment. Provisions for removal of judges by address by the legislature by a vote of two-thirds of both Houses of the General Assembly were originally included in all four of Kentucky's Constitutions. *Id.* at 301. While the power of removal by address was initially directed at causes for which impeachment would have been improper, it was later permitted "for any reasonable cause." *Id.* at 302 (quoting Ky. Const. of 1850, art. IV, § 3; Ky. Const. § 117 (repealed 1976)).

In Kentucky, removal by address "with its requirement of the support of two-thirds of both houses, has like impeachment been too politically difficult to carry out very often."[7] *Id.* at 303. "This difficulty is what led to the Old Court-New Court crisis of 1824 to 1826 in which the General Assembly failed to remove judges from the Court of Appeals and, instead, tried to repeal the court and create a new one." *Id.* at 304. This crisis stemmed from a three judge Court of Appeals panel affirming two trial court decisions that struck down a popular debt-relief act, the result of which was public outcry and the initiation of removal proceedings. *Id.* Thus, although the General Assembly was unable to remove the judges by address, it was nevertheless able to cause judicial chaos in Kentucky for two years, as two different courts claimed to be the court of last resort during that period. *Id.* at 305. As here, the "Old Court-New Court" petitions were based on the dislike and/or disagreement of the day-to-day work within the courtroom.

[7] We do note however that "in the more than 200 years of Kentucky's existence, despite several attempts, only two higher-court judges. . . have been successfully removed by address." *Id.* at 305-06. Those judges were William H. Burns and Joshua F. Bullitt, "both of whom were accused of being Confederate sympathizers." *Id.* at 306.

Regardless, the option for removal by address remained extant in Kentucky until it was "*removed* when the Judicial Article was adopted in 1975 and *replaced by* a Retirement and Removal Commission[,]" now referred to as the JCC. *Id.* at 312 (citing Ky. Const. § 121) (emphasis added). The Legislature's current attempt to impeach a sitting judge based on behavior that clearly does not rise to the level of a misdemeanor in office is a thinly veiled and unconstitutional attempt to revive the practice of removal by address.

To be clear, we do not herein conclude that the Legislature can *never* impeach a sitting judge. *Commonwealth v. Tartar*, 239 S.W.2d 265, 267 (Ky. 1951) ("The Constitution (Section 68), and the statute (K.R.S. 63.030), provide for the impeachment of officers, which would include judges[.]"); *accord Jameson v. Judicial Conduct Comm'n*, 701 S.W.3d 236, 283 (Ky. 2024). Nor do we hold that JCC proceedings and impeachment proceedings, under the right factual circumstances, are mutually exclusive. But we do conclude that it is only the rarest of circumstances in which a sitting judge has committed either an actual, indictable crime or an offense in office constituting the most reprehensible moral turpitude that the Legislature is permitted to veer into the judge removal lane which is, under most circumstances, reserved solely for the Judiciary. Those circumstances simply are not present in this case and the Legislature has consequently intruded on the authority of both this Court, the Judicial Branch at large, and the constitutionally empowered Judicial Conduct Commission in entertaining impeachment proceedings against a sitting judge based solely on rulings that, right or wrong, were within her discretion to make.

3) The impeachment hearing did not afford Judge Goodman due process.

As noted, the entire basis of the facially invalid petition for impeachment concerned Judge Goodman's actions and rulings in six cases over which she presided. But, at the time of the House Impeachment Committee's hearing against her, five of those cases remained active. This included the three cases that were the primary focus of the impeachment hearing. As impeachment hearings are public proceedings, Judge Goodman was unable to explain or defend any of the actions she took in those cases without running afoul of SCR[8] 4.300(2.10)(A)("A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court[.]").

[8] Kentucky Supreme Court Rule.

Judge Goodman's inability to defend herself by providing any explanation for her actions does not comport with procedural due process. "At its most basic level, procedural due process ensures that one is not unfairly deprived of his life, liberty, or property without receiving a hearing, adequate notice, and a neutral adjudicator." *White v. Boards-Bey*, 426 S.W.3d 569, 574 (Ky. 2014). While she received notice, a hearing, and what we must presume were neutral adjudicators, she was forced by her obligations under the Judicial Code of Conduct to stand silent rather than attempt to defend her actions or thought processes in taking those actions. This is yet another reason these misconduct allegations, which fall short of criminal acts, immoral behavior, or high moral turpitude, can only be handled by the JCC.

4) Judge Goodman would face irreparable harm in the absence of this writ.

Finally, although our typical standards for the issuance of a writ do not apply to the question of whether to issue a supervisory writ, we note that Judge Goodman faces irreparable harm in the absence of the relief she requests herein. *See, e.g., Ex parte Smith*, 664 S.W.3d 505, 507 (Ky. 2022) ("The standard 'is very simply whether a majority of this Court believes the circumstances merit a supervisory writ.'"). If impeached, Judge Goodman will be removed from office; she will be disqualified from ever holding any office of honor, trust, or profit in the Commonwealth again; and she will be stripped of the retirement benefits she has accrued over her nearly twenty years of service to the Commonwealth. All of this will occur, and yet there exists no means by which she may appeal her impeachment. This is the textbook definition of harm that is irreparable.

5) This matter does not present a non-justiciable political question.

The political question doctrine, which is primarily grounded in the separation of powers doctrine, states that "the judicial department should not interfere in the exercise by another department of a discretion that is committed by a textually demonstrable provision of the Constitution to the other department, or seek to resolve an issue for which it lacks judicially discoverable and manageable standards[.]" *Fletcher v. Commonwealth*, 163 S.W.3d 852, 860 (Ky. 2005) (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962); *Powell v. McCormack*, 395 U.S. 486, 518 (1969); *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004)).

> Yet while the separation of powers bars our consideration of unduly political questions, *it also unquestionably assigns to us the solemn duty of ensuring that the legislative and executive departments do not violate our Kentucky Constitution, even in the exercise of functions or discretion falling within their exclusive domains*. . . [A] claim that an act of government is unconstitutional presents a purely judicial question appropriate for resolution by the judiciary. . . Indeed, our Constitution itself commands that each Justice and Judge of this Commonwealth solemnly swear or affirm before taking office that he or she will "support ... the Constitution of this Commonwealth." Ky. Const. § 228.

Graham v. Adams, 684 S.W.3d 663, 679 (Ky. 2023) (emphasis added).

The Attorney General asserts that Ky. Const. § 109 "commands the judiciary to stay out of impeachments[,]" and that this alleged commandment renders Judge Goodman's claims against the proceedings against her non-justiciable political questions. Section 109 states in its entirety:

> The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court. The court shall constitute a unified judicial system for operation and administration. The impeachment powers of the General Assembly shall remain inviolate.

In context, this Section discusses the powers of the judiciary and then makes an unequivocal statement that the "impeachment powers of the General Assembly shall remain inviolate." This simply means that the power to impeach belongs to the Legislature alone, and we have remained faithful to that mandate long before this matter arose. *See Jameson*, 701 S.W.3d at 283 ("While this Commonwealth's Constitution grants the JCC the authority to retire, suspend, or remove a judge, it places the authority to impeach an elected official solely in the hands of the legislature[.]").

Despite the argument to the contrary, Section 109 does *not* mean that the Legislature has the unfettered authority to conduct unconstitutional impeachment proceedings based on the mundane, discretionary actions of a judge that are within the exclusive authority of *this* branch to address. Kentucky's Constitution contemplates *co-equal* branches of government. Yet the Respondents would have us interpret it (or more to the point, *not* interpret it) such that the Legislature may have the complete, unchecked power to impeach judicial branch officials for matters which our Constitution gives *this* branch the authority to address. This would not be co-equal. It would not be constitutional. It would be tyrannical.

Simply put: "The issue presented by this case is a constitutional issue, not a political one; thus, it is justiciable." *Fletcher v. Commonwealth*, 163 S.W.3d 852, 860 (Ky. 2005) (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989) ("To allow the General Assembly. . .to decide whether its actions are constitutional is literally unthinkable.")).

Based on the foregoing, the Court ORDERS that:

1. Judge Goodman's petition for a supervisory writ under Section 110(2)(a) of the Kentucky Constitution is GRANTED;

2. Judge Goodman's motion for a declaration that H.R. 124 encroaches upon the inherent powers of the Judicial Branch and violates the Separation of Powers Doctrine is GRANTED;

3. Judge Goodman's motion for a declaration that H.R. 124 violated due process of law is GRANTED;

4. Judge Goodman's motion to declare H.R. 124 and the Articles of Impeachment against her void *ab initio* is GRANTED; and

5. The General Assembly is hereby ENJOINED from further impeachment proceedings against Judge Goodman and is ORDERED to dismiss the current impeachment proceedings against her.

Lambert, C.J.; Bisig, Conley, Keller, Nickell and Thompson, JJ., sitting. Bisig, Conley, Keller, and Thompson, JJ., concur. Thompson, J., also concurs by separate opinion. Nickell, J., dissents by separate opinion. Goodwine, J., not sitting.

ENTERED: April 6, 2026

EMPLOYMENT LAW

RETALIATION

KENTUCKY WHISTLEBLOWER ACT (KWA)

JURY INSTRUCTIONS

PRESERVATION OF OBJECTIONS TO JURY INSTRUCTIONS

PERSONNEL ACTION TAKEN AGAINST AN EMPLOYEE MUST BE "MATERIALLY ADVERSE" TO BE ACTIONABLE UNDER THE KWA

Three former Kentucky State Police (KSP) officers filed Kentucky Whistleblower Act (KWA) action against KSP alleging KSP retaliated against them for reporting concerns about "irregularities and thefts of evidence from Post 4" — Plaintiffs claimed that KSP officials retaliated against them by threatening to transfer them, initiating an internal affairs investigation into one of plaintiffs on an unrelated incident, and constructively discharging another plaintiff — Both parties tendered proposed jury instructions — After numerous discussions with counsel, trial court issued final jury instructions — Jury returned verdicts in favor of plaintiffs — Trial court denied KSP's motion for a new trial and jnov — KSP appealed — Court of Appeals reversed and remanded for a new trial, finding that trial court erroneously instructed jury — Plaintiffs appealed — AFFIRMED — Plaintiffs did not dispute Court of Appeals' holding that final jury instructions were erroneous or that KSP tendered proposed jury instructions without the erroneous language; rather, they argued that regardless of tendered instruction, KSP waived any error because KSP's counsel did not object to the final jury instructions — Pursuant to CR 51(3), no party may assign as error the giving or failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground(s) of his objection — If a party seeks to preserve error by tendered instruction instead of specific objection, that party must actually tender the desired instruction — Pursuant to *Sand Hill Energy, Inc. v. Smith* (Ky. 2004), so long as the offered instructions clearly present the party's position, no further action is required to preserve for appellate review — A party has not fairly and adequately presented their position if (1) the omitted language or instruction was not contained in the instruction tendered to the court, *i.e.*, when the allegation of error was not presented to the trial court at all; (2) the minor differences between the language of the tendered instruction and the instruction given by the trial court would not call the trial court's attention to the alleged error; or (3) the tendered instruction itself was otherwise erroneous or incomplete — In instant action, KSP did not waive its objection to jury instructions — KSP argued that jury should have been instructed on whether KSP took materially adverse employment actions against plaintiffs since, under KWA, jury must find that plaintiffs suffered specific adverse employment actions — KSP's proposed instructions met requirements of *Sand Hill* — Plaintiffs relied on a single statement made by KSP's counsel at the final bench conference on jury instructions to allege that KSP agreed to the erroneous instructions — Counsel stated, "We're not objecting to the final version." — However, considering this statement in the context of the trial itself, statement did not amount to a waiver of the jury instruction issue — KSP's proposed instructions clearly presented its position to trial court — Under *Sand Hill*, tendering them was sufficient to preserve KSP's argument — Statement did not prove KSP's "voluntary and intentional surrender or relinquishment" of its claim of error — Under KRS 61.103(3), a plaintiff must "show by a preponderance of evidence that the disclosure was a contributing factor in the personnel action" — Burden then shifts to employer to "prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action" — The Kentucky Supreme Court adopted the same standard used in retaliation claims under the Kentucky Civil Rights Act for personnel actions under the KWA, requiring that a plaintiff must prove "a materially adverse change in the terms and conditions of his employment" — A materially adverse action by an employer is one which "might well have dissuaded a reasonable worker from making or supporting a charge" — This is a fact-specific inquiry — Therefore, under the KWA, jury instructions must instruct the jury to decide whether (1) the employee made a good faith disclosure or report; (2) the employer took or threatened to take a materially adverse employment action; and (3) the good faith disclosure or report was a contributing factor in the materially adverse employment action —

Sgt. Kevin Burton; Lt. Frank Chad Taylor; and Sgt. Mike Garyantes v. Kentucky State Police/Commonwealth of Kentucky (2024-SC-0309-DG); On review from Court of Appeals; Opinion by Justice Goodwine, *affirming*, rendered 4/23/2026. **[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 Sgt. Kevin Burton, Lt. Frank Chad Taylor, and Sgt. Mike Garyantes brought an action against their former employer, Kentucky State Police ("KSP"), under the Kentucky Whistleblower Act ("KWA") in the Franklin Circuit Court. A jury found in their favor and awarded them $900,000 collectively in punitive damages for their claims. KSP appealed as a matter of right, and the Court of Appeals reversed and remanded for a new trial because of erroneous jury instructions. Appellants sought discretionary review, which we granted. After review of the record, applicable law, and the arguments of the parties, we affirm the decision of the Court of Appeals.

BACKGROUND

Appellants are former employees of KSP Post 4. They initiated their KWA action against KSP in 2019. They alleged KSP retaliated against them for reporting concerns about "irregularities and thefts of evidence from Post 4." They reported that Sgt. Ryan Johnson took evidence from an open case for personal use, that evidence destruction forms were improperly completed, and that KSP employees covered up Johnson's actions rather than properly investigating them. They claimed KSP officials retaliated against them by threatening to transfer them, initiating an internal affairs investigation into Garyantes on an unrelated incident, and constructively discharging Burton.

The case progressed to trial. Both parties tendered proposed jury instructions to the trial court. After multiple discussions with counsel, the court issued final jury instructions. Ultimately, the jury returned verdicts in favor of Appellants and awarded $500,000 in punitive damages to Burton[1] and $200,000 in punitive damages to each Garyantes and Taylor. The court denied KSP's motions for a new trial and judgment notwithstanding the verdict.

[1] The jury was instructed on compensatory damages for Burton but declined to award such damages.

KSP appealed the judgment as a matter of right to the Court of Appeals.[2] Among other issues, KSP argued the trial court erroneously instructed the jury on the requirements of the KWA. The Court of Appeals was convinced by this argument and reversed and remanded the case for a new trial. Appellants then moved for discretionary review which we granted.

[2] Appellants filed a cross-appeal on the issue of attorney's fees. The Court of Appeals dismissed the cross-appeal on Appellants' own motion.

ANALYSIS

On discretionary review, Appellants argue KSP waived any error in the jury instructions.[3] "A properly preserved challenge to the contents of a given jury instruction is a question of law subject to de novo review on appeal. But if a party fails to preserve properly a challenge to jury instructions in the trial court, the challenge is not entitled to appellate review." *Norton Healthcare, Inc. v. Disselkamp*, 600 S.W.3d 696, 709-10 (Ky. 2020) (footnote omitted).

[3] Appellants also argue KSP did not comply with Kentucky Rules of Appellate Procedure (RAP) 32(A)(4) by failing to include preservation statements in its brief before the Court of Appeals. We note that Appellants allege they preserved this argument by first raising it in their petition for rehearing before the Court of Appeals. Failure to raise this argument in their original briefs amounts to waiver. *Johnson v. Commonwealth*, 450 S.W.3d

707, 713 (Ky. 2014). The Court of Appeals declined to address KSP's compliance with RAP 32(A)(4). We also decline to do so.

First, KSP did not waive its argument related to the jury instructions. Appellants do not dispute the Court of Appeals' holding that the final instructions were erroneous or that KSP tendered proposed jury instructions without the erroneous language. Instead, Appellants argue that regardless of the tendered instruction, KSP ultimately waived any error because their counsel did not object to the final jury instructions.

> No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction **or** by motion, **or** unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

CR[4] 51(3) (emphasis added). This rule is meant to ensure the "best possible trial" and to give the trial court "an opportunity to correct any errors before instructing the jury." *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 162-63 (Ky. 2004) (footnotes and internal quotation marks omitted). It also dictates that counsel be an active participant in the court's crafting of the instructions so that counsel cannot intentionally build reversible error into the final instructions. *Burke Enters., Inc. v. Mitchell*, 700 S.W.2d 789, 792 (Ky. 1985). We have repeatedly refused to review errors in instructions alleged for the first time on appeal as unpreserved. *Fraser v. Miller*, 427 S.W.3d 182, 186 (Ky. 2014); *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66, 72-73 (Ky. 2000); *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 64 (Ky. 1996); *Mapother and Mapother, P.S.C. v. Douglas*, 750 S.W.2d 430, 431 (Ky. 1988); and *Cooper v. Cooper*, 485 S.W.2d 509, 511 (Ky. 1972).

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[4] Kentucky Rules of Civil Procedure.

The plain language of CR 51(3) allows a party to preserve its objections to jury instructions through **any one** of the three listed methods. "If a party seeks to preserve error under [the rule] by tendered instruction instead of specific objection, that party must actually tender the desired instruction[.]" *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 416 (Ky. 1998). So long as the "offered instructions clearly present [the] party's position, no further action is required to preserve for appellate review[.]" *Sand Hill*, 142 S.W.3d at 163. A party has not fairly and adequately presented their position if:

> (1) the omitted language or instruction was not contained in the instruction tendered to the court; i.e., when the allegation of error was not presented to the trial court *at all*; (2) the minor differences between the language of the tendered instruction and the instruction given by the trial court would not call the trial court's attention to the alleged error; or (3) the tendered instruction itself was otherwise erroneous or incomplete.

Id. at 163-64 (footnotes omitted).

Here, in Instruction No. 1(a), the jury was instructed as follows:

> State whether you are satisfied by the evidence as follows (if you are satisfied, answer YES):
>
> That the Kentucky State Police's handling of the tennis shoe and lip balm issue constituted an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance, or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety and that Plaintiff Sgt. Kevin Burton's support of Lt. Frank Chad Taylor or Sgt. Mike Garyantes or bringing facts and information to the attention of Commonwealth Attorney Shane Young and/or Kentucky State Police Sgt. Clint Collins and/or Kentucky State Police Sgt. Kevin Warrell was a **good faith disclosure** and such disclosure was a **contributing factor** in the decision to take or threaten to take **a personnel action** against Sgt. Kevin Burton to discourage or punish Sgt. Kevin Burton from making the disclosure.

(emphasis added).[5]

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[5] The jury was instructed separately on the claims of the three plaintiffs. We recite only the instruction on Burton's claims because it is nearly identical to the instructions related to the other plaintiffs.

In contrast, KSP's tendered Instruction No. 1 stated:

> You will find for Plaintiff, Kevin Burton, and against Defendant, KSP, under this instruction if you are satisfied by the evidence:
>
> (A) That Kevin Burton made, aided, supported, or substantiated a **good faith report(s)** or **disclosure(s)** to an appropriate body or authority of a violation of state law or of mismanagement, waste, fraud, abuse of authority, or a danger to public health or safety.
>
> . . .
>
> AND
>
> (B) That KSP took **materially adverse action(s)** against Kevin Burton;
>
> . . .
>
> AND
>
> (C) That Kevin Burton's disclosure(s) to the appropriate authority was a **contributing factor** in KSP's decision to take adverse personnel action(s) against him.

(emphasis added).[6] Before the Court of Appeals, KSP argued the jury should have been instructed on whether KSP took materially adverse employment actions against Appellants. It was their position, as evidenced by the above proposed instruction, that under the KWA, the jury must find that the Appellants suffered specific adverse employment actions.

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[6] KSP tendered instructions for each plaintiff's claims. We recite only the instruction on Burton's claims because it is nearly identical to the instructions related to the other plaintiffs.

KSP's proposed instructions meet the requirements set out in *Sand Hill*. First, the instruction clearly asserts KSP's position that the jury must find Appellants proved KSP took materially adverse actions against them. Second, the difference between the tendered and final instructions is not minor. The final instructions assumed KSP had "take[n] or threatened to take a personnel action" against each Appellant. This failure to require the jury to specifically find such an action was taken by KSP is significant. Third, as we will describe below, KSP's tendered instruction was not otherwise erroneous.

Furthermore, we are unconvinced by Appellants' argument that KSP waived any error otherwise preserved by their proposed instructions. Appellants rely on a single statement made by counsel to allege KSP affirmatively agreed to the erroneous instructions. It is true that nearly all issues can be waived by either inaction or consent. *Commonwealth v. Steadman*, 411 S.W.3d 717, 724 (Ky. 2013). It is also true that at the end of the final bench conference on the jury instructions, KSP's counsel said, "We're not objecting to the final version." However, we must consider this statement in context of the trial itself.

In its brief, KSP directs our attention to three bench conferences among counsel and the trial judge.[7] First, during the conference on February 8, 2022, there was a discussion about whether the KWA requires Appellants to prove an "adverse personnel action." KSP argued it was required, while Appellants argued it was not. The judge did not appear to decide any argument raised by the parties, but instead distributed the jury instructions to the parties and told them to review them for additional arguments the next day.

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[7] We have reviewed the video record of the conferences and attempt to summarize them in relevant part herein. Some portions are difficult to discern either because counsel and/or the trial judge cannot be clearly heard on the recording or because it is unclear to what the discussions refer. For example, there are discussions of case law wherein neither counsel nor the judge state to which case(s) they are referring. Despite these limitations, we are confident in our analysis of the preservation issue.

The following day, which was the last day of trial, the judge again raised the issue of whether the instructions should include language regarding an adverse personnel action. Ultimately, the judge rejected this argument and moved on to discuss other issues in the instructions for approximately twenty minutes. After a break for lunch, counsel and the judge returned to the discussion of the instructions. At one point, the judge referenced "material factors" and said, "we couldn't find anything on that, so we left it out." At the close of the third bench conference, the judge said he hoped the instructions were "set in stone" and asked counsel, "Can I get everyone to say yea[?]"[8] Appellants' counsel answered in the affirmative. KSP's counsel then said, "We're not objecting to the final version."

[8] The judge appeared to ask this question in jest. Both the judge and KSP's counsel laughed.

This statement does not amount to waiver of the jury instruction issue. First, as explained above, KSP's proposed instructions clearly presented its position to the court and, under *Sand Hill*, tendering them was sufficient to preserve its argument. 142 S.W.3d at 163. Furthermore, this statement by counsel does not prove KSP's "voluntary and intentional surrender or relinquishment" of its claim of error. *Vinson v. Sorrell*, 136 S.W.3d 465, 469 (Ky. 2004). While the video record does not demonstrate KSP made a clear objection to Instruction No. 1(a), it does show that counsel asserted its position regarding personnel actions in a discussion with the trial judge and the judge rejected that argument. Counsel did not continue to pursue the argument and, when prompted by the court, stated she had no objections to the final jury instructions. In context, counsel's statements can be interpreted to be an agreement to move on with the trial after the court rejected its proposed instruction rather than waiver of the argument.

Finally, despite Appellants' failure to challenge the Court of Appeals' determination of error in Instruction No. 1(a), we will briefly address the substance of the instructions to provide clarity to the trial court on remand. The requirements of the KWA are laid out in KRS[9] 61.102 and KRS 61.103. To prove a violation of the statute, a plaintiff must first show:

> (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure.

Davidson v. Commonwealth, Dep't. of Mil. Affs., 152 S.W.3d 247, 251 (Ky. App. 2004) (citing *Woodward v. Commonwealth*, 984 S.W.2d 477, 480-81 (Ky. 1998)). Under KRS 61.103(3), the plaintiff must also "show by a preponderance of evidence that the disclosure was a contributing factor in the personnel action." The burden then shifts to the employer "to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action." *Id.*

[9] Kentucky Revised Statutes.

Herein, it is uncontested that the first and second elements under *Davidson* are met. The third element is contested but not relevant to the jury instruction issue now before us. The fourth element is at issue. First, we affirm the Court of Appeals' determination that the jury instructions must instruct the jury to find each of the contested elements individually. This leaves us to determine whether the law requires a jury to find KSP took "materially adverse action(s)" against each Appellant, as proposed by KSP's Instruction No. 1.

The KWA "recognizes the overt retaliatory act of reprisal as well as the subtle exercise of official authority or influence in the relationship between state employee and state government." *Commonwealth Dep't of Agric. v. Vinson*, 30 S.W.3d 162, 164 (Ky. 2000). In *Harper v. University of Louisville*, 559 S.W.3d 796, 802 (Ky. 2018), this Court inserted "adverse" into the language of KRS 61.103(3), to state that a plaintiff must show his good faith disclosure was a "contributing factor in the [adverse] personnel action" taken against him by his employer. The *Harper* decision repeatedly uses the phrase "adverse employment action" without explanation. *Id.* at 804-05, 809. Otherwise, this Court has left "personnel action" undefined. *Vinson*, 30 S.W.3d at 165.

While KRS 61.102(1) is broad in its description of prohibited conduct by employers, for an employee to prove a violation under the KWA, the personnel action taken against him must be "materially adverse." To reach this conclusion, we look to the Kentucky Civil Rights Act ("KCRA") because its prohibition on retaliation is substantially similar to that of the KWA. KRS 344.280(1).[10] Despite the broad prohibition on retaliation in the KCRA, this Court has construed the law to require a plaintiff to prove "a materially adverse change in the terms and conditions of his employment." *Brooks v. Lexington-Fayette Urb. Cnty. Hous. Auth.*, 132 S.W.3d 790, 802 (Ky. 2004). For retaliation claims under the KCRA, we have defined a materially adverse action by an employer as one which "might well have dissuaded a reasonable worker from making or supporting a charge." *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 855-56 (Ky. 2016) (quoting *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 67-68 (2006)). This is a fact-specific inquiry. *Id.* at 856. We now adopt the same standard for personnel actions under the KWA.

[10] Non-binding authority from both the Sixth Circuit Court of Appeals and the Kentucky Court of Appeals has relied on the KCRA to find that personnel action under the KWA must be materially adverse. *Harper v. Elder*, 803 F. App'x 853, 857 (6th Cir. 2020); *Arnold v. Holmes*, No. 2009-CA-000514-MR, 2010 WL 3810191, at *2-3 (Ky. App. Oct. 1, 2010); *Jones v. Oldham Cnty. Sheriff's Dep't*, No. 2009-CA-000350-MR, 2010 WL 1508150, *10-11 (Ky. App. Apr. 16, 2010).

Therefore, KSP's tendered instructions were not erroneous. Under the KWA, jury instructions must instruct the jury to decide whether (1) the employee made a good faith disclosure or report; (2) the employer took or threatened to take a materially adverse employment action; and (3) the good faith disclosure or report was a contributing factor in the materially adverse employment action.[11] On remand, the trial court must conform its instructions to these requirements.[12]

[11] This assumes that the first two elements under *Davidson* are not at issue in a case. We also note that, rather than including multiple elements in a single instruction as proposed in KSP's Instruction No. 1, a better practice would be to include each element in a separate instruction so that the jury clearly decides each element individually.

[12] The dissent suggests this outcome should not be based on whether KSP failed to object to the final version of the jury instructions, but whether KSP affirmatively agreed to the final version of the jury instructions. To clarify, the outcome turns on the trial court erroneously instructing the jury as a matter of law, not on whether counsel failed to object or affirmatively agreed with the trial court.

CONCLUSION

Based on the foregoing, the decision of the Court of Appeals is affirmed.

All sitting. Bisig, Conley, Keller, and Nickell, JJ., concur. Thompson, J., dissents by separate opinion in which Lambert, C.J., joins.

AUTOMOBILE ACCIDENT

WRONGFUL DEATH

NEGLIGENCE

CONSTRUCTION LAW

DESIGN FLAWS IN THE WIDENING OF AN INTERSTATE HIGHWAY

PRIVATE ENGINEERS HIRED AS CONTRACTORS FOR A STATE AGENCY

IMMUNITY

PREEMPTION BY FEDERAL LAW

For nearly fourteen years, the Kentucky Transportation Cabinet (KYTC) consulted with several engineering firms to collaboratively design a widened Interstate 65 (I-65) through Hart, Larue, and Hardin Counties — KYTC hired WSP USA, Inc., as lead engineer on project — WSP then retained HMB Professional Engineers and HDR Engineering as subconsultants (collectively "Engineers") — Because I-65 is part of National Highway System (NHS), final design plan had to be approved by Federal Highway Administration (FHWA) pursuant to federal law that requires that all national highways meet FHWA design standards and criteria — Kentucky highway designs must also comply with state standards — Years after construction was complete, two men were traveling in a rental car along I-65 near Hart County when their vehicle hydroplaned and was ultimately struck by a tractor trailer — Driver was severely injured and his passenger died — Passenger's widow, on behalf of herself, her two minor children, and husband's estate, filed instant wrongful death and negligence action against driver — Widow later amended her complaint to include claims against Engineers — Driver later filed third-party complaint against Engineers — During discovery, parties' experts discussed drainage and shoulder design issues at accident site — At accident site, drainage

inlets were omitted by Engineers' design plan — Engineers noted that their plans, including all design exceptions, were accepted and approved by KYTC and FHWA, and once approval was granted by FHWA, neither Engineers nor KYTC had the ability to deviate from final design plan — Accident occurred in a curved section of I-65 — HMB contended that there is a standard design for curved sections that drains all water from the inside barrier wall to the outside shoulder — After discovery, Engineers moved for summary judgment, arguing that (1) as contractors working for a governmental entity that is immune from liability, Engineers were entitled to immunity; and (2) claims asserted against Engineers were preempted by federal law relating to design of interstate highways that are part of NHS — Trial court granted Engineers' motion for summary judgment — Plaintiffs appealed — Court of Appeals reversed and remanded — Engineers appealed — AFFIRMED — Engineers do not enjoy immunity simply because they served as contractors for a state agency — An independent contractor performing government services is liable for his own negligence, and is responsible just as he would be on private work — Engineers who propose designs can be liable in negligence for injuries caused by those designs, at least where the designs were not mandated by applicable guidelines — In instant action, KYTC's and FHWA's approval of final designs as prepared and submitted by Engineers may be admitted to suggest the reasonableness of their conduct — In addition, summary judgment on "immunity" grounds allegedly arising from the mandated nature of Engineers' work was not appropriate because a genuine issue of material fact exists as to whether such work was in fact mandated — Engineers were specifically hired to develop a highway design consistent and compliant with all federal and state standards — Engineers' purported failure to comply with governing standards resulted in an allegedly negligent shoulder design, thus forming the basis for plaintiffs' claims and potentially subjecting Engineers to liability — Plaintiffs presented evidence, which was controverted by Engineers' competing evidence, that government did not mandate design of highway, but rather simply required that certain guidelines be followed — This evidence could support a finding that Engineers were not hired to implement plans that were already prepared, but rather for their design knowledge and expertise, and to exercise their independent judgment and knowledge of federal standards (*i.e.*, AASHTO standards) — If FHWA's controlling criteria are not met on an NHS project, a design exception must be prepared — A design exception is a documented decision to design a highway element or segment of highway to design criteria that do not meet minimum values or ranges established for that highway or project — In instant action, experts agreed that shoulder slope is not a controlling criterion for which a design exception can be requested — KYTC implemented *Highway Design Guidance Manual* (*Manual*) to provide uniformity in highway design — *Manual* specifically adopts AASHTO guidelines and states that *Manual* should not supersede application of sound engineering principles by experienced design professionals — In instant action, Engineers sought and obtained a design exception due to issues with sag vertical curves — Plans asserted that drainage issues were of limited concern and were addressed in the design — Genuine issues of material fact exist as to appropriateness of Engineers' design, including whether it satisfies governing standards, whether an exception should have been obtained, or whether the exception obtained sufficiently addressed purported issues at accident scene — Plaintiffs' claims are not federally preempted — No evidence was presented that Kentucky law requires a higher standard for this roadway design issue than the FHWA — There is no conflict between federal regulations governing highway design and requiring professional engineers to exercise ordinary care under general principles of negligence —

HMB Professional Engineers, Inc.; D. Paul Lincks; and Haworth-Meyer-Boleyn Professional Engineers, Inc. v. Kristina L. Ives, Individually; Kristina L. Ives, as the Next Friend for the Minor Children, Hiram Miller Ives and June Lelia Ives; and Kristina L. Ives, as the Personal Representative and Administratrix of the Estate of Hiram Dudley Ives, III (2024-SC-0284-DG); *HDR Engineering, Inc. and James L. Guinn v. Kristina L. Ives, Individually; D. Paul Lincks; Haworth-Meyer-Boleyn Professional Engineers, Inc.; HMB Professional Engineers, Inc.; Jennings L. Copley; Kristina Ives, as the Personal Representative and Administratrix of the Estate of Hiram Dudley Ives, III; Kristina Ives, as Next Friend for the Minor Children, Hiram Miller Ives and June Lelia Ives; Necto Architecture, PSC; Parsons Brinckerhoff, Inc.; Susan Rowland Slade, as Personal Representative and Executrix of the Estate of Frank Steven Slade; and WSP USA Inc.* (2024-SC-0289-DG); *WSP USA Inc.; Parson Brinckerhoff, Inc.; and Susan Rowland Slade, as Personal Representative and Executrix of the Estate of Frank Steven Slade v. Kristina L. Ives, Individually; D. Paul Lincks; Haworth-Meyer-Boleyn Professional Engineers, Inc.; HDR Engineering, Inc.; HMB Professional Engineers, Inc.; James L. Guinn; Jennings L. Copley; Kristina L. Ives, as the Next Friend for the Minor Children, Hiram Miller Ives and June Lelia Ives; Kristina L. Ives, as the Personal Representative and Administratrix of the Estate of Hiram Dudley Ives, III; and Necto Architecture, PSC* (2024-SC-0291-DG); and *HMB Professional Engineers, Inc.; D. Paul Lincks; and Haworth-Meyer-Boleyn Professional Engineers, Inc. v. Jennings L. Copley; Kristina Ives, as the Next Friend for the Minor Children, Hiram Miller Ives and June Lelia Ives; Kristina Ives, as the Personal Representative and Administratrix of the Estate of Hiram Dudley Ives, III; Kristina L. Ives, Individually; and Necto Architecture, PSC* (2024-SC-0295-DG) On review from Court of Appeals; Opinion by Justice Bisig, *affirming*, rendered 4/23/2026. **[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).]**

Jennings Copley II and his business partner, Hiram "Dudley" Ives III, were traveling on Interstate 65 (I-65) near Hart County when their rental vehicle hydroplaned and was ultimately struck by a tractor trailer. The accident killed Ives and seriously injured Copley. Ives' widow, Kristina, on behalf of herself, her minor children and her husband's estate, along with Copley, sued the engineers who designed the widening of I-65 years prior. Ives and Copley asserted that the engineers negligently designed the highway, ultimately causing more water to pool on the roadway and thus increasing the occurrence of hydroplaning incidents. The three engineering firms that consulted the Kentucky Transportation Cabinet on the highway design strongly contested these allegations, asserting that their designs complied with the governing state and federal standards for highways.

