



KENTUCKY LAW SUMMARY

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

August 31, 2026
73 K.L.S. 8
Louisville, Kentucky

CASE DIGESTS
VERBATIM OPINIONS
COURT OF APPEALS

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UNIFORM COMMERCIAL CODE

SALES

SALE OF A USED AUTOMOBILE

WARRANTIES

CIVIL PROCEDURE

SMALL CLAIMS COURT

**FAILURE TO ENTER THE WRITTEN
SALES CONTRACT INTO EVIDENCE**

Defendant is a mechanic whose primary business is operating an auto repair garage — Defendant occasionally sells used vehicles, most of which come from customers who do not want to spend the money to repair their vehicles — Defendant purchases these vehicles, makes the needed repairs, and then sells the vehicles — In July 2024, buyer purchased a 2008 Mazda from defendant for her daughter — The odometer registered over 157,000 miles at the time of purchase — Purchase price was \$3,500 — Buyer paid \$1,500 down and her daughter agreed to pay remaining balance at \$200 per month over ten months — Parties agreed entered into a written agreement (Agreement) for the sale — Agreement was originally drafted by buyer, but was modified by defendant's wife — Agreement supposedly contained no express warranties and may have contained an "as is" clause; however, Agreement is not in the record — Approximately two weeks after the sale, daughter contacted defendant about a transmission hose leak — Defendant fixed the leak at no cost — Daughter paid the first \$200 installment — However, weeks after the hose repair, daughter contacted defendant to report other problems with the engine — Defendant determined that the engine was "bad" and needed to be replaced, but refused to replace it for free — Daughter took vehicle to another mechanic, who determined that engine would need to be replaced and estimated the cost of up to \$3,000 — Buyer and her daughter demanded

— Note —

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unedited majority opinions.**

that defendant either return the deposit or pay for the engine to be replaced — Defendant refused — Buyer and her daughter (collectively "plaintiffs") filed a small claims action against defendant in district court demanding either reimbursement of the deposit or funds to replace the engine — Defendant filed a counterclaim for breach of contract demanding the remaining balance of \$1,800 from plaintiffs — District court held a hearing — Defendant appeared with counsel — Plaintiffs proceeded *pro se* — Video recording indicates that buyer presented a document purporting to be parties' Agreement — Judge examined this document, but it was not admitted as an exhibit by parties — After hearing testimony and reviewing Agreement, district court decided that vehicle was sold "as is" with no warranties — District court asked defendant if he was willing to take vehicle back in lieu of pursuing his breach of contract counterclaim, but defendant declined — Although finding that an "as is" sale occurred, district court entered judgment for plaintiffs, in effect rescinding Agreement — District court ordered defendant to return \$1,500 down payment — District court dismissed defendant's counterclaim — There was no provision for a return of the vehicle to defendant — Defendant appealed to circuit court with an appropriate statement of appeal — Plaintiffs did not file a counterstatement — Circuit court affirmed district court, but on other grounds — Circuit court found that, even though district court believed sale was "as is," there was no proof in the record that notice of that limitation was in writing — Circuit court noted that Agreement was not in the record and determined that, other than defendant's testimony, there was no proof in the record that plaintiffs were given notice that the sale was "as is" — Circuit court also found that defendant waived his right to a return of the vehicle by seeking damages rather than repossession — Defendant appealed — REVERSED, VACATED the judgment of the district court, and REMANDED to district court to dismiss the complaint and to adjudicate the counterclaim — Court of Appeals noted that nothing prohibited district court from directing parties to try to resolve the case before another hearing — Substantial evidence supported district court's finding that vehicle was sold "as is" — There is an implied warranty of merchantability, even with the sale of used vehicles — Pursuant to KRS 355.2-314(2)(c), that simply means that the used vehicle was "fit for the ordinary purposes

for which" it is used — Question is whether this used car with was fit for ordinary purposes when defendant sold it as a used car — Implied warranty of fitness for a particular purpose under KRS 355.2-315 may arise; however, for this warranty to apply, evidence must show that the buyer relied upon the seller to select a product suitable for some particular purpose — In instant action, vehicle was sold to operate as a vehicle generally, not for some particular purpose which called upon defendant to advise on what type of vehicle to buy — KRS 355.2-315 did not expand the general proposition that the sale of used vehicles does not involve an implied warranty of fitness for a particular purpose — District court made no finding about an implied warranty of fitness for a particular purpose; rather, it held that any implied warranty had been waived by the "as is" sale — While the waiver of the implied warranty of merchantability does not require a written document, the waiver of any warranty of fitness for a particular purpose would have — Both parties testified that no written warranties were included in Agreement and that no verbal warranties were discussed or offered — Defendant confirmed that transaction was "as is" and testified that he never offered warranties for any of the used vehicles he sold — Buyer stated that there was no "as is" language in Agreement — The exclusion of warranties does not require the phrase "as is," but may be found based on other language used — Court of Appeals was unable to confirm the language used because the Agreement was not in the record; however, district court had the opportunity to review the Agreement and resolved this factual issue in defendant's favor — District court confirmed on two occasions that vehicle was bought "as is" — Nevertheless, district court basically ordered a rescission or awarded damages to plaintiffs — Noting that Agreement was not part of the record, circuit court found that defendant's testimony alone was not sufficient to support that sale was "as is" — However, Agreement did not have to be marked and admitted as an exhibit to be considered as evidence by the small claims division of the district court — There are minimal rules that must be followed in small claims court — Video makes clear that Agreement exists, that it was provided to district court, and that district court reviewed Agreement — When parties do not make sure that evidence becomes part of the record, an appellate court must assume the missing evidence supports the trial court's decision — "As is" finding did not support rescission of the contract as a proper remedy — Plaintiffs are not entitled to rescission of the contract or reimbursement of the deposit paid because they assumed the risk that the vehicle was in good and operable condition, which it initially was — Rescission is an extraordinary remedy that is available only

when fraud has occurred or a warranty has been breached — Plaintiffs did not allege fraud — Nearly two years have passed since judgment was entered in plaintiffs' favor — It is unclear if plaintiffs still possess vehicle — Because vehicle was sold "as is," on remand, district court cannot award damages against defendant and must consider his contractual counterclaim — Whether defendant can get the vehicle back or even wants it to reduce his loss is to be determined on remand —

Steve Elliot v. Kristina Miles and Lisa Peak (2025-CA-0870-DG); Jefferson Cir. Ct., Clay, J.; Opinion by Judge Easton, *reversing, vacating, and remanding*, rendered 7/31/2026. [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 is an appeal involving a small claims dispute over the sale of a used vehicle. We granted Appellant (Elliot)'s Motion for Discretionary Review because this case presents important issues about the small claims process, which is not often the subject of our review, and the law applicable to a frequent subject of small claims disputes. Elliot challenges the circuit court's determination that the evidence did not support the district court's finding that he sold the used vehicle "as is" and thus with no warranties. Upon review of the record and applicable law, we reverse the circuit court, vacate the district court judgment, and direct remand of the case to the district court for further proceedings.

BRIEF COMPLIANCE

Elliot timely filed his Appellant Brief. Neither Appellee Lisa Peak (Peak) nor Appellee Kristina Miles (Miles) filed an Appellee Brief. RAP¹ 31(H)(3) provides:

If the appellee's brief has not been filed within the time allowed, the court may: (a) accept the appellant's statement of the facts and issues as correct; (b) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (c) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

¹ Kentucky Rules of Appellate Procedure.

We should not be surprised when small claims parties do not file briefs, if for no other reason than the expense involved. But "rules are rules," and we should not shy away from exercising our discretion in such cases. In the circumstances presented by this case and pursuant to RAP 31(H)(3)(a), we accept Elliot's statement of the facts and issues as correct in part because we have independently reviewed the record and find Elliot's statement of facts and issues is correct. And, pursuant to RAP 31(H)(3)(b), we reverse the circuit court, vacate the district court judgment, and direct remand of the case because Appellant's Brief reasonably appears to sustain such action.

FACTUAL AND PROCEDURAL HISTORY

Elliot is a mechanic whose primary business is operating an auto repair garage. He occasionally

sells used vehicles. Most of the vehicles he sells come from customers who come in for repairs but, upon learning of the extent of the work needed, do not want to spend funds to repair their vehicles. So, Elliot purchases those vehicles, makes the needed repairs (if economically feasible for him to do so), and then sells the vehicles to others.

In July 2024, Peak purchased a 2008 Mazda vehicle from Elliot for her daughter, Miles. The odometer registered over 157,000 miles at the time of the sale. The purchase price was \$3,500.00. Peak paid a \$1,500.00 down payment, and Miles agreed to pay the remaining \$2,000.00 balance at \$200.00 per month for ten months.

The parties testified that they entered into a written agreement (Agreement) for the sale of the vehicle. The Agreement was originally drafted by Peak but was modified by Elliot's wife. The Agreement supposedly contained no express warranties. It may have contained an "as is" provision. But this written agreement is not included in the record.

We recognize that we are addressing a judgment resulting from the informal small claims process where the Kentucky Rules of Evidence do not apply. KRE² 1101(d)(3). The informality allowed does not eliminate the importance of making a sufficient record for review. We do not expect that the district courts will clutter the record of small claims cases with unnecessary documents, but the governing one-page written contract, which was clearly reviewed by the trial court, should have been part of the record here. We will discuss the impact of the state of the record in this case shortly.

² Kentucky Rules of Evidence.

Approximately two weeks after the purchase, Miles contacted Elliot about a transmission hose leak. Elliot performed this simple repair at no cost. Miles paid the first \$200.00 installment under the Agreement. But then, weeks after the hose repair, Miles contacted Elliot to report other problems with the engine, including a ticking noise and a coolant leak.

Elliot confirmed that at this point the engine was "bad" and needed to be replaced, but he refused to replace it for free. Miles took the vehicle to another mechanic, who agreed the engine would have to be replaced at an estimated cost of up to \$3,000.00. Miles and Peak demanded that Elliot either return the deposit or pay for the engine replacement. Elliot again refused.

Elliot testified that the vehicle was in good condition when it was sold and he believed that someone "rode it too hard and trashed it." Miles and Peak insisted that Elliot sold them an inoperable vehicle, which is obviously inaccurate as they operated the vehicle for over a month before the engine problem arose. Miles admitted that she and her 20-year-old son had driven the vehicle for five weeks.

Peak and Miles filed a small claims action against Elliot in district court. They again demanded either reimbursement of the deposit or funds to replace the engine. Elliot filed a counterclaim for breach of contract demanding the remaining \$1,800.00

balance owed under the parties' Agreement.

In October 2024, the district court held a hearing. Elliot was present with counsel and Peak and Miles appeared *pro se*. The district court heard testimony from the parties. The video recording indicates Peak presented a document purporting to be the parties' Agreement. This document was handed to the bailiff, who then handed the document to the judge. The judge examined it. The Agreement was not attached to the Small Claims Complaint or the Counterclaim. The Agreement was not admitted as an exhibit by any of the parties.

After hearing testimony and reviewing the Agreement, the district court ultimately decided that the vehicle was sold "as is" with no warranties. The district court asked Elliot if he was willing to take the vehicle back in lieu of pursuing his breach of contract counterclaim, but Elliot declined this compromise. The judge clearly struggled with reaching a fair result in the circumstances. It seems harsh, although not contrary to the law, for Miles and Peak to have to pay \$1,800 for a vehicle that only worked for five weeks. Ultimately, although finding that an "as is" sale occurred, the district court then entered judgment for Miles and Peak, in effect rescinding the Agreement. The district court ordered Elliot to return the \$1,500.00 down payment. The district court dismissed Elliot's counterclaim. There was no provision for a return of the vehicle to Elliot.

Elliot appealed this decision to the circuit court with an appropriate Statement of Appeal. Neither Peak nor Miles filed a Counterstatement. The circuit court affirmed the district court but on grounds other than those relied upon by the district court. The circuit court found that, even though the district court believed the sale was "as is," there was no proof in the record that notice of that limitation was in writing. The circuit court noted the absence of the Agreement in the record and determined that, other than Elliot's testimony, there was no proof in the record that Miles and Peak were given notice that the sale of the vehicle was "as is."

The circuit court, relying on the language of KRS³ 355.2-316 that an "as is" contract provision must be in writing to exclude or modify an implied warranty of fitness for a particular purpose, determined there was no such proof in the record. Since such a warranty was not excluded in writing, the record supported the ultimate judgment ordering rescission. The circuit court thus affirmed the district court. The circuit court also determined that Elliot waived his right to a return of the vehicle by seeking damages rather than repossession.

³ Kentucky Revised Statutes.

STANDARD OF REVIEW

Because this is an appeal from a bench trial without a jury, the district court's findings of fact were not to be set aside unless clearly erroneous with due regard being given to the opportunity of the trial judge to consider the credibility of the witnesses. Factual findings are not considered clearly erroneous if they are supported by substantial evidence. *Goshorn v. Wilson*, 372 S.W.3d 436, 439 (Ky. App. 2012) (internal quotation marks and citations omitted).

If the trial judge's findings are supported by substantial evidence, then the appellate court's role is confined to determining whether those facts support the trial judge's legal conclusions. In reviewing legal conclusions, an appellate court conducts a *de novo* review. *Ellington v. Becraft*, 534 S.W.3d 785, 790 (Ky. 2017) (internal quotation marks and citations omitted).

ANALYSIS

On appeal, Elliot argues the circuit court erred in rejecting the district court's finding that the vehicle was sold "as is" with no warranties. He also argues it was error to allow rescission of an "as is" contract for the sale of a used vehicle. Alternatively, Elliot challenges the denial of his right to a return of the vehicle if rescission was ordered and upheld on appeal.

There are a few things to unpack here. First, we believe the circuit court erred in failing to conclude that substantial evidence supported the district court's finding that the sale of the used vehicle was "as is." But we also conclude that rescission was an improper remedy in these circumstances. Ultimately, we have decided that the circuit court decision should be reversed, the district court decision should be vacated, and the matter should be remanded to the district court for further proceedings consistent with the following analysis.

SUBSTANTIAL EVIDENCE SUPPORTS THE DISTRICT COURT'S FINDING THAT THE USED CAR WAS SOLD "AS IS."

Elliot argues the circuit court erred in finding insufficient proof to support the district court's finding that the sale of the vehicle was "as is." We agree, but we also recognize that this result arises partly from a failure to make a record rather than application of the law to the Agreement which clearly exists, but which is not in the record for any appellate court to consider.

First, we should review the law about warranties. There is an implied warranty of merchantability, even with the sale of used vehicles. *See, e.g., Moore v. Mack Trucks, Inc.*, 40 S.W.3d 888 (Ky. App. 2001). But that simply means that the used vehicle was "fit for the ordinary purposes for which" it is used. KRS 355.2-314(2)(c). The question is whether this used car with 157,000 miles on it was fit for ordinary purposes when Elliot sold it as a used car. Any used vehicle may run for years or not. Again, there was no express warranty, such as one for ninety days, which is sometimes seen with used vehicle sales.

Another implied warranty *may* arise. This is the warranty of fitness for a particular purpose. KRS 355.2-315. But for such a warranty to apply the evidence must show that the buyer relied upon the seller to select a product suitable for some particular purpose. Here, the vehicle was sold to operate as a vehicle generally, not for some particular purpose which called upon the seller to advise on what type of vehicle to buy.

KRS 355.2-315 did not expand the general proposition that the sale of used vehicles does not involve an implied warranty of fitness for a particular purpose. *See Moss v. Yount*, 177 S.W.2d 372, 375 (Ky. 1944). *See also Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So.2d 1024,

1027 (Miss. 1982) (example of a more modern case under the Uniform Commercial Code holding that no warranty of fitness for a particular purpose arises from the typical sale of a used vehicle).

The district court made no finding about an implied warranty of fitness for a particular purpose. It simply held that any implied warranty had been waived by the "as is" sale. If the evidence had supported the existence of a fitness for a particular purpose warranty, it was for the district court to first decide, but there was no such evidence. While the waiver of the implied warranty of merchantability does not require a written document, the waiver of any warranty of fitness for particular purpose would have. KRS 355.2-316(2).

So now we arrive at the next problem – the incompleteness of the record. The evidence presented supported a finding that Elliot sold the vehicle "as is" and without any warranties. Both parties testified that no written warranties were included in the Agreement, and no verbal warranties were discussed or offered. When the district court asked Elliot whether the transaction was "as is," he confirmed that it was. Elliot said he never offered warranties for any of the used vehicles he sold.

Peak stated there was no "as is" language in the Agreement. The exclusion of warranties does not require the phrase "as is" but may be found based on other language used. We are unable to confirm whether this disputed fact was conclusively determined by the parties' Agreement because it is not in the record. Yet the district court had the opportunity to review the Agreement and resolved this factual issue in favor of Elliot. The district court expressly stated, on two separate occasions, "I think they bought the car as is." Even so, the district court basically ordered a rescission or awarded damages to Peak and Miles.

The circuit court affirmed the judgment for Miles and Peak but rejected the "as is" finding by the district court because there was no written proof in the record that the sale of the vehicle was "as is" at least with respect to any warranty of fitness for a particular purpose. The circuit court correctly noted (on p. 2 of its decision in footnote 1) that the video record showed Peak giving a single page document to the judge for review, and based on the context, the circuit court concluded it was a copy of the Agreement. The circuit court surmised that the Agreement was not part of the record because it was not made an exhibit by any of the parties. Since there was no written proof of an "as is" sale *in the record*, the circuit court reasoned that Elliot's testimony alone was insufficient to support this claim.

The Agreement did not have to be marked and admitted as an exhibit to be considered as evidence by the small claims division of the district court. As we pointed out in *Campbell v. Crager*, 167 S.W.3d 669, 672 (Ky. App. 2005), there are minimal rules that must be followed in small claims court. The record is often small and unsophisticated compared to heavily litigated cases. "The procedural requirements are relaxed in order to provide parties a simple forum in which to litigate their claims." *Id.* In a small claims case, the court "simply considers the complaint and sundry information provided by the parties and renders a decision based upon equity and fair dealing." *N. Tool & Equip., Inc. v. Durbin*, 392 S.W.3d 424, 426 (Ky. App. 2013) (internal

quotation marks and citations omitted).

Here, no one asked to enter the parties' Agreement as an exhibit, and this document was a key piece of evidence in determining whether there was notice that the sale of the vehicle was "as is" leaving the entire assumption of risk as to the vehicle's condition with the purchasers. But the video record does make clear that the Agreement exists and was provided to the district court for its consideration. The video record also makes clear the district court reviewed the Agreement.

When the parties do not make sure that evidence becomes part of the record, a court considering an appeal must assume the missing evidence supports the trial court's decision – in this case that the vehicle was sold "as is." *See Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985) (citing *Commonwealth, Dep't of Highways v. Richardson*, 424 S.W.2d 601, 604 (Ky. 1968)) ("when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court"). *See also* RAP 25(B).

CR⁴ 52.01 further limits appellate review to whether the "as is" finding is clearly erroneous. CR 52.01 admonishes us to give due regard to the opportunity of the trial court to judge the credibility of the witnesses. Based on the district court's sole review of the Agreement, and its discretion as the trier of fact to weigh the credibility of the testimony, we cannot say that the "as is" finding was clearly erroneous, and it was error for the circuit court to disturb this finding in these unusual circumstances.

⁴ Kentucky Rules of Civil Procedure.

KRS 355.2-316 seeks to provide a structure for construing both oral representations and written disclaimers within an agreement for the sale of goods. To carry out that purpose, the statute provides that, "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties[.]" KRS 355.2-316(3)(a).

An official comment to the statute provides that an "as is" clause in a sales contract is "understood to mean that the buyer takes the entire risk as to the quality of the goods involved." KRS 355.2-316 official cmt. 7 (2008). The rationale was further explained:

A valid "as is" agreement prevents a buyer from holding a seller liable if the thing sold turns out to be worth less than the price paid, because *it is impossible for the buyer's injury on account of this disparity to have been caused by the seller and the sole cause of the buyer's injury is the buyer himself or herself*. Thus, by agreeing to purchase something "as is," a buyer agrees to make his or her own appraisal of the bargain and to accept the risk that he or she may be wrong, and the seller gives no assurances, express or implied, concerning the value or condition of the thing sold. 67 Am. Jur. 2d *Sales* § 772 (2012) (emphasis added). Such a position parallels Kentucky case law, as well as the law in other jurisdictions.

Roberts v. Lanigan Auto Sales, 406 S.W.3d 882, 884 (Ky. App. 2013).

The district court did not err in finding that the vehicle was sold “as is.” This foreclosed any remedy for breach of the implied warranty of merchantability. There was no evidence of any warranty of fitness for a particular purpose (e.g., the buyer told the seller that the vehicle must be able to operate to pull a certain heavy trailer) which called for the seller to advise on which vehicle to purchase. Thus, the lack of a writing in the record to disclaim any warranty of fitness for a particular purpose was irrelevant.

**THE “AS IS” FINDING DOES NOT
SUPPORT RESCISSION OF THE
CONTRACT AS A PROPER REMEDY.**

Having determined there was substantial evidence to support the finding that the vehicle was sold “as is,” we conclude the facts do not support judgment in favor of Peak and Miles. They are not entitled to rescission of the contract or reimbursement of the deposit paid because they assumed the risk that the vehicle was in good and operable condition, which it initially was. The “as is” nature of the sale bars their claim, absent fraud, which was not argued nor proven.

Under Kentucky law, rescission is an extraordinary remedy that is available only when fraud has occurred or a warranty has been breached. *Beattie v. Friddle*, 17 S.W.2d 246, 248 (Ky. 1929). Here, there was neither fraud nor breach of warranty proven. Fraud was not alleged, and the parties agreed there were no express warranties. And because the district court determined the sale was “as is,” there were also no implied warranties. As a result, rescission of the parties’ contract was not a proper remedy.

Elliot’s argument that the circuit court erred in failing to return the vehicle to him upon judgment for Peak and Miles is rendered moot by our decision. While rescission of an executed contract is not ordinarily allowed for a breach unless the former status of the parties can be restored, *id.*, no such order was entered in this case. The circuit court found a waiver by Elliot because he sought damages. This was not a waiver in the event the court orders rescission which Elliot did not seek.

We are aware that nearly two years have passed since judgment was entered in favor of Miles and Peak, who may or may not still possess the vehicle. It may have been junked by now. We do not decide on the proper remedy on remand. We should not tie the hands of the district court on remand because intervening circumstances may affect a just result. We will outline the directions on remand to leave no confusion left by the too oft-used expression of “for proceedings not inconsistent with this opinion.”

In the circumstances presented, we reverse the circuit court and vacate the district court decision as to damages. There is no need to revisit the “as is” finding because no writing was needed to disclaim a merchantability warranty and the circumstances do not support a fitness for a particular purpose warranty.

Because the vehicle was sold “as is,” the district court cannot award damages against Elliot and must consider his contractual counterclaim. Whether

Elliot can get the vehicle back or even wants it to somehow reduce his loss remains an open question.

CONCLUSION

The Jefferson Circuit Court is REVERSED, the Judgment of the Jefferson District Court is VACATED, and this case shall be REMANDED to the Jefferson District Court to dismiss the Complaint and to adjudicate the Counterclaim. As is the common practice in small claims court, nothing prohibits the district court from directing these parties to try to resolve the case before another hearing. With all that has occurred here, such a compromise may lead to the best resolution now possible for the parties and a fair result.

ALL CONCUR.

BEFORE: ACREE, EASTON, AND KAREM,
JUDGES.

CHILD SUPPORT

FAILURE TO PAY CHILD SUPPORT

CONTEMPT

CIVIL CONTEMPT

**WAIVER OF THE RIGHT TO BE PRESENT
AT A CONTEMPT HEARING**

ATTORNEYS

**AN INDIGENT PERSON’S RIGHT
TO APPOINTED COUNSEL IN CIVIL
CONTEMPT PROCEEDINGS**

Father and mother, who were not married, had three children — Mother brought paternity and child support action against father in September 2023 — In May 2024, family court set father’s monthly child support payment at \$1,300, which included father’s ongoing obligation as well as a small amount to go toward an arrearage — In April 2025, mother brought *pro se* motion for contempt, alleging that father had not paid child support since June 2024 — At hearing on April 8, 2025, mother and father both appeared without counsel — Family court determined that father had not made a payment since September 2024 — Father conceded that he had not made any payments since then — Father testified that he had been injured at work, had surgery, and had not yet been medically cleared to return to work — Father stated he was looking for a new job which would allow him to work while seated — Father did not produce any documentation to support his statements — Family court passed the motion for contempt to a hearing date and appointed a public defender for father — Family court told father to contact public defender within five days or he would not get an appointed attorney — The written order was served on father and emailed to Department of Public Advocacy

(DPA) — On May 6 hearing date, only mother appeared — Based on evidence presented by county attorney and mother, family court found father in contempt — Family court passed sentencing to a future court date and issued order for father to appear — On June 17, father appeared at sentencing hearing with counsel — Counsel made CR 60.02 motion to set aside finding of contempt, stating that father had valid defenses to contempt charge — Counsel stated that she had not been appointed at the time of the contempt hearing and argued that father was entitled to counsel at the contempt hearing — Counsel had medical proof of father’s knee surgery in September, which was why he stopped making child support payments; however, counsel did not yet have medical proof that father was unable to work — Family court did not set aside contempt finding, but continued sentencing to allow counsel to obtain medical documentation that father was not able to work — Family court noted that father had still not made any additional child support payments — Counsel informed family court that father had just started a new job and they were hopeful he would be able to start making payments — Sentencing hearing was held on September 25, 2025 — Since June hearing, father had made two payments, one for \$100 on June 30 and one for \$300 on August 18 — Father testified that his disability denial was on appeal — Father also stated that he was to have stomach surgery on September 16 — Father did not have health insurance, so he was paying out-of-pocket for his medical care — Father was employed, but he was on medical leave that began on August 13 — Family court imposed sentence of 180 days to serve, but due to father’s medical conditions, family court allowed home incarceration with medical and work release — Family court advised mother to file another motion for contempt if father continued to fail to make payments — Family court told father that if he continued to fail to make payments, it would revoke his home incarceration and order him to serve his sentence in jail — Family court’s written order stated a purge amount of \$2,500 — Father appealed — AFFIRMED — Court of Appeals chose to address merits of instant action, even though 180-day home incarceration period had expired, under the public interest exception to the mootness doctrine for issues that are capable of repetition, yet evading review — Instant action is for civil contempt since father was given the option to “purge” his contempt by paying \$2,500 toward his child support arrearage — Due process requires notice and an opportunity to be heard, even in civil contempt cases — An indigent person has a right to appointed counsel in civil contempt proceedings prior to the execution of an order of incarceration — In instant action, father was explicitly told that prior to the May 6 contempt hearing that he needed to be present in court with proof that he had been making attempts to find employment — While DPA was only made aware of their appointment on

the day of the scheduled May 6 court date, it was father's responsibility to meet with DPA — Under facts, father's absence was "intentional, knowing, and voluntary;" therefore, he waived his right to a hearing — While father did not have counsel present at May 6 hearing in which contempt finding was made, he had assistance of counsel at multiple subsequent hearings, including the one where his sentence was imposed — Father and his counsel were given several additional hearings in which to show that father was unable to work, and he was unable to do so — Father's counsel did not request any specific purge amount or even a range of what counsel believed father would be able to afford — Instead, counsel asked for a purge amount "that he can afford" that takes into account his current ability to pay and medical conditions — Under instant facts, family court did not abuse its discretion in setting purge amount at \$2,500 —

R.L.A. v. Com.; Com. of Kentucky, Attorney General; and J.D.F. (2025-CA-1263-MR); R.L.A. v. Com.; Com. of Kentucky, Attorney General; and J.D.F. (2025-CA-1264-MR); R.L.A. v. Com.; Com. of Kentucky, Attorney General; and J.D.F. (2025-CA-1266-MR); Jefferson Fam. Ct., Gatewood, J.; Opinion by Judge Easton, affirming, rendered 7/2/2026, and ordered not to be published. The opinion was ordered to be published on 8/7/2026. [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 (Father) challenges the Jefferson Family Court's order finding him in contempt for failure to pay child support. Father was later sentenced to 180 days to serve on home incarceration, with work and medical release. After a thorough review of the record and the applicable law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Father and Appellee, J.D.F. (Mother), have never been married but have three young children together. Mother brought a paternity and child support action against Father in September 2023 when the younger two children, who are twins, were about six months old. In May 2024, the family court set Father's monthly child support payment at \$1,300, which included Father's ongoing obligation as well as a small amount to go toward an arrearage.

In April 2025, Mother brought a *pro se* motion for contempt, alleging Father had not paid child support since June 2024. At a hearing on April 8, 2025, the family court determined by looking at the County Attorney's payment records that Father had not made a payment since September 2024. Father conceded he had not made any payments since then.

Father told the family court that he had been injured at work, had surgery, and had not yet been medically cleared to return to work. He further stated he had been looking for new employment that would allow him to work while seated. He was unable to produce any documentation to the family court to support his statements. At this hearing, both Mother and Father were present without counsel.

The family court stated it was going to pass the motion for contempt to a hearing date and appoint a public defender for Father. The family court told Father:

I want you to come in here prepared at the next date to show me the effort you have been making to find a job because you are at risk of going to jail for not paying child support. So, I need you to come in to be able to show the efforts that you have made to look for a job because your children have not received support since September. Understand?^[1]

The family court reiterated to Father that he needed to bring proof that he was making a genuine effort to find a job, because "your kids need to eat."

¹ Hearing of April 8, 2025, Video Record (VR) at 12:11:35.

The family court entered an Appointment of Counsel Order on April 8, 2025. The bottom of this order reads:

The Public Defender will represent you in this case. Please take this copy immediately to the Public Defender's Office at 200 Civil Plaza, 719 West Jefferson Street, to get your lawyer. (The original has been placed in the court file.) If you don't contact the Public Defender within the next five days, you will not get a lawyer, and the Public Defender will report this to the Court.^[2]

It appears a copy of this Order was served upon Father, as a signed certified mail receipt appears in the record.³ The return receipt was filed in the court record on April 14, 2025, well in advance of the May 6 hearing. A scan log is also in the court record, which shows a copy of the order was emailed to the Louisville DPA⁴ office, but it was not sent to DPA until May 6.⁵

² Appointment of Counsel Order 23-J-501523, Trial Record (TR) at 104.

³ *Id.* at 106.

⁴ Department of Public Advocacy.

⁵ TR at 105.

On the May 6 hearing date, only Mother appeared. The County Attorney's Office had tendered a payment history, which showed that Father's last child support payment was in September 2024. Mother confirmed, under oath, that she had not received any additional payment since that date. Based on this evidence, the family court found Father in contempt. The family court stated it would pass the sentencing to a future court date and would issue an order for Father to appear. The court told Mother that if Father did not appear for sentencing, it would issue a bench warrant for his arrest.

Father did appear at the sentencing hearing, with counsel, on June 17, 2025. His counsel made a verbal motion, under CR⁶ 60.02, asking the family court to set aside the finding of contempt. Counsel did not specify which subsection of CR 60.02 was

applicable to Father's case.⁷ Counsel stated she had not been appointed at the time of the contempt hearing, and she believed Father had valid defenses to the contempt charge. She further argued that Father was entitled to counsel at a contempt hearing. Counsel stated she has medical proof from Father regarding a knee surgery that occurred in September, which was when he stopped making his child support payments. She then acknowledged she did not yet have medical proof that Father was unable to work.

⁶ Kentucky Rules of Civil Procedure.

⁷ This is of little consequence because it was not proper for Appellant to rely on CR 60.02 which authorizes relief only from final judgments, orders, or proceedings. An order is final if it adjudicates all the rights of all the parties. See CR 54.01. The order finding Appellant in contempt was not final as it did not impose a punishment. *Armstrong v. Bryan*, 273 S.W.2d 835, 837 (Ky. 1954). When an order is not final, it remains "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." CR 54.02(2).

The family court stated it would not set aside the contempt finding, but it would continue sentencing to allow counsel to obtain medical documentation that Father was not able to work. The family court advised it would consider any medical information in setting Father's sentence. It then told Father he needed to get documentation to his attorney. The family court also noted that Father still had not made any additional child support payments. At the end of the hearing, Father's counsel informed the family court that Father had just started a new job the previous weekend, so they were hopeful he would be able to start making payments.

A sentencing hearing was held on September 2, 2025. Since the June hearing, Father had made two payments, one for \$100 on June 30 and one for \$300 on August 18. The family court took the testimony of both Father and Mother. Father testified that his disability denial was on appeal. He was scheduled to have stomach surgery on September 16. He does not have health insurance and is having to pay out of pocket for his medical care. He was employed; he began working in July. Father makes \$30 an hour, and he works about 28 hours per week. He was on medical leave, and that began on August 13. In addition to his current medical issues, Father has diabetes and previously had knee surgery.

Mother testified that Father has paid \$400 since this process began. She stated that even when Father is working, he is not making payments. She further testified that he is not utilizing his parenting time with the children. Mother was visibly upset, and she told the court she was "overwhelmed" with caring for the children on her own.

The family court imposed a sentence of 180 days to serve, but due to Father's medical conditions, it would allow home incarceration with medical and work release. The family court further advised Mother to file another motion for contempt if Father continued to fail to make payments. The family court told Father that if he continued to not pay his child support, it would revoke his home incarceration and order Father to serve his

sentence in jail. While not stated on the record at the hearing, the family court's written order stated a purge amount of \$2,500. Father then timely filed this appeal.

STANDARD OF REVIEW

"When a court exercises its contempt powers, it has nearly unlimited discretion." *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007) (citing *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky. App. 1986)). Abuse of discretion is the standard of review for decisions regarding contempt. *Id.* A trial court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The clear error standard applies to the findings of fact by the family court. *Cabinet for Health and Family Services v. Ivy*, 353 S.W.3d 324, 332 (Ky. 2011).

ANALYSIS

Father argues the family court abused its discretion by trying him for contempt *in absentia* and without the presence of counsel. He further argues it was error for the family court to set an unattainable purge amount despite his inability to pay.

Before we reach the merits of Father's arguments, we will address the Commonwealth's contention that the case is moot. Father was sentenced on September 2, 2025, to 180 days of home incarceration. That time period has expired. Any action of this Court will make no difference to Father at this point.

A case becomes moot when a rendered judgment cannot have any practical legal effect upon a *then* existing controversy. And [t]he general rule is, and has long been, that where, pending an appeal, an event occurs which makes a determination of the question unnecessary or which would render the judgment that might be pronounced ineffectual, the appeal should be dismissed.

Belt v. Commonwealth Cabinet for Fams. & Child., 520 S.W.3d 406, 408 (Ky. App. 2017) (citing *Norton Hosps., Inc. v. Willett*, 483 S.W.3d 842, 845 (Ky. 2016)).

Despite this, Father asks this Court to review the matter under the public interest exception. "There are two exceptions to the mootness doctrine: (1) for issues that are 'capable of repetition, yet evading review' and (2) matters of 'public interest.'" *Commonwealth v. Ellery*, 713 S.W.3d 114, 118 (Ky. 2025). "The exception for cases 'capable of repetition, yet evading review,' has two elements: (1) the challenged action must be too short in duration to be fully litigated prior to its cessation or expiration, and (2) there must be a reasonable expectation that the same complaining party will be subjected to the same action again." *Morgan v. Getter*, 441 S.W.3d 94, 100 (Ky. 2014). The "public interest" exception contains three elements: "(1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question." *Id.* at 102.

Arguably, the exception for "capable of

repetition, yet evading review" could apply, but Father did not argue this option. A sentence for contempt is a maximum of 180 days or six months. *Bloom v. Illinois*, 391 U.S. 194 (1968) (a penalty of more than six months is deemed a "serious" rather than "petty" punishment, which entitles a defendant to a finding of guilt beyond a reasonable doubt by a jury). Such sentences are not long enough for a typical appeal to be fully reviewed prior to the expiration of the sentence.

With Father's history of non-payment of child support and failure to appear for court, it is not unreasonable to conclude that Father will be "subjected to the same action again." The children Father is ordered to pay support for are very young, so Father will likely have many more years of child support payments. The United States Supreme Court has found this exception applied to similar facts in *Turner v. Rogers*, 564 U.S. 431, 439-40 (2011).

The "public interest" exception might apply. The matter of procedural due process regarding findings of contempt is a matter of public interest. Circuit and family courts are regularly called upon to determine if a party has acted in a contemptuous manner. While there is a wealth of case law on the procedural due process requirements regarding criminal contempt, there is not quite as much regarding civil contempt. Finally, contempt in the context of failing to pay required child support occurs sadly far too often, so it is likely this question will arise again. This Court has the discretion to consider a moot case under the public interest exception when we determine a case involves "matters of the utmost public importance." *Muhammad v. Kentucky Parole Bd.*, 468 S.W.3d 331, 338 (Ky. 2015). We will consider the merits of the appeal, despite the mootness argument.

Contempt is the willful disobedience toward, or open disrespect for, the rules or orders of a court. Contempts are either civil or criminal. Civil contempt consists of the failure of one to do something under order of court, generally for the benefit of a party litigant. Examples are the willful failure to pay child support as ordered, or to testify as ordered. While one may be sentenced to jail for civil contempt, it is said that the contemptuous one carries the keys to the jail in his pocket, because he is entitled to immediate release upon his obedience to the court's order.

Commonwealth v. Burge, 947 S.W.2d 805, 808 (Ky. 1996) (internal quotation marks and citations omitted).

While not expressly stated, the contempt in this action was civil in nature, as Father was given the option to "purge" his contempt by paying \$2,500 toward his child support arrearage. "[S]anctions for civil contempt are meant to benefit an adverse party either by coercing compliance with the order or by compensating for losses the noncompliance occasioned. For the punishment to retain its civil character, the contemnor must, at the time the sanction is imposed, have the ability to purge." *Nienaber v. Commonwealth ex rel. Mercer*, 594 S.W.3d 232, 236 (Ky. App. 2020) (internal quotation marks and citations omitted).

In a civil contempt proceeding, the initial burden is on the party seeking sanctions to show by clear and convincing evidence that the alleged contemnor has violated a valid court order. Once

the moving party makes out a prima facie case, a presumption of contempt arises, and the burden of production shifts to the alleged contemnor to show, clearly and convincingly, that he or she was unable to comply with the court's order or was, for some other reason, justified in not complying.

Id.

Father first argues the family court abused its discretion in finding him in contempt *in absentia* without counsel present. Our case law is clear that due process requires notice and an *opportunity* to be heard, even in civil contempt cases. *Cabinet for Health & Fam. v. J.M.G.*, 475 S.W.3d 600, 615-16 (Ky. 2015) (emphasis added). Further, "an indigent person has a right to appointed counsel in civil contempt proceedings *prior* to the execution of an order of incarceration." *Lewis v. Lewis*, 875 S.W.2d 862, 864 (Ky. 1993) (emphasis added). Father was entitled to the opportunity for a hearing before the family court could find him in contempt, and he was given this opportunity.

The initial contempt hearing was scheduled for May 6, 2025. Father had explicitly been told at the prior hearing that he needed to be present in court with proof that he had been making attempts to find employment. He had been served notice via the appointment order. The Commonwealth argues that Father's absence was "intentional, knowing, and voluntary," as explained in *McKinney v. Commonwealth*, 474 S.W.2d 384, 386 (Ky. 1971), and he therefore waived his right to a hearing. Given the record of subsequent proceedings prior to incarceration being ordered, we find no due process violation in the family court's actions here.

There are constitutional protections in place that prohibit a party from being tried in his absence "unless that absence is voluntary and therefore a waiver of his right to be present." *Burns v. Commonwealth*, 655 S.W.2d 497, 498 (Ky. App. 1983) (citing KY. CONST. Art. XIII, § 12 (1891); U.S. CONST. Amend. XIV).

This rule is qualified in cases where the Commonwealth proves the defendant knew of the trial date, as here, and did not appear. An inference then may be indulged that the absence was intentional, knowing and voluntary and consequently waived. Then the defendant not only has the right but also the burden of going forward with proof that his absence was not intentional, knowing and voluntary, and was consequently not waived.

Id.

In this instance, Father was aware of the contempt hearing. And while DPA was only made aware of their appointment on the day of the scheduled court date, it was Father's responsibility to meet with DPA. After Father was served with an order to appear, both Father and his DPA attorney appeared at the scheduled sentencing hearing on June 17. At this later date, Father's counsel moved to set aside the finding of contempt, as she believed he had a valid defense and was entitled to counsel prior to the finding of contempt.

It is notable that the family court did not issue a sanction for Father's contempt at the initial contempt hearing; instead, it scheduled a further

hearing. At the June 17 hearing, both Father and his counsel were present, and Father's only explanation of why he missed the May 6 court date was that he had "a couple different court dates." The family court determined this was insufficient cause for Father's failure to appear, and it declined to set aside the contempt finding. Yet the family court again set a future hearing date, and Father and his counsel were instructed to gather information regarding his disability appeal and medical information that would show the family court that Father was unable to work.

Despite Father and his counsel insisting to the family court that Father was unable to work at the time due to medical issues, it was stated at the end of the June 17 hearing that Father had just started a new job, and he was hopeful he would be able to start making payments. The family court stated it would take any information Father provided into account when setting his sentence.

At the next hearing, which occurred on September 2, 2025, both Father and his counsel were again present. Father testified to some of his medical conditions, and he did provide some medical records in support. Father provided a Medically Excused Absence form from a physician that stated Father was under medical care from August 13, 2025, to September 15, 2025, and could return to work on September 16, 2025. Father then stated he was scheduled for stomach surgery on September 16, but he provided no documentation of this. This report of a serious surgery also seems inconsistent with the date range provided in the medical excuse provided which was to end on September 16. Father did provide some medical records that outlined some of his medical diagnoses, including diabetes and hypertensive chronic kidney disease.

Only after all this information was considered did the family court impose its sentence, which was 180 days to serve on home incarceration, with medical and work release. In *Lewis*, 875 S.W.2d at 864, the Kentucky Supreme Court held that "the statutes of the Commonwealth require that an indigent person has a right to appointed counsel in civil contempt proceedings *prior to the execution of an order of incarceration*." (Emphasis added.) While Father did not have counsel present at the hearing in which the contempt finding was made, he had the assistance of counsel at the multiple subsequent hearings, including the one where his sentence was imposed. It should also be noted that the family court granted Father's counsel's request for Father to have home incarceration with medical and work release. Counsel did not request a specific purge amount but simply requested "a purge amount within his ability to pay."

We have upheld findings of contempt under similar circumstances:

The issue then becomes whether James was given a fair opportunity to be heard since he was not present at the contempt hearing. Significantly, James had notice, and then sent another attorney to request a continuance, which the court denied. James had an opportunity to present a defense at the hearing which he did not attend or have counsel appear on his behalf. He had the opportunity to be heard but ignored it. He had the obligation to pay child support and did not.

James v. Brewer, No. 2009-CA-001776-ME, 2011 WL 474813, at *4 (Ky. App. Feb. 11, 2011).⁸ See also *Terry v. Terry*, No. 2020-CA-0938-MR, 2022 WL 4587680, at *4 (Ky. App. Sep. 30, 2022) ("Careful review of the record before us shows Norma had notice of the contempt proceedings against her and multiple opportunities to be heard."). While these cases are non-binding, they illustrate that this Court has determined that it is not inherently a due process violation to hold an initial civil contempt hearing *in absentia*.

⁸ Unpublished and non-binding, cited pursuant to Kentucky Rules of Appellate Procedure (RAP) 41.

Despite the contempt finding being made in Father's absence, no sentence or consequences were imposed until both Father and his counsel were present in front of the family court. In fact, Father and his counsel were given several additional hearings in which to show Father was unable to work. He was unable to do so, and the family court made the finding that "you are willfully, willfully, not paying your child support."

⁹ Hearing of September 2, 2025, VR at 11:07:51.

"In a civil contempt proceeding, the initial burden is on the party seeking sanctions to show by clear and convincing evidence that the alleged contemnor has violated a valid court order." *Ivy*, 353 S.W.3d at 332. In this instance, Mother had the initial burden, which she met by showing that Father had failed to pay his ordered child support payments. At the May 6 hearing, Mother testified she had not received a child support payment since September 2024, which was confirmed by the County Attorney's payment history.

Once the moving party makes out a prima facie case, a presumption of contempt arises, and the burden of production shifts to the alleged contemnor to show, clearly and convincingly, that he or she was unable to comply with the court's order or was, for some other reason, justified in not complying. This burden is a heavy one and is not satisfied by mere assertions of inability. The alleged contemnor must offer evidence tending to show clearly that he or she made all reasonable efforts to comply.

Id. (citations omitted).

In civil contempt situations involving non-payment of child support, circuit and family courts must be allowed to proceed with the initial step of determining contempt for non-payment when a party has been properly notified and fails to appear. If contempt proceedings could be delayed simply by choosing not to appear, the collection of needed child support would be seriously impaired. Again, whether through a hearing after a bench warrant for failure to appear has been served or another hearing after an initial contempt finding has been made, what occurred here was a hearing before incarceration occurred for contempt. That was sufficient.

Despite having already made a finding of contempt, the family court gave Father several additional opportunities to show that he was unable

to make the required payments. While Father made some general assertions about "medical issues," he only provided proof that he was unable to work from August 13, 2025, to September 15, 2025. As the family court noted, the contempt finding was made in May 2025, and Father had not made a payment since September 2024. And despite Father's assertions that he was unable to work, he also testified that he was working in July 2025 to August 2025, making \$30 an hour. The family court determined Father had not met the shifted burden that he was unable to comply with the court order, and we will not set that finding aside as it was not clearly erroneous.

Father next argues that the family court erred by setting an unattainable purge amount. In her remarks to the family court, Father's counsel said, "I would also ask for a purge amount to be set, I believe, well, my client, [R.L.A.], is entitled to a purge amount that he can afford, that takes into account his current ability to pay, which currently he's not able to work with his medical conditions."¹⁰ She also stated she does not believe he is currently able to afford his current support obligation. A contemnor must have the ability to purge the contempt and cannot be required to perform an impossible act. *Ivy*, 353 S.W.3d at 334-35.

¹⁰ Hearing of September 2, 2025, VR at 11:15:16.

Father argues that he has extensive medical issues. And during the September 2 hearing, he stated that he has always had medical conditions. But the only medical proof Father submitted to the family court covered a one-month period from August to September 2025. Father claimed he had surgery in September 2024, which was why he stopped making his child support payments, but there is no documentation in the record to support this claim. "[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). A family court is not required to simply take a litigant's word in the absence of other admissible evidence.

Despite all the medical contentions he asserted, Father testified that he had been working. He had obtained a job in July 2025 making \$30 per hour. He testified he made \$17 per hour at his previous job. Father's counsel did not request any specific purge amount, or even a range of what they believed Father would be able to afford. Setting Father's purge amount at \$2,500 was not an abuse of discretion in these circumstances.

CONCLUSION

The family court did not abuse its discretion in finding Father in contempt, nor in setting the purge amount. The order of the Jefferson Family Court is **AFFIRMED**.

ALL CONCUR.

BEFORE: EASTON, A. JONES, AND MOYNAHAN, JUDGES.