The Fayette Circuit Court granted the engineers' motion for summary judgment, determining that they were immune from suit. Further, the trial court held that the claims were federally preempted. The Court of Appeals reversed, and the Engineers sought discretionary review in this Court. After granting discretionary review, considering oral arguments, and carefully reviewing the record, we affirm the Court of Appeals.

FACTS AND PROCEDURAL HISTORY

For nearly fourteen years, the Kentucky Transportation Cabinet (KYTC) consulted with several engineering firms to collaboratively design a widened Interstate 65 (I-65) through Hart, Larue, and Hardin Counties. The KYTC hired WSP USA, Inc., as its lead engineer on the project. WSP then retained HMB Professional Engineers and HDR Engineering as subconsultants (collectively referred to as the "Engineers"). Because I-65 is part of the National Highway System (NHS), the final design plan had to be approved by the Federal Highway Administration (FHWA) pursuant to federal law that requires that all national highways meet FHWA design standards and criteria. Kentucky highway designs must also comply with state standards.

Prior to construction, this portion of I-65 contained two lanes on each side with a grass median dividing the north and southbound lanes. The widening project first involved a determination that the new lanes would be added to I-65 by replacing the grassy median that divided the two sides of the interstate with a concrete median barrier wall. The Engineers proposed four alternative designs to the KYTC at the outset of the project: two designs that involved maintaining the existing grass median, and two designs that involved adding a concrete barrier to separate the north and southbound lanes.[1] The project resulted in a fourteen-foot shoulder next to the concrete barrier wall, three twelve-foot travel lanes, followed by a twelve-foot right shoulder on each side of I-65. In short, the Engineers' design widened the highway from four to six lanes.

[1] Factors contributing to the decision to replace the grassy median with a concrete barrier wall included: (1) less adverse environmental impacts; (2) reduction in right of way impact; (3) fewer utility impacts; (4) lower construction cost; and (5) reduction in potential for median crossovers and head-on collisions.

Years after construction was complete, Jennings Copley II was driving a rental car to Lexington from Western Kentucky with his business partner, Hiram "Dudley" Ives III, riding as his passenger. While traveling northbound on I-65, they encountered a heavy rainstorm. The vehicle hydroplaned and travelled from the far-left lane across the highway to the right shoulder, where it struck a guardrail. The vehicle then rolled backwards onto the highway and was struck by a tractor trailer. The collision killed Ives and seriously injured Copley. Kentucky State Police responding to the collision listed "water pooling" as an environmental factor of the accident.

Ives' widow, Kristina, on behalf of herself, her two minor children, and Ives' Estate, filed a wrongful death and negligence suit against Copley in Fayette Circuit Court. Kristina later amended her complaint to include claims against WSP, HMB and HDR – the Engineers that consulted on the design of the widened highway where the accident occurred. Thereafter, Copley filed a third-party complaint against the Engineers, effectively "joining forces" with Kristina (Appellees) for the sake of pursuing claims that the Engineers negligently designed the highway and that the defective design caused the accident.

Prior to the I-65 widening project, the portion of I-65 where the accident occurred was designed with the fast lane draining to the left-side grass median and the slow lane draining to the right shoulder and off the highway. Importantly, the highway as constructed by the Engineers' designs requires all water to travel across the left shoulder and all three travel lanes to exit on the right shoulder, thereby causing water to flow across all travel lanes. In the area leading up to the accident site, drainage inlets were placed at the bottom of the concrete barrier wall where water from a portion of the highway and left shoulder drains into the inlets. The water collected by these inlets then travels underneath the concrete barrier wall, underneath the highway, and ultimately exits on the right side of the highway. Therefore, water collected by the inlets on this portion of I-65 does not travel over the lanes of the highway.

At the accident site, drainage inlets were omitted by the Engineers' design plan. There are no drainage inlets for the northbound lanes of I-65 beginning past the "point of curvature" (where the highway begins to curve and the pavement transitions, causing all the water to flow away from the barrier wall) to past the "point of tangency" (the point where the highway becomes straight again). Appellees' expert opined that if the Engineers followed more appropriate design standards, at least a portion of the left shoulder would have drained water away from through traffic, thus decreasing the risk of hydroplaning. Instead, due to a lack of drainage inlets, the Engineers' design resulted in more water flowing across the travel portions of the highway, thus creating an unduly hazardous roadway during expected rainfall, which was a substantial factor in the accident.

In his deposition, Andre Johannes, Project Manager for KYTC, specifically admitted that there is a chapter in the Kentucky highway design manuals regarding slope and water issues, but that he is not a drainage engineer and typically relies on the engineers hired for a project for drainage design. He continued to explain that he routinely relies on hired engineers to make sure the drainage and slope designs are correct.

Conversely, the Engineers assert that their plans, including all design exceptions, were accepted and approved by the KYTC and FHWA, and once approval was granted by the FHWA, neither the Engineers nor the KYTC had the ability to deviate from the final design plan. The accident occurred in a curved section of the interstate and HMB contends that there is a standard design for curved sections that drains all water from the inside barrier wall to the outside shoulder. That required design involves utilizing a straight-line slope from the median to the outside shoulder. HMB explained that once it was determined that a concrete barrier wall would be added to the highway, the Engineers were then locked in to utilizing the straight-line slope for the portion of the highway where the accident occurred. The final design plans for the widening project contained this standard straight-line slope – a design utilized in various sections of Kentucky's interstates according to HMB.

After discovery, the Engineers moved for summary judgment, arguing that (1) as contractors working for a governmental entity that is immune from liability, the Engineers were entitled to immunity; and (2) the claims asserted against the Engineers were preempted by federal law relating to the design of interstate highways that are part of the National Highway System. In opposition, the Appellees argued that the Engineers could be held liable for their negligence, and that their state tort claims were parallel to the applicable federal requirements and therefore were not preempted.

The Fayette Circuit Court granted summary judgment in favor of the Engineers, concluding they were immune from litigation. Further, all claims asserted against them were preempted by federal law. Kristina and Copley appealed, and the Court of Appeals reversed and remanded. In a unanimous opinion, the Court of Appeals held that the mere fact the Engineers contracted with KYTC did not transform them into any kind of state actor for immunity purposes. Further, ultimate government approval of the Engineers' design plans could not absolve them from their own design negligence. The Court of Appeals also held that Kentucky's negligence and wrongful death actions were in harmony with federal law, and therefore the claims were not preempted.

ANALYSIS

"The proper standard of review on appeal when a trial judge has granted a motion for summary judgment is whether the record, when examined in its entirety, shows there is 'no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Motorists Mut. Ins. Co. v. First Specialty Ins. Corp.*, 706 S.W.3d 120, 124 (Ky. 2024) (citation omitted). We review the grant of summary judgment de novo. *Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014).

Here, we agree with the Court of Appeals that the trial court erred in granting summary judgment on immunity and preemption grounds. First, under long-standing Kentucky jurisprudence, the Engineers do not enjoy immunity simply because they served as contractors for a state agency. Second, the trial court likewise erred in granting summary judgment on grounds of "immunity" arising from the government's mandating of the design used by the Engineers because a genuine issue of material fact exists as to whether that design was in fact governmentally "mandated." Finally, the trial court's finding that Appellees' claims are preempted by federal law was likewise in error.

I. The Engineers are not entitled to immunity simply because they contracted with a state agency.

The trial court first found the Engineers are entitled to summary judgment because they are "immune" from the Appellees' claims. While the trial court's order did not distinguish between sovereign and related derivative immunities on the one hand, and the exemption from liability for contractors governmentally mandated to perform in the manner alleged to have been negligent on the other, it appears its decision was premised on both. In any event, we consider first the Engineers' contention that because they contracted with a state agency, they are entitled to enjoy the same sovereign or related derivative immunity the state agency itself would enjoy against a negligence claim.

Put simply, the Engineers argue that they are entitled to immunity in this case – immunity that is co-existent with the immunity held by the Commonwealth. We disagree. It is of course well-established that sovereign immunity protects the Commonwealth from suit. *Comair, Inc. v. Lexington-Fayette Urb. Cnty. Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009). In fact—and with particular relevance to this case—Kentucky Revised Statute (KRS) 12.211 states that the state shall not "be subject to an action arising from discretionary acts or decisions pertaining to the design or construction of public highways, bridges, or buildings."

However, the fact that the state itself enjoys immunity from certain claims arising from the construction of public highways does not mean that contractors performing such work pursuant to contracts with the state also enjoy such immunity. To the contrary, nearly 100 years ago this Court's predecessor plainly overruled a line of cases holding that an independent contractor could not be liable in damages to injured third parties for negligence in prosecuting work performed under contract with the state. *Taylor v. Westerfield*, 233 Ky. 619, 26 S.W.2d 557, 561 (1930). Further, the Court held a state contractor is responsible for damages "just as he would be on private work." *Id.*

In *Combs v. Codell Construction Co.*, the high court again held that "immunity does not absolve the contractor from negligence in performing his contract" in a case requiring determination of whether a construction contractor was liable for damages caused by negligent construction. 244 Ky. 772, 52 S.W.2d 719, 720 (1932). Thereafter, this rule was reaffirmed by *Codell Construction Co. v. Steele*, in which a construction company asserted it was an agent of the state and therefore exempt from liability when a person was injured while traveling across one of its construction sites. 247 Ky. 173, 56 S.W.2d 955 (1933). The Court explained that the rule in *Taylor* completely determined that the construction company was subject to liability for its negligence. As a result, the jury was entitled to a negligence instruction. *Id*.

This tenet of Kentucky law was recently

reaffirmed in *Shadrick v. Hopkins County, Ky.*, 805 F.3d 724, 729 (6th Cir. 2015). There, Butler entered the Hopkins County Detention Center to serve a short sentence for a misdemeanor offense and died three days later from an untreated infection. Butler's mother filed suit alleging that Southern Health Partners, Inc. (SHP), a private for-profit corporation that contracted with Hopkins County to provide medical services to inmates, was negligent, among other claims. *Id.* The federal district court held that SHP was protected by qualified official immunity from the negligence claim. *Id.* at 744.

In determining whether SHP was entitled to share the county's governmental immunity, the Court of Appeals applied the test enunciated in *Comair*: "[t]he immunity inquiry turns on the source of the entity and 'the nature of the function it carries out.'" *Id.* at 745 (citing *Comair*, 295 S.W.3d at 99). The *Comair* Court explained that the origin of the entity matters because the entity's immunity status depends on whether the parent entity is immune. *Id.* The Sixth Circuit in *Shadrick* concluded that SHP did not satisfy the first part of the test because Hopkins County did not create SHP as a governmental agency, nor did it designate SHP as the county's agent. *Id.* at 746. SHP is a private, for-profit company and provides medical services to dozens of prison facilities in multiple jurisdictions. *Id.* Despite clearly satisfying the second prong of the test, and even though SHP contracted to perform a government function, it nonetheless could not partake in the county's immunity because it did not derive its existence and status from Hopkins County. *Id.*

Importantly, the *Comair* Court disclaimed any assertion that it was creating a bright-line rule for application of immunity and instead noted the question of official immunity must be resolved on a case-by-case basis. 295 S.W.3d at 99. In any event, it is well-established under Kentucky law that one contracting with the state or a state agency does not enjoy immunity from a negligence claim simply because the state or agency itself would enjoy immunity. To the contrary, our highest court has long rejected the notion of any such immunity for contractors with the state. *See*, *e.g.*, *Taylor*, 233 Ky. 619. Indeed, this long-held principle was recently affirmed in *Shadrick*, which likewise rejected the application of immunity to a private entity that had contracted with the government. 805 F.3d at 746.

Applying the *Shadrick* rationale to this case, the Engineers are not state agencies, but rather private, for-profit companies. Simply providing design services to the state does not automatically entitle the engineers to official immunity.[2] In fact, returning to *Taylor*, 233 Ky. 619, an independent contractor performing government services is liable for his own negligence and is "responsible just as he would be on private work."

[2] *See Sietsema v. Adams*, 2013-CA-001159-MR, 2015 WL 4776304, at *7 (Ky. App. Aug. 14, 2015), *reversed on other grounds by, Adams v. Sietsema*, 533 S.W.3d 172 (Ky. 2017).

While involving construction of a highway, not design, our high court has held that "[a] contractor constructing a highway without negligence under the plans of the Highway Commission is not liable for damages resulting from the obstruction of the stream on the right of way, **but he is liable for negligence in the performance of the contract** . . ." *H.H. Miller Constr. Co. v. Collins*, 269 Ky. 670, 108 S.W.2d 663, 664 (1937) (emphasis added). Likewise, this Court's predecessor held that a construction company building highways could be "held responsible to appellee if the injury to him was caused by negligence." *Hunt-Forbes Constr. Co. v. Robinson*, 227 Ky. 138, 12 S.W.2d 303, 304 (1928). In *Hunt-Forbes*, the state contracted with a construction company to build a highway. *Id.* at 303. The construction required the highway cross through the plaintiff's land and, upon completion of the project, plaintiff's porch collapsed. *Id.* at 304. While the court recognized that when a contractor's performance is done "without negligence and within the terms of the contract," it cannot be liable for damages, it explicitly acknowledged that this general rule would not prevent a state contractor from being liable where a plaintiff's injury was caused by the contractor's negligence. *Id.*

While the case before us deals with the design, not construction, of a highway, the same principles are applicable. Just as a construction worker implementing designs approved by the Highway Commission is still liable in negligence for damages caused by faulty construction, engineers who propose designs can be liable in negligence for injuries caused by those designs, at least where the designs were not mandated by applicable guidelines. *See infra* Section II. Of course, as noted by the Court of Appeals, the KYTC's and FHWA's approval of the final designs as prepared and submitted by the Engineers may also be admitted to suggest the reasonableness of their conduct.

The Engineers rely on several cases that predate the court's holding in *Taylor* that a state contractor may be held liable just as he would be for private work. 26 S.W.2d at 561. These cases primarily involve allegations against the city itself, not a contracting entity. *See Teager v. City of Flemingsburg*, 60 S.W. 718, 719 (Ky. 1901) (plaintiff sued city for alleged negligence in design of a sidewalk); *Clay City v. Abner*, 82 S.W. 276 (Ky. 1904) (involving alleged negligence on behalf of the city in the design of a street in which a pedestrian was injured); *McCourt v. City of Covington*, 143 Ky. 484, 136 S.W. 910, 911 (1911) (involving allegation that city should have adopted a different design relating to the covering of a catch basin). Further, *Portwood v. Hoskins-Squier*, 689 S.W.3d 728, 729 (Ky. App. 2024), is distinguishable because in that case, a pedestrian filed suit against the county government seeking to recover for injuries sustained when he was struck by a motorist while crossing the road. The plaintiff asserted that the government and its employees negligently failed to install pedestrian crosswalks. *Id.* Thus, the case involved suit against the government and its employees, not an independent government contractor.

Caselaw clearly indicates that an independent government contractor may nonetheless have to defend a negligence claim resulting from alleged deficient performance of its duties. As such, the trial court erred in holding the Engineers immune from suit simply because they contracted with a state agency.

II. Summary judgment on grounds of "immunity" allegedly arising from the mandated nature of the Engineers' work was not appropriate because a genuine issue of material fact exists as to whether such work was in fact mandated.

We next consider the Engineers' contention that the trial court correctly granted summary judgment because they cannot be held liable for work they were mandated by the state to perform. While our case law recognizes such an exemption from liability, it was improperly applied here given the existence of genuine issues of material fact. Indeed, the Engineers' immunity argument is predicated on a disputed issue of material fact: whether the final design plans amount to state approval and mandating of the shoulder design defects alleged by Appellees.

Citing *Rigsby v. Brighton Engineering Co.*, 464 S.W.2d 279 (Ky. 1970), the Engineers claim they are immune because their design plans were approved—and thus mandated—by the KYTC and the FHWA and prepared in accordance with their design criteria, as established by AASHTO. In *Rigsby*, Brighton Engineering consulted the Kentucky Department of Highways in designing the Bluegrass Parkway. The Kusza family was traveling on the Parkway when their vehicle collided head-on with a bridge pier, killing all five family members. *Id.* Brighton designed bridge piers, which are vertical supports for bridges, and was sued by the family's estates for negligent design, among other claims. *Id.* at 280. The Estates specifically alleged that Brighton failed to recommend that a guardrail be constructed to prevent vehicles from colliding with the bridge pier. *Id.*

In an affidavit, the assistant project manager for the Kentucky Department of Highways stated that the design criteria did not require installation of guardrails around bridge piers, and that hired engineers are required to comply with standard design criteria. *Id.* "They have no discretion to alter, change or deviate therefrom in any material respect." *Id.* Despite competing evidence from an expert engineer who opined that recommending guardrails at this location was reasonably necessary, the trial court granted Brighton's motion for summary judgment. *Id.* On appeal, the state's high court concluded that the Department of Highways adopted criteria that was binding on Brighton, and that a recommendation that guardrails be installed would have been futile. *Id.* at 281. Therefore, the Court held that Brighton could not be held liable for the alleged failure to recommend guardrails. *Id.*

Similarly, in *City of Louisville v. Padgett*, 457 S.W.2d 485, 486 (Ky. 1970), Padgett sued the city, a construction company, and Metropolitan Sewer District for injuries she sustained when a vehicle she was riding in hydroplaned and wrecked. Padgett claimed the parties were negligent in the construction and maintenance of the drainage system of the road where the incident occurred. *Id.* The Court held that "[o]rdinarily one contracting with the sovereign Commonwealth of Kentucky who performs his contract in conformity with the plans and specifications of the contract will not be held liable for injury to the public in the absence of a negligent . . . or a wilful [sic] tortious act . . . ." *Id.* at 488. Because the construction company was told what to do by highway department officials, the construction company could not be held liable. *Id.*

at 490.

While unpublished, and clearly not binding, we also consider the Court of Appeals' decision in *McCarty v. Willett*, in which a young girl drowned after flood waters swept her car from a bridge in Monroe County. 2023 WL 7931118, at *1 (Ky. App. Nov. 17, 2023). McCarty, as administratrix of her daughter's estate, filed suit against several parties, including the two engineering companies that helped design the bridge. *Id.* The trial court held that the engineering firms were protected by the county's sovereign immunity and by qualified official immunity. *Id.*

The appellate court first determined whether the engineers were an agent of the Commonwealth, pursuant to *Comair*, 295 S.W.3d at 99. The court reasoned that the status of the engineers was analogous to the status of SHP in *Shadrick* – the engineers were private, for-profit companies with numerous commercial clients. *McCarty* at *8. Therefore, the engineers were not entitled to immunity. *Id.* Additionally, the engineers argued that, in addition to being cloaked in the same immunity as the county, they were further entitled to immunity because the county approved its bridge design. *Id.* The Court of Appeals reasoned that the engineers' argument ignored the distinction between immunity and common law liability for negligence. *Id.*

The Court of Appeals declined to grant the engineers "derivative sovereign immunity" or "government contractor immunity." *Id.* at *9. Instead, the appellate court pointed to *Rigsby*, 464 S.W.2d at 281, for its straightforward application of a negligence analysis that does not extend sovereign or governmental immunity to the contractor. *Id.* Because issues of material fact existed, the court determined that summary judgment was inappropriate and remanded the case for further proceedings. *Id.* at *9, *11.

In this case, the Engineers argue that *Rigsby* mandates that they be held immune from liability for following the KYTC design requirements. They assert that, like in *Rigsby*, the KYTC and FHWA approved the design and any attempt to deviate from that design would have been futile. Importantly, both the trial court and this Court's predecessor in *Rigsby* couched their analysis in terms of negligence, not immunity. In fact, the Court made no mention of immunity.

Further, in *Rigsby*, the plaintiffs were attempting to impose liability on consulting engineers for failing to adopt an alternative design that did not comply with Kentucky Department of Highways directives. Those plaintiffs alleged the engineers should have deviated from required standards. However, it was undisputed that the *Rigsby* engineers had no authority to deviate from the required standards. In this case, the Engineers were specifically hired to develop a highway design consistent and compliant with all federal and state standards. The Engineers' purported failure to comply with governing standards resulted in an allegedly negligent shoulder design, thus forming the basis for the Appellee's claims and potentially subjecting the Engineers to liability.

Moreover, in this case, the Appellees present evidence – admittedly controverted by the Engineers' competing evidence, but evidence all the same – that the government did **not** mandate the design of the highway, but rather simply required that certain guidelines be followed. That evidence could support a finding that the Engineers were not hired to implement plans that were already prepared, but rather for their design knowledge and expertise, and to exercise their independent judgment and knowledge of the AASHTO standards. Further, the Engineers were paid over four million dollars, surely not to rubber-stamp generic or standard plans, but to make certain the design complied with AASHTO and the geographic landscape of the area.

The FHWA is responsible for assuring that the NHS is developed and maintained according to current approved design standards. Generally, the government has broad latitude concerning the design of public highways. *Sturgill v. Commonwealth, Dep't of Highways*, 384 S.W.2d 89, 91 (Ky. 1964). Because I-65 is part of the National Highway System, all construction and lane widening projects must comply with FHWA standards, in cooperation with KYTC standards, such as the *Highway Design Guidance Manual*.[3] The FHWA standards are those proffered by the American Association of State Highway and Transportation Officials (AASHTO). This book of standards is commonly referred to as the Green Book, and the FHWA has adopted this manual as their own through federal regulations that require AASHTO resources to be consulted on all projects within the NHS. Exceptions to these guiding standards are not allowed unless an approved design exception is granted by the FHWA. Ultimately, a final design plan for the widening project, called the Design Executive Summary, was prepared, and approved by both KYTC and the FHWA.

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[3] Kentucky Transportation Cabinet, *Highway Design Guidance Manual* (Jan. 2006) https://transportation.ky.gov/Highway-Design/Highway%20Design%20Manual/General%20Information.pdf.

In this case, WSP contracted with KYTC as the prime design consultant and provided the overall roadway expansion design. In its contract with KYTC, WSP was paid $4,387,009, of which $4,200,856.05 was specifically designated as "Roadway Design Lump Sum." WSP then contracted with HMB and HDR. HMB provided design plans for water flow and drainage, which WSP incorporated into the final design. As part of its contract with WSP, HMB agreed to secure professional liability insurance with limits of at least $1 million, and agreed to indemnify, defend, and hold harmless WSP and the KYTC from any claims arising out of its negligent acts or omissions. HDR had a limited role with the section of the project where the accident occurred and primarily designed schematics for maintenance of traffic for use during the construction project. WSP paid HMB $1,724,516 to provide "field surveys and engineering services." Importantly, all engineering entities involved in this project stamped the final design plans with their seals of approval.

If "FHWA's controlling criteria are not met on an NHS project, a design exception must be prepared." A design exception is defined by the FHWA as "a documented decision to design a highway element or a segment of highway to design criteria that do not meet minimum values or ranges established for that highway or project."[4] At the time of design, the FHWA delineated thirteen controlling criteria that require formal approval for design exceptions when criteria are not met: (1) design speed; (2) lane width; (3) shoulder width; (4) bridge width; (5) structural capacity; (6) horizontal alignment; (7) vertical alignment; (8) grade; (9) stopping sight distance; (10) cross slope; (11) superelevation; (12) vertical clearance; and (13) horizontal clearance. The only way to obtain exceptions to the minimum standards set forth in AASHTO is a design exception, which only the FHWA can grant pursuant to 23 Code of Federal Regulations (C.F.R.) § 625.3(f). Requested design exceptions are thoroughly analyzed and reviewed by a technical team. If a design exception is not obtained, the minimum standards set forth in AASHTO must be met. Here the experts agree that shoulder slope is not a controlling criterion for which a design exception can be requested.

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[4] Federal Highway Administration, *Mitigation Strategies for Design Exceptions* (July 2007) https://wsdot.wa.gov/publications/fulltext/ProjectDev/Manuals/MitigationManual.pdf.

As for state standards, the KYTC implemented the *Highway Design Guidance Manual* to provide uniformity in the interpretation and administration of laws, regulations, policies, and procedures applicable to highway design. The KYTC dictates the project from start to finish. Engineers are routinely hired by the KYTC to design road projects in the Commonwealth, including NHS projects, through a rigorous and competitive qualification process that includes selection by a committee consisting of professional engineers. For federal highway projects, the Kentucky Model Procurement Code requires KYTC to utilize this type of qualified-based selection process when procuring engineering design services for federal highway projects. The KYTC Design Manual explicitly adopts the AASHTO guidelines, requiring engineers to work within those parameters to propose plans and alternatives that meet minimum federal standards.

The *Highway Design Guidance Manual* specifically acknowledges that engineering judgment must be used in the design process:

> This manual has been prepared to provide guidance to personnel of the Transportation Cabinet and primarily to the road designer. . . . This Highway Design Guidance Manual places an emphasis on flexibility. The goal is to be permissive by default and explicit where needed. Sufficient flexibility should encourage independent designs tailored to particular situations. **This manual should not supersede the application of sound engineering principles by experienced design professionals.**[5]

(Emphasis added).

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[5] Kentucky Transportation Cabinet, *Highway Design Guidance Manual* (Jan. 2006) https://transportation.ky.gov/Highway-Design/Highway%20Design%20Manual/General%20Information.pdf.

Early in the design process, the FHWA, KYTC, and the Engineers determined that adding lanes to I-65 would be accomplished by replacing the existing grassy median that divided the two sides of the highway with a concrete median barrier wall. According to HMB, the FHWA and KYTC examined two proposed alternatives that did not involve replacement of the grassy median with a barrier wall, but those alternatives were ultimately rejected. HMB asserts that once the concrete median alternative was selected, it was then required to implement a design which required all water to drain from the concrete median barrier wall to the outside shoulder utilizing a straight-line slope that drains water to the outside shoulder, thus across all travel lanes.

Additionally, the Engineers notified KYTC of a preexisting issue with the accident scene – a sag vertical curve – that did not meet FHWA standards for minimum stopping sight distance. Because of this issue, along with six other sag vertical curves, the Engineers sought and obtained a design exception, approved by the FHWA. The final design plans noted that the sag vertical curves were in a slight curvature section with low superelevation. Therefore, the plans asserted the drainage issues were of limited concern and were addressed in the design.

This exception was solely based on vertical alignment, which implicated only the reduction of the line of sight on the highway while traveling. This means the FHWA approved the stopping sight distance to be reduced from AASHTO's minimum standard of 730 feet to 652 feet at the area where this accident occurred, and in 6 other unrelated locations on I-65. No parties assert that the reduction of stopping sight distance contributed to the accident. Therefore, the contention that the design exception for vertical alignment resulted in FHWA approval for utilizing a straight-line shoulder slope with no rollover is misplaced, because the exception solely pertained to stopping sight distance. After the KYTC and FHWA approved the final design, a construction contractor added the new lanes, installed the concrete median barrier wall, and "superelevated" the curved sections of the roadway so that all lanes sloped in one direction, pursuant to the Engineers' design.

Returning to the applicable summary judgment standard, genuine issues of material fact exist as to the appropriateness of the Engineers' design, including whether it satisfies the governing standards, whether an exception should have been obtained, or whether the exception obtained sufficiently addressed the purported issues at the scene of the accident. Appellees' expert, James Valenta, is a highway safety engineer with over 47 years of experience in traffic safety research and highway design. In his opinion, the failure to include appropriate drainage inlets and slope a portion of the highway so that water drained into the drainage inlets, and not across the entire shoulder and travel lanes, failed to meet the minimum standards required by the KYTC and the FHWA. According to Valenta, the required design standards of the KYTC and FHWA call for at least a portion of the shoulder area to be drained away from the through traffic lanes. Therefore, he opined that the Engineers did not follow this design requirement, thus creating an unduly hazardous roadway during rainfall events, which was a substantial factor causing the accident.

Additionally, Valenta consulted Brent Slone, another engineering expert, who provided accident reconstruction services and performed an analysis of the accident data at the crash site both before and after construction. Slone calculated that the construction resulted in an increase in wet pavement accidents of 466% and was a result of designing stormwater runoff to drain across the through lanes of traffic. Slone noted that from May 16, 2011, to September 16, 2014, six wet pavement accidents occurred in the area, averaging 1.8 accidents per year. This period was prior to or during the design of the widened highway. After the designs were implemented and the highway was reconstructed, between July 31, 2017, and November 20, 2020, 34 wet pavement accidents were reported, which averages 10.2 accidents per year. Slone appropriately adjusted his calculations to account for an increase in road traffic and increase in precipitation days. Notably, two "slippery when wet" signs have been added to the accident site since this accident occurred.

The AASHTO standards state that in areas with a depressed median, all shoulders should be sloped to drain away from the traveled way on a divided highway. A depressed median, like the median that existed prior to the highway widening in this case, is lower than the road and is utilized for superior drainage and preventing head-on collisions given the wide separation between the directions of the interstate.[6] Conversely, a raised narrow median involves a concrete barrier elevated above the road, which prevents crossover collisions.[7] This type of median was added through the widening project.

> "With a raised narrow median, the median shoulders may slope in the same direction as the traveled way. However, in regions with snowfall, median shoulders should be sloped to drain away from the traveled way to avoid melting snow draining across travel lanes and refreezing. **All shoulders should be sloped sufficiently to rapidly drain surface water,** but not to the extent that vehicular use would be restricted."[8]

(Emphasis added).

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[6] Georgia Department of Transportation, *Improving Safety and Reducing Costs* (last visited Feb. 27, 2026) https://www.dot.ga.gov/GDOT/pages/Medians.aspx#:~:text=Medians%20are%20portions%20of%20the%20roadway%20that,/suburban%20areas%20*%20Increase%20capacity%20by%2030%25.

[7] *Id.*

[8] *A Policy on Geometric Design of Highways and Streets*, AASHTO, "Shoulder Cross Sections," § 4.4.3.

Using images from the final design plans, Valenta points out that a straight-line slope was recommended at the accident site, draining water from the concrete median barrier to the right-side shoulder. He notes that there is no shoulder break as required by the KYTC *Highway Design Guidance Manual*, and that the full shoulder drains across the travel lanes which is not recommended by the National Highway System design standards. In his deposition, he explained that it was a mistake for the Engineers to incorporate the typical section for a superelevated portion of the roadway that featured a straight-line slope from the concrete median all the way across the highway. Superelevation relates to the amount of cross slope needed on a horizontal curve to help counterbalance the centrifugal force of a vehicle traveling the curve based on the design speed.[9] Valenta asserted that the highest point should have been the line between the 14-foot shoulder and the new widened lane.

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[9] *Design Exceptions*, Texas Department of Transportation (last visited Feb. 27, 2026) https://www.txdot.gov/content/txdotoms/us/en/manuals/des/rdw/chapter-1--general-guidance/1-2-design-exceptions--design-waivers--design-vari/1-2-1-design-exceptions.htm.

Valenta explained the perceived slope issue as follows:

> Defendant engineers incorrectly designed the highway with a 2.8% straight line slope from the concrete median barrier across the 14 foot left shoulder where the barrier wall begins and the 2.8% slope continues across three (3) lanes of travel and exits after traveling over the right shoulder. By the defendant engineers improperly designing the highway where the accident occurred, there is extra stormwater from the 14 foot shoulder, together with an additional travel lane of pavement (as compared to pre-construction) which has placed more stormwater on the highway causing hydroplaning of vehicles.

Instead, Valenta opined that there should have been a slope to drain water from the left shoulder to the barrier wall and then into a drain, meaning the design should have included the highest point to be the line between the fourteen-foot shoulder and the new widened lane. That high point would have created a slope to the left, thus draining water off the left shoulder, instead of sloping to the right as shown in the Design Executive Summary. In sum, Valenta opined that the design standards of the KYTC and the FHWA call for at least a portion of the shoulder area to be drained away from the through traffic lanes, and this design requirement was not followed by the Engineers.

On the other hand, HMB contends the 2.8% straight line slope design was compliant with the AASHTO standards. Andre Johannes, Project Manager for KYTC, testified in his deposition that the Engineers complied with both KYTC and AASHTO standards with respect to the design where the accident occurred. He further stated the area in which the accident occurred was a curve, so "[f]or drainage purposes, this results in super-elevation rather than a crown point."[10] The Engineers explain his opinion to mean that because the area was a curve, the Engineers were required to utilize a straight-line slope and could not deviate from that requirement by adding a crown point. To the extent the Engineers or their experts disagree with Valenta, this is a question of fact with respect to how the Engineers designed the highway and whether such designs met the applicable standard of care.

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[10] We acknowledge that in *Rigsby*, exemption from liability was found where the plaintiff

presented only evidence that the particular design feature at issue was "necessary" but did not contradict the defendant's showing that the state forbade such a feature. Here, in contrast, Appellees meet the Engineers' proof that the state would not have allowed the desired design feature with competing expert proof that such a feature in fact was allowable.

Based on the foregoing, summary judgment was improper. Whether the Engineers complied with the applicable standards is clearly contested. The parties submitted evidence demonstrating that there are genuine issues of material fact, thus precluding summary judgment.

III. The Appellees' claims are not federally preempted.

The trial court also found summary judgment warranted on grounds that Appellees' claims are federally preempted. Again, we disagree. There is no evidence presented in this case that Kentucky law requires a higher standard for this roadway design issue than the FHWA.

The Engineers argue that because the FHWA has complete and exclusive control over the design of interstate highways that are part of the NHS, Appellees' negligence claims are preempted by federal law. Federal preemption, derived from the supremacy clause of the United States Constitution, directs that a state law that conflicts with federal law is without effect. *Niehoff v. Surgidev Corp.*, 950 S.W.2d 816, 820 (Ky. 1997). Preemption can be express, when the preemption language is found in the explicit language of federal law, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), or implied. "Implied preemption occurs when the state law actually conflicts with federal law or where the federal law so thoroughly occupies the legislative field that it may be reasonably inferred that Congress left no room for the state to supplement it." *Niehoff*, 950 S.W.2d at 820.

Congress has charged the FHWA with overseeing the design, construction, and maintenance of the NHS. *See* 49 United States Code (U.S.C.) § 104, 23 U.S.C. § 315. The applicable standards for interstate design are expressly set forth in 23 C.F.R. § 625. The purpose in adopting federal guidelines for interstate design is to "[a]dequately serve the existing and planned future traffic of the highway in a manner that is conducive to safety, durability, and economy of maintenance . . . ." 23 C.F.R. § 625.2(a)(1). An explicit goal of the FHWA is to provide the highest practical and feasible level of safety for people traveling on the NHS and to reduce hazards and "the resulting number and severity of accidents." 23 C.F.R. § 625.2(c). Further, the regulations specify the design standards to be utilized, but the standards are not absolute, and exceptions are permitted so long as the appropriate approval is received. 23 C.F.R. § 625.3(f)(1).

The Engineers assert that they designed the particular section of I-65 where the accident occurred in accordance with FHWA and KYTC requirements, therefore following the correct procedure as mandated by 23 C.F.R. § 625. Neither the enabling statutes nor the regulations contain an express statement of preemption, thus directing our analysis to implied preemption.

The Supreme Court has explained that it addresses claims of preemption "with the starting presumption that Congress does not intend to supplant state law." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). The Engineers assert that federal regulations would have no significance if a jury were simply allowed to second-guess the FHWA's approval of a design and determine at some time later that the FHWA made a mistake. The Engineers' position that state law negligence claims in Kentucky cannot coexist with federal highway design standards is simply unsupported by the law.

In *Russell v. Johnson & Johnson, Inc.*, 610 S.W.3d 233, 238 (Ky. 2020), a patient and his wife filed state law tort claims against a medical device manufacturer after a catheter perforated the patient's pulmonary vein, causing life-threatening issues. The federal Medical Device Amendments (MDA), applicable to the patient's claims, contains a limited preemption clause preempting states from establishing requirements for medical devices that are different from or in addition to any requirement applicable to the device under federal law. *Id.* at 238-39.

Citing several federal cases, the Court made clear that "limited federal preemption only applies to the extent Kentucky's parallel tort claims seek to impose a higher standard than federal law; our claims must be in harmony with federal regulations." *Id.* at 240. The Court held that "[i]f a state tort standard imposes a higher duty than federal regulations, the state standard is only preempted to the extent it imposes a more stringent duty . . . ." *Id.* "[A]s long as the state cause of action seeks to vindicate a claim within the boundaries of the federal regulation, it survives." *Id.*

The Engineers emphasize that federal law requires the Engineers to comply with standards when designing a national highway and those standards were satisfied. Further, they assert that Appellees' claims that the design should have been different from the design required by federal standards conflicts with the federal requirements.

In *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 661 (1993), a man was killed when a train operated by CSX collided with his truck at a railroad crossing. His widow pursued a wrongful death action, alleging CSX was negligent under Georgia law for failure to maintain adequate warning devices at the crossing and operating the train at an excessive speed. *Id.* The Court was tasked with determining the extent to which the Federal Railroad Safety Act (FRSA) preempted the state law claims. *Id.* The FRSA permits states to adopt laws or regulations relating to roadway safety "until such time as the Secretary has adopted . . . a regulation . . . covering the subject matter of such State requirement." *Id.* at 662. Thus, the Court explained that to prevail on the preemption claim, the petitioner had to establish more than that the regulations "touch upon" or "relate to" the maintenance and operation of trains at crossings. *Id.* at 664. The Court reasoned that "covering" indicated that preemption **"will lie only if the federal regulations substantially subsume the subject matter of the relevant state law."** ***Id.***

The FHWA dictates that states must employ warning devices that comply with its Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD), and regulations specify that warning devices must be installed at grade crossings. *Id.* at 666. As part of its ultimate holding that the state law negligence claims were not preempted, the Court held that the requirement that states comply with the MUTCD "does not cover the subject matter of the tort law of grade crossings." *Id.* at 668. In so reasoning, the Court explicitly recognized that the MUTCD states: "[i]t is the intent that the provisions of this Manual be standards for traffic control devices installation, but not a legal requirement for installation." *Id.* at 669. The enactment of the regulatory scheme for grade crossings did not rewrite traditional negligence law. *Id.* at 668. Therefore, the negligence claims regarding the grade crossing design were not preempted. *Id.* at 676.

Likewise, in this case, the FHWA requires that the design of highways part of the NHS, like I-65, comply with certain requirements. The parties agree that the highway design had to comply with *A Policy on Geometric Design of Highways and Streets*, published by AASHTO and commonly referred to as the "Green Book." The Green Book explicitly states:

> [t]he intent of this policy is to provide guidance to the designer by referencing a recommended range of values for critical dimensions. Good highway design involves balancing safety, mobility, and preservation of scenic, aesthetic, historic, cultural, and environmental resources. **This policy is therefore not intended to be a detailed design manual that could supersede the need for the application of sound principles by the knowledgeable design professional. Sufficient flexibility is permitted to encourage independent designs tailored to particular situations.**[11]

(Emphasis added). One of HMB's experts, Taylor Kelly, opined that the AASHTO standards are only a "guidance manual" used as a tool to inform decisions.

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[11] 6th ed., p. xli (2011).

The Engineers argue that adoption of these federal standards preempt state tort law claims trying to impose different standards in the design of interstate highways. To the contrary, the state tort law claim – that the design defects at issue did not comply with the applicable FHWA standards – seek to impose the same standards as federal law requires. While the federal government has clearly opted to regulate highway construction and design through imposition of the AASHTO standards, we fail to see how the negligence claims conflict with federal law.

Here, state law does not conflict with federal law. There is no conflict between the federal regulations governing highway design and requiring professional engineers, who were paid considerable sums for their design expertise, to exercise ordinary care under general principles of negligence.

CONCLUSION

For the foregoing reasons, we affirm the Court of Appeals.

All sitting. Lambert, C.J.; Conley, Goodwine, and Keller, JJ., concur. Nickell, J., dissents by separate opinion which Thompson, J., joins.

CRIMINAL LAW

APPELLATE PRACTICE

TIMELINESS OF AN APPEAL

CROSS-EXAMINATION OF A WITNESS

UNPRESERVED *MOSS* VIOLATION

PROSECUTORIAL MISCONDUCT

Defendant appealed as a matter of right his convictions for first-degree trafficking in a controlled substance, first offense and being a first-degree PFO — Commonwealth's case centered on a controlled buy conducted through a confidential informant — Police searched informant before and after buy; observed him enter defendant's residence; and recovered methamphetamine after he emerged from residence; however, police did not observe what occurred inside residence — Trial record alludes to an audio recording device fitted on informant, and to an audio recording that was apparently inconclusive — Commonwealth did not play any such recording for jury or seek to enter it into evidence — Defendant testified that informant did not buy drugs from him, but instead interacted with a woman who was present at his home — Defense attacked informant's credibility and sought to show case depended on whether jury believed informant — Leading officer and informant himself both testified that informant had been stopped for DUI while on probation for drug trafficking; that an apparent controlled substance was found in informant's vehicle; that no charge was brought in connection with that substance; that substance was never tested; that informant offered to help police gather evidence against defendant in response to this arrest; and that informant only worked with police on instant case — During a brief cross-examination of defendant, prosecutor attacked defendant's credibility and attempted to neutralize defendant's effort to portray informant as the witness whose trustworthiness the case depended upon — Pertinent to instant appeal, are the following questions: (1) after referencing informant's testimony that he had purchased narcotics from defendant before, prosecutor asked, "So he just made that up?"; (2) after establishing that defendant used methamphetamine and denied selling it to informant, prosecutor asked, "You just happened to have methamphetamine, use methamphetamine, and then Mr. Wilson [informant] is not telling the truth?"; and (3) after reciting informant's admissions that he was a felon, had received a DUI, and had purchased narcotics from defendant, prosecutor asked, "But your testimony today is that that's not accurate?" — Defense counsel did not object to these questions — Jury found defendant guilty — On June 6, 2024, trial court orally pronounced 10-year sentence and entered a signed docket entry — Trial court later reopened sentencing, held a further hearing, and stated that 10-year sentence had been based on mistaken information in pre-sentence investigation report — On August 19, 2024, trial court entered amended judgment imposing 20-year sentence — REVERSED and REMANDED for a new trial — Pursuant to RAP 3(A)(1), a defendant has 30 days to file an appeal from a final judgment of conviction — Final judgment includes the sentencing decision by the court — In instant action, trial court placed case back on the docket to correct a sentencing issue — Only 11 days passed since June 6 sentencing proceeding when defendant received notice that trial court *sua sponte* was claiming to reopen the matter — Defendant waited for re-hearing and its result, and then timely filed his notice of appeal, including his arguments regarding the conviction itself and the re-sentencing together in one appeal — Under these procedural facts, defendant's appeal was not untimely — The Kentucky Supreme Court noted that this holding is narrow — It did not hold that every later amended criminal judgment restarts the time for appeal — It did not decide whether June 6 docket entry constituted a final judgment for all purposes implicated by the parties' resentencing dispute — *Moss v. Com.* (Ky. 1997) prohibits forcing one witness to characterize another witness's testimony as a lie or otherwise to opine directly on another witness's truthfulness — Such questioning invades the jury's role as the sole judge of credibility and unfairly places the witness in a position where his own testimony is made to appear crude, hostile, or unbelievable simply because he rejects another witness's account — In instant action, prosecutor's first two challenged questions were direct *Moss* violations — Third challenged question, when taken in context of the entire cross-examination, is also a *Moss* violation — Since defendant did not preserve error, reviewed for palpable error under RCr 10.26 — A palpable error is one that results in manifest injustice — In the context of prosecutorial misconduct, the question is whether the misconduct was so improper, prejudicial, and outcome-significant that there is a substantial possibility that the result would have been different absent the error — Four factors to consider in this determination are: (1) whether the misconduct tended to mislead the jury or prejudice the accused; (2) whether it was isolated or extensive; (3) whether it was deliberate or accidental; and (4) the strength of the evidence against the accused — Under instant facts, unpreserved *Moss* violation was palpable and warrants reversal — The Kentucky Supreme Court noted that most unpreserved *Moss* violations do not merit reversal — In instant action, case rested on informant's testimony — Officer admitted on cross-examination that they were relying on informant for the critical gap during the unobserved interval inside defendant's residence — All four factors weighed towards palpable error —

Paul Jones v. Com. (2024-SC-0423-MR); Bath Cir. Ct., Barber, J.; Opinion by Justice Conley, *reversing and remanding*, rendered 4/23/2026. **[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, Paul Jones, appeals as a matter of right[1] from a Bath Circuit Court judgment convicting him of first-degree trafficking in a controlled substance, first offense, and of being a first-degree persistent felony offender. He argues that the Commonwealth committed misconduct during his cross-examination and closing argument by violating the rule set out in *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997), and that the trial court's amendment of his sentence from ten years to twenty was improper. The Commonwealth argues that no reversible *Moss* violation occurred and that the amended sentence was permissible, but also argues, at the threshold, that Jones's conviction-related claim is untimely.

[1] Ky Const. §110(2)(b).

We hold that Jones's appeal is properly before this Court; that the Commonwealth's cross-examination of Jones violated *Moss*; and that, in the particular circumstances of this trial, the resulting misconduct was palpable and requires a new trial. Because we reverse Jones's conviction and remand for a new trial, we do not decide the parties' dispute concerning the later resentencing proceedings.

I. Facts and Procedural History

The Commonwealth's proof centered on a controlled buy conducted through confidential informant Brian Wilson. Police searched Wilson before and after the buy, observed him enter Jones's residence, and recovered methamphetamine after he emerged. The police did not, however, observe what occurred inside the residence. The trial record alludes to an audio recording device fitted to Wilson, and to an audio recording that was apparently inconclusive. The Commonwealth did not play any such recording for the jury or seek to enter the same into evidence. Jones testified that Wilson did not buy drugs from him at all, but instead interacted with a woman who was present there. Thus, although some parts of the Commonwealth's proof were not disputed, the core factual dispute concerned what happened during the period Wilson was inside the residence and, more specifically, who sold him the methamphetamine.

The defense theory was correspondingly clear. From opening statement forward, the defense attacked Wilson's credibility and sought to show that the case depended on whether the jury believed him. Evidence was presented, through the testimony of the leading officer on the case (Officer Southerland) as well as through that of Wilson himself, that Wilson had been stopped for

DUI while on probation for drug trafficking; that an apparent controlled substance was found in his vehicle; that no charge was brought in connection with that substance; that the substance was never tested; that Wilson offered to help police gather evidence against Jones in response to this arrest; and that Wilson worked with police only in this case. The defense also elicited agreement from Officer Southerland on cross-examination that police were relying on Wilson's account for what occurred during the unobserved interval inside the residence.

Jones testified in his own defense. The prosecutor's cross-examination of Jones was brief. As the video record reflects, it lasted only about five minutes and consisted of roughly ten substantial questions. Nearly all of those questions were directed at the same point: attacking Jones's credibility and neutralizing his effort to portray Wilson as the witness whose trustworthiness the case depended upon. Within that short examination, the prosecutor asked three questions that are the focus of this appeal: (1) after referencing Wilson's testimony that he had purchased narcotics from Jones before, the Commonwealth asked, "So he just made that up?"; (2) after establishing that Jones used methamphetamine and denied selling methamphetamine to Wilson, the Commonwealth asked, "You just happened to have methamphetamine, use methamphetamine, and then Mr. Wilson is not telling the truth?"; and (3) after reciting Wilson's admissions that he was a felon, had received a DUI, and had purchased narcotics from Jones, the Commonwealth asked, "But your testimony today is that that's not accurate?"

Defense counsel did not object to these questions. The jury convicted Jones. It recommended a five-year sentence on the trafficking conviction, later enhanced to twenty years by the PFO finding. On June 6, 2024, the circuit court orally pronounced a ten-year sentence and entered a signed docket entry reflecting five years enhanced to ten years. The court later reopened sentencing, held a further hearing, and stated that the ten-year sentence had been based on mistaken information found in the pre-sentence investigation report. It then entered an amended AOC-450 judgment on August 19, 2024 imposing a twenty-year sentence. Jones filed his notice of appeal from that August judgment.

II. Jones's appeal of his conviction is properly before this Court.

The Commonwealth first contends that Jones's challenge to his conviction must be dismissed as untimely. Its argument is that if the June 6, 2024 docket entry was a final judgment, as Jones himself would have it when pressing his argument on the re-sentencing issue, then Jones had to file a notice of appeal within thirty days of that entry. Because Jones instead appealed from the later August 19 judgment that followed the amended sentence, the Commonwealth says the only timely appealed matter is the later sentence, not the conviction-related *Moss* claim.

We are not persuaded.

A defendant has 30 days to file an appeal from a final judgment of conviction. Ky. R. App. P. (RAP) 3(A)(1). The final judgment includes the sentencing decision by the court. Ky. R. Crim. P. (RCr) 11.04. However, this case does not present the ordinary situation in which a trial court enters judgment, the case becomes fixed, and a party simply declines or otherwise fails to appeal. After the June 6 sentencing proceeding, the circuit court signed an order on June 14 placing the case back on the docket "to correct Defendant's sentence on the record." That order was entered June 17. A further sentencing hearing was then held in August, and the circuit court later entered the amended AOC-450 judgment sentencing Jones to twenty years on August 19, 2024. In other words, while the time to file an appeal from a final judgment is thirty days, only eleven days had passed since the June 6 sentencing proceeding when Jones received notice that the trial court *sua sponte* was claiming to reopen the matter. At that point, Jones waited for that re-hearing and its result, and then timely filed his notice of appeal, including his arguments regarding the conviction itself and the re-sentencing together in the one appeal.

The Commonwealth seems to contend that Jones should have appealed the **conviction** within thirty days of the June 6 entry, while waiting to see what would happen regarding the **sentence** at a rehearing that was still in the future, and then filed a separate appeal to the re-sentencing. First, this is incorrect on the merits, as we will discuss shortly. But even if the Commonwealth were correct that this is what should have been done, dismissal of the appeal would still be unwarranted. When counsel's negligence costs an indigent defendant his statutory right of appeal, the proper remedy is "at least" a reinstated or belated appeal. *Moore v. Commonwealth*, 199 S.W.3d 132, 139 (Ky. 2006). Jones has consistently sought appellate review, and his reply brief expressly requests the functional equivalent of belated-appeal relief in the alternative. Under these circumstances, we would decline to mandate the empty formality of dismissing this appeal only to permit the same case to return through a separate belated-appeal procedure.

Turning to the merits, however, in this procedural posture, Jones's appeal was not untimely. We decline to hold that Jones forfeited (non-belated) appellate review of his conviction by failing to file a separate merits appeal while the trial court itself had reopened sentencing and was actively conducting further proceedings.

Our holding is narrow. We do not hold that every later amended criminal judgment restarts the time for appeal. Nor do we decide whether the June 6 docket entry constituted a final judgment for all purposes implicated by the parties' resentencing dispute. It is enough to say that, where the trial court reopened sentencing within the thirty-day period for filing a notice of appeal, conducted a later sentencing hearing, and then entered the judgment from which the defendant appealed, a timely appeal from that later judgment may proceed against both the conviction and the re-sentencing that caused the delay.

III. The Commonwealth's cross-examination of Jones violated *Moss*.

Kentucky law has long prohibited forcing one witness to characterize another witness's testimony as a lie or otherwise to opine directly on another witness's truthfulness. *See Moss*, 949 S.W.2d at 583; *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010); *Barrett v. Commonwealth*, 677 S.W.3d 326, 340–41 (Ky. 2023). The reason is plain. Such questioning invades the jury's role as the sole judge of credibility and unfairly places the witness in a position where his own testimony is made to appear crude, hostile, or unbelievable simply because he rejects another witness's account. The *Moss* prohibition exists "to prevent a witness from being presented in an unflattering light from which he could not recover in the eyes of the jury." *Luna v. Commonwealth*, 460 S.W.3d 851, 880 (Ky. 2015).

The Commonwealth argues that no *Moss* violation occurred because Jones's testimony already implied that Wilson was lying, and the prosecutor was only verbalizing that implication. But factfinders have to sort through mutually-exclusive stories all the time. It is the charge of the litigants to provide evidence to persuade the finder of fact that their version of the underlying events is the correct one. The jury may infer that there is a contradiction -- i.e. "if X is correct then Y must be incorrect" -- but *Moss* forbids compelling the witness to assert the contradiction directly. That a defendant's theory necessarily implies that another witness is mistaken or untruthful does not authorize the prosecutor to compel the defendant to adopt the formulation that *Moss* forbids.

Notably, even the cases the Commonwealth cites for its argument that the questions were not even *Moss* violations, such as *Newman v. Commonwealth*, 366 S.W.3d 435, 451 (Ky. 2012), and *Parker v. Commonwealth*, 482 S.W.3d 394 (Ky. 2016), do not state that no *Moss* violation occurred. This Court in *Newman* found that there was no palpable error in part because of the nature of the defendant's defense, but the questions in that case were still *Moss* violations. *Newman*, 366 S.W.3d at 442. And in *Parker*, we held that a proposed distinction between being mistaken and lying did not need to be analyzed, because even if *Moss* violations occurred, they would not have been palpable under the conditions of that case. *Parker*, 482 at 442. Multiple questions in this case pertained to accusing the witness of lying, not merely of being mistaken, and so the distinction briefly considered in *Parker* remains of no use here.

Turning to the particular questions challenged in the appeal, the first two challenged questions were direct *Moss* violations. After asking Jones whether he had heard Wilson testify that he had bought narcotics from Jones before, the prosecutor asked, "So he just made that up?" Later, after eliciting that Jones used methamphetamine and denied selling methamphetamine to Wilson, the prosecutor asked, "You just happened to have methamphetamine, use methamphetamine, and then Mr. Wilson is not telling the truth?" Those questions did not merely illuminate a discrepancy in testimony, or contrast two irreconcilable accounts. They required Jones to answer in precisely the forbidden liar-or-truth-teller format. The first question demanded that Jones say Wilson "made that up." The second demanded that Jones say Wilson was "not telling the truth." Both violate *Moss*.

The third question, viewed in isolation, is closer: after reciting Wilson's admissions that he was a felon, had gotten a DUI, and had purchased narcotics from Jones, the prosecutor asked, "But your testimony today is that that's not accurate?" Standing alone, that question might be characterized as a mere restatement of conflicting evidence, or as an assertion that the other witness was merely "mistaken" rather than lying (if this Court were of

a mind to draw such a distinction when it comes to *Moss* violations, as was requested in *Parker*). But it did not occur in isolation. It came after the two earlier liar-or-truth-teller questions and was part of the same short, concentrated cross-examination. In context, it served the same function. It again forced Jones to reject Wilson's account in the prosecutor's preferred framing rather than simply allowing the jury to compare the two witnesses' testimony for itself.

IV. In the circumstances of this trial, the misconduct was palpable.

Because the issue is unpreserved, Jones is entitled to relief only if the error was palpable under RCr 10.26. A palpable error is one that results in manifest injustice. In the context of prosecutorial misconduct, the question is whether the misconduct was so improper, prejudicial, and outcome-significant that there is a substantial possibility the result would have been different absent the error. *See Brafman v. Commonwealth*, 612 S.W.3d 850 (Ky. 2020). There are four factors a court must consider when determining whether the misconduct rises to this level: (1) whether the misconduct tended to mislead the jury or prejudice the accused; (2) whether it was isolated or extensive; (3) whether it was deliberate or accidental; and (4) the strength of the evidence against the accused. *Id.*, at 861.

We have in multiple cases pointed out that unpreserved *Moss* violations have never yet been found to be palpable error. *See*, *e.g.*, *Barrett* at 342; *Parker v. Commonwealth*, 482 S.W.3d 394, 406 (Ky. 2016). But these sorts of statements summarizing past findings are not a rule that no *Moss* violation **can** be palpable error. Indeed, how could that be? Palpable error is reviewed on a case-by-case basis; and if an error is real, then it might turn out to be palpable under the circumstances of a given case. *Moss* has long drawn a clear line that it is error for a prosecutor to force one witness to characterize another as lying or "not telling the truth." That line has not become unenforceable merely because palpable-error relief has previously been denied on the particular facts before this Court in other cases. To the contrary, the repeated need to identify *Moss* violations while withholding relief confirms only that the inquiry remains case-specific. *Meadows* does not hold otherwise.

We do not hold that every unpreserved *Moss* violation warrants reversal. Most do not; in fact as *Meadows* correctly pointed out, thus far no case on which we have ruled has.[2] But we also cannot understand *Moss* and its progeny to create a rule of practical impunity. If repeated liar-or-truth-teller questions aimed at the central credibility issue in a tightly contested trial could never amount to palpable error, then the rule announced in *Moss* is essentially toothless. We decline to treat it that way.

[2] Though it is an unpublished Court of Appeals opinion and not binding precedent per RAP 41(a), *Ceraulo v. Commonwealth*, No. 2023-CA-0625-MR, 2024 WL 4644782, at *4 (Ky. App. Nov. 1, 2024) demonstrates that Kentucky appellate courts do not treat palpable-error relief for unpreserved *Moss* errors as categorically unavailable.

The Commonwealth proved that Wilson entered Jones's residence under surveillance and emerged with methamphetamine. But the Commonwealth did not prove who sold the methamphetamine to Wilson while he was inside, unless you believe Wilson's account (and discount Jones's). The Commonwealth's case against Jones depended on Wilson's account.

In these circumstances, we have struck upon a case in which *Moss* errors were palpable. This was not a case in which the improper questions touched only a collateral contradiction. Nor was it a case in which abundant independent proof rendered the witness-to-witness credibility dispute incidental. The case rested on Wilson. The defense developed multiple facts from which the jury could question Wilson's credibility: his DUI arrest, his probationary status, the apparent controlled substance found in his vehicle, the absence of charges concerning that substance, the lack of testing of that substance, and his one-shot role as a confidential informant who worked with police only in this case. On top of that, Officer Southerland admitted on cross-examination that police were relying on Wilson for the critical gap during the unobserved interval inside the residence. The defense did not merely assert that Wilson was untrustworthy. It gave the jury concrete reasons to scrutinize him.

That is why the Commonwealth's use of *Moss*-violating questions created a substantial possibility that the verdict was affected. When credibility is central, *Moss*-violating questions aimed at the defendant are live fodder for palpable error. By the time the Commonwealth reached its cross-examination of Jones — the last witness of the case — it had every reason to recognize that Jones's credibility attack on Wilson was the central obstacle to conviction. The case turned on the jury's assessment of credibility between these two witnesses regarding the unobserved event inside the residence.

In that moment, rather than simply exposing inconsistencies, making its best arguments as to why it had the better of the credibility issue during its closing statement, and letting the jury do its work, the prosecutor resorted to *Moss*-violating formulations to cast Jones's defense in an inaccurately negative light. This was manifestly unjust in this particular case because the inaccurately negative light was being cast on the central issue of the case.

In terms of the considerations required for a misconduct analysis in cases such as *Brafman*, all four factors weigh towards palpable error in this case. First, the improper questions prejudiced the accused. The questions went directly to the one point the jury most needed to assess independently: whether Wilson should be believed about the identity of the seller. By forcing Jones to characterize Wilson's testimony in liar-or-truth-teller terms, the prosecutor reshaped the conflict into a form that unfairly burdened Jones's defense. The jury was not simply invited to decide which witness was more credible. Jones was made to look as though his defense amounted to nothing more than branding Wilson a liar to save his own skin. In reality there was substantial evidence to challenge Wilson's credibility without any testimony from Jones. The jury must decide that question of credibility, but it must be framed properly for them to do so. If credibility is the central issue in a case, then a *Moss* error is likely to be prejudicial, and it was in this case.

The circumstances also indicate that the improper questions were deliberate rather than accidental, and that they were not isolated or stray incidents. The brevity of the exchange does not cut against Jones in this case, but for him. In some cases, a short exchange suggests an isolated misstep. Here, the entire examination was short because it was focused. Three of the ten questions were *Moss* violations. The prosecutor used a meaningful fraction of a very brief cross-examination to hammer the precise forbidden theme. The concentration of the improper questioning underscores the centrality of the credibility battle, and the Commonwealth's deliberate focus on that issue. The *Moss* questions were neither isolated nor accidental.

Finally, the strength of the evidence also weighs in favor of finding the errors palpable. The evidence was sufficient to go to the jury, but sufficiency is not the point. The point is whether the Commonwealth's proof of the decisive disputed fact — who sold the methamphetamine inside the residence — was so strong that the improper questioning could not have mattered. It was not. As we have observed previously, "the witness who affirms, and the accused who denies, make an equal balance." *Masters v. Commonwealth*, 724 S.W.3d 751, 768 (Ky. 2025) (quoting V Tucker's *Blackstone* 357 (St. George Tucker ed., *The Lawbook Exchange*, Ltd. 2011) (1803)). The Commonwealth's only proof that it was Jones who sold the drugs in the otherwise unseen transaction was to offer a confidential informant to contradict Jones's denial, and then to attack Jones's credibility relative to that witness in part by asking Jones *Moss*-violating questions.