WILLS AND ESTATES**PROBATE****WILL CONTEST****TESTAMENTARY CAPACITY****UNDUE INFLUENCE**

On October 4, 2021, Joseph Paul Leone, Jr. (Joe Paul), who was 70 years old, fell at his home — Joe Paul lived alone and independently, managing his own household and finances — Joe Paul and never married and had no children — When he fell, Joe Paul called Ricky Spaulding (Spaulding), whom he had known since 1990 — Both worked together in state government and kept in close contact after Joe Paul retired in 1998 — Spaulding convinced Joe Paul to call an ambulance and go to the hospital — Aside from a brief stay at a nursing home for rehabilitation services, Joe Paul remained hospitalized until his death on October 20, 2021 — Spaulding informed Jo Brown Leone (Jo Brown), Joe Paul's stepmother, of his hospitalization — Spaulding, Jo Brown, and Carrie Darnaby (Darnaby), Joe Paul's cousin, frequently visited Joe Paul during his hospital stay — Neither Spaulding nor Darnaby knew Joe Paul's niece and nephew — Joe Paul did not contact or request that anyone else contact his niece and nephew — Shortly after Joe Paul's hospitalization, Darnaby and Jo Brown learned that Joe Paul had not made any arrangements for his own affairs and encouraged him to contact an attorney regarding a will, living will, or power of attorney (POA) — Spaulding was not a part of these conversations — Jo Brown recommended Ed Logan (Logan) — Logan had represented Joe Paul's father and handled his estate — Joe Paul worked with Logan as he was his father's executor and trustee over the inheritance his father left to his two grandchildren, *i.e.*, Joe Paul's niece and nephew — Further, Logan had referred clients to Joe Paul because Joe Paul collected coins and could help with questions on coins found in his clients' estates — With Joe Paul's permission, Jo Brown contacted Logan — On October 7, Logan spoke by phone with Joe Paul, who asked that Logan prepare a will and POA for him — Joe Paul advised that the wanted 75% of his estate left to the Humane Society and 25% to Spaulding — He also wanted Spaulding to have his POA — Logan had never met Spaulding and had no prior relationship with him — Niece and nephew alleged that Logan's son had once served on the Humane Society's board, but Logan had no knowledge of whether that was true — Logan did not discuss Joe Paul's will or bequests with his son, Humane Society, or Spaulding — On October 8, Logan contacted Spaulding to secure his agreement to act as POA — That same day, Logan prepared drafts of the

documents and had his paralegal deliver them to Joe Paul at the hospital — Separately, Joe Paul asked both Jo Brown and Spaulding to review the documents to make sure they were "okay" — Jo Brown testified that the disposition of assets was consistent with her prior conversations with Joe Paul and that she asked Joe Paul about his decision to exclude his niece and nephew — Joe Paul responded that he saw no reason to include them as they were not close — Spaulding had never discussed the will with Joe Paul and did not know he was a beneficiary until he read the documents — On or about October 10, Joe Paul had been given solid food at the rehabilitation center instead of a liquid diet, which he aspired, causing respiratory failure — Joe Paul returned to the hospital — At some point he was placed on a fentanyl drip, but medical records indicated that this was discontinued on October 12, although Dr. Chaker's October 13 notes stated that he was still on drip — Dr. Chaker's notes from October 14 indicated that Joe Paul was still on drip, but additional notes that day stated that Joe Paul was awake and alert — Dr. Swafford's notes from October 14 indicated that Joe Paul was alert — Medical records indicated that hospital wanted to place a feeding tube in, but that Joe Paul declined it — Hospital spoke with Jo Brown, who indicated that Joe Paul is able to make his own decisions — On October 15, nurse noted that Joe Paul was alert and completed his POA, appointing Spaulding as his POA — Hospital informed Spaulding — Spaulding came to the hospital to discuss the feeding tube and end-of-life plans with Joe Paul and was present when Logan arrived with two of his staff members and the documents he drafted — Spaulding left the room and did not speak with or introduce himself to Logan — Logan testified that only he, his two staff members, and Joe Paul were present in the room when Joe Paul signed his will — Joe Paul informed Logan that he had signed a POA earlier that day and that he did not need POA that Logan had prepared — Logan reviewed terms of the will with Joe Paul — Joe Paul's condition worsened thereafter and he passed away on October 20 — Spaulding filed petition to probate Joe Paul's will — Niece and nephew contested will alleging that Joe Paul lacked testamentary capacity and was subject to undue influence — Trial court found that niece and nephew failed to present conclusive evidence to overcome the presumption that Joe Paul had testamentary capacity and failed to allege any cognizable claims of undue influence; therefore, it granted summary judgment to Estate and its beneficiaries — Niece and nephew appealed — **AFFIRMED** — There are four basic prerequisites for the valid execution of a will — The testator must: (1) know the natural objects of his bounty; (2) know his obligations to them; (3) know the character and value of his estate; and (4) dispose of his estate according to his own fixed purpose — The degree of mental capacity

required to make a will is minimal and less than that necessary to make a deed or a contract — There is a strong presumption in favor of a testator possessing adequate testamentary capacity which can only be rebutted by the strongest showing of incapacity at the time of execution of the will — Similar to a lack of testamentary capacity nullifying a will, undue influence over the testator in the testator's execution of a will invalidates that will — To determine whether a will reflects the wishes of the testator, the court must examine the indicia or badges of undue influence — These badges include: (1) a physically weak and mentally impaired testator; (2) a will which is unnatural in its provisions; (3) a recently developed and comparatively short period of close relationship between the testator and principal beneficiary; (4) participation by the principal beneficiary in the preparation of the will; (5) possession of the will by the principal beneficiary after it was reduced to writing; (6) efforts by the principal beneficiary to restrict contacts between the testator and the natural objects of his bounty; and (7) absolute control of testator's business affairs — The burden is on the contestant of a will to demonstrate the existence and effect of the influence — When undue influence and a mentally impaired testator are both alleged and the mental impairment of the testator is proven, the level of undue influence which must be shown is less than would normally be required since the testator is in a weakened state — Niece and nephew proffered their own affidavits, two expert witnesses, and selected medical records — Niece and nephew admitted that they did not have a close relationship with Joe Paul — While Joe Paul did not have a close relationship with the Humane Society, multiple witnesses described his affection for animals — Joe Paul provided hospital with Jo Brown's name as his next of kin — Fact witnesses regarding Joe Paul's testamentary capacity were Jo Brown, Darnaby, Spaulding and Logan — Each knew Joe Paul well and none of them questioned his mental capacity at the time he executed the will — Neither expert witness provided care to Joe Paul or knew him personally — Both experts concluded that Joe Paul lacked testamentary capacity; however, trial court dismissed their opinions as speculative and insufficient to overcome the presumption that Joe Paul was competent to execute his will — Medical records before trial court showed that Joe Paul suffered from Parkinson's disease that debilitated his body and affected his speech, but that his mind remained intact — It was not the review of the medical records by the experts that fell short, but the speculation required by the experts to reach their conclusion that Joe Paul lacked testamentary capacity — Experts rejected the very medical records they reviewed and assumed facts that were not in evidence — For instance, one expert continually downplayed nursing staff's notes that Joe Paul was alert and oriented on October 15 — Niece and nephew offered nothing more than speculation

that there was undue influence —

Annie-Katherine Maggie Leone and Michael Joseph Leone v. Ricky Lynn Spaulding, In His Official Capacity as Executor of the Estate of Joseph Paul Leone, Jr.; Franklin County Humane Society; and Ricky Lynn Spaulding (2025-CA-0340-MR); Franklin Cir. Ct., Wingate, J.; Opinion by Judge L. Jones, *affirming*, rendered 8/7/2026. [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, Annie-Katherine Maggie Leone (Annie-Katherine) and Michael Joseph Leone (Michael Joseph), challenge the February 26, 2025 order of summary judgment upholding the validity of a will against Appellants' claims that the testator lacked sufficient mental capacity to execute the will and was subject to undue influence by the beneficiaries. We affirm.

BACKGROUND

The relevant facts are uncontroverted. The testator, Joseph Paul Leone, Jr. (Joe Paul), was seventy years old when he died on October 20, 2021, at the Frankfort Regional Medical Center. He had been admitted to the hospital on October 4, 2021, following a fall. Aside from a brief stay at a nursing home facility for rehabilitation services, he remained hospitalized until his death. While hospitalized, Joe Paul was found to be malnourished and was diagnosed with Parkinson's disease.

Joe Paul had never married and never had children. He was preceded in death by his brother Michael Leone and, later, his father, Joseph Paul Leone, Sr. (Joe, Sr.). His closest living relatives were his stepmother, Jo Brown Leone (Jo Brown), of Fayette County; a cousin, Carrie Darnaby (Darnaby), of Frankfort; and Appellants, who were his niece and nephew, the children of his deceased brother, who reside in North Carolina. Joe Paul was a CPA¹ who had retired from state government where he worked as an auditor. That was where he met Appellee, Ricky Spaulding (Spaulding), in 1990. The two worked together until 1998 and maintained close ties after Joe Paul's retirement. Joe Paul was an avid coin collector and enjoyed investing as a hobby. He lived a modest life in the home he had inherited from his father. At the time of his passing, Joe Paul had amassed assets valued at over five million dollars.

¹ Certified public accountant.

At the time of his fall on October 4, 2021, Joe Paul lived alone and independently, drove himself, managed his own household and finances, and served as trustee managing and investing the inheritance Annie-Katherine had received from her grandfather, the testator's father, Joe, Sr.² When he fell, Joe Paul called Spaulding. Spaulding and his wife went to Joe Paul's home to check on him and subsequently convinced him to allow them to contact an ambulance which transported Joe Paul to the hospital. Spaulding remained at the hospital with Joe Paul that evening.

² Joe Paul had also served as trustee over Michael Joseph's inheritance from his grandfather until

he reached the age of twenty-five at which time authority over the trust passed to Michael Joseph.

Knowing Darnaby and Joe Paul were related, Spaulding informed her of Joe Paul's hospitalization. At the request of Joe Paul, Spaulding also contacted Jo Brown, whom he had never met, though Joe Paul also reached out to her himself, asking her to visit. Spaulding, Darnaby, and Brown each frequently visited Joe Paul during his hospital stay and communicated to update each other on his condition. Neither Spaulding nor Darnaby knew Joe Paul's niece and nephew. Joe Paul did not contact nor did he request anyone else contact his niece and nephew.

On or about October 5, but sometime prior to October 7, and after learning that Joe Paul had not made any arrangements for his own affairs, both Darnaby and Jo Brown encouraged Joe Paul to contact an attorney regarding a will, living will, or power of attorney. Spaulding was not part of these conversations.

Though another attorney may have been mentioned, Jo Brown recommended Ed Logan (Logan). Logan was not a stranger to Joe Paul. Logan had represented Joe, Sr. and handled his estate which led to Logan and Joe Paul developing a relationship as Joe Paul was his father's executor and trustee over the inheritance Joe, Sr. left to his two grandchildren. Knowing Joe Paul collected coins, Logan, an estate attorney, previously had referred clients to Joe Paul with questions about coins they had discovered in a loved one's estate. With Joe Paul's permission, Jo Brown contacted Logan.

On October 7, 2021, Logan called Joe Paul at Frankfort Regional Medical Center. He spoke directly to Joe Paul, and Joe Paul did not indicate a third party was in the room with him during the conversation, nor did any witnesses testify to having been there. Joe Paul asked Logan to prepare a will and a power of attorney for him. Logan documented the phone call in an office memo dated that day:

At the request of Jo [Brown] Leone[,] I contacted Joe Paul who wanted a will and P.O.A.^[3] prepared. He advised by phone that he wanted a will prepared that left 75% of his estate to the Humane Society and 25% to his friend Ricky Spaulding of Frankfort. He wanted Ricky Spaulding to also have his P.O.A. He wanted me to do these documents and get [them] to him in the hospital.^[4]

³ Power of attorney.

⁴ Record (R.) at 410.

Logan had never met Spaulding and had no prior relationship with him. And, though Appellants allege Logan's son once served on the board of the Frankfort Humane Society, Logan had no knowledge of whether this was true and no reason to suspect otherwise when he spoke to Joe Paul or prepared the will. Nor did Logan discuss Joe Paul's will or the bequests contained therein with his son, any representative of the Humane Society, or Spaulding.

On October 8, 2021, Logan contacted Spaulding to secure his agreement to act as Joe Paul's power of attorney. Logan documented the phone call with Spaulding by another office memo: "Mr. Spaulding agreed to serve as P.O.A. for Joe [Paul]. I prepared the documents to take to the hospital for signature."⁵ That same day Logan prepared drafts of the documents and had his paralegal deliver them to Joe Paul at the hospital.

⁵ Deposition of Edwin A. Logan from November 17, 2022: Exhibit 2.

Separately, Joe Paul asked both Jo Brown and Spaulding to review the documents and asked if they were "okay." Jo Brown testified that the disposition of assets contained in the will was consistent with her prior conversations with Joe Paul and that she asked Joe Paul about his decision to exclude his niece and nephew. Joe Paul responded that he saw no reason to include them as they were not close. Spaulding had never discussed the will with Joe Paul and did not know he was a beneficiary until he read the documents. Spaulding believed Jo Brown contacted Logan's office after reading the will because he recalled the draft documents incorrectly describing Joe Paul as a resident of Fayette County, but Logan had no memos reflecting such a conversation occurred.

The trial court record contains portions of Joe Paul's medical records from October 4, 2021, until his death. Those records are relied upon by both Appellants and Appellees, and we will refer to relevant portions herein. On October 8, 2021, at 8:43 p.m., Dr. David Muncy described a conversation with Joe Paul about a recent fall.⁶ Joe Paul advised Dr. Muncy that he had lost his balance and struck his head, but he denied any loss of consciousness.⁷ Dr. Muncy noted that Joe Paul was "[a]lert, awake, and oriented to person, place, and time" with "normal mood and appropriate affect with good attention span and thought process."⁸ Imaging of his brain for injury was unremarkable.⁹

⁶ R. at 476.

⁷ R. at 476.

⁸ R. at 478.

⁹ R. at 478, 483.

Following this, either later that same day or the next, Joe Paul was discharged from the hospital to a rehabilitation facility. He was transported by Spaulding. At some point, Jo Brown was contacted by either the facility or the hospital as Joe Paul's next of kin. She was informed that there had been an incident and Joe Paul was being transferred back to the hospital. Medical records indicate that on or about October 10, 2021, Joe Paul had been given solid food while at the facility instead of a liquid diet and he had aspirated, causing respiratory failure.¹⁰

¹⁰ R. at 491.

Upon his arrival back at the hospital, Joe Paul

was on bag-valve-mask ventilation.¹¹ He could not speak or answer questions, but could follow basic commands.¹² He was placed on a ventilator and sedated.¹³ Another CT scan was performed which was “negative for any acute intracranial abnormalities.”¹⁴

¹¹ R. at 494.

¹² R. at 494.

¹³ R. at 494.

¹⁴ R. at 497.

According to his medical records, Joe Paul was weaned from the ventilator and extubated on October 12, 2021, at 5:40 p.m.¹⁵ On October 13, at 9:47 a.m., Dr. Kara Swafford noted Joe Paul was complaining of a sore throat, and repeatedly asking for help.¹⁶ She found he was “alert, oriented to person but not to place and time” with “normal speech/language,” able to follow commands, and recall the name of one of three objects correctly.¹⁷

¹⁵ R. at 508.

¹⁶ R. at 514.

¹⁷ R. at 514.

Also on October 13, 2021, Dr. Mhd. Chaker noted that Joe Paul was on a fentanyl drip and sedated;¹⁸ however, medication records from that day show fentanyl had been discontinued on October 12,¹⁹ and Dr. Chaker’s narrative states that Joe Paul reported resting comfortably though he appeared to Dr. Chaker to be lethargic and confused.²⁰ On October 14, Dr. Chaker’s records again state that Joe Paul was on a fentanyl drip and sedated²¹ though fentanyl remained on the list of discontinued medications, with October 12 being the last date fentanyl was administered.²² Additional notes from Dr. Chaker on October 14 indicate Joe Paul was awake and alert during his visit and that he again reported having rested well through the night.²³

¹⁸ R. at 524.

¹⁹ R. at 518-21.

²⁰ R. at 521.

²¹ R. at 531.

²² R. at 527-30.

²³ R. at 526, 530-32.

On October 14, Dr. Swafford’s notes from 9:28 a.m. indicate a conversation with Joe Paul who reported no problems had occurred during the previous night, that he had slept well, and he was requesting water and orange juice.²⁴ Dr. Abhishek Kalipa noted that Joe Paul had dysphagia, *i.e.*, difficulty swallowing.²⁵ That same day at approximately 11:08 a.m., Dr. Swafford again examined Joe Paul.²⁶ Her notes indicate Joe Paul

was “alert, oriented to person, place and month[,] but said year was 2002, normal attention span and concentration, normal speech/language, follows commands, names 3 objects correctly.”²⁷

²⁴ R. at 543.

²⁵ R. at 540. *See dysphagia*, DORLAND’S ILLUSTRATED MEDICAL DICTIONARY (25th ed. 1965). Dysphagia refers to a patient’s physical ability to swallow. It is not to be confused with dysphasia. *Dysphasia*, DORLAND’S ILLUSTRATED MEDICAL DICTIONARY (25th ed. 1965) (“Impairment of speech, consisting in lack of coordination and failure to arrange words in their proper order. It is due to a central lesion.”).

²⁶ R. at 546.

²⁷ R. at 546.

Because Joe Paul was at high risk for aspiration, the hospital wanted to surgically place a feeding tube (PEG tube). Dr. Bryan Shouse was brought in for the surgical consult. The first note from Dr. Shouse is dated October 14, 2021, at 10:43 a.m.²⁸ He indicated Joe Paul has “difficulty communicating” and “can answer yes, no questions, but his answers are somewhat inconsistent.”²⁹ Both the medical records and witness testimony agree Joe Paul vacillated on whether to have the feeding tube placed. The afternoon of October 14, the hospital contacted Jo Brown as Joe Paul’s next of kin, and she was asked to give her consent to the PEG tube procedure.

²⁸ R. at 549.

²⁹ R. at 549.

On October 15, 2021, between 7:00 and 7:30 a.m., in the process of being prepped for the PEG tube procedure, Joe Paul halted the process.³⁰ A surgical representative, Janice Newton, made the following note:

[W]hen checking patient in and obtaining vitals and verifying everything, patient was oriented to self, time, day, month, year, birthday and what they were doing but patient didn’t want Dr. Shouse to do it. . . . Explained to patient why a PEG tube was necessary that he was aspirating into his lungs and not able to eat and take medications that the PEG will give him the nutrition that he needs to get stronger, better and allow him to be able to take his medications that is necessary. Explained that the xrays show that he is aspirating into his lungs and patient wanted to see the xrays. Explained to patient that I would have to have the doctors show him this and explain that to him. Patient would like for that to happen. Called his stepmom who stated that the patient makes his own decisions and has no POA. Patient adamant that he didn’t want Dr. Shouse to perform the procedure. Explained that there are other doctors that do this type of procedure. Wanted to know their names and that was provided. [G]oing to take the patient back up to room and hold off on the PEG tube placement so that the doctors can talk to him about it better in detail. Patient was incontinent

of urine, changed and clean patient and asked if he was [sic] let us put on condom cath on him so that he doesn’t have urine on his skin. [A]greed for condom cath to be placed and EKG button put in the nurse call bell so that patient could better call out for assistance. . . .³¹

This was followed by a note from a second surgical representative, Amanda Wade, at 7:32 a.m., who noted: “Patient interviewed and appears to be mentally intact, able to answer questions appropriately. Patient refuses to have this (PEG) procedure done and states that he does not want to prolong his life. Spoke to next of kin and she states that he is able to make his own decisions.”³²

³⁰ R. at 432.

³¹ R. at 432.

³² R. at 433.

Dr. Shouse spoke to Joe Paul, at 7:36 a.m. that same morning.³³ Dr. Shouse documented the conversation with this note:

The patient was scheduled for a PEG tube insertion this morning. I spoke briefly with him yesterday, and he did not express any objection to PEG placement. Due to his clinical condition and difficulty communicating with him, I also discussed consent with his step mother who is his only family. He does not have a living will or court designated guardian. She consented to placement of the feeding tube. However this morning the patient was able to communicate that he does not want a feeding tube placed. He is alert and oriented but has physical difficulty communicating due to his Parkinson’s disease and failure to thrive. He made it clear multiple times that he does not want a feeding tube placed. He seems mentally competent to make the decision and there is no legal guardian or medical power of attorney to discuss the situation with. The hospital staff contacted his step mother again and she confirmed that he has legal authority to make his own medical decisions. The planned PEG placement is cancelled. Should he voice in the future that he desires a feeding tube, please contact me and I will be happy to assist.³⁴

³³ R. at 555.

³⁴ R. at 555.

Only three of eight pages of Dr. Chaker’s report from October 15, 2021, are included in the trial court record. At 12:09 p.m. Dr. Chaker again records that Joe Paul is on a fentanyl drip and sedated.³⁵ As there is only a partial record, it is possible but unclear whether Joe Paul was administered fentanyl that day; however, Chaker describes the patient as comfortable and able to communicate that he was not experiencing any cough or shortness of breath.³⁶

³⁵ R. at 559.

³⁶ R. at 559.

At 1:03 p.m. on October 15, 2021, Dr. Swafford again evaluated Joe Paul.³⁷ Her notes describe the visit as follows: “[A]lert, oriented to person, month and year, said he is at Kings Daughters,^[38] normal attention span and concentration, normal speech/language, follows commands, names 3 objects correctly.”³⁹ Dr. Swafford noted that “moderate dysarthria” is present, a condition in which the muscles used for speech are weakened or paralyzed, and that there was “unintelligible speech at times.”⁴⁰

³⁷ R. at 563-64.

³⁸ The address of Frankfort Regional Medical Center is 299 Kings Daughters Drive, Frankfort, Kentucky, 40601.

³⁹ R. at 563.

⁴⁰ R. at 563. See *dysarthria*, <https://my.clevelandclinic.org/health/diseases/17653-dysarthria> (last visited Jul. 23, 2026).

At 2:58 p.m., yet another nurse spoke with Joe Paul regarding his wishes.⁴¹ Jennifer Brock entered the following notation in Joe Paul’s medical record: “POA completed after alert and oriented x4 patient expressed to myself and Corrine Rose that his wishes are for Ricky Spaulding to be his POA with [his] Stepmother, Jo [Brown] Leone being the backup is (sic) Ricky unavailable.”⁴² After the power of attorney was completed on a form provided by the hospital, the hospital contacted Spaulding to inform him of the situation. When Spaulding arrived at the hospital that day, he discussed the feeding tube and end-of-life plans with Joe Paul and was present in Joe Paul’s hospital room when Logan arrived with two of his staff members and the documents he had drafted. Spaulding left the room and did not speak with or introduce himself to Logan.

⁴¹ R. at 432.

⁴² R. at 432.

Logan testified that the only people present in the room when the will was signed besides himself and Joe Paul were the two members of Logan’s staff who accompanied him to witness and notarize the will. Logan testified that Joe Paul made him aware he had signed a power of attorney earlier that day so the power of attorney prepared by Logan wouldn’t be needed.

Logan testified that he reviewed the terms of the will with Joe Paul, but did not read the document to him. Logan also testified that Joe Paul confirmed there was no one else he wanted to include in the will. Logan did not discuss with Joe Paul the value of his estate, but he knew that Joe Paul had inherited approximately \$500,000 from Joe, Sr., that Joe Paul was a retired CPA, that Joe Paul handled his own investments, and that he was a frugal individual.

Logan provided the will to Joe Paul, observed Joe Paul review the document, and directed Joe Paul where to initial and sign the document. Logan did advise Joe Paul that he could merely make a mark for his signature and noted that his signature on October 15, 2021, differed from its usual appearance. Logan described Joe Paul that day as

soft-spoken and thin, and testified that this was consistent with how Joe Paul had always appeared to him. Logan was able to converse with Joe Paul at the hospital and prepared a memo when he returned to the office, noting as follows:

I took Polly and Sam with me to get Joe Paul’s will and POA signed.

We all went to his room and in each other [sic] presence signed the will. I discussed the will with Joe Paul and he verbally acknowledged that he want [sic] the will to give 75% to Humane Society and 25% to Ricky Spaulding.

He thanked me as we left his room.^[43]

Logan signed the memo and subsequently made a separate notation which he also signed: “My POA was not used. The hospital had provided one which Joe Paul signed.”⁴⁴

⁴³ Deposition of Edwin A. Logan, November 17, 2022: Exhibit 4.

⁴⁴ Deposition of Edwin A. Logan, November 17, 2022: Exhibit 4.

On October 16, 2021, after conversing with Spaulding and reviewing the list of alternative surgeons, Joe Paul again consented to the placement of the PEG tube, and surgery was scheduled for Monday, October 18, 2021. However, consent was again withdrawn. Joe Paul’s condition worsened, and he passed away on October 20, 2021.

The Franklin District Court granted Spaulding’s petition to probate the October 15, 2021 will and appointed him executor on November 9, 2021. On April 17, 2022, Appellants instituted an action in Franklin Circuit Court contesting the will by alleging Joe Paul lacked testamentary capacity and was subject to undue influence. Finding Appellants “failed to present conclusive evidence to overcome the presumption that Joe Paul had testamentary capacity” and failed “to allege any cognizable claims of undue influence,” the circuit court granted summary judgment to Appellees by order entered February 26, 2025. This appeal followed.

STANDARD OF REVIEW

Appellants allege the circuit court erred in awarding summary judgment to Appellees by: (1) disregarding the opinions of Appellants’ two expert medical witnesses on Joe Paul’s testamentary capacity; (2) applying the lucid interval doctrine; and (3) denying there was sufficient evidence of undue influence to present the issue to a jury.

We begin our analysis by restating the well-established standard under which appellate courts review summary judgment. Pursuant to CR⁴⁵ 56.03, summary judgment shall be entered “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” “The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present ‘at least

some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citing *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991)). Summary judgment can only occur “where the movant shows that the adverse party could not prevail under any circumstances.” *Steelvest*, 807 S.W.2d at 480. “The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor.” *Lewis*, 56 S.W.3d at 436 (citing *Steelvest*, 807 S.W.2d at 480-82). However, the word “impossible” is meant to be interpreted “in a practical sense, not in an absolute sense.” *Id.* (citations omitted). Furthermore, “speculation and supposition are insufficient to justify a submission of a case to the jury, and that the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation.” *O’Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (quoting *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). Finally, because only legal issues are involved, “an appellate court need not defer to the trial court’s decision and will review the issue *de novo*.” *Lewis*, 56 S.W.3d at 436.

⁴⁵ Kentucky Rules of Civil Procedure.

ANALYSIS

The Kentucky Supreme Court has set forth four basic prerequisites for the valid execution of a will. The “testator must: (1) know the natural objects of her bounty; (2) know her obligations to them; (3) know the character and value of her estate; and (4) dispose of her estate according to her own fixed purpose.” *Bye v. Mattingly*, 975 S.W.2d 451, 455 (Ky. 1998) (citations omitted). “The degree of mental capacity required to make a will is minimal” and “less than that necessary to make a deed, or a contract.” *Id.* (citations omitted). “Merely being an older person, possessing a failing memory, momentary forgetfulness, weakness of mental powers or lack of strict coherence in conversation does not render one incapable of validly executing a will.” *Id.* at 456 (citations omitted). Thus, “there is a strong presumption in favor of a testator possessing adequate testamentary capacity” which “can only be rebutted by the strongest showing of incapacity . . . at the time of execution of [the] will.” *Id.* at 455 (citations omitted). In *Bye*, our Supreme Court went so far as to say that only evidence “which demonstrates *conclusively* that the testator lacked testamentary capacity at the time of the execution of the will results in nullifying that will.” *Id.* at 456 (emphasis added).

Often found hand-in-hand with allegations of a lack of testamentary capacity are accusations of undue influence. “Similar to a lack of testamentary capacity nullifying a will, undue influence over the testator in the testator’s execution of a will invalidates that will.” *Boone v. Hoskins*, 613 S.W.3d 45, 53 (Ky. App. 2020). The *Bye* Court provided its guidance on this topic as well:

Undue influence is a level of persuasion which destroys the testator’s free will and replaces it with the desires of the influencer.

In discerning whether influence on a given testator is “undue,” courts must examine both the nature and the extent of the influence. First, the influence must be of a type which is inappropriate. Influence from acts of kindness, appeals to feeling, or arguments addressed to the understanding of the testator are permissible. Influence from threats, coercion and the like are improper and not permitted by the law. Second, the influence must be of a level that vitiates the testator’s own free will so that the testator is disposing of her property in a manner that she would otherwise refuse to do. The essence of this inquiry is whether the testator is exercising her own judgment.

In addition to demonstrating that undue influence was exercised upon the testator, a contestant must also show influence prior to or during the execution of the will. Undue influence exercised after the execution of the will has no bearing whatsoever upon whether the testator disposed of her property according to her own wishes. The influence must operate upon the testator at the execution of the will. If the influence did not affect the testator, then such conduct is irrelevant. However, even if the influence occurred many years prior to the execution of the will, but operates upon the testator at the time of execution, it is improper and will render the will null and void.

To determine whether a will reflects the wishes of the testator, the court must examine the indicia or badges of undue influence. Such badges include [1] a physically weak and mentally impaired testator, [2] a will which is unnatural in its provisions, [3] a recently developed and comparatively short period of close relationship between the testator and principal beneficiary, [4] participation by the principal beneficiary in the preparation of the will, [5] possession of the will by the principal beneficiary after it was reduced to writing, [6] efforts by the principal beneficiary to restrict contacts between the testator and the natural objects of his bounty, and [7] absolute control of testator’s business affairs.

...

When a contestant seeks to claim that undue influence was employed upon a testator, the burden is upon the contestant to demonstrate the existence and effect of the influence. Merely demonstrating that the opportunity [existed] to exert such influence is not sufficient to sustain the burden of proof. When undue influence and a mentally impaired testator are both alleged and the mental impairment of the testator is proven, the level of undue influence which must be shown is less than would normally be required since the testator is in a weakened state.

Bye, 975 S.W.2d at 457-58 (citations omitted). Appellants rely heavily upon that final statement to argue they have a reduced burden to overcome summary judgment. However, a reduced burden does not open the door so wide as to allow mere speculation a permit to enter. Nullifying a will remains a steep hurdle, and we agree with the trial court’s conclusion that Appellants have failed to surmount this obstacle.

On their behalf, Appellants proffered their own affidavits, two expert witnesses, and selected

medical records. Because a prerequisite to testamentary capacity is knowledge of the natural objects of one’s bounty and a will that is unnatural in its disposition is considered a badge of undue influence, we begin our analysis there.

Appellants admittedly did not have a close relationship with their uncle. Taking the facts in their virtually identical affidavits as true, Michael Joseph had not seen Joe Paul in the two years preceding his death, and Annie-Katherine did not even claim a recent visit. Neither Appellant claims to have been at Joe Paul’s funeral. Their relationship with Joe Paul consisted of the occasional phone call and the exchange of cards for Christmas and birthdays. Joe Paul did not contact them from the hospital, nor did he ask Jo Brown, Spaulding, Logan, Darnaby, or any member of the hospital staff to do so. Joe Paul provided the hospital with the name and contact information of his stepmother as his next of kin. Neither Darnaby nor Jo Brown described the relationship between Appellants and Joe Paul as close.

Therefore, the merit of Appellants’ claim that the disposition of Joe Paul’s assets by will was unnatural rests solely on their status as heirs under the laws of intestacy.

The law recognizes as an element of capacity the appreciation of paternal or maternal love or instinct and an obligation to bestow one’s property upon those bound by such natural ties. But it is simply the existence of such duty that the law recognizes. The mere failure to perform that natural obligation can never be held sufficient to invalidate the bestowal of property upon another.

Jackson’s Ex’r v. Semones, 98 S.W.2d 505, 508 (Ky. 1936) (citations omitted).

Here, Appellants are not the disinherited children of the testator, but a niece and nephew with whom Joe Paul had a cordial, but not close, relationship. While Joe Paul likewise did not have a close relationship with the Franklin County Humane Society, multiple witnesses described his affection for animals. On the other hand, Spaulding had been a friend and co-worker for thirty years, was one of the few people invited into Joe Paul’s home, helped Joe Paul with household repairs, welcomed Joe Paul into his home with his family during holidays, and was the one person Joe Paul chose to contact the night he fell.

The power of the owner to dispose of his property after his death is not by natural law, but positive statutory enactment. One of sound and disposing mind, gauged by a familiar standard, may exercise this valuable privilege and transmit his property by will to whomsoever he chooses, and in such manner as he pleases[.]

Jackson’s Ex’r, 98 S.W.2d at 507. For these reasons, we do not find the disposition of Joe Paul’s property to be unnatural. And,

[i]f a will is rational and consistent on its face, the burden rests upon him who questions it to establish want of mental capacity in the maker, or a subjection to such influence as induced him to dispose of his property other than according to his own purpose, or against that intention which he really wills to be performed after his death.

Id.

The only fact witnesses regarding Joe Paul’s testamentary capacity are Jo Brown, Darnaby, Spaulding, and Logan. All four of these witnesses knew Joe Paul well and not one calls into question Joe Paul’s mental capacity at the time he executed the will.

This brings us to Appellants’ only proffer of evidence to defeat summary judgment, their two expert witnesses, Dr. John Gilbert (Gilbert) and Dr. Thomas Tobin (Tobin). Appellants’ experts claim Joe Paul lacked the mental capacity to formulate his own plan to dispose of his assets which allowed him to fall victim to undue influence. Only Dr. Gilbert was deposed, and only excerpts from his deposition were provided to the trial court; however, it is uncontested that neither expert provided care to Joe Paul nor did they know him personally. Dr. Gilbert reviewed the medical records from Joe Paul’s two hospital stays from October 4, 2021, to his death on October 20, 2021, and it is unclear whether Dr. Tobin reviewed the entire record or was asked to provide his opinion on certain medications administered to Joe Paul during those last two weeks of his life. Both experts concluded that Joe Paul lacked testamentary capacity; however, the circuit court dismissed their opinions as speculative and insufficient to overcome the presumption that Joe Paul was competent to execute his will. We agree.

Because of Joe Paul’s hospitalization, the case at hand is unique in that there is daily, and often even more frequent, documentation of the testator’s health and mental status in the medical records for the days surrounding and including the execution of the will. Though the full medical record was not made part of the trial court record, what records there were before the circuit court clearly show a testator suffering from a severe physical disability, *i.e.*, advanced Parkinson’s disease, that debilitated his body and affected his speech, but whose mind remained intact.

Nevertheless, solely as a result of his review of the medical records, Dr. Gilbert diagnosed Joe Paul with a variety of ailments, including encephalopathy, potential Alzheimer’s disease, psychosis, congestive heart failure, myocardial infarction, and a concussion. When asked to describe what he meant by “encephalopathy,” Dr. Gilbert stated it simply “[m]eans the brain ain’t working right.”⁴⁶ And, though there was no diagnosis of many of these conditions contained in the medical records provided to the court, Dr. Gilbert argued they each individually or in combination “*could* account for [Joe Paul’s] encephalopathy.”⁴⁷ This is the language of speculation and is not based on the facts contained in the record.

⁴⁶ R. at 649.

⁴⁷ “Anyone [sic] of the following conditions alone (much less in combination) *could* account for his encephalopathy: respiratory failure, hypoxemia, chronic malnutrition, concussion from fall, chronic overuse and misuse of Ensure, constipation, microvascular ischemic change, aspiration pneumonia, Type II myocardial infarction, IV Fentanyl, IV Versed, IV Zosyn, IV Ativan, IV Dilaudid, ICU Psychosis.” R. at 638 (emphasis added). *See also* R. at 633 (“The notes highlight a

decreased blink rate which can be seen with both Parkinson's and other encephalopathies. I suspect this patient would have had an increased blink rate on checking a Glabellar Reflex Test (which was not done) this is positive in patients with Alzheimer's and numerous other encephalopathies").

When Dr. Gilbert was confronted with Dr. Shouse's lengthy descriptions of the conversations he had with Joe Paul about the placement of the PEG tube, Gilbert responded by essentially accusing Dr. Shouse of falsifying the record: "He's a busy surgeon. I'm sure he relies on nursing staff and hospital to do – do those things."⁴⁸ Again, this is unsupported speculation.

⁴⁸ R. at 656.

When he was confronted with the notes of the nursing staff that supported Dr. Shouse's observations, Gilbert also discredited their assessment: "Nothing against nurses, don't, but the – you know, the preponderance of all the doctor notes show that this patient was either lethargic or confused or sedated." This is a mischaracterization of the medical records, at least those provided to the circuit court. *See Dossenbach v. Reidhar's Ex'x* (holding that "[a] decision may not be rested upon unreal or remote inferences. A pyramiding of inferences is not regarded as sound reasoning, and is not a permissible predicate for a conclusion") 53 S.W.2d 731, 733 (Ky. 1932) (citations omitted).

Furthermore, Gilbert insisted the nursing staff noted Joe Paul was *not* alert and oriented on October 15, 2021; however, the records available to the circuit court indicate the exact opposite. In fact, not only do they state that Joe Paul was oriented to person, place, time, and situation, but they describe a very coherent patient who had the mental and physical capacity, as well as the assertiveness, to halt a scheduled surgery mid-prep, question the necessity of the procedure, demand the x-rays to confirm the information provided, request a list of alternate surgeons, and articulate his wishes.

Dr. Gilbert and Appellants place great emphasis on the few observations from Dr. Chaker which describe Joe Paul as sedated and on a fentanyl drip. However, Dr. Chaker's own notes call that into question as he simultaneously noted Joe Paul was awake and able to communicate, and fentanyl is not on Chaker's list of Joe Paul's current medications for the days those lists were provided in full into the record with Chaker's notes. Furthermore, even a testator under the influence of narcotics at the time the will was executed can possess testamentary capacity. *Nunn v. Williams*, 254 S.W.2d 698, 701 (Ky. 1953).

Finally, it is unclear whether Dr. Gilbert understood or articulated the correct definition of testamentary capacity. Dr. Gilbert repeatedly equated physical weakness with mental incapacity:

Question: At what point in time, at what date, in your opinion, did [Joe Paul] become unable to make executive decisions?

Answer: The day he quit driving and was admitted to the hospital, okay? Driving is, you know, come on. He didn't have enough brain

power to drive.^[49]

...

Answer: If someone can't take care of themselves, they sure as hell can't do a will. I mean, come on.

Question: So a person who needs assistance with their activities of daily life and care, in your opinion . . . does not have the ability to make a will. Is that your testimony?

Answer: No. This patient can't take care of himself, he can't drive, can't function; he doesn't have the executive function to do a will. Period.^[50]

...

Answer: So I mean, I think his medical condition, his malnutrition was so bad, even if he didn't have the drugs, I don't think he'd be capable. He couldn't drive, he's peeing and pooping on himself. He is – he was a mess. I mean he is – this was a dying man.^[51]

...

Question: And what would prevent that, in your opinion? . . . Him being able to formulate that kind of mental capacity?

Answer: Any one of these meds – as well as just the – the – the debilitated, cachectic wasting disease that he had. I mean, the guy is dying here, and without food and water, you die.^[52]

⁴⁹ R. at 646.

⁵⁰ R. at 650.

⁵¹ R. at 663.

⁵² R. at 666.

Similarly, Dr. Gilbert's written report also falls short of stating the correct legal standard for testamentary capacity: "It is clear from review of all the records and associated records on [Joe Paul] that he had a multifactorial persistent encephalopathy or dysfunction of the brain, which, in my opinion, would make it impossible for him, or someone in his exact medical condition, to understand and give informed consent about anything[,] including his medical treatment as well as any definite understanding of will."⁵³

⁵³ R. at 637-38.

Dr. Tobin's opinion also fails to rise above mere speculation. Dr. Tobin, a veterinarian, is highly regarded in the racing and equine industry for his research relating to the effect of pharmaceuticals on horses. Though he obtained his Ph.D. in general pharmacology in 1970, his curriculum vitae does not contain experience or study on human subjects since that time. There is no deposition of Dr. Tobin in the file and we are limited to our review of his written report.

Dr. Tobin does not claim to have reviewed Joe Paul's medical records in full and appears to have been asked solely to comment on certain medications administered to Joe Paul and their common effects on the general population. While this information might be useful in certain contexts, it cannot overcome Kentucky's strong presumption in favor of testamentary capacity. *See Bye*, 975 S.W.2d at 455.

In rejecting the opinions of Appellants' experts, Appellants allege the circuit court disregarded KRE⁵⁴ 703 which "allows expert witnesses to form opinions based on facts made known to them (such as by medical records), not just facts learned from observation." Appellants' Brief at 22. Appellants' claim is without merit as the circuit court's order of summary judgment repeatedly quoted Appellees' expert, Michael Ward, who also had not provided care to Joe Paul. We do, however, agree the trial court made several erroneous and overbroad statements of law pertaining to expert witnesses in will contest proceedings.

⁵⁴ Kentucky Rules of Evidence.

While we agree with the circuit court's statement that "[o]ffering speculative medical opinions in an attempt to rebut the presumption of testamentary capacity or the lucid interval presumption is not sufficient," we believe the circuit court goes too far in claiming generally that "[a]n opinion based only on a medical record review is speculation on the issue of testamentary capacity or lucidity, and cannot defeat summary judgment." R. at 942. Nevertheless, appellate courts have "affirmed a judgment or decision of the trial court even if that court reached the right result for the wrong reason." *Commonwealth v. Fields*, 194 S.W.3d 255, 257 (Ky. 2006) (citations omitted). And, appellate courts "may affirm the trial court for any reason in the record." *Peterson v. Foley*, 559 S.W.3d 346, 349 (Ky. 2018) (citation omitted).

While we agree with the circuit court's assessment that the opinions of Appellants' experts were speculative in light of the facts of this case, no appellate court of the Commonwealth has gone so far as to declare as the circuit court has here that "under Kentucky law, a record-reviewing expert's opinion is insufficient to rebut the normal presumption in favor of testamentary capacity or the lucid interval presumption." R. at 943. It is not the review of medical records by Appellants' experts that falls short, but the speculation required to reach their conclusion that Joe Paul lacked testamentary capacity because, in reaching such a conclusion, Drs. Gilbert and Tobin reject the very medical records they have reviewed and assume facts that are very much not in evidence. The opinions of witnesses, even expert witnesses, "will not be sufficient evidence to take a case to the jury, unless the facts upon which the opinions are based are such as tend to establish a lack of testamentary capacity." *Dossenbach*, 53 S.W.2d at 735 (citations omitted).

Appellants further argue the trial court incorrectly applied the lucid interval doctrine to this case. "When a testator is suffering from a mental illness which ebbs and flows in terms of its effect on the testator's mental competence, it is presumed that the testator was mentally fit when

the will was executed. This is commonly referred to as the lucid interval doctrine.” *Bye*, 975 S.W.2d at 456 (citations omitted). Here there is no assertion by the parties that Joe Paul suffered from a mental illness, nor did the circuit court make such a claim. The purpose of the circuit court’s mention of the lucid interval doctrine was simply to illustrate that the Commonwealth “has always taken the broadest possible view of who may execute a will no matter what their infirmity.” *Id.* As previously stated, in Kentucky there is a presumption of testamentary capacity. The lucid interval doctrine extends this presumption to a testator suffering from the effects of a mental illness, but even the *Bye* Court expanded the doctrine further to include Alzheimer’s disease. *Id.*

Nor is the expansion of the lucid interval doctrine beyond mental illness a recent creation. As early as 1829, Kentucky’s highest court acknowledged that the will of a physically paralyzed testator should be admitted to probate though the man might have been incompetent to make a will in certain moments and his “mind was more feeble and passive than it had been when his body was in health and vigor.” *In re McDaniel’s Will*, 25 Ky. (2 J.J. Marsh.) 331, 336 (1829). Without the benefit of nearly two centuries of medical knowledge and after much philosophizing on the nature of mind and body and the effect a weakness of the body may have upon the mind, this predecessor to our Supreme Court concluded: “Therefore, the will must be established, unless the disease, with which the testator was afflicted, be of such a character, as to shew that it was impossible, [or] greatly improbable, that he could have had a disposing mind[.]” *Id.* at 338. Thus, we find the trial court has committed no error in reciting the lucid interval doctrine.

Whether the lucid interval doctrine applies, the burden of proof was upon Appellants to overcome the presumption of testamentary capacity at the time the will was executed. “[E]vidence of undue influence is relevant both in examining whether the testator lacked testamentary capacity to execute a will and whether another individual unduly influenced that testator in the execution of a will.” *Getty v. Getty*, 581 S.W.3d 548, 556 (Ky. 2019). And, though alleging six, and possibly all seven, badges of undue influence are present, we find Appellants have done nothing more than demonstrate the mere opportunity to exert such influence which the previously cited language in *Bye* makes clear is insufficient to sustain Appellants’ burden of proof. *Bye*, 975 S.W.2d at 458.

First, as explained above, while it is undisputed Joe Paul was physically weakened, Appellants have failed to show by more than mere speculation that he was mentally impaired to such a degree he lacked testamentary capacity. Nor, as we have previously explained, have Appellants shown the will to be unnatural in its disposition.

The third badge of undue influence points to “a recently developed and comparatively short period of close relationship between the testator and [the] principal beneficiary[.]” *Id.* at 457. While it is undisputed Joe Paul had no previous relationship with the Frankfort Humane Society, it is also undisputed that Joe Paul previously had pets, was considering obtaining another pet, and demonstrated an interest in and fondness for animals. Nor is there evidence of anyone from the Humane Society personally contacting Joe Paul to

exert any influence over him.

Next, Appellants question the participation of the Humane Society and Spaulding in preparing the will. There is no evidence in the record to support this claim. Appellants allege Logan’s son was on the Board of the Humane Society and assert Joe Paul had requested another attorney prepare the will. Whether Logan’s son was affiliated with the Humane Society, it is undisputed that Logan had no knowledge of this when he prepared the will, nor did Logan discuss the will with his son, nor did his son participate in drafting the will. And Logan did not solicit Joe Paul’s business. It is undisputed that Jo Brown suggested Logan draft the will and Joe Paul agreed to this. Jo Brown is not a beneficiary of the will and, while she may have made the initial contact with Logan for Joe Paul, Logan then called Joe Paul and spoke directly to him about his wishes. Additionally, it is undisputed that Logan did not know Spaulding at the time he drafted the will, nor did he discuss the contents of the will with Spaulding or inform Spaulding he was to be a beneficiary.

While Spaulding is not the principal beneficiary, because he was bequeathed a significant portion of Joe Paul’s assets, Appellants have also made allegations of undue influence against him. There is no evidence Spaulding encouraged Joe Paul to make a will or to include him as a beneficiary. The mere possibility that Spaulding was present when Jo Brown or Darnaby advised Joe Paul he needed to prepare a will does not equate to involvement in the preparation of a will, nor does the fact that Joe Paul asked Spaulding to review a draft of the will. Logan prepared the will in accordance with the directions he was given by Joe Paul. Logan did not discuss the will with Spaulding, and Spaulding did not advise Logan to make any changes to the draft. Spaulding was not present when Logan discussed the will with Joe Paul over the phone, nor was he present when the will was signed. Thus, there is no evidence Spaulding participated in the preparation of the will.

Appellants concede the fifth badge of undue influence, possession of the will by the principal beneficiary, “may not be present,” but still argue the possibility exists because Spaulding read a draft of the document before it was executed. We again note that Spaulding is not the principal beneficiary. Nor is possession of one document accomplished by reading a separate document. Appellants’ assertion is nonsensical.

Appellants claim Spaulding restricted their access to Joe Paul by failing to notify them of his hospitalization. However, Appellants do not claim they tried to contact Joe Paul during this time and were turned away. Furthermore, it is undisputed that Spaulding did not know Appellants, nor was he under any obligation to inform Appellants of Joe Paul’s medical condition.

The final badge of undue influence is “absolute control of [the] testator’s business affairs.” *Bye*, 975 S.W.2d at 457. Appellants argue Spaulding had “the power of life and death” over Joe Paul because he was named Joe Paul’s power of attorney. Appellants’ Brief at 28. However, Spaulding became power of attorney no more than an hour or two before the will was executed. He did not ask for the position, and he was not present during the conversations between Joe Paul and Logan or Joe

Paul and the hospital. There is no proof he directed the will or the power of attorney to be prepared, dictated the terms, or threatened Joe Paul. While Appellants make much of Spaulding’s decision to implement a do-not-resuscitate order for Joe Paul, this was done days after the will was executed and the hospital records do not dispute that it was done in accordance with the wishes of Joe Paul.

Having reviewed all seven badges of undue influence, we find Appellants have failed to offer more than speculation. While there may have been an opportunity for the beneficiaries of the will to exercise undue influence over Joe Paul, there is no proffer of actual evidence that they did so.

[Kentucky’s appellate courts] have frequently written that it is not sufficient to show that there was an opportunity to exercise undue influence, or that it was a possibility that it was exercised, but some evidence must be adduced showing that such influence was actually exercised. And by evidence is meant something of substance and relevant consequence, and not vague, uncertain, or irrelevant matter not carrying the quality of proof, or having fitness to induce conviction.

Whallen’s Ex’rs v. Moore, 58 S.W.2d 601, 604 (Ky. 1933).

Appellants have presented nothing more than an invitation to the court to engage in speculation, and the circuit court rightly refused to extend that invitation to a jury. It follows that we affirm the decision of the Franklin Circuit Court granting summary judgment in favor of Appellees.

ALL CONCUR.

BEFORE: THOMPSON, CHIEF JUDGE;
EASTON AND L. JONES, JUDGES.

REAL PROPERTY

DEEDS

CEMETERIES

PRIVATE FAMILY CEMETERY

BURIAL RIGHTS IN A FAMILY CEMETERY

Plaintiffs are members of a family that has relatives buried in a small family cemetery located in property that defendants purchased on March 28, 2023 — Plaintiffs planned on continuing to visit and maintain cemetery, as well as continuing to bury relatives at the cemetery — Undisputed evidence depicts monuments for burials that occurred at the cemetery as early as 1912 and, prior to defendants’ purchase, as recently as 2022 — Further, evidence indicated that at least two double headstones, with one side containing only a name and date of birth, marked lots where people ostensibly intended to be buried beside loved ones upon their own deaths — Deed conveying property to defendants stated: “This conveyance is also subject to that Cemetery, and the access road thereto, shown on the Plat

of record in Plat Cabinet B, Slide 404.” — In July 2023, plaintiffs filed instant action against defendants alleging that defendants wrongfully denied them access to cemetery by erecting a locked gate at the entrance of the access road and refusing to give them a key — Defendants filed answer alleging that plaintiffs had lost title to the real property many years ago when their ancestors failed to pay property taxes on the cemetery and the property was foreclosed upon by the county — Eventually, trial court entered order requiring defendants to provide plaintiffs with a key to the gate — Plaintiffs later filed a motion to require defendants to remove posts blocking access to the cemetery — After much legal maneuvering, trial court granted plaintiffs’ motion for summary judgment — Trial court permanently enjoined defendants from interfering in any manner with visitors to the cemetery, including future burials and upkeep of the cemetery — Defendants appealed — **AFFIRMED** — No Kentucky statute establishes a right of family members for ingress and egress to a private cemetery where their relatives are buried to visit or maintain gravesites — Further, no statute provides how the right to burial in a family cemetery is acquired or lost — Kentucky case law recognizes that where a purchaser acquires property with awareness of the presence of a private cemetery that a prior owner had established, that purchaser may not exercise all of the same rights of ownership in that portion that they might in other realty — This is regardless of whether the instrument of conveyance contained any express reservations or exceptions — An easement, not a fee, in the land, including for burial purposes, is maintained by the family of the deceased who established the private family burial plot — In instant action, undisputed facts are sufficient to establish the common-law right of plaintiffs to continue future burials within the boundaries of the family cemetery — Trial court’s order made no determination as to who the titleholder of the fee in the cemetery was — Instead, plaintiffs sought, and were granted, an order enjoining defendants from interfering with their access to and use of family cemetery for proper purposes —

Dana Hal Maddox; Alyssia Noelle Maddox; and Kimberly Ann Maddox v. Bernie Brumagen; Betty Van Winkle; Ricky Brumagen; Susan Price; and William Brumagen (2025-CA-0648-MR); Jackson Cir. Ct., House, J.; Opinion by Judge Caldwell, affirming, rendered 8/7/2026. [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).]

Dana Hal Maddox, Alyssia Noelle Maddox, and Kimberly Ann Maddox (“the Maddoxes”) appeal an Order of the Jackson Circuit Court (“the circuit court”) granting summary judgment in favor of Bernie Brumagen, Betty Van Winkle, Ricky Brumagen,¹ Susan Price, and William Brumagen (“the Brumagens”) which determined the Brumagens had a right to continue burials in a private family cemetery. Additionally, the Maddoxes appeal a finding in the Order that the

statement in the deed that the property was “subject to that Cemetery, and the access road thereto” meant that the Cemetery had been excepted and reserved from conveyance. After careful review, we affirm.

¹ Ricky Brumagen passed away on April 7, 2025, and there was no substitution of his estate under Kentucky Rules of Appellate Procedure 8.

FACTS AND PROCEDURAL HISTORY

This case concerns a dispute as to burial rights in the Brumagen, Abrams, Hayes Cemetery,² a small family graveyard situated in Clover Bottom, Jackson County, Kentucky. The Maddoxes are the owners of a tract of real property where the cemetery is located, which they purchased in 2023.

² The cemetery is also referred to in the record as the “Hayes/Brumagen Cemetery.”

The Brumagens are persons who each have relatives buried at the cemetery and “some, if not all of the [Brumagens], plan to be buried” there. Record on Appeal (“R.”) at 2. The deed reflects that the Maddoxes purchased the property on March 28, 2023. Undisputed evidence depicts monuments for burials that occurred at the site as early as 1912 and, prior to the Maddoxes’ purchase, as recently as 2022.³ Photographs entered into evidence show at least two double headstones, with one side containing only a name and date of birth, marking lots where people ostensibly intended to be buried beside loved ones following their own deaths. One of these double headstones bears the name of Appellee Bernie Brumagen. Bernie’s wife, who died in 2017, is buried beneath the other side of the double headstone. The record indicates Bernie’s father was buried in the cemetery about 50 years ago. His grandfather and grandmother, “as well as a host of other relatives” are also buried in the cemetery. R. at 2.

³ Photos attached to an affidavit of Bernie Brumagen show the headstone of Jeffery Lynn Brumagen, who died on May 4, 2022, in the cemetery.

The Maddoxes purchased the tract from the Estate of Mary King Abrams (“the Estate”) on March 28, 2023. In a duly recorded deed, the description of the property that was conveyed is as follows:

[b]eing all of Parcel “B” (14.00 acres), as shown on that “Boundary Retracement for Mary King Abrams (Heirs)” recorded December 12, 2022, and of record in Plat Cabinet B, Slide 404, in the Jackson County Clerk’s Office, reference to which is hereby made for a more particular description, and attached hereto.

There is excepted and reserved from the property hereby conveyed a One Sixth (1/6) undivided interest in the mineral rights, same having been reserved in Mesne Conveyances.

This conveyance is also subject to that Cemetery, and the access road thereto, shown on the Plat of

record in Plat Cabinet B, Slide 404.

R. at 5.

As indicated, the “Boundary Retracement for Mary King Abrams (Heirs)” plat of record was attached to the deed. The plat contained notations of a surveyor indicating it had been produced about 3 months prior to the conveyance, in December of 2022. Within the boundary lines outlining the 14-acre plat, a smaller enclosed boundary of less than a half-acre, per the included graphic scale, is depicted and labeled “fenced in cemetery.” R. at 8. A pair of parallel dotted lines leading from the boundary line of the cemetery to KY-1955 are labeled “gravel drive.” *Id.*

The instant action was initiated a few months after this conveyance, when, in July of 2023, the Brumagens filed a complaint in the circuit court against the Maddoxes. In that Complaint, the Brumagens alleged they had been wrongfully denied access to the cemetery after the Maddoxes, shortly upon taking title to the parcel, erected a locked gate at the entrance of the access road, and refused to give them a key. Attached to the Complaint was a photograph of a sign announcing that access to the cemetery required a request to be made 48 hours in advance and that the cemetery would be closed from June 10th through June 17th of 2023.

The Brumagens’ Complaint sought “a temporary and thereafter permanent restraining order and injunction requiring the [Maddoxes] to remove the gate, chain and lock and to permit the [Brumagens] and those similarly situated to visit and maintain said cemetery, and utilize the access road without restriction, and to conduct additional burials in said cemetery.” R. at 4.

Answering the Complaint, the Maddoxes asserted that the Brumagens had no rights as to the family cemetery because their ancestors had lost title to the real property long before:

The ancestors of the Plaintiff, many years ago, failed to pay the property taxes on the cemetery and property and it was foreclosed on by Jackson County and made a part of the Deed and property that was purchased by and now solely owned by the Defendants. The Plaintiffs have no current interest in the cemetery, by deed, easement or otherwise, which would entitle them to have access to the property at their desire and to make any claim of continued rights to be buried in the cemetery. The Plaintiffs do not own any of the property or cemetery, nor do they own any individual burial plots or anything similar thereto.

Quite simply, the Defendants solely own the land and cemetery pursuant to their deed. The Plaintiffs cannot produce any deeds, easements or any other documents showing they have any ownership or rights thereto in the cemetery.

R. at 19.

Following this, in October of 2023, the Brumagens filed a motion seeking a temporary restraining order and injunction to require that the Maddoxes provide Bernie with a key to the locked gate. A sworn affidavit of Bernie indicated that he and his daughter, Appellee Susan Price, had been

unable to visit the gravesite of Bernie's wife and Susan's mother because of the locked gate at the cemetery entrance. Additionally, the affidavit indicated that Bernie had typically maintained the gravesites of his family members but had been unable to because of the installation of the locked gate. The affidavit further indicated that:

Before this lawsuit was filed, I met with the defendants who stated they did not want strangers going upon the cemetery property and drinking and such. I told them I understood but would like to have a key so we could visit and maintain the graves. The defendants refused this request. We would request that at a minimum we be provided with a key to the gate leading to the cemetery so we can visit and would be glad to lock the gate back when we left.

R. at 23.

The Maddoxes responded that, prior to erecting the locked gate, they had experienced trouble on the property with trespassing, criminal activity, and littering. They argued the locked gate was a reasonable safeguard and their requirement of 48 hours for entry still provided reasonable accommodation for access. The circuit court conducted a hearing on the motion and the Judge stated that it appeared the Brumagens were entitled to a key to the locked gate. The court asked the parties to attempt to execute an agreed order with terms resolving the dispute and advised that the matter could be revisited if the parties were unable to come to an agreement.

The parties could not agree upon terms and conditions for any agreed order and the Brumagens filed a subsequent motion in November of 2023, again seeking an order requiring the Maddoxes to provide a key to the gate. The motion and an attached proposed order indicated that the Brumagens would access the cemetery only during daylight hours, remove trash, and keep the cemetery in orderly condition. The following December, the Brumagens filed a motion requesting that the circuit court issue a ruling on the pending motion and, in January of 2024, the circuit court signed an order requiring the Maddoxes to provide the Brumagens with a key to the gate.

After gaining access to the cemetery, in February of 2024, the Brumagens filed a "Motion to Remove Impediments" which requested an order requiring the Maddoxes to remove posts blocking access to the cemetery. Bernie Brumagen stated, by way of affidavit, that wooden posts and logs had been placed around the entrance and on the side of the graveyard that would block and impede entry into the cemetery with a riding mower for maintenance of the gravesites. Shortly after that, an affidavit indicated, rebar posts had been placed at the cemetery entrance. The affidavit indicated the wooden posts, logs, and rebar prevented anyone with a trailer or large vehicle from turning around at the cemetery. Furthermore, the affidavit indicated that the impediments prevented the entry and use of a riding lawn mower in the cemetery, and that Bernie was still unable to resume the mowing and maintenance of the cemetery as he had done for the prior ten years. The affidavit indicated the impediments would also prevent the entry of a hearse and necessary equipment for future burials in the cemetery. Photographs of the alleged impediments were attached.

On February 23, 2024, the Maddoxes filed combined "Motions for Summary Judgment and for Damages for the Destruction of Private Property and Response to Motion to Remove Impediments." Therein, the Maddoxes alleged that Bernie had damaged their property by removing posts from the entrance of the cemetery. They argued that they owned the cemetery and access road in fee simple; that they accordingly had the right to protect it with barriers and a fence; and, that the Brumagens had no right to continue burying relatives at the cemetery. They argued that just because former owners of the cemetery allowed people to be buried there, it did not mean that the current owners—the Maddoxes—were also required to allow future burials in perpetuity. As authority, the Maddoxes cited *Grinestaff v. Grinestaff*, 318 S.W.2d 881, 882 (Ky. 1958), which they alleged was factually on point.

On June 26, 2024, the Brumagens filed a motion for summary judgment. The Brumagens cited *Rose v. Rose*, 314 Ky. 761, 762, 237 S.W.2d 80, 80 (1951), as authority for their right to future burials. They maintained that the recorded deed put the Maddoxes on notice that their purchase of the parcel was subject to the cemetery and access road. They argued that they were not seeking to expand the cemetery as alleged by the Maddoxes and that they had never received permission to bury relatives in the past. The Brumagens contended the presence and continuing use of the family cemetery was obvious and apparent before the Maddoxes purchased the parcel, emphasizing that Bernie Brumagen had placed a double headstone where his wife is buried and clearly planned to be buried there upon his death.

In September 2024, the Brumagens filed a "Motion for Emergency Hearing" and sought an order requiring the Maddoxes to permit the burial of Tyler Wayne Dunnaway to be buried within the cemetery. The Maddoxes responded in opposition, arguing the decedent was not a party to the proceedings and that, as title holders, they had no obligation to allow additional burials in a cemetery. The record indicates a hearing and oral arguments were conducted, after which the circuit court granted the Brumagens' request for an order allowing the burial.

In November of 2024, the Maddoxes moved for the matter to be scheduled for trial and the circuit court scheduled a trial by jury for June of 2025. In April of 2025, the Brumagens filed another motion for an emergency hearing after Ricky Brumagen died, seeking an order requiring the Maddoxes to allow his burial in the cemetery.

On April 25, 2025, the circuit court entered findings of fact, conclusions of law, and summary judgment in favor of the Brumagens ("Order"). In so doing, the court relied largely on the language noted above in the deed which stated that, "[t]his conveyance is also subject to that Cemetery; and the access road thereto[.]" The circuit court determined that the boundaries of the cemetery and access road were clearly delineated on the plat; that the phrase "subject to" demonstrated that the cemetery and access road were not conveyed to the Maddoxes; and, that the Maddoxes were placed on notice of the foregoing by virtue of the deed and the survey plat which was recorded with the deed. The court permanently enjoined the Maddoxes from interfering in any manner with visitors to the

cemetery, including future burials and upkeep of the cemetery. The judgment held that the Brumagens, along with:

their heirs and successors, have the right to conduct burials and interments within the cemetery boundary as well as visitation, services, gathering of family members and friends, maintenance and all acts consistent therewith, and for all purposes consistent with cemetery use.

The [Maddoxes], their heirs, successors and/or assigns, shall not erect any impediments along the cemetery boundary and/or access road or within the cemetery proper.

Order, p. 4. This appeal followed. Additional background will be developed as necessary.

STANDARD OF REVIEW

We review the trial court's grant of summary judgment under the non-deferential *de novo* standard, as the Kentucky Supreme Court has explained: "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) (footnotes omitted). CR⁴ 56.03 provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

⁴ Kentucky Rules of Civil Procedure.

Kentucky case law construing CR 56.03 holds that granting summary judgment is only proper "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." *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (citing *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)). The circuit court noted this standard explicitly in its "Conclusions of Law" in the Order. Furthermore, the circuit court noted guidance in *Steevest* that a court deciding a motion for summary judgment "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." Order, p. 4 (quoting 807 S.W.2d at 480). Moreover, the circuit court further cited Kentucky case law regarding the practicalities of resolving summary judgment motions:

In reviewing motions for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible for the nonmoving party [to] produce evidence at trial warranting a judgment in his favor. *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Initially the movant bears the burden of establishing that no material facts exist. Thereafter, the burden is then upon the party opposing the motion. *Hubble v. Johnson*, 841 S.W.2d 169 (Ky. 1992); *Hibbitts*

v. Cumberland Valley National Bank and Trust Company, 977 S.W.2d 252 (Ky. App. 1998). The trial court “must examine the evidence, not decide any issue of fact, but to discover if a real issue exists.” *Steelvest*, 807 S.W.2d at 480.

Order, p. 3-4.

Despite recognizing, as noted here, that its task was to examine the evidence solely to determine if genuine issues existed and not to make findings of fact therein, the trial court used the heading “Findings of Fact” for one section of the Order. Certainly then, this heading in the Order gives the impression that the trial court was making factual findings. Additionally, the body of the Order does not explicitly state that the circuit court viewed the facts in the light most favorable to the Maddoxes.

However, the “Findings of Fact” in the Order themselves include the statement that “[t]he court finds that there are no material issues of fact and the [Brumagens] are entitled to Judgment as a matter of law.” Order, p. 1. Furthermore, close examination of the “Findings of Fact” shows mostly determinations that are in the nature of legal conclusions, rather than any fact-finding by the circuit court. Statements which are simply recitations of facts concerning matters such as the Maddoxes’ purchase of the tract from the Abrams Estate, or the existence of the cemetery, provide background which is largely undisputed.

We conclude that the trial court arrived at the correct result in resolving the renewed motion for summary judgment based upon our review of precedent, the parties’ briefs, and the record. As the Kentucky Supreme Court explained in *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724 (Ky. 1999):

trial judges are to refrain from weighing evidence at the summary judgment stage; that they are to review the record after discovery has been completed to determine whether the trier of fact could find a verdict for the non-moving party. *Steelvest* at 482-483. The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.

Id. at 730. Despite some language in the body of its Order which might suggest that the trial court was weighing the evidence, we construe its Opinion and Order as effectively reviewing the record after discovery was completed and determining, based upon the evidence of record, that facts did not exist which would make it possible for the non-moving party (the Maddoxes) to prevail in the case. And from our review of the record, this determination was not erroneous.

ANALYSIS

On appeal, the Maddoxes present two arguments. In the first, they argue that the circuit court committed reversible error by including in its Order, “that the wording within the [Maddoxes’] deed that the conveyance is, ‘subject to,’ the cemetery and access road as shown on the recorded survey plat means that the cemetery and access road are reserved and not conveyed to the defendants.” Order, p. 2.

The Maddoxes’ second argument is closely related to and dependent upon the success of their first. Here, the Maddoxes argue that the circuit court erred in permanently enjoining them from interference with future burials at the cemetery by the Brumagens. This argument turns upon the premise that where a stranger purchases land containing a family cemetery within it, absent an express written easement or proof of adverse possession, any future burials by the family in the cemetery may occur only with the express permission of the purchasers. As this premise rests upon a misunderstanding or misstatement of Kentucky law, we will examine applicable law before addressing the Maddoxes’ arguments more directly.

Burial Rights in Family Cemeteries in Kentucky

There is little statutory law in Kentucky which might provide guidance in determining the rights of burial for individuals as to a particular private cemetery. For the most part, Kentucky statutes concerning rights and obligations as to cemeteries are inapplicable to private family cemeteries. *See, e.g.*, KRS⁵ 381.715. An exception is KRS 381.697(2), which obligates the legal owner of private burial grounds to protect it from uses which may result in the burial grounds being damaged or destroyed; other provisions about private burial grounds are in KRS 381.697(3)-(4). However, “private family cemeteries” are explicitly excepted from some other subsections of KRS 381.697. *See* KRS 381.697(1).

⁵ Kentucky Revised Statutes.

No Kentucky statute establishes a right of family members for ingress and egress to a private cemetery where their decedents or relatives are buried to visit or maintain the gravesites. Neither does any statute provide how the right to burial in a family cemetery is acquired or lost. We therefore must turn to the common law.

To be sure, there is not an overabundance in Kentucky case law of published decisions concerning burial rights as to private family cemeteries. Nonetheless, Kentucky cases have long recognized that, where a purchaser acquires property with awareness of the presence of a private cemetery that a prior owner had established, that purchaser may not exercise all of the same rights of ownership in that portion they might in other realty. This is regardless of whether the instrument of conveyance contained any express reservations or exceptions:

As to the graveyard it is very evident that appellant knew it was on the land when he purchased, and being there the law without any reservation, and inhibition in the deed, prohibits him from removing the stones that mark the resting place of the dead buried there, or of injuring and removing the inclosure around the graveyard and compels him to permit the relatives of these buried there to exercise the right of ingress and egress to and from said graveyard on proper occasions and for proper purposes.

Hutchison v. Akin, 5 Ky. Op. 373, 1871 WL 6279, at

*1 (1871) (emphasis added).

In *Johnson v. Kentucky-Virginia Stone Co.*, a rule was stated that the right of a family member in a private or family cemetery in which another family member is interred, whether classified as a mere easement, license, or privilege, is not extinguishable by the owner of the fee’s sale of the property to another. 286 Ky. 1, 149 S.W.2d 496 (1941).

Haas v. Gahlinger articulated a general rule that the right of the relatives of deceased persons in ground where a prior owner established a family cemetery is an easement, and not a fee. 248 S.W.2d 349 (Ky. 1952). “The general rule is that the right of the relatives of deceased persons in ground dedicated to family burials is a mere easement and not a fee.” *Id.* at 351 (citing *Johnson v. Kentucky-Virginia Stone Co.*, 149 S.W.2d 496; *Brunton v. Roberts*, 265 Ky. 569, 97 S.W.2d 413 (1936); *United Cemeteries Co. v. Strother*, 332 Mo. 971, 61 S.W.2d 907 (1939) (en banc); 14 C.J.S. *Cemeteries* § 20, p. 79 (1939)) (emphasis added). The *Gahlinger* Court discussed a “mere privilege of burial in a family graveyard” which remained after the land was sold without reservation in the deed for the family cemetery constituted an easement within the meaning of an exception for “easements” in the deed’s covenant against encumbrances. 248 S.W.2d 349, 351. In arriving at that rule, the *Gahlinger* Court recognized that, under the common law of Kentucky, such an easement against the fee is created by the establishment of a family burial plot. *Id.* By operation of law, an “easement,” not a fee, in the land, including for burial purposes, is maintained by the family of the deceased who established the private family burial plot.

In *Fraser v. Tenney*, this Court described the common-law rights of the heirs of a purchaser of a family plot in a public cemetery:

When Joseph A. Goodwin purchased the family plot within an established cemetery, he acquired an easement or license to make interments therein as he assigned or as he designated with the Lexington Cemetery. *Brunton v. Roberts*, 265 Ky. 569, 97 S.W.2d 413 (1936). This right of sepulture is a property right subject to reasonable regulations by the cemetery and by the state. *Id.* and *Hertle v. Riddell*, 127 Ky. 623, 106 S.W. 282 (1907). In the absence of an assignment of sites by the purchaser, before his death, the lineal descendants or parentelic relatives of the deceased have an easement in the unused sites in ground dedicated to family burials. *Id.* *See also Hook v. Joyce*, 94 Ky. 450, 22 S.W. 651 (1893).

987 S.W.2d 796, 798 (Ky. App. 1998).

In a footnote to the above excerpt, we drew a distinction between how an easement for interment is created by purchase of a public family lot as opposed to purchase of realty for establishment of a family cemetery: “[i]f Joseph purchased a parcel to establish a family cemetery, he would have purchased a fee and not an easement. However, the heirs would have acquired an easement.” *Id.* at 798 n.3 (citing *Gahlinger*, 248 S.W.2d 349; *Hook*, 22 S.W. 651).

Summarizing Kentucky common law as to the rights of the heirs of a decedent who purchased a family plot in a public cemetery, we stated:

The heirs are joint owners of the easement for interment. The right to possession of a lot or the right to be buried therein, is on a first-need basis (date of death), provided there is space available. We believe this is the common law which exists in Kentucky. See 14 Am. Jur. 2d Cemeteries, Section 26; 14 CJS Cemeteries § 28.

Fraser, 987 S.W.2d at 798.

Today, under the facts of the case at hand, we believe this is also the common law which exists in Kentucky regarding the rights of the heirs of a decedent who established a family cemetery within a parcel the decedent owned. This is consistent with the common-law right of further burial as articulated in an oft-quoted passage from the Tennessee Supreme Court's 1911 decision in *Hines v. Tennessee*: "[t]he right of burial extends to all the descendants of the owner who devoted the property to burial purposes, and they may exercise it when the necessity arises." 149 S.W. 1058, 1059 (Tenn. 1911). Moreover, it is fully consistent with Kentucky case law cited by either party here as decisive to this issue of future burial rights.

The Brumagens cite *Rose v. Rose* as authority for their right to future burials. 237 S.W.2d at 80. Although a remarkably terse opinion, operation of the common-law principle implicit in *Gahlinger* and *Tenney* is plainly evident in *Rose*. There, a property owner, who was the father of all parties to the litigation, had set apart a portion of about 1 acre of land for a family cemetery. *Id.* Prior to his death, that owner conveyed a tract of land to his son, G.B. Rose, which included the family cemetery within its boundaries. *Id.* Later, G.B.'s brother, Taylor Rose, along with other siblings, filed an action to enjoin G.B. from interfering with their use of the family cemetery on G.B.'s land; G.B.'s siblings alleged he had prevented them from entering the cemetery for any purposes. *Id.*

While the conveyance contained no written reservation or exception for the family cemetery, the *Rose* Court determined it had been established that G.B. knew of the graveyard as well as its continuing use for burial of the dead prior to the conveyance. 237 S.W.2d at 80. *Rose* included a determination that there were "sufficient facts to show the graveyard has been dedicated for family use[.]" *Id.* (emphasis added). Ultimately, the opinion held that G.B.'s siblings, lineal descendants of a prior owner who set apart, or "dedicated," the family cemetery, had attained a right to use the graveyard for its proper purposes, which included the right to make interments of their own families therein. *Id.*

The Maddoxes argue that the case of *Grinestaff v. Grinestaff*, 318 S.W.2d 881 (Ky. 1958), modified *Rose* and is dispositive of the question of burial rights in this case. In that case, T.S. Grinestaff owned a large tract of land, upon which he had been planning to start a family graveyard. *Id.* at 882. Prior to T.S. Grinestaff's burying any member of his own immediate family in the planned graveyard, the infant son of T.S.'s brother, Roscoe Grinestaff, died. When T.S. permitted Roscoe to bury the deceased child on his land, this became the first interment on T.S.'s tract. Thereafter, T.S. fenced off a plot surrounding the deceased child's grave and the plot was used as a cemetery thereafter. *Id.*

At some point, title to the tract of land was conveyed to T.S.'s heirs, Jack Grinestaff, and others.

By the time of the appeal, forty-one persons had been buried in the cemetery that T.S. established. Most people buried there were members of either T.S.'s or Roscoe's families, although some non-relatives of either were also laid to rest in the cemetery. Any terms between T.S. and Roscoe concerning the burial of members of Roscoe's family had been lost to history. Except for a single burial, it was undisputed that all interments in the cemetery had occurred "only by permission of T. S. and his lineal descendants." *Id.* (emphasis added).

At some point, descendants of Roscoe Grinestaff "placed markers around a southwest section in which members of Roscoe's family had been buried" and "[b]y this act they undertook to appropriate a specific part of the cemetery for the future use of their branch of the family, there being substantial unused ground for new graves." *Id.* at 883. T.S.'s heirs, who were owners of the tract, sought an injunction to enjoin Roscoe's descendants from appropriating a part of a private cemetery located thereon. *Id.* at 882. Roscoe's descendants asserted defenses of 1) adverse possession, and 2) dedication of the cemetery by the original owner, T.S.

The Chancellor rejected the defense of adverse possession but agreed with Roscoe's descendants "that a part of this cemetery had been dedicated to the Roscoe Grinestaff family." *Id.* at 883. The heirs of T.S. appealed to the Court of Appeals—then Kentucky's highest Court. On appeal, the Court examined whether acquiescence by T.S. and his heirs, to Roscoe and his descendants, had established the right of Roscoe's descendants to conduct future burials in the cemetery.

Additionally, the Court examined the question of whether T.S. had *dedicated* the cemetery to Roscoe and his descendants for their private use. *Id.*

The *Grinestaff* Court noted that the claim of Roscoe's descendants that T.S. had dedicated the cemetery to Roscoe and his heirs was unavailing as "dedication" referred to "the intentional appropriation of land by the owner to some proper public use" and that, "[t]here is no such thing known to the law as the dedication of land to an individual for private use." *Id.* at 883 (citation omitted). The Court further held:

The essence of dedication is that it shall be for the use of the public at large. There may be a dedication for special uses, but it must be for the benefit of the public. Properly speaking, there can be no dedication to private uses or for a purpose bearing an interest or profit in the land, as distinguished from general public uses.

Id. (quoting 16 AM. JUR., *Dedication* § 5 (p. 349)). "[I]t seems settled that the right of burial in a private cemetery cannot be established or acquired by dedication." *Grinestaff*, 318 S.W.3d at 883 (citations omitted).

Judge Clay, the presiding judge in both *Grinestaff* and *Rose*, lamented his use of the word "dedication" in the prior opinion:

In *Rose v. Rose*, 314 Ky. 761, 237 S.W.2d 80, there appears language to the effect that a graveyard may be dedicated to family use. *From the opinion it appears that this term was used in its broad sense as meaning that a certain*

plot had been set aside as a family graveyard. The effect of the decision was that this burying ground had been excepted from the conveyance of a larger tract surrounding it. The language used in that opinion was unfortunate (the fault lies wholly with the author of this opinion), but we cannot invoke that case in support of defendants' position.

Grinestaff, 318 S.W.2d at 884 (emphasis added).

Grinestaff clarified that *Rose* had *not* "recognized private dedication as a basis for the right of future burials to be conducted at a family cemetery." *Rose* was hardly unique in using the word "dedicate" to describe the establishment of a family cemetery where terms such as "set aside" or "set apart" might have avoided confusion and kept the concept distinct from that of a public dedication for readers. This quandary is well-recognized: "the appropriation of land for a family burial plot is often described as a 'dedication,' without clarity as to whether a dedication in the strict legal sense is meant or whether a family burial ground was established in a manner other than by a legal dedication." H.D. Warren, Annotation, *Private or Family Cemeteries*, 75 A.L.R.2d 591 (1961). As summarized in another jurisdiction:

it has long been recognized that the owner may, without using a deed, "set apart" a portion of his land for use as a family cemetery. *Hines v. State*, 126 Tenn. 1, 149 S.W. 1058 (1911); *Frost v. Columbia Clay Co.*, 130 S.C. 72, 124 S.E. 767 (1924); *Meadows v. Edwards*, 116 S.W.2d 831 (Tex. Civ. App. 1938); *Benn v. Hatcher*, 81 Va. 25; *Grinestaff v. Grinestaff*, Ky., 318 S.W.2d 881 (1958); *Rose v. Rose*, 314 Ky. 761, 237 S.W.2d 80 (1951); *Heiligman v. Chambers*, Okl., 338 P.2d 144, 75 A.L.R.2d 583 (1959). Perhaps inaccurately, this has often been referred to as a "dedication."

Stoker v. Brown, 583 S.W.2d 765, 766 (Tenn. 1979).

And elsewhere in Kentucky law, use of the word "dedicated" in describing the establishment of a family cemetery has not been confined to *Rose*.⁶ And, as with *Rose*, such an easement will include a *burial privilege* that is confined to the direct family for whom the family cemetery was set aside by a prior land holder. *Gahlinger*, 248 S.W.2d at 351.

⁶ "[T]he right of the relatives of deceased persons in ground *dedicated* to family burials is a mere easement and not a fee." *Gahlinger*, 248 S.W.2d at 351 (citing *Johnson* 149 S.W.2d 496; *Brunton*, 97 S.W.2d 413; *United Cemeteries Co.*, 61 S.W.2d 907; 14 C.J.S. *Cemeteries* § 20, p. 79) (emphasis added).

The Maddoxes contend that *Grinestaff* held "that the owner of land where a family cemetery is located has the right to deny future burials in the family cemetery where adverse possession . . . has not been established." Appellant brief, p. 16-17. Upon careful reading of *Grinestaff*, we locate no support for such a sweeping and unqualified statement.

Under the Maddoxes' interpretation of *Grinestaff*, G.B. Rose had the right to deny Taylor and his other siblings any burial of their families in the family

cemetery that G.B.'s and Taylor's ancestors had established, since the property was conveyed to him. However, *Grinestaff* contains no indication that a mere lamentable word choice had led to an incorrect result being reached in *Rose*. There is only regret expressed for use of the word "dedication" and a determination that *Rose* could not be invoked in support of the position of the descendants of Roscoe Grinestaff. 318 S.W.2d at 884. Again, the descendants of Roscoe were merely collateral relatives and not lineal descendants of T.S., who had originally established the family cemetery. *Id.* This is likewise the case in the unpublished opinion of this Court cited by the Maddoxes in support of their interpretation of *Grinestaff*.⁷

⁷ See *Spradlin v. Spradlin*, No. 2023-CA-0606-MR, 2024 WL 501454, at *1 (Ky. App. Feb. 9, 2024) (unpublished).

The Maddoxes additionally assert that *Grinestaff* held "that any prior consent or license was revocable and the owner of the property had the right to deny future burials." Based upon this purported authority, "the Maddoxes have the right to deny future burials to the Brumagens despite the fact the Brumagens buried their relatives on the property for many years." Here, again, we find no support for such extrapolation from *Grinestaff* based upon our reading of that case. In fact, there is no explicit indication that the heirs of T.S. objected to or had intended to revoke the longstanding consent or license for the descendants of Roscoe to continue with future burials. Rather, the "issue presented [was] whether or not defendants have an absolute right to continue to bury their dead in this cemetery, and particularly the exclusive right to bury their dead in the section of the cemetery which they marked off shortly before this suit was filed." 318 S.W.2d at 883.

The record here is sparse as to details regarding the history of the cemetery and the chain of title of the larger parcel. Nonetheless, undisputed facts of the case, including some relied upon by the Maddoxes in purported support of their defenses to the circuit court, are sufficient to establish the common-law right of the Brumagens to continue with future burials within the boundaries of the family cemetery, as recognized in *Rose*.

From the time they first answered the Complaint in this case, the Maddoxes have consistently asserted that burial rights in the family cemetery, once held by the ancestors of the Brumagens, vanished when those ancestors lost title to a fee in the land where the cemetery is situated:

The ancestors of the [Brumagens], many years ago, failed to pay the property taxes on the cemetery and property and it was foreclosed on by Jackson County and made a part of the Deed and property that was purchased by and now solely owned by the [Maddoxes]. The [Brumagens] have no current interest in the cemetery, by deed, easement or otherwise, which would entitle them to have access to the property at their desire and to make any claim of continued rights to be buried in the cemetery.

...

Quite simply, the [Maddoxes] solely own

the land and cemetery pursuant to their deed. The [Brumagens] cannot produce any deeds, easements or any other documents showing they have any ownership or rights thereto in the cemetery.

...

Any interest [the Brumagens] may have had in the past, if any at all, has been extinguished.

R. at 19.

The Maddoxes nowhere argue that *Rose* is inapplicable as a result of lineage. Regarding burial rights and control of the family cemetery generally, the Maddoxes have remained consistent in this position throughout the litigation, including in their arguments on appeal. However, the premise of this position—that an easement for interment may be established solely by a written instrument or adverse possession—is simply incorrect.

The Circuit Court Did Not Commit Reversible Error When Interpreting the "Subject To" Language in the Deed

The Maddoxes argue that the circuit court committed reversible error in ruling "that the cemetery and access road were 'excepted out' of the deed such that [the Maddoxes] did not own the cemetery or cemetery road[.]" Appellant brief, p. 11. This argument disputes the finding in the Order that "the wording within the [Maddoxes'] deed that the conveyance is, 'subject to,' the cemetery and access road as shown on the recorded survey plat means that the cemetery and access road are reserved and not conveyed to [the Maddoxes]." Order, p. 2.

The interpretation of a deed presents an issue of law which we review *de novo*. See *Baker v. Hines*, 406 S.W.3d 21 (Ky. App. 2013). Interpretation is controlled by the intention of the parties as gleaned from the four corners of the deed. *Shields v. University of Louisville Foundation, Inc.*, 536 S.W.3d 706 (Ky. App. 2017) (citing *Rhoades v. Bennett*, 307 Ky. 507, 211 S.W.2d 693 (1948); *Standard Elkhorn Coal Co. v. Bolen*, 193 Ky. 342, 236 S.W. 241 (1921); *Hicks v. Phillips*, 146 Ky. 305, 142 S.W. 394 (1912); and 28A C.J.S. *Easements* § 72 (2017)).

Our inquiry is limited. The Order of the circuit court made no determination as to who the titleholder of the fee in the cemetery was. Appropriately so, as the question was not before it; nowhere does the record indicate that the Brumagens made any claims to quiet title in the cemetery property. Rather, the Brumagens sought, and were granted, an Order enjoining the Maddoxes from interfering with their access to and use of the family cemetery for proper purposes. And so, neither then is any question as to title in fee for the cemetery appropriately before this Court.

Among the Order's conclusions of law, the circuit court concluded that "[t]he words 'subject to' in a deed of conveyance denote an exception to the deed. *Kelley v. Haas*, 262 S.W.2d 687, 688 (Ky. 1953)." The Maddoxes argue that *Kelley* is inapplicable because it is factually distinguishable; it concerned a dispute as to a reservation of mineral rights, not rights within a cemetery. We find this argument unpersuasive.

Case law supports the circuit court's conclusion that the words "subject to" in this deed were words of qualification and a limitation on the grant. *Kelley*, 262 S.W.2d at 688. This is further supported in the deed by the reference to and attachment of the survey clearly indicating the presence and location of the cemetery and access road. "[W]hen 'subject to' language is coupled with the incorporation of the certificate of survey into an instrument of conveyance, however, an express easement by reservation may be created." 28A C.J.S. *Easements* § 71.

The question in *Kelley* was whether the phrase "subject to" was limited to an exception to conveyance that acknowledged an interest in the property that had previously been attained by third parties, or whether the clause could also "create an exception or reservation in favor of a grantor." 262 S.W.2d at 688. The *Kelley* Court determined that the words "subject to" could also create a reservation in favor of a grantor. *Id.* However, in doing so, that Court was acknowledging the "subject to" clause was typically used to indicate that the warranty of the interest transferred is made "subject to" an interest owned by a third party. See *id.* ("The question is simply whether the quoted language constituted an exception of all the mineral rights, or only of such as had previously been conveyed to others[.]") (emphasis added).⁸

⁸ "[S]ome draftsmen, mistaking ['subject to'] for a reservation clause, have used it as a mechanism for retaining an interest in the grantor." Ernest E. Smith, *The 'Subject To' Clause*, 30 ROCKY MOUNTAIN MIN. L. INST. § 15.01 (1984) (citing *Kelley*, 262 S.W.2d at 687); see also 26A C.J.S. *Deeds* § 356 (2026) ("Where title to a part of the property covered by the general description of the deed is already in a third person so that an exception thereof will not attempt to create title in a stranger to the deed, but merely exclude from its operation that which one not a party thereto already has, an exception may properly and validly be made recognizing and confirming such third person's rights.")

The Maddoxes argue that the "subject to" language in the deed, along with the depiction of the boundaries of the cemetery and road in the referenced and attached survey plat, is an indication only that "the Maddoxes were conveyed the cemetery and access road, but there were rights by others to use the cemetery and access road." Appellant brief, p. 12. Throughout the underlying proceedings, as well as on appeal, the Maddoxes insist that an assertion of a right of burial is no less than a claim to ownership of the land in fee. In their argument here, the Maddoxes argue that the deed's language could not provide the Brumagens with "title to the cemetery for future burials . . . because there was no language in the conveyance that it was also 'subject to' future burials in the cemetery." *Id.* at 15.

In their Reply brief, they argue the presence of the language concerning the cemetery and the attached plat, "is a difference without a legal significance. In Kentucky, whether the deed to the Maddoxes referred to the cemetery and access road or not, there is an easement implied by law for relatives to visit their dead in a private cemetery on private property, and access cannot be lawfully denied. Thus the 'subject to' language and the Plat Map did

nothing to increase the rights of the Brumagens to visit their deceased.” Reply brief, p. 2.

The Maddoxes assert that “if ‘subject to’ meant that the cemetery and access road were excepted and reserved, then they would belong to the Grantor, the Estate of Mary King Abrams, and not the Brumagens.” Appellant brief, p. 13. Regardless of whether this contention is correct, which we need not determine today, the Maddoxes make no case for how this would authorize them to interfere with the use of the cemetery and access road by the Brumagens.

Moreover, each of the Maddoxes’ arguments regarding the deed would be applicable to the Abrams Estate. And, by these arguments, the deed demonstrated no intent by the parties for the Abrams Estate to reserve or except from conveyance *any* rights as to the Brumagen, Abrams, Hayes Cemetery, outside those that the Maddoxes would concede they possess by common law.

Therefore, we find the argument that the words “subject to” are without legal significance here to be unpersuasive. Whether the words indicate the intent of the parties for the Estate to retain title in the cemetery, or merely an easement, is unnecessary for us to determine. Neither was this the question before the circuit court. The question the Maddoxes put before the circuit court was whether the Estate had conveyed sufficient property rights as to the cemetery and access road to interfere with the Brumagens’ use of the cemetery. The circuit court did not err in concluding that the deed demonstrated no such conveyance.

As stated in *Kelley*:

[w]e have, in the deed before us, the phrase, ‘subject to . . . all mineral rights.’ To say that this was not effective to except or reserve all mineral rights would be to attach an unwarranted importance to the technicalities of the language of conveyancing. It is our opinion that no mineral rights passed to the grantees under this deed.

262 S.W.2d at 689 (emphasis added).

Throughout all proceedings in this case, the Maddoxes argued the private cemetery was conveyed to them, by deed, in fee simple, and that this conveyance vested them with far-reaching property rights. On appeal, the Maddoxes prudently concede that the Brumagens have an easement for ingress and egress. They do not challenge many aspects of the circuit court’s Order, nor do they appeal the prior order that they provide Bernie Brumagen with a key to the locked gate.

However, for much of the litigation before the circuit court, the Maddoxes have characterized their rights gained through the alleged conveyance in terms which would resemble a fee simple *absolute* in the cemetery. In their answer to the Complaint, the Maddoxes contended that the Brumagens lost *all* rights as to the family cemetery when their ancestors lost title in fee to the property. This included the right to simply *visit* the gravesites of relatives, which the Maddoxes contended they had consented to only from a sense of charity rather than legal obligation:

The [Maddoxes] have accommodated the [Brumagens] with reasonable safeguards to have

access to the cemetery so they can visit their deceased relatives. The [Maddoxes] did not have to do this but did based on general principles of human decency. Now the [Brumagens] have filed this frivolous and baseless lawsuit herein asserting a fictitious interest in the cemetery that they do not possess. Even asserting a continued interest to be buried there when they clearly do not own the cemetery or land around, do not own any burial plots, nor do they have any easement/s thereto that can be enforced. Any interest they may have had in the past, if any at all, has been extinguished.

R. at 19-20.

In their own motion for summary judgment, the Maddoxes argued that “the [Brumagens] don’t even have an easement [for ingress and egress] but even if they did, the Defendants have a right to put up barriers to protect the graves and cemetery, a fence around it, or whatever they choose if there is ingress and egress available.” By the time of their response to the Brumagens’ motion for summary judgment, the Maddoxes had modified their position with the limited concession that “the only interest that the [Brumagens] have a cognizable legal right to is reasonable ingress and egress to visit their loved ones who are buried at the cemetery, which the [Circuit] Court has previously and generously allowed them by an Order of the Court.” R. at 79.

At various points, the Maddoxes had argued to the circuit court that the deed conveyed *all* property rights to the cemetery, including rights that their predecessor in title could not have possessed, such as the right to interfere with ingress and egress. We cannot say the circuit court erred, as a matter of law, in finding that the deed had not conveyed ownership in the nature of that alleged by the Maddoxes.

CONCLUSION

We discern no error in the circuit court’s conclusion that there were no genuine issues as to any material fact, and that the Brumagens were entitled to judgment as a matter of law. For these reasons, the summary judgment of the Jackson Circuit Court is affirmed.

JONES, A., JUDGE, CONCURS.

THOMPSON, CHIEF JUDGE, DISSENTS
AND FILES SEPARATE OPINION.

CRIMINAL LAW

ROBBERY IN THE FIRST DEGREE

KRS 439.3401 AS AMENDED IN 2024

“VIOLENT OFFENDER”

KRS 439.3401(9), effective July 15, 2024, provides that subsection (1) of this section extending the definition of “violent offender” to persons convicted of or pleading guilty to robbery in the first degree shall apply only to persons whose crime was committed after July 15, 2002 — Relative to this provision, prior to July 15, 2002, first-degree robbery was not specifically designated in KRS 439.3401 as

a violent offense — Under that earlier version of KRS 439.3401, a person could theoretically have committed robbery and not have been designated a “violent offender” if the victim did not suffer death or serious physical injury — Since July 15, 2002, every subsequent version of KRS 439.3401 has specifically designated persons who commit first-degree robbery as “violent offenders” regardless of whether the victim suffers death or serious physical injury — KRS 439.3401 was amended again in 2026, but that amendment did not affect subsection (9) —

Cameron Osborne v. Cookie Crews, Individually and In Her Official Capacity as Comm’r of the Ky. Dep’t of Corr.; Amy Robey, Individually and In Her Capacity as Warden of the Luther Luckett Corr. Complex; Stormey Prieskop, Individually and In Her Official Capacity as Offender Information Specialist II; and Heather McManis, Individually and In Her Official Capacity as Offender Information Specialist I (2025-CA-0371-MR); *Edward Hale, Jr. v. Cookie Crews, Individually and In Her Official Capacity as Comm’r of the Ky. Dep’t of Corr.; Amy Robey, Individually and In Her Capacity as Warden of the Luther Luckett Corr. Complex; Heather McManis, Individually and In Her Official Capacity as Offender Information Specialist I; and Allasandra Cunningham, Individually and In Her Official Capacity as Offender Information Supervisor* (2025-CA-0372); *Robert D. Smith v. Cookie Crews, Individually and In Her Official Capacity as Comm’r of the Ky. Dep’t of Corr.; Amy Robey, Individually and In Her Capacity as Warden of the Luther Luckett Corr. Complex; Heather McManis, Individually and In Her Official Capacity as Offender Information Specialist I; and Loretta B. New, Individually and In Her Official Capacity as Offender Information Specialist II* (2025-CA-0373-MR); *Thomas Davidson v. Cookie Crews, Individually and In Her Official Capacity as Comm’r of the Ky. Dep’t of Corr.; Amy Robey, Individually and In Her Capacity as Warden of the Luther Luckett Corr. Complex; Heather McManis, Individually and In Her Official Capacity as Offender Information Specialist I; and Michael R. Ammons, Individually and In His Official Capacity as Offender Information Specialist II* (2025-CA-0393-MR); *Kevin Boyd v. Cookie Crews, Individually and In Her Official Capacity as Comm’r of the Ky. Dep’t of Corr.; Amy Robey, Individually and In Her Capacity as Warden of the Luther Luckett Corr. Complex; Heather McManis, Individually and In Her Official Capacity as Offender Information Specialist I; and Winfrey Moore, Individually and In Her Official Capacity as Offender Information Specialist* (2025-CA-0435-MR); *Carlos Brooks v. Cookie Crews, Individually and In Her Official Capacity as Comm’r of the Ky. Dep’t of Corr.; Amy Robey, Individually and In Her Capacity as Warden of the Luther Luckett Corr. Complex; Heather McManis, Individually and In Her Official Capacity as Offender Information Specialist I; and Loretta B. New, Individually and In Her Official Capacity as Offender Information Specialist II* (2025-CA-0436-MR); *Aaron Jackson v. Cookie Crews, Individually and In Her Official Capacity as Comm’r of the Ky. Dep’t of Corr.; Amy Robey, Individually and In Her Capacity as Warden of the Luther Luckett Corr. Complex; Heather McManis, Individually and In Her Official Capacity as Offender Information Specialist I; and Julia Wollums, Individually and In Her Official*

Capacity as Offender Information Specialist I (2025-CA-0714-MR); Franklin Cir. Ct., Shepherd, J.; Opinion by Judge L. Jones, *affirming*, rendered 8/7/2026. [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 above-captioned Appellants seek to overturn a February 12, 2025 order of the Franklin Circuit Court that collectively dismissed their consolidated declaratory actions pursuant to CR¹ 12.02(f). Upon review, we affirm.