RCr 10.26 is case-specific. In this case, repeated *Moss*-violating questions during a short and highly concentrated cross-examination created a substantial possibility that the verdict was affected.[3] We therefore conclude that, in the specific factual context of this case, the misconduct was flagrant enough to amount to palpable error. Manifest injustice occurred.

[3] Jones also points to the prosecutor's closing argument emphasizing that Wilson and the officers "had no reason to lie." We do not treat the closing argument as a separate, independent ground for reversal. But it is relevant to the prejudice and misconduct analysis. The problem is not that the Commonwealth argued credibility. Of course it could do so. The problem is that, after using improper questioning to force Jones into the liar-or-truth-teller posture, the Commonwealth then returned in closing to the same ground by inviting the jury to view Wilson and the officers as having "no reason to lie." In a case where the defense had developed record-based reasons to question Wilson's motives, reliability, and credibility, and in which the officers by their own admission had nothing to lie about in that they did not witness the disputed transaction, that closing argument brushed aside real credibility concerns the jury was entitled to weigh. The defense did not object to this statement either (as a misrepresentation of the facts in evidence, for instance), and the jury was free to reject this argument by the prosecutor if it found it unpersuasive. But it was much more likely to find it persuasive because of the *Moss*-violating questions that had been brought to bear against Jones on cross-examination. The closing argument therefore aggravated the prejudice created by the improper cross-examination.

V. We do not reach the resentencing issue.

The appellant also argues that the circuit court lacked authority to increase his sentence from ten years to twenty years after the June 6 proceedings. Because we reverse Jones's conviction and remand for a new trial, we do not decide that resentencing dispute. Nothing in this opinion should be read as resolving whether the June 6 entry constituted a final judgment for resentencing-authority purposes, whether the error the court cited in the resentencing hearing was clerical or judicial in nature, or whether the sentencing issue would otherwise entitle Jones to relief. We addressed the June-to-August procedural sequence above only as necessary to address the Commonwealth's threshold claim that the conviction-related appeal is untimely.

VI. Conclusion

For the foregoing reasons, the judgment of the Bath Circuit Court is reversed, and this matter is remanded for a new trial.

All sitting. Lambert, C.J.; Bisig, Goodwine, Nickell, and Thompson, JJ., concur. Keller, J., concurs in result only.

OPEN RECORDS ACT

"PUBLIC RECORDS" HELD BY A "PUBLIC AGENCY"

PRIVATE RECORDS IN THE EXCLUSIVE OWNERSHIP AND CONTROL OF KENTUCKY DEPARTMENT OF FISH AND WILDLIFE RESOURCES COMMISSION MEMBERS ON THEIR PRIVATE CELL PHONES AND IN THEIR PRIVATE EMAIL ACCOUNTS

On August 10, 2021, plaintiff made Open Records Act (ORA) request to Kentucky Department of Fish and Wildlife Resources Commission (Commission) seeking all emails and text messages sent from June 1, 2020, to present time between any two or more of the following individuals: Commission members, including all current and some former Commission members who were listed by name, Representative Massey, and Representative Koch — On August 17, Commission produced documents and recommended plaintiffs seek correspondence from Massey's and Koch's offices — Commission produced more documents on August 24, and promised a third release on August 27 — On August 25, Commission asked plaintiff to confirm if their search included emails sent or received exclusively on private devices and email addresses — Commission noted that several members used private email to conduct public business — It is undisputed that Commission members were not provided with governmental email accounts — On August 27, with its final release, Commission noted that, consistent with an Attorney General opinion, documents solely in the possession of individuals on their personal devices are not owned by Commonwealth; therefore, they are not "public records" within the scope of ORA — Commission stated that it provided Commission members with copy of plaintiff's ORA request and asked them to produce any responsive documents that they may have in their personal email — Commission stated that individual members could not conduct any business except when in a public meeting with a quorum and therefore their personal emails and texts were not considered public records to be retained by Commission — Plaintiffs filed instant action against Commission alleging willful violation of ORA — Both parties filed motions for summary judgment — Trial court granted in part and denied in part each of the two motions — Trial court ordered Commission to produce emails Commission members sent or received from their private email addresses concerning Commission business — Trial court did not explain how Commission was to obtain such emails from the volunteer Commission members' private email accounts — Trial court reached the opposite conclusion when it came to Commission members' text messages and other electronic communications sent and received on their private devices — Trial court did not find that Commission willfully violated ORA — Both parties appealed — Court of Appeals affirmed in part, reversed in part, and remanded — AFFIRMED IN PART, REVERSED IN PART, and REMANDED — Private records in the exclusive ownership and control of individual Commission members and former members (collectively "members") on their private cell phones and in their private email accounts are not "public records" held by a "public agency" for purposes of ORA — A "public agency" includes several distinct groups, including "every state or local government officer" — "Every state officer" in KRS 61.870(1)(a) includes both state officers specifically provided for in the Kentucky Constitution and inferior state officers that are not named in the Constitution — Commissioner of the Department is an "inferior state officer" — "Every state officer" does not include "members of boards and commissions" as they are excluded from being state officers by Constitution — Thus, volunteer members of Commission do not individually qualify as each being a "public agency" — Texts and emails retained by individual Commission members are not constructively public records in the possession of the Commission simply by virtue of the members' volunteer connection to the Commission — Because these private records are not in the custody of a public agency, individual Commission members do not qualify as being the "custodian" of "public records" under KRS 61.870(6) — It makes logical sense to treat these individual Commission members differently than the Department, Commission, and Commissioner — Commission members cannot act alone and authoritatively through texts and email — Commission members can only officially act when they meet quarterly as a group in Frankfort and at other times as committees; advise the Commissioner; and approve certain actions of the Commissioner — Whether public records can be generated on private devices and thus be subject to disclosure under ORA depends upon the authority of the person making such records — If someone requesting public records has a good faith basis to believe that government actors are seeking to subvert ORA by deliberately conducting government business on private devices, the solution is to file a civil lawsuit regarding conspiracy to subvert ORA against the governmental entities and officers, members, employees, etc., who are alleged to have participated in such a conspiracy — If there is probable cause that such is occurring, discovery under court supervision can explore that issue, and disputed items can be subject to *in camera* review — The Kentucky Supreme Court noted that instant action exposes the problems inherent in not providing the members of the Commission with the means to conduct the government's business in a way that will automatically create records that the Commission can review and use to respond to ORA requests — Executive public agencies can avoid such problems in the future by providing anyone who acts on their behalf with state email addresses and establishing policies that instruct them to use the email addresses for any government business-related emails — General Assembly can also alter ORA to address these issues —

Kentucky Department of Fish and Wildlife Resources Commission v. Kentucky Open Government Coalition, Inc. (2023-SC-0524-DG) and *Kentucky Open Government Coalition, Inc. v. Kentucky Department of Fish and Wildlife Resources Commission* (2024-SC-0275-DG); On review from Court of Appeals; Opinion by Justice Thompson, *affirming in part, reversing in part, and remanding*, rendered 4/23/2026. **[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 are reviewing the resolution of an open records request. The Kentucky Department of Fish and Wildlife Resources Commission (the Commission) and the Kentucky Open Government Coalition (KOGC) each appeal from the portion of the Court of Appeals' opinion which was determined contrary to their positions. We conclude that private records in the exclusive ownership and control of individual Commission members and former members[1] on their private cell phones and in their private email accounts are not "public records" held by a "public agency" for purposes of the Open Records Act (ORA), Kentucky Revised Statutes (KRS) 61.870 *et seq.* which must be disclosed in response to an open records request.

[1] As it is cumbersome to repeatedly be referring to current and former Commission members, we will generally just refer to both groups as Commission members.

I. FACTUAL AND LEGAL BACKGROUND

On August 10, 2021, the KOGC made open records requests from the Commission seeking:

> All emails and text messages that were sent from 1 June 2020 to present time, between any 2 or more of the following individuals listed: Rich Storm (former Commissioner KDFWR), Brian Clark (deputy commissioner/acting commissioner KDFWR), KDFWR Commission Chairman- Karl Clinard, Jeff Eaton (past 6th district commissioner), KDFWR Commission members, [and elected members to the legislature] Representative C. Ed Massey and Representative Matthew Koch.
>
> Please note that this request is **not limited** to communications that took place on government-owned email accounts and cell phones . . . .

The Commission responded promptly, producing some 400 documents on August 17, 2021; it also recommended seeking such correspondence from Representative Massey's and Representative Koch's offices and provided mailing and email addresses for them. The Commission provided a second release of documents on August 24, 2021, and promised a third release on August 27, 2021.

On August 25, 2021, the KOGC inquired: "Can you please confirm if your search for responsive records includes emails sent or received exclusively on private devices/addresses?" and further noted its understanding that "several commission members use private email to conduct public business[.]" The KOGC attached printouts from the Commission's website which listed the Commission members' private email accounts as their contact information. It is undisputed that the Commission members were not provided with governmental email accounts.

On August 27, 2021, the Commission responded with its final release of responsive documents and expressed its viewpoint consistent with an Attorney General opinion[2] that "documents solely in the possession of individuals on their personal devices are not owned by the Commonwealth and therefore are not 'public records' within the scope of the open records act." The Commission additionally stated: **"Commission members were provided with a copy of your open records request, and were asked to produce any responsive documents which may be contained in their personal email. No such privately owned communications have been provided for the Department's review or release."** (Emphasis added). The Commission further expressed its opinion that individual commission members could not conduct any business except when in a public meeting with a quorum and therefore their personal emails and texts were not considered public records to be retained by the Commission.

[2] *In re: Brian Mackey/Dep't of Fish and Wildlife*, 21-ORD-127, 2021 WL 3233032 (2021).

On September 3, 2021, the KOGC filed suit before the Franklin Circuit Court claiming a willful violation of the ORA on the basis that "the Commission has failed to provide any communications between and among the Commissioners on their private devices or email accounts from which they do all Commission business[.]" The KOGC disagreed with the Commission's justification that these communications on the members' cell phones and email accounts were not public records.

The parties filed competing motions for summary judgment. The trial court ultimately granted in part and denied in part each of the two motions.

The trial court first concluded that public records are not subject to a "possession only approach" under the ORA and determined that all records "used or prepared by an agency fall within the scope of the [ORA], regardless of where the record is stored." The trial court reasoned that because the Commission provided private email addresses as the point of contact for the Commission members, it was logical to presume that emails sent or received by them were "prepared" and "used" by the Commission. The trial court ordered the Commission to produce emails Commission members sent or received from their private email addresses concerning Commission business. The trial court did not explain how the Commission was to obtain such emails from the volunteer Commission members' private email accounts.

The trial court reached the opposite conclusion when it came to the Commission members' text messages and other electronic communications sent and received on their private devices. It found that although such communications were public records under the ORA, the exemption found in KRS 61.872(6) was applicable because retrieving and producing those records would be impractical and would place an unreasonable burden on the responding agency as well as invade the Commission members' privacy interests.

Finally, the trial court rejected KOGC's assertion that the Commission has committed a willful violation of the ORA. It held the Commission "at least made a good faith effort" to obtain the requested records by asking the Commission members to provide emails sent or received on their private email accounts. Therefore, the trial court concluded that the statutory penalties provided in KRS 61.882(5) as available for a willful violation were unwarranted.

The Commission and the KOGC both appealed from this mixed result to the Court of Appeals. The Court of Appeals affirmed in part, reversed in part, and remanded to the trial court for further proceedings.

The Court of Appeals agreed with the trial court's assessment that all records prepared and used by a public agency constitute public records which are subject to production. Noting the ORA "generally favors disclosure," it concluded that adopting the possession-only approach to public records advocated by the Commission "would certainly defeat the underlying purpose of the Open Records Act as public officials could easily evade disclosure of public records simply by utilizing their personal cell phones." The Court of Appeals concluded both emails and text messages were subject to production, thereby rejecting the trial court's categorical exclusion of text messages from the ORA. Additionally, the Court of Appeals concluded the trial court erred in finding the request would impose an unreasonable burden on the Commission by relying on generalized concerns and hypothetical scenarios rather than conducting the fact-specific analysis required under the ORA and remanded the matter for the trial court to conduct the appropriate analysis.

The Court of Appeals likewise held the trial court erred in utilizing general privacy interests and theoretical "government overreach" in support of its decision to invoke the exception from disclosure based on a "clearly unwarranted invasion of personal privacy." It concluded the ORA contemplates a fact-specific analysis which balances personal privacy interests with the public interest in disclosure. Thus, a categorical exclusion of text messages found on personal cellphones would be antithetical to the core purpose of the ORA and would encourage public officials to utilize personal devices to "place vital public records beyond the reach of citizens." The Court of Appeals did not explain how the Commission was to obtain responsive emails or texts from the volunteer Commission members' private email accounts or their private cell phones.

Finally, the Court of Appeals agreed with the trial court that the Commission had not committed a willful violation of the ORA. It held the law surrounding open records requests relative "to personal email accounts and text messages stored on personal cell phones was unsettled" and, therefore, statutory penalties were unwarranted.

We granted the Commission's motion and KOGC's cross-motion for discretionary review of the Court of Appeals' decision. We affirm in part, reverse in part, and remand.

II. ANALYSIS

At the time of its enactment in 1976, the ORA typically applied to stored paper documents, but whether a record exists in paper or electronic form does not change our analysis of whether the ORA applies to require that documents be produced as "public records" held by a "public agency." The fundamental policy of the ORA "is that free and open examination of public records is in the public interest[.]" KRS 61.871.

KRS 61.878(1) excludes access to public records absent a court order on various grounds, including as are pertinent here:

> (a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;
>
> . . . .
>
> (s) Communications of a purely personal nature unrelated to any governmental function[.][3]

By doing so, the ORA recognizes that there is a right of privacy and that documents of a personal nature or held in the custody of private individuals need not be disclosed.

[3] We opt to use the current numbering of KRS 61.878(1)(s), rather than the subsection numbering in effect in 2021.

A. Records in the Custody of Individual Commission Members Do Not Constitute Public Records of a Public Agency.

The Department of Fish and Wildlife Resources (the Department) is comprised of "a commissioner, a Fish and Wildlife Resources Commission, the Division of Law Enforcement, and other agents and employees provided for in this chapter." KRS 150.021(1). The Commission consists of nine members appointed by the governor and confirmed by the senate, one from each commission district. KRS 150.022(1)-(2).

Both the Department and the Commission each qualify as a "public agency" under several of the broad definitional categories established in KRS 61.870, specifically KRS 61.870(1)(b), (g), and (j). Accordingly, the Department and the Commission must maintain and produce public records pursuant to KRS 61.872. Certainly, records which are available on the Department's servers and its computers which are the result of its employees' and volunteers' work for the Commission can properly be accessed and produced.[4]

[4] For example, emails from the Commission members' private email accounts which were sent to the Commissioner and other persons with Commission email accounts were available for disclosure pursuant to the ORA and were in fact disclosed in response to the KOGC's request.

The Kentucky Constitution vests the supreme executive power in the Governor. Ky. Const. § 69. The Kentucky Constitution also identifies executive state officers in the persons of the Treasurer, Auditor of Public Accounts, Commissioner of Agriculture, Labor and Statistics, Secretary of State, and Attorney-General. Ky. Const. § 91. Below these named officers are inferior state officers who are not specifically identified in the Constitution but instead created by statute. Ky. Const. § 93. Below or at least distinct from inferior state officers are members of boards and commissions.

Section 93 of the Kentucky Constitution, as amended in 1992, provides:

> **Inferior State officers and members of boards and commissions**, not specifically provided for in this Constitution, may be appointed or elected, in such manner as may be prescribed by law, which may include a requirement of consent by the Senate, for a term not exceeding four years, and until their successors are appointed or elected and qualified.

1992 Ky. Acts, Ch. 168 § 12 (S.B. 226) (emphasis added). Prior to this amendment of this section of the Constitution, there was only the category of "inferior state officers." *See Fox v. Grayson*, 317 S.W.3d 1, 5 (Ky. 2010) (detailing this history for other purposes in comparing S.B. 226 with the relevant language contained in our Third and Fourth Constitutions).

Therefore, prior to the 1992 amendment taking effect, members of commissions may have been included as "inferior state officers." For example, in *Sibert v. Garrett*, 197 Ky. 17, 246 S.W. 455, 461 (1922), the Court determined that Section 93 precluded the legislature from appointing members of the state highway commission.

However, the 1992 amendment establishes that "members of boards and commissions" are distinct from "inferior state officers" by placing an "and" between these two categories. If these two groups were meant to both be considered inferior state officers the amendment could have instead stated "inferior state officers, including members of boards and commissions."

KRS 61.870(1) defines "public agency" as including several distinct groups. One such group is: "Every state or local government officer[.]" KRS 61.870(1)(a). "Every state officer" includes both state officers specifically provided for in the Constitution and inferior state officers that are not named in the Constitution. The Commissioner of the Department is certainly an "inferior state officer."

What "every state officer" cannot include are "members of boards and commissions" as they are excluded from being state officers by the clear wording of our Constitution. Therefore, volunteer members of the Commission do not *individually* qualify as each being a "public agency" under KRS 61.870(1) because these members are not each a "state . . . officer" per KRS 61.870(1)(a), with the concomitant duty to maintain and produce public records under KRS 61.872.

Individual members of the Commission cannot qualify as being a "public agency" based on any other definition. *See* KRS 61.870(1)(b)-(k) (providing that various other governmental units qualify as public agencies, including government departments, commissions, and boards). Likewise, regular employees and volunteers that serve an agency do not qualify as state officers.

Pursuant to KRS 61.870(2), "public record" is defined as meaning: "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, *which are prepared, owned, used, in the possession of or retained by* **a public agency**." (Emphasis added). While the Commission prepares, owns, uses, possesses, and retains various documents which were produced through the actions of its members, employees, and volunteers, including private emails sent to the Commissioner's public email address, what these people do on their own time without using workplace technology (to either produce records or memorialize records privately produced) is simply outside of the Commission's control. Therefore, texts and emails retained by individual Commission members are not constructively public records in the possession of the Commission simply by virtue of the members' volunteer connection to the Commission.

Because these private records are not in the custody of a public agency, this also means that the individual Commission members do not qualify as being the "custodian" of "public records" under KRS 61.870(6). They may have "personal custody and control" of their own texts and emails, but these texts and emails simply do not qualify as public records.

It makes logical sense to treat these individual Commission members differently than the Department, Commission and the Commissioner. The members of the Commission can take no actions individually while engaging in text or email correspondence with non-commission members. Simply put, the Commission members cannot act alone and authoritatively through texts and email, thus the texts and emails they produced and stored were not "prepared, owned, used, in the possession of or retained by a public entity" because the individual members' communications are not those of the Commission. Instead, the Commission members can only officially act when they: meet quarterly as a group in Frankfort and at other times as committees; advise the Commissioner; and approve certain actions of the Commissioner. KRS 150.023(1)-(4).

In *City of Champaign v. Madigan*, 992 N.E.2d 629, 639 (Ill. App. Ct. 2013), the Court recognized that records produced by individual aldermen and city council members do not constitute public records for purposes of Illinois's open records act because the people who make up these groups do not constitute a "public body" unless they are present together in sufficient numbers to constitute a quorum. The Court distinguished the situation where city council members were transmitting private text messages to each other on their private devices during an official city council meeting. The Court concluded that texts they exchanged while they were acting collectively as a public body were subject to disclosure as public records as otherwise the open meetings act would be subverted. *Id.* at 639-40.

Whether public records can be generated on private devices and thus be subject to disclosure under open records acts, depends upon the authority of the person making such records. Therefore, in *In re Silberstein*, 11 A.3d 629, 633 (Pa. Commw. Ct. 2011), the Court ruled that emails stored on a commissioner's personal computer did not qualify as public records because the commissioner was not a governmental entity; he lacked any authority to act alone on behalf of the Township, he was not authorized to speak for it, and his emails were not later ratified, adopted or confirmed by the Township.

Commission members' actions only result in public records being produced when they act as a body, such as when they meet and vote. In such circumstances, public records are produced by the Commission and maintained by it. Conversely, when individual members are exchanging emails and texts with other people, even if these messages involve the duties of the Commission, the members are not acting for the Commission itself or doing anything that could bind the Commission. Therefore, there is little basis for requiring disclosure of such messages as they do not and cannot result in action by the Commission.

In *Zink v. Commonwealth, Dep't. of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825, 829 (Ky. App. 1994), the Court explained that "the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing." Thus this "work" would generally be excluded as being "[p]reliminary drafts, notes, correspondence with private individuals" or "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]" KRS 61.878(1)(i) and (j).

We decline to legislate from the bench in interpreting the term "public agency" beyond the

scope of its clear definition. There is no basis to believe that the General Assembly intended that individual Commission members be treated as public agencies, especially where they had no authority to bind the commission based on their individual actions.

B. Fears of Possible Deliberate Subversion of the Open Records Act by Purposefully Using Private Devices to Conduct Government Business Requires Another Remedy

Compliance with the ORA always requires that the government act in good faith. While we recognize the concern raised by the Court of Appeals and the trial court that bad actors with nefarious intent may try to subvert the ORA by using private devices to conduct government business, this alleged "loophole" is not an issue before us and cannot justify reclassifying private documents as public ones in contravention of the clear language of the ORA. Absolutely no evidence has been advanced to even suggest that the Commission members were not acting honorably in their volunteer role in serving the people of this Commonwealth and in using the only means available to them to communicate with each other, the Commission, and the public. They used their private email addresses as they were not provided with any alternatives from the Department.[5]

[5] The Department's website listed the members' email addresses, phone numbers, and addresses. It is unclear whether the phone numbers listed were cell phones, personal landlines, or business landlines. It appears that members' personal email accounts were the primary method they used to communicate with others regarding Commission business.

If someone requesting public records has a good faith basis to believe that government actors are seeking to subvert the ORA by deliberately conducting government business on private devices, the solution is not to pressure a governmental department to make the individuals working on its behalf give up their private devices and private accounts for inspection, but for the seeker to file a civil lawsuit regarding conspiracy to subvert the ORA against the governmental entities and the officers, members, employees, etc. who are alleged to have participated in such a conspiracy. If there is probable cause that such is occurring, discovery under court supervision can explore this issue, and disputed items can be subject to *in camera* review.

However, in this open records action to compel the release of records, because neither the individual Commission members nor the other third parties (the named legislators) were made parties, the trial court cannot order them to produce responsive records. *See Tracy Press, Inc. v. Super. Ct.*, 80 Cal. Rptr. 3d 464, 471 (Cal. App. 2008) (concluding that to the extent the requester of public records is seeking an order requiring a private individual to produce private emails that are argued to be public records, that individual is a necessary party).

Although the Commission members received notice from the Commission that such records were sought by the KOGC (if only because the Commission wanted them to look through their emails for responsive records), the record does not indicate that the named legislators ever received any kind of notification that their private correspondence with Commission members was the topic of an open records request. While the Commission suggested that such correspondence could be sought from Representative Massey's and Representative Koch's offices, the record does not contain any information that KOGC attempted to contact them. Due process requires notice and an opportunity to be heard before private correspondence can be ordered disclosed through a court proceeding.

This case has exposed the problems inherent in not providing the members of the Commission with the means to conduct the government's business in a way that will automatically create records that the Commission can review and use to respond to open records requests. It would be appropriate for our executive public agencies to proactively change their practices to avoid such problems in the future by providing anyone who acts on their behalf with state email addresses and establishing policies that instruct them to use these email addresses for any government business-related emails.

Certainly, it is within the General Assembly's purview to alter the ORA to, for example, prohibit any government-related correspondence from occurring on private devices, require that all governmental volunteers be issued government email accounts, or declare that each member of a commission should henceforth be deemed to qualify as personally constituting a "public agency" for purposes of the ORA. It is our legislative branch's responsibility to make such decisions, and we will not engage in legislating from the bench simply because the General Assembly has not yet acted.

III. CONCLUSION

While we recognize the importance of the Open Records Act in allowing for private oversight of the government's actions, the Commission members are categorically excluded from individually having the status of a public agency and thus records in their personal possession cannot qualify as public records.

The Commission properly disclosed all responsive records in its possession. It was not required to do anything to obtain non-public records from the Commission members.

Therefore, we affirm in part, reverse in part, and remand for the Franklin Circuit Court to enter an order granting summary judgment to the Commission and dismissing this action.

Lambert, C.J.; Bisig, Conley, Keller, Nickell, and Thompson, JJ., sitting. Lambert, C.J.; Bisig, and Conley, JJ., concur. Nickell, J., dissents by separate opinion in which Keller, J., joins. Goodwine, J., not sitting.

CRIMINAL LAW

INVOLUNTARY COMMITMENT

HOUSE BILL (HB) 310, WHICH AMENDED KRS 504.110(2) AND ESTABLISHED A NEW INVOLUNTARY COMMITMENT PROCESS VIA THE CREATION OF KRS CHAPTER 202C

EVIDENTIARY HEARING UNDER KRS CHAPTER 202C

KRS CHAPTER 202C IS CONSTITUTIONAL

House Bill (HB) 310, which became effective on April 1, 2021, amended KRS 504.110(2) and established a new involuntary commitment process via the creation of KRS Chapter 202C — KRS Chapter 202C sets forth the process for the involuntary commitment of a defendant who is deemed incompetent to stand trial for a qualifying offense under KRS 504.110(2)(a) and who has no substantial probability of regaining competency within 360 days — KRS Chapter 202C commitment process has two phases: a threshold evidentiary hearing pursuant to KRS 202C.030, followed by a commitment hearing pursuant to KRS 202C.040 — The purpose of the evidentiary hearing is to determine whether sufficient evidence exists to support a finding that the respondent is guilty of the charged crime — The evidentiary hearing shall be held before a judge without a jury — The Commonwealth bears the burden of proving the sufficiency of the evidence in the evidentiary hearing by a preponderance of the evidence — The respondent can present evidence and cross-examine witnesses — The respondent may also present evidence of affirmative defenses that could be raised at a criminal trial on the charged crime, which must also be proven by a preponderance of the evidence — The Commonwealth does not bear the burden of disproving any asserted affirmative defenses — If a respondent stipulates to potential guilt and waives the hearing, the stipulation of potential guilt cannot be used against the respondent in any future criminal prosecution or civil litigation — No evidence or statement submitted by the respondent during the evidentiary hearing is admissible in any criminal prosecution or civil litigation — If, at the conclusion of the evidentiary hearing, the trial court determines that insufficient evidence has been presented to support a finding that the respondent is guilty of the charged crime, then the trial court shall order the immediate release of the respondent — If the trial court determines that sufficient evidence has been presented to support a finding that the respondent is guilty of the charged crime, it must immediately schedule a commitment hearing to be held within 20 days — KRS 202C.050 sets forth the criteria for involuntary commitment — The Kentucky Supreme Court

noted that instant holding does not address later amendments to KRS 202C.050, which occurred after the involuntary commitment of the respondent in instant action, since no arguments, constitutional or otherwise, were raised in instant action concerning those amendments — Those later amendments to KRS 202C.050 require proof of only one of the four criteria for involuntary commitment — KRS 202C.030 is constitutional — Evidentiary hearing process does not violate due process — KRS Chapter 202C clearly establishes civil, rather than criminal, proceedings — KRS Chapter 202C serves neither the retributive nor deterrent objectives of criminal punishment — KRS Chapter 202C does not adjudicate the guilt of or criminal responsibility of an incompetent individual — Respondent failed to properly preserve his argument that KRS Chapter 202C violates due process and equal protection by creating a more restrictive commitment that applies only to those found incompetent to stand trial; therefore, reviewed this argument for palpable error — There was no palpable error — Manner in which HB 310 was passed did not violate § 46 and § 51 of the Kentucky Constitution — The Kentucky Supreme Court reviewed the legislative steps taken during the passing of HB 310 in light of § 46's three readings requirement — Title of HB 310 was not false or misleading; therefore, HB 310 did not violate § 51 —

R.L.P. v. Com. (2025-SC-0121-DG); On review from Court of Appeals; Opinion by Chief Justice Lambert, *affirming*, rendered 4/23/2026. **[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).]**

R.L.P. was involuntarily committed under the recently enacted KRS[1] Chapter 202C after he was deemed incompetent to stand trial for his father's murder. In this appeal, he raises due process and equal protection challenges to Chapter 202C and argues that it was enacted in violation of §§ 46 and 51 of the Kentucky Constitution. After review, we reject his constitutional challenges and affirm.

[1] Kentucky Revised Statutes.

I. FACTUAL AND PROCEDURAL BACKGROUND

In Kentucky, the involuntary civil commitment of individuals deemed to be a danger to themselves or others due to mental illness or defect is governed by either KRS Chapter 202A, 202B, or 202C. Under Chapter 202A, a mentally ill person[2] may be involuntarily hospitalized if that person presents a danger or threat of danger to themselves or others, can reasonably benefit from treatment, and hospitalization is the least restrictive alternative mode of treatment presently available. KRS 202A.026. Similarly, Chapter 202B provides for the involuntary hospitalization of an individual with an intellectual disability[3] if that person presents a danger or threat of danger to themselves or others, the least restrictive alternative mode of treatment presently available requires placement in an ICF/ID,[4] and treatment that can reasonably benefit the individual is available in an ICF/ID. KRS 202B.040.

[2] *See* KRS 202A.011(9) (defining "mentally ill person").

[3] *See* KRS 202B.010(9) (defining "individual with an intellectual disability").

[4] An "ICF/ID" is "an intermediate-care facility approved by the cabinet for the evaluation, care, and treatment of individuals with an intellectual disability[.]" KRS 202B.010(10).

As the involuntary commitment criteria under Chapters 202A and 202B require that an individual be capable of benefitting from treatment, if a court finds that an individual cannot reasonably benefit from treatment the court is without authority to commit that individual and that person must be released from state custody. In an attempt to address this loophole—where a person has committed a criminal offense but cannot be tried due to incompetency and cannot be involuntarily committed because they cannot benefit from treatment—the General Assembly passed House Bill (HB) 310. HB 310, *inter alia*, amended KRS 504.110(2) and established a new involuntary commitment process via the creation of KRS Chapter 202C.

Prior to HB 310's enactment, if a court found a defendant both incompetent to stand trial and unlikely to attain competency in the foreseeable future KRS 504.110(2) directed that court to conduct an involuntary hospitalization proceeding under either Chapter 202A or 202B. *See* KRS 504.110(2) (eff. July 15, 1988, to March 31, 2021). HB 310 amended that subsection to now direct that either

> (a) The Commonwealth's attorney's office serving the county of criminal prosecution shall immediately petition the Circuit Court that found the defendant incompetent to stand trial or, if the finding was by a District Court, the Circuit Court in the county of criminal prosecution, to initiate an involuntary commitment proceeding under [KRS Chapter 202C] if the defendant is charged with a capital offense, a Class A felony, a Class B felony resulting in death or serious physical injury, or a violation of KRS 510.040 [(rape in the first degree)] or 510.070 [(sodomy in the first degree)]; or
>
> (b) The court shall conduct an involuntary hospitalization proceeding under KRS Chapter 202A or 202B if the defendant is charged with an offense not listed in paragraph (a) of this subsection.

KRS 504.110(2)(a)-(b).

In turn, KRS Chapter 202C delineates the process for the involuntary commitment of a defendant who is deemed incompetent to stand trial for a qualifying offense under KRS 504.110(2)(a) and who has no substantial probability of regaining competency within 360 days. KRS 202C.020(1). After the Commonwealth's Attorney files a petition to initiate commitment proceedings under Chapter 202C, the "defendant" becomes the "respondent," and the court must immediately assign counsel, a guardian ad litem (GAL), "to represent the needs and best interest of the respondent." KRS 202C.020(2). The respondent must also be represented by an attorney and, if at any time he is not, "the court shall appoint counsel for the [respondent], without a showing of indigency, to be provided by the Department of Public Advocacy." KRS 202C.020(2).