¹ Kentucky Rules of Civil Procedure.

BACKGROUND

Appellants are all inmates at the Luther Luckett Correctional Complex, each serving sentences for first-degree robbery. *See* KRS² 515.020. All Appellants committed their crimes and were convicted well *after* July 15, 2002. All Appellants initiated administrative actions with their correctional complex and the Kentucky Department of Corrections, asserting that a July 15, 2024 amendment to KRS 439.3401 “retroactively” converted their first-degree robbery convictions into *nonviolent* offender convictions; and, as a consequence, they were now all eligible for additional credit on their sentences beyond what KRS 197.045(1)(a)1. provided, making Appellants eligible for probation without having to serve 85% of their sentences.

² Kentucky Revised Statutes.

Appellants’ administrative actions were unsuccessful. Appellants then sought declaratory relief from the Franklin Circuit Court. Their declaratory actions were then consolidated, considering their identical claims. Following a CR 12.02(f) motion from Appellees (hereinafter referred to collectively as the Department of Corrections), all of the Appellants’ actions were dismissed by the circuit court. These consolidated appeals followed. We will discuss the finer points of Appellants’ claims, the Department of Corrections’ motion to dismiss their claims, and the circuit court’s dispositive order in our analysis below.

STANDARD OF REVIEW

When ruling upon a CR 12.02(f) motion to dismiss for failure to state a claim, “the circuit court is not required to make any factual determination; 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?” *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). A CR 12.02(f) motion is properly granted if, and only if, accepting all of plaintiff’s allegations as true and drawing all reasonable inferences in plaintiff’s favor, the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. *See Shaw v. Handy*, 588 S.W.3d 459, 461 (Ky. App. 2019). Our standard for reviewing the propriety of a circuit court’s decision to grant a CR 12.02 motion is *de novo*. *See Shaw*, 588 S.W.3d at 461.

ANALYSIS

The Appellants’ claims and the Department of Corrections’ CR 12.02 motion involved the following relevant sections of the current version of KRS 439.3401, which has been effective since July 15, 2024:³

(1) As used in this section, “violent offender” means any person who has been convicted of or pled guilty to the:

...

(b) Commission of:

1. A felony involving the death of the victim or serious physical injury to a victim; [or]

...

10. Robbery in the first degree as described in KRS 515.020;

...

(2) The court shall designate in its judgment if:

(a) The victim suffered death or serious physical injury;

...

(4) A violent offender with a sentence of a term of years shall not be released on probation, shock probation, parole, conditional discharge, or other form of early release until he or she has served at least eighty-five percent (85%) of the sentence imposed.

(5) A violent offender shall only be awarded credit on his or her sentence authorized by KRS 197.045(1)(a)1.

...

(9) The provisions of subsection (1) of this section extending the definition of “violent offender” to persons convicted of or pleading guilty to robbery in the first degree shall apply only to persons whose crime was committed after July 15, 2002.

³ KRS 439.3401 was recently amended again in 2026. *See* 2026 Ky. Acts ch. 68 § 27 (eff. Jul. 15, 2026). That amendment, however, did not affect any subsections of KRS 439.3401 on review in this appeal.

Appellants’ claims (*i.e.*, that KRS 439.3401 now instructs that a person who commits first-degree robbery is not a “violent offender”) are rooted in KRS 439.3401(1)(b)1., which provides that the meaning of “violent offender” *includes* a person who commits “[a] felony involving the death of the victim or serious physical injury to a victim[.]” Appellants focused *exclusively* upon that singular meaning of “violent offender” provided in KRS 439.3401(1)(b)1. According to Appellants’ understanding of KRS 439.3401(9), only a person who commits a first-degree robbery *that involves a victim who suffers death or serious physical injury*

can qualify as a “violent offender.” Therefore, because their respective judgments of conviction did not specifically indicate whether their victims “suffered death or serious physical injury” per KRS 439.3401(2)(a), Appellants argue their convictions could not have involved any such victims. Thus, Appellants believe they should now be considered *nonviolent* offenders.

To be clear, Appellants’ claims stem from a collective misreading of KRS 439.3401. As the Department of Corrections properly noted in its CR 12.02 motion, KRS 439.3401 provides *several* definitions of “violent offender,” and Appellants, in making their claims, ignored the definition most applicable to themselves. Pursuant to KRS 439.3401(1)(b)10., a “violent offender” is *also* a person who commits “[r]obbery in the first degree as described in KRS 515.020[.]” (Emphasis added.) Accordingly, there was no need for Appellants’ respective judgments of conviction to specify whether the victims “suffered death or serious physical injury” because the General Assembly had designated persons who commit first-degree robbery as “violent offenders” *regardless*.

Furthermore, the language of KRS 439.3401(9) – which Appellants seized upon in support of their claims – only supports that Appellants were indeed violent offenders within the meaning of the statute. To review, KRS 439.3401(9) provides:

The provisions of subsection (1) of this section extending the definition of “violent offender” to persons convicted of or pleading guilty to robbery in the first degree shall apply only to persons whose crime was committed after July 15, 2002.

Relative to this provision, *prior* to July 15, 2002, first-degree robbery was not specifically designated in KRS 439.3401 as a violent offense. Instead, the version of the statute preceding that date provided:

“[V]iolent offender” means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to a victim, or rape in the first degree or sodomy in the first degree of the victim. The court shall designate in its judgment if the victim suffered death or serious physical injury.

See KRS 439.3401(1) (version effective from July 14, 2000, through July 14, 2002).

In other words, under that earlier version of the statute one could theoretically have committed robbery and not have been designated a “violent offender” if the victim did not suffer death or serious physical injury. *Since* July 15, 2002, however, every subsequent version of KRS 439.3401 – including the versions in effect when each of the appellants committed their crimes – has specifically designated persons who commit robbery in the first degree as “violent offenders” *regardless* of whether the victim suffers death or serious physical injury. The version of KRS 439.3401(1) which was effective July 15, 2002 through July 11, 2006 provided:

As used in this section, “violent offender” means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony *involving the*

death of the victim or serious physical injury to a victim, or rape in the first degree or sodomy in the first degree of the victim, burglary in the first degree accompanied by the commission or attempted commission of a felony sexual offense in KRS Chapter 510, burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010, 508.020, 508.032, or 508.060, burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by KRS 509.040, or robbery in the first degree. The court shall designate in its judgment if the victim suffered death or serious physical injury.

(Emphasis added.)

Thus, KRS 439.3401(9) did not have any “retroactive” effect, much less the “retroactive” effect Appellants have projected upon it. Rather, the sole function and plain language of KRS 439.3401(9) simply clarifies that as of July 15, 2002, the law of Kentucky has considered persons who have committed first-degree robbery to be “violent offenders” irrespective of whether the victim suffered death or serious physical injury.

This, in turn, dooms Appellants’ claims that they are not “violent offenders.” Each Appellant committed first-degree robbery *after* July 15, 2002. Therefore, all Appellants *are* “violent offenders” within the meaning of KRS 439.3401. None of them, even assuming the truth of the factual allegations in their complaints, could have been entitled to the relief they requested, which was premised upon their assertions that they are *not* “violent offenders.” Thus, the circuit court committed no error in granting the Department of Corrections’ CR 12.02(f) motion to dismiss Appellants’ claims.

Appellants additionally argue the circuit court abused its discretion or otherwise erred by failing to grant various motions they filed below, *i.e.*, motions for default judgment, summary judgment, and to strike the Department of Corrections’ pleadings. In each of those motions, appellants argued – or sought relief stemming from the same arguments – that under the current version of KRS 439.3401 they are no longer considered to be “violent offenders.” In light of our disposition, these additional arguments lack merit and are otherwise moot.

CONCLUSION

In light of the foregoing, we AFFIRM the February 12, 2025 order of the Franklin Circuit Court which collectively dismissed the consolidated declaratory actions filed by Appellants pursuant to CR 12.02(f).

ALL CONCUR.

BEFORE: ECKERLE, A. JONES, AND L. JONES, JUDGES.

CHILD CUSTODY

TIMESHARING

STATUTORY PRESUMPTION IN KRS 403.270(2)

CIVIL PROCEDURE

REQUEST FOR JUDICIAL NOTICE OF EVENTS SUBSEQUENT TO THE TRIAL COURT’S ORDER

Mother and father, who never married, have two minor children — Mother and father lived together and jointly cared for children until January 2024 — At that time, older child began living with father and his family — Younger child remained with mother — In October 2024, father filed petition seeking custody and timesharing orders — Trial court conducted evidentiary hearing with testimony from mother, father, social workers, law enforcement, and various family members and acquaintances of the parties — Evidence showed that father was employed, maintained stable housing with his grandparents, and had substantial family support available to assist with children — Although father had a prior conviction for possession of methamphetamine and remained on probation, he testified that he had been sober for approximately 15 months — Father testified that he and mother have difficulty coparenting and communicating — Evidence showed mother had experienced significant instability in both her housing and employment — Mother acknowledged prior substance abuse issues — Additional testimony raised concerns regarding mother’s judgment, supervision of children in her care, and use of marijuana while pregnant with younger child; however, other witnesses disputed or minimized some of those concerns — Trial court awarded parties joint custody, designated father as children’s primary residential parent, and established a parenting schedule under which mother would exercise parenting time every Tuesday from 4:00 p.m. until 6:00 p.m.; on alternating weekends from 10:00 a.m. until 4:00 p.m. on Saturday during one week; and from 12:00 p.m. until 6:00 p.m. on Sunday during the alternate week, together with holiday parenting time as set forth in the order — Trial court’s order included detailed findings of fact and conclusions of law — Mother appealed — AFFIRMED — Mother’s sole argument on appeal is that trial court failed to properly apply KRS 403.270 when determining custody and parenting time — Mother did not challenge trial court’s factual findings — As an initial matter, Court of Appeals declined mother’s request to take judicial notice of information concerning events that allegedly occurred after the trial court entered the order that is now on appeal, including subsequent criminal charges involving father and one of the witnesses, and father’s incarceration — However, under KRS

403.320(3), mother may seek modification of a parenting-time order based upon changed circumstances arising after entry of the original order, and she may appeal any such order that is adverse to her — Trial court properly applied KRS 403.270(2), which provides, in part that there is a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interests of the child — Trial court evaluated the evidence in light of the statutory best-interest factors set forth in KRS 403.270(4) and concluded that father had overcome the presumption of 50/50 timesharing — Weighing of evidence and assessment of witness credibility are matters committed to the trial court’s discretion — While it may have been preferable for trial court to expressly state at the outset that it was applying the statutory presumption in favor of joint custody and equal parenting time, the law does not require trial courts to employ magic words — Once trial court determined that father had rebutted statutory presumption by a preponderance of the evidence, trial court fashioned a parenting-time schedule that maximized each parent’s time with children while remaining consistent with their welfare — KRS 403.270 provides no formula for doing so or prescribe a minimum or maximum number of hours, days, weekends, or overnights that must be awarded — Parenting-time schedule was not a manifest abuse of trial court’s discretion —

Faith Shawhan v. Tucker Paris (2025-CA-0306-MR); Cumberland Cir. Ct., Williams, J.; Opinion by Judge A. Jones, *affirming*, rendered 8/7/2026. [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).]

Faith Shawhan (“Mother”) appeals from the Cumberland Circuit Court’s December 30 2024, Findings of Fact, Conclusions of Law, and Order establishing custody and timesharing for the two minor children she shares with Tucker Parrish (“Father”). Mother does not challenge the trial court’s factual findings. Rather, she argues that the trial court misapplied KRS¹ 403.270 by failing to first apply the presumption in favor of equal parenting time.

¹ Kentucky Revised Statutes.

Although Mother disagrees with the weight the family court assigned to certain evidence and the conclusions it ultimately reached, those determinations were within the trial court’s broad discretion. Because the trial court applied the correct legal standard, made findings supported by substantial evidence, and did not manifestly abuse its discretion in fashioning a timesharing schedule it determined to be in the children’s best interests, we affirm.

II. BACKGROUND

Mother and Father are the parents of two minor children: M.T.P., born in December 2021, and C.P.P., born in May 2024. The parties were

never married but previously lived together and jointly cared for the children. Around the end of January 2024, after the parties discontinued their relationship, M.T.P. began living with Father and his family, while C.P.P. stayed with Mother.²

² Mother also has two older children from prior relationships. At the time of the hearing, her son resided with her, while her daughter did not, having previously been removed from Mother's care following a Cabinet investigation.

On October 4, 2024, Father filed a petition in Cumberland Circuit Court seeking custody and timesharing orders concerning the children. The trial court conducted an evidentiary hearing on October 29, 2024, at which it heard testimony from Mother, Father, social workers, law enforcement, and various family members and acquaintances of the parties.

The evidence presented at the hearing showed that Father was employed, maintained stable housing with his grandparents, and had substantial family support available to assist with childcare. Since January 2024, M.T.P. had primarily resided with Father in a multigenerational household where she enjoyed a close relationship with Father and his extended family. The testimony indicated that the family maintained a regular routine that included shared meals, church attendance, and other family activities. Father testified that he was actively involved in M.T.P.'s daily care, and no witness expressed concerns regarding his ability to provide for her physical, emotional, or developmental needs. Although Father had a prior conviction for possession of methamphetamine and remained on probation, he testified that he had been sober for approximately fifteen months.

Father also testified that he and Mother have difficulty coparenting and communicating. Although the parties had been involved in physical altercations during their relationship, Father testified that neither had caused serious physical injury to the other. Due to the parties' ongoing conflict, Father's grandmother frequently serves as an intermediary for communications concerning the children.

The evidence further showed that Mother had experienced significant instability in both her housing and employment. At the time of the hearing, Mother was residing with her former stepmother, an arrangement that had begun less than one week earlier. Before moving there, Mother had lived with an acquaintance, Jennifer Jessie, and then with her father. Mother testified that she was performing part-time cleaning work and was participating in a job-training program that she hoped would lead to full-time employment in about three months. Mother also acknowledged prior substance abuse issues, testified that she possessed a medical marijuana card, and admitted continued marijuana use. However, she denied that she did so around the children.³

³ Mother's former roommate, Jennifer Jessie, however, testified that she had observed Mother smoking marijuana around C.P.P.

The trial court also heard evidence regarding Mother's supervision and care of the children, her relationship with Father's family, and her financial instability. Evidence was presented that Mother had entered guilty pleas to harassing communications charges involving Father's mother and grandmother. Additional testimony raised concerns regarding Mother's judgment, supervision of children in her care, and use of marijuana while pregnant with C.P.P. Other witnesses disputed or minimized some of those concerns.

The trial court also heard evidence that Mother was involved in an ongoing Cabinet matter arising from concerns regarding the supervision of children in her care. During the investigation, Mother's twelve-year-old son was found home alone, and marijuana was discovered in the residence in close proximity to the boy. Mother testified that she had substantially complied with the resulting case plan, with housing remaining the principal unresolved issue.

The trial court also heard testimony from Cabinet employees Bailey Scott and Lori Slaughter, both of whom testified they had no current concerns regarding either parent's ability to care for the children and believed the children's basic needs were being met.

Following the hearing, the trial court awarded the parties joint custody, designated Father as the children's primary residential parent, and established a parenting schedule under which Mother would exercise parenting time every Tuesday from 4:00 p.m. until 6:00 p.m.; on alternating weekends from 10:00 a.m. until 4:00 p.m. on Saturday during one week; and from 12:00 p.m. until 6:00 p.m. on Sunday during the alternate week, together with holiday parenting time as set forth in the order. The order was accompanied by detailed findings of fact and conclusions of law explaining the trial court's decision. This appeal followed.

II. STANDARD OF REVIEW

As an initial matter, we note that Mother does not challenge the trial court's factual findings. Indeed, she expressly acknowledges in her brief that "the trial court's findings of fact were correct." Rather, Mother contends that the trial court improperly applied KRS 403.270 to those facts when fashioning a parenting-time schedule. In doing so, Mother primarily disputes the significance the trial court attributed to certain evidence and the weight it afforded the testimony of various witnesses.

Questions of law, including whether the trial court correctly applied KRS 403.270, are reviewed *de novo*. *Kentucky Properties Holding, LLC v. Sproul*, 507 S.W.3d 563, 569 (Ky. 2016). However, once the trial court has made findings supported by substantial evidence and applied the correct legal standard, we must be highly deferential to its determination regarding parenting time and may reverse only if it constitutes "a manifest abuse of discretion." *Hempel v. Hempel*, 380 S.W.3d 549, 551 (Ky. App. 2012); *McGregor v. McGregor*, 334 S.W.3d 113, 116 (Ky. App. 2011) ("This Court will only reverse a trial court's determinations regarding a parenting schedule if they constitute a manifest abuse of discretion or were clearly erroneous in light of the facts of the case."). Under a manifest abuse of discretion standard, the trial court's decision will

be affirmed unless no reasonable judge would have reached the same conclusion. *Id.*

II. ANALYSIS

A. Mother's Request for Judicial Notice of Subsequent Events

Before addressing Mother's substantive arguments, we first consider her request for this Court to take judicial notice of information concerning events that allegedly occurred after the trial court entered the order under review, including subsequent criminal charges involving Father and witness Jennifer Jessie and Father's incarceration. See KRE⁴ 201.

⁴ Kentucky Rules of Evidence.

"While judicial notice may be taken at any stage of the proceedings, KRE 201(f), it is to be used cautiously by appellate courts." *Commonwealth, Cabinet for Health & Fam. Servs. v. Ivy*, 353 S.W.3d 324, 335 (Ky. 2011) (internal quotation marks omitted). The events identified by Mother occurred after the evidentiary hearing and after the trial court entered the order presently under review. The trial court did not possess a crystal ball, and we will not engage in speculation regarding how subsequent events might have affected its decision had they occurred earlier. Our review is confined to the record actually created below and the issues presented to the trial court. *Id.*

This is not to say that Mother is without a remedy should subsequent events materially affect the children's best interests. Pursuant to KRS 403.320(3), a party may seek modification of a parenting-time order based upon changed circumstances arising after entry of the original order, and Mother may appeal any such order that is adverse to her. Likewise, should further proceedings occur, the admissibility of any subsequent convictions for impeachment purposes will be governed by the Kentucky Rules of Evidence and determined by the trial court in the first instance. We therefore confine our review to the record before the trial court at the time it rendered the decision under review. *Dunn v. Solomon Found.*, 723 S.W.3d 711, 718 (Ky. 2025).

B. The Trial Court Properly Applied KRS 403.270

Mother's sole argument on appeal is that the trial court failed to properly apply KRS 403.270 when determining custody and parenting time. Specifically, Mother contends that the trial court failed to begin its analysis with the statutory presumption that joint custody and equally shared parenting time were in the children's best interests and instead proceeded directly to an evaluation of the statutory best-interest factors. According to Mother, this error infected the remainder of the trial court's analysis and resulted in an improperly restrictive parenting-time schedule.

Father responds that the trial court correctly recognized and applied the statutory presumption, thoroughly considered the factors set forth in KRS 403.270(4), and ultimately determined that he had rebutted the presumption by a preponderance of the evidence. Father maintains that Mother's argument is, in substance, a disagreement with the weight

the trial court assigned to the evidence and the conclusions it drew therefrom.

KRS 403.270(2) provides, in relevant part: “Subject to KRS 403.315, there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interests of the child.” In his petition, Father expressly asserted that the presumption had been rebutted and requested that the trial court award a parenting schedule that was not equally shared. To determine whether Father had met his burden, the trial court was necessarily required to evaluate the evidence in light of the statutory best-interest factors set forth in KRS 403.270(4).

Contrary to Mother’s argument, a careful review of the trial court’s findings of fact, conclusions of law, and order demonstrates that it applied the statutory presumption. The trial court began its conclusions of law by stating that “[t]his Court is to determine the best interest of the children with *equal consideration given to each parent*.” (Emphasis added.) While the trial court did not employ the precise language of KRS 403.270, its statement reflects the premise underlying the statutory presumption: that neither parent begins the analysis with an advantage over the other. More importantly, after conducting a detailed review of the statutory factors, the trial court expressly concluded that Father had “overcome the presumption of 50/50 timesharing.”

The trial court’s findings reveal that it did not disregard the presumption; rather, it concluded that the presumption had been rebutted. In reaching that determination, the trial court relied upon a number of factors, including the parties’ inability to effectively coparent, Mother’s housing and employment instability, Mother’s harassment of Father’s family members, the children’s ages, Father’s demonstrated stability, and evidence concerning Mother’s judgment and parenting decisions. Whether another factfinder might have weighed those considerations differently is not the question before us.

Indeed, Mother does not contend that any of these findings are clearly erroneous. Rather, she argues that the trial court should have afforded greater weight to the testimony of the Cabinet witnesses and less weight to the testimony of Father and his witnesses. However, the weighing of evidence and assessment of witness credibility are matters committed to the trial court’s discretion. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

We are not permitted to reweigh that evidence on appeal. Moreover, it is important to recognize, as our predecessor Court observed decades ago, that a child’s “interest and welfare” encompasses considerations beyond whether a parent is able to provide food, shelter, and clothing. *Gaffney v. Gaffney*, 223 S.W.2d 583 (Ky. 1949).

Mother also relies heavily upon several unpublished opinions that she contends support reversal. Ultimately, however, custody and parenting time “must be determined by the facts in each particular case.” *Aubrey v. Aubrey*, 198 S.W.2d 209, 210 (Ky. 1946). The unpublished decisions cited by Mother turn upon their own particular facts and do not alter the standards governing our review. Our lodestar remains the text of KRS 403.270.

Here, the trial court carefully addressed each statutory factor and explained the evidence it found persuasive. Although Mother disagrees with the trial court’s ultimate conclusions, those conclusions were supported by evidence presented at the hearing. The trial court heard testimony that Mother had experienced significant housing instability, that concerns had been raised regarding her supervision of children in her care, that she continued to use marijuana,⁵ that she had engaged in harassing conduct toward Father’s family members, and that the parties were unable to effectively coparent. The trial court also heard evidence that Father had established a stable home environment, maintained steady employment, enjoyed substantial family support, and had successfully cared for M.T.P. for an extended period. It was the trial court’s prerogative to determine what weight should be afforded that evidence and, based upon its assessment of the evidence as a whole, to conclude that Father had rebutted the presumption in favor of equal parenting time.

⁵ Pursuant to KRS 218B.045(2), a medical cannabis cardholder “otherwise entitled to custody of, or visitation time or parenting time with, a minor child shall not be denied that right, and there shall be no presumption of abuse, neglect, or dependency for conduct permitted under this chapter unless the person’s actions in relation to medicinal cannabis created an unreasonable danger to the safety of the minor child as established by clear and convincing evidence.” Our reference to Mother’s marijuana use should not be construed as suggesting that her possession of a medical cannabis card, standing alone, supports a restriction on custody or parenting time. Rather, the trial court heard testimony that Mother smoked marijuana in a closed bedroom while C.P.P. was present and evidence that marijuana was discovered in proximity to Mother’s son when he was found home alone during a Cabinet investigation. The trial court was entitled to consider that evidence, together with all other evidence bearing upon the children’s best interests.

Again, we reiterate that our review of the trial court’s findings of fact, conclusions of law, and order as a whole convinces us that the trial court began its analysis with the presumption required by KRS 403.270. While it may have been preferable for the trial court to expressly state at the outset that it was applying the statutory presumption in favor of joint custody and equal parenting time, the law does not require trial courts to employ magic words or follow a prescribed script. Appellate review focuses on whether the trial court applied the correct legal standard, not whether it recited that standard in a particular order. We place substance over form. Here, the trial court’s repeated references to equal consideration of the parents, its detailed analysis of the statutory best-interest factors, and its ultimate conclusion that Father had rebutted the presumption leave no doubt that the trial court understood and correctly applied the governing statute.

C. The Parenting-Time Schedule Was Not a Manifest Abuse of Discretion

Finally, while the parenting-time schedule awarded to Mother is less than equal, KRS 403.270 does not mandate any particular schedule. Rather, the statute provides that “[i]f a deviation from equal parenting time is warranted, the court shall construct

a parenting time schedule which maximizes the time each parent or *de facto* custodian has with the child and is consistent with ensuring the child’s welfare.” KRS 403.270(2). Once the trial court determined that Father had rebutted the statutory presumption by a preponderance of the evidence, it remained the trial court’s responsibility to fashion a parenting-time schedule that maximized each parent’s time with the children while remaining consistent with their welfare. The statute provides no formula for doing so, nor does it prescribe a minimum or maximum number of hours, days, weekends, or overnights that must be awarded in any particular case.

Reasonable minds may differ regarding the amount of parenting time that should be awarded once a court concludes that equal parenting time is no longer in a child’s best interests. A disappointed litigant can almost always argue that an additional day should have been awarded here, an overnight added there, or a weekend extended elsewhere. Such determinations, however, are precisely the type of fact-intensive judgments trial courts are uniquely situated to make. For that reason, our review is limited to whether the parenting-time schedule constitutes a manifest abuse of discretion, not whether we might have fashioned a different schedule had we been sitting as the trial court.

The schedule imposed by the trial court is unquestionably restrictive. However, the trial court’s findings reflect that it viewed Mother as presenting ongoing concerns relating to housing instability, lapses in supervision of children in her care, and the misuse of resources intended to meet the children’s needs. The trial court also expressed concern regarding Mother’s judgment as it related to marijuana use and storage around children. At the same time, the trial court found that Father provided a more stable and structured environment for the children.

Given those findings, we cannot say it was unreasonable for the trial court to conclude that Mother should receive less than equal parenting time. Importantly, the trial court did not eliminate Mother’s role in the children’s lives. Rather, it awarded her recurring weekly parenting time that it reasonably believed would permit her to maintain and foster her relationship with the children while addressing the concerns identified in its findings. Whether another judge might have awarded somewhat more, or somewhat less, parenting time is beside the point. The question before us is not whether the trial court selected the best conceivable schedule, but whether the schedule it selected falls within the range of reasonable outcomes permitted by the evidence and the law. We conclude that it does.

Finally, although the order establishes a permanent parenting-time schedule, it is not etched in stone. Parenting-time determinations remain subject to modification as circumstances change. Should Mother achieve greater stability in her housing, employment, or overall circumstances, she remains free to seek modification pursuant to KRS 403.320. The trial court’s order reflects its assessment of the children’s best interests based upon the evidence before it at the time of the hearing. On this record, we find no manifest abuse of discretion.

IV. CONCLUSION

For the foregoing reasons, the order of the Cumberland Circuit Court is AFFIRMED.

THOMPSON, CHIEF JUDGE, CONCURS.

CALDWELL, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MEDICAL MALPRACTICE

STATUTE OF LIMITATIONS

DISCOVERY RULE

CIVIL PROCEDURE

MOTION FOR SUMMARY JUDGMENT

JOINDER WITH CO-DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Plaintiff played football in high school and for Georgetown College — Plaintiff had a history of concussions and hip, shoulder, and back injuries both before and after the event at issue in instant action — In August 2020, plaintiff was weightlifting with kettlebells as part of his training with college football team — Plaintiff felt a “pop” in his lower back, immediately followed by pain that radiated down his leg — Team athletic trainer suspected a possible herniated disc and recommended plaintiff see team doctor — The next day, plaintiff was seen by team doctor (physician) — Physician diagnosed plaintiff with lumbar strain at L5-S1 without neurological deficits and ordered an X-ray of his lower back — Radiologist noted a loss of disc space at L5-S1 and stated that further evaluation with an MRI should be considered — Physician did not speak directly with radiologist and did not order an MRI — Neither physician nor radiologist noted any concerns with T12-L1 region — Physician referred plaintiff to physical therapy, but placed no restrictions on either his football or weightlifting activities — Plaintiff continued with those activities and experienced some initial relief; however, plaintiff sustained further injuries to his foot, ankle and hip — Plaintiff continued to experience lower back pain despite physical therapy — Physician's notes from initial visit and follow-up care in 2020 indicated that plaintiff should report to emergency room if he experienced any red-flag symptoms, such as urinary or fecal incontinence or saddle anesthesia — There is a disputed in deposition testimony whether plaintiff reported such symptoms to physician or athletic trainer prior to July 2021 — At the end of the academic year, plaintiff returned home and his symptoms worsened — Plaintiff's mother made an appointment with University of Louisville Orthopedics and Sports Medicine group — Dr. Miller and Dr. Pohlgeers examined plaintiff on July 8, 2021 — Dr. Miller ordered an

MRI, which showed disc protrusions at both L5-S1 and T12-L1 with nerve compression — Protruding disc at T12-L1 was pressing on spinal cord and required immediate referral to a spine specialist — On July 20, 2021, both Dr. Miller and Dr. Pohlgeers discussed findings with plaintiff — Plaintiff decided to seek a second opinion with Dr. Villanueva, a neurosurgeon, who could not evaluate plaintiff until January 2022 — Prior to that appointment, plaintiff suffered loss of bladder control, numbness in the groin area, and erectile dysfunction — Plaintiff went to emergency room and was seen Dr. Villanueva — Dr. Villanueva then evaluated plaintiff in August 2021 and informed him that physician should have ordered an MRI at the time of the kettlebell injury, instead of just an X-ray — Further, Dr. Villanueva stated that radiologist misread X-ray from August 2020 because he failed to see calcifications that were evidence of injury to T12-L1 region — Dr. Villanueva opined that plaintiff should have been restricted from football and weightlifting until disc at T12-L1 could be further evaluated and treated — Plaintiff testified that his consultation with Dr. Villanueva on August 31, 2021, was the first time he realized he received “bad care” from physician and radiologist — On September 23, 2021, plaintiff underwent surgery on T12-L1 region, which left him with pain, weakness, and other issues — On August 1, 2022, one year and almost two weeks after Dr. Miller and Dr. Pohlgeers advised plaintiff he had a previously untreated herniated disc at T12-L1, plaintiff filed suit against physician and radiologist alleging medical malpractice — Eventually, physician filed motion for summary judgment alleging that plaintiff's complaint was time-barred — Radiologist later joined the motion — Plaintiff claimed that suit was timely under the discovery rule — Trial court granted motion for summary judgment — Plaintiff appealed — AFFIRMED — Pursuant to KRS 413.140(1)(e), an action against a physician, surgeon or hospital must be brought within one year — Under the discovery rule, the statute of limitations begins to run on the date of the discovery of the injury, or from the date it should, in the exercise of ordinary care and diligence, have been discovered — It is the date of the actual or constructive knowledge of the injury which triggers the running of the statute of limitations — In instant action, plaintiff had constructive knowledge of the injury on July 20, 2021, when he consulted with Dr. Miller and Dr. Pohlgeers — Record indicated that radiologist did not file his own motion for summary judgment; however, he later joined physician's motion — Since facts and legal issues raised were identical for physician and radiologist, making separate motions was duplicative and an inefficient use of trial court's time; therefore, radiologist's joinder to motion for summary judgment was sufficient —

Cody Auxier v. Srikanth Nithyanandam; Central Kentucky Radiology, PLLC; and Robert Counts Pope (2025-CA-0889-MR); Scott Cir. Ct., Gabhart,

J.; Opinion by Judge Easton, affirming, rendered 8/14/2026. [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 is a medical negligence case. Appellant Cody Auxier (Auxier) appeals the summary judgment of the Scott Circuit Court in favor of Appellees Srikanth Nithyanandam (Physician), Robert Pope (Radiologist), and Central Kentucky Radiology, PLLC (CKR). Auxier filed a malpractice action seeking damages for failure to properly recognize and treat a herniated disc, including failure to restrict his football and weightlifting activities at Georgetown College, which worsened his condition and resulted in permanent damage to his spinal cord. The circuit court granted summary judgment against Auxier upon finding the Complaint was time-barred. Auxier argues the circuit court erred in its application of the discovery rule and by including Radiologist and CKR in Physician's dispositive motion. Physician argues waiver as an alternative defense. After our review, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Auxier is a gifted athlete who played football for state champion Trinity High School and for Georgetown College. As a football player, Auxier had a history of concussions and hip, shoulder, and back injuries both before and after the event at issue. In August 2020, Auxier was weightlifting with kettlebells as part of his participation in strength training with his college football team when he felt a “pop” in his lower back, immediately followed by pain that radiated down his leg. Auxier was evaluated by the team athletic trainer, who suspected a possible herniated disc. She recommended that Auxier see the team doctor and arranged an appointment for him the following day.

Auxier was seen by Physician, who is employed by UK Health and serves as a contractor for Georgetown College. Physician diagnosed Auxier with a lumbar strain at L5-S1 without neurological deficits and ordered an X-ray of his lower back. Radiologist dictated his findings from the images, noting a loss of disc space at L5-S1, minimal degenerative endplate changes, normal alignment, and to “[c]onsider further evaluation with MRI.”

Physician did not speak to Radiologist directly and did not order an MRI. Neither Physician nor Radiologist made note of any observations or concerns with the T12-L1 region of Auxier's spine. Physician referred Auxier to physical therapy but placed no restrictions on either his football or weightlifting activities. Auxier was a defensive tackle nose guard whose weightlifting regimen included bench pressing 350 pounds and squatting 500-pound repetitions.

Auxier continued to play football and participate in weightlifting. Although there may have been initial relief from symptoms following the kettlebell incident, this would prove to be temporary. Auxier later sustained further injuries to his foot, ankle, and hip. Auxier continued to experience pain in his lower back, despite physical therapy, and stated later to his primary care physicians that he was told to “train through it.” Physician's notes from the initial visit and follow-up care in 2020 indicate Auxier was advised to report to the emergency room if he

experienced any red-flag symptoms, such as urinary or fecal incontinence or saddle anesthesia.¹ There is dispute in the deposition testimony whether Auxier reported such red-flag symptoms to Physician or the athletic trainer prior to July 2021.

¹ Saddle anesthesia is numbness or loss of feeling in the areas that would touch a saddle, such as the inner thighs, backs of the legs, and around the rectum. Saddle anesthesia, along with bladder and bowel dysfunction, may indicate *cauda equina* syndrome, a medical emergency requiring quick treatment. *Cauda equina* is the bundle of nerves at the end of the spinal cord within the spinal canal. *Herniated disk*, Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/herniated-disk/symptoms-causes/syc-20354095> (last visited Jul. 17, 2026).

At the end of the academic year, Auxier returned home where he continued to complain of low back pain. His symptoms were getting worse. His mother was concerned that Auxier may have suffered more than just a lumbar strain, so she arranged for her son to be seen by doctors at the University of Louisville Orthopedics and Sports Medicine group. On July 8, 2021, Auxier presented to Dr. Miller and Dr. Pohlgeers with a chief complaint of persistent lower back pain, which he attributed to the August 2020 kettlebell injury. The office visit notes state that patient's pain began 10 months ago after lifting a kettlebell.

Dr. Miller ordered an MRI, which showed disc protrusions at both L5-S1 and T12-L1 with nerve compression. Both Dr. Miller and Dr. Pohlgeers discussed the results of the MRI with Auxier on July 20, 2021. The protruding disc at T12-L1 was then pressing on the spinal cord and required an immediate referral to a spine specialist.

Auxier was referred to an orthopedic surgeon, Dr. Gum, who initially advised Auxier that he needed a simple discectomy. Unfortunately, subsequent CT scan results would reveal that Auxier actually needed a more extensive and invasive procedure. Auxier and his mother decided to seek a second opinion with a neurosurgeon, Dr. Villanueva, who was unable to evaluate Auxier until January of 2022. Prior to this scheduled consultation, Auxier suffered a loss of bladder control and numbness in the groin area, as well as erectile dysfunction. He reported to the emergency room at Baptist Health Louisville, where Dr. Villanueva had hospital privileges. Auxier was then evaluated by Dr. Villanueva in August 2021.

Dr. Villanueva explained that Physician should have ordered an MRI at the time of the kettlebell injury instead of just ordering an X-ray. He further explained that Radiologist had misread the X-ray image from August 2020 because he failed to see calcifications that were evidence of injury to the T12-L1 region of Auxier's spine. It is not clear to what extent Dr. Villanueva thought a disc herniation was apparent on the 2020 X-ray or if nerve compression could be seen on such an image, but there was a sign of a problem that should have been evaluated at that time according to Dr. Villanueva.

Dr. Villanueva thought that Auxier should have been restricted from football and weightlifting activities until the disc at T12-L1 was further

evaluated and treated. Dr. Villanueva explained that the calcifications or bone growth indicated on the MRI scans take time to develop and did not happen overnight. Whatever the timeline for the injury at T12-L1, the bone was now pushing on the spinal cord in the *cauda equina* region and required prompt surgical intervention. Dr. Villanueva also explained that the problems at T12-L1 could have caused the other injuries Auxier later suffered to his foot, ankle, and hip. Auxier testified at his deposition that this consultation with Dr. Villanueva on August 31, 2021, was the first time he realized he had received "bad care" from Physician and Radiologist.

On September 23, 2021, Auxier underwent a decompression, discectomy, and posterolateral fusion at the T12-L1 region of his lumbar spine. He was left with irreversible erectile dysfunction, urinary incontinence, and fecal incontinence. To date, he continues to suffer from pain and weakness in the lumbar region, weakness in the legs, erectile dysfunction, pilonidal cysts,² and depression.

² A pilonidal cyst is an unusual pocket in the skin near the tailbone at the top of the buttocks that can become infected and be very painful. *Pilonidal cyst*, Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/pilonidal-cyst/symptoms-causes/syc-20376329> (last visited Jul. 17, 2026). Auxier testified at his deposition that these cysts are the result of his inability to twist around and properly clean himself after bowel movements. As a result, he must now shower after bowel movements.

On August 1, 2022, one year and almost two weeks after Dr. Miller and Dr. Pohlgeers advised Auxier he had a previously untreated herniated disc at T12-L1, Auxier filed suit against Physician, Radiologist, and CKR for medical malpractice. Auxier alleged Radiologist failed to identify the disc herniation at the T12-L1 level, which, because of continued deterioration, ultimately led to incontinence and erectile dysfunction. He alleged Physician breached the standard of care by failing to order an MRI to determine whether Auxier had a herniated disc, and by failing to restrict his football and weightlifting activities, which allowed the protruding disc to continue pressing on the spinal cord ultimately causing permanent damage to the nerves.

In June 2024, Physician filed a Motion for Summary Judgment on the basis that a liability waiver signed by Auxier released Physician from any alleged negligence claims. The circuit court denied that motion, but, shortly before the circuit court denied the motion on the waiver issue, Physician filed two additional motions: (1) requesting summary judgment on the basis that the Complaint was time-barred and (2) requesting partial summary judgment as to Auxier's damages (which would be rendered moot if the case was time-barred). Radiologist and CKR joined the Motion for Summary Judgment on statute of limitations grounds. Auxier responded that the lawsuit was timely under the discovery rule.

The circuit court heard arguments in January 2025 and granted the Motion for Summary Judgment by Order entered on February 18, 2025. The circuit court concluded, as a matter of law, that by at least July 2021, a reasonable person would be under an obligation to inquire as to the medical care

he received following the August 2020 kettlebell incident, which would include the medical care provided by Physician and Radiologist following the incident and the X-ray report. Since the Complaint in this case was not filed until August 1, 2022, the action was time-barred.

The circuit court reasoned that, following the July 20, 2021, consultation with his primary care physicians concerning the MRI results, Auxier knew he had an injury which he attributed to the kettlebell incident in August of 2020. On July 20, 2021, Auxier had knowledge of which medical providers provided him treatment for that injury in August of 2020 and that those providers had supposedly missed the injury at T12-L1. Furthermore, on July 20, 2021, Auxier had knowledge that Physician had not ordered an MRI to determine the extent of the injury and that Radiologist had read the X-ray. On July 20, 2021, Auxier knew that Physician did not place any restrictions on him and allowed him to return to football and weightlifting. As such, as of July 20, 2021, Auxier knew he had experienced an injury and had, from that date, a responsibility to exercise reasonable diligence to both determine the cause of that injury and to file any action within one year of that date.

The circuit court rejected Auxier's argument that the injury was not discovered until the August 31, 2021, consult with Dr. Villanueva. The circuit court reasoned that Auxier's decision to wait and see the neurosurgeon to confirm his suspicions that he had received "bad care" did not trigger the statute of limitations under the discovery rule. Instead, it was the date upon which Auxier discovered the injury, July 20, 2021, at his consult with Dr. Miller and Dr. Pohlgeers, and from that date he had a duty to exercise ordinary care and diligence to confirm within one year whether Physician and Radiologist's medical care caused or worsened his injury and to file his claim. The circuit court never ruled on the Motion to Reconsider the waiver issue.

Auxier filed a Motion to Vacate, which was denied by Order entered in June 2025. The circuit court rejected Auxier's argument that the court had *sua sponte* joined Radiologist and CKR to Physician's Motion for Summary Judgment on timeliness grounds. The circuit court found that Physician's arguments made in Physician's motion also applied to Radiologist and CKR through joinder, and that requiring Radiologist to file a separate written motion that would be virtually identical to Physician's motion would be a "useless formality." The trial court further determined the Motion to Vacate did not raise newly discovered or previously unavailable evidence. This timely appeal followed. All issues have been properly preserved, and the briefs are compliant with the Kentucky Rules of Appellate Procedure.

STANDARD OF REVIEW

This appeal concerns whether the trial court properly granted summary judgment against Auxier on his Complaint. 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) (internal quotation marks and citations omitted).

Summary judgment is only proper when “it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record “in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor.” *Id.* at 480. A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id.* at 481.

Summary judgment can only be properly granted “where the movant shows that the adverse party could not prevail under any circumstances.” *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985) (citation omitted). If a claim is time-barred, the factual disputes about the merits of the underlying claim are not material, and summary judgment should be granted.

ANALYSIS

Auxier raises two questions on appeal: (1) did the circuit court properly apply the discovery rule, and (2) did the circuit court properly grant summary judgment to Radiologist. Because we answer each question in the affirmative, we need not address Physician’s alternative argument that the liability waiver signed by Auxier bars his claims.

THE CIRCUIT COURT PROPERLY APPLIED THE DISCOVERY RULE

In Kentucky, an action against a physician, surgeon, or hospital must be brought within one year. KRS³ 413.140(1)(e). The statute begins to run pursuant to KRS 413.140(2), which provides that such cause of action:

shall be deemed to accrue at the time the injury is first discovered or in the exercise of reasonable care should have been discovered; provided that such action shall be commenced within five (5) years from the date on which the alleged negligent act or omission is said to have occurred.

³ Kentucky Revised Statutes.

The discovery rule in the medical malpractice context has been further explained by the Kentucky Supreme Court in *Wiseman v. Alliant Hospitals, Inc.*, 37 S.W.3d 709 (Ky. 2000):

The statute begins to run on the date of the discovery of the injury, or from the date it should, in the exercise of ordinary care and diligence, have been discovered. This rule entails knowledge that a plaintiff has a basis for a claim before the statute of limitations begins to run. The knowledge necessary to trigger the statute is two-pronged; one must know: (1) he has been wronged; and, (2) by whom the wrong has been committed.

Id. at 712 (internal quotation marks and citations omitted).

Under the discovery rule, it is the date of the *actual or constructive knowledge of the injury* which triggers the running of the statute of limitations. *Id.* And there is a distinction between discovery of harm and discovery of injury. “Injury” does not mean mere physical harm. As the *Wiseman* Court explained:

Harm in the context of medical malpractice might be the loss of health following medical treatment. “Injury,” on the other hand, is defined as “the invasion of any legally protected interest of another.” Thus, injury in the medical malpractice context refers to the actual wrongdoing, or the malpractice itself. Harm could result from a successful operation where a communicated, calculated risk simply turns out poorly for the patient, although the medical treatment met the highest medical standards. In such case, there would be no “injury,” despite the existence of “harm.” Under the discovery rule, it is the date of the actual or constructive knowledge of the injury which triggers the running of the statute of limitations.

Id. (citations omitted).

This does not mean that the patient must know that he has a legal cause of action before the clock starts running. *Conway v. Huff*, 644 S.W.2d 333, 334 (Ky. 1982). But it does mean that the limitations period will not begin until the patient knows or should know that a defendant may have wronged him—*i.e.*, negligently contributed to his bad medical outcome. *Wiseman*, 37 S.W.3d at 712.

Importantly, the discovery rule stops tolling the statute once a plaintiff knows, either actually or constructively, that the defendant *may* have caused him injury—definitive knowledge of causation is not needed. *Adams v. 3M Co.*, No. CIV. 12-61-ART, 2013 WL 3367134, at *3 (E.D. Ky. Jul. 5, 2013) (citing *Louisville Tr. Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497, 501 (Ky. 1979)). Nor does the discovery rule require knowledge that the wrong is *actionable*. The statute of limitations begins to run simply upon knowledge that one has been wronged. *Conway*, *supra*.

“Constructive knowledge, through awareness of sufficient ‘critical facts’ to put the plaintiff on notice, will trigger the statute of limitations period.” *Adams*, 2013 WL 3367134, at *3. Once a plaintiff encounters facts that should excite his suspicion that a defendant negligently caused him harm, a patient effectively has actual knowledge of the entire claim. *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 64 (Ky. 2010) (citation omitted).

Auxier makes several challenges to the circuit court’s application of the discovery rule. First, he argues the circuit court erroneously equated “harm” with “injury.” As of July 20, 2021, Auxier insists he only knew he had suffered *harm*: a herniated disc pressing into his spine at T12-L1. He maintains that the herniated disc is a *diagnosis*, nothing more. He knew he was in pain. He knew he was being referred to a neurosurgeon. But Auxier denies he knew Physician’s failure to order an MRI or restrict his activities had caused the harm he was now suffering.

We pause here just to note the challenges of causation presented for Auxier’s claim. The claim is that the doctors in 2020 should have

seen calcifications around T12-L1 and further investigated the condition of that area. But calcifications indicate *prior* injury, and the development of the later problems stemming from this area indicate a progressive process. It may have been quite difficult to show that the kettlebell incident alone was some triggering event for this process. Other injuries both before and after that event could have contributed to it. Again, the merits of the claim are not decided if the claim is time-barred.

Auxier’s deposition testimony revealed that, while Dr. Miller and Dr. Pohlgeers explained he had a herniated disc at T12-L1, he did not know the herniated disc had been present for nearly a year, if in fact it was, until his conversation with Dr. Villanueva. Auxier argues that in July 2021, he did not know, and could not have known, that his symptoms were caused by potential malpractice, *i.e.*, the failure to see the calcifications on the 2020 X-ray. He insists that his injury was the failure to see evidence of a condition at T12-L1 that predated the August 2020 kettlebell injury at L5-S1 with that failure allowing a herniated disc to become progressively worse and ultimately causing Auxier irreversible harm. If so, Auxier still knew of that failure in July of 2021.

In *Wiseman*, a medical malpractice plaintiff visited multiple doctors seeking treatment for post-surgical pain, but they were all “indefinitive as to the origin of her pain and attributed it to a tailbone injury.” 37 S.W.3d at 712. While the plaintiff “may have suspected that something went wrong during the surgery, that in and of itself was insufficient to accrue a cause of action[.]” because all she had was a “mere suspicion of injury due to medically unexplainable pain[.]” *Id.* at 712-13. The *Wiseman* Court determined that the cause of action accrued when “the fact of her injury became objectively ascertainable”—when another surgeon operated and found that the first surgeon had left behind a piece of a medical instrument. *Id.* at 711, 713.

Here, while Auxier could argue that he may not have had *actual knowledge* of his injury until the August consult with Dr. Villanueva, he had *constructive knowledge* of the injury in July. That is when the fact of his injury became “objectively ascertainable.” That is when he should have known that Physician and Radiologist may have wronged him. And under the discovery rule, constructive knowledge of the injury triggers the running of the statute of limitations.

It is undisputed that as of July 20, 2021, Auxier knew he injured his back in August 2020 performing kettlebell swings at football practice and that the athletic trainer suspected he had a herniated disc. As of July 20, 2021, Auxier sought medical attention for that injury from Physician, who diagnosed only a lumbar strain and ordered only an X-ray to evaluate the injury. Radiologist interpreted those films.

Yet Auxier continued to have persistent pain that he associated with the August 2020 injury, and that pain did not resolve after physical therapy. This persistent pain is the reason he sought out a second opinion and additional tests from Dr. Miller and Dr. Pohlgeers. Unlike the plaintiff in *Wiseman* who visited multiple doctors that were unable to explain the origin of her pain, Dr. Miller and Dr. Pohlgeers explained Auxier’s continued pain as resulting

from a herniated disc at T12-L1 that had not been previously discovered by Physician or Radiologist. These undisputed facts should have excited *Auxier's suspicion* that Physician and Radiologist may have wronged him. As a result, Auxier had one year from obtaining this constructive knowledge to investigate whether he had a legally cognizable cause of action against them and within which to file that claim.

The discovery rule extends the commencement of the statute of limitations only up to the time that the harmful effect of the complained of negligence first manifests itself. *Hall v. Musgrave*, 517 F.2d 1163, 1167 (6th Cir. 1975). While Auxier's August 31st consultation with Dr. Villanueva may have reinforced his knowledge of his potential claim, the July 20th consultation with Dr. Miller and Dr. Pohlgeers was the first time medical negligence manifested itself. The supposedly missed injury, a herniated disc at T12-L1, was now objectively ascertainable. At that point in time, Auxier possessed the constructive knowledge and critical facts needed to connect the dots that his continued back pain was the result of a missed herniated disc and not a lumbar strain at a different area of the spine.

Auxier was required to investigate his potential legal claim with reasonable diligence. He could not wait for Dr. Villanueva to connect the dots for him as the starting point. Seeking such reinforcing knowledge is part of the whole purpose of the discovery rule. It allows for further investigation while still permitting a timely case to be filed. Again, actual or constructive knowledge that a wrong may have been done is the statute's trigger, and that knowledge in this case came about on July 20, 2021.

Auxier relatedly argues the circuit court's application of the discovery rule erroneously required him to discover the medical malpractice on his own. Auxier insists *Wiseman* mandates a different analysis. Auxier argues he possesses no medical knowledge and there was no way he could possibly understand how Physician and Radiologist's negligence caused his injury until Dr. Villanueva explained it to him.

Auxier's injury is complex and difficult to understand, especially for someone with a history of concussions and memory loss and no medical background. He maintains the circuit court erred in failing to consider these issues when it determined that he was on notice of his injury after simply learning he had a herniated disc at T12-L1. Because he possessed no medical knowledge, Auxier should have been permitted to rely on Physician's diagnosis of a lumbar strain until he learned otherwise from Dr. Villanueva. We must disagree.

"One who possesses no medical knowledge should not be held responsible for discovering an injury based on the wrongful act of a physician. The nature of the tort and the character of the injury usually require reliance on what the patient is told by the physician or surgeon." *Wiseman*, 37 S.W.3d at 712-13. Here, Auxier's mother testified in her deposition that they trusted the team doctor, and if he said it was a strain, then they believed him. But Auxier actively sought out additional tests and a second opinion from Dr. Miller and Dr. Pohlgeers after he returned home for summer break. And it was at this July 20, 2021, consultation when he

learned his injury was more than just a lumbar strain.

While Auxier may have been entitled to rely on the opinion of Physician prior to summer break, he was certainly put on notice on July 20, 2021, that he could no longer reasonably rely on the lumbar strain diagnosis. And while Auxier's concussion-related memory loss issues present unfortunate challenges, they do not relieve him from his obligation to exercise ordinary care and diligence to discover whether he had an actionable claim against Physician and Radiologist.

The discovery rule uses a reasonably prudent person test. *Davis v. All Care Med., Inc.*, 986 S.W.2d 902, 906 (Ky. 1999). The "reasonable person" standard is an often-utilized term of art that involves an inherently objective test: a reasonable person is "a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests. The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions." *Wilson v. Commonwealth*, 628 S.W.3d 132, 143 (Ky. 2021) (citing *Reasonable Person*, *Black's Law Dictionary* (8th ed. 2004)). Auxier is held to the standard of what a reasonable person would understand about the possibility he has suffered medical malpractice.

Although Auxier concedes his memory "wasn't good" due to his prior head injuries, he admits he was told in July of 2021 he had a herniated disc and needed to see a neurosurgeon, and he related this problem to the kettlebell injury. The question is not when Auxier *felt* his suspicions of "bad care" were validated, nor when he actually *understood* he had a malpractice claim. The question is when a reasonably prudent person would possess adequate information to reasonably suspect that Physician and Radiologist failed to properly diagnose a herniated disc following the kettlebell injury. Again, that constructive knowledge arose on July 20, 2021, when Auxier's injury became objectively ascertainable, *i.e.*, when he learned the MRI showed the existence of more than just a lumbar strain. Auxier knew then that Physician and Radiologist arguably missed something important.

We also reject Auxier's argument that the application of the discovery rule in this case was a fact issue for the jury. Whether an action is barred by the statute of limitations is a question of law to be decided by the courts. *Cuppy v. Gen. Acc. Fire & Life Assur. Corp.*, 378 S.W.2d 629, 631 (Ky. 1964).

Here, there is no dispute of material fact as to when the MRI results were communicated to Auxier, and the circuit court did not err in finding, as a matter of law, that on July 20, 2021, Auxier possessed adequate information to reasonably suspect Physician and Radiologist may have failed to properly diagnose his condition following his August 2020 kettlebell injury.

Finally, we reject Auxier's argument that his continued treatment by Physician tolled the statute of limitations. The Kentucky Supreme Court adopted the continuing course of treatment doctrine to toll the statute of limitations in medical malpractice actions in *Harrison v. Valentini*, 184 S.W.3d 521 (Ky. 2005), *as modified on denial of reh'g* (Mar. 23, 2006). There, Kentucky's highest Court held that "where a patient relies, in good

faith, on his physician's advice and treatment or, knowing that the physician has rendered poor treatment, . . . continues treatment in an effort to allow the physician to correct any consequences of the poor treatment, the continuous course of treatment doctrine operates to toll the statute of limitations until the treatment terminates at which time running of the statute begins." *Id.* at 525. Auxier's reliance on this doctrine fails, because the statute of limitations is tolled *only if the patient is under the continuing care of the physician* for the injury caused by the negligent act or omission. Here, there was no evidence that Auxier continued treatment with Physician for his lower back pain after he left campus for the summer in 2021.

The undisputed medical records show Auxier's last treatment date with Physician was April 21, 2021, when he was seen for an injury to his ankle and foot. While there is a subsequent note in Auxier's records that he had surgery in September, he was not seen by Physician at this time and was unable to return to football activities after his spinal surgery. Auxier was therefore not a "patient under the continuing care" of Physician and the continuing course of treatment doctrine does not operate to toll the statute of limitations in such manner as to save his time-barred claims.

Auxier had one year from July 20, 2021, to file his Complaint. Unfortunately, the Complaint was filed almost two weeks too late, and the action is thus time-barred. Physician, Radiologist, and CKR were therefore entitled to summary judgment as a matter of law.

THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR RADIOLOGIST

Separate from the allegations against Physician, Auxier asserts Radiologist misread the X-ray following his August 2020 kettlebell injury, and had he read it correctly, Radiologist would have seen calcifications surrounding the herniated disc at T12-L1 and would have known that there was an existing issue separate from the herniation at L5-S1 caused by the kettlebell workout. One of Auxier's expert witnesses testified in support of this claim.

The circuit court granted summary judgment in favor of Radiologist and CKR. Auxier challenges this decision because Radiologist and CKR failed to file a formal Motion for Summary Judgment on statute of limitations grounds, and because the identity of Radiologist was not known to Auxier until this litigation commenced. We disagree with each of these contentions.

Radiologist did not file his own motion. And nowhere in Physician's motion was Radiologist ever mentioned. But the trial record at page 1546 contains Radiologist's "Joinder to Co-Defendant's Pretrial Motions filed December 05, 2024." The Joinder states that Radiologist and CKR adopt and incorporate arguments set forth in various motions by Physician, including the Motion for Summary Judgment based on the statute of limitations. In addition, at the pretrial conference held on January 9, 2025, Radiologist, by and through his counsel, confirmed that he joined in the Motion for Summary Judgment and argued that Auxier had adequate information that his injuries occurred prior to the commencement of the statute of limitations period when measured from one year prior to the filing of

the suit in August 2022.

The circuit court did not err in determining the facts and legal issues raised were identical for Physician and Radiologist, and that making separate detailed motions was duplicative and an inefficient use of the circuit court's time. Auxier was not surprised by some new argument at the summary judgment hearing because the arguments articulated in Physician's filings applied equally to Radiologist and CKR.

A "summary judgment may be properly granted despite the lack of a motion requesting such relief if the formal motion for summary judgment would have been a 'useless formality.'" *Abel v. Austin*, 411 S.W.3d 728, 734 (Ky. 2013) (citations omitted). Thus, Radiologist's Joinder to the Motion for Summary Judgment was appropriate and sufficient.

Auxier also argues that, although he had several visits with Physician, he had never met Radiologist and did not even know his name until discovery occurred in this case. Therefore, since *Wiseman* required knowledge of a wrong as well as knowledge of the wrongdoer, the circuit court erred in finding the claims against Radiologist and CKR were time-barred.

This argument fails for two reasons. First, "the discovery rule does not operate to toll the statute of limitations to allow an injured plaintiff to discover the identity of the wrongdoer unless there is fraudulent concealment or a misrepresentation by the defendant of his role in causing the plaintiff's injuries." *Queensway Fin. Holdings Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 151 (Ky. 2007) (citing *McLain v. Dana Corp.*, 16 S.W.3d 320, 326 (Ky. App. 1999)). Here, there was no allegation of fraudulent concealment or misrepresentation.

Second, "A person who knows he has been injured has a duty to investigate and discover the identity of the tortfeasor within the statutory time constraints." *Combs v. Albert Kahn Associates, Inc.*, 183 S.W.3d 190, 199 (Ky. App. 2006). Here, Auxier testified that he obtained the X-ray results himself from the local hospital where they were performed and provided copies of them to Physician. These records include the August 27, 2020, transcription of the dictation by Radiologist, identified by name as Dr. Robert Pope. Auxier did not need to wait until this litigation commenced to learn the identity of an individual named in Auxier's own personal medical records to which he had direct access and possession.

CONCLUSION

Finding no error in the decision granting summary judgment in favor of Appellees, the Scott Circuit Court is AFFIRMED.

ALL CONCUR.

BEFORE: ACREE, EASTON, AND KAREM, JUDGES.

PLANNING AND ZONING

APPEAL OF A ZONING PERMIT

APPELLATE PRACTICE

CIVIL PROCEDURE

MOTION FOR SUMMARY JUDGMENT

DECLARATORY JUDGMENT ACTION

JURISDICTION

PARTICULAR-CASE JURISDICTION

STANDING

STATUTORY STANDING

Bakery erected a storage shed at the rear of its property within one foot of the property line shared with KFF, LLC (KFF) — Bakery did not obtain the required zoning permit prior to building the shed — Boone County Planning Commission contacted bakery — As a result, bakery belatedly obtained necessary zoning permit — KFF appealed to Board of Adjustment (Board) citing KRS 100.261, claiming to be "injuriously affected or aggrieved" by approval of zoning permit — Board held public hearing — At hearing, Board staff member noted that there is no set-back requirement for structures and that bakery was not seeking a variance for its shed since shed met all building set-back requirements — KFF acknowledged that shed was located exclusively on bakery's property — KFF's sole argument focused on the timing of the building of the shed as related to the request for a zoning permit, maintaining that "you cannot build something and ask for permission later" — Board denied KFF's appeal — KFF appealed to circuit court — In addition to its appeal, KFF asserted a declaratory action against Board challenging its jurisdiction to hear the appeal based on the alleged failure of Board members to complete required training — In declaratory judgment action, KFF filed motion for summary judgment — Board argued that KFF had no standing to sue — Trial court agreed with Board, denied KFF's motion for summary judgment, and dismissed declaratory judgment claim — In direct appeal of Board's decision to uphold grant of zoning permit, KFF again filed motion for summary judgment — Board filed motion to dismiss since KFF failed to identify any injury it sustained as a result of Board's decision — Trial court dismissed remainder of KFF's claims under CR 12.02 — KFF appealed — AFFIRMED — Outside of the context of immunity, appellate courts only have jurisdiction to review grants of summary judgment; a denial of summary judgment is in most cases unreviewable until a final judgment is rendered at the trial court — Thus, trial court did not err in denying KFF's

motions for summary judgment — In order to have standing to invoke a court's jurisdiction, the plaintiff must allege an injury caused by the defendant of a sort that the court is able to redress — Statutory standing asks whether the legislature has accorded this injured plaintiff the right to sue the defendant to redress his injury — Jurisdiction is the power of the court to decide an issue in controversy — There are three types of jurisdiction: (1) personal jurisdiction; (2) subject-matter jurisdiction; and (3) particular-case jurisdiction — Particular-case jurisdiction refers to the court's authority to decide a specific case based on its facts — Compliance with statutory requirements as promulgated in KRS 100.347(1) is an issue of particular-case jurisdiction — Trial court was required to dismiss the direct appeal — KFF conceded that shed rested solely on bakery's property — Without allegations that it had been "injured or aggrieved" by Board's action, trial court had no particular-case jurisdiction to hear the appeal — KFF was required to strictly comply with KRS 100.347(1), but failed to do so — Pursuant to KRS 418.045, any person whose rights are affected by a statute, municipal ordinance, or other government regulation may apply for and secure a declaration of his rights or duties, even though no consequential or other relief is requested — However, a prerequisite condition to the justiciability of any claim is standing — With respect to constitutional standing, KFF argued it was injured by being compelled to appear before a board whose members failed to comply with KRS 100.346 requiring members to complete training — There are limited exceptions to the prohibition against asserting a constitutional right on behalf of a third party — To have such third-party standing, litigant must demonstrate: (1) an injury in fact that gives litigant a sufficiently concrete interest in the outcome of the dispute; (2) a close relationship between the litigant and the non-party individual(s) whose rights the litigant seeks to assert; and (3) that there exists a genuine obstacle or hindrance to the possessor of the right's ability to assert his own interest — It is uncontroverted that KFF has no injury of its own, but is invoking the general injury as a citizen of Boone County — KFF cannot show it has an interest in the right asserted that differs from that of the general public — Thus, trial court did not err in dismissing KFF's declaratory judgment action for a lack of standing —

K.F.F. Enterprises, LLC v. City of Walton Board of Adjustment and Its Members, Barb Farrow, Caitlyn Fugate, David Hincks, Edward Sedor, and Steven Turner; Bailey Jayne's Bakery & Café, LLC; and PFLP, LLC (2025-CA-0904-MR); Boone Cir. Ct., Schrand, II, J.; Opinion by Judge Karem, affirming, rendered 8/14/2026. [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).]

Bailey Jayne's Bakery & Café, LLC ("the Bakery"), erected a storage building on its property

belatedly obtaining a necessary zoning permit. The neighboring business, KFF, LLC (“KFF”), challenged the zoning permit before both the Walton Board of Adjustment (“the Board”) and ultimately the Boone Circuit Court. The trial court dismissed both the appeal of the Board’s decision and the declaratory judgment action brought by KFF. This appeal followed.

FACTUAL AND PROCEDURAL BACKGROUND

The property located at 5 North Main Street, Walton, Kentucky, is within the boundaries of Boone County. The Bakery has been a continuous tenant of the property since prior to the onset of litigation in this case. At some point during its tenancy, the Bakery erected a storage building (“the shed”) at the rear of the property within one foot of the property line shared with KFF. At the time the shed was erected, the property was owned by Hudson Properties, LLC (“Hudson”) but was subsequently acquired by PFLP, LLC (“PFLP”).

Prior to the construction of the shed, the Bakery did not obtain a required zoning permit. The Boone County Planning Commission, acting as local zoning administrator, communicated with Hudson by letters dated May 23, 2023, and July 13, 2023, respectively, directing that the shed be removed or the Bakery should contact the zoning enforcement officer to discuss the proper plans and process to have the structure on the property. A zoning permit was approved on February 6, 2024. By this time, PFLP owned the property. KFF filed an appeal to the Board citing Kentucky Revised Statute (“KRS”) 100.261,¹ claiming to be “injuriously affected or aggrieved” by the approval of the Bakery’s zoning permit.

¹ KRS 100.261 **Procedure for all appeals to board.**

Appeals to the board may be taken by any person, or entity claiming to be injuriously affected or aggrieved by an official action, order, requirement, interpretation, grant, refusal, or decision of any zoning enforcement officer.

On March 27, 2024, the Board held a public hearing to review the decision by the enforcement officer to grant the permit. To begin the discussions, a staff member for the Board made a presentation explaining the procedural process for the Bakery’s zoning permit request. He stated that there is no set-back requirement for structures, “so if the shed is on the subject property, we are obligated to approve the zoning permit based on the code.” He further noted that the Bakery, as applicant for a zoning permit, was not seeking a variance from the Board for its shed because the shed met all the building set-back requirements.

Upon completion of the staff member’s comments, KFF was allowed to present its argument supporting its request that the Board overrule the administrator’s decision to grant the Bakery’s permit. Notably, KFF began its presentation by acknowledging the shed was located exclusively on the Bakery’s property, albeit seven-tenths of a foot from the property line.² KFF’s sole argument focused on the timing of the building of the shed as it related to the request for a zoning permit.

Specifically, the shed was built sometime in 2022,³ and the zoning permit was not obtained until February 6, 2024, after completion of the building. KFF maintained, “you cannot build something and ask for permission later.” Although KFF’s appeal never asserted any other basis for their request, they went on to expound on other issues such as the size of the shed, the perceived safety concerns of the structure itself, and the timeline of the process which exceeded the seven days allowed by the zoning code. Following the presentation by KFF, the floor was open for comments from the public. Lastly, KFF was allowed the opportunity to cross-examine a witness. At the completion of the hearing, finding no basis to reverse the decision to grant the Bakery a zoning permit, the Board denied KFF’s appeal.

² The distance from the shed to the Bakery’s property line is described in the record as both “seven-tenths of a foot” and “seven inches.”

³ During the hearing the Bakery stipulated that the shed was built in June 2022, and the permit was approved February 6, 2024.

KFF next appealed the Board’s decision to the Boone Circuit Court. In addition to its appeal, KFF asserted a declaratory action against the Board challenging its jurisdiction to hear the appeal based on the alleged failure of Board members to complete required training.

In the declaratory judgment action, KFF motioned for summary judgment. The Board in turn argued KFF had no standing to sue. The trial court agreed with the Board’s denying KFF’s motion for summary judgment and dismissing the declaratory judgment claim.

In the direct appeal of the Board’s decision to uphold the grant of the zoning permit, KFF again filed a motion for summary judgment. Subsequently, the Board filed a motion to dismiss noting KFF’s failure to identify any injury it sustained as a result of the Board’s decision. The trial court agreed with the Board and dismissed the remainder of KFF’s claims pursuant to Kentucky Rule of Civil Procedure (“CR”) 12.02 for KFF’s failure to state a claim upon which relief can be granted. This appeal followed.

PRELIMINARY ISSUE

In reading *both* the Appellant’s and Appellee’s briefs, we note in the Statement of Points and Authorities, and at various points scattered throughout, the parties use the term “*passim*.” Ironically, the word itself is an antiquated Latin word meaning “here and there: used in bibliographic references to indicate that the writer has drawn upon material scattered throughout the source cited.”⁴ Microsoft Word, by default, inserts *passim* in the Statement of Points and Authorities if a citation is used more than five times in a brief.⁵ Generally, use of this type of software is not objectionable, however, failing to edit a brief and insert proper page citations leaves this Court thumbing through briefs in a frustrating game of seek and find. Such casual adherence to briefing rules is unacceptable.

⁴ *Passim*, Dictionary.com, <https://www.d>

[dictionary.com/browse/passim](https://www.d) (last visited Aug. 13, 2026).

⁵ *TableOfAuthorities.Passim property (Word)*, Microsoft Learn, <https://learn.microsoft.com/en-us/office/vba/api/Word.TableOfAuthorities.Passim> (last visited Aug. 13, 2026)

Our Rules of Appellate Procedure dictate the organization and contents of appellate briefs. Specifically, Kentucky Rule of Appellate Procedure (“RAP”) 32(A)(2) states:

A statement of points and authorities, which shall set forth, succinctly and in the order in which they are discussed in the body of the argument, the appellant’s contentions with respect to each issue of law relied upon for a reversal, listing under each the authorities cited on that point and *the respective pages of the brief on which the argument appears and on which the authorities are cited.*

RAP 32(A)(2) (emphasis added).

“Appellate procedural rules, including those for briefing, cannot be ignored by appellate advocates.” *White v. Fowler*, 717 S.W.3d 176, 180 (Ky. App. 2025). Indeed, we have held that:

Competency is the very first rule of professional conduct. And there is no more basic element of competency in the practice of appellate advocacy than knowing and simply following the Court’s rules of procedure and brief writing. Failure in that regard has only two explanations: (1) an ignorance of the rules, or (2) an impertinent refusal to follow them.

J.P.T. v. Cabinet for Health & Fam. Servs., 689 S.W.3d 149, 152 (Ky. App. 2024). Thus, we expect that any briefs submitted by counsel in the future will strictly adhere to the Rules of Appellate Procedure and provide every page number on which counsel has cited a case as legal authority.

ANALYSIS

1. Denial of Summary Judgment.

KFF appeals the trial court’s denial of its motions for summary judgment; however, these are not properly before the Court. “Outside of the context of immunity, appellate courts only have jurisdiction to review *grants* of summary judgment; a denial of summary judgment is in most cases unreviewable until a final judgment is rendered at the trial court.” *Erie Ins. Exch. v. Johnson*, 647 S.W.3d 198, 202 (Ky. 2022). We thus cannot review the court’s denial of summary judgment. Our review will therefore be limited to the trial court’s dismissal of both the direct appeal of the Board’s decision and the declaratory judgment claim.

2. Standing and Jurisdiction – Affirmative Defenses.

The trial court dismissed KFF’s claims due to lack of standing. Before we address the substance of this issue, we must first address the timeliness of its assertion. KFF maintains that the Board belatedly raised the issue of standing in its motion for summary judgment. And, if that were in fact the case, KFF would prevail on this issue.

In *Harrison v. Leach*, the Supreme Court adopted the “use-it-or-lose-it” approach to standing. *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010) (the defendant did not raise the issue of standing before the trial court and thus the defense was waived). The Supreme Court further expounded on this concept in its affirmation of this Court’s decision in *Corner v. Popplewell*, wherein it held that defendants must raise the defense of standing in their initial answer.

[U]nless defendants in the future can make a colorable showing of why it is unjust or unworkable to raise statutory standing in their initial answer, our adoption of this rule will lead to a prompt disposition of cases so that the parties with proper standing can be determined and do so without the appearance of gamesmanship which so often tarnishes the reputation of our profession.

Corner v. Popplewell, 701 S.W.3d 519, 522 (Ky. 2024).

However, KFF’s claim that the Board raised standing as a defense for the first time in its motion for summary judgment is unfounded. The third defense listed in the Board’s answer states, “[KFF’s] Complaint should be dismissed as [KFF] has not suffered any cognizable injury or suffered any damages to support standing or jurisdiction.” Thus, KFF’s argument that the Board’s assertion that KFF lacked standing was not timely, is without merit and exposes either an intent to deceive the Court or the failure of counsel to read the Board’s answer.

It is most concerning to the Court that KFF again misstates the record when alleging in its reply that the Board never raised particular-case jurisdiction as a defense, thereby waiving it. We agree that particular-case jurisdiction, unlike subject-matter jurisdiction, can be waived if not asserted in a timely manner. See *Goodlett v. Brittain*, 544 S.W.3d 656, 660 (Ky. App. 2018). As noted above however, the Board included jurisdiction as its third defense in its answer. We caution counsel to read the record more carefully when making arguments to this Court.

Ultimately, whether KFF had standing to bring the action is not dispositive of the case. And the issues of both standing and jurisdiction will be more thoroughly discussed below.

3. Strict Statutory Compliance, Standing, and Jurisdiction.

The trial court granted the Bakery’s motion to dismiss the declaratory action specifically on the grounds that KFF lacked standing to bring the claim. As noted by both parties, the Supreme Court tackled this same question in an almost identical case, *Kenton County Board of Adjustment v. Meitzen*, 607 S.W.3d 586 (Ky. 2020).

In *Meitzen*, property owners Jessica Swope and Aimee Glover were granted approval to open a nursery school in a residential zone. Adjoining property owners, Ian Meitzen and Donald Nageleisen, initiated an administrative appeal pursuant to KRS 100.347(1) just as KFF did in the case *sub judice*.

Any person or entity claiming to be injured or

aggrieved by any final action of the board of adjustment and that owns real property within the same zone where the property that is the subject of the final action is located shall appeal from the action to the Circuit Court of the county in which the property that is the subject of the action of the board of adjustment lies.

KRS 100.347(1).

In their complaint, Meitzen and Nageleisen claimed the zoning board should not have granted approval because the location was dangerous for both the children and the general public and that the action of granting the request did not meet certain statutory requirements. *Meitzen*, 607 S.W.3d at 590. The trial court, concluding it lacked jurisdiction, dismissed the appeal finding the appellants failed to allege in their complaint that they were injured or aggrieved by the final action of the board. *Id.* The Supreme Court agreed with the trial court and went on to provide a tutorial on the topics of strict statutory compliance, standing, and jurisdiction.

The Court first noted, “[w]e must emphasize yet again, ‘an appeal from an administrative decision is a matter of legislative grace and not a right.’ When the grace to appeal a decision of [an administrative agency] to a circuit court is granted by statute, strict compliance with the statute’s terms is required.” *Id.* at 595 (citations omitted). The Court expounded that the trial court’s dismissal was justified because Meitzen and Nageleisen failed to strictly comply with KRS 100.347(1) because they did not claim to be injured or aggrieved in some way by the board’s action of granting the zoning permit. *Id.*

However, the Court’s analysis did not end there. Rather, the Court provided a detailed overview of the concept of statutory standing in relation to a court’s jurisdiction.

Standing and jurisdiction are two distinct concepts, and the distinction is particularly important in this case. “‘Standing,’ of course, in its most basic sense, refers to an integral component of the ‘justiciable cause’ requirement underlying a trial court’s jurisdiction. To invoke the court’s jurisdiction, the plaintiff must allege an injury caused by the defendant of a sort the court is able to redress.” *Lawson v. Office of Atty. Gen.*, 415 S.W.3d 59, 67 (Ky. 2013) (citing Ky. Const. § 112; *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989)). More specifically in this case,

“Statutory standing” refers to whether a statute creating a private right of action authorizes a particular plaintiff to avail herself of that right of action. Statutory standing is simply statutory interpretation: the question it asks is whether [the legislature] has accorded *this* injured plaintiff the right to sue the defendant to redress his injury.

Lexington-Fayette Urban Cty. Human Rights Comm’n v. Hands on Originals, 592 S.W.3d 291, 296 (Ky. 2019).

Jurisdiction, on the other hand, “. . . is the power of the court to decide an issue in controversy. The courts’ power to inquire into facts, apply the law, make decisions, and declare judgment between parties is both constrained by and a function of their jurisdiction.” *Nordike*

v. Nordike, 231 S.W.3d 733, 737 (Ky. 2007) (citing *Black’s Law Dictionary* 867 (8th ed. 2004)). “It is fundamental that a court must have jurisdiction before it has authority to decide a case. Jurisdiction is the ubiquitous procedural threshold through which all cases and controversies must pass prior to having their substance examined.” *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005).

Id. at 597.

In applying the concepts of strict statutory compliance, standing, and jurisdiction to Meitzen’s and Nageleisen’s claims, it affirmed the trial court’s decision dismissing the action.

Simply put, in order to have statutory standing, Meitzen and Nageleisen must be “injured or aggrieved” by a final action of the Board, but in order for the circuit court to have jurisdiction, Meitzen and Nageleisen must also strictly comply with KRS 100.347(1). Because Meitzen and Nageleisen did not comply with one of the conditions precedent, *i.e.* claiming that they were injured or aggrieved by the Board’s action, the circuit court was required to dismiss the action.

Id. at 598.

Notably, the Supreme Court in *Meitzen* never specified which type of jurisdiction was at the heart of their decision. And, “[t]here are actually three separate types of jurisdiction, all of which must be met before a court may hear a case. See [*Milby v. Wright*, 952 S.W.2d 202, 205 (Ky. 1997)]; [*Covington Trust Co. of Covington v. Owens*, 278 Ky. 695, 129 S.W.2d 186, 190 (1939)].” *Nordike*, 231 S.W.3d at 737. The three types of jurisdiction include: 1) personal jurisdiction; 2) subject-matter jurisdiction; and, 3) particular-case jurisdiction. Personal jurisdiction hinges on the court’s ability to compel a person to appear before it. *Id.* Subject-matter jurisdiction concerns the court’s power to hear and rule on a specific type or class of controversy. *Id.* And lastly, particular-case jurisdiction refers to the court’s authority to decide a specific case based on its facts. *Id.* at 738.

In a recent Supreme Court decision, *Louisville Historical League, Inc. v. Louisville/Jefferson County Metro Government*, 709 S.W.3d 213 (Ky. 2025), the Court made it clear that compliance with statutory requirements as promulgated in KRS 100.347(1) will always be an issue of particular-case jurisdiction. *Id.* at 227. In other words, in the case *sub judice*, the trial court has the jurisdiction to hear cases brought by “aggrieved or injured” plaintiffs. However, in order to meet particular-case jurisdiction, a plaintiff must specify *how* it is injured or aggrieved.

In the case *sub judice*, KFF claimed to have been injured first by the “bureaucratic approval” of the zoning permit and, second, when it was forced to appear before an “unlawfully constituted government agency.” KFF filed suit under two different legal theories, a direct appeal of the Board’s decision per KRS 100.347(1) and, in a collateral attack against the Board, its declaratory judgment claim.

a. Direct Appeal.

The trial court granted the Board's motion to dismiss KFF's direct appeal of the Board's affirmation of the zoning permit pursuant to CR 12.02(f). Specifically, the trial court decided KFF lacked standing to bring the appeal. "[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).

KFF alleges many grounds upon which it has been aggrieved by the Board's decision to uphold the granting of the Bakery's zoning permit, some of which are: 1) the Board failed to make substantial findings to support its decision; 2) the Board lacked jurisdiction to hear the appeal; 3) the zoning permit was not approved within seven days as required by the zoning code; and, 4) the shed is unsafe. The trial court, citing to *Meitzen*, subsequently found "[KFF] has not demonstrated or even speculated any cognizable interest of which it has been deprived . . . a minimum threshold to establish constitutional standing." KFF argues the trial court must be reversed because *Meitzen*'s holding relies on the prerequisite of jurisdiction, not standing.

As outlined above, the Supreme Court in *Meitzen* expends great effort to explain the interaction of strict statutory compliance, standing, and jurisdiction. And, as the Supreme Court opined, these concepts are thresholds a plaintiff must cross to bring a justiciable claim, the first of which is jurisdiction.

It is fundamental that a court must have jurisdiction before it has authority to decide a case. Jurisdiction is the ubiquitous procedural threshold through which all cases and controversies must pass prior to having their substance examined.

Wilson, 162 S.W.3d at 913. And, while KFF is correct that the trial court bypassed the issue of jurisdiction making its decision based on KFF's lack of standing, that fact is not a basis for reversal of the trial court.

[A]n appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result. *See e.g. McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n.19 (Ky. 2009) ("[I]t is well-settled that an appellate court may affirm a lower court for any reason supported by the record.") (citing *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991)); *see Fischer v. Fischer*, 197 S.W.3d 98, 102-03 (Ky. 2006) ("Appellee's failure to raise the issue in the Court of Appeals does not prevent Appellant from presenting it here as he had no duty to present it to the Court of Appeals since he defended the trial court decision and it had to be affirmed if it was sustainable on any basis.") (citing *Commonwealth Transp. Cabinet Dept. of Highways v. Taub*, 766 S.W.2d 49 (Ky. 1988)); *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 n.11 (Ky. 2008).

Emberton v. GMRI, Inc., 299 S.W.3d 565, 576 (Ky. 2009).

As in *Meitzen*, KFF's enumerated grievances in its appeal amount to a mere disagreement with the Board's decision. Nowhere in its pleadings or briefs does KFF identify any damages it incurred as a result of the Board's actions. In fact, KFF conceded that the shed rested solely on the Bakery's property. Without allegations it had been "injured or aggrieved" by the action of the Board, the trial court had no particular-case jurisdiction to hear the appeal. Like *Meitzen* and *Nageleisen*, KFF must have been "injured or aggrieved" by a final action of the Board to have statutory standing, but in order for the trial court to have jurisdiction, KFF must also strictly comply with KRS 100.347(1). Because KFF did not comply with the condition precedent, the trial court was required to dismiss the action making any other arguments in KFF's direct appeal moot.

b. Declaratory Judgment.

In addition to the direct appeal of the Board's decision, KFF asserted a declaratory judgment action challenging the jurisdiction of the Board due to its members' failure to complete required training/continuing education. KFF claimed this failure rendered their decision as to the zoning permit arbitrary and filed a motion for summary judgment. In response, the Board argued KFF lacked standing to sue due to its lack of specified injury. KFF countered, "the [B]oard argues a citizen or corporate entity affected by administrative agency action cannot collaterally attack it's [sic] jurisdiction and authority [A]s a corporate entity owning property and operating a business adjacent to the property at issue, . . . [KFF has] standing to bring this action." However, the trial court found that KFF was not a party to the original action (the request for a zoning permit by the Bakery) and, thus, no adverse action was taken against KFF. Summary judgment was denied, and the declaratory judgment was dismissed due to KFF's lack of standing to bring the action. KFF appealed.

"Whether Appellants have standing is a jurisdictional question of law that is reviewed *de novo*." *Ward v. Westerfield*, 653 S.W.3d 48, 51 (Ky. 2022) (citation omitted).

KRS 418.045 provides that any person "whose rights are affected by statute, municipal ordinance, or other government regulation . . . may apply for and secure a declaration of his right or duties, even though no consequential or other relief be asked." However, a prerequisite condition to the justiciability of any claim is standing. *Commonwealth Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Sexton by & through Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 194-95 (Ky. 2018). KFF maintains there are two types of standing – constitutional and statutory – and that their claims satisfy both. We disagree.

The Supreme Court in *Sexton* provided an overview of the differences between statutory and constitutional standing invoking the reasoning of the federal courts.

To clarify the differences among the standing concepts, we find helpful this explanation offered by the U.S. Court of Appeals for the Third Circuit:

Though all are termed "standing," the

differences between statutory, constitutional, and prudential standing are important. Constitutional and prudential standing are about, respectively, the constitutional power of a . . . court to resolve a dispute and the wisdom of so doing. Statutory standing is simply statutory interpretation: the question it asks is whether [the legislature] has accorded *this* injured plaintiff the right to sue the defendant to redress his injury.

Put differently, "The question whether a plaintiff can sue for violations of [a statute] is a matter of statutory standing, 'which is perhaps best understood as not even standing at all.' . . . Dismissal for lack of statutory standing is properly viewed as dismissal . . . for failure to state a claim [upon which relief may be granted]."

Id. at 191.

As outlined above, KFF does not have statutory standing to bring their claim, and we decline to engage in further analysis of the issue.

As to the existence of constitutional standing, KFF specifically argues it was injured by being compelled to appear before a board whose members failed to comply with KRS 100.346⁶ requiring members to complete training "on the impact of planning and zoning policies and procedures on housing supply and accessibility." KFF theorizes that such failure on the part of some Board members renders the Board an "unlawfully constituted government agency." As supporting authority, KFF cites *Cameron v. EMW Women's Surgical Center*, P.S.C., 664 S.W.3d 633 (Ky. 2023). However, *Cameron* litigates the question of when a plaintiff can have third-party standing to assert the constitutional rights of another. *Id.* at 650.

⁶ KFF cites to KRS 147A.027 for this proposition. However, effective June 27, 2025, KRS 147A.027 was renumbered as KRS 100.346 – "Orientation and continuing education training for planning and zoning officials and staff." We will refer to the updated numerology.

In *Cameron*, abortion providers sued for declaratory relief from legislation which effectively prohibited abortions in Kentucky with limited exceptions. *Id.* at 640. As the Court noted,

The U.S. Supreme Court has identified five major justiciability doctrines to ensure that only cases and controversies are considered by the federal judiciary. Those doctrines are: the prohibition against rendering advisory opinions, ripeness, mootness, the political question doctrine, and – most significant for our purposes – standing. "As an aspect of justiciability, the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of [a court's] jurisdiction and to justify exercise of the court's remedial powers on his behalf." Indeed, this Court considers standing to be such a fundamental requirement that we have previously directed that "all Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only justiciable causes

proceed in court[.]”

Id. at 647 (footnotes omitted).

There exist only limited exceptions to the prohibition against asserting a constitutional right on behalf of a third party.

[I]n Kentucky, for a litigant to have third-party standing to assert the constitutional rights of another in order to obtain relief for himself or herself, the litigant must demonstrate: (1) an injury in fact that gives the litigant a sufficiently concrete interest in the outcome of the dispute; (2) a close relationship between the litigant and the non-party individual or individuals whose rights the litigant seeks to assert; and (3) that there exists a genuine obstacle or hindrance to the possessor of the right’s ability to assert his or her own interest.

Id. at 650-51.

It is uncontroverted that KFF has no injury of its own. Instead it invokes the general injury as a citizen of Boone County. However, this argument fails as well.

In *Ward v. Westerfield*, the Supreme Court considered an appeal to a ballot initiative that was attempting to amend the Kentucky Constitution to include enumerated victim’s rights. 653 S.W.3d 48. Similar to the case at bar, the plaintiffs in *Ward* alleged they, as taxpayers and voters, faced injury.

To have constitutional standing, a “plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” The party invoking jurisdiction bears the burden of establishing the elements of standing.

Id. at 51 (citations omitted). The Court ultimately decided that their analysis turned on the question of whether “these Appellants” had standing based on the specific record before them.

Our analysis in this case is limited to whether *these Appellants* have standing as citizens and voters on *this* record. Ultimately, Appellants lack standing as citizens and voters because they have not demonstrated a concrete and particularized injury that is not shared with all Kentucky citizens and voters.

Id. at 55. “[T]he allegation of a concrete and particularized injury is a constitutional prerequisite to prosecution of any action in the courts of this Commonwealth.” *Id.* at 53.

KFF maintains that, because some Board members failed to complete statutorily required education, they have been aggrieved by the Board’s decision to uphold the zoning decision for the Bakery. However, as outlined above, KFF cannot show they have an interest in the right asserted that differs from that of the general public. Put another way, KFF suffers an injury, if at all, that all Boone County residents suffer – a Board who is delinquent in obtaining the education the General Assembly deems necessary. Thus, the trial court was correct in its dismissal of KFF’s declaratory judgment action for lack of standing.

We view any remaining contentions of errors as moot or without merit.

CONCLUSION

For the foregoing reasons, we affirm the Boone Circuit Court’s order dismissing KFF’s claims.

ALL CONCUR.

BEFORE: THOMPSON, CHIEF JUDGE;
CETRULO; AND KAREM, JUDGES.

LANDLORD AND TENANT LAW

FAIR HOUSING DISCRIMINATION COMPLAINT

FAMILY LAW

TERMINATION OF A LEASE UNDER KRS 383.300

“PROTECTED TENANT”

EMERGENCY PROTECTION ORDER (EPO)

RETALIATION UNDER KRS 383.300 AND KRS 344.280

Plaintiff entered into a lease for an apartment – Lease term commenced on August 18, 2019, and ended on July 31, 2020 – Lease expressly stated that there are no termination privileges with the lease – Plaintiff originally entered into the lease with a roommate – Roommate moved from the apartment in January 2020 – Roommate agreed to continue paying her share of the rent until plaintiff found another roommate – Sometime thereafter, plaintiff’s boyfriend began residing with her in apartment – On May 3, 2020, police responded to an incident at plaintiff’s apartment involving her boyfriend – Both plaintiff and boyfriend were arrested on drug-related offenses – Charges against plaintiff were later dismissed – Later in the day on May 3, plaintiff petitioned for and obtained an emergency protection order (EPO) against boyfriend – Shortly thereafter, plaintiff vacated apartment, returned her keys, and provided apartment’s property manager (property manager) with copy of EPO – On May 11, property manager informed plaintiff by email that lease did not permit early termination and that plaintiff remained responsible on lease until its termination date – Further, property manager informed plaintiff that she could execute a promissory note permitting her to satisfy remaining balance through payment plan and, in the absence of such a plan, any unpaid balance would be referred for collection – Plaintiff replied that she had previously raised concerns with fair housing authorities over apartment’s management practices; that she was a survivor of sexual assault; and that she no longer felt safe in apartment since

boyfriend had not yet been located or served with EPO – Plaintiff stated if apartment declined to release her from lease, she would pursue relief through fair housing process, but would pay rent in the interim, so there was no need to refer her to collections – Boyfriend was never served with EPO; therefore, neither a domestic violence order (DVO) nor an interpersonal order (IPO) was ever entered, and EPO was dismissed on November 10, 2020 – Parties continued to communicate through summer of 2020 – Plaintiff made a formal request that apartment accommodate her by permitting early termination based on her status as a victim of domestic violence – Apartment declined request – In July and August 2020, after plaintiff vacated apartment, apartment’s in-house collections coordinator (collections coordinator) sent correspondence seeking payment of remaining rent due under lease and advised that ordinary collection remedies could follow if balance remained unpaid – On December 7, 2020, plaintiff filed housing discrimination complaint against apartment with Lexington-Fayette Urban County Human Rights Commission (Commission) – Commission issued probable cause determination in May 2022 – Plaintiff elected to pursue her claims in circuit court pursuant to KRS 344.635 and KRS 344.670 – On July 5, 2022, Commission, on plaintiff’s behalf, filed instant action in circuit court against apartment, property manager, and collections coordinator alleging that apartment violated KRS 383.300 by refusing to permit plaintiff to terminate her lease after obtaining an EPO and retaliated against plaintiff in violation of KRS 383.300 and KRS 344.280 by refusing to release her from her lease and subsequently attempting to collect unpaid rent – Complaint also alleged housing discrimination under KRS Chapter 344 – Defendants filed motion for summary judgment, which trial court granted – Trial court found that KRS 383.300(5) limits right to terminate a lease to tenants who obtain a DVO or IPO, and does not extend that remedy to recipients of an EPO – Further, since plaintiff was not entitled to terminate her lease, apartment’s subsequent efforts to collect unpaid rent did not constitute actionable retaliation under either KRS 383.300 or KRS 344.280 – Plaintiff appealed – **AFFIRMED** – KRS 383.300(2)(b)2. expressly provides that recipients of EPOs, temporary IPOs, and no-contact orders are “protected tenants” for purposes of subsections (3) and (4) – However, lease-termination provisions are found in subsection (5), which expressly limits lease-termination remedy to a protected tenant who obtains a valid protection order listed in subsection (2)(b)1., which only lists DVOs issued pursuant to KRS 403.740 and IPOs issued pursuant to KRS 456.060 – Plaintiff failed to produce evidence from which a reasonable jury could conclude that apartment engage in retaliatory conduct prohibited by KRS 383.300 – KRS 383.300 did not entitle plaintiff to terminate her lease and she did

not produce any evidence that apartment responded to her early termination request any differently than it did to similar requests by other tenants — A retaliation claim under KRS 344.280 is analytically distinct from the underlying discrimination claim — Standard for proving retaliation is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint — Thus, a plaintiff need not ultimately prevail on the underlying claim to mandate a retaliation claim under KRS 344.280 — To establish a *prima facie* case of retaliation, a plaintiff must demonstrate: (1) he engaged in a protected activity; (2) he was disadvantaged by an act of defendant; and (3) there was a causal connection between the protected activity and the defendant's act — In instant action, even assuming that plaintiff engaged in protected activity by contacting Commission, filing a formal housing discrimination complaint, and participating in Commission's investigation, Commission failed to produce evidence from which a reasonable jury could conclude that apartment thereafter subjected plaintiff to a materially adverse action because of that protected activity — Apartment consistently maintained that plaintiff remained liable under lease — There was no evidence that apartment's actions changed because plaintiff sought help from Commission —

Lexington-Fayette County Human Rights Commission on Behalf of Hannah Hurt v. Anderson Campus Rental Properties, LLC; Haley Boyd; and Ron Morton (2025-CA-0898-MR); Fayette Cir. Ct., VanMeter, J.; Opinion by Judge A. Jones, *affirming*, rendered 8/14/2026. [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 Lexington-Fayette Urban County Human Rights Commission (“the Commission”), on behalf of Hannah Hurt (“Hurt”), appeals from the Fayette Circuit Court’s order granting summary judgment in favor of Anderson Campus Rental Properties, LLC (“Anderson”),¹ Haley Boyd, and Ron Morton (collectively “Appellees”). The Commission principally argues that the circuit court erroneously interpreted KRS² 383.300 by concluding that Hurt, who obtained an emergency protective order (“EPO”), was not entitled to terminate her lease under that statute. The Commission further contends that Anderson unlawfully retaliated against Hurt in violation of KRS 383.300 and KRS 344.280 by refusing to release her from the lease and by subsequently attempting to collect unpaid rent after she vacated the premises. We conclude that the circuit court correctly interpreted KRS 383.300 and properly entered summary judgment. Although we reach the retaliation claims by somewhat different reasoning than the circuit court, we likewise conclude that those claims fail as a matter of law. Accordingly, we affirm.