The Chapter 202C commitment process itself is comprised of two phases: a threshold evidentiary hearing pursuant to KRS 202C.030 ("evidentiary hearing") followed by a commitment hearing pursuant to KRS 202C.040 ("commitment hearing").

The evidentiary hearing must be held within twenty days of the filing of a commonwealth's attorney's Chapter 202C petition, and appropriate notice of that hearing "shall be served on all parties." KRS 202C.030(1). All discovery must be provided to the respondent no later than seven days prior to the hearing, and the Commonwealth may not present any evidence it did not provide through discovery. *Id.* The purpose of the evidentiary hearing is "to determine whether sufficient evidence exists to support a finding that the respondent is guilty of the charged crime against him[.]" KRS 202C.030(3). The Commonwealth bears "the burden of proving the sufficiency of the evidence by a preponderance of the evidence." *Id.*

The evidentiary hearing "shall be held before a judge without a jury. The rules of evidence shall apply. [And] [t]he respondent shall be permitted to present evidence and cross examine witnesses." KRS 202C.030(4). The respondent may also "present evidence of affirmative defenses that could be raised at a criminal trial on the charged crime[,]" which must also be proven by a preponderance of the evidence. *Id.* The Commonwealth does not bear the burden of disproving any asserted affirmative defense. *Id.* In addition, although a "respondent may stipulate to potential guilt and waive the hearing[,] [a] stipulation of potential guilt cannot be used against the respondent in any future criminal prosecution or civil litigation." KRS 202C.030(2). Nor can any evidence or statement submitted by the respondent during the evidentiary hearing "be admissible in any criminal prosecution or civil litigation." KRS 202C.030(7).

If, at the conclusion of the evidentiary hearing, "the court determines that insufficient evidence has been presented to support a finding that the respondent is guilty of the charged crime. . . the court shall order the immediate release of the respondent." KRS 202C.030(6). However, if the court determines that sufficient evidence has been presented to support a finding that the respondent is guilty of the charged crime it must immediately schedule a commitment hearing to be held within twenty days. KRS 202C.030(5)(a). It must also order the respondent to be examined by two qualified mental health professionals,[5] at least one of whom must be a physician. KRS 202C.030(5)(b). Those mental health professionals must then certify their findings regarding whether the respondent meets the criteria for involuntary commitment under KRS 202C.050 prior to the commitment hearing. *Id.*

[5] *See* KRS 202C.010(11)(a)-(h) (defining "qualified mental health professional").

PLEASE SEE NOTE ON PAGE 57 CONCERNING FINALITY OF DECISIONS DIGESTED.

The commitment hearing "may be held in an informal manner" and need not be held in a courtroom. KRS 202C.040(1). It may instead be conducted in any suitable place "not likely to have a harmful effect on the mental or physical health of the respondent." *Id.* "The manner of proceeding and the rules of evidence shall be the same as those in any criminal proceeding[,]" and "shall be heard by the judge unless a party or guardian ad litem requests a jury." KRS 202C.040(4). The respondent is not permitted to waive his right to the commitment hearing, KRS 202C.040(5), and both "[t]he respondent and the respondent's guardian ad litem shall be afforded an opportunity to testify, to present evidence, and to cross-examine any witnesses." KRS 202C.040(3). During the hearing, the Commonwealth must prove beyond a reasonable doubt that the respondent meets the criteria for involuntary commitment under KRS 202C.050. KRS 202C.040(3)-(4). At the time R.L.P. was committed, those criteria were as follows:

> (a) The respondent presents a danger to self or others as a result of his or her mental condition;
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> (b) The respondent needs care, training, or treatment in order to mitigate or prevent substantial physical harm to self or others;
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> (c) The respondent has a demonstrated history of criminal behavior that has endangered or caused injury to others or has a substantial history of involuntary hospitalizations under KRS Chapter 202A or 202B prior to the commission of the charged crime; and
>
> (d) A less restrictive alternative mode of treatment would endanger the safety of the respondent or others.

KRS 202C.050(1) (eff. April 1, 2021, to July 15, 2024). After R.L.P. was committed, KRS 202C.050 was amended to require proof of only one of the foregoing criteria. No arguments against that change, constitutional or otherwise, were raised in this case. This Court is therefore without jurisdiction to opine on whether that change was constitutionally permissible at this time.

If a respondent is involuntarily committed under KRS Chapter 202C, "the [C]abinet [for Health and Family Services][6] shall place that respondent in a forensic psychiatric facility designated by the secretary [for the Cabinet][7]." KRS 202C.050(2). Kentucky's primary forensic psychiatric facility is the Kentucky Correctional Psychiatric Center (KCPC), a licensed psychiatric hospital that performs a number of functions including conducting competency and criminal responsibility evaluations and providing inpatient treatment to individuals that are deemed incompetent to stand trial and are involuntarily committed. The facility, although therapeutic in nature, is located on the grounds of Luther Luckett Correctional Complex in Lagrange, Kentucky, and is itself secure.

[6] *See* KRS 202C.010(1) (defining "cabinet").

[7] *See* KRS 202C.010(15) (defining "secretary").

Once an individual has been committed pursuant to Chapter 202C, the statutorily mandated schedule of review hearings is as follows:

> (a) From the initial order of commitment, a standard review hearing shall be conducted not sooner than ninety (90) days and not later than one hundred twenty (120) days;
>
> (b) For the first two (2) years after the initial order of commitment, standard review hearings shall be conducted not less than one hundred eighty (180) days and not more than two hundred ten (210) days from the most recent review;
>
> (c) Beginning two (2) years after the initial order of commitment, a standard review hearing shall be conducted not more than three hundred sixty-five (365) days from the most recent review hearing; and
>
> (d) A heightened review hearing shall be conducted not more than five (5) years from the initial order of commitment and, thereafter, not more than five (5) years from the most recent heightened review hearing.

KRS 202C.060(2). Moreover, "[i]f at any point. . . it appears that the respondent no longer meets the criteria for involuntary commitment under KRS 202C.050. . . the respondent or the respondent's guardian ad litem may request a review hearing[.]" KRS 202C.060(1)(b). And, during a patient's period of involuntary commitment, they are statutorily entitled to a number of rights including, but not limited to the right to receive visitors, the right to be free from unreasonable use of seclusion and restraint, and the right to the assistance of counsel to uphold those rights. KRS 202C.140(5), (9), (10).

HB 310—which, as discussed above, included both the amendments to KRS 504.110(2) and the creation of Chapter 202C—passed in the Senate by a vote of thirty-seven to zero with one abstention and passed in the House of Representatives by a vote of ninety-one to zero.[8] On April 1, 2021, the Governor of Kentucky signed the bill into law which, due to its emergency clause, became immediately effective.

[8] *See* https://apps.legislature.ky.gov/record/21rs/hb310.html (last accessed Dec. 30, 2025).

On February 2, 2022, ten months after HB 310 went into effect, R.L.P. was indicted by a Warren County grand jury for the murder of his father, John.[9] He was appointed counsel and entered a not guilty plea. On February 7, the day of his arraignment, the circuit court ordered that he be sent to KCPC for both a competency evaluation and to determine whether he met the criteria for insanity as defined by KRS 504.060(7). R.L.P. was admitted to KCPC on June 9, 2022. The court's order was for an evaluation of up to thirty days, however staff at KCPC thereafter requested and were granted: a thirty-day extension on July 7, a thirty-day extension on August 4, and a sixty-day extension on August 31. Each request indicated that R.L.P. was being administered antipsychotic medication and/or mood stabilizers for either an unspecified psychotic disorder or schizophrenia; that he had shown some improvement, but still remained psychotic; and that the requesting staff member believed there was a substantial probability that he could regain competency with additional treatment.

[9] As these are confidential proceedings, we will identify both R.L.P.'s father and his brother via pseudonym.

The circuit court ultimately held a competency hearing on January 3, 2023, and on the basis of Dr. Daniel Hackman's report found that R.L.P. was incompetent to stand trial pursuant to KRS 504.060(5). As R.L.P. had been charged with murder, a qualifying offense under KRS 504.110(2)(a), the Warren County Commonwealth's Attorney immediately petitioned for his involuntary commitment under Chapter 202C. Rather than proceeding with the evidentiary hearing within twenty days of the petition's filing, R.L.P. filed objections to proceeding under the new laws created by HB 310 and a motion to hold HB 310 unconstitutional. He waived his entitlement to having the evidentiary hearing within twenty days in order to have his constitutional arguments ruled on prior to, rather than contemporaneously with, his commitment proceedings.

The arguments raised by R.L.P.'s objections and motion are the sole focus of the appeal now before us. He first argued that the manner in which HB 310 was enacted by the General Assembly violated §§ 46 and 51 of the Kentucky Constitution. He further argued that the evidentiary hearing under KRS 202C.030 violated due process because it allowed for a finding of "guilt" by a preponderance of the evidence and without a jury and because it allowed an incompetent individual to be tried on the facts in a criminal matter. Because this Court reviews the circuit court's rulings on these issues *de novo*—*see*, *e.g.*, *TECO/Perry Cty. Coal v. Feltner*, 582 S.W.3d 42, 45 (Ky. 2019)—we reserve an in-depth discussion of R.L.P.'s arguments for Section II of this Opinion below. It suffices to say here that the circuit court rejected each of R.L.P.'s constitutional arguments. Accordingly, the circuit court moved forward with R.L.P.'s commitment proceedings.

R.L.P.'s KRS 202C.030 evidentiary hearing took place over two days in August 2023. During that hearing, the Commonwealth presented testimony from twelve witnesses and admitted 155 exhibits into evidence. That evidence can be fairly summarized as follows. R.L.P. lived in a duplex apartment in Warren County with his father John, they were the only two individuals that lived in that apartment, and John paid rent to their landlord in person on November 1, 2021. On November 12, R.L.P. drove John's car to Simpson County and was arrested for trespassing on an abandoned property. R.L.P. was booked into the Simpson County Jail on the same day, and two different nurses that worked for the jail observed a deep cut on R.L.P.'s right hand in the webbing between his thumb and index finger. R.L.P. had attempted to bandage the wound, which was no longer bleeding and had begun to heal, with a sanitary napkin and a surgical mask. The nurses did not observe any other injuries.

On November 15, R.L.P. was released from the Simpson County Jail, and on November 16, he was seen by Dr. Daniel Long in the emergency room of a hospital in Warren County. Dr. Long testified that R.L.P. was difficult to understand due to his pressured speech and disorganized thoughts, both of which were indicators of some sort of mental health episode. However, R.L.P. stated several times that his father was at home lying in a puddle of blood and that someone had broken in and stabbed both R.L.P. and his father. Dr. Long also

observed the deep cut to R.L.P.'s right hand, which a specialist concluded was a couple of days old and had begun to heal. Dr. Long did not observe any other injuries. R.L.P. remained at that hospital for three to four days after which he was admitted to Western State Hospital, a state psychiatric facility. Following his interaction with R.L.P. on November 16, Dr. Long called 911 out of concern for John and provided dispatch with R.L.P.'s address.

Officer Andre Creek with the Bowling Green Police Department responded to the apartment on November 16, but did not make entry. He instead spoke with R.L.P.'s and John's neighbor in the duplex, who told them he had not seen John for about a week and had not seen R.L.P. for approximately three days. The neighbor also noted that several newspapers had piled up outside their apartment and that that was unusual.

Eight days later, on November 24, R.L.P.'s brother Adam was released from incarceration in Marion County and drove to the duplex in an attempt to surprise John for Thanksgiving. No one responded to Adam's knocks on the front and back doors, both of which were locked, and Adam noted that a window air conditioning unit was on despite the time of the year. Adam called the police out of concern, but the police would not allow him to enter the apartment. Officers instead told Adam they believed they had located John at a hospital in Tennessee. But at some point, upon calling the cellphone number of that individual, Adam concluded it was not his father.

Adam learned the next day that R.L.P. was at Western State and contacted him by phone. Adam testified that during that conversation R.L.P. rambled and was difficult to understand but he nevertheless told Adam that their father "may have a little blood on him but he's warm" and that he looked like he might be dead but R.L.P. did not think he was. R.L.P. also told Adam that four people in Bowling Green Police Department uniforms had broken in and tried to rob them. Around ten to eleven days later Adam again spoke to R.L.P. on the phone at which point he would only say that John had gone to a card show.[10] Following that conversation Adam again called the police and filed a missing persons report.

[10] John regularly sold collectible trading cards—baseball, basketball, etc.—at a local flea market.

On December 8, the police at last made entry into the apartment and discovered John's body. He was lying on his back with the top half of his body in a bathroom and the bottom half sticking out into a hallway that was between R.L.P.'s bedroom and John's bedroom. The medical examiner who performed John's autopsy concluded that he had sustained forty-five sharp force injuries to his head, neck, torso, and extremities and that he had died from blood loss. A blanket and a sport coat had been placed on top of John's body, a pillow had been placed beneath his head, a Bible had been put beneath his left hand, and four letters had been placed near the Bible. All of those items were placed post-mortem. Each of the four letters were from R.L.P. to John during R.L.P.'s previous incarceration at Kentucky State Penitentiary; one was postmarked December 2008, two were postmarked December 2009, and one was postmarked October 2014. The window air conditioning unit was still running and was set to sixty-four degrees.

Several newspapers were found in the living room near a recliner, the most recent of which was dated Monday, November 8, 2021, while the oldest newspaper found in the pile outside the front door was dated November 9, 2021. Bloody, barefoot footprints were found leading into R.L.P.'s bedroom accompanied by "gravity drops" of blood that had fallen straight down and hit the floor. Blood was also found on the kitchen floor and was smeared in what looked like an attempt to clean it up with a mop also found in the kitchen. A bloody knife was found in the kitchen sink that appeared to be from a butcher block on the kitchen counter. For some inexplicable reason, the investigating officers did not have any of the items in the home forensically tested.

The day after John's body was discovered Detective Kyle Scharlow conducted a recorded interview with R.L.P. at Western State. R.L.P. continued to demonstrate pressured speech and disorganized thoughts during that interview. At first, R.L.P. seemed to claim that several men in Bowling Green Police Department uniforms had broken in and attacked John and thereafter took R.L.P. to the property in Simpson County where he was arrested on November 12. But he also claimed that while John was being murdered, he told R.L.P. that men were trying to "gas the house" and that R.L.P. needed to take the keys to John's car and go to the "safe place" (the abandoned property in Simpson County) and R.L.P. drove himself there. He told the officers that before he left, he checked on John and he was unconscious but still alive so R.L.P. put a blanket over him.

Later in the interview, the officers told R.L.P. that John was dead and that they believed R.L.P. had killed him. At that point R.L.P. began saying that John had been drugging him, raping him, yelling at him, overworking him, suffocating him, and shoving a hose down his throat. Because of this, R.L.P. said he had defended himself and "cut" John. When the officer directly asked R.L.P. if he had stabbed John, he said he did but he did not know how many times because John had "shoved eighteen bottles of pills down [his] throat." R.L.P. said that he sat John on the floor and said, "Daddy I think you're dead" and that he went to the "safe place" to try to get help.

The only evidence presented by R.L.P. during the evidentiary hearing was his own testimony, which was largely incoherent. At various points he claimed that Adam and another man had stabbed his father and that seven men he went to high school with had committed the murder. He also claimed that he had been hit in the head and that John was dead when he woke up. However, he did acknowledge placing the Bible and letters next to John and leaving from the scene in John's vehicle.

Based on the foregoing, the circuit court entered a fourteen-page order on August 25, 2023, which found that there was sufficient evidence to conclude that R.L.P. was guilty of murder by a preponderance of the evidence. R.L.P. does not challenge that finding in the appeal now before us. In accordance with KRS 202C.030(5), the circuit court then scheduled a commitment hearing and ordered that R.L.P. be examined by two qualified mental health professionals.

During R.L.P.'s commitment hearing, for which R.L.P. did not request a jury, the Commonwealth presented three witnesses. The first, Dr. Eric Lesch, is a psychiatrist employed by KCPC. Dr. Lesch testified regarding his sixteen-page report in which he concluded that R.L.P. met KRS 202C.050's criteria for involuntary commitment. Dr. Hackman, the same KCPC forensic psychiatrist that had previously conducted R.L.P.'s competency evaluation, also testified. Dr. Hackman compiled an eighteen-page report in which he likewise opined that R.L.P. satisfied the criteria for involuntary commitment under KRS 202C.050. Finally, Gordon Turner, a detective employed by the Warren County Commonwealth's Attorney's office testified regarding several instances of R.L.P.'s previous criminal behavior. *See* KRS 202C.050(c). Specifically, R.L.P. pled guilty to first-degree wanton endangerment and receiving stolen property in 1993 and attempted murder in 1996 and was convicted of both first-degree assault and second-degree assault in 2006.

As with the evidentiary hearing, the only evidence presented on R.L.P.'s behalf was his own testimony. It was again largely incoherent, but when asked by his GAL he said he would not be a danger to anyone else and that he would take his medication and otherwise follow KCPC's directions if he were released.

The circuit court entered a twenty-three-page order of involuntary and indefinite commitment on September 25, 2023. The order thoroughly recounted the evidence presented during the commitment hearing and found that each of KRS 202C.050's criteria had been proven beyond a reasonable doubt as follows:

> 1. *The respondent presents a danger to himself or others as a result of his mental condition.* [R.L.P.] is currently exhibiting severe psychotic symptoms, unabated by therapeutic doses of potent antipsychotic medications. He clearly is exhibiting delusional thought content and bizarre beliefs. His lack of recognition of his mental illness, and his lack of any coping mechanisms to address it, prevent him from self-governing behavior. He has exhibited, and been convicted of, violence on multiple occasions in the past, and when asked [by Dr. Lesch] if he ever used a gun or a knife violently, replied, "That will come in due time, believe me." For these reasons and others set forth in the opinions of Drs. Lesch and Hackman, and respondent's criminal history, this criteria is met beyond a reasonable doubt;
>
> 2. *The respondent needs care, training, or treatment in order to mitigate or prevent substantial physical harm to himself or others.* There is clearly a correlation between [R.L.P.'s] psychotic symptoms and his violence. Though his mood has improved during hospitalization, he continues to be extremely psychotic, exhibiting paranoid delusions and illogical thoughts. Based on the evidence presented, he would, undoubtedly, benefit from ongoing psychiatric medication management and psychotherapy, with the hope that he can bolster his coping skills and address the mental illness that has resulted in past violent behavior. For the reasons stated throughout the testimony of Drs. Lesch and Hackman, continuing care and treatment as he is now receiving is required to prevent harm to others;

3. *The respondent has demonstrated a history of criminal behavior that has endangered or caused injury to others.* His prior violent convictions for Criminal Attempt to Commit Murder and Assault Second Degree with Serious Physical Injury, due to his long-standing mental illness, leads the Court to conclude beyond a reasonable doubt, that the defendant has a demonstrated history of criminal behavior that has endangered or caused injury to others. Though he has numerous prior hospitalizations at Western State and KCPC, this Court cannot find, beyond a reasonable doubt, that these hospitalizations were involuntary based on the evidence at trial. Nevertheless, the [respondent's] demonstrated history of criminal behavior endangering or injuring others is clear, and this criteria is met, beyond a reasonable doubt; and

4. *A less-restrictive alternative mode of treatment other than the Level Six hospitalization*[11] *would, at this time, undoubtedly endanger the safety of the respondent or others.* His insight into his mental illness is virtually non-existent. He does not agree with his diagnosis of schizophrenia, and has stated, and demonstrated, that he will not continue treatment if transferred to a less-restrictive setting. Additionally, he would have easier access to weapons and illicit substances outside of a Level Six hospital setting, which would markedly increase his risk of violence. He has threatened future use of weapons during his evaluation with Dr. Lesch. . . . He requires medication management, in a lockdown facility, with 24-hour psychiatric and medical care, in which he could be subject to physical restraint if needed. A less restrictive treatment alternative in a "free-standing facility," would endanger the safety of others at this time.

The circuit court accordingly ordered R.L.P. to be involuntarily committed to KCPC. R.L.P. does not challenge the court's finding that he satisfied KRS 202C.050's commitment criteria in the appeal now before us.

[11] Per both Dr. Lesch's and Dr. Hackman's reports, "Level Six hospitalization" refers to the Level of Care Utilization System (LOCUS) tool. LOCUS was designed to assist staff in psychiatric hospitalization settings to determine the most appropriate level of care an individual should receive. Level Six—medically managed residential services—is the highest level. It requires, *inter alia*, that the patient typically be in a locked environment and that seclusion and/or restraint of the patient be available if necessary as well as the twenty-four-hour availability of clinical services.

R.L.P. thereafter appealed to the Court of Appeals. *R.L.P. v. Commonwealth*, No. 2023-CA-1254-MR, 2025 WL 420930 (Ky. App. Feb. 7, 2025). Consistent with his arguments before the circuit court, he asserted that HB 310 was unconstitutionally adopted by the General Assembly and that KRS 202C.030 violated the due process rights of mentally ill persons by allowing an adjudication of guilt by a preponderance of the evidence and without a jury. *Id.* at *4-*5. He also, for the first time, asserted that KRS Chapter 202C violated due process by creating "a more restrictive commitment reserved only for those found incompetent." *Id.* at *5. The Court of Appeals affirmed the circuit court's finding that HB 310 was not unconstitutionally passed, and that the evidentiary hearing provided for by KRS 202C.030 is not violative of due process. *Id.* at *4-*7. It declined to address R.L.P.'s argument that Chapter 202C created a more restrictive commitment only for incompetent individuals despite his request for palpable error review. *Id.* at *5.

This Court then granted R.L.P.'s motion for discretionary review and held oral arguments. R.L.P.'s constitutional arguments against KRS Chapter 202C and the passage of HB 310 are now properly before us for review.

II. ANALYSIS

R.L.P. raises the following arguments: (1) KRS 202C.030 violates due process by allowing an element of commitment to be established by a preponderance of the evidence and without a jury; (2) KRS 202C.030 violates due process by requiring the adjudication of an incompetent individual's guilt of a crime; (3) KRS Chapter 202C violates due process and equal protection by creating a more restrictive commitment that applies only to those found incompetent to stand trial; and (4) the manner in which HB 310 was passed violated §§ 46 and 51 of the Kentucky Constitution.

All of R.L.P.'s arguments were properly preserved for our review save for argument (3). We will review each preserved issue *de novo*, providing no deference to the circuit court's rulings. *TECO/Perry Cty. Coal*, 582 S.W.3d at 45 ("We review questions of law, including the constitutionality of a statute, *de novo*."). We will review R.L.P.'s unpreserved argument for palpable error pursuant to CR[12] 61.02 ("A palpable error which affects the substantial rights of a party may be considered. . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.").

[12] Kentucky Rules of Civil Procedure.

In conducting our review, we remain mindful of "the presumption that the challenged statutes were enacted by the legislature in accordance with constitutional requirements[,]" and that "[a] constitutional infringement must be 'clear, complete and unmistakable' in order to render the statute unconstitutional." *Beshear v. Acree*, 615 S.W.3d 780, 805 (Ky. 2020).

A. The evidentiary hearing provided for by KRS 202C.030 does not violate due process.

R.L.P. first argues that the evidentiary hearing provided for by KRS 202C.030 fails to provide a respondent adequate due process based on two grounds. The first is that the finding made during the evidentiary hearing—whether the respondent is "guilty" of the crime charged against him—is found without a jury and by a preponderance of the evidence. The second is that KRS 202C.030 allows for the adjudication of an incompetent person's guilt of a crime. We disagree with R.L.P. on both fronts and find *Kansas v. Hendricks*, 521 U.S. 346 (1997) to be instructive regarding each.

In *Hendricks*, the U.S. Supreme Court addressed the constitutional validity of Kansas' Sexually Violent Predator Act ("the Act" or "the Kansas Act"), which provided for the involuntary commitment of a person found to be a "sexually violent predator." *Id.* at 350. It applied to four classes of individuals: those, like Hendricks, who were serving a sentence for their conviction of a sexually violent offense and were scheduled to be released; those charged with a sexually violent offense and deemed incompetent to stand trial; those found not guilty of a sexually violent offense by reason of insanity; and those found not guilty of a sexually violent offense due to mental disease or defect. *Id.* at 352.

After a petition for commitment under the Act was filed, a court would "determine whether 'probable cause' existed to support a finding that the person was a 'sexually violent predator' and thus eligible for civil commitment." *Id.* at 352. The individual would then be evaluated by a mental health professional, and "[a]fter that evaluation a trial would be held to determine beyond a reasonable doubt whether the individual was a sexually violent predator[,]" defined as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." *Id.* at 352-53. The person would then be committed until their personality disorder or mental abnormality had changed such that they were "safe to be at large." *Id.* at 353.

Hendricks was involuntarily committed under the Act and challenged it on the grounds that it violated due process as well as his rights under the Double Jeopardy and *Ex Post Facto* Clauses of the U.S. Constitution. *Id.* at 356, 360-61. The Court first held that the Act satisfied due process requirements. *Id.* at 356. It began by noting that "[a]lthough freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,' *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), that liberty interest is not absolute." *Id.* "Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety[,]" and the Court had "consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards." *Id.* at 357. Thus, the Court concluded, it "cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty." *Id.*

The Court held that the Kansas Act satisfied due process requirements because it justified an individual's indefinite involuntary commitment on the basis of both a finding that the individual was a danger to themself or others and an additional factor of mental abnormality or personality disorder. *Id.* at 357-58. It explained:

> The challenged Act unambiguously requires a finding of dangerousness either to one's self or to others as a prerequisite to involuntary confinement. Commitment proceedings can be initiated only when a person "has been convicted of **or charged with** a sexually violent offense," and "suffers from a mental abnormality or

> personality disorder which makes the person likely to engage in the predatory acts of sexual violence." Kan. Stat. Ann. § 59–29a02(a) (1994). The statute thus requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated. As we have recognized, "[p]revious instances of violent behavior are an important indicator of future violent tendencies." *Heller v. Doe*, 509 U.S. 312, 323 (1993)[.]
>
> A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. **We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a "mental illness" or "mental abnormality**." *See*, *e.g.*, *Heller*, *supra*, at 314–315 (Kentucky statute permitting commitment of "mentally retarded" or "mentally ill" and dangerous individual);[13] *Allen v. Illinois*, 478 U.S. 364, 366 (1986) (Illinois statute permitting commitment of "mentally ill" and dangerous individual); *Minnesota ex rel. Pearson v. Probate Court of Ramsey Cty.*, 309 U.S. 270, 271–272 (1940) (Minnesota statute permitting commitment of dangerous individual with "psychopathic personality"). These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.

Id. at 358 (emphasis added) (internal citation and parallel citations omitted). The Court went on to conclude that the Kansas Act was "plainly of a kind with these other civil commitment statutes[]" that the Court had previously upheld. *Id.* In particular, the Act "[required] a finding of future dangerousness, and then [linked] that finding to the existence of a 'mental abnormality' or 'personality disorder' that [made] it difficult, if not impossible, for the person to control his dangerous behavior." *Id.*

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[13] *Heller* rejected equal protection and due process challenges to KRS Chapters 202A and 202B.

Here, at the time R.L.P. was committed, KRS Chapter 202C certainly comported with *Hendricks*' requirement that an individual's indefinite involuntary commitment be based on that individual's dangerousness coupled with a mental condition. During his final commitment hearing under KRS 202C.040, which R.L.P. does not challenge, the court found beyond a reasonable doubt that R.L.P. satisfied all four of KRS 202C.050's criteria for involuntary commitment. Namely: that he presented a danger to himself or others as a result of his mental condition; that he needed care, training, or treatment to mitigate or prevent substantial physical harm to himself or others; that he had a history of criminal behavior that endangered or caused injury to others; and that a less restrictive alternative mode of treatment would endanger his safety or the safety of others. KRS 202C.050(1) (eff. April 1, 2021, to July 14, 2024). Those criteria unmistakably based R.L.P.'s involuntary indefinite commitment on a finding of dangerousness coupled with a mental condition and each were found beyond a reasonable doubt.

R.L.P. seeks to invalidate his involuntary commitment solely by attacking the preliminary evidentiary hearing provided for by KRS 202C.030. As noted, that hearing occurs prior to the final commitment hearing, it is heard by the court rather than a jury, and it addresses whether there is proof by a preponderance of the evidence that the respondent is "guilty"[14] of the crime he was charged with and for which he was deemed incompetent to stand trial. R.L.P. contends that his "guilt" was an element of commitment that was not addressed again during his final commitment hearing, and it thus had to be found beyond a reasonable doubt and by a jury during his evidentiary hearing. To support this argument, he relies on *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1964), *Addington v. Texas*, 441 U.S. 418 (1979), and *S.W. v. S.W.M.*, 647 S.W.3d 866 (Ky. App. 2022).

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[14] Although the General Assembly chose to use the term "guilty" in KRS 202C.030, because KRS Chapter 202C establishes a civil commitment process and not criminal proceedings, we discern that KRS 202C.030 is focused on the concept of criminal responsibility rather than guilt as we know it in a criminal prosecution and thus interpret the use of the word in its civil sense of responsibility for the act.

In *Denton*, Kentucky's then-highest court held that in a "lunacy inquest" the manner of proceeding and rules of evidence must be the same as those in any "criminal or quasi-criminal" proceeding. 383 S.W.2d at 682-83. Denton completed a temporary thirty-five-day commitment for observation under KRS 202.120 (repealed), and thereafter two physicians filed certificates in circuit court stating their opinion that Denton was mentally ill and required confinement. *Id.* at 682. The court treated the certificates as a petition under KRS 202.240 (repealed) which concerned "procedures in cases of formal inquests." *Id.* Denton was not provided with counsel until two- and one-half hours before the formal inquest, and during the inquest affidavits from the two physicians were read into the record by the county attorney in lieu of the physicians testifying and being subject to cross-examination. *Id.* The *Denton* Court reversed, noting that

> [a]lthough lunacy inquests are not concerned with criminal intent or criminal acts they may result in depriving the defendant of his liberty and his property. This deprival should be obtained only by the due processes of law under constitutional guarantees.
>
> We have therefore concluded that when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution.

Id. The Court took exception to the lower court's assumption that the physicians were not required to testify in person, noting the right to confrontation protected by both the U.S. and Kentucky Constitutions. *Id.* at 683. It further believed that the statutes governing lunacy inquests improperly shifted the burden of proof from the Commonwealth to the respondent. *Id.* It concluded by holding that "the burden of proof. . . and the manner of proceeding and the rules of evidence should be the same as those in any criminal or quasi criminal proceeding[.]" *Id.*

Over a decade after *Denton*, the U.S. Supreme Court issued *Addington*, which addressed what standard of proof was the minimum, constitutionally acceptable standard for involuntary commitment to a mental hospital. 441 U.S. at 425-33. The Court held that the preponderance of the evidence standard was insufficient, and at a minimum the standard of proof must be proof by clear and convincing evidence. *Id.* at 427, 431. While it explicitly declined to require all states to apply a proof beyond a reasonable doubt standard, it acknowledged that some states, including Kentucky, had chosen to do so. *Id.* at 431.