¹ The Commission’s complaint named “Anderson Campus Rental, Inc.” as the defendant. In their answer, Appellees noted that the proper entity is “Anderson Campus Rental Properties, LLC.” The complaint was never amended to correct

the misnomer. Because the identity of the intended defendant is not at issue on appeal, we refer to the entity throughout this Opinion as Anderson Campus Rental Properties, LLC, which is the corporate designation used by the Commission in its notice of appeal.

² Kentucky Revised Statutes.

I. BACKGROUND

On August 17, 2019, Hurt entered into a written lease agreement with Anderson for Apartment 6, located at 650 Maxwellton Court in Lexington, Kentucky.³ The lease term commenced on August 18, 2019, and expired on July 31, 2020. It expressly provided that “[t]here are no termination privileges with this lease.” Hurt also executed a Crime Free Lease Addendum, which provided that certain criminal activity by a tenant or the tenant’s guests could constitute grounds for termination of the tenancy.

³ Hurt originally entered into the lease with another tenant, Kaylee Hoelscher. After Hoelscher moved from the apartment in January 2020, Hurt testified that the two agreed Hoelscher would continue paying her share of the rent until Hurt found another roommate. Sometime thereafter, Hurt’s romantic partner at the time, Ramon Mercado, began residing with Hurt at the apartment.

On May 3, 2020, Lexington police responded to an incident at Hurt’s apartment involving Ramon Mercado.⁴ Later that day, Hurt petitioned for and obtained an EPO against Mercado pursuant to KRS 403.730(2)(a). Shortly thereafter, Hurt vacated the apartment, returned her keys, and provided Anderson with a copy of the EPO.⁵ On May 11, 2020, Anderson’s property manager, Haley Boyd (“Property Manager Boyd”), advised Hurt by email that the lease did not permit early termination and that Hurt remained financially responsible for rent through the lease’s expiration on July 31, 2020. Property Manager Boyd further advised Hurt that she could execute a promissory note permitting her to satisfy the remaining balance through a payment plan and explained that, absent such an arrangement, any unpaid balance would be referred for collection.

⁴ According to the record, both Hurt and Mercado were arrested following the May 3, 2020, incident and were charged with drug-related offenses. The charges against Hurt were subsequently dismissed. Nothing in this Opinion should be construed as expressing a view regarding the applicability of the Crime Free Lease Addendum under the facts presented here. Although the provision appears in the record, Anderson did not seek to terminate Hurt’s tenancy on that basis, and that issue is not before us.

⁵ The parties dispute precisely when Anderson received Hurt’s keys and a copy of the EPO. Because that factual dispute is not material to the issues on appeal, we need not address it further.

Hurt responded that court personnel had informed her the EPO entitled her to terminate the

lease without penalty. She further explained that she had previously raised concerns with fair housing authorities regarding Anderson’s management practices (entering her apartment without notice), that she was a survivor of sexual assault, and that she no longer felt safe residing in the apartment because Mercado had not yet been located or served with the EPO.⁶ Hurt indicated that if Anderson declined to release her from the lease, she intended to pursue relief through the fair housing process but would pay rent in the interim, so there was no need to refer her to collections. Property Manager Boyd reiterated Anderson’s position that the lease remained legally binding and that the EPO did not entitle Hurt to terminate the lease early.

⁶ Mercado was never served with the EPO. As a result, neither a domestic violence order (“DVO”) nor an interpersonal (“IPO”) was ever entered, and the EPO was ultimately dismissed on November 10, 2020.

The parties continued communicating regarding the lease throughout the summer of 2020. During that time, a formal request was made that Anderson accommodate Hurt by permitting an early termination of the lease based upon Hurt’s status as a victim of domestic violence. Anderson declined the request.

In July and August 2020, after Hurt had vacated the apartment, Anderson’s in-house collections coordinator, Ron Morton (“Collections Coordinator Morton”), sent Hurt correspondence seeking payment of the remaining rent due under the lease and advising that ordinary collection remedies such as institution of a civil action or referral to an outside collections agency could follow if the balance remained unpaid.

On December 7, 2020, Hurt filed a housing discrimination complaint against Anderson with the Commission. Following an investigation, the Commission issued a probable cause determination in May 2022. Hurt thereafter elected to pursue her claims in circuit court pursuant to KRS 344.635 and KRS 344.670. On July 5, 2022, the Commission, on Hurt’s behalf, filed the underlying action in Fayette Circuit Court alleging that Anderson violated KRS 383.300 by refusing to permit Hurt to terminate her lease after obtaining an EPO and retaliated against Hurt in violation of both KRS 383.300 and KRS 344.280 by refusing to release her from the lease and subsequently attempting to collect unpaid rent. The complaint also alleged housing discrimination under KRS Chapter 344 arising from the same conduct.

Anderson answered the complaint, denying liability, and subsequently moved to dismiss the Commission’s claims. The circuit court denied that motion, and the parties proceeded through written discovery, depositions, and the exchange of documentary evidence.

Following discovery, Anderson moved for summary judgment, arguing principally that Hurt was not a “protected tenant” entitling her to terminate her lease under KRS 383.300 because she obtained only an EPO rather than a DVO or IPO. Anderson further argued that the undisputed facts failed to establish actionable retaliation under either KRS 383.300 or KRS 344.280. The Commission

opposed the motion, and at the circuit court's request the parties submitted supplemental briefing addressing the statutory definition of a "protected tenant" and whether the protections afforded recipients of EPOs extend to the lease-termination provisions contained in KRS 383.300(5).

In a thorough written opinion, the circuit court concluded that the statute unambiguously limits the right to terminate a lease under KRS 383.300(5) to tenants who obtain a DVO or IPO and does not extend that remedy to recipients of an EPO. The court further concluded that, because Hurt was not entitled to terminate the lease under the statute, Anderson's subsequent efforts to collect unpaid rent did not constitute actionable retaliation under either KRS 383.300 or KRS 344.280. Accordingly, the circuit court entered summary judgment in favor of Anderson, Boyd, and Morton. This appeal followed.

II. STANDARD OF REVIEW

This appeal is taken from an order granting summary judgment. "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." *HMB Professional Engineers, Inc. v. Ives*, 733 S.W.3d 246, 251 (Ky. 2026) (quoting *Motorists Mut. Ins. Co. v. First Specialty Ins. Corp.*, 706 S.W.3d 120, 124 (Ky. 2024)). Because summary judgment involves no fact-finding, we afford no deference to the circuit court's legal conclusions. *State Auto Property & Casualty Insurance Co. v. Greenville Cumberland Presbyterian Church*, 706 S.W.3d 35, 43 (Ky. 2024).

This appeal also presents issues of statutory interpretation. "Statutory interpretation is a question of law for the court to be reviewed *de novo*." *Bell v. Bell*, 423 S.W.3d 219, 222 (Ky. 2014).

III. ANALYSIS

On appeal, the Commission advances three principal arguments. First, it contends the circuit court erroneously construed KRS 383.300 by concluding that Hurt, who obtained an EPO, was not entitled to terminate her lease without further liability under the statute. Second, it argues the circuit court erred in dismissing Hurt's retaliation claim under KRS 383.300. Finally, it contends the circuit court improperly dismissed Hurt's retaliation claim under KRS 344.280. We address each argument in turn.

A. Hurt's Status as a Protected Tenant Under KRS 383.300.

The Commission first argues that the circuit court erroneously concluded Hurt was not entitled to terminate her lease pursuant to KRS 383.300 because she obtained an EPO rather than a DVO or an IPO. Specifically, the Commission contends the circuit court interpreted the statute too narrowly by failing to recognize that KRS 383.300 extends "protected tenant" status to recipients of EPOs and that, once Hurt became a protected tenant, she was entitled to all of the protections afforded by the statute, including early termination of her lease without penalty. Anderson responds that the General Assembly deliberately distinguished

between recipients of EPOs and recipients of DVOs and IPOs, extending certain protections to both groups while reserving the lease-termination remedy exclusively for tenants who obtain a DVO or an IPO.

Resolution of this issue turns upon the language of KRS 383.300, which provides, in relevant part:

(2) As used in this section:

(a) "Named individual" means a person identified in the protective orders listed in paragraph (b) of this subsection as restrained from contact with the protected tenant; and

(b)1. "Protected tenant" means a residential rental or leased housing tenant, applicant for tenancy, or a tenant with a minor household member, who is protected by a valid:

a. Domestic violence order issued pursuant to KRS 403.740, which restrains the adverse party from any unauthorized contact; or

b. Interpersonal protective order issued pursuant to KRS 456.060 which restrains the adverse party from any unauthorized contact.

2. For purposes of subsections (3) and (4) of this section, "protected tenant" also means a residential rental or leased housing tenant, applicant for tenancy, or a tenant with a minor household member who is protected by a valid:

a. Emergency protective order issued pursuant to KRS 403.730;

b. Temporary interpersonal protective order issued pursuant to KRS 456.040; or

c. Pretrial release no contact order issued pursuant to KRS 431.064.

(3)(a) A landlord shall not terminate, fail to renew, refuse to enter into, or otherwise retaliate in the renting or leasing of a residence because of the person's status as a protected tenant.

(b) It shall be a defense to an action for possession of a rented or leased residential property if the court determines that: The tenant is a protected tenant; and The notice to vacate is substantially based on acts which violated the tenant's protective order or led to the issuance of a protective order listed in subsection (2) of this section, including an action for possession based on complaints of noise, disturbances, or repeated presence of peace officers.

(4)(a) After informing the landlord of an intention to install a new lock, a protected tenant, at his or her expense, may install a new lock to his or her dwelling

...

(b) Regardless of any provision in the lease or rental agreement, the landlord may refuse to provide a key to the new lock to a named individual

...

(c) A named individual who has been excluded

from leased or rented property under this section remains liable for rent.

(5)(a) For a protected tenant who obtains a valid protective order listed in subsection (2)(b)1. of this section after entering into a lease or rental agreement, the lease or rental agreement may be terminated by providing the landlord with:

1. Written notice of termination to be effective on a date stated in the notice that is at least thirty (30) days after the landlord's receipt of the notice; and

2. A copy of the valid protective order.

(b) For a protected tenant who obtains a valid protective order listed in subsection (2)(b)1. of this section before entering into a lease or rental agreement, the lease or rental agreement may be terminated by: Providing the landlord with written notice of termination. . . . Attaching a copy of the valid protective order; and Demonstrating a safety concern to the landlord that arises after execution of the lease.

(c) Upon termination of a lease or rental agreement under this section, the released protected tenant shall: Be liable only for rent prorated to the effective date of termination; Not receive a negative credit entry or be liable for additional rent or fees solely because of the early termination; and Not be subject to damages or penalties under the circumstances specified by the statute.

(d) Regardless of whether the named individual is a party to the lease, the named individual is deemed to have interfered with the lease and is civilly liable for the landlord's resulting economic losses.

Id.

The Commission's argument focuses upon subsection (2)(b)2. It correctly observes that recipients of EPOs are included in the definition of "protected tenant." From that premise, the Commission reasons that Hurt became entitled to every protection afforded by KRS 383.300, including the right to terminate her lease pursuant to subsection (5).

The difficulty with the Commission's position is that subsection (2)(b)2. does not broadly redefine "protected tenant" throughout KRS 383.300. Rather, it expressly provides that recipients of EPOs, temporary IPOs, and no-contact orders are protected tenants "[f]or purposes of subsections (3) and (4)[.]" *Id.* (emphasis added). The lease-termination provisions, however, are found in subsection (5), not subsection (3) or (4). Moreover, subsection (5) does not apply generally to any "protected tenant." Instead, it expressly limits the remedy to "a protected tenant who obtains a valid protective order listed in subsection (2)(b)1." *Id.* (emphasis added). The only protective orders listed in subsection (2)(b)1. are DVOs issued pursuant to KRS 403.740 and IPOs issued pursuant to KRS 456.060. An EPO issued pursuant to KRS 403.730 is not among them. This language is plain and unambiguous.

"[C]ourts . . . have a duty to interpret and enforce a statute according to its plain-text meaning."

Normandy Farm, LLC v. Kenneth McPeck Racing Stable, Inc., 701 S.W.3d 129, 137 (Ky. 2024). “Where the words used in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as it is written.” *Griffin v. City of Bowling Green*, 458 S.W.2d 456, 457 (Ky. 1970). We are not at liberty “to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used.” *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000).

The Commission advances several arguments for why recipients of EPOs should enjoy the same lease-termination rights as recipients of DVOs and IPOs. Those arguments, however, are more appropriately directed to the General Assembly than this Court. Our role is to apply statutes as written. In doing so, we must recognize that where the General Assembly creates a legislative cause of action, it alone retains the authority, within constitutional bounds, to prescribe the elements, limitations, and prerequisites for one who seeks to pursue such an action. See *Commonwealth, Revenue Cabinet v. Gossum*, 887 S.W.2d 329 (Ky. 1994).

We do not rewrite legislation to remedy perceived omissions or to extend statutory protections beyond those the legislature has chosen to provide. “While liberal construction is proper to effect a beneficent purpose, a statute should not be construed so as to give it a meaning which the language of the statute does not fairly and reasonably support as it is ‘neither the duty nor the prerogative of the judiciary to breathe into the statute that which the Legislature has not put there.’” *Commonwealth v. Garnett*, 8 S.W.3d 573, 576 (Ky. App. 1999) (quoting *Wilson v. SKW Alloys, Inc.*, 893 S.W.2d 800, 802 (Ky. App. 1995)).

While the Commission persuasively articulates various reasons why it might be better to provide EPO recipients the same rights as recipients of DVOs and IPOs, our task is not to make such policy determinations, but instead, to determine what the legislature actually intended, gleaning this intent from the unambiguous statutory language the legislature chose to employ. *Chapman v. Chapman*, 498 S.W.2d 134, 137 (Ky.1973) (“[I]t is for this court to interpret the law, not to enact legislation.”). If KRS 383.300 should afford recipients of EPOs the same lease-termination rights as recipients of DVOs and IPOs, the statute must be amended through the legislative process.

Nor is the distinction drawn by the General Assembly inherently irrational. Although the statute does not explain why recipients of EPOs receive fewer protections than recipients of DVOs and IPOs—and no explanation is required—one plausible reason lies in the temporary nature of an EPO. Unlike DVOs and IPOs, which generally remain in effect for extended periods, an EPO is an *ex parte* order of limited duration that may never result in the entry of a DVO or IPO. The General Assembly may well have concluded that recipients of EPOs should receive the immediate protections afforded by subsections (3) and (4), while reserving the extraordinary remedy of unilateral lease termination for those who ultimately obtain a DVO or IPO. Whether that was, in fact, the legislature’s reasoning is beside the point. The language of KRS 383.300 clearly and unmistakably distinguishes between the two classes of protective

orders. Because Hurt obtained only an EPO, she was not entitled to terminate her lease pursuant to subsection (5). The circuit court therefore correctly granted summary judgment on this claim.

B. Retaliation Under KRS 383.300.

The Commission next argues that, even if Hurt was not entitled to terminate her lease pursuant to KRS 383.300(5), Anderson nevertheless retaliated against her in violation of KRS 383.300(3). Specifically, the Commission contends Anderson retaliated by refusing to release Hurt from her lease, demanding payment of the remaining rent, threatening legal action, and advising that the outstanding balance could negatively affect her credit.

Subsection (3) prohibits a landlord from “terminat[ing], fail[ing] to renew, refus[ing] to enter into, or otherwise retaliat[ing] in the renting or leasing of a residence because of the person’s status as a protected tenant.” Thus, even assuming Hurt qualified as a protected tenant for purposes of subsection (3), the Commission was still required to produce evidence from which a reasonable jury could conclude that Anderson engaged in retaliatory conduct prohibited by the statute.

The Commission failed to do so. The principal conduct identified by the Commission is Anderson’s refusal to release Hurt from the lease after she presented an EPO. But as discussed above, KRS 383.300 did not entitle Hurt to terminate her lease based on an EPO alone, and Hurt’s lease explicitly stated that it did not include any early termination rights. Anderson’s insistence that Hurt comply with the lease was based on its contractual rights under the lease and its legal obligations under KRS 383.300. And Hurt did not produce any evidence that Anderson responded to her early termination request any differently than it responded to similar requests by its other tenants.

Likewise, the record establishes that the subsequent correspondence from Property Manager Boyd and Collections Coordinator Morton demanding payment of the remaining rent, offering a payment plan, advising Hurt of the outstanding balance, and warning that ordinary collection remedies could follow was in conformity with Anderson’s standard operating practices for overdue or unpaid rent.⁷

⁷ Although Anderson advised Hurt that failure to satisfy the debt could result in collection activity, the record does not indicate that Anderson immediately filed suit or imposed any penalties beyond those contemplated by the lease.

Ultimately, the Commission’s retaliation claim depends on the premise that Anderson’s continued insistence on enforcement of the lease was retaliatory simply because Hurt asserted statutory rights with which Anderson disagreed. KRS 383.300(3) does not compel that conclusion. Because the Commission failed to identify evidence from which a reasonable jury could conclude that Anderson retaliated against Hurt in the renting or leasing of the residence because of her status as a protected tenant, the circuit court properly entered summary judgment on this claim.

C. Retaliation Under KRS 344.280.

Finally, the Commission argues the circuit court erred in dismissing its retaliation claim under KRS 344.280. KRS 344.280(1) provides, in relevant part:

It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:

(a) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter[.]

Id.

As the Commission correctly observes, a retaliation claim under KRS 344.280 is analytically distinct from the underlying discrimination claim. “[T]he standard [for proving retaliation] is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint.” *Asbury University v. Powell*, 486 S.W.3d 246, 252 (Ky. 2016) (citation omitted). Thus, a plaintiff need not ultimately prevail on the underlying claim to maintain a retaliation claim under KRS 344.280.

That principle, however, does not alter the outcome here. To establish a prima facie case of retaliation, a plaintiff must demonstrate “(1) she engaged in a protected activity, (2) she was disadvantaged by an act of [the defendant], and (3) there was a causal connection between the [protected] activity and the [defendant’s] act.” *Kentucky Department of Corrections v. McCullough*, 123 S.W.3d 130, 133-34 (Ky. 2003).

Even assuming Hurt engaged in protected activity by contacting the Commission, filing a formal housing discrimination complaint against Anderson, and participating in the Commission’s subsequent investigation, the Commission failed to produce evidence from which a reasonable jury could conclude that Anderson *thereafter* subjected Hurt to a materially adverse action because of that protected activity.

The Commission identifies no conduct by Anderson following Hurt’s protected activity that differed in any meaningful respect from Anderson’s position before that activity occurred. Immediately after Hurt vacated the apartment, Property Manager Boyd advised Hurt that she remained liable under the lease because Anderson did not believe KRS 383.300 authorized early termination based upon an EPO. Property Manager Boyd simultaneously offered Hurt the opportunity to satisfy the remaining balance through a payment plan. The subsequent correspondence from Collections Coordinator Morton merely reiterated that same position by requesting payment of the outstanding balance and advising Hurt of the potential consequences of continued nonpayment. Those communications were consistent with Anderson’s previously stated contractual position; they did not reflect a new or different course of conduct undertaken in response to Hurt’s protected activity.

Nor did the Commission present evidence that Anderson treated Hurt differently from similarly

situated tenants or otherwise departed from its ordinary business practices in attempting to collect what it believed to be a lawful debt. The record simply does not support a reasonable inference that Anderson's collection efforts were motivated by Hurt's protected activity rather than by its longstanding position that Hurt remained contractually obligated under the lease.

The Commission emphasizes the temporal proximity between some of Anderson's collection correspondence and Hurt's contacts with the Commission. Temporal proximity, however, cannot alone create a genuine issue of material fact where the challenged conduct merely continues a course of action that began before the protected activity occurred. *Montell v. Diversified Clinical Services, Inc.*, 757 F.3d 497, 507 (6th Cir. 2014) (holding that where the defendant merely proceeds along lines previously contemplated before knowledge of the protected activity, we cannot rely on temporal proximity as evidence of causality).

Here, Anderson consistently maintained—from its first communication with Hurt after she vacated the apartment through the conclusion of the parties' correspondence—that Hurt remained liable under the lease. The Commission has identified no evidence from which a reasonable jury could conclude that Anderson's actions changed because Hurt sought relief from the Commission.

Accordingly, although we reach the issue by somewhat different reasoning than the circuit court, we likewise conclude that the Commission failed to establish a genuine issue of material fact on its retaliation claim under KRS 344.280. Summary judgment on this claim was therefore proper as well.

IV. CONCLUSION

The circuit court correctly concluded that Hurt was not entitled to terminate her lease pursuant to KRS 383.300 and properly entered summary judgment on the Commission's remaining claims. Accordingly, the judgment of the Fayette Circuit Court is AFFIRMED.

ALL CONCUR.

BEFORE: ACREE, A. JONES, AND TAYLOR, JUDGES.

FAMILY LAW

ORDER OF PROTECTION

DOMESTIC VIOLENCE ORDER (DVO)

INTERPERSONAL PROTECTION ORDER (IPO)

STALKING

SUFFICIENCY OF THE EVIDENCE

USE OF AOC FORM 275.3

Pursuant to *Smith v. McCoy* (Ky. 2021), checking the boxes on Administrative Office of

the Courts (AOC) Form 275.3 for the entry of an order of protection alone is sufficient to satisfy a family court's fact-finding duty — There would be no reason for AOC to have taken the time and expense to create Form 275.3, approved by the Kentucky Supreme Court, if additional findings need to be made separately every time that it is used — *Smith* noted that any and all findings of fact not contained in Form 275.3 are merely "supporting" the "ultimate factual findings" made in the form and thus not "essential" — The fact that the family court in *Smith* also incorporated its oral findings into its written decision does not mean that family courts must do so in every case, even though it is always advisable — A party always has the authority under CR 52.02 to request additional findings if he believes the court's fact-finding on AOC 275.3 alone is insufficient — Further, a court need not supplement the already-executed AOC form by making additional findings of fact when issuing a domestic violence order (DVO) based upon stalking — "Stalking" in the context of a DVO is defined the same as it is in the context of an interpersonal protective order (IPO) — Thus, at a minimum, the person seeking an IPO or a DVO must prove by a preponderance of the evidence that an individual intentionally engaged in two or more acts directed at the victim that seriously alarmed, annoyed, intimidated, or harassed the victim, that served no legitimate purpose, and would have caused a reasonable person to suffer substantial mental distress, and that these acts may occur again — In addition, the individual must prove that there was an implicit or explicit threat by the perpetrator that put the victim in reasonable fear of sexual contact, physical injury, or death —

Jeffrey Case Meeks v. Leslee Elizabeth Bandy; O.F.M., a Minor Child; and W.J.M., a Minor Child (2025-CA-1365-ME); Warren Fam. Ct., Broderson, Special J.; Opinion and Order by Judge Eckerle, affirming, entered 8/14/2026. [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).]

Appellant, Jeffrey Case Meeks ("Meeks"), brings this expedited appeal from the Warren Family Court's issuance of a domestic violence order ("DVO"). After careful review, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Appellee, Leslee Elizabeth Bandy ("Bandy"), Meeks's former wife, filed a petition for a DVO on July 25, 2025, seeking protection for herself and the two children she shares with Meeks, Appellees, O.F.M., A Minor Child ("Younger Son"), and W.J.M., A Minor Child ("Older Son"). Bandy alleged that Meeks had repeatedly telephoned and harassed her, following her and their two children. The petition also alleged that Meeks had continued to touch her in a sexual manner even after she told him to stop.

The Warren Family Court issued an emergency protective order on behalf of Bandy and both children. After some continuances, the Family

Court held a hearing on Bandy's DVO petition in October 2025, with a Special Judge presiding due to the retirement of the former Warren Family Court Judge.

Both Bandy and Meeks were represented by counsel at the hearing, which lasted roughly two hours. Three witnesses testified: Bandy, Meeks, and Meeks's current wife, Stephanie Meeks ("Meeks's Wife").

Bandy testified first, stating that she and Meeks were divorced in 2022. Originally, both Meeks and Bandy possessed joint custody and equal time-sharing by agreement. However, in January of 2025, Bandy became sole custodian. Agreeing that the contents of her petition were true and correct, Bandy then described her memory of a July 25, 2025, incident at a bowling alley. According to Bandy, she knew that Older Son needed to see a doctor about his ear, and she had arranged for her mother to take him to an appointment later that day. Bandy averred that while she was dropping off Younger Son at a bowling camp, Meeks appeared in the parking lot, opened the passenger door, and angrily demanded to know about Older Son's medical condition and appointment. Bandy did not want to provide those details to Meeks because he had been following her and making her feel unsafe, and she was Younger Son's sole legal custodian. After the confrontation, Bandy proceeded to her workplace, whereupon her mother telephoned to inform her that Sheriff's office personnel were present at Bandy's home to perform a welfare check on Older Son. Bandy then decided to seek a DVO.

When asked by the Family Court whether Meeks had ever harmed her physically, Bandy stated that he had restrained her during their marriage. She also said that, beginning in March or April of 2025, Meeks had forced himself sexually upon her without her consent and had touched her in a sexual manner several times even though she had asked him to stop. She also recounted that Meeks had repeatedly telephoned or contacted her, including calling her roughly 120 times between July 4 and July 24 (the day before she filed the petition for a DVO). Bandy opined that the unwanted sexual acts, Meeks's prior threats to kill her during the divorce proceedings if she kept their children away from him, and his habit of carrying a loaded weapon in his vehicle caused Bandy to feel unsafe.

Bandy further testified that the Family Court had restricted Meeks to one hour of supervised visitation per week since giving her full custody in January of 2025. Nonetheless, Bandy conceded that after Meeks pressured her, she agreed to let him have overnight visitation with the children on the night of June 14, 2025.

According to Bandy, on that date, Meeks left the children at his home with his wife and went to find Bandy. Eventually, Meeks saw Bandy's vehicle at her boyfriend's apartment and began to pound angrily on her boyfriend's front door at approximately midnight. Bandy eventually came outside and drove away from her boyfriend's apartment, claiming that Meeks chased her at high speeds. Bandy said that Meeks drove in the incorrect direction at a roundabout to block her car, exited his car, and yelled at her through her car window. Bandy did not exit her car because she did not feel safe. She stated her fear of Meeks, both for herself and their children's safety.

On cross-examination, Bandy admitted that Meeks had not physically touched her during either the July 25 incident at the bowling alley or the June 14 incident at her boyfriend's home and the roundabout. She stated that she had engaged in sexual relations with Meeks, at his insistence, around ten times in the months preceding her seeking of the DVO, including after the June 14 incident. Bandy acknowledged that she was pregnant, but she was not sure if Meeks or her boyfriend was the father. She also conceded that, despite fearing Meeks herself and concern for her children, and in violation of the Family Court's order restricting Meeks's supervised visitation, she had continued to allow him to have unsupervised visitation with their children after the June 14 incident. Bandy further admitted that Meeks had asked her to look for houses that they could buy together, as evidenced in the record by her correspondence with a realtor.

Bandy denied that her attitude towards Meeks had only changed after he told her on July 20, 2025, that he was going to stay with his (soon-to-be) wife instead of reuniting with Bandy. According to Bandy, Meeks only made that statement in response to Bandy's earlier informing him that she did not want to reunite with him. When questioned by the guardian *ad litem* ("GAL") appointed for the children, Bandy admitted that she had allowed Meeks to have unsupervised visitation with the children even though the January 2025 order which gave her sole custody contained a finding that Meeks had subjected the children to abuse.

Meeks testified next, explaining that he drives a truck at night, and his children usually contact him during work hours. Older Son had called Meeks in the wee hours of July 25 and had mentioned needing to see a doctor about his ear. That conversation alarmed Meeks, and he contacted Bandy three times, but she did not respond. Thus, he went to the bowling alley because he knew that she would be dropping off Younger Son there for a camp. Meeks denied having behaved aggressively towards Bandy at the bowling alley, and he presented video footage of his interaction with her that morning.

According to Meeks, he had not forced Bandy to have sex with him. Instead, Meeks and Bandy had consensual sex several times prior to July 25, including at her workplace and on June 14 (before she went to her boyfriend's apartment later that same day).

As to the June 14 incident, Meeks said that the children wanted to talk to Bandy, so he tried to contact her and eventually found her at her boyfriend's apartment (the address of which he intuited that he found via an internet search). When Bandy came to the door, Meeks told her it was not right for her to be with her boyfriend since she was pregnant with his (Meeks's) child, and they (Meeks and Bandy) had planned to reunite. Bandy left, and Meeks followed her until she stopped near a roundabout. There were no other vehicles on the road. He stopped in front of her vehicle and told her to stop driving "crazy" because she was pregnant. He did not touch Bandy, and they were only stopped at the roundabout for 15-20 seconds. Bandy continued to allow him to have unsupervised visitation with children after the June 14 incident. He also helped coach the children's football team(s).

Meeks testified that on July 20 he had informed

Bandy that he was going to remain with his soon-to-be wife instead of reuniting with Bandy. He claimed that conversation changed Bandy's attitude towards him. Meeks denied ever having improperly touched or threatened Bandy.

During cross-examination by Bandy's counsel and questioning by the GAL, Meeks denied that Bandy had told him numerous times between March and July 25 that she did not want to be with him. He did not deny the accuracy of telephone records submitted by Bandy showing that he had called her numerous times. Meeks maintained that he and Bandy had talked frequently, and he would call her back if she did not answer the first time.

Meeks's Wife served as the final witness at the hearing. She testified that she had received a telephone call from Bandy on June 14, and during the ensuing dialogue, Bandy told her that she (Bandy) and Meeks had been engaged in a sexual relationship, and she (Bandy) was pregnant with Meeks's child. Meeks's Wife averred that during that conversation, and a subsequent one, Bandy did not mention being fearful of Meeks or having been pressured into having sex with him. Meeks's Wife acknowledged at the hearing that she was also pregnant with Meeks's child.

At the conclusion of proof and arguments by counsel, the Family Court made a few brief oral findings. First, it explicitly declined to find that an act of domestic violence occurred on July 25 at the bowling alley. However, it found that Bandy had testified "credibly" that there had been domestic violence in the past, and that Meeks had made threats to harm Bandy if she took their children away. The Family Court stated that it appeared as if Meeks and Bandy were attempting to reunite prior to July 20, when Bandy told Meeks there would be no reconciliation. Nonetheless, Meeks continued to try to contact Bandy until she sought a DVO. The Family Court found that Meeks's conduct constituted stalking, and it issued a DVO to protect Bandy alone. It did not extend the DVO to the children. The Family Court also did not state with specificity the acts that amounted to stalking.

The Family Court soon thereafter issued its written decision, which consists entirely of a completed Administrative Office of the Courts ("AOC") Form 275.3. It did not craft a Judgment of its own. Instead, the Family Court merely checked a box indicating that it had jurisdiction and another box stating that "it was established, by a preponderance of the evidence, that an act(s) of" stalking had occurred. Trial Court Record ("R.") at 31. The Family Court neither incorporated its oral findings nor made any additional, written findings. The DVO prevents Meeks from coming within 500 feet of Bandy for three years. Meeks then filed this appeal.

II. ANALYSIS

Although not explicitly enumerated as such in Meeks's briefs, we perceive him to raise two, overarching issues: first, that the DVO is fatally flawed because the Family Court failed to make sufficient findings of fact; second, that there was insufficient evidence to conclude he stalked Bandy. Bandy asserts that both issues are unpreserved. Before we may address the merits, we must resolve competing motions filed by the parties.

A. Motions to Supplement and to Strike Parts of the Record

Bandy has asked to supplement the certified record with two decisions issued by the Warren Family Court during the pendency of this appeal. Those rulings make some minor modifications to the January 2025 custody order but substantively deny Meeks's request to vacate or amend that decision. Bandy included those orders as the first two exhibits in the appendix to her Appellee Brief. Relatedly, Meeks has asked us to strike those two exhibits to Bandy's brief because they are not in the certified record. A motion panel of this Court passed both motions to this merits panel.

The January 2025 order granting Bandy sole custody of the children was discussed at the DVO hearing, as was Meeks's then-pending motion to alter, amend, or vacate. However, the propriety of the DVO is the sole issue properly before us. Consequently, this appeal does not directly involve any issues pertaining to child custody or visitation, and the children are not protected parties under the DVO. As a result, the orders that Bandy attached as Exhibits 1 and 2 to her brief are not germane to the limited issues before us.

Because the orders at issue do not provide meaningful assistance with our analysis of the DVO, Bandy has not shown good cause to supplement the record with them. We decline to engage in an analysis of whether we may properly take judicial notice of Family Court decisions that are not directly relevant. Accordingly, we will deny Bandy's motion to supplement the record and grant Meeks's motion to strike exhibits 1 and 2 to Bandy's brief. However, we will deny Meeks's request to strike the entirety of Bandy's brief; instead, we will disregard the stray references therein to exhibits 1 and 2, resulting in no prejudice to Meeks.

Standards of Review

Our standards for reviewing appeals are specific and oft-stated:

We review the entry of a DVO for whether the trial court's finding of domestic violence was an abuse of discretion. *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). Our review of the trial court's factual findings is limited to whether they were clearly erroneous. Kentucky Rules of Civil Procedure ("CR") 52.01; *Hall v. Smith*, 599 S.W.3d 451, 454 (Ky. App. 2020). A trial court's factual determination is not clearly erroneous if it is supported by substantial evidence, which is evidence of sufficient probative value to induce conviction in the minds of reasonable people. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

"A trial court is authorized to issue a DVO if it 'finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur[.]'" *Castle v. Castle*, 567 S.W.3d 908, 915 (Ky. App. 2019) (quoting Kentucky Revised Statutes ("KRS") 403.740(1)). "The preponderance of the evidence standard is satisfied when sufficient evidence establishes the alleged victim was more likely than not to have been a victim of domestic violence." *Caudill v. Caudill*, 318 S.W.3d 112, 114 (Ky. App. 2010) (citing *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007)).

Johnston v. Johnston, 639 S.W.3d 428, 431 (Ky. App. 2021).

B. Sufficiency of Findings of Fact

Before we may address the merits of the DVO, we must first resolve Meeks's argument that the DVO is inherently flawed because the Family Court failed to meet its duty to make sufficient findings of fact. We review *de novo* whether a Court has met its duty to make sufficient factual findings under CR 52.01. *Smith v. McCoy*, 635 S.W.3d 811, 814 (Ky. 2021). *Smith* is the seminal decision as to the findings that a Family Court must make when issuing a DVO.

In *Smith*, as here, the Family Court orally found at the conclusion of the hearing that an act of domestic violence had occurred. *Id.* at 813. Also in *Smith*, as here, the Family Court checked boxes on Form 275.3 to indicate that it had jurisdiction and that domestic violence had occurred and may occur again. *Id.* at 813-14. Further, in *Smith*, as here, the Family Court did not make additional written findings of fact. *Id.* at 814.

But, unlike here, the Family Court in *Smith* also issued a separate form order incorporating its oral findings by reference. *Id.* Because the Warren Family Court here failed to incorporate its oral findings into its written decision, its oral findings are "beyond our consideration" since "[a] trial court speaks only through written orders entered upon the official record." *Castle v. Castle*, 567 S.W.3d 908, 916 (Ky. App. 2019). Consequently, the issue becomes whether the Family Court here satisfied its fact-finding obligations by merely checking boxes on Form 275.3, or whether it must also make additional findings. The ambiguous language in *Smith* on that recurring issue has divided prior panels of this Court.

To determine the precise holding in *Smith*, we must quote from that opinion in more detail than we usually deem necessary:

As previously described, the trial court made findings of fact and conclusions of law orally at the end of the hearing. It also fully and accurately completed AOC Form 275.3, finding, by a preponderance of the evidence, that acts of sexual abuse had occurred and may occur again. Finally, it entered a written order "expressly and specifically incorporating" its oral findings and conclusions into the written order. We hold this was sufficient to meet the trial court's duty to engage in at least a good faith effort at fact-finding and that the found facts be included in a written order.

First, we note that in issuing a protective order, the only essential facts, the trial court is required to find are (1) whether an act of domestic violence and abuse, dating violence and abuse, stalking, or sexual assault has occurred, and (2) whether it may occur again. The trial court made both of these findings in writing on AOC Form 275.3. Any additional factual findings the trial court makes in issuing a protective order are merely supporting those ultimate factual findings and are not "essential."

This stands in contrast to the complex and multi-faceted factual findings a trial court must make in the child custody context. In custody

disputes, the trial court must specifically consider multiple factors to determine what is in the child's best interest. See KRS 403.270(2). In the child custody context, the mere written finding that something is or is not in a child's best interest cannot be sufficient because it does not show how the trial court weighed each factor to determine what was in the child's best interest. Written factual findings regarding each factor are an "essential" part of the trial court's written order in child custody cases. Such is not the case in the protective order context. . . .

AOC Form 275.3 sufficiently apprises any third parties of the facts they must know to act on the order. Law enforcement, school officials, and medical providers are the third parties most likely to require this information. It is sufficient that they know an act of domestic violence and abuse, dating violence and abuse, stalking, or sexual assault has occurred and that it may occur again and what the object of the protective order is restrained from doing. All of this information is contained in a completely and accurately filled out AOC Form 275.3. No additional information is required for third parties to fulfill any obligations they have in assisting in the enforcement of these orders.

Smith, 635 S.W.3d at 817-18 (some internal quotation marks, citations, and paragraph breaks omitted).

The language that has divided prior panels of this Court stems from seemingly inconsistent language in two consecutive paragraphs in *Smith*. In the first paragraph, our Supreme Court said that the Family Court's completion of Form 275.3 and its incorporation of its oral findings "was sufficient to meet the trial court's duty to engage in at least a good faith effort at fact-finding and that the found facts be included in a written order." *Id.* at 817 (internal quotation marks and citations omitted). At least two prior panels of this Court have relied on that paragraph to conclude that a Family Court satisfies its fact-finding duty by completing Form 275.3 and making additional findings. See *Hild v. Hild*, No. 2024-CA-0363-ME, 2024 WL 4996639, at *3 (Ky. App. Dec. 6, 2024) (unpublished) (citing *Smith* and holding that "a completely and accurately completed AOC Form 275.3 order, along with some kind of additional findings, is sufficient to satisfy the circuit court's good faith duty to record its findings."); and *Clan v. Strebbe*, No. 2024-CA-0455-ME, 2025 WL 876392, at *2 (Ky. App. Mar. 21, 2025) (citing *Smith* and holding that "[i]n cases involving an order of protection, it is well established that the language set out in AOC Form 275.3 order, along with some level of additional findings, is sufficient to satisfy the family court's duty to reduce its findings to writing.").¹

¹ We cite to these unpublished opinions pursuant to Kentucky Rules of Appellate Procedure ("RAP") 41(A) as demonstrative, non-binding authority.

And in the very next paragraph of *Smith*, our Supreme Court held that the only "essential facts" that a Family Court must make to support a DVO may be made "in writing on AOC Form 275.3," and "[a]ny additional factual findings the trial court makes in issuing a protective order are merely supporting those ultimate factual findings

and are not 'essential.'" *Smith*, 635 S.W.3d at 817. At least four prior panels of this Court have relied on that essential/nonessential dichotomy in *Smith* to conclude that a Family Court satisfies its fact-finding duties by merely completing Form 275.3. See, e.g., *Jones v. Heavner*, No. 2022-CA-0483-ME, 2022 WL 17543040, at *6 (Ky. App. Dec. 9, 2022) (unpublished) (holding that a Family Court made sufficient findings by checking boxes on Form 275.3); *Njere v. Jerry*, No. 2022-CA-1005-ME, 2023 WL 5312193, at *2 (Ky. App. Aug. 18, 2023) (unpublished) (holding that "[u]nder our current precedent, an AOC Form 275.3 completely and accurately completed is sufficient" to satisfy the Family Court's factfinding duty); *Mills v. E.M.*, No. 2023-CA-1230-ME, 2024 WL 1589668, at *3 (Ky. App. Apr. 12, 2024) (unpublished) ("A properly completed AOC Form 275.3 constitutes sufficient findings to support the issuance of a DVO."); *McClusky v. Yount*, No. 2022-CA-1300-ME, 2023 WL 4139876, at *3 (Ky. App. Jun. 23, 2023) (unpublished) (holding that "under our current precedent, an AOC Form 275.3 completely and accurately completed is sufficient.".)²

² Again, we cite to these unpublished opinions pursuant to RAP 41(A). Some of our post-*Smith* decisions have also relied on our pre-*Smith* opinion in *Williford v. Williford*, 583 S.W.3d 424, 430 (Ky. App. 2019), wherein we held that "logically, completely and accurately filling out AOC Form 275.3 and checking the appropriate box under 'Additional Findings' on the form, in and of itself, must satisfy[] the court's good faith duty to record fact-finding." (Brackets in *Williford*; some internal quotation marks omitted; citation omitted.) However, in *Thurman v. Thurman*, 560 S.W.3d 884, 887 (Ky. App. 2018), we noted, in *dicta*, that checking boxes on Form 275.3 does not satisfy a Court's duty to make sufficient findings of fact. Any inconsistencies between *Williford* and *Thurman* are irrelevant going forward because each opinion predates our Supreme Court's seminal decision on the subject in *Smith* (which does not cite to either *Williford* or *Thurman*). Because *Smith* is both more recent and a decision of our Commonwealth's highest Court, we conclude that *Smith* governs our review of this issue. We thus decline to examine further the potential impact on this case of *Williford* or *Thurman*.

We conclude that *Smith* held that checking the boxes on AOC Form 275.3 alone is sufficient to satisfy a Family Court's fact-finding duty. Indeed, there would be no reason for AOC to have taken the time and expense to create this form, approved by the Kentucky Supreme Court, if additional findings need to be made separately every time that it is used.

Our Supreme Court in *Smith* stressed that the Family Court made the "essential" factual findings "in writing on AOC Form 275.3." *Smith*, 635 S.W.3d at 817. That Court held that any additional findings made by the Family Court beyond what is contained in Form 275.3 "are merely supporting those ultimate factual findings and are not 'essential.'" *Id.* We decline to make it mandatory for Family Courts to issue nonessential findings of fact. After all, our Supreme Court explicitly noted that any and all findings of fact not contained in Form 275.3 are merely "supporting" the "ultimate factual findings" made in the form and thus not

“essential.” *Id.*

Therefore, the fact that the Family Court in *Smith* also incorporated its oral findings into its written decision does not mean that Family Courts must do so in every case – even though it is always advisable. Incorporating oral findings is common, as well as prudent and helpful to the parties and reviewing Courts. But we decline to require invariably that busy Family Courts in essence issue two orders on the same subject and in the same matter because any findings beyond those found in Form 275.3 have been deemed inessential by our Supreme Court. Thus, we reject Meeks’s argument that the DVO here is fatally flawed due to insufficient findings of fact. However, we stress that “[a] party always has the authority under CR 52.02 to request additional findings if [he or] she believes the court’s fact-finding on AOC 275.3 alone is insufficient.” *Williford*, 583 S.W.3d at 430.

We also reject the argument that a Circuit/Family Court must supplement the already-executed AOC form by making additional findings of fact when issuing a DVO based upon stalking. The parties have not cited, and we did not independently locate, published, *post-Smith* precedent determining whether Courts must make additional findings of fact when issuing a DVO based upon stalking. As we shall soon discuss, stalking is somewhat different than other forms of domestic violence in that it requires at least two instances of misconduct by the perpetrator.

However, stalking is a type of domestic violence under KRS 403.720(2)(a), which defines *domestic violence and abuse* as “[p]hysical injury, serious physical injury, stalking . . . between family members” Former spouses are included within the definition of “family member” in KRS 403.720(3). We see no indication in *Smith* that a Court has additional duties when issuing a DVO based upon stalking. Certainly our Supreme Court in *Smith* explicitly mentioned stalking, even though *Smith* did not involve stalking:

we note that in issuing a protective order, the only essential facts, the trial court is required to find are (1) whether an act of domestic violence and abuse, dating violence and abuse, **stalking**, or sexual assault has occurred, and (2) whether it may occur again. The trial court made both of these findings in writing on AOC Form 275.3.

Smith, 635 S.W.3d at 817 (emphasis added) (internal quotation marks and citation omitted). Therefore, appropriately completing Form 275.3 sufficiently satisfies a Family Court’s fact-finding duties when issuing a DVO based on all forms of domestic violence and abuse, including stalking.³

³ Though not cited by the parties, our research revealed that in one *post-Smith* opinion, we referenced additional factfinding for DVOs based on stalking. See *Bowie v. Bowie*, No. 2023-CA-1391-ME, 2024 WL 3380987, at *4 (Ky. App. Jul. 12, 2024) (unpublished). However, we did not directly analyze in *Bowie* that any requirement for additional factfinding for DVOs based upon stalking may not be harmonized with our Supreme Court’s holding in *Smith*. Additionally, *Bowie* is unpublished and thus not binding. See, e.g., *Meier v. Jeff Wyler Alexandria, Inc.*, 685 S.W.3d 9, 14-15 (Ky. App. 2024).

That conclusion is not impacted by our decision in the distinguishable case of *Taylor v. Fitzpatrick*, 659 S.W.3d 745 (Ky. App. 2023). In *Taylor*, we concluded that there was insufficient evidence to support an order extending an analogous interpersonal protective order (“IPO”). *Id.* at 749. We also criticized the Family Court’s failure to make findings of fact beyond checking a box on Form 275.3. *Id.* at 751. Here, however, there was evidence which, if believed, supported the issuance of a DVO. And, crucially, in *Taylor* we did not cite our Supreme Court’s holding in *Smith* regarding which findings of fact are essential and which are unessential. In sum, the DVO at hand contained sufficient findings of fact via the Family Court’s completion of Form 275.3.

C. Sufficiency of the Evidence Supporting the DVO

Meeks and Bandy gave conflicting accounts of many events, such as whether Meeks forced Bandy to engage in sexual acts and whether he kept contacting her after she had asked him to stop doing so. Of course, we must stress that the Family Court alone had the ability to weigh the evidence and assess the credibility of the witnesses. *Moore*, 110 S.W.3d at 354. Thus, Meeks’s reliance upon the testimony he gave, in which he denied most of Bandy’s allegations, does not mean that there was insufficient evidence to support the issuance of a DVO.

To determine whether there was substantial evidence that Meeks stalked Bandy, we must first analyze the term “stalking” and specify the conduct that constitutes it by defining its meaning. Bandy asks us to refer to the dictionary; Meeks seeks reference to statutes governing IPOs. Surprisingly, the parties have not cited a published opinion defining “stalking” as it is used in the DVO context.⁴

⁴ We have repeatedly used the definition of stalking found in the IPO statutes when reviewing a DVO based on stalking, albeit in unpublished opinions. See, e.g., *Kiser v. Kiser*, No. 2018-CA-000812-ME, 2019 WL 169204, at *4 (Ky. App. Jan. 11, 2019) (unpublished); *Kummer v. Valla*, No. 2018-CA-001333-ME, 2019 WL 1578801, at *2 (Ky. App. Apr. 12, 2019) (unpublished); *Parker v. Butler*, No. 2025-CA-1368-ME, 2026 WL 1622937, at *4 n.2 (Ky. App. Jun. 5, 2026) (unpublished); *Flintroy v. Gallegos-Esparza*, No. 2021-CA-0928-ME, 2023 WL 324617, at *3 n.2 (Ky. App. Jan. 20, 2023) (unpublished).