Finally, *S.W. v. S.W.M.* addressed the constitutionality of the Matthew Casey Wethington Act for Substance Abuse Intervention (Casey's Law), codified at KRS 222.430-222.437. 647 S.W.3d at 873. Casey's Law allows an individual to be ordered to undergo involuntary treatment for substance use disorder (SUD) if that individual: suffers from SUD; presents an imminent threat of danger to themselves or others as a result of SUD, or there is a substantial likelihood of such a threat in the future; and can reasonably benefit from treatment. KRS 222.431. The respondents in *S.W.* challenged the then-existing version of KRS 222.433, which allowed a court to order a respondent to undergo involuntary SUD treatment after holding a single hearing in which it determined "if there [was] probable cause to believe the respondent" met the criteria for involuntary treatment under KRS 222.431. *Id.* The Court of Appeals, in relevant part, reinforced that the burden of proof for involuntary commitment in Kentucky is proof beyond a reasonable doubt. *Id.* at 874. It accordingly held that "the probable cause standard of proof set out in Casey's Law is unconstitutional." *Id.*

Thus, *Denton* and *S.W.* have no application in this case, apart from their holdings that proof beyond a reasonable doubt is required for involuntary commitment, which this Court does not dispute. In *Denton*, the **final** commitment hearing that directly resulted in the respondent's commitment did not provide the respondent with adequate assistance of counsel and did not allow the respondent the opportunity to cross-examine the physicians whose opinions formed the basis of the commitment proceedings against her. In *S.W.*, the **sole** hearing which resulted in the respondent's involuntary commitment required proof by only probable cause. Whereas, in R.L.P.'s final commitment hearing under KRS 202C.040, each of the commitment factors under KRS 202C.050 were proven by the Commonwealth beyond a reasonable doubt; he was given the option to have a jury (which he waived); the witnesses against him testified and were thus available to his counsel and GAL for cross-examination; and he presented evidence on his own behalf.

R.L.P. attempts to invalidate the full complement of due process protections afforded him during his commitment hearing by re-framing the finding made during the evidentiary hearing as an "element of commitment" that must be found by a jury beyond a reasonable doubt. But the elements of commitment under KRS Chapter 202C are those listed in KRS 202C.050, and none of those criteria

PLEASE SEE NOTE ON PAGE 57 CONCERNING FINALITY OF DECISIONS DIGESTED.

require a finding of "guilt" of the underlying offense. We instead agree with the Commonwealth that the KRS 202C.030 evidentiary hearing is merely a preliminary screening process similar to those under KRS 202A.051(6)(a), KRS 202B.100(8), and KRS 222.433(2).

An initial hearing or determination with a lower standard of proof followed by a hearing with a heightened standard of proof is the typical procedure under our involuntary commitment statutes. For example, KRS Chapter 202A requires a "preliminary hearing" to determine whether "there is probable cause to believe the person should be involuntarily hospitalized[,]" or, in other words, whether the person meets the criteria for commitment in KRS 202A.026. KRS 202A.051(6)(a). Then, following that preliminary hearing, the court must hold a "final hearing" to determine "if the respondent should be involuntarily hospitalized." KRS 202A.051. And, while the burden of proof during the preliminary hearing is probable cause, the burden of proof during the final hearing is "proof beyond a reasonable doubt." KRS 202A.076(2).

Likewise, KRS Chapter 202B requires a court to find, following a "preliminary hearing," that "there is probable cause to believe the respondent should be involuntarily admitted[]" (i.e., that the respondent satisfies the criteria for involuntary admission in KRS 202B.040). KRS 202B.100(8). That preliminary hearing is followed by a "final hearing" in which the standard of proof is "clear and convincing evidence"[15] that the respondent should be involuntarily admitted. KRS 202B.100(8); KRS 202B.160(2). And, during the pendency of the Court of Appeals' ruling in *S.W.*, Casey's Law was amended to require an initial finding by the court "that there is probable cause to believe the respondent should be ordered to undergo treatment" (meets the criteria for involuntary commitment under KRS 222.431), followed by a hearing where the court must find "proof beyond a reasonable doubt that the respondent should be ordered to undergo treatment." KRS 222.433(2),(3).

[15] It does not appear that KRS 202B.160's use of the clear and convincing standard rather than proof beyond a reasonable doubt has ever been challenged in state court.

Certainly, a determination of a respondent's eligibility for commitment under KRS 202C.050 by a preponderance of the evidence during the KRS 202C.030 evidentiary hearing, as opposed to his "guilt" of the underlying offense, would place KRS Chapter 202C in more alignment with our other civil commitment statutes. However, it is not the business of this Court to tell the General Assembly how to "best" write an otherwise constitutional statute; we are not the men and women in that proverbial arena. Rather, our bailiwick is to determine whether a given statute, as written, is violative of either the U.S. or Kentucky Constitution, and in the case KRS 202C.030, we cannot conclude that such a violation has occurred.

The circuit court did not have the authority to involuntarily commit R.L.P. after the KRS 202C.030 evidentiary hearing. R.L.P. was not subject to commitment until after the Commonwealth met its burden of proof in the KRS 202C.040 commitment hearing. In turn, that commitment hearing required proof beyond a reasonable doubt of each of the commitment criteria in KRS 202C.050 which, when considered together, incorporate both the requisite finding of dangerousness and couple it with a mental condition that the U.S. Supreme Court has routinely upheld in challenges to involuntary commitment statutory schemes. *Hendricks*, 521 U.S. at 358. The final commitment hearing under KRS 202C.040 also explicitly requires that "[t]he manner of proceeding and the rules of evidence [to] be the same as those in any criminal proceeding[,]" and that "the respondent and the respondent's [GAL] shall be afforded an opportunity to testify, to present evidence, and to cross-examine any witnesses." KRS 202C.040(3)-(4). It also entitles the respondent to have a jury be the fact finder. KRS 202C.040(4). Thus, although this Court is admittedly perplexed by the General Assembly's utilization of what is termed a "guilt" determination during the initial KRS 202C.030 evidentiary hearing, we cannot say that the fact that the initial criminal responsibility determination is made by a preponderance of the evidence and without a jury renders it violative of due process.

R.L.P. next asserts that KRS Chapter 202C violates due process because it does not create a new civil commitment process and is instead a pretext that permits the Commonwealth to prosecute an incompetent defendant's guilt of a crime via the evidentiary hearing provided for in KRS 202C.030. Without question, the prohibition against the criminal prosecution of an incompetent defendant has long stood as a pillar of the Due Process Clause. *See, e.g.*, *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) ("We have repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'"). However, it is equally beyond question that in order for this Court to hold that KRS 202C.030 permits the adjudication of an incompetent person's guilt of a crime, we must first conclude that KRS Chapter 202C creates a criminal, rather than civil, proceeding. We again look to *Hendricks*.

In addition to his due process claims, Hendricks argued that because "punishment" under the Kansas Act "[was] predicated upon past conduct for which he [had] already been convicted and forced to serve a prison sentence, the Constitution's Double Jeopardy and *Ex Post Facto* Clauses [were] violated." *Hendricks*, 521 U.S. at 361. The Court rejected both arguments based on its holding that the Act did not establish criminal proceedings. *Id.* at 361-69.

The Court expounded that "[t]he categorization of a particular proceeding as civil or criminal is first of all a question of statutory construction[,]" i.e., it had to first "ascertain whether the legislature meant the statute to establish civil proceedings." *Id.* at 361. It concluded that the Kansas Legislature's intent to create a civil proceeding was clear based on both the statute's placement within the Kansas probate code as opposed to its criminal code as well as its description of the Act as "creating a 'civil commitment procedure.'" *Id.* (emphasis omitted). Thus, "[n]othing on the face of the statute [suggested] that the legislature sought to create anything other than a civil commitment scheme designed to protect the public." *Id.* And, while "a civil label is not always dispositive," Hendricks had failed to satisfy the heavy burden of overcoming the legislature's manifest intent by providing "the clearest proof that the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] stated intention to deem it civil." *Id.* (internal quotation marks omitted).

Moreover, the *Hendricks* Court opined that "commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." *Id.* at 361-62. It reasoned that "[t]he Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a 'mental abnormality' exists or to support a finding of future dangerousness." *Id.* at 362. Furthermore, the Act "[did] not make a criminal conviction a prerequisite for commitment" as "persons absolved of criminal responsibility may nonetheless be subject to confinement under the Act." *Id.* It concluded that the "absence of the necessary criminal responsibility suggests that the State is not seeking retribution for a past misdeed[,]" and accordingly "the fact that the Act may be tied to criminal activity is insufficient to render the statute punitive." *Id.* (internal quotation marks omitted). The Court further concluded that the Act was not meant to function as a deterrent. *Id.* It reasoned that, by definition, persons committed under the Act were suffering from a mental abnormality that prevented them from controlling their behavior and that such persons were "unlikely to be deterred by the threat of confinement." *Id.* at 362-63.

Also pertinent here, Hendricks argued that his potentially indefinite confinement under the Act, coupled with the State's use of procedural safeguards traditionally utilized in criminal trials, rendered the proceedings criminal in nature. *Id.* at 363-64. The Court rejected this, reasoning that "[f]ar from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others." *Id.* at 363. And, if at any time a confined individual was adjudged to be "safe at large" he would be statutorily entitled to immediate release. *Id.* at 364. Thus, "commitment under the Act [was] only *potentially* indefinite." *Id.* Regarding Hendrick's latter argument, the Court held that "the State's decision 'to provide some of the safeguards applicable to criminal trials cannot itself turn these proceedings into criminal prosecutions.'" *Id.* (quoting *Allen*, 478 U.S. at 372). The Court thus concluded:

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims.

Id. at 368-69.

Based on the foregoing, KRS Chapter 202C clearly establishes civil, rather than criminal, proceedings. As did the *Hendricks* Court, we first look to the statute itself to ascertain legislative intent. *Id.* at 361. KRS Chapter 202C is located under "Title XVII. Economic Security and **Public Welfare**" rather than "Title L. Kentucky Penal Code." (Emphasis added). And, although KRS Chapter 202C does not explicitly state that it is creating a new civil commitment procedure, it was deliberately placed after KRS Chapters 202A and 202B, both of which are long-standing civil commitment statutory schemes.

KRS Chapter 202C also serves neither the retributive nor deterrent objectives of criminal punishment. Its purpose is not retributive because it does not make a criminal conviction a prerequisite for commitment. It in fact does the inverse, as it is a *lack* of competence to stand trial for a qualifying offense under KRS 504.110(2)(a) that serves as the sole triggering mechanism for commitment under KRS Chapter 202C. And commitment under Chapter 202C is not punitive in nature. While it is true that KCPC is located on the grounds of a state penitentiary, its goals in relation to its involuntary commitment patients are first and foremost rehabilitative in nature, not penal. KCPC is meant to provide medication and therapy—in addition to basic necessities such as shelter, clothing, food, etc.—to its Chapter 202C patients with an aim towards those patients regaining competency.

In that vein, Chapter 202C specifically provides a schedule of review hearings to ensure continued commitment is warranted and directs that "if at **any** point. . . it appears that the respondent no longer meets the criteria for involuntary commitment[,]" the respondent or the respondent's GAL may request a review hearing. KRS 202C.060(1)(b) (emphasis added). If a respondent no longer meets the criteria for commitment, he must be released. This is in obvious contrast to an imposed sentence following a criminal conviction, for which an individual may not be released from "custody," whether that be institutionalization or parole, until the sentence is completed. As with the Act at issue in *Hendricks*, this means that commitment under KRS Chapter 202C is only potentially indefinite.

KRS Chapter 202C is also highly unlikely to serve as a deterrent to individuals who are eligible for commitment thereunder. As noted, the triggering mechanism for commitment under this statute is being charged with one of the serious qualifying offenses listed in KRS 504.110(2)(a) and being deemed incompetent to stand trial for that offense with no substantial probability of attaining competency within the foreseeable future. A criminal defendant is deemed incompetent to stand trial if as a result of mental condition, he lacks the capacity to appreciate the nature and consequences of the proceedings against him and cannot participate rationally in his own defense. KRS 504.060(5). An individual who is mentally ill enough to satisfy that definition is unlikely to be deterred by the threat of confinement.

Based on the foregoing, R.L.P. has failed to satisfy the heavy burden of providing clear proof that the KRS Chapter 202C is so punitive either in purpose or effect as to negate the General Assembly's manifest intent to deem it a civil proceeding. *Hendricks*, 521 U.S. at 361. Accordingly, Chapter 202C does not adjudicate the guilt of or criminal responsibility an incompetent individual. This renders R.L.P.'s arguments under *In re Gault*, 387 U.S. 1 (1967), *In re Winship*, 397 U.S. 358 (1970), and *Commonwealth v. B.H.*, 548 S.W.3d 238 (Ky. 2018), inapplicable.

In *Gault*, the U.S. Supreme Court held that in juvenile criminal proceedings, a juvenile has the right to notice of the charges against him, the right to counsel, the right to confrontation and the cross-examination of witnesses, and the privilege against self-incrimination. 387 U.S. at 31-57. In *Winship*, the Supreme Court held that a juvenile's guilt of a crime must be proven beyond a reasonable doubt. 397 U.S. at 368. And in *B.H.*, this Court held that a juvenile criminal defendant has the right to have his competency to stand trial adjudicated by a district court before the decision regarding whether the case should be transferred to circuit court is made. 548 S.W.3d at 247-48. As discussed, proceedings under KRS Chapter 202C are not criminal proceedings, let alone juvenile criminal proceedings. And, at any rate, Chapter 202C affords the rights to notice, counsel, and confrontation during both the evidentiary and commitment hearings as well as proof beyond a reasonable doubt during the final commitment hearing.

B. KRS Chapter 202C does not violate the Equal Protection or Due Process Clauses by creating a more restrictive commitment only for those found incompetent to stand trial.

As previously discussed, R.L.P. concedes this argument was not properly preserved for our review but has requested review for palpable error pursuant to CR 61.02.

> The language of CR 61.02 is identical to its criminal law counterpart, RCr[16] 10.26, and we interpret that language identically. . .
>
> To qualify as "palpable error" under either rule, an error "must be easily perceptible, plain, obvious and readily noticeable." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). "Implicit in the concept of palpable error correction is that the error is so obvious that the trial court was remiss in failing to act upon it *sua sponte*." *Lamb v. Commonwealth*, 510 S.W.3d 316, 325 (Ky. 2017).

Nami Res. Co., L.L.C. v. Asher Land & Mineral, Ltd., 554 S.W.3d 323, 338 (Ky. 2018). R.L.P. argues that Chapter 202C creates an aggravated or enhanced commitment system reserved solely for incompetent persons, and that it is accordingly unconstitutional pursuant to *Baxstrom v. Herold*, 383 U.S. 107 (1966), *Jackson v. Indiana*, 406 U.S. 715 (1972), and *Foucha v. Louisiana*, 504 U.S. 71 (1992).

[16] Kentucky Rule of Criminal Procedure.

In *Baxstrom*, the U.S. Supreme Court held that a New York prisoner was denied equal protection "by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York[,]" and was further denied equal protection "by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those. . . nearing the expiration of a penal sentence." 383 U.S. at 110. No such equal protection violations occurred in this case. R.L.P. was not committed under a statutory scheme that failed to afford him the same rights that are granted to those committed under our other involuntary commitment statutes; tellingly, R.L.P. has failed to identify any rights that were not afforded to him that are provided to respondents under any other involuntary commitment statute. Moreover, R.L.P. was adjudged beyond a reasonable doubt to be both mentally ill and dangerous.

R.L.P. also perplexingly cites *Jackson*'s holding

> that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.

406 U.S. at 738. The Indiana statutory scheme at issue in that case provided that if a criminal defendant was deemed incompetent to stand trial, the "trial is delayed or continued and the defendant is remanded to the state department of mental health to be confined in an 'appropriate psychiatric institution.'" *Id.* at 720. The defendant then had to remain in that institution until "[w]henever the defendant shall become sane[,]" and the statutes did not provide for periodic review of the defendant's competency. *Id.* (internal quotation marks omitted). Again, R.L.P. was not involuntarily committed based solely on his incompetency to stand trial. He was involuntarily committed because the Commonwealth presented proof beyond a reasonable doubt that he satisfied each of the commitment criteria in KRS 202C.050 which, in turn, require combined findings of both dangerousness and mental illness. And periodic, statutorily mandated review of his continued satisfaction of those criteria are available to him. KRS 202C.060.

Last, R.L.P. cites to *Foucha*'s holding that due process prohibits the commitment of a defendant found not guilty by reason of insanity in the absence of a finding that he is, at the time of commitment, both mentally ill and dangerous. 504 U.S. at 77-78. To state the obvious, R.L.P. was not found to be not guilty by reason of insanity, as he never attained competency to stand trial in the first instance. And, again, he was found to be both dangerous and mentally ill beyond a reasonable doubt prior to his involuntary commitment.

Additionally, we highlight that KRS Chapter 202C is not the only involuntary commitment proceeding in Kentucky that is triggered by a criminal defendant's incompetence to stand trial. Pursuant to KRS 504.110(2)(b), those deemed incompetent to stand trial for any criminal offense not listed in KRS 504.110(2)(a) are also subject to involuntary commitment under either KRS Chapter 202A or 202B. No palpable error occurred.

C. The enactment of HB 310 violated neither §46 nor §51 of the Kentucky Constitution.

For his last assertion, R.L.P. argues that the manner in which the General Assembly passed

HB 310 violated §§ 46 and 51 of the Kentucky Constitution. A description of that enactment process is therefore necessary.

HB 310 was first introduced on February 2, 2021, as part of the 2021 regular session of the General Assembly.[17] It was initially titled "AN ACT relating to the victims of sex offenses[,]" and contained four sections. Section 1 amended KRS 439.340 regarding parole board notifications to victims of certain sex crimes. Section 2 amended KRS 510.037 to add several offenses for which convictions constitute applications for an interpersonal protective order. Section 3 amended the definitions of "sexual assault," "stalking," and "strangulation" in relation to civil protection orders under KRS 456.010. And Section 4 amended the definition of "strangulation" under KRS 403.720, our domestic violence and abuse statutes concerning divorce and child custody.

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[17] All of the information that follows regarding the bill's passage was found on https://apps.legislature.ky.gov/record/21rs/hb310.html (last accessed January 8, 2026).

The first reading of HB 310 in the House occurred on March 3, and the second reading took place on March 4. Thereafter, on March 12, floor amendments (1) and (2) were filed. Floor amendment (1) added Section 5 through Section 23 to the bill's original language. Section 5 made the previously discussed amendments to KRS 504.110(2) requiring involuntary commitment proceedings under KRS Chapter 202C when a defendant is deemed incompetent to stand trial for certain qualifying criminal offenses and proceedings under either Chapter 202A or 202B when a defendant is deemed incompetent to stand trial for any offense that does not qualify for commitment under Chapter 202C. Section 6 through Section 22 established the creation of KRS Chapter 202C, and Section 23 amended KRS 31.110 to ensure that every person, whether needy or not, is entitled to representation if they are subject to Chapter 202C proceedings. Floor amendment (2) changed the title of HB 310 to "AN ACT relating to crimes and punishments."

Three days later, floor amendments (3) and (4) were filed. Floor amendment (3) added Section 24 to the bill which declared an emergency in order to make the bill effective immediately upon its approval by the Governor in addition to the changes made under amendment (1). Floor amendment (4) changed the title of the bill to "AN ACT relating to crimes and punishments and declaring an emergency." On the same day, the bill was read for the third time in the House and passed with a vote of ninety-six to zero with floor amendments (3) and (4).

The bill was then received in the Senate and was sent to the Senate Committee on Committees. Thereafter, the first reading occurred, and it was returned to the Committee on Committees, which transferred it to the Senate Judiciary Committee. The following day, the second reading occurred, and it was returned to the Senate Judiciary Committee. Nearly two weeks later it was sent to the Senate Rules Committee with a Senate Committee Substitute. The bill was then read for a third time and passed thirty-seven to zero with one abstention with the Senate Committee Substitute. Because the Senate had recommended minor edits to HB 310 via the Committee Substitute, the bill was then returned to the House and was sent to the House Rules Committee. The House ultimately concurred with the Senate Committee Substitute and on March 29, 2021, the House passed HB 310 for the second time by a vote of ninety-one to zero. The bill was then signed into law by the Governor on April 1.

R.L.P. argues that the foregoing process violated § 46's directive that "[e]very bill shall be read at length on three different days in each House, but the second and third readings may be dispensed with by a majority of all the members elected to the House in which the bill is pending[,]" colloquially known as the three readings clause, as well as § 51's directive that "[n]o law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title[.]" Ky. Const. § 46, 51.

He relies upon *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74 (Ky. 2018), in which this Court declared Senate Bill (SB) 151 void because its passage did not comply with § 46. *Bevin* concerned the General Assembly's efforts during its 2018 session to address pressing concerns about the inadequate funding of our public pension systems. *Id.* at 78. In response to this looming crisis, the Senate initially introduced SB 1 with the title "AN ACT relating to retirement[.]" *Id.* Public resistance to SB 1 ultimately caused it to die in committee. *Id.* at 78-79.

Then, three days before the legislative session was to end, the House Committee on State Government selected a bill which had already been given one or more readings by each chamber and "amended" it by inserting most of SB 1's original language. *Id.* at 79. The Committee selected SB 151, an eleven-page bill concerning contracts for the acquisition of local wastewater facilities titled, "AN ACT relating to the local provision of wastewater services." *Id.* SB 151 was amended by a House Committee Substitute which contained the pension reform language; all eleven pages of SB 151's original text were removed and replaced with 291 pages of text addressing pension reform from SB 1. *Id.* It was then given a third reading in the House while still bearing the title of a wastewater management bill. *Id.* at 80. It was not until after the House voted to pass HB 151 by a vote of forty-nine to forty-six with five abstentions that its title was amended to reflect its relation to retirement and public pensions. *Id.* Thus, it was never read in either chamber as an act relating to retirement and public pensions. *Id.*

In addressing the meaning of the three readings clause on appeal, the *Bevin* Court opined that "[a]t first glance, one might reasonably surmise that to be 'read at length' in each House . . . the words of each bill must be collectively looked at and spoken aloud in its entirety." *Id.* at 90. However, this Court took a more pragmatic approach to interpreting the clause and concluded that "such a literal interpretation of the words produces an unreasonable and absurd result[,]" and that "[t]he framers of our Constitution were not intent upon burdening the legislature with such an absurd waste of time." *Id.* Moreover, the court did

> not purport to state within the pages of [the] opinion all the ways by which a bill may be "read" in compliance with § 46, nor [did it] conclude that there is only one way that a bill can be "read" in compliance with § 46. [It was] satisfied that the common legislative practice of reading only the title of the bill and electronically publishing simultaneously the full text of the bill to the electronic legislative journal available on every legislator's desk satisfies the constitutional mandate of § 46.

Id. The Court further acknowledged that "legislators may amend the text of a bill between readings without running afoul of § 46[,]" and that "[o]rdinarily, the revised text is some variation of the original text and remains consistent with the theme reflected in the title of the bill." *Id.* at 91-92 (citing *Hoover v. Bd. of Cty. Comm'rs, Franklin Cty.*, 482 N.E.2d 575, 579 (Ohio 1985) ("[A]mendments which do not vitally alter the substance of a bill do not trigger a requirement for three considerations anew of such amended bill."); *Magee v. Boyd*, 175 So.3d 79, 114 (Ala. 2015) ("[W]e hold that an amended bill or a substitute bill, if germane to and not inconsistent with the general purpose of the original bill, does not have to be read three times on three different days to comply with § 63 [Alabama's three readings requirement.]")).

The issue with the process that occurred in *Bevin*, is that "[a] fundamental premise underlying [the] holding that reading a bill 'by title only' is an appropriate mode of compliance with § 46 . . . is the assumption that the title so read is germane to the law being enacted[]" in accordance with § 51. *Id.* at 91. This Court concluded it would be absurd to assume § 46 was satisfied when the title was read as "AN ACT relating to the local provision of wastewater services" when the content of the nearly 300-page bill concerned only pension reform. *Id.* Thus, in consideration of the fact that the purpose of § 46 "was to ensure that every legislator had a fair opportunity to fully consider each piece of legislation that would be brought to a vote[,]" and that such a purpose "cannot be achieved by reading a bill only by its title which has no rational relationship to the subject of the law being enacted[,]" this Court held that SB 151 was void. *Id.* at 93-94.

Clearly, the changes made to HB 310 during its enactment were not nearly as drastic as what occurred in *Bevin*. R.L.P. does not dispute this but argues that they did not need to be in order to violate §§ 46 and 51. He contends that in order to comply with those sections, the House had to read the HB 310 at least once under the title "AN ACT relating to crimes and punishments and declaring an emergency" and suspend the remaining readings by majority vote. And, because that did not occur, HB 310 must be declared void in its entirety. We disagree.

HB 310 was read once in the House under the title "AN ACT relating to crimes and punishments and declaring an emergency." At that time, the substance of the bill included the establishment of KRS 202C and the concomitant amendments to KRS 504.110(2). The bill passed unanimously in the House and was thereafter read three times in the Senate without any major changes and was passed in that chamber unanimously with one abstention. It was then returned to the House for consideration once again with a Committee Substitute and was again passed by the House unanimously. If the

purpose of § 46 is "to ensure that every legislator [has] a fair opportunity to fully consider each piece of legislation that would be brought to a vote[,]" *id.* at 92, then clearly that purpose was satisfied here.

Moreover, the title of HB 310 "is not false or misleading[.]" *Yeoman v. Commonwealth, Health Pol'y Bd.*, 983 S.W.2d 459, 476 (Ky. 1998). While it is true that KRS Chapter 202C establishes a new civil commitment procedure, the trigger for that procedure always begins with a defendant being charged with a qualifying crime under KRS 504.110(2)(a) and being deemed incompetent to stand trial for that crime. "The purpose of § 51 is to prevent [the] mislabeling of legislation so as to mislead. Unless the title of an act is wholly inaccurate so as to actually deceive, it will be held to be constitutional under § 51[.]" *Id.* The title of HB 310 as "AN ACT relating to crimes and punishments and declaring an emergency" is not misleading so as to actually deceive and is therefore sufficient to pass muster under § 51.

Based on the circumstances of HB 310's essentially unanimous passage by the legislative branch of our government, followed by endorsement from the head of our executive branch, we would be loath to render it void without a clear violation of either § 46 or § 51. Because we cannot conclude such a violation occurred, we decline to do so.

III. CONCLUSION

Based on the foregoing, we affirm.

All sitting. Bisig, Goodwine, Keller, Nickell, and Thompson, JJ., concur. Conley, J., dissents by separate opinion.

CRIMINAL LAW

MURDER

INVOLUNTARY COMMITMENT

KRS CHAPTER 202C

EVIDENTIARY HEARING

FAILURE TO FIND THAT THE RESPONDENT WAS INSANE AT THE TIME OF THE MURDER

H.M. was deemed incompetent to stand trial for the murder of his caretaker and was thereafter involuntarily committed to the Kentucky Correctional Psychiatric Center pursuant to procedures set forth in KRS Chapter 202C — During the evidentiary hearing under KRS 202C.030, H.M. conceded that he killed his caretaker, but claimed that he was insane during the time of the offense — During the evidentiary hearing, both sides presented expert testimony regarding H.M.'s claim of insanity — Commonwealth presented testimony from Dr. Parker — H.M. presented testimony from Dr. Trivette and Dr. Drogin — Trial court found that H.M. was guilty but mentally ill of caretaker's murder and that he did not satisfy his burden of proving his insanity defense by a preponderance of the evidence — Trial court relied on H.M.'s own behavior and statements in body cam footage after the murder — During his interview at police department, H.M. affirmatively asserted his Fifth Amendment Right not to incriminate himself — Dr. Parker was the only expert who testified who had actually reviewed both body cam footage and interview conducted at police station — Dr. Parker stated that this evidence was closest in time to the murder and was the best evidence at determining criminal responsibility — Dr. Parker opined that although H.M. suffered from a mental illness at the time of the offense, he both appreciated the wrongfulness of his actions and had the capacity to conform his behavior to the requirements of the law — Trial court noted that Dr. Trivette stated that she did not recall seeing body cam footage or police station interview prior to forming her opinion that H.M. was insane at the time of the murder, but that it would have been helpful in forming her opinion — Trial court did not assign Dr. Drogin's opinion much weight because it appeared from the record that his opinion was largely based upon Dr. Trivette's records and was largely derivative of her first hand work — Trial court also heard testimony from two neighbors concerning H.M.'s behavior prior to the murder — Trial court note that neither of them was a medical expert or trained law enforcement officer — While their observations supported the fact that H.M. was mentally ill, trial court found that it was not related to the technical, legal issue of criminal responsibility — After finding H.M. guilty but mentally ill, trial court order H.M. to be examined by two qualified mental health professionals and scheduled a commitment hearing — Following the commitment hearing, trial court found beyond a reasonable doubt that H.M. satisfied each of KRS 202C.050's criteria for commitment — H.M. appealed trial court's findings following his KRS 202C.030 evidentiary hearing — The Kentucky Supreme Court noted that when H.M. was committed, KRS 202C.050 required Commonwealth to prove all four criteria for involuntary commitment — Approximately two years later, KRS 202C.050 was amended to only require a showing of one of the four commitment factors — H.M. has not asserted an argument against this statutory change in this appeal — Further, H.M. did not raise any issues or arguments concerning his KRS 202C.040 commitment hearing — Court of Appeals affirmed — Both H.M. and Commonwealth appealed — AFFIRMED — H.M.'s sole issue on appeal is that the trial court erred by not finding him legally insane at the time of the caretaker's murder — As a preliminary matter, the Kentucky Supreme Court addressed whether H.M. properly preserved this issue for review — At conclusion of Commonwealth's evidence, H.M.'s counsel moved for a directed verdict arguing that it had put forth enough evidence during its cross-examination of Commonwealth's witnesses for trial court to find that H.M. lacked criminal responsibility for caretaker's murder — Trial court overruled that motion — H.M.'s counsel renewed his motion for directed verdict at the close of all of the evidence — Trial court noted this motion was redundant as the issue of H.M.'s insanity was the sole issue before it — Proper mechanism to preserve this issue was a motion for dismissal under CR 41.02(2) rather than a motion for directed verdict under CR 50.01 — Pursuant to KRS 202C.030(4), evidentiary hearing is held before a judge without a jury — A directed verdict is improper in an action tried by a court without a jury — However, under the circumstances of instant action, the Kentucky Supreme Court could not say that H.M.'s counsel improperly preserved this issue simply because he presented the motion as a directed verdict motion as opposed to a motion to dismiss; therefore, reviewed trial court's ruling on insanity for abuse of discretion — Trial court did not err in rejecting H.M.'s insanity defense — In order to be found not guilty by reason of insanity, H.M. had to prove that "as a result of a mental illness" he either "[lacked] substantial capacity . . . to appreciate the criminality of his conduct" or "[lacked] substantial capacity . . . to conform his conduct to the requirements of law" — Trial court's decision to favor Dr. Parker's opinion over that of Dr. Trivette and Dr. Drogin was not an abuse of discretion — Trial court did not abuse its discretion in refusing to consider testimony from H.M.'s neighbors in making its sanity ruling — There was sufficient evidence beyond H.M.'s invocation of his right to remain silent to conclude that he understood the criminality of his conduct — KRS 202C.030 is a civil proceeding — In *R.L.P. v. Com.* (Ky. 2026), which was rendered on the same day as the opinion in instant action, and is set forth at 73 K.L.S. 4, p. 38, the Kentucky Supreme Court rejected the contention that KRS Chapter 202C is a criminal proceeding — There was a litany of evidence from the day of the offense that supported trial court's conclusion that H.M. had the ability to conform his conduct to the requirements of the law at the time of the murder — For instance, when police responded to H.M.'s home, he complied with their commands, was taken into custody without incident, and calmly participated in law enforcement's questioning — H.M. participated in an interview with officers at the police station for about 30 minutes before claiming that he was insane and invoking his right to remain silent — During that interview, and during the time that H.M. was alone in the interview room and speaking to himself, H.M. made statements suggesting that he attacked caretaker, not because God told him to, but because he lost his temper at the fact that caretaker wanted to keep her living space in his home separate from his — Since trial court did not abuse its discretion in declining to find that H.M. was insane at the time of the murder, the Kentucky Supreme Court did not need to address Commonwealth's argument that

the insanity defense should not be available to a respondent during a KRS 202C.030 evidentiary hearing — However, the Kentucky Supreme Court noted that KRS 202C.030 provides that a respondent may present evidence of affirmative defenses that could be raised at a criminal trial on the charged crime, and that if the court determines that insufficient evidence has been presented to support a finding that the respondent is guilty of the charged crime against him, the court shall order the immediate release of the respondent — Insanity is an affirmative defense that may be raised against a criminal charge, and if a defendant is found to be insane at the time of an offense, he is considered "not guilty" by reason of insanity of that offense — Thus, it appears that the statutory scheme would currently require the immediate release of an individual deemed incompetent to stand trial in the criminal proceedings against him and thereafter deemed not guilty by a reason of insanity during KRS Chapter 202C proceedings against him — The Kentucky Supreme Court strongly suspected, without explicitly holding, that the General Assembly could not have intended such an absurd result —

Com. v. H.M. (2024-SC-0271-DG) and *H.M. v. Com.* (2024-SC-0273-DG); On review from Court of Appeals; Opinion by Chief Justice Lambert, *affirming*, rendered 4/23/2026. **[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).]**

H.M. was deemed incompetent to stand trial for the murder of his caretaker and was thereafter involuntarily committed to the Kentucky Correctional Psychiatric Center (KCPC)[1] pursuant to the procedures provided for under Kentucky Revised Statutes (KRS) Chapter 202C. During the evidentiary hearing under KRS 202C.030, H.M. conceded that he killed the victim but asserted he was insane during the commission of the offense. His sole argument before this Court is that the Scott Circuit Court erred by failing to find that he was insane at the time of the murder. After review, we affirm.