The defining issue presents itself because, for reasons to which we are not privy, the General Assembly has allowed for the issuance of a DVO based on stalking but has not defined that term. See KRS 403.720(2)(a) (including stalking within the definition of “domestic violence and abuse”). Yet the General Assembly did define “stalking” in the context of IPOs, describing it as “conduct prohibited as stalking under [KRS 508.140 or 508.150], or a criminal attempt, conspiracy, facilitation, or solicitation to commit the crime of stalking[.]” KRS 456.010(8). The cited statutes, KRS 508.140 and 508.150, “refer, respectively, to the criminal offenses of first- and second-degree stalking.” *Taylor*, 659 S.W.3d at 749.

Of course, terms in statutes are generally defined

according to their everyday, common meaning under KRS 446.080(4). However, “technical words and phrases” which “have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.” *Id.* “Stalking” is a technical word that has acquired a technical meaning in the law, as shown by the fact that it is specifically defined in both IPO and penal statutes.

IPOs and DVOs are closely related. As our Supreme Court has explained, “the heart of the difference” between them is “to whom the respective protective orders offer relief.” *Smith v. Doe*, 627 S.W.3d 903, 909 (Ky. 2021). However, “[a]part from who may file a petition for an IPO or DVO, the statutes governing the respective protective orders read and operate in much the same way.” *Id.* at 910. The Kentucky Supreme Court, and we, have remarked many times in other published opinions on the close parallels between DVOs and IPOs. For example, we have noted that “[a]lthough the statutes governing the issuance of DVOs are found under KRS Chapter 403, the legislative intent for enacting the IPO statutes is identical to that of the DVO statutes.” *Jones v. Jones*, 617 S.W.3d 418, 424 n.4 (Ky. App. 2021). Our Supreme Court has also noted that “though they are housed under different portions of KRS, the statutes governing IPOs and DVOs are nearly identical.” *Doe*, 627 S.W.3d at 908. We have held that “[i]t appears the purpose and intent behind, and the interpretation of, the DVO statutes are almost identical to that of the IPO statutes.” *Calhoun v. Wood*, 516 S.W.3d 357, 360 (Ky. App. 2017). The close relationship between a DVO and an IPO is perhaps best highlighted by the fact that “the same form [275.3] is utilized by the Courts for both IPOs and DVOs.” *Taylor*, 659 S.W.3d at 748.

We perceive no logical, compelling reason to interpret the meaning of “stalking” differently in the DVO context than in the IPO context. Consequently, we will define “stalking” in the context of a DVO by using the definition of the term found in the context of an IPO. And we have summarized the IPO statutes to mean that:

for an individual to be granted an IPO for stalking, he or she must at a minimum prove by a preponderance of the evidence that, an individual intentionally engaged in two or more acts directed at the victim that seriously alarmed, annoyed, intimidated, or harassed the victim, that served no legitimate purpose, and would have caused a reasonable person to suffer substantial mental distress, and that these acts may occur again. Additionally, the individual must prove that there was an implicit or explicit threat by the perpetrator that put the victim in reasonable fear of sexual contact, physical injury, or death.

Halloway v. Simmons, 532 S.W.3d 158, 162 (Ky. App. 2017) (citations omitted).

Bandy alleged that Meeks forced her to engage in sexual acts against her will, followed her, and continued to contact her frequently after she had asked him not to do so. Indeed, it is undisputed that Meeks went to Bandy’s boyfriend’s apartment without an invitation on June 14, and followed Bandy from that apartment at a high rate of speed. It is also beyond question that Meeks called Bandy numerous times, as discussed in Bandy’s testimony and shown on call logs from her telephone that were entered into evidence. Bandy testified that Meeks

called her roughly 120 times between July 4 and July 24, 2025. Meeks also visited Bandy's place of employment and photographed her car in the parking lot. Bandy testified that she told Meeks on July 20 that she did not wish to reunite with him, but telephone logs show calls made to her from his phone between July 20 and July 25 (when she sought the DVO). Bandy testified that she feared Meeks, both for herself and for their children.

Meeks had a markedly different version of events, as he generally testified that Bandy had consented to the sexual acts and to his frequent communications. However, the Family Court alone had the ability to judge credibility, and it obviously found Bandy to be more credible than Meeks.

Accepting Bandy's testimony as credible, there was sufficient evidence to show that Meeks had stalked her via frequently initiating unwanted contact (or the attempt at contact) with her, following her, and forcing her to engage in sexual acts without her consent. Bandy testified that Meeks was angry and unpredictable. She also testified that she feared Meeks; he had threatened to harm her in the past; and he had pushed her against a wall during their marriage. Bandy also testified that Meeks kept a loaded gun in his vehicle. The evidence is sufficient to support a reasonable inference that Meeks made explicit or implicit threats that placed Bandy in reasonable fear of sexual contact, physical injury, or death. In sum, the Family Court's decision to issue a DVO against Meeks based on his having stalked Bandy is supported by substantial evidence.

We have concluded that any further arguments in the parties' briefs are without merit, irrelevant, or redundant. *Schell v. Young*, 640 S.W.3d 24, 29 n.1 (Ky. App. 2021). For the foregoing reasons, the Warren Family Court is affirmed.

III. ORDER

For the reasons discussed in this Opinion, the Court ORDERS that Appellee's motion to supplement the record with the documents found in Exhibits 1 and 2 to Appellee's brief be, and it is hereby, DENIED. The Court ORDERS Appellant's motion to strike Appellee's brief in its entirety be, and it is hereby, DENIED.

ALL CONCUR.

ENTERED: 08/14/2026

BEFORE: COMBS, ECKERLE, AND KAREM,
JUDGES.

DIVORCE

CHILD CUSTODY

TIMESHARING

CHILD SUPPORT

STATUTORY PRESUMPTION IN KRS 403.315

DOMESTIC VIOLENCE ORDER (DVO)

ADMISSIBILITY OF EVIDENCE

TESTIMONY FROM THE HUSBAND'S TREATING THERAPIST

H and W, who are both physicians, were married in 2014 — They have two minor children — In May 2023, W filed for divorce — W had recently been granted an emergency protective order (EPO) against H — W requested sole custody of children and that child support be set according to Kentucky child support guidelines — In July 2023, W filed a motion for contempt against H in domestic violence case, claiming that H had violated EPO's no-contact provision by contacting her by text and/or email over 800 times between May and July 2023 — In November 2023, W obtained domestic violence order (DVO) against H — In December 2023, family court found H to be in contempt for violating no-contact provisions in EPO — Complete record for domestic violence case, a separate action from the divorce proceeding, is not before appellate court, but same judge presided over both domestic violence case and divorce case — At divorce trial, court heard testimony from H, W, and various other witnesses, including H's treating therapist — Guardian *ad litem* (GAL) also testified — In April 2025, family court entered divorce decree, awarding joint custody and equal timesharing to H and W — W filed motion to alter, amend, or vacate for further findings, in which she raised issues about custody and parenting time — Family court denied motion — W appealed — AFFIRMED — Family court did not violate KRS 403.315 or abuse its discretion in awarding joint custody and equal timesharing — Family court noted that EPO, which was originally entered protecting W and children, was amended to remove children — Family court had entered no-contact DVO protecting only W from H for three years, based on a finding that H made threats to harm himself, including when children were in his care — Family court stated that it would not apply usual presumption that joint custody and equal parenting time are in children's best interests given prior history of domestic violence — However, W claimed that, despite this statement, family court effectively applied the presumption that joint custody and equal timesharing were in children's best interests —

Family court entered detailed factual findings about prior history of domestic violence, and expressed clear reasoning for its conclusion that joint custody and equal timesharing were in children's best interests — Version of KRS 403.315 in effect during the 2025 custody trial and post-trial motion proceedings does not expressly prohibit awarding joint custody and equal timesharing under all circumstances any time there is a history of domestic violence — Instead, the version in effect at that time simply directed that the usual statutory presumption in favor of joint custody and equal timesharing did not apply to the party against whom a DVO has been entered — Family court noted that, under the unique facts of instant action, concerns posed by prior history of domestic violence had been overcome — Family court's reasoning included that H demonstrated that he had not engaged in further acts of domestic violence in nearly two years; that H sought treatment for mental illness and complied with his treatment plan; that H had a strong bond with children; and that, since the separation, H had gradually gained more unsupervised parenting time with W's agreement — Neither party raised any significant safety concerns about children while in the care of the other party — W had received mental health treatment from May 2022 until September 2023 — W was concerned that direct contact and co-parenting with H would negatively affect her mental health — Family court made detailed findings about H's mental health and treatment — Substantial evidence supported family court's findings that H had not engaged in further abusive behavior for nearly two years and that he had been consistent in seeking appropriate mental health treatment and in complying with treatment recommendations — Court of Appeals noted that its holding that family court did not abuse its discretion in awarding joint custody and equal parenting time was limited to the facts in this case and that it was applying the versions of KRS 403.315 and KRS 403.270 in effect at the time of the trial and entry of the divorce decree — Family court made detailed best interest findings of all relevant KRS 403.270(2) factors — While a family court should consider the GAL's arguments along with those of the parties, there is no authority which requires that family court must accept a GAL's assessment of the children's best interests or adopt GAL's recommendations for custody and timesharing — It is the family court's responsibility to assess children's best interests and to make decisions about custody and timesharing accordingly — Family court did not abuse its discretion in awarding joint custody and equal timesharing despite finding that parties had some difficulties in communicating and cooperating with each other — Trial court did not commit reversible error in considering H's treating therapist's testimony — Family court orally stated that therapist would be testifying as a fact witness, to which W's counsel said "okay" — Therapist testified that she did not intend to testify as an

expert witness or as a custody evaluator, but simply as a fact witness who could testify to her treating H and to his compliance with his treatment plan — Therapist admitted that she did not directly observe H with children — H's amended witness list stated that he intended to call therapist as a witness and that she would testify to his compliance with his treatment plan — W alleged that therapist's conclusions that H's behavior had stabilized and her assessment of a lack of safety concerns with H's parenting were based on specialized knowledge which is outside the scope of proper lay witness opinion testimony — Court of Appeals rejected W's contention that lay witnesses may not ever offer any type of opinion testimony — Reviewed child support issue for palpable error since W failed to show how the issue was preserved for review — Under instant facts, there was no palpable error resulting in manifest injustice in family court's failure to award child support — After trial, H, W and GAL submitted proposed judgments with findings of fact and conclusions of law — None of the proposed judgments addressed child support — Family court declined to award either party child support in its decree since both parents were employed as physicians and neither party reported any issues in meeting children's financial needs — Further, family court had awarded parties equal timesharing — W did not raise any child support issues in her motion to alter, amend or vacate —

Catherine Schuster v. Tushar Nayar (2025-CA-0693-MR); Jefferson Fam. Ct., Brown, J.; Opinion by Judge Caldwell, *affirming*, rendered 8/14/2026. [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 appeal challenges the Jefferson Family Court's awarding joint custody and equal timesharing and its declining to award child support in the parties' dissolution decree. We affirm.

FACTS

Dr. Catherine Schuster ("Mother") and Dr. Tushar Nayar ("Father") were married in 2014. They have two minor, school-age children.

Mother filed a petition to dissolve the parties' marriage in early May 2023, stating the parties had separated just a few days beforehand. Mother also stated she had recently been granted an Emergency Protective Order ("EPO") against Father. Mother requested that she be granted sole custody and stated child support should be set according to the Kentucky child support guidelines.

In July 2023, Mother filed a motion for contempt against Father in the domestic violence case. She asserted he had violated the EPO's no-contact provision by contacting her by text and/or email over 800 times between May and July 2023. Mother obtained a Domestic Violence Order ("DVO") against Father in November 2023, and her contempt motion proceeded to a hearing in early December 2023. At the end of the early December 2023 hearing, the family court found Father to be

in contempt for violating no-contact provisions in the EPO.¹

¹ The complete record for the domestic violence case, a separate action from the divorce action, is not before us. The same judge presided over both the domestic violence case and the divorce case between Mother and Father. The court made some findings about the domestic violence proceedings in the divorce decree. A recording of the hearing on the contempt motion filed by Mother in the domestic violence case was included in the record on appeal from the divorce decree, but the order finding Father in contempt for violating the EPO was not.

As the divorce trial approached, Father filed a motion requesting the court bring the DVO case file to trial. He stated he was seeking joint custody of the children. Father's amended witness list stated he planned to call Dr. Karen McCurry to testify to his treatment plan and compliance therewith.

The court heard testimony from both parties and from other witnesses including Dr. McCurry, Father's treating therapist, on the scheduled February 2025 trial date. A guardian *ad litem* ("GAL") also participated at trial to represent the children's interests. At the end of the trial, the court invited both parties and the children's GAL to submit proposed findings of fact and conclusions of law.

In April 2025, the family court entered the divorce decree with findings of fact and conclusions of law. The court awarded joint custody and equal timesharing to the parties.

Mother filed a timely motion to alter, amend, or vacate or for further findings—in which she raised issues about custody and parenting time. The family court denied this motion, and Mother filed a timely appeal.

Further facts will be provided as needed in our analysis.

ANALYSIS

Standard of Review—Custody and Parenting Time

Binding precedent from our Supreme Court states:

an appropriate standard of review in a child custody case is as follows:

Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are

clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

Coffman v. Rankin, 260 S.W.3d 767, 770 (Ky. 2008) (footnote omitted).

With this standard of review in mind, we consider Mother's arguments about custody and time sharing. First, we consider Mother's argument that the family court failed to comply with KRS² 403.315 in finding joint custody and equal timesharing to be in the children's best interests despite the DVO and contempt finding against Father.

² Kentucky Revised Statutes.

Family Court Did Not Violate KRS 403.315 or Abuse Its Discretion in Awarding Joint Custody and Equal Timesharing

As Mother emphasizes, Father had a DVO entered against him, and he had been found in contempt for violating no-contact provisions in the EPO. In fact, the family court entered findings about the domestic violence proceedings in the divorce decree, stating:

7. On May 5, 2023, Petitioner [Mother] filed a petition for an emergency protective order, alleging Respondent [Father] made statements of self-harm and threatened to take the children. The petition also alleged Respondent had physically assaulted Petitioner.

8. The petition was granted on the same day and a no-contact Emergency Protective Order was entered protecting Petitioner and the minor children. Under the order, Respondent was vacated from the marital residence.

9. On June 14, 2023, the Emergency Protective Order was amended to remove the children. The protection for Petitioner remained in effect.

10. On November 1, 2023, this court entered a no-contact Domestic Violence order protecting Petitioner only from Respondent for three (3) years, based on a finding that Respondent committed an act of domestic violence against Petitioner and it is likely to occur in the future. Specifically, the court found Respondent made threats to harm himself, including when the children were in his care. Petitioner was also awarded temporary custody of the children. The DVO is set to expire on October 31, 2026.

11. On December 8, 2023, Respondent was found in contempt for violating the Emergency Protective Order by sending Petitioner over 800 text messages and emails. Respondent stopped sending the messages after Petitioner filed her contempt motion on July 25, 2023.

(Pages 2-3 of Findings of Fact, Conclusions of Law, Judgment and Decree (hereinafter "decree") attached as Appendix 1 to Appellant red brief, also located at Record on Appeal, ("R."), pp. 502-03).

Neither party challenges the accuracy of the family court's factual findings regarding the domestic violence case proceedings. However, Mother argues the family court violated KRS

403.315 and abused its discretion in awarding Father joint custody and equal timesharing.

Mother admits the family court stated it would not be applying the usual presumption that joint custody and equal parenting time are in the children's best interests,³ given the prior history of domestic violence. But she claims that despite this statement, the family court effectively did apply a presumption that joint custody and equal timesharing were in the children's best interests.

³ See generally KRS 403.270(2).

We disagree with Mother's assertion that the family court violated KRS 403.315 and applied a presumption in favor of joint custody and equal timesharing despite the history of domestic violence. The fact that the family court ultimately found joint custody and equal timesharing to be in the children's best interest does not show that the court applied a presumption in favor of joint custody and equal timesharing. The family court stated it was not applying such a presumption. Also, it entered detailed factual findings about the prior history of domestic violence, and it expressed clear reasoning for its conclusion that joint custody and equal timesharing were in the children's best interests.

Moreover, the version of KRS 403.315 in effect during the 2025 custody trial and post-trial motion proceedings does not expressly prohibit awarding joint custody and equal timesharing under all circumstances any time there is a history of domestic violence. Instead, the effective version of KRS 403.315 simply directed that the usual statutory presumption in favor of joint custody and equal timesharing did not apply to the party against whom a DVO has been entered.⁴

⁴ KRS 403.315, as amended in 2026, now contains a subsection 2 providing:

(2) There shall be a presumption, rebuttable by a preponderance of the evidence, that joint custody and equally shared parenting time is not in the best interests of the child if the court finds that a party has committed two (2) or more acts of domestic violence and abuse as defined in KRS 403.720 against another party.

2026 Ky. Laws ch. 92 (SB 122). This bill does not contain an emergency clause allowing for it to take immediate effect nor state it must be applied retroactively. So, the new rebuttable presumption stated in the 2026 version of KRS 403.315 does not apply here.

The court noted it was undisputed that the children wanted to spend more time with Father than they received under the current parenting time schedule then in effect. The court also expressly noted the existence of the DVO and the contempt finding for violating no-contact provisions in the EPO. The court stated that the EPO alleged that Father had expressed an intention to harm himself and threatened to take the children and that Father had physically assaulted Mother.⁵

⁵ Unfortunately, we do not have the full text of

the EPO, DVO, or other portions of the domestic violence case proceeding record to review. Based on other statements in the record for this case, Mother's petition for a protective order apparently alleged an incident in which Father somehow forced Mother to go upstairs, causing bruising to her.

Nonetheless, the court effectively determined that, under the unique facts of this case, the concerns posed by the prior history of domestic violence had been overcome. The reasons given included: Father's demonstrating that he had not engaged in further acts of domestic violence in nearly two years; that Father sought treatment for mental illness and complied with his treatment plan; that Father had a strong bond with the children; and that, since the separation, Father had gradually gained more unsupervised parenting time with Mother's agreement.

The court specifically found: "Neither party raised any significant safety concerns about the children while in the care of the other party. The court did not hear any testimony indicating the children are unsafe in the care of either parent." The court also found: "Both parties have suitable homes for the children and the children are fully integrated into both homes." (Page 6 of decree, R., p. 506). Although it took note of the prior finding of domestic violence against Father, the court found there were no allegations that Father had ever been physically abusive or aggressive with the children.

The court found Mother had previously received mental health treatment from May 2022 until September 2023. It noted Mother expressed a belief that her mental health had improved since she ended contact with Father. It also noted Mother expressed concern that direct contact and co-parenting with Father would negatively affect her mental health since he continued to be a "trigger" for her due to his past actions. (Page 7 of decree, R., p. 507).

The court also made detailed findings about Father's mental health and treatment. The court found Father had been hospitalized for mental health issues, including thoughts of self-harm, when the parties separated in May 2023. And the court further found Father's hospitalization led to his receiving a mental health diagnosis and that Father had been receiving treatment for this condition, including medication and therapy. The court found Father was compliant with his treatment and there had been "no reported issues" and no reports of thoughts of self-harm since he obtained treatment. (Page 7 of decree, R., p. 507).

The court discussed the testimony of clinical psychologist Dr. Karen McCurry. This included her assessment that Father had been consistent in attending therapy, receptive to treatment, and motivated to change, and that his behavior had now stabilized and did not resemble the behavior he engaged in at the time of separation. The court noted Dr. McCurry testified to having no safety concerns about Father's parenting and that she believed Father strove to be a healthy person and parent.

The court also discussed the testimony of Father's significant other, who had observed Father's parenting his children and reported no concerns about his parenting choices. The court noted Father's significant other had two children

of her own from another relationship and reported that she trusted Father to watch her own children at times when she was unavailable.

The court also found the children's nanny testified to their being upset and confused at the time of separation, but that they had settled into a routine in the summer of 2024, and they remained stable. The court found that Mother and the nanny testified to Father's phone calls with the children being excessive in length and/or frequency and disruptive to the children's routine. The court also found Mother testified to Father being a "Disney dad" who only did fun things with the children. (Pages 5–6 of decree, R., pp. 506–07).

In its conclusions of law, the court stated it would not apply a rebuttable presumption that joint custody and equal timesharing would be in the children's best interest. Nonetheless, it found joint custody and equal timesharing in the children's best interest despite Father's prior history of domestic violence:

While Respondent [Father] did commit acts of domestic violence around the end of the marriage, it is clear to the court that this has not substantially disrupted the parent-child bond between Respondent and the minor children. In addition, the court believes Respondent has engaged in, and continues to engage in, effective treatment for the underlying mental health condition that contributed to his previous actions. Respondent has not shown similar behavior since his diagnosis and treatment. Further, while the parties have different parenting styles and preferences, the court does not have any safety concerns about either party's parenting and does not believe these differences prevent these parties from having an effective co-parenting relationship and raising loving, successful children.

5. The court concludes it is in the best interest of the minor children to have equal time with each parent. Again, while the court is not bound by the rebuttable presumption in this case, the court still concludes an equal parenting time schedule is in the best interest of the children. This is consistent with the wishes of the children, as expressed through their Guardian ad Litem in this action. Both parents are active, loving, parents to the children. Both parents show a commitment to raising happy, successful children. Finally, while the Respondent engaged in abusive behavior to Petitioner prior to and around the date of separation, Respondent has since sought mental health treatment and has not shown any additional abusive behavior for a period of almost two (2) years. In this same time period, the children's relationship with Respondent has normalized and the court believes it is in the[] best interest of the children to have a parenting time schedule that emphasizes the equal role of each parent.

(Pages 14–15 of decree, R., pp. 514–15).

Based on the record before us, the family court's findings that Father had not engaged in further abusive behavior for nearly two years is supported by substantial evidence. Similarly, the family court's findings that Father had been consistent in seeking appropriate mental health treatment and in complying with treatment recommendations

(including taking prescribed medications and attending therapy) is also supported by substantial evidence—including Father’s testimony and the testimony of his therapist.⁶

⁶ We recognize that perhaps another factfinder might have viewed Dr. McCurry’s testimony with more skepticism given her admission on cross-examination that she was not aware of his having sent more than a couple of text messages to Mother following entry of the EPO and that she and Father had not discussed his having violated a court order. Nonetheless, the family court had the sole prerogative to assess the credibility of witnesses and to weigh the evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

Moreover, while we recognize that often there are legitimate, significant concerns about placing children in the care of parties who have been found to have engaged in domestic violence, we discern no abuse of discretion in the family court’s awarding joint custody and equal parenting time under the unique facts here.⁷ This is especially true considering the passage of nearly two years between the acts of domestic violence found to have occurred in May 2023 and the divorce decree’s entry in April 2025. And it is also especially true considering evidence of Father’s having consistently sought treatment for mental health issues during this two-year period and of there being no further acts of domestic violence since the separation. Also, supportive as evidence is the fact that the parties entered into agreed orders providing for Father to gradually attain increasing amounts of unsupervised visitation with the children. Although the parties may have different parenting styles, the family court’s finding that no significant safety issues were reported as Father’s time with the children gradually expanded is supported by substantial evidence.

⁷ Our holding is limited to the facts of this case, applying the version of KRS 403.315 in effect at the time of trial and entry of the divorce decree.

Regardless of whether we or some other court might have made a different ruling, the family court’s findings were supported by substantial evidence, and it did not abuse its discretion in awarding joint custody and equal timesharing despite the prior history of domestic violence under the unique facts here. Thus, we must affirm its custody and timesharing decision. *See Coffman*, 260 S.W.3d at 770.

We also reject Mother’s contention that the family court failed to comply with KRS 403.315 by not expressly discussing “all” KRS 403.270(2) factors about best interests. For example, Mother points out the family court did not discuss Mother’s mental health in its conclusions of law despite Mother’s testifying that joint custody and equal timesharing would have a negative impact on her mental health. However, as previously noted, the family court did discuss Mother’s testimony about her mental health in its findings of fact. The court did note Mother’s expressions of concern about the effect of co-parenting and direct contact with Father in its factual findings. Moreover, the family court also made findings on other relevant factors

regarding the children’s best interests.

KRS 403.315 (in the version applicable during all relevant times here) states that in cases where a DVO was entered against a party: “The court shall weigh **all** factors set out in KRS 403.270 in determining the best interest of the child.” (Emphasis added.) And KRS 403.270(2)(f)⁸ does identify as one best interest factor: “The mental and physical health of all individuals involved.”

⁸ Like KRS 403.315, KRS 403.270 was also amended in 2026—without an express statement that this amendment applies retroactively or took effect immediately. We apply the version of KRS 403.270 in effect at the time of the custody trial and entry of the divorce decree.

As previously noted, the court made findings concerning both parties’ mental health. The court also found both parties had no physical health issues affecting its custody determination. We also note the court made findings relating to the children’s physical health and their mental and/or emotional health.

Moreover, the court also made findings regarding other listed KRS 403.270(2) factors including the wishes of the parties and their children, and the children’s adjustment and proximity to their home, school, and community. In fact, the court found: “The children attend private school and this will not be affected by the division of time between the homes. Their community involvement and extracurricular activities will also not be impacted by the division of time between the homes.” (Page 6 of decree, R., p. 506). The court also made findings about the motivations of both parties, finding that both were active, loving parents who were committed to raising happy and successful children.

Perhaps the court did not make explicit findings about whether each parent would permit the other substantial contact and communication, although it made detailed findings about both parties’ complaints about the other party’s communications. Moreover, in ordering that each party receive equal parenting time and that the children would be provided with a device to contact the non-possessory parent during daytime hours, the court facilitated the children’s having substantial contact and communication with each parent.

The court made no findings about *de facto* custodians but there appears to be no evidence the children were ever placed in the care of a *de facto* custodian. *See* KRS 403.270(2)(h)–(j). The court did make relevant findings about the prior domestic violence history, finding this prior history had not affected Father’s relationship with the children and Father had consistently sought mental health treatment. *See* KRS 403.270(2)(g).⁹

⁹ At the time of trial, KRS 403.270(2)(g) called for consideration of any “finding by the court that domestic violence and abuse, as defined in KRS 403.720, has been committed by one (1) of the parties against a child of the parties or against another party.” This statutory subsection further stated: “The court shall determine the extent to which the domestic violence and abuse has affected the child and the child’s relationship to each party,

with due consideration given to efforts made by a party toward the completion of any domestic violence treatment, counseling, or program[.]”

To the extent that the family court did not expressly weigh all KRS 403.270(2) factors despite the then-effective version of KRS 403.315’s requirement that it do so, we conclude the error was harmless given the detailed findings made here and the unique facts of this case. *See generally* CR¹⁰ 61.01. In our estimation, the family court made detailed best interest findings of all relevant KRS 403.270(2) factors,¹¹ and it did not abuse its discretion in ultimately awarding joint custody and equal timesharing.

¹⁰ Kentucky Rules of Civil Procedure.

¹¹ We reject Mother’s assertion that the family court failed to make required best interest findings and/or failed to adequately analyze the best interest standards expressed in KRS 403.270. This case is substantively distinguishable from *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011), in which the family court’s conclusion of law that it was not in the minor child’s best interest to move was not supported by any factual findings. *See id.* at 458–59. Again, the family court here made detailed findings on relevant KRS 403.270 factors.

Similarly, this case substantially differs from *Glodo v. Evans*, 474 S.W.3d 550 (Ky. App. 2015), in which the family court made only a conclusory finding that the mother was an unfit parent who had been incarcerated and had a substance abuse problem in resolving a custody dispute between a parent and non-parents (grandparents). *See id.* at 553–54. Moreover, unlike *Glodo*, the present case involves a custody dispute between the children’s parents so the clear and convincing evidence standard governing custody disputes between parents and non-parents does not apply. *See id.* at 554.

Furthermore, this case also substantially differs from *Scheer v. Zeigler*, 21 S.W.3d 807 (Ky. App. 2000), in which we overruled prior precedent regarding custody modification and remanded for the family court to decide the custody modification request pursuant to the standard set forth in KRS 403.340. *See id.* at 813–14. Here, we perceive no need to remand for the family court to decide custody anew pursuant to applicable law such as KRS 403.315. The family court was obviously aware of applicable statutes such as KRS 403.315 and KRS 403.270 and its decision was not inconsistent with the standards set forth in these statutes at the time of trial and entry of the divorce decree.

Moreover, also relevant to domestic violence-related issues, we reject Mother’s contention that the family court’s custody order must be set aside because it was not consistent with the recommendation of the children’s GAL. Mother points out that the GAL proposed that the court should award Mother sole custody until the DVO expires and that Mother and Father have a 60/40 timesharing schedule. The GAL’s proposal also suggested that joint custody commence upon the expiration of the DVO. (Perhaps the GAL was concerned about how the parties could make decisions together while the no-contact provisions of the DVO still applied.)

As Mother asserts, the GAL was appointed to represent the children and binding authority recognizes that a GAL for minor children is charged with arguing for the children's best interests, which are not necessarily synonymous with the children's expressed wishes. *See generally Morgan v. Getter*, 441 S.W.3d 94, 108, 117 (Ky. 2014).

On the other hand, as Father points out, a GAL plays a different role than a Friend of the Court who is appointed by a court to investigate custodial issues and to make reports and recommendations. *Id.* at 111. *See also* KRS 387.305; KRS 403.300. Father argues the family court was not required to give more weight to the children's GAL's opinion and recommendations than to those espoused by Mother's or Father's trial counsel.

While both parties make good points, we ultimately discern no reversible error in the family court's not adopting the GAL's recommendations concerning custody and timesharing.¹² While certainly the family court should and did consider the GAL's arguments along with those of the parties, Mother cites no authority which requires that the family court must accept a GAL's assessment of the children's best interests or adopt his/her recommendations for custody and timesharing. Ultimately, it is the family court's responsibility to assess the children's best interests and to make decisions about custody and timesharing accordingly. *See generally* KRS 403.270; KRS 403.320.

¹² The DVO was set to expire October 31, 2026—about a year-and-a-half after entry of the divorce decree and about twenty months after the custody trial. Neither party's briefs discussed whether the GAL's proposal for Mother to have sole custody until the DVO expired is consistent with Kentucky statutes about establishing or modifying child custody and parenting time, such as KRS 403.270, KRS 403.320, and KRS 403.340, nor precedent construing such statutes.

Family Court Did Not Abuse its Discretion in Awarding Joint Custody and Equal Timesharing Despite Finding the Parties had Some Difficulties in Communicating and Cooperating With Each Other

Mother argues that the family court erred in awarding joint custody and equal timesharing because, in her view, the parties were unable to communicate and cooperate with one another. Certainly, courts may consider evidence of the parties' being unable to communicate or cooperate with one another in deciding whether equal timesharing is in a child's best interest. *See generally Barnett v. White*, 584 S.W.3d 755, 760–62 (Ky. App. 2019). Where a court makes properly supported findings that the parties were unable to effectively communicate or cooperate with little to no improvement over the years, such properly supported findings can support the court exercising its discretion to decline to order equal timesharing despite statutory presumptions that joint custody and equal timesharing are in children's best interests. *See id.*

However, in the instant case, the family court did not find that the parties were completely unable to communicate or cooperate with each other. The

court noted Mother's objection to Father's requests for direct communication, including Mother's concern that such communication could negatively affect her mental health. The court found the parties currently communicated through third parties, including their attorneys and Mother's mother. The court also found that the use of such third parties for communication often resulted in delays in conveying important information.

The court ordered the parties to "continue to use Google calendar, or Our Family Wizard (if agreed to in writing), for scheduling the children's events and activities." (Page 19 of decree, R., p. 519). The court also ordered the parties to use Our Family Wizard (a court-approved parental communications application) for other communications. The court acknowledged Mother's concerns about direct communication, but it found direct communication in the children's best interest to allow "for faster and clearer communication on important issues related to the children's safety and well-being." (Page 20 of decree, R., p. 520).

The court stated Mother may use a third party to send messages through Our Family Wizard if she preferred. Moreover, the court noted it retained the ability to modify decree provisions about communication, if Father proved unable to communicate with Mother in an appropriate manner. The court also stated that discussion on Our Family Wizard must be limited to issues about co-parenting the children and shall be conducted in a respectful manner with no disparaging comments about the other party's parenting choices or relationship with the children. The court also concluded the parties could telephone each other directly if and only if an emergency regarding the children's health or safety occurred. The court further directed that neither party shall make disparaging remarks about the other (or allow others to do so) in front of the children.

Despite noting some prior conflicts and difficulties in communication, the family court made findings that the parties were able to communicate—albeit through third parties and Google calendar. The family court also essentially found the parties had been able to agree on many important matters—as it made findings about the parties' agreeing to the gradual expansion of Father's parenting time, division of marital assets, and resolution of how to split the children's health costs (including insurance and unreimbursed expenses).

In sum, the family court's findings indicate that the parties have been able to communicate and to agree on how to resolve many matters. Moreover, the court provided directions in the divorce decree about future communications, aimed at helping the parties to communicate and co-parent in a constructive and respectful manner. Thus, we discern no abuse of discretion in the family court's awarding joint custody and equal timesharing despite the parties' past difficulties with communications. *See Barnett*, 584 S.W.3d at 761 (citing *Squires v. Squires*, 854 S.W.2d 765, 768–69 (Ky. 1993)) ("While joint custody should not be automatically rejected where parents cannot cooperate at present, especially if they are in the midst of a divorce, joint custody can be appropriate if it appears that with time parents will be able to achieve an acceptable level of cooperation.").

No Reversible Error in Family Court's Consideration of Father's Treating Therapist's Testimony

Mother argues the family court improperly relied on opinion testimony from Dr. Karen McCurry, a clinical psychologist and Father's treating therapist. Mother points out her trial attorney objected to Dr. McCurry's testifying because Father had not identified Dr. McCurry as an expert witness prior to trial. She also emphasizes that Father's counsel represented that Dr. McCurry would testify as a lay witness rather than an expert witness.

Based on our review of the trial recording, the family court also orally stated that Dr. McCurry would be testifying as a fact witness, and Mother's trial counsel said "okay" or something to that effect without further objecting.

Dr. McCurry stated at trial that she did not intend to testify as an expert witness or a custody evaluator but instead simply as a fact witness who could testify to her treating Father and to his compliance with his treatment plan. She also admitted she did not directly observe Father with the children.

Father's amended witness list, filed prior to trial, indicated he intended to call Dr. McCurry as a witness and that she would testify to his compliance with his treatment plan. Father did not state he would be calling Dr. McCurry as an expert witness, however. *See generally* CR 26.02(4).

Mother quotes the family court's findings about Dr. McCurry's opinions, including that Father's behavior had stabilized and he was not demonstrating the concerning behaviors which occurred during the May 2023 separation and his hospitalization. She also quotes the family court's finding that Dr. McCurry expressed no concerns about Father's ability to safely provide care for the children. Mother admits that Dr. McCurry is a trained psychologist.

Mother asserts that Dr. McCurry was not qualified to testify as an expert yet offered opinion testimony on scientific, technical, or other specialized knowledge. In particular, she complains that Dr. McCurry's conclusions about Father's behavior having stabilized and her assessment of a lack of safety concerns with Father's parenting were based on specialized knowledge which is, in her view, outside the scope of proper lay witness opinion testimony.

Father responds by arguing that Dr. McCurry properly testified as a lay witness to her own observations about Father's progress and treatment which she made while providing therapy to him. While Father acknowledges that Dr. McCurry testified to her education and training as a clinical psychologist and used some clinical terms in her testimony, he suggests she still properly testified as a lay witness to matters within her personal knowledge as Father's treating therapist.

In the alternative, Father contends that, to the extent that the family court allowed Dr. McCurry to testify as an expert (or concerning opinions about specialized matters which may properly be offered only by expert witnesses), there was no abuse of discretion and/or any error was harmless. *See McDaniel v. Commonwealth*, 415 S.W.3d 643, 655–56 (Ky. 2013) (recognizing a lower court has

discretion whether a witness qualifies as an expert and concluding that the improper offering of expert opinions by a lay witness amounted to harmless error since the expert opinions offered did not substantially influence the resolution).

As Mother points out, the scope of proper opinion testimony from lay and expert witnesses is set forth in KRE¹³ 701 and KRE 702.

KRE 701 states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness;
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

KRE 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the proponent demonstrates to the court that it is more likely than not that:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness' opinion reflects a reliable application of the principles and methods to the facts of the case.

¹³ Kentucky Rules of Evidence.

We reject any apparent contention by Mother that lay witnesses may not ever offer any type of opinion testimony.¹⁴ Moreover, having carefully reviewed Dr. McCurry's testimony and the family court's findings based on this testimony, we discern no reversible error in this regard—whether the testimony is considered entirely lay witness testimony or whether some opinions offered might normally come within the purview of expert testimony. See generally KRE 103(a) (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]”). See also CR 61.01 (no error in admitting evidence is grounds for disturbing a judgment unless refusing to afford relief would be “inconsistent with substantial justice” and further stating: “The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”).

¹⁴ Mother claims the Kentucky Supreme Court has held that lay witnesses cannot properly give opinion testimony, citing *Time Warner Cable, Inc. v. Smith*, 635 S.W.3d 82 (Ky. 2021). But our Supreme Court's holding was much more limited than Mother suggests. In fact, our Supreme Court held a worker's compensation claimant—like any other lay witness—can testify to facts about his/her psychological (as well as physical) medical condition, but he/she cannot testify to his/her medical prognosis, which must be established by medical testimony. We do not read *Smith*, 635 S.W.3d at 88, as categorically holding that lay witnesses may never offer opinion testimony on any subject. See also KRE 701.

Mother also asserts that expert testimony must be offered on any issue which is not a matter of common knowledge, citing *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676 (Ky. 2005). But *Miller* simply held that since the standard of care for drawing blood in a medical facility is not within the common experience of laypeople, expert testimony about the standard of care for phlebotomists was required. *Id.* at 680–81. Dr. McCurry did not testify to any medical standard of care but simply to her observations about Father's compliance with his treatment plan. Nor did she go beyond the scope of lay witness testimony in testifying that she had no safety concerns about his parenting based on her interactions with him, including his consistent attendance at therapy and the statements he made to her. And although she acknowledged that she did not directly observe his parenting the children and her assessments depended largely on what he reported to her, the family court had the prerogative to weigh the weight and credibility of the evidence. See, e.g., *Moore*, 110 S.W.3d at 354. See also CR 52.01.

Mother was notified prior to trial of Father's intent to offer Dr. McCurry's testimony about his compliance with his treatment plan and the fact that at least one other witness testified to perceiving no safety concerns with Father's parenting after observing him interacting with the children. We find no reversible error in the family court's consideration of Dr. McCurry's opinion that Father's caring for the children posed no safety concerns.

Moreover, the court's consideration of Dr. McCurry's opinions about Father's behavior having stabilized and no longer resembling the behavior he was engaging in at the time of separation and his hospitalization (based on his self-reports during therapy) also did not amount to reversible error. As the family court further found, there was no testimony or other evidence showing that Father had engaged in any further abusive behavior or made statements about intending to harm himself for nearly two years prior to trial.

Child Support

We Review Child Support Issue for Palpable Error Given Mother's Failure to Show How This Issue was Preserved for Our Review

Generally, we review child support decisions for abuse of discretion. See, e.g., *Davis v. Davis*, 720 S.W.3d 622, 628 (Ky. App. 2025). However, unpreserved issues may be reviewed solely for palpable error resulting in manifest injustice. *Id.*

at 631 (citing CR 61.02). Because Mother did not show how the child support issue was preserved for our review, we review this issue solely for palpable error resulting in manifesting injustice.

Mother's initial appellant brief argument begins with a general preservation statement indicating her arguments were preserved “through her counsel's requests at trial, and finally through her timely post-trial motion for relief under CR 52 and CR 59.” (Appellant red brief, page 10). Mother provides a general reference to the several pages of the record (R., pp. 531–39) at which her post-trial motion (which did not address child support) appears. However, Mother fails to provide any specific references to the video recording where she raised any issues about child support during the trial, pressed the trial court for a ruling on child support, or requested an additional hearing to determine child support.¹⁵

¹⁵ Mother's appellant brief fails to fully comply with Kentucky Rules of Appellate Procedure (“RAP”) 32(A)(4) which requires that appellant brief arguments contain “ample references to the specific location in the record” and “shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.” We are generally satisfied that Mother raised her appellate issues about custody and timesharing to the family court through her post-trial motion and during the trial and therefore review the custody decision under the generally applicable standard of review. However, Mother failed to provide a proper preservation statement, with a specific reference to the record, identifying if or how the child support issue was raised to the family court in her initial appellant brief.

We are not aware of Mother's appellate counsel having a prior history of failure to comply with appellate briefing rules and we decline to impose further sanctions. See RAP 10(B) and RAP 31(H)(1). Nonetheless, the failure to identify where in the record the child support issue was raised to the trial court and preserved for review means that the child support issue may be considered unpreserved. *Ford v. Commonwealth*, 628 S.W.3d 147, 155 (Ky. 2021) (“If a party fails to inform the appellate court of where in the record his issue is preserved, the appellate court can treat that issue as unpreserved.”).

Father argues that the alleged error in not awarding child support was not preserved for review. He points out that Mother did not raise any issues about child support in her motion to alter, amend, or vacate. He also points out Mother did not specifically identify child support as an issue to be resolved at the February 2025 trial in her pretrial compliance or in motions filed shortly before trial.

Mother's reply brief does not correct her prior failure to cite to the record to show where the child support issue was raised to the family court. Instead, her reply brief appears to concede that the child support issue is unpreserved, especially since she argues therein that the family court's failure to make explicit findings on the children's reasonable needs amounted to palpable error resulting in manifest injustice. We leniently construe this argument as an implicit request for palpable error review. See, e.g., *Oakley v. Oakley*, 391 S.W.3d 377,

380 (Ky. App. 2012) (whether appellant provides a preservation statement identifying how an issue was presented to the lower court and thus preserved for review “has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.”).¹⁶ *See also generally J.P.T. v. Cabinet for Health and Family Services*, 689 S.W.3d 149, 153 (Ky. App. 2024).

¹⁶ *Oakley*, 391 S.W.3d 377, predates the adoption of our Rules of Appellate Procedure. However, it applies substantially similar provisions from then-effective Rules of Civil Procedure regarding preservation statements and other briefing requirements. *See id.* at 378–80. Its reasoning remains sound.

Despite Mother’s seeming concession that the child support issue was not properly preserved, Mother had requested child support early in the proceeding. However, she failed to bring this issue to the family court’s attention shortly prior to trial or to press for a ruling on child support at trial or in her motion to alter, amend, or vacate. We summarize child support-related filings in the record to aid us in determining whether the family court committed palpable error in declining to award either party child support in the decree.

Family Court’s Awarding No Child Support in Decree Was Not a Palpable Error Resulting in Manifest Injustice Under the Unique Facts of this Case

Mother’s divorce petition, filed in May 2023, contained a statement indicating that child support should be set under the Kentucky child support guidelines. Several weeks later, Mother filed a Motion for Temporary and Permanent Child Support. She attached a supporting affidavit, child support worksheets, and recent pay stubs. In late December 2023, the family court entered an Agreed Order stating: “Child support shall be \$3,418.00 per month based on the current parenting time schedule, work-related childcare costs, Catherine’s [Mother’s] cost to cover the children’s insurance, and each party’s current income.” (R., p. 131). The family court characterized this agreed order as a temporary child support order in the divorce decree.

Father filed a motion to modify child support, which was set for a hearing in late October 2024. A couple of weeks prior to the scheduled hearing, Mother filed an exhibit list indicating she would present a child support worksheet and relevant documents about income and child-related expenses. She attached to this exhibit list paystubs, other documents about the parties’ incomes, and documentation of childcare and health insurance costs. However, shortly before the scheduled hearing date, Father withdrew his motion to modify child support.

Meanwhile, the court had recently entered the parties’ Mediated Partial Agreed Order of Marital Settlement resolving property issues such as division of the marital estate and assignment of debts, but reserving issues regarding child custody, support, and parenting time.

In early November 2024, the family court entered an order setting a February 13, 2025, trial

date. The trial order stated that if child support was at issue, the responding party must file paystubs or other proof of current income, tax returns, and an affidavit about his/her monthly expenses and income at least 24 hours before trial.

As the trial date approached, Mother filed a motion identifying issues for trial including custody and parenting time. She did not specifically state that child support was at issue in this motion. Nor did she update the information about income and other financial matters she had filed back in October 2024 by filing similar, more recent documents into the record.

A few days before trial, Mother filed a witness and exhibit list indicating she would be offering income evidence and evidence about costs including work-related childcare and the children’s health insurance. However, neither party filed into the record paystubs or tax returns or affidavits about their monthly expenses in the days leading up to trial. Mother claims that the family court improperly limited her inquiry into financial matters such as the parties’ respective income at trial.

After trial, both parties and the children’s GAL submitted proposed judgments with findings of fact and conclusions of law. Mother’s proposed findings and judgment, like those proposed by Father and the GAL, did not address child support, instead focusing on child custody and parenting time issues.

The court declined to award either party child support in the decree. It found both parents were employed as physicians and that: “Neither party reports any issues in meeting the financial needs of the children.” (Page 12 of decree, R., p. 512). Mother did not raise any issues about child support in her motion to alter, amend, or vacate.

Seemingly conceding that the child support issue was not properly preserved for our review, Mother argues in her reply brief that the family court’s declining to award child support violated KRS 403.211(5) and resulted in palpable error. KRS 403.211(5) states: “When . . . the court is otherwise presented with insufficient evidence to determine gross income, the court shall order child support based upon the needs of the child or the previous standard of living of the child, whichever is greater.”

Mother argues the family court failed to inquire into the children’s needs as required by KRS 403.211(5) after refusing to hear testimony about the parties’ income. She suggests the family court’s finding that both parties have the financial resources to meet the children’s needs is not supported by evidence considering that the family court refused to admit testimony or other evidence at trial about the parties’ incomes. She contends this amounts to palpable error resulting in manifest injustice.

While we express no opinion on whether the family court may have otherwise erred if the issue were properly preserved, we reject Mother’s assertion that the family court’s awarding nothing in permanent child support amounted to palpable error resulting in manifest injustice under the unique facts here.

The family court found that both parents were financial supporters of the children during the marriage. The court specifically found it had

entered an agreed order in December 2023, setting temporary child support at \$3,418.00 per month, which included “work-related childcare expenses and insurance premiums paid by Petitioner [Mother] on behalf of the children.” (Page 12 of decree, R., p. 512). The family court also found that Mother incurred childcare expenses of \$800.00 per week and \$500.00 per month for gas. The court further found that the parties agreed to equally divide all unreimbursed medical expenses for the children and that the parties had agreed on division of their marital assets.

In a significant change from the time of the agreed order about temporary child support, the court awarded the parties equal timesharing in the divorce decree. The court concluded that each parent was entitled to select the children’s caregiver(s) during his/her parenting time. The court also concluded that each parent was responsible for any work-related childcare expenses during his/her parenting time. And it concluded the parties must split equally the children’s unreimbursed health expenses and the children’s extracurricular activities costs and Father must reimburse Mother for one-half of the children’s health care insurance premiums. It further ruled that, so long as both children could be claimed as dependents, each party could claim one child on his/her tax return each year.

In short, despite Mother’s claims that the family court failed to make any findings about the children’s needs, the family court made findings and conclusions about many costs of providing for the children (including childcare, health expenses, and extracurricular activities) and essentially ordered the parties to split these costs equally along with awarding equal parenting time. Moreover, its awarding equal parenting time (in contrast to Mother’s having substantially more parenting time than Father previously) was a valid consideration in the court’s determination of what amount, if any, must be awarded as child support. *See generally* KRS 403.2122 (regarding shared parenting time credit).