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[1] KCPC "is a licensed psychiatric hospital that conducts forensic competency evaluations, competency restoration, and criminal responsibility evaluations for pre-trial patients. The facility also provides inpatient treatment for individuals who have been adjudicated incompetent to stand trial and are held on a civil commitment order. All patients at KCPC are court-ordered under KRS 504.080, KRS 504.110, or KRS 202C. KCPC serves all 120 counties and is located in a secure facility on the grounds of Luther Luckett Correctional Complex in Lagrange, Kentucky." https://dbhdid.ky.gov/facilities (last accessed January 22, 2026).

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 2, 2018, H.M. was arrested for the murder of his live-in caretaker, Denise Hamilton. Less than two weeks later, the Scott County Circuit Court ordered that H.M. be sent to KCPC to be evaluated for both his competency to stand trial and his criminal responsibility for the offense. H.M. was initially admitted to KCPC from September 24, 2018, to December 21, 2018. In a January 2019 report Dr. Amy Trivette—a psychiatrist who was the medical director of KCPC at that time—opined that H.M. had been restored to competency to stand trial, but he was legally insane when he killed Denise.

As his competency had been restored, H.M. was transferred back to the Scott County Jail. Dr. Trivette evaluated him there in July 2019 and found him to be actively psychotic and unable to stand trial due to the deterioration of his mental state. He was therefore readmitted to KCPC in October 2019 with the goal of restoring his competency. In a March 2020 report, Dr. Trivette stated that H.M. had again regained competency despite continued auditory hallucinations and delusional statements. She recommended that he not be returned to the Scott County Jail in order to avoid another decline in his mental state; he remained at KCPC from that point forward. In a June 2020 report, Dr. Trivette again opined that H.M. was competent although he continued to demonstrate symptoms of psychosis.

H.M. was next evaluated in March 2021 and August 2021 by Dr. Martine Turns, a KCPC psychologist. After both evaluations, one of which she acknowledged was a "close call," she concluded he was competent to stand trial. However, by December 2021, H.M.'s mental state had again decompensated significantly. In a February 2022 report, Dr. Turns opined that based on the fluctuating and unpredictable course of H.M.'s mental condition, and the deterioration of his baseline level of functioning over time despite adequate medication, H.M. was not competent to stand trial and was not restorable within the foreseeable future.

Following competency hearings in March 2022 and July 2022, the circuit court found H.M. to be incompetent to stand trial and unlikely to regain competency in the foreseeable future. The Commonwealth accordingly filed a petition for H.M.'s involuntary commitment under KRS Chapter 202C. *See* KRS 504.110(2)(a). Commitment proceedings under Chapter 202C occur in two stages. First, unless the respondent waives it, the circuit court must hold an evidentiary hearing to determine "whether sufficient evidence exists to support a finding that the respondent is guilty of the crime charged against him. . . by a preponderance of the evidence." KRS 202C.030(3). If the court makes that finding, it must hold a subsequent commitment hearing to determine "whether the respondent meets the criteria for involuntary commitment under KRS 202C.050[]" beyond a reasonable doubt. KRS 202C.040(3), (4).

At the time H.M. was committed,[2] the criteria for involuntary commitment under KRS 202C.050 were that the respondent presented a danger to himself or others as a result of his mental condition; that the respondent needed care, training, or treatment to mitigate or prevent substantial physical harm to himself or others; that the respondent had a demonstrated history of criminal behavior that has endangered or caused injury to others or had a substantial history of involuntary hospitalizations under KRS Chapter 202A or 202B prior to the commission of the charged crime; and that a less restrictive alternative mode of treatment would endanger the respondent or others. KRS 202C.050(1) (eff. April 1, 2021, to July 14, 2024).

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[2] We note that when H.M. was committed, KRS 202C.050 required the Commonwealth to prove all four criteria for involuntary commitment. Approximately two years later, KRS 202C.050 was amended to only require a showing of one of the four commitment factors, but H.M. has not asserted an argument against this statutory change before this Court.

The sole focus of H.M.'s appeal now before this Court is the circuit court's findings following his KRS 202C.030 evidentiary hearing. Both the parties and the court understood from the outset of that hearing that the primary issue was whether H.M. was insane when he killed Denise, i.e., whether "as a result of mental illness or intellectual disability, he [lacked] substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." KRS 504.020(1). The evidence presented during that hearing was as follows.

H.M. was born in Lexington, Kentucky, but when he was about five years old his parents moved to Alabama with him and his maternal half-sister Jane.[3] So far as his mental health was concerned, H.M. reportedly had a normal childhood; in high school he received average grades and played baseball. By his early twenties he had obtained an associate degree in psychology and was pursuing a bachelor's degree when, in 2005, his schizophrenia began to manifest, marked by paranoid delusions and a preoccupation with, *inter alia*, Christianity. He also has a longstanding, severe addiction to alcohol.

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[3] As these are confidential proceedings, we will identify H.M.'s sister via pseudonym.

H.M. has had numerous hospitalizations for his mental health, including a five-day admission in October 2005 to an unknown facility; six admissions between 2012 and 2017 at Tennessee Valley Life Center where records indicated he presented with "paranoia/hyper-religious/drinks 20 beers per day/loosening of association"; and a five-day admission in December 2017 due to "increasingly delusional auditory and visual hallucinations" and bizarre behavior.

H.M.'s mental illness was so debilitating that his parents were his caretakers until his mother's death in May 2010 followed by his father's death in September 2017. Following their deaths, his sister Jane became his legal guardian and conservator. However, she lived in Texas and was unable to move H.M. into her home. She would therefore fly to Alabama to see him every few weeks, but she quickly recognized that it was not a sustainable situation. She was in fact told by law enforcement that she needed to arrange a different living situation for H.M., as he was "terrorizing" his neighbors: he threatened to kill his neighbor's dog, set his neighbor's lawn on fire, and shot an arrow at either his neighbor or the neighbor's home. That was how Denise, the victim in this case, came to be H.M.'s caretaker.

Jane met Denise, who had been friends with

both H.M. and his father, at H.M.'s father's funeral. Denise's workplace was close to H.M.'s home in Alabama, and Jane had arranged to have Denise check on H.M. regularly. Upon Denise's agreement to be H.M.'s live-in caretaker, Jane sold the home where H.M. was living in Alabama and purchased a home in Georgetown, Kentucky. The home was two stories; Denise's living space was in the finished basement area and H.M.'s living space was on the first floor. The two floors were connected by an internal staircase. Their separate living spaces were a point of contention for H.M. On April 3, 2018, Captain Donald Mather with the Georgetown Police Department responded to a 911 call at the home. While there, H.M. told Capt. Mather that Denise had gone into the basement and locked the door. This had infuriated H.M., and he tried to "hack" through the door with a golf club. Per Capt. Mather, that incident was resolved peacefully.

Four months later, on August 2, 2018, Troye Shannon, a neighbor, went to the home to tend to the flower beds. She knocked on the basement door seeking gardening supplies and noticed it was open. She stuck her head inside and saw Denise just inside the door on the floor in a puddle of blood. Denise had been beaten to death with an aluminum baseball bat. Ms. Shannon called 911 at about 4:15 p.m. and several officers from the Georgetown Police Department responded. They first cleared the basement of the house, and while they were standing at the foot of the stairs in the basement preparing to clear the first floor H.M. appeared at the top of the stairs. H.M. complied with the officers' orders to come down the stairs and about where to place his hands as he did so. He was handcuffed without incident and taken outside on the front porch while the officers continued to clear the house. The officers found numerous beer cans and liquor bottles strewn about H.M.'s living space. They also found the baseball bat he had used to kill Denise in the floor of his living room and a black t-shirt shoved into a toilet bowl in one of the bathrooms.

After H.M. was taken outside onto the front porch, Capt. Mather arrived on the scene and approached him. Presumably because H.M. remembered Capt. Mather from the incident in April of that year, H.M. immediately began speaking to him as he approached the front porch. Because some of the statements H.M. made were incriminating, Capt. Mather mirandized him and then began asking him questions, which was captured on another officer's body camera. Throughout the questioning, H.M. stood calmly and stared at the ground; he was dressed in jeans and a brown hat and did not have a shirt on.

When Capt. Mather asked him what happened he responded, "It's been like the Devil or something" in "all the ways." He claimed that he had seen "a big shadow" that was "in the sky with wings" the night before, and that Denise "looked like the Devil" and "there was a baby inside her" that was "moving around in her stomach." Because of that, he went downstairs and "beat her up with a baseball bat." He said that he did not remember how many times he struck her, "maybe seven or eight" and that she asked him "Why are you doing this to me?" He acknowledged that the bat was his and stated that he "didn't clean it." He said that after he killed her, he went upstairs and "was just sittin' there" and "[he] was scared." Capt. Mather asked him why he was scared and he replied, "I was afraid I had killed somebody." The officer asked him if there were consequences for killing someone and he answered, "Yes, sir. I asked the, I was talking to them and told them that there was the Devil, and they'll pardon me." Capt. Mather asked, "But nobody else in the house, nobody else made you do this, nobody else said to do it, it's just you and you have this thing and you thought she had the Devil I guess is what you're telling me, so you hit her seven or eight times, and then you came upstairs and sat with the bat." And H.M. responded, "Yes, sir."

H.M. was taken from the scene to the Georgetown Police Station. He was recorded in an interview room from 5:35 p.m. until 8:50 p.m. The officers did not start the formal interview until 7:25 p.m., and H.M. was alone in the interview room for almost the entirety of the two hours that preceded the questioning. During that time, he talked to himself almost incessantly and made bizarre statements that were consistent with his religious psychosis, such as: "God told me to do it, that should be good enough for innocent. I'm psychic, I'm the closest thing to God, I've got the key to Hell and death, I'll be out in no time. I'm the alpha and the omega." He also said to himself: "Well, Denise, looks like you're gonna get it. I went crazy. God told me how to, God told me, she's the eternity writer. She kept locking her door. It's my house. She kept telling me to leave and I went crazy. That's what it was all about."

The investigating officers came into the room three times during the two-hour period that H.M. was alone: at 6:04 p.m. they came in and gave him a t-shirt to wear; at 6:27 p.m. they took pictures of him for evidentiary purposes; and at 7:06 p.m. they took his shoes because they appeared to have blood on them. Each time, H.M. fully cooperated with the officers. He also cooperated with the officers' questioning for approximately thirty minutes. During that questioning H.M. told the officers that the incident in April 2018 occurred because he was more comfortable in the basement and liked sleeping on the couch down there, but Denise kept locking the door and did not want him there. He further stated that he believed he struck Denise about six times with the bat and that God told him to do it. When the officers asked him if he had argued with Denise before he killed her, he replied, "No, God told me to do that." He then stated that Denise "took [his] bike and sold it to some guy. . . last thing I remember." When the officers asked him if he wanted to kill Denise he responded:

> No. I didn't want to kill Denise. Whatever happened was very real, I just went with what God had said. I feel deeply sorry for beating somebody. I plead the Fifth. I'm gonna plead insanity and the Fifth. I don't know why I did it. I am pleading the Fifth. I was told. Insanity and the Fifth is what I'm pleading.

The officers ended the interview at that time. Additionally, it was undisputed that H.M. had stopped taking his medication for at least ten days prior to the offense and that he was drinking extremely heavily during that time.

During the evidentiary hearing, both sides presented expert testimony regarding H.M.'s claim of insanity at the time of the offense. The Commonwealth presented testimony from Dr. George Parker, and H.M. presented testimony from Dr. Trivette and Dr. Eric Drogin.

Dr. Parker is the director of forensic psychiatry and professor of clinical psychiatry at Indiana University's medical school. He is also an adjunct professor of law at Indiana's law school. His entire private practice involved conducting competency and criminal responsibility evaluations for both prosecution and defense. His opinion was that although H.M. suffered from a mental illness at the time of the offense, he both appreciated the wrongfulness of his actions and had the capacity to conform his behavior to the requirements of the law. Dr. Parker reviewed numerous KCPC documents regarding H.M., police reports, the probable cause affidavit related to the offense, the body camera video with Capt. Mather at the scene, the entirety of the footage of H.M. at the police station, and he interviewed H.M. for about an hour and fifteen minutes in May 2022.

It was Dr. Parker's opinion that the best information about H.M.'s mental state at the time of the offense came from the police reports, the body camera footage with Capt. Mather, and the police station footage because those sources were the closest in time to the offense. Dr. Parker found it significant that H.M. fully cooperated with the officers at the scene; that he told Capt. Mather that he was scared he had killed someone and agreed that there would be consequences for it; and that he agreed with Capt. Mather's statement that no one made him do it.

As for the footage from the police station, Dr. Parker opined that H.M.'s statement to himself that God told him to kill Denise and that "that should be enough for innocent" demonstrated that H.M. was aware of guilt versus innocence and that he should be considered innocent if God instructed him to do it. Additionally, H.M.'s statement to himself that "She kept locking the door. It's my house. She kept telling me to leave and I went crazy. That's what it was all about[,]" was a much different narrative than receiving a directive from God to kill her. This narrative was then reinforced during his police interview when H.M. expressed his frustration about Denise wanting to keep her living space separate. Finally, H.M. expressing that he was deeply sorry for "beating somebody" immediately before invoking his Fifth Amendment right to silence and asserting he was insane indicated to Dr. Parker that he understood that he was about to be charged with a serious offense.

Dr. Parker also discussed his May 2022 interview with H.M. and clarified that although H.M. has schizophrenia "he's not stupid" and his condition does not prevent him from learning. He highlighted this because during their interview, when Dr. Parker asked H.M. what he did in response to the voice that he heard before he assaulted Denise, he responded, "I'm gonna plead the Fifth. I didn't have any reaction. I didn't have any thought. I did not know what I was doing, what was wrong." When Dr. Parker asked why he did not know what he was doing was wrong H.M. responded, "I was completely unaware of what was wrong and what was right." When asked why he thought that way H.M. said, "mental disorder." It was Dr. Parker's opinion that H.M. had learned over time, likely during his numerous KCPC evaluations, what the definition of legal insanity was and had fit his narrative of the crime within it.

Dr. Parker also noted a clear pattern across the materials he reviewed that whenever H.M.

is asked a specific, direct question about what he did or why he did it he either would not answer or would answer with something involving the Fifth Amendment or an insanity defense. He concluded this was a logical response to those questions despite the seemingly delusional statements that accompanied them. Moreover, at no point in any of the materials he reviewed did H.M. claim that he was not able to control himself; he claimed several times that God made him do it, but he never stated he was unable to stop himself.

Finally, Dr. Parker was asked to give his opinion about Dr. Trivette's and Dr. Drogin's respective reports concerning H.M.'s criminal responsibility. He testified that Dr. Drogin's three-page report did not rise to the level of competency that is expected for their profession. It does not recount any of the materials he relied upon and the bulk of it was a recitation of his attempts to interview H.M. via Zoom on three occasions in May and September 2021. Dr. Drogin's report also states that he agreed with Dr. Trivette's January 2019 opinion that H.M. was insane at the time of the offense, but he offered no reasoning for his agreement. And, while Dr. Trivette's sixteen-page report was more thorough, it too suffered a flaw. Namely, although she reviewed police reports from the offense, she watched neither the body camera footage from the scene nor the footage from the police station.

Dr. Drogin testified that he is a clinical forensic psychologist and an attorney that has performed over 3,000 mental health evaluations and has testified for both the prosecution and defense. He testified that his opinion that H.M. was not criminally responsible for the murder was based on the three interviews he conducted with H.M., Dr. Trivette's January 2019 report, the recording of the police questioning H.M. at the police station, and his guardianship. Although we again note that his review of those materials was not discussed in his report.

Dr. Trivette is currently the regional psychiatric director for a company that contracts with Kentucky's Department of Corrections to provide mental and physical healthcare for its facilities. Prior to that, she worked at KCPC for thirteen years: first as a staff psychiatrist, then as an assistant director, and finally as its medical director. The bulk of her work during her time at KCPC was to conduct competency and criminal responsibility evaluations and she estimated she had conducted around 4,000 to 5,000 of them. She testified that for her January 2019 report, in which she concluded H.M. was insane at the time of the offense, she relied on information gathered during H.M.'s treatment at KCPC. This included her observations as his treating psychiatrist, testing performed by a psychologist, and a biopsychosocial history compiled by a social worker. She also reviewed records regarding H.M.'s history of psychiatric hospitalizations and police reports concerning the crime. Under the section of her report titled "Opinion on Criminal Responsibility Issues" she stated:

> [H.M.] does have a history of severe, persistent mental illness, and available information indicates he was noncompliant with psychiatric medication at the time of the incident. His intellectual functioning is sufficient to appreciate the difference between right and wrong. He does acknowledge voluntary use of alcohol, although available descriptions do not indicate obvious intoxication around the time of the alleged incident. However, there is no blood alcohol level to provide objective information regarding his level of intoxication at the time of the incident. There is no known non-psychotic motive for the alleged criminal behavior, and [H.M.] describes delusional beliefs and auditory hallucinations from God as the primary motivation for the alleged criminal behavior. Thus, with the available information, it is this evaluation's opinion that [H.M.] did not have the capacity to appreciate the criminality of his conduct or the ability to conform his conduct to the requirements of the law at the time of the alleged crime due to psychiatric symptomatology associated with untreated mental illness.

She testified that nothing that has occurred since January 2019, including her review of Dr. Parker's report, changed her opinion on H.M.'s lack of criminal responsibility.

During cross-examination, Dr. Trivette agreed with Dr. Parker's conclusion that H.M. is an intelligent person and explained that his lack of competency to stand trial had more to do with his inability to participate rationally in his own defense than with his inability to understand the proceedings against him. In fact, it had consistently been her opinion (apart from periods when H.M. was floridly psychotic) that he understood the charge against him and that he would face serious punishment for it if convicted. She further acknowledged that she did not believe she had reviewed any of the video footage of H.M. from the day of his arrest, and that she did not know if reviewing that footage would have changed her mind about his criminal responsibility. She conceded his invocation of his Fifth Amendment rights could be an indication that he appreciated the criminality of his conduct but noted that he also could have simply been parroting legal jargon that he did not actually understand.

H.M.'s counsel also presented the testimony of H.M.'s neighbor, Patrick Williams. On an unspecified date prior to the murder, Patrick saw H.M. smashing some of his belongings on the curb outside. He had posted a tweet that said: "the guy who lives across the way just smashed his acoustic guitar in the street and his skateboarding helmet, too, left the shards lying in the middle of the road." H.M. believed that God told him to break everything he owned that was made in China because China was "the Beast." Then, at around 1:30 a.m. on the night of the murder, Patrick went outside to smoke a cigarette and saw H.M. in the middle of the street on his knees shaking some kind of long staff at the sky. He sent a text to someone that said, "schizophrenic guy is out in middle of street at 1:30 a.m. with a stick, kneeling like an Old Testament prayer and gesturing at the heavens[.]" Patrick testified that when he woke up the next day, the police were "all over" H.M.'s home.

A recorded phone call between one of the investigating officers and a woman named Janet Poland was also played into the record, but she was not called to testify. Janet worked near H.M.'s neighborhood, and she claimed that she saw him walking down the middle of the street at 8 a.m. on the day he was arrested. She did not think anything of it at the time because the area has a halfway house and "a lot of weird people" were around. On the same day, a little after 1 p.m. she again saw H.M. in the middle of the street, and he was yelling, pointing his finger, and talking about "hellfire damnation kind of stuff." She claimed that she recognized H.M. when she saw his picture on the news but because she did not testify, she did not positively identify him under oath.

Based on the foregoing evidence, the circuit court found that H.M. was guilty but mentally ill of Denise's murder and that he did not satisfy his burden of proving his insanity defense by a preponderance of the evidence. It explained:

> The Court reaches this conclusion in reliance of [H.M.'s] own behavior and statements in the body cam footage after the murder; the interview at the Georgetown Police Department wherein [H.M.] affirmatively asserts his Fifth Amendment Right not to incriminate himself, a clear acknowledgement that he had committed a wrongful act and there would be consequences; the observations and testimony of Captain Mather; testimony of Dr. George F. Parker, the only expert who testified that he actually reviewed both the body cam interview footage and the interview conducted at the police station, which were both must closer in time to the criminal conduct of [H.M.] than the subsequent interviews each of the three experts conducted with [H.M.] in the intervening years.
>
> The Court certainly appreciates the testimony of Dr. Amy Trivette and assigns her opinions and observations a great deal of weight, but Dr. Trivette's admission under cross-examination that she did not recall seeing the body cam footage or police station interview prior to forming her opinion that [H.M.] was insane at the time of the commission of the criminal act. In addition, she states that she "did not know" if those videos would change her professional opinion of [H.M.] She did indicate that the information would be helpful in forming an opinion. This is key for the Court as Dr. Parker's opinion encompasses those videos and [H.M.'s] behavior/statements contained in those videos are the closest in time of any observation of [H.M.] to the commission of the criminal act. The fact that viewing those may have changed Dr. Trivette's opinion. . . tends to lessen the impact of her opinion. . .
>
> Dr. Parker also explained that it was the evidence closest in time to the act that was the best evidence at determining criminal responsibility. There does not seem to be a dispute on the weight given to the evidence available closest in time to the criminal act as opposed to evidence obtained later in time. It was Dr. Parker and not Dr. Trivette or Dr. Drogin who looked most extensively at the evidence of [H.M.'s] behavior at the time of the criminal act and it is on that basis that the Court assigns his opinion controlling weight in the matter.

The court in fact did not assign Dr. Drogin's opinion much weight at all as it "[appeared] from the record that [Dr.] Drogin's opinion is largely based upon Dr. Trivette's records and [was] largely derivative of her first hand work." The court further found that "Dr. Drogin did little to dispel this notion on the stand as the vast majority of Dr. Drogin's testimony was about Dr. Drogin himself and not [H.M.]" As for the testimony of Mr. Williams, and Mrs. Poland's recorded statement,

the court explained that "neither are medical experts or trained law enforcement officers." Thus, while their observations "obviously support the fact that [H.M.] is mentally ill. . . nothing in either's testimony [was] in any way persuasive as it [related] to the technical, legal issue of criminal responsibility[.]" Last, regarding H.M.'s ability to conform his behavior to the requirements of law, the court found

> that he did have that ability as demonstrated by the fact that he did in fact conform his conduct to the law in the months leading up to the incident. [H.M.] owned and possessed a golf club and a Louisville Slugger baseball bat for some period of time prior to committing this murder. At no point did [H.M.] use either of those potentially deadly weapons to attack or harm another human being. He was able to conform his behavior to the law. [H.M.] and Denise Hamilton resided together throughout their time in Kentucky and she had previously cared for him in Alabama with no known physical harm befalling her at the hands of [H.M.]

As the court found H.M. guilty but mentally ill of the murder, it ordered H.M. to be examined by two qualified mental health professionals and scheduled a commitment hearing. KRS 202C.030(5). Following his final commitment hearing, the court found beyond a reasonable doubt that H.M. satisfied each of KRS 202C.050's criteria for commitment. KRS 202C.040(3). H.M. does not raise any issues or arguments concerning the KRS 202C.040 commitment hearing.

H.M. thereafter appealed to the Court of Appeals, which unanimously affirmed. *H.M. v. Commonwealth*, No. 2022-CA-1016-MR, 2024 WL 1122572 (Ky. App. Mar. 15, 2024). Both H.M. and the Commonwealth filed appeals from the Court of Appeals' ruling. This Court then granted the motions for discretionary review from both appeals and held oral arguments. Additional facts are discussed below as necessary.

II. ANALYSIS

H.M.'s appeal raises a single issue: he argues the circuit court erred by not finding that he was legally insane at the time of Denise's murder. As part of that argument, he asserts that the circuit court erred by considering the invocation of his Fifth Amendment right to silence as evidence of his sanity and by refusing to consider Mr. Williams' testimony and Mrs. Poland's recorded statement as evidence of his insanity at the time of the offense. The Commonwealth's appeal challenges dicta from the Court of Appeals, which opined that KRS 202C.050(1)(c)'s former requirement that the respondent "has a demonstrated history of criminal behavior that has endangered or caused injury to others" could not be proven by evidence of the underlying offense with which the respondent was charged and for which he was deemed incompetent to stand trial. *H.M.*, No. 2022-CA-1016-MR, 2024 WL 1122572, at *10-*11 (discussing KRS 202C.050(1)(c) (eff. April 1, 2021, to July 14, 2024)). We will discuss each argument in turn.

A. The circuit court did not err by rejecting H.M.'s insanity defense.

As a preliminary matter, the parties dispute whether H.M. properly preserved this issue for our review. At the conclusion of the Commonwealth's evidence, H.M.'s counsel moved for a directed verdict arguing that it had put forth enough evidence during its cross-examination of the Commonwealth's witnesses for the court to find that H.M. lacked criminal responsibility for the offense. The court overruled the motion, as it had only heard expert testimony from Dr. Parker at that time; however, it agreed with the parties that the sole issue before it was whether H.M. was guilty but mentally ill or not guilty by reason of insanity. H.M.'s counsel then renewed his motion for directed verdict at the conclusion of all of the evidence. The court noted the motion, but felt it was redundant as the issue of H.M.'s insanity was the sole issue before it. It therefore declined to rule on the motion at that time and took the case under submission.

The Commonwealth argues, and is correct, that the proper mechanism to preserve this issue was a motion for dismissal pursuant to Kentucky Rule of Civil Procedure (CR) 41.02(2) rather than a motion for directed verdict under CR 50.01. Pursuant to KRS 202C.030(4), the evidentiary hearing "shall be held before a judge without a jury." And this Court has previously held that a directed verdict "is clearly improper in an action tried by a court without a jury." *R.S. v. Commonwealth*, 423 S.W.3d 178, 184 (Ky. 2014) (quoting *Brown v. Shelton*, 156 S.W.3d 319, 321 (Ky. App. 2004)). Instead, "the appropriate procedural mechanism for early dismissal is found in CR 41.02(2)." *Id.* The rule itself plainly provides that

> [i]n an action tried by the court without a jury, after the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

CR 41.02(2).

However, under the circumstances of this case, it would be absurd for this Court to conclude that the circuit court was not given "an opportunity to (1) rule on the issue or (2) correct any alleged error." *Gasaway v. Commonwealth*, 671 S.W.3d 298, 312 (Ky. 2023) (discussing the rationale behind the preservation rule). Indeed, in *Gasaway* we stated that "while the form of the objection does not control, the fact that an issue was made known to the trial court is paramount[.]" *Id.* at 313. As we have noted several times, the sole issue before the circuit court was whether H.M. was insane at the time of the offense. Thus, we cannot say that his counsel improperly preserved this issue simply because he presented the motion as a directed verdict motion as opposed to a motion to dismiss. This Court will accordingly review the circuit court's ruling for abuse of discretion. This means we are without authority to reverse the circuit court's ruling unless we conclude that its ruling was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999).

In order to be found not guilty by reason of insanity, H.M. had to prove that "as a result of a mental illness" he either "[lacked] substantial capacity. . . to appreciate the criminality of his conduct" or "[lacked] substantial capacity. . . to conform his conduct to the requirements of law." KRS 504.020(1). The burden of proving his insanity was entirely on H.M., and the Commonwealth did not bear the burden of disproving it. KRS 202C.030(4).

At its core, H.M.'s appeal asks this Court to reweigh the evidence presented to the circuit court in his favor. In particular, he contends that the circuit court should have found the testimony of Drs. Trivette and Drogin to be more persuasive on the issue of his criminal responsibility than Dr. Parker's and that it should have considered Mr. Williams' testimony and Mrs. Poland's recorded statement when reaching its conclusion on that issue.

Overall, we cannot conclude that the circuit court's decision to favor Dr. Parker's opinion over that of Drs. Trivette and Drogin was an abuse of discretion. As the court noted, Dr. Parker was the only one of the three experts who reviewed both the body camera footage of H.M.'s statements to Capt. Mather and the entirety of the footage of H.M. while at the police station on the day of the offense. This evidence of H.M.'s behavior was the closest in time to the actual offense and therefore, as Dr. Parker concluded, it was the best evidence available of his state of mind at the time of the offense. While it is true that Dr. Trivette spent more time observing H.M. than Dr. Parker due to his confinement at KCPC, those interactions took place months to years after the actual offense and were accordingly less probative of his mental state during the commission of the crime itself. And Dr. Drogin's opinion, it seems, was nothing more than an agreement with Dr. Trivette's conclusion with no supportive reasoning other than three brief, largely unproductive interviews Dr. Drogin had with H.M. via Zoom roughly three years after the offense occurred.

The circuit court also did not abuse its discretion in refusing to consider the testimony of Mr. Williams and Mrs. Poland in making its sanity ruling. As the court stated, neither of those individuals was an expert or a trained officer and neither were qualified to, nor did they, provide an opinion regarding whether H.M. satisfied the legal definition of insanity. Moreover, Mrs. Poland did not even testify in person and therefore never positively identified H.M. under oath nor was she subject to cross-examination.

We are also unable to conclude that the circuit court's finding that H.M. failed to prove he met either prong of the insanity defense was an abuse of discretion. To begin, despite the numerous delusional and bizarre statements H.M. made on the day of his arrest, there is ample evidence that he did not lack substantial capacity to appreciate the criminality of his conduct. At the scene, he told Capt. Mather that he was scared he had killed someone and acknowledged there were consequences for doing so. At the police station he told the officers he was deeply sorry for beating Denise to death and that he was going to "plead insanity." He also made various statements both to himself and to the officers to the effect that, because God told him to kill Denise, he should be "pardoned" or found "innocent." As Dr. Parker discussed, his indications that he would need to claim insanity or that he could be pardoned or found innocent implies that he understood he had done something criminal in nature.

H.M. also invoked his Fifth Amendment right

to silence during the police's questioning of him, which is an additional indication that he understood his actions in killing Denise were criminal. H.M. argues that the court erred by considering his invocation of the Fifth Amendment as evidence of his sanity, citing *Wainwright v. Greenfield*, 474 U.S. 284 (1986) (holding that a prosecutor's use of a defendant's post-arrest, post-*Miranda* silence as evidence of sanity violated the Due Process Clause); *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (holding that a prosecutor's use of a defendant's post-*Miranda* silence for impeachment purposes violates the Due Process Clause); and *Bartley v. Commonwealth*, 445 S.W.3d 1, 9 (Ky. 2014) (holding that use of a defendant's pre-arrest, post-*Miranda* silence as substantive evidence of guilt violated the Due Process Clause).

The problem with H.M.'s reliance on *Wainwright*, *Doyle*, and *Bartley* for this argument is that they all arose from *criminal* convictions, whereas KRS Chapter 202C provides a process for *civil* commitment. H.M. asserts before this Court that while KRS 202C.040 might be a civil proceeding, KRS 202C.030 is not. However, during H.M.'s counsel's objection to the circuit court considering evidence of H.M.'s invocation of the Fifth Amendment as evidence of his guilt, his counsel acknowledged that KRS 202C.030 is a civil proceeding. H.M. cannot now feed a different can of worms to this Court by asserting that it is criminal in nature. *Henson v. Commonwealth*, 20 S.W.3d 466, 470 (Ky. 1999). Moreover, we addressed and rejected the contention that KRS Chapter 202C is a criminal proceeding in a companion case to the one now before us. *See R.L.P. v. Commonwealth*, --- S.W.3d --- (Ky. 2026). And, even assuming arguendo that the circuit court did err, the error was harmless because, as discussed above, there was sufficient evidence beyond H.M.'s invocation of his right to remain silent to conclude he understood the criminality of his conduct.

Finally, regarding whether H.M. lacked substantial capacity to conform his behavior to the requirements of law, we agree with H.M. that the circuit court's basis for this finding was problematic. In essence, the circuit court found that H.M. had the ability to conform his behavior to what the law requires because he had not previously attacked or killed Denise. However, "[e]ven if a lower court reaches its judgment for the wrong reason, we may affirm a correct result upon any ground supported by the record." *Wells v. Commonwealth*, 512 S.W.3d 720, 721–22 (Ky. 2017). Here, there was a litany of evidence from the day of the offense that supported the circuit court's conclusion that H.M. had the ability to conform his conduct to the requirements of the law at the time of the offense.

When the police responded to the home, H.M. complied with their commands, was taken into custody without incident, and calmly participated in questioning by Capt. Mather. He was then taken to the police station where he complied with the officers when they took photographs of him and took his shoes for evidentiary purposes. He also participated in an interview with the officers for about thirty minutes before claiming that he was insane and invoking his right to silence. During that interview, and during the time that he was alone in the interview room and speaking to himself, he made statements suggesting that he attacked Denise, not because God told him to, but because he lost his temper at the fact that she wanted to keep her living space in the home separate from his. Further support for this motive exists via the April 2018 incident in which he attempted to beat down the door that divided their living spaces with a golf club because Denise had locked it.

In sum, we cannot conclude that the circuit court's finding that H.M. had the substantial capacity to both understand the criminality of his conduct and conform his conduct to the requirements of the law was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

As we hold that the circuit court did not abuse its discretion in declining to find that H.M. was insane at the time of the offense, it is unnecessary for us to address the Commonwealth's argument that the insanity defense should not be available to a respondent during a KRS 202C.030 evidentiary hearing. However, we are compelled to bring this issue to the attention of our General Assembly. As it is currently written, KRS 202C.030 provides that a respondent "may present evidence of affirmative defenses that could be raised at a criminal trial on the charged crime[,]" and that "[i]f the court determines that insufficient evidence has been presented to support a finding that the respondent is guilty of the charged crime against him or her, the court shall order the immediate release of the respondent." KRS 202C.030(4), (6). Insanity is of course an affirmative defense that may be raised against a criminal charge, and if a defendant is found to be insane at the time of an offense he is considered "not guilty" by reason of insanity of that offense.

Thus, it appears that the statutory scheme would currently require the immediate release of an individual deemed incompetent to stand trial in the criminal proceedings against him and thereafter deemed not guilty by reason of insanity during KRS Chapter 202C proceedings against him. We strongly suspect, without explicitly holding, that the General Assembly could not have intended such an absurd result. *See also*, *H.M.*, No. 2022-CA-1016-MR, 2024 WL 1122572, at *9 (raising similar concerns regarding KRS 202C.030).

B. We decline to address the meaning of the prior version of KRS 202C.050(c) as it relates to the underlying offense.

Before the Court of Appeals, H.M. asserted that the circuit court erred by finding that he satisfied each of KRS 202C.050's criteria for commitment.[4] Of relevance, H.M. argued that he did not satisfy KRS 202C.050(c) which, at the time of his commitment, required that "[t]he respondent has a demonstrated history of criminal behavior that has endangered or caused injury to others or has a substantial history of involuntary hospitalizations under KRS Chapter 202A or 202B prior to the commission of the charged crime." KRS 202C.050(c) (eff. April 1, 2021, to July 14, 2024). As H.M.'s previous hospitalizations were in Alabama hospitals, he did not have a history of hospitalizations under KRS Chapters 202A or 202B. Thus, the Court of Appeals focused on whether he had a demonstrated history of criminal behavior that had endangered or caused injury to others. *H.M.*, No. 2022-CA-1016-MR, 2024 WL 1122572, at *10.

[4] He did not renew this argument in his appeal to this Court.

The Court of Appeals held that "criminal behavior" did not mean a criminal conviction and instead interpreted the statutory requirement to mean that the Commonwealth must prove that the respondent "has a demonstrated history of engaging in. . . conduct which causes social harm and is punishable by law." *Id.* at *11. The court held that the undisputed incidents of H.M. setting his neighbor's lawn on fire and firing an arrow at his neighbor while living in Alabama satisfied this criteria. *Id.* Nevertheless, in dicta, it rejected the Commonwealth's argument that the underlying offense for which a KRS 202C respondent is deemed incompetent to stand trial can, in and of itself, satisfy the history of criminal behavior prong of KRS 202C.050(c). *Id.* at *10.

The Commonwealth's appeal asks this Court to not address this issue or, in the alternative, to hold that the Court of Appeals decided it incorrectly. We opt for the former, as we agree with the Court of Appeals that H.M. had a sufficient history of criminal behavior that endangered or caused injury to others apart from the underlying offense to satisfy this criterion.

III. CONCLUSION

Based on the foregoing, we affirm.

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

WORKERS' COMPENSATION

CUMULATIVE TRAUMA INJURY

PERMANENT PARTIAL DISABILITY (PPD) BENEFITS

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

Claimant was employed with International Automotive Components (IAC) from June 2002 until June 25, 2021, when plant closed — On September 16, 2023, claimant filed instant claim alleging a June 25, 2021, cumulative trauma injury to multiple body parts, including her cervical spine, lumbar spine, both hands, both knees, and both shoulders, resulting from approximately 20 years of physically demanding and repetitive work for IAC — IAC contested her claim — ALJ determined that claimant's neck and bilateral shoulder conditions are partially attributable to her work at IAC; however, her low back condition is attributable to her age — With respect to permanent partial disability (PPD) income benefits, ALJ relied on Dr. Oteham to find that claimant retains a 13.6% impairment for her work-related bilateral shoulder and cervical spine condition — Further, based

on Dr. Oteham's testimony, ALJ found that claimant lacks the physical capacity to return to her pre-injury work at IAC, and that she is entitled to enhanced benefits contained in KRS 342.730(1)(c)1 — IAC filed petition for reconsideration, arguing that record did not support ALJ's award of three-multiplier — IAC argued that ALJ's finding that claimant is eligible was contradicted by claimant's testimony that when she was laid off by IAC, she was working without restrictions and had no plans of quitting — IAC also requested additional findings from ALJ — In response, ALJ clarified that only claimant's bilateral shoulder and cervical conditions are compensable, but overruled remainder of IAC's petition seeking additional findings and explanation of the basis of the award of the three-multiplier — Workers' Compensation Board (Board) affirmed ALJ on issue of work-relatedness of neck and shoulder injuries, but vacated award of three-multiplier and remanded to ALJ for further findings — Claimant appealed — Court of Appeals affirmed — Claimant appealed — AFFIRMED — When a petition for reconsideration of an ALJ's order or award is filed, the Board may review that order or award to determine whether the material evidence in the whole record renders it clearly erroneous, arbitrary, capricious, an abuse of discretion, or clearly unwarranted — In instant action, because IAC filed a petition for reconsideration, Board was entitled to review ALJ's award of PPD benefits enhanced by the three-multiplier for clear error, arbitrariness, capriciousness, abuse of discretion, and to determine whether the award was clearly unwarranted — KRS 342.730(1)(c)1 requires that, before a claimant be awarded the three-multiplier, he must be physically incapable of returning to the type of work that the employee performed at the time of the injury — Dr. Oteham opined that claimant could continue to perform her work duties in the full-time setting in which she is currently employed — At the time of Dr. Oteham's examination, claimant was working in a clerical data entry position for a new employer — Dr. Oteham did not mention any specific physical restrictions or whether she could perform her pre-injury work — Without more, it is difficult to follow the logical leap ALJ made from Dr. Oteham's opinion that claimant is able to continue performing her current clerical position to ALJ's conclusion that claimant cannot perform her prior tasks at IAC — Thus, ALJ's award of three-multiplier was an abuse of discretion —

Kendra Russell v. International Automotive Components; Hon. Phillipe Rich, ALJ; and Workers' Compensation Board (2025-SC-0241-WC); On appeal from Court of Appeals; Opinion by Justice Keller, *affirming*, rendered 4/23/2026. **[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 Kendra Russell ("Russell") appeals the Court of Appeals' decision affirming the Workers' Compensation Board's ("Board") Opinion vacating the administrative law judge's ("ALJ") award of the three-multiplier and remanding for additional findings. For the reasons set out below, we affirm the decision of the Court of Appeals.

I. FACTUAL AND PROCEDURAL BACKGROUND

Russell, a 54-year-old female resident of Madisonville, Kentucky, filed a claim for workers' compensation benefits arising out of her employment with International Automotive Components ("IAC"). Russell was employed by IAC from June of 2002 until June 25, 2021, the date the plant closed. On September 16, 2023, Russell filed a claim for injury, alleging a June 25, 2021, cumulative trauma injury to multiple body parts — including her cervical spine, lumbar spine, both hands, both knees, and both shoulders — resulting from approximately twenty years of physically demanding and repetitive work for IAC. IAC contested Russell's claim, and her claim went before an ALJ. The issues contested include whether the injury was caused by Russell's employment with IAC and whether Russell was entitled to permanent income benefits per KRS[1] 342.730.

[1] Kentucky Revised Statutes.

On July 24, 2024, the ALJ rendered an Opinion, Award, and Order. That opinion summarized the conflicting medical evidence presented in reports by Dr. Larry Oteham, Dr. Mitchell Harris, and Dr. Gregory Snider. Dr. Oteham and Russell were also deposed prior to the final hearing, and Russell testified at the final hearing. Dr. Oteham, who had evaluated Russell at the request of Russell's attorney, diagnosed Russell with "lumbar, cervical, bilateral knee, and bilateral shoulder degenerative disease, bilateral hand osteoarthritis and carpal tunnel syndrome." Dr. Oteham attributed 80% of Russell's complaints to her work at IAC. Dr. Harris and Dr. Snider had performed Independent Medical Exams on Russell at IAC's request. Dr. Harris found "no abnormal findings in the cervical spine, mild lumbar pain with slightly decreased motion, a likely right shoulder SLAP tear, mild bilateral patellofemoral knee arthritis, and bilateral carpal tunnel syndrome." Dr. Harris attributed none of Russell's diagnoses to her work at IAC and assigned a 0% impairment, opining that her condition was the result of common degenerative changes associated with her age and body mass index. He concluded that he would not recommend physical restrictions for Russell and that further medical treatment was unnecessary. In his report, Dr. Snider noted that at the time Russell was laid off in June of 2021, Russell was working full time without restrictions and was not complaining about any limitations or work-related symptoms pertaining to her back, knees, neck, hands, and shoulders. While Dr. Snider concluded that Russell suffered from knee arthritis and may have shoulder tendinitis, he found no signs that they were symptoms of work-induced cumulative trauma.

Ultimately, the ALJ concluded that "Russell's neck and bilateral shoulder conditions [are] partially attributable to her work with IAC." However, the ALJ concluded that "Russell's low back condition is not traceable to a work-related cumulative trauma," and instead attributed these conditions to her age. As for the permanent partial disability ("PPD") income benefits under KRS 342.730 and KRS 342.732, the ALJ "relie[d] on Dr. Oteham to find Russell retains a 13.6% impairment for her work-related bilateral shoulder and cervical spine condition." After explaining how the ALJ calculated this figure, the ALJ briefly noted that "[b]ased upon the testimony of Dr. Oteham, the ALJ finds Russell lacks the physical capacity to return to her pre-injury work at IAC, and she is entitled to the 3.2 multiplier contained in KRS 342.730(1)(c)2 [sic]."[2] The ALJ awarded $186.12 per week in PPD.

[2] The Board explained in its Opinion that, "We note the three-multiplier is contained in [KRS] 342.730(1)(c)1, not (1)(c)2 as stated by the ALJ; however, as we are remanding this claim on other grounds, the ALJ may correct any clerical error on remand."

IAC filed a petition for reconsideration, arguing that the record did not support the ALJ's award of the three-multiplier. KRS 342.730(1)(c)1 states, "If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined . . . ." IAC argued that the ALJ's finding that Russell is eligible under that statute was contradicted by Russell's testimony that when she was laid off by IAC, she was working without restrictions and had no plans of quitting. IAC requested additional findings from the ALJ, including a finding "reconciling how Plaintiff worked without restrictions until she was laid off, at which point she had no plans of quitting, but is now incapable of returning to that job." IAC also requested the ALJ to clarify those conditions found to be work-related. The ALJ's order in response clarified that "only Russell's bilateral shoulder and cervical conditions are found to be compensable" but overruled the remainder of the Defendant's petition seeking additional findings and explanation of the basis for the award.

IAC then appealed to the Board, raising two issues: (1) that the ALJ's determination that Russell's neck and shoulder conditions were work-related was not supported by substantial evidence; and (2) the ALJ abused his discretion by awarding the three-multiplier because the record contained no evidence that Russell was unable to perform her prior job at IAC or was now under any work restrictions.

The Board issued an Opinion Affirming in Part, Vacating in Part, and Remanding. The Board affirmed the ALJ on the issue of work-relatedness of the neck and shoulder injuries but vacated the award of the three-multiplier and remanded to the ALJ for further findings. The Board explained,

> The ALJ is required to recite the specific evidence he relied upon in finding the three-multiplier applicable. A general statement of reliance upon a particular doctor is insufficient, as more detail is required. In his report, Dr. Oteham opined Russell could "continue to perform her work duties in the full-time setting she is currently employed in." Russell was working in a clerical data entry position for a new employer at the time of Dr. Oteham's

examination. Dr. Oteham did not mention any specific physical restrictions or whether she could perform her pre-injury work.

The ALJ was charged with analyzing the actual tasks the employee performed prior to the injury and then assessing the limitations and restrictions on her physical activities resulting from the work-related injury. *Voith Industrial Services, Inc. v. Gray*, 516 S.W.3d 817 (Ky. App. 2017). *Miller v. Square D. Co.*, 254 S.W.3d 810, 813–14 (Ky. 2008) stands for the proposition that a worker who can no longer perform all his required job tasks lacks the ability to return to the "type of work performed at the time of injury." Additionally, in *Ford Motor Co. v. Forman*, 142 S.W.3d 141 (Ky. 2004), the Supreme Court held that the type of work performed at time of injury refers to the actual jobs the individual performed. Finally, the evidence is reviewed as of the time of the hearing to determine whether a claimant could perform his pre-injury work. *See Apple Valley Sanitation Inc. v. Stambaugh*, 645 S.W.3d 434, 438–39 (Ky. 2022).

A worker's testimony is competent evidence of his or her physical condition and of their ability to perform various activities both before and after being injured. *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979). The ALJ may but is not compelled to rely upon the claimant's self-assessment of their ability to perform their prior work. *Ira A. Watson Department Store v. Hamilton*, [34 S.W.3d 48 (Ky. 2000)].

The Board is not directing a particular result. The ALJ must simply and adequately detail the evidence relied upon in reaching his decision. *Kentland Elkhorn Coal Corporation v. Yates*, 743 S.W.2d 47 (Ky. App. 1988). A party is entitled to know with some specificity the reasons for the award, although certainly the ALJ is not required to engage in a detailed discussion or set forth in minute detail the reasons for reaching a particular result. *Big Sandy Community Action Program v. Chaffins*, 502 S.W.2d 526 (Ky. App. 1973).

We affirm the finding Russell sustained injuries to her neck and shoulders caused by work-related cumulative trauma; however, we must vacate the award of PPD benefits enhanced by the three-multiplier contained in KRS 342.730(1)(c)1 and remand for additional findings consistent with this Opinion.

Russell appealed the Board's Opinion Affirming in Part, Vacating in Part, and Remanding to the Court of Appeals, arguing that the Board's determination to vacate in part and remand was based upon a misunderstanding of the evidence. The Court of Appeals perceived no such error and agreed with the Board's analysis. Accordingly, the Court of Appeals affirmed the Board. This appeal followed.

II. STANDARD OF REVIEW

"[A]ppellate courts may review the Board's decision to remand to the ALJ for error, taking into consideration, however, the Board's wide discretion to do so." *Tryon Trucking, Inc. v. Medlin*, 586 S.W.3d 233, 238 (Ky. 2019). "[T]he Board should have wide latitude and deference in whether to remand a particular issue to the ALJ for additional findings and analysis . . . ." *Id.* "If the ALJ has made all necessary findings to resolve the issue at hand and the Board has erred in remanding for additional, unneeded findings that would be of no additional value in resolving the issues in the case, if for no other reason than judicial economy alone, that decision, just as any other, is subject to review and reversal by the appellate courts." *Id.* "[W]e assess the Board's decision to remand based upon whether it 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)).

III. ANALYSIS

On appeal to this Court, Russell argues that the Court of Appeals erred in affirming the decisions of the Board. She likewise alleges that the Board erred as a matter of law in vacating in part and remanding the ALJ's decision by substituting its judgment for that of the ALJ. Specifically, Russell claims the Board erred in vacating the award of PPD benefits enhanced by the three-multiplier and remanding to the ALJ for additional findings. Citing *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999), Russell argues that "[t]he Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record."

KRS 342.230(2) defines the duties of a Workers' Compensation administrative law judge as follows:

> [A]dministrative law judges shall conduct hearings, and otherwise supervise the presentation of evidence and perform any other duties assigned to them by statute and shall render final decisions, orders, or awards. Administrative law judges may, in receiving evidence, make rulings affecting the competency, relevancy, and materiality of the evidence about to be presented and upon motions presented during the taking of evidence as will expedite the preparation of the case.

"The ALJ, as the finder of fact, . . . has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). "Where . . . the . . . evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ." *Id.* "When one of two reasonable inferences may be drawn from the evidence, the finders of fact may choose." *Jackson v. Gen. Refractories Co.*, 581 S.W.2d 10, 11 (Ky. 1979) (citing *Blair Fork Coal Co. v. Blankenship*, 416 S.W.2d 716, 718 (Ky. 1967)).

Although the ALJ is tasked with fact-finding, its findings are not review-proof. KRS 342.285 grants the Board the authority to review the ALJ's order or award on appeal:

> (1) **An award or order of the administrative law judge** as provided in KRS 342.275, **if petition for reconsideration is not filed** as provided for in KRS 342.281, **shall be conclusive and binding as to all questions of fact**, but either party may in accordance with administrative regulations promulgated by the commissioner appeal to the Workers' Compensation Board for the review of the order or award.
> (2) No new or additional evidence may be introduced before the board except as to the fraud or misconduct of some person engaged in the administration of this chapter and affecting the order, ruling, or award, but the board shall otherwise hear the appeal upon the record as certified by the administrative law judge and shall dispose of the appeal in summary manner. **The board shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact, its review being limited to determining whether or not**:
> (a) The administrative law judge acted without or in excess of his powers;
> (b) The order, decision, or award was procured by fraud;
> (c) The order, decision, or award is not in conformity to the provisions of this chapter;
> **(d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record**; or
> **(e) The order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion**.

(emphasis added). The emphasized portions together indicate that when a petition for reconsideration of the ALJ's order or award is filed, the Board may review that order or award to determine whether the material evidence in the whole record renders it clearly erroneous, arbitrary, capricious, an abuse of discretion, or clearly unwarranted. Because IAC filed a petition for reconsideration, the Board was entitled to review the ALJ's award of PPD benefits enhanced by the three-multiplier for clear error, arbitrariness, capriciousness, abuse of discretion, and to determine whether the award was clearly unwarranted.

KRS 342.730(1)(c)1 requires that, before a claimant be awarded the three-multiplier, he or she must be physically incapable of returning to the type of work that the employee performed at the time of the injury. Here, the ALJ found that, "[b]ased upon the testimony of Dr. Oteham, the ALJ finds Russell lacks the physical capacity to return to her pre-injury work at IAC, and she is entitled to the 3.2 multiplier contained in KRS 342.730(1)(c)2." *See* fn. 2. As the Board pointed out in its Opinion Vacating in Part, the flaw with the ALJ's analysis is that

> [i]n his report, Dr. Oteham opined Russell could "continue to perform her work duties in the full-time setting she is currently employed in." Russell was working in a clerical data entry position for a new employer at the time of Dr. Oteham's examination. Dr. Oteham did not mention any specific physical restrictions or whether she could perform her pre-injury work.

Without more, it is difficult to follow the logical leap the ALJ made from Dr. Oteham's opinion that Russell is able to continue performing her current clerical position to the ALJ's conclusion that Russell *cannot* perform her prior tasks at IAC. While it is true that the ALJ is the sole fact-finder in proceedings in workers' compensation claims, and the Board may not substitute its own assessment of the weight and credibility of the evidence in the record for that of the ALJ's, the ALJ must still have a reasonable basis for its factual conclusions. As it stands, without greater support from the record, the ALJ's findings here suffer from a dearth of evidence and are therefore clearly erroneous, and the award of the three-multiplier was an abuse of discretion. Because of this, we cannot find that it was error for

the Board to remand to the ALJ with instructions to "simply and adequately detail the evidence relied upon in reaching his decision."

IV. CONCLUSION

Based on the foregoing, we affirm the Court of Appeals' decision affirming the Workers' Compensation Board's Opinion vacating the administrative law judge's award of the three-multiplier and remanding for additional findings.

All sitting. Bisig, Conley, Goodwine, and Nickell, JJ., concur. Thompson, J., concurs in result only. Lambert, C.J., dissents.

ATTORNEYS

Suspended from the practice of law for 181 days —

In re: Barry Nathaniel Sullivan (2024-SC-0196-KB); In Supreme Court; Opinion and Order entered 4/23/2026. **[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).]**

On August 22, 2024, this Court issued an Opinion and Order suspending Barry Nathaniel Sullivan from the practice of law for 181 days, probated for 3 years, subject to conditions. *In re Sullivan*, 701 S.W.3d 123, 128-29 (Ky. 2024). After Sullivan failed to make required restitution payments—an explicit condition of his probated suspension—this Court entered an Order directing Sullivan to show cause, if any, why his probation should not be revoked. Sullivan did not respond. Therefore, we hereby impose the probated sanction.[1]

[1] 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

The disciplinary sanction underlying this Opinion addressed Sullivan's ethical violations related to services provided to the Estate of Ruthan Fields, whose will was invalidated after her death due to signature issues. Ruthan died intestate, leaving her son, Christopher Fields, as her only heir at law. But prior to her death, Ruthan transferred significant financial assets to Shayana, Christopher's only child. During his representation, Sullivan met with Christopher, Shayana, and Jonathan Davis, Ruthan's former financial advisor, who had been named administrator by Ruthan's invalidated will. Christopher and Shayana signed affidavits requesting that Davis be appointed administrator of the Estate and that the testamentary wishes Ruthan expressed prior to her death be carried out.

Sullivan lacked experience in handling estates and incorrectly inventoried assets that passed outside of the estate, which vastly increased the estate's value. Sullivan also miscalculated the percentage of the estate's value that could be paid to the representative and demanded a $32,000 retainer from Shayana to assist Davis in handling an estate with an approximate value of only $70,000. In addition, there was no written fee agreement documenting the basis for Sullivan's fees.

Sullivan paid Jonathan Davis over $12,000 in fees, with no basis or reason for the payments. 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. Ultimately, after the relationship between Christopher and Shayana deteriorated, the probate court replaced Davis and Sullivan with the Public Administrator.

After several unsuccessful attempts to contact Sullivan regarding whether she was entitled to a partial refund of the $32,000 retainer, Shayana hired an attorney. The Inquiry Commission issued a six-count Charge against Sullivan for the violation of several professional rules. To resolve the disciplinary proceedings against him, Sullivan proposed a sanction to which the KBA did not object and which this Court ultimately deemed sufficient. In an August 22, 2024 Order, this Court subjected Sullivan to a 181-day suspension, probated for 3 years, with conditions. In accordance with the disciplinary order, Sullivan paid the costs of the disciplinary action, and completed the Commonwealth's Ethics and Professional Enhancement Program and the Trust Account Management Program. Pertinent to the matter before us, this Court also required Sullivan to comply with the following condition:

> **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.**

Sullivan, 701 S.W.3d at 129 (emphasis added). As of July 17, 2025, when the KBA filed the motion to show cause, Sullivan had only paid Shayana $250 in restitution.

Sullivan was ordered to pay a minimum of $1,000 every ninety days beginning ninety days from the entry of the Order. Further, Sullivan was directed to pay the full restitution amount within one year of entry of the Order. Sullivan mailed his first restitution payment of $1,000 on November 19, 2024, though Shayana misplaced the check and it was thus never cashed. On March 14, 2025, attorney Nathan Billings contacted Deputy Bar Counsel on behalf of Shayana because Billings contacted Sullivan in December 2024 to inquire about the November restitution payment on Shayana's behalf. According to Billings, Shayana agreed to assign some of the restitution payments to Billings to pay legal fees she owed him. Billings contacted Sullivan multiple times in December 2024 and January 2025 to resolve the matter.

On March 28, 2025, Sullivan emailed the Office of Bar Counsel to inform them that he was terminated from his employment and therefore unable to make a full restitution payment on time. He mailed Billings a $250 check toward the restitution owed to Shayana and planned to make bi-weekly payments. As of July 17, 2025, when the KBA filed its motion to show cause, Shayana had only received $250 of the $31,500 required to be paid by Sullivan. On August 18, 2025, this Court entered an order directing Sullivan to show cause, if any, why the suspension should not be imposed. Sullivan has not responded.

When Sullivan filed his motion for negotiated sanction to resolve the pending disciplinary matters, he proposed paying $16,359.47 in restitution to Shayana. His proposal required payment of a minimum of $1,000 every ninety days, with the full balance to be paid by the expiration of the three-year probationary period. Instead, this Court required $31,500 be paid in restitution upon reasoning that, while Sullivan performed some work in the estate matter, his time was not appropriately spent and the services performed did not function for the benefit of his client. Therefore, Sullivan was only entitled to retain $500 of the $32,000 retainer.

Sullivan proposed and agreed to make a minimum payment of $1,000 to Shayana every ninety days—a condition he failed to satisfy—thereby expressly violating this Court's August 2024 Order. As such, we hereby impose the 181-day suspension.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. Barry Nathaniel Sullivan, KBA Member Number 91634, is hereby suspended from the practice of law for 181 days upon entry of this Order.

2. Sullivan shall receive no new disciplinary charges issued by the Inquiry Commission.

3. Sullivan shall pay restitution in the amount of $31,250 to Shayana Fields. He is directed to pay a minimum of $1,000 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 instruments, 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. Sullivan shall pay the costs associated with proceeding in the amount of $180.56.

5. Pursuant to SCR 3.390, Sullivan:

a. Shall notify all clients in writing of his inability to continue to represent them and shall furnish copies of all such letters to the Director of the Kentucky Bar Association. These notices shall be mailed or emailed to the respective clients within ten (10) days of the entry of this Order, if not already mailed. Sullivan shall make arrangements to return all active files to the client or new counsel, and shall return all unearned attorney fees and client property to the client and shall advise the Director of such arrangements within the ten (10) day period;

b. Shall not, during the term of suspension and until reinstatement, accept new clients or collect unearned fees;

c. Shall immediately cancel any pending

advertisements; must terminate any advertising activity for the duration of the term of suspension; and must not allow his name to be used by a law firm in any manner until he is reinstated.

All sitting. All concur.

ENTERED: April 23, 2026

SUPREME COURT RULINGS

DEPUBLISHING OPINIONS OF

THE COURT OF APPEALS

Jajic v. Sainato, 72 K.L.S. 3, p. 49; 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 4/15/2026.

Lane v. Kentucky Dep't of Corr., 72 K.L.S. 10, p. 5; 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 4/15/2026.

Taylor v. Com., 72 K.L.S. 9, p. 27; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 4/15/2026.

PETITIONS FOR REHEARING, ETC.

FILED AND FINALITY ENDORSEMENTS

ISSUED BETWEEN

MARCH 19, 2026 AT 10:00 A.M.

AND APRIL 23, 2026 AT 10:00 A.M.

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

PETITIONS:

Hodge v. Kentucky Parole Bd., 73 K.L.S. 3, p. 48; Petition for rehearing was filed on 4/8/2026.

MOTIONS for extension of time to file petitions: None.

RULINGS on petitions previously filed:

Coleman v. Jefferson Cty. Bd. of Educ., 72 K.L.S. 12, p. 31; Petition for rehearing and petition for extension were denied on 4/23/2026. Finality endorsement was issued on 4/23/2026.

Jackson v. Mayfield KY OPCO, LLC, 72 K.L.S. 12, p. 44; Petition for rehearing was denied on 4/23/2026. The opinion was modified on the court's own motion on 4/23/2026. Said modification did not affect the holding.

FINALITY ENDORSEMENTS:

During the period from March 19, 2026, through April 23, 2026, 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).

In re: Calilung, 73 K.L.S. 3, p. 42, on 4/9/2026.

Coleman v. Jefferson Cty. Bd. of Educ., 72 K.L.S. 12, p. 31; Petition for rehearing and petition for extension were denied on 4/23/2026. Finality endorsement was issued on 4/23/2026.

Gibbs v. Com., 73 K.L.S. 3, p. 42, on 4/9/2026.

Harris v. Mercy Home Health, 73 K.L.S. 3, p. 45, on 4/9/2026.

In re: McLeod, 73 K.L.S. 3, p. 53, on 3/25/2026.

Schneider Electric USA, Inc. v. Williams, 73 K.L.S. 3, p. 53, on 4/9/2026.

DISCRETIONARY REVIEW:

MOTIONS granted:

Jajic v. Sainato, 72 K.L.S. 3, p. 49; 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 4/15/2026.

Lane v. Kentucky Dep't of Corr., 72 K.L.S. 10, p. 5; 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 4/15/2026.

MOTIONS denied:

Hawkins v. Bd. of Educ. of Scott Cty., 72 K.L.S. 5, p. 34; Motion for discretionary review was denied on 4/15/2026.

Kentucky Bluegrass Experience Resort v. Woodford Cty. Bd. of Adjustments, 72 K.L.S. 7, p. 17; Motion for discretionary review was denied on 4/15/2026.

Motter v. Motter, 72 K.L.S. 9, p. 24; Motion for discretionary review was denied on 4/15/2026.

Taylor v. Com., 72 K.L.S. 9, p. 27; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 4/15/2026.

MOTIONS filed:

Com., Cab. for Health and Fam. Servs. v. Faces of Change, LLC, 73 K.L.S. 1, p. 52; Motion for discretionary review was filed on 4/1/2026.

Skinner v. Louisville/Jefferson Cty. Metro Gov't, 73 K.L.S. 3, p. 4; Motion for discretionary review was filed on 3/24/2026.

Stone v. Dean Dairy Holdings, LLC, 73 K.L.S. 3, p. 29; Motion for discretionary review was filed on 3/27/2026.

MOTIONS for extension of time to file motions for discretionary review: None.

OTHER:

Flynn v. VanMeter, J., 73 K.L.S. 3, p. 17; A notice of appeal to the Kentucky Supreme Court was filed on 3/23/2026.

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.

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