Furthermore, although Mother may challenge the family court’s finding that neither party reported issues in meeting the children’s financial needs, we cannot say that this finding amounted to palpable error. Neither party made an explicit request for an award of child support in documents filed between the early November 2024 trial order and the February 2025 order, and no one discussed child support in their proposed judgments. Also, since neither party had recently filed current income and expense documentation prior to trial as required by the trial order for child support determination, we discern no palpable error in the family court’s limiting the admission of evidence about jobs and income at trial, instead focusing on hearing evidence related to custody and parenting time.

Furthermore, although we are sympathetic to Mother’s assertion that simply finding both parents are doctors is not enough by itself to merit declining to award child support, we discern no palpable error under the facts here in the family court’s conclusion that both parties “have the financial resources to meet the needs of the children while in their possession under an equal time schedule.” (Page 22 of decree, R., p. 522). This is especially true since both parties are responsible for paying childcare costs for their parenting time pursuant to the decree. Moreover, although the family court

was not inclined to hear testimony about the parties' jobs or income at trial, other evidence in the written record shows that both parties generally had ample, six-figure employment earnings every year. Also, Mother has not alleged that either party recently lost a job or had otherwise recently incurred substantial financial difficulties.

So, under the unique facts here, the family court's declining to award either party child support while awarding both equal parenting time does not amount to palpable error resulting in manifest injustice. Thus, we must affirm the family court on this unpreserved issue.

Further arguments raised in the parties' briefs which are not discussed herein have been determined to lack merit or relevancy to our resolution of this appeal. Nothing in this Opinion prevents either party from filing or prevailing on properly supported future motions to modify custody, parenting time, or child support, provided that applicable standards for modification are met.

CONCLUSION

For the foregoing reasons, we AFFIRM.

ALL CONCUR.

BEFORE: CALDWELL, COMBS, AND EASTON, JUDGES.

PETITIONS FOR REHEARING, ETC.

FILED AND FINALITY ENDORSEMENTS

ISSUED BETWEEN

JULY 24, 2026 AT 10:00 A.M.

AND AUGUST 14, 2026 AT 10:00 A.M.

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

PETITIONS:

Ramsey v. Ramsey, III, 73 K.L.S. 7, p. 29; A petition for rehearing was filed on 7/29/2026. The petition for rehearing was denied on 8/12/2026.

MOTIONS for extension of time to file petitions: None.

FINALITY ENDORSEMENTS:

During the period from July 24, 2026, through August 14, 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).

J.D. v. Com., Cab. for Health and Fam. Servs., 73 K.L.S. 7, p. 22, on 8/13/2026.

Howell v. Baptist Healthcare Sys., Inc., 73 K.L.S. 7, p. 26, on 8/10/2026.

Miller v. Com., 73 K.L.S. 7, p. 20, on 8/3/2026.

RULINGS on petitions previously filed:

York v. Hamlet, 73 K.L.S. 6, p. 17; Petition for rehearing was denied on 7/29/2026.

OTHER: None.

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

McKenzie v. Com., 73 K.L.S. 5, p. 12—735 S.W.3d 543.

Padgett v. Meade County, Kentucky, 73 K.L.S. 1, p. 40—733 S.W.3d 397.

—END OF COURT OF APPEALS—

SUPREME COURT

ATTORNEYS

Denied negotiated sanctions and remanded for further proceedings —

In re: F. Dennis Aldering (2026-SC-0174-KB); In Supreme Court; Opinion and Order entered 8/20/2026. [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).]

This matter is before the Court upon F. Dennis Aldering's Motion for Probated Suspension, pursuant to SCR 3.480(2). His bar number is 00625. Aldering was admitted to practice in 1971. He is at this point, presumably, in his seventies with more than fifty years' experience in the practice of law. Yet and still this is not the first time Aldering has come before this Court upon charges of violating SCR 3.130(1.15)(a), failing to hold client's funds in a separate account, and SCR 3.130(1.15)(e), failure to deposit advance fees in a client account. This is his fourth violation of SCR 3.130(1.15) and fifth violation of our rules of professional conduct overall. Accordingly, we conclude the proposed sanction is inadequate and remand for further proceedings.

As represented by the Office of Bar Counsel's (OBC) response, Aldering

received a \$5,000 unearned fee in the form of a bail refund check in connection with his representation of Summer Oldham. There was no signed fee agreement. Instead of depositing that money into a trust account, he cashed the check and put the money into a drawer in his office, taking it out as he expended time on the case. He kept no records in connection with the funds.

Aldering admits this conduct violated SCR 3.130(1.15)(a)¹ and SCR 3.130(1.15)(e).² Aldering and the OBC contend a sixty-one-day suspension, probated for two years, is consistent with previous cases. We disagree.

¹ "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client, third person, or both in the event of a claim by each to the property."

² "Except for advance fees as provided in 1.5(f), a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."

In *Thompson v. Kentucky Bar Ass'n*, the attorney was given a sixty-one-day suspension, with thirty-one days probated for two years, for several violations of our rules, including the two rules at issue here. 360 S.W.3d 238, 239 (Ky. 2012). But Thompson's past disciplinary history was only a

private reprimand in 2011. *Id.* at 240.

In *Kentucky Bar Ass'n v. Justice*, we imposed a thirty-day suspension upon an attorney for violating five separate rules, including SCR 3.130(1.15)(a). 198 S.W.3d 583, 584 (Ky. 2006). That attorney's disciplinary history was four private reprimands issued by the Inquiry Commission. *Id.*

In *Forbush-Moss v. Kentucky Bar Ass'n*, we imposed a sixty-one-day suspension, probated for two years, for four separate violations of our rules, including the two rules at issue here. 458 S.W.3d 300, 300-01 (Ky. 2015). Although we noted the attorney "does have a past disciplinary record[.]" no detail was given. *Id.* at 302. There are no other published opinions or orders from this Court regarding Mrs. Forbush-Moss other than the one just cited, so we can safely assume these must have been private reprimands. This assumption is buttressed by our citation to *Thompson*, 360 S.W.3d at 239 for support. *Id.*

Finally, the cases the OBC cites in support are all distinguishable as all involved first offenses. For example, the attorney in *Snyder v. Kentucky Bar Ass'n*, "in his forty years of practice, has no disciplinary history in the Commonwealth of Kentucky." 437 S.W.3d 141, 144 (Ky. 2014). For all the other cases, no prior disciplinary history is mentioned in the opinions, and a Westlaw search reveals that no previous cases involving attorney discipline exist for the attorneys. *Ky. Bar Ass'n v. Bubenzer*, 145 S.W.3d 842, 842 (Ky. 2004); *Stanziano-Sparks v. Ky. Bar Ass'n*, 552 S.W.3d 507 (Ky. 2018);³ *Keen v. Ky. Bar Ass'n*, 386 S.W.3d 737 (Ky. 2012).⁴

³ Stanziano-Sparks is currently under temporary suspension for a separate violation. *Inquiry Comm'n v. Stanziano-Sparks*, 653 S.W.3d 881 (Ky. 2022).

⁴ Keen would subsequently violate the conditions of his probated sentence, and we imposed the thirty-day suspension. *Keen v. Ky. Bar Ass'n*, 441 S.W.3d 89, 90 (Ky. 2014). The discipline for the new violations took into account his previous disciplinary history, imposing "a longer probationary period and a potentially longer suspension under these proposed disciplinary actions." *Keen v. Ky. Bar Ass'n*, 443 S.W.3d 607, 608 (Ky. 2014).

Alderding's own disciplinary history is in stark contrast to the cases cited. This is not his first offense, but rather his fifth overall offense, as well as his fourth offense for violating SCR 3.130(1.15). He was given a private reprimand for violating SCR 3.130(1.15)(a) in 2018. He was given a public reprimand for violating SCR 3.130(1.15)(e) in 2023. *Alderding v. Ky. Bar Ass'n*, 671 S.W.3d 137, 139 (Ky. 2023). But Alderding was suspended from the practice of law for ninety days for violating SCR 3.130(1.15) in 2001. *Ky. Bar Ass'n v. Alderding*, 57 S.W.3d 297, 298 (Ky. 2001). Our opinion in 2023 made no mention of the 2001 case, and the OBC makes no mention of it in its response to Alderding's motion now under consideration. Alderding made no mention of any of his past disciplinary actions in his motion. As the OBC accurately notes, "his disciplinary history demonstrates a pattern of similar violations related to these rules, occurring even after his participation in the Trust Account

Management Program." Lastly, Alderding was also publicly reprimanded for violating SCR 3.130(8.3)(c) in 1996. *Ky. Bar Ass'n v. Alderding*, 929 S.W.2d 190, 191 (Ky. 1996). No mention of this case is found in our 2023 opinion or the OBC's response to Alderding's present motion.

Given Alderding's repeated violations of the same rule over the course of his career, a probated suspension for a fourth violation of the same rule is too lenient. Alderding paid the piper for his violation of SCR 3.130(1.15) back in 2001 with a ninety-day suspension, and his repeated violations of this rule since 2018 represent a backsliding that has heretofore been treated with leniency.

It is rare for an attorney to be disciplined four separate times involving the same rule over the course of his career. Nor are we aware of any other instance in which the first offense merited a suspension, yet subsequent offenses for violating the same rule were treated with the lesser sanction of reprimands. Typically, the opposite occurs, and subsequent offenses are treated with increasing severity. See e.g., *Justice v. Ky. Bar Ass'n*, 232 S.W.3d 527, 528 (Ky. 2007) (rejecting agreed upon sanction of thirty days' suspension because attorney had previously received a thirty-day suspension "for conduct nearly identical to that recited herein." A sixty-day suspension was instead imposed.). Whether our private and public reprimands of Alderding in 2018 and 2023, without seemingly taking into account the suspension in 2001, was done mistakenly or intentionally is of no moment. The fact remains Alderding has received lenient treatment the last two times he has violated SCR 3.130(1.15), yet he continues to violate the same rule. The camel's back is now broken.

For the aforementioned reasons, we reject the proposed discipline.

ACCORDINGLY, IT IS ORDERED THAT:

1. F. Dennis Alderding's motion for this Court to impose a sixty-one-day suspension, probated for two years with conditions, is **denied**.

2. Alderding's KBA file shall be remanded to the KBA for further disciplinary proceedings pursuant to SCR 3.480(2). In the event Alderding and Bar Counsel fail to reach a different proposal for consensual discipline within ninety days after the date of this order, the matter shall proceed as a contested matter in accordance with the Supreme Court Rules and any subsequent orders of this Court.

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

ENTERED: August 20, 2026.

AUTOMOBILE ACCIDENT

INSURANCE

BASIC REPARATION BENEFITS (BRB)

EXAMINATION UNDER OATH (EUO)

INSURANCE COMPANY'S QUESTIONS DURING AN EUO CONCERNING POSSIBLE STATUTORY MISCONDUCT BY THE PLAINTIFF'S HEALTHCARE PROVIDER

SOLICITATION OF THE PATIENT

INSURANCE FRAUD

CONSUMER PROTECTION ACT (CPA)

On January 24, 2022, plaintiff was sideswiped by another driver — Police classified the incident as a minor, non-injury collision — Plaintiff did not receive any medical treatment at the scene — On January 31, 2022, plaintiff applied for basic reparation benefits (BRB), also known as personal injury protection (PIP) benefits or no-fault benefits, with her reparation obligor (Allstate) — Application stated that she had been injured in January 24 accident and listed injuries as neck, shoulders, right hip down to leg, and stiff neck — Plaintiff stated that she had not gone to a hospital, but was instead treated by Iroquois Chiropractic (Iroquois) — Other driver's insurer eventually settled plaintiff's injury claim exclusive of BRB — Plaintiff participated in an examination under oath (EUO) at Allstate's request pursuant to terms of her policy — Allstate asked plaintiff basic background questions and then asked her to describe what happened before, during and immediately after accident up until the time she spoke with police — Allstate then asked plaintiff how she found Iroquois — Plaintiff's attorney instructed plaintiff not to answer — EUO was concluded without further questioning — Allstate did not deny plaintiff's BRB claim outright based on alleged failure to cooperate with its investigation — Instead, Allstate filed a petition under KRS 304.39-280(3) requesting order requiring plaintiff to submit to EUO regarding "her knowledge of the facts and circumstances surrounding" the accident — Allstate noted that, as an insurance carrier, it had a duty to deter and investigate fraudulent insurance acts — Further, during its investigation, Allstate had uncovered concerning issues — Primarily, Allstate stated that Iroquois is a medical provider that was known by Allstate to solicit patients in violation of KRS 367.4082(1) of the Consumer Protection Act (CPA), which states that a healthcare provider shall not solicit a person involved in a motor vehicle accident for the provision of reparation benefits during the first 30 days following the accident — Allstate also believed that plaintiff's claimed injuries

were too significant for her minor collision; that Iroquois may have billed her for services it did not render; and that Iroquois may have billed for treatment to areas of her body that were not injured in the accident — At the hearing on Allstate's petition, Allstate clarified that it was not accusing plaintiff of anything illegal — Further, if Allstate's investigation found that plaintiff had been solicited by Iroquois, neither Allstate nor plaintiff would owe Iroquois for her treatment — Trial court entered opinion and order granting Allstate's request to "finish" its initial EUO — Trial court later entered a second order clarifying that questioning shall include questions regarding alleged injuries from the accident, medical treatment from the accident, and solicitation — Further, at least 10 days prior to EUO, plaintiff was to provide all documents in her possession related to the claims she is making against Allstate with respect to the accident — Court of Appeals affirmed — Plaintiff appealed — AFFIRMED — Motor Vehicle Reparations Act (MVRA) is a remedial statutory scheme and must be liberally construed to effectuate its beneficial purposes for motor vehicle accident victims — Trial court did not err by granting Allstate's petition for further questioning under oath pursuant to KRS 304.39-280(3) — A petition under KRS 304.39-280(3) may be granted only "for good cause shown" — A good cause determination is one of reasonableness to be determined by the particular facts of each case — CR 35.01, which concerns involuntary medical examinations, provides guidance on "good cause" — Good cause requires that movant demonstrate that the issue is genuinely in controversy — Further, good cause is shown when information of the same degree of reliability is not available from another source and it is useful in the preparation, trial, or disposition of the cause — Solicitation and insurance fraud are proper subjects for an obligor to explore during an EUO — Pursuant to *State Farm Mut. Auto. Ins. Co. v. Adams* (Ky. 2017), if MVRA provides a means to obtain a particular category of information, an obligor must utilize the means provided for under MVRA to obtain it; however, if MVRA does not provide a means to obtain certain information, and does not otherwise forbid it, an obligor may use an EUO to attempt to obtain that information — MVRA is silent on the matter of illegal solicitation and does not provide a statutory means for an obligor to obtain information on illegal solicitation — KRS 367.4082(1) of CPA addresses non-solicitation for 30 days after a motor vehicle accident, but does not provide a means for an obligor to obtain information on solicitation — Thus, allowing an obligor to ask questions during an EUO regarding whether a claimant was solicited does not run afoul of *Adams* — Whether a claimant was unlawfully solicited falls under the umbrella of "circumstances surrounding the accident" in *Adams* — Solicitation does not fall under the umbrella of information about "a claimant's medical condition" — MVRA does

discuss benefits that are paid as the result of "intentional misrepresentations of material fact" — Iroquois' allegedly fraudulent acts fall within this category; however, MVRA does not contain any means for an obligor to obtain information about those potential misrepresentations — Thus, it is proper for Allstate to ask plaintiff questions regarding whether Iroquois perpetrated fraud — Under *Adams*, Allstate must utilize the means provided by the MVRA to obtain plaintiff's treatment records — However, those records alone do not answer the issue of whether Iroquois' billing practices were fraudulent — Thus, Allstate can ask plaintiff if treatment billed by Iroquois was actually performed on plaintiff — Kentucky Supreme Court noted that Allstate has not yet paid plaintiff's BRB claim or formally denied it — Absent a formal denial, Allstate should not have withheld payment of BRB claim — Thus, to the extent permitted, reparation obligors may question their claimants in an effort to investigate potentially illegal activity on behalf of medical providers, but they may not withhold payment of BRB while they do so — Rather, they must pay those expenses to claimants monthly as they accrue, and, if their suspicions of illegal activity are substantiated, they must seek repayment of those monies as provided under KRS 304.39-210(4) of the MVRA and/or KRS 367.4083 of the CPA —

Dayelin Gonzalez Alvarez v. Allstate Property and Casualty Insurance Company (2024-SC-0348-DG); On review from Court of Appeals; Opinion by Chief Justice Lambert, *affirming*, rendered 8/20/2026. [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).]

Dayelin Gonzalez Alvarez (Alvarez) was involved in a motor vehicle accident and filed a claim for basic reparation benefits (BRB) from Allstate Property and Casualty Insurance Company (Allstate), her reparation obligor. Per Allstate's request, Alvarez participated in an examination under oath (EUO), but her attorney refused to allow her to answer questions concerning possible statutory misconduct by her healthcare provider.

Allstate filed a petition in Jefferson Circuit Court pursuant to KRS 304.39-280(3) requesting to ask her such questions. The circuit court granted Allstate's petition and ruled it could ask her about whether she was unlawfully solicited by her healthcare provider and whether her healthcare provider had engaged in fraudulent billing practices. Alvarez appealed that ruling, and the Court of Appeals affirmed. After review, we hold that the trial court did not err by granting Allstate's petition for further questioning, nor did it err by allowing Allstate to ask Alvarez questions regarding potential illegal solicitation and fraudulent billing practices.

¹ Kentucky Revised Statutes.

I. FACTS AND PROCEDURAL BACKGROUND

On January 24, 2022, Alvarez was traveling on

I-65 in Jefferson County when the right side of her vehicle was sideswiped by another driver. The police report from the incident classified it as a minor, non-injury collision and noted that Alvarez did not receive any medical treatment at the scene. On January 31, 2022, Alvarez applied for BRB—also known as personal injury protection (PIP) benefits or no-fault benefits—with Allstate, her reparation obligor. Her application asserted that she had been injured as a result of the January 24 accident, and listed her injuries as "neck, shoulders, right hip down to leg, stiff neck." It further stated that she had not gone to a hospital for medical treatment but had instead been treated by Iroquois Chiropractic (Iroquois). At some point following the accident, the other driver's insurer settled Alvarez's injury claim exclusive of BRB.

Four months after submitting her BRB application, Alvarez participated in an EUO at Allstate's request pursuant to the terms of her policy, which stated, *inter alia*:

A person making a claim must:

...

3. Cooperate with **us** in **our** effort to investigate the accident or loss and settle any claims.

4. Allow **us** to take signed and recorded statements, including sworn statements and examinations under oath, separately and apart from others, and answer all reasonable questions **we** may ask as often as **we** may reasonably require.

During Alvarez's brief EUO, Allstate asked her basic background questions such as her personal information and place of employment. It then asked her to describe what occurred before, during, and immediately after the collision up until the time she spoke with police at the scene. Thereafter, Allstate asked, "How did you find Iroquois Chiropractic that you went to?" This garnered an objection from Alvarez's attorney, who asserted that line of questioning "doesn't have anything to do with the facts and circumstances of the accident[.]" and instructed her not to answer. The EUO was concluded without further questioning.

Rather than denying Alvarez's BRB claim outright based on an alleged failure to cooperate with its investigation, Allstate filed a "Petition under KRS 304.39-280(3)" in Jefferson Circuit Court, requesting an "order requiring [Alvarez] to submit to an [EUO] regarding her knowledge of the facts and circumstances surrounding" the accident. Allstate asserted that, as an insurance carrier authorized to conduct business in Kentucky, it had a duty pursuant to KRS 304.47-080(1) "to deter and investigate fraudulent insurance acts[.]" It additionally argued, citing *Temple v. State Farm Mut. Ins. Co.*, 548 S.W.2d 838 (Ky. 1977) and *State Farm Mut. Auto. Ins. Co. v. Adams*, 526 S.W.3d 63 (Ky. 2017), that an insurance carrier has a right to enforce conditions precedent to coverage. Those conditions include, *inter alia*, requiring a claimant to submit to an EUO and to cooperate with the carrier's investigation of the claim.

Allstate's petition further recounted several concerns it had developed as a result of its investigation into Alvarez's claim. Primarily, it contended that Iroquois is a medical provider

that was known by Allstate to solicit patients in violation of KRS 367.4082(1) (“During the first thirty (30) days following a motor vehicle accident a healthcare provider . . . shall not . . . solicit a person involved in a motor vehicle accident for the provision of reparation benefits, as defined by KRS 304.39-020(2)). Allstate also believed that Alvarez’s claimed injuries were too significant for such a minor collision, that her treatment may have been performed by an unlicensed individual, that Iroquois may have billed her for services it did not render, and that it may have billed for treatment to areas of her body that were not injured in the accident. Allstate’s petition specifically listed the following lines of inquiry it wished to pursue during its questioning of her based on the foregoing concerns:

- a) Standard background information, including, but not limited to, name, address, previous addresses, co-residence, education history, work history, etc.;
- b) Detailed testimony of all the facts and circumstances regarding the subject accident;
- c) Complete testimony relative to all claims, injuries, and bills which respondent is submitting as a result of this subject accident;
- d) Detailed testimony regarding any communications between [Alvarez] and others regarding this accident;
- e) Detailed testimony regarding pre-existing medical conditions and injuries and related bills arising out of her prior accidents;
- f) Detailed testimony regarding claim history; and
- g) Detailed testimony regarding solicitation.

It further stated that it intended to ask questions that included “in-depth factual details surrounding the subject accident, injuries sustained in the subject accident[,] and the medical treatment [Alvarez] received as a result of the collision.”

During the August 31, 2022, hearing on Allstate’s petition, counsel for Allstate alleged that certain chiropractors in Louisville hire “runners” that monitor chatter on police scanners and go to the scenes of accidents. The runners will then solicit accident victims in violation of state law. Allstate explained that it was concerned Alvarez was unlawfully solicited by Iroquois and was further concerned that Iroquois had engaged in insurance fraud. Allstate clarified that it was not accusing Alvarez of anything untoward; it simply wanted access to information she had regarding her treatment about which it did not expect Iroquois to be forthcoming.

Allstate further expounded that Kentucky’s anti-solicitation statutes provide that any medical bills that result from illegal solicitation are void. KRS 367.4083. Accordingly, if Allstate’s investigation established that Alvarez had been solicited by Iroquois, neither Allstate nor Alvarez would owe Iroquois for her treatment. This would in turn benefit Alvarez because she would have access to more BRB monies than she otherwise would have if the bills issued by Iroquois were not voided. Allstate contended it was illogical for Alvarez’s

counsel to forbid such questions when no prejudice to her could result from them.

Alvarez’s counsel responded that *Adams* did not permit Allstate to ask questions that were unrelated to the facts and circumstances of the accident and that the questions it sought to ask fell squarely outside of what *Adams* allows. Counsel argued Allstate should be required to follow the law and should not be permitted to vex his client by co-opting her into its investigation.

Following the hearing, the circuit court entered an opinion and order on October 14 granting Allstate’s request to “finish” its initial EUO via a second round of questioning under oath. It found:

Allstate has been investigating the circumstances around Ms. Alvarez’s claim, including a first EUO on April 4, 2022. As part of their investigation, Allstate has developed suspicions that Ms. Alvarez may have been improperly solicited for medical care the day after the accident. Allstate now seeks a second EUO to further investigate “the circumstances surrounding the accident.” [*Adams*, 526 S.W.3d at 68]. Ms. Alvarez objects to this second EUO, arguing that Allstate already gathered all the information it needs at the first EUO.

Kentucky law does not prohibit a second EUO, and the circumstances of this case warrant it. EUO’s (sic) are permissible for investigating the circumstances surrounding an accident. *Adams*, 526 S.W.3d at 68. While Ms. Alvarez would limit the circumstances to just the accident itself, the scope is necessarily broader. The medical care received as a result of an accident logically falls under the circumstances surrounding an accident. If insurance companies are required to investigate claims to prevent fraud, then they must be able to carry out those investigations. KRS 304.47-080. Allstate’s request here is proper and not an attempt to unduly harass or delay Ms. Alvarez and her claim.

The court ordered that a second EUO take place within thirty days of the issuance of the order. However, the parties thereafter disputed what questioning the order permitted: counsel for Alvarez believed it allowed Allstate to ask questions “about medical treatment and injuries[,]” but did not allow it to ask questions about solicitation. Counsel for Allstate believed the antisolicitation statutes were clearly the crux of the hearing and order, but nevertheless filed a motion to enforce the court’s October 14 opinion and order. The court held a hearing on Allstate’s motion to enforce and reiterated that it meant what it said in its initial order: Alvarez must participate in a second round of questioning under oath and answer Allstate’s questions, solicitation questions included. However, it cautioned Allstate that the questioning should not take more than a few hours and that the court would not allow it to become a weeks-long investigation.

On November 30, the court entered a second order that counsel for Allstate had previously tendered as an attachment to its motion to enforce. The order provided that the questioning “shall include questioning regarding[] alleged injuries from subject accident, medical treatment for subject accident[,] and solicitation[,]” and “shall also include questioning on all other matters Allstate has outlined within their petition.” It further ordered

Alvarez to produce the following at least ten days prior to the date of the questioning:

1. All documents in [her] possession which support, or which are related to, any and all claims [she] is making to Allstate regarding this accident, including, but not limited to, correspondence, medical and treatment records, medical bills, receipts, employment records[,] and evidence to support the occurrence of this accident and how it occurred.
2. Any damage estimates, repair records, photographs or video of the vehicles involved in this accident, prior to and following the subject accident.

The court struck the portion of the proposed order that requested Alvarez’s telephone records from January 25, 2022, to January 31, 2022. Alvarez thereafter filed a notice of appeal to the Court of Appeals, which challenged both the October 14 and November 30 circuit court orders.

A split Court of Appeals panel affirmed. *Alvarez v. Allstate Prop. & Cas. Ins. Co.*, No. 2023-CA-0013-MR, 2024 WL 3210270, at *2 (Ky. App. June 28, 2024). The majority reasoned that because claimants are only “entitled to receive BRB for motor vehicle accident-related losses, reparation obligors are entitled to conduct a reasonable investigation to determine if such relationship exists.” *Id.* To expedite those investigations, it went on, the Kentucky Motor Vehicle Reparations Act (MVRA) provides for the disclosure of certain information by a claimant, and when a dispute arises regarding what information must be disclosed, KRS 304.39-280(3) allows an obligor to petition the appropriate circuit court for further discovery, including questioning under oath. *Id.* Alvarez asserted that the scope of that questioning must be limited to the accident itself. *Id.* The Court of Appeals rejected this argument, and agreed with the circuit court’s conclusion that “the scope is necessarily broader.” *Id.* It explained that

As in *Adams*, some of the issues listed by Allstate pertained to the acquisition of accident-related information. Moreover, Allstate’s claim investigation deemed Alvarez’s claim suspicious. Indeed, the day after the accident, Alvarez went to a medical provider known by Allstate to solicit in violation of Kentucky law. Further, the medical provider billed Alvarez for an “extensive amount of chiropractic treatment” resulting from a “non-injury collision” with “minor” damage to both vehicles. Allstate further expressed concerns that the medical provider billed for services not rendered and that an unlicensed individual performed the treatments allegedly rendered to Alvarez.

Id. at *3. It accordingly held that the circuit court did not abuse its discretion in finding that Allstate had demonstrated good cause under KRS 304.39-280(3) for further questioning. *Id.*

Alvarez filed a motion for discretionary review of the Court of Appeals’ opinion with this Court. We granted her motion and heard oral arguments, and this case is now before us for decision. Additional facts are discussed below as necessary.

II. ANALYSIS

This matter requires this Court to address two issues: (1) whether the circuit court erred in finding good cause to grant Allstate's petition for further questioning under KRS 304.39-280; and (2) as a matter of first impression, whether the circuit court violated *Adams* by permitting the substance of that questioning to include inquiries regarding alleged illegal solicitation and insurance fraud.

Although this appeal presents matters of first impression, we do not paint on a blank canvas. As always, our primary obligation is to honor the language of, and policy considerations behind, the MVRA. KRS 304.39-010, *et seq.* Over five decades ago now, the General Assembly adopted the MVRA to serve the following purposes:

(1) To require owners, registrants and operators of motor vehicles in the Commonwealth to procure insurance covering basic reparation benefits and legal liability arising out of ownership, operation or use of such motor vehicles;

(2) To provide prompt payment to victims of motor vehicle accidents without regard to whose negligence caused the accident in order to eliminate the inequities which fault-determination has created;

(3) To encourage prompt medical treatment and rehabilitation of the motor vehicle accident victim by providing for prompt payment of needed medical care and rehabilitation;

(4) To permit more liberal wage loss and medical benefits by allowing claims for intangible loss only when their determination is reasonable and appropriate;

(5) To reduce the need to resort to bargaining and litigation through a system which can pay victims of motor vehicle accidents without the delay, expense, aggravation, inconvenience, inequities and uncertainties of the liability system;

(6) To help guarantee the continued availability of motor vehicle insurance at reasonable prices by a more efficient, economical and equitable system of motor vehicle accident reparations;

(7) To create an insurance system which can more adequately be regulated; and

(8) To correct the inadequacies of the present reparation system, recognizing that it was devised and our present Constitution adopted prior to the development of the internal combustion motor vehicle.

KRS 304.39-010 (emphasis added). Put simply, the legislature recognized the delay in coverage and general mayhem that resulted from our previous system of requiring a fault determination prior to allowing individuals involved in motor vehicle accidents to obtain coverage for medical care and other losses. It therefore implemented our current no-fault system that mandates a maximum of \$10,000.00 in BRB to be paid for qualifying losses regardless of who was at fault for the underlying accident. KRS 304.39-010(2), (3); KRS 304.39-040(1) ("Basic reparation benefits shall be paid without regard to fault."). BRB "are

payable monthly as loss accrues[.]" unless the obligor rejects the claim and provides written notice and an explanation for the rejection. KRS 304.39-210(1), (5).

Thus, the MVRA is a remedial statutory scheme and must be liberally construed to effectuate its beneficial purposes for motor vehicle accident victims. *Coleman v. Bee Line Courier Serv., Inc.*, 284 S.W.3d 123, 130 (Ky. 2009) (collecting cases). In order to effectuate those beneficent purposes, the MVRA directs that "[i]f the accident causing injury occurs in this Commonwealth every person suffering loss from injury arising out of maintenance or use of a motor vehicle has a right to reparation benefits[.]"² KRS 304.39-030(1) (emphasis added). Those benefits include, *inter alia*, medical expenses which are defined under the Act as "reasonable charges incurred for reasonably needed products, services, and accommodations[.]" KRS 304.39-020(5)(a). And, significantly, the Act directs that "[t]here shall be a presumption that any medical bill submitted is reasonable." *Id.* (emphasis added).

² Unless that right has been explicitly rejected pursuant to KRS 304.39-060(4).

A. The circuit court did not err by granting Allstate's petition for further questioning under oath pursuant to KRS 304.39-280(3).

The threshold issue before us is whether the circuit court erred by finding that Allstate demonstrated good cause to grant its petition for further questioning of Alvarez under oath. The MVRA provides, in relevant part, that

[i]n case of dispute as to the right of a claimant or reparation obligor to discover information required to be disclosed, the claimant or reparation obligor may petition the Circuit Court in the county in which the claimant resides for an order for discovery including the right to take written or oral depositions. Upon notice to all persons having an interest, the order may be made for good cause shown.

KRS 304.39-280(3). Accordingly, a petition under KRS 304.39-280(3) may be granted only "for good cause shown." A good cause determination "is essentially one of reasonableness to be determined by the particular facts of each case." *Deadwyler v. Grange Prop. & Cas. Ins. Co.*, 697 S.W.3d 539, 543 (Ky. App. 2024) (quoting *Nichols v. Ky. Unemployment Ins. Comm'n*, 677 S.W.2d 317, 321 (Ky. App. 1984)). This Court must accordingly review the circuit court's decision to grant Allstate's petition under the deferential abuse of discretion standard, *id.*, and will affirm unless the circuit court's "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

As the Court of Appeals previously observed in *Deadwyler*, "[s]cant jurisprudence exists illuminating an answer to the question when a party petitioning for an EUO has adequately shown good cause." 697 S.W.3d at 544. Nevertheless, it went on to conclude, and we agree, that the case law concerning CR³ 35.01 provides sufficient "guidance by analogy." *Id.* CR 35.01 permits a court to order a party or a person in the custody of or under the legal control of a party to submit to an

involuntary medical examination (IME). Similar to a petition under KRS 304.39-280(3), an order for an IME under CR 35.01 may be granted "only on motion for good cause shown and upon notice to the person to be examined and to all parties[.]" As the *Deadwyler* Court explained:

Good cause under CR 35.01 requires the movant to demonstrate that the issue the movant seeks to resolve by IME "is really and genuinely in controversy[.]" *Metro. Prop. & Cas. Ins. Co. v. Overstreet*, 103 S.W.3d 31, 39 (Ky. 2003) (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964)). Further, "[g]ood cause is shown when information of the same degree of reliability is not available from another source and it is useful in the preparation, trial, or disposition of the cause." *Perry v. Commonwealth, ex rel. Kessinger*, 652 S.W.2d 655, 660 (Ky. 1983). A CR 35.01 motion should be denied "[o]nly if no additional relevant information could be gleaned from such an examination[.]" *Taylor v. Morris*, 62 S.W.3d 377, 380 (Ky. 2001) (citing *Duncan v. The Upjohn Co.*, 155 F.R.D. 23, 25 (D. Conn. 1994)).

697 S.W.3d at 544 (internal parallel citations omitted).

³ Kentucky Rules of Civil Procedure.

Point being, "good cause" is by no means a high bar, and in this case Allstate's petition certainly satisfied it. Alvarez, Allstate's insured, was in a minor car accident and sought BRB for treatment she received from a chiropractor. Allstate contended that the chiropractor was "known by" it to unlawfully solicit motor vehicle accident victims. Allstate was also concerned that the chiropractor had engaged in fraudulent billing practices based on the disparity between the minor nature of the accident and the bills it received in relation to Alvarez's treatment. How Alvarez came to treat with Iroquois, and whether the treatment it billed for corresponded with the treatment she actually received, assuming she remembers, are both matters within Alvarez's knowledge.

Although Alvarez participated in an EUO, as required by her policy, her counsel instructed her not to answer Allstate's questions about potential solicitation by Iroquois. And, given her counsel's consistent stance that the "circumstances of the accident" under *Adams* is limited to the accident itself, he presumably would have done the same for any questions regarding fraudulent billing. As Allstate believed it was entitled to information about those subjects, a dispute arose "as to the right of [the] . . . reparation obligor to discover information required to be disclosed[.]" KRS 304.39-280(3). Because we conclude below that solicitation and insurance fraud are proper subjects for an obligor to explore during an EUO, we cannot conclude that the circuit court's finding of good cause for additional questioning "was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

B. The circuit court did not err by permitting Allstate's questioning to include inquiries about potential solicitation and insurance fraud.

The next issue we must address is whether the

circuit court erred in permitting the content of Allstate's questioning to include questions about solicitation and insurance fraud. The questions a reparation obligor is or is not permitted to ask during questioning under oath is a question of law we review *de novo*, affording no deference to the circuit court's ruling. See *Adams*, 526 S.W.3d at 65 (citing *Cumberland Valley Contractors, Inc. v. Bell Cnty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007)).

Our jurisprudence's leading case on this issue is *Adams*. In *Adams*, State Farm insured a vehicle owned by Milton Mitchell. 526 S.W.3d at 64. Mitchell was stopped at a red light with three passengers—Roniesha Adams, her minor child, and the child's father, Barry—when another vehicle struck him in the rear and fled the scene. *Id.* Mitchell, Adams, and Barry each asserted claims against State Farm seeking BRB and uninsured motorist coverage under Mitchell's policy. *Id.* State Farm initially made those payments, but suspended them after its investigator obtained inconsistent, unsworn statements from the trio regarding "where they were going that day, where they had been, and what happened when they were hit." *Id.* State Farm was also suspicious of the fact that Adams and Barry had been in several motor vehicle accidents the year prior. *Id.* Seeking to resolve its concerns, State Farm informed Mitchell, Adams, and Barry that Mitchell's policy⁴ required them to submit to questioning under oath regarding four issues:

Whether the bodily injury or property damage was caused by the accident.

Whether the injury was caused by a hit-and-run motor vehicle, so as to qualify as an uninsured motor vehicle under the Uninsured Motor Vehicle coverage.

Whether the accident arose out of the ownership, maintenance, or use of an uninsured motor vehicle as defined in the policy.

If [Mitchell, Adams, or Barry] . . . has made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under [the] policy.

Id. Mitchell participated in questioning, and State Farm provided coverage to him. *Id.* at 65. Adams and Barry, however, refused to submit to questioning, and State Farm denied them any further payments. *Id.* Adams and Barry sued State Farm, and State Farm filed a counterclaim seeking a declaratory judgment that it did not have to provide them coverage because they failed to cooperate in its investigation. *Id.* The circuit court ruled in State Farm's favor, finding that "[u]nder the terms of the policy, the plaintiffs failed to cooperate in the investigation of their claims, thus their claims for BRB and uninsured motorist benefits are barred." *Id.* Adams appealed, Barry did not, and the Court of Appeals reversed based on its holding that State Farm had to obtain a court order before it could require Adams to sit for questioning under oath. *Id.*

⁴ Mitchell's policy, like Alvarez's policy, mandated any individual seeking coverage to "submit to an examination under oath, provide a statement under oath, or do both as reasonably often as [the obligor may] require." *Id.* at 64 n.1.

Thus, the *Adams* Court addressed "whether [a reparation obligor] is permitted unilaterally to require that a person seeking coverage undergo questioning under oath[.]" as well as what the substance of that questioning may entail. *Id.* at 64, 67-68. As to the first issue, the Court held that "[b]ecause a claimant is only entitled to receive BRB for motor vehicle accident-related losses, reparation obligors are entitled to conduct a reasonable investigation to determine if such a relationship exists[.]" and that "nothing in the MVRA [prevented] State Farm from requiring a person seeking benefits under the policy to submit to a statement under oath as to the circumstances surrounding the accident." *Id.* at 66, 68; accord *Temple*, 548 S.W.2d at 840.

As for what State Farm was permitted to ask during that questioning, the Court first discussed that the MVRA provides mechanisms for the disclosure of information concerning a claimant's medical information. *Id.* at 66-67. Specifically, KRS 304.39-280(1)(b) directs that

[t]he claimant shall deliver to the reparation obligor a copy of every written report, previously or thereafter made, relevant to the claim, and available to him, concerning any medical treatment or examination of a person upon whose injury the claim is based and the names and addresses of physicians and medical care facilities rendering diagnoses or treatment in regard to the injury or to a relevant past injury, and the claimant shall authorize the reparation obligor to inspect and copy relevant records of physicians and of hospitals, clinics, and other medical facilities.

Id. at 66 (emphasis added). It further noted KRS 304.39-280(3)'s means of resolving a dispute regarding discoverable evidence via a petition for further discovery, as well as KRS 304.39-270(1)'s authorization for an obligor to "petition the circuit court for an order directing the [claimant] to submit to . . . examination by a physician[.]" if the mental or physical condition of the claimant is material to a BRB claim. *Id.* at 67. Accordingly, the *Adams* Court concluded that "the MVRA provides for the disclosure of medical information, and it provides a method to obtain that information if it is not forthcoming and a method to resolve disputes regarding a claimant's physical and mental condition." *Id.* (emphasis added). "However," it went on, "the MVRA does not specifically provide for the disclosure of information regarding the underlying motor vehicle accident." *Id.* (emphasis added). The Court therefore concluded that

because the MVRA specifically provides for the sharing of documentation regarding a claimant's medical condition and methods for resolving disputes regarding failure to provide that documentation as well as for resolving disputes regarding a claimant's mental or physical condition, a reparation obligor must avail itself of the provisions of the MVRA to resolve such issues. A reparation obligor cannot attempt to resolve those issues through "questioning under oath" or any other similar procedure that is outside the boundaries established by the MVRA.

Id. at 68. Notwithstanding, it determined that "nothing in the MVRA prevents [a reparations obligor] from requiring a person seeking benefits

under [a] policy to submit to a statement under oath as to the circumstances surrounding the accident." *Id.*

The Court then went on to address the four specific categories of questioning State Farm sought via questioning of Adams under oath. *Id.* As to the first—"whether bodily injury or property damage was caused by the accident"—the Court held "[involved] medical information and State Farm should have pursued resolution of that issue through the provisions of the MVRA." *Id.* The second and third issues—"whether injury was caused by a hit-and-run vehicle[.]" and "whether the accident arose out of the ownership, maintenance, or use of an uninsured motor vehicle"—the Court held were "related to the accident itself and are proper subjects for questioning under oath." *Id.* As to the fourth and final issue—"whether Adams had made false statements in connection with her claim"—the Court held it may have "[involved] both medical and accident-related questions[.]" and any medical-related questions should have been pursued through the MVRA. *Id.* In sum, "[b]ecause some of the issues listed by State Farm involved the acquisition of accident-related information, the circuit court correctly found that Adams was required to submit to questioning under oath regarding those issues as a condition precedent to coverage." *Id.*

Although *Adams* is distinguishable in some ways on its facts,⁵ its practical takeaway that is applicable for our purposes is this: if the MVRA provides a means to obtain a particular category of information, an obligor must utilize the means provided for under the MVRA to obtain it. But, if the MVRA does not provide a means to obtain certain information, and does not otherwise forbid it, an obligor may use an EUO to attempt to obtain that information. With this tenet as our guidepost, we now address whether solicitation and insurance fraud are proper subjects for questioning in an EUO.

⁵ By way of example: In *Adams*, the obligor initially made payments to the claimants but thereafter suspended the payments and ultimately denied the claim based on the claimant's refusal to sit for an EUO as a condition precedent to coverage. Here, Alvarez participated in an EUO, and Allstate has never made BRB payments to Alvarez nor formally denied her claim. And, in *Adams*, the obligor suspected the claimant of misconduct whereas, here, Allstate suspects a healthcare provider of misconduct.

1) Solicitation

The MVRA is altogether silent on the matter of illegal solicitation. Rather, the statutes concerning solicitation are housed within Kentucky's Consumer Protection Act (CPA). KRS 367.4082(1) of the CPA directs that

[d]uring the first thirty (30) days following a motor vehicle accident a healthcare provider or an intermediary, at the request or direction of a healthcare provider, shall not solicit⁶ or knowingly permit another individual to solicit a person involved in a motor vehicle accident for the provision of reparation benefits, as defined by KRS 304.39-020(2).

It further provides that “[a]ny charges owed by, or on behalf of, a person involved in a motor vehicle accident for health services rendered by a healthcare provider to the person, in violation of KRS 367.4082, shall be void[.]” and that

[a]ny charges billed and paid by, or on behalf of, a person of a motor vehicle accident for health services rendered by a healthcare provider to the person, in violation of KRS 367.4082, shall be returned to the reparations obligor or other payor. The healthcare provider who violates KRS 367.4082 shall not pursue collection from the person.

KRS 367.4083(1)-(2). As the MVRA does not address solicitation, it does not provide a statutory means for an obligor to obtain information regarding whether a claimant was unlawfully solicited. The CPA likewise does not provide a means for an obligor to obtain that information. It therefore would not run afoul of *Adams* to permit an obligor to ask questions during an EUO regarding whether a claimant was solicited.

⁶ KRS 367.4081(4)(a) defines “solicit” as

the initiation of communication with a person involved in a motor vehicle accident, including but not limited to any face-to-face contact with the person, in writing, electronically, or by any form of telephonic communication, in anticipation of financial gain or remuneration for the communication itself or for prospective charges for healthcare services.

Public advertising; telemarketing which is taken from a general list of phone numbers, is not directed at motor vehicle accident victims, and does not violate Kentucky’s prohibition on telephone solicitation under KRS 367.46951 to 367.46999 and 367.990; and contact between a healthcare provider and an individual with a pre-existing provider-patient relationship with that provider are excluded from the definition of “solicit.” KRS 367.4081(4)(b).

Additionally, we conclude that whether a claimant was unlawfully solicited following an automobile accident falls under the umbrella of “circumstances surrounding the accident[.]” pursuant to *Adams*. 526 S.W.3d at 68. In other words, although Alvarez asserts that phrase should be limited to the accident itself, we agree with both of the lower courts’ conclusions that it must necessarily be broader. And, at any rate, solicitation certainly does not fall under the umbrella of information about “a claimant’s medical condition[.]” *Id.* at 68. Based on the foregoing, the circuit court did not err in permitting Allstate to inquire about Alvarez’s potential solicitation via questioning under oath.

2) Intentional Misrepresentations of Fact

Unlike solicitation, the MVRA does discuss benefits that are paid as the result of “intentional misrepresentations of material fact.” KRS 304.39-210(4). We conclude that the fraudulent acts that Allstate suspects Iroquois of committing in this case—billing for unrendered services, billing for treatment to body parts not injured in the subject accident, and/or allowing an unlicensed individual to provide treatment—would fall into this category.

However, the statutory provision that discusses said misrepresentations does not contain any means for an obligor to obtain information about those potential misrepresentations. Rather, it simply states:

A reparation obligor may bring an action to recover benefits which are not payable, but are in fact paid, because of an intentional misrepresentation of a material fact, upon which the reparation obligor relies, by the insured or by a person providing an item of medical expense. The action may be brought only against the person providing the item of medical expense, unless the insured has intentionally misrepresented the facts or knows of the misrepresentation. An insurer may offset amounts he is entitled to recover from the insured under this subsection against any basic or added reparation benefits otherwise due.

KRS 304.39-210(4). There is no other provision in the MVRA that provides a means to obtain information regarding whether a healthcare provider has perpetrated the kind of fraud that Allstate alleges. Thus, we conclude it is proper for Allstate to ask questions of Alvarez, to the extent she can answer them, regarding whether Iroquois perpetrated fraud and affirm the circuit court’s ruling in that regard.

Certainly, consistent with *Adams*, Allstate must utilize the means provided by the MVRA to obtain Alvarez’s treatment records. But those records, alone, do nothing to illuminate the issue of whether Iroquois’ billing practices were fraudulent. For example, Allstate could obtain Alvarez’s treatment records through KRS 304.39-280. It could then use the EUO process to ask Alvarez: “Your treatment records indicate that Iroquois performed heat and stim treatment and billed us for it. Did they perform heat and stim treatment on you?” If she were to respond in the negative, Allstate’s suspicions would potentially be confirmed. But Allstate could not do that without the ability to have Alvarez either confirm or dispute what exists within the four corners of her medical records and bills. Thus, although this line of questioning treads closer to “a claimant’s medical condition” than solicitation questions, we cannot conclude such questioning would violate *Adams* because the questions Allstate desires to ask cannot be answered simply by obtaining Alvarez’s medical records through the MVRA; it also requires her personal knowledge of what actually occurred in order to cross-reference that knowledge with what it was billed for.

Notwithstanding, as a final note, we are compelled to highlight that Allstate has yet to either pay Alvarez’s BRB claim or formally deny it. To be clear, absent a formal denial, Allstate should not have withheld payment of Alvarez’s BRB until such time as it was satisfied that neither solicitation nor insurance fraud occurred. While this Court does not dispute that insurance providers have a duty to investigate potential illegal activity, we are unable to conclude that duty trumps or invalidates an individual’s entitlement to prompt BRB payments. See KRS 304.39-030(1) (“[E]very person suffering loss . . . has a right to basic reparation benefits[.]”); KRS 304.39-020(5)(a) (“There shall be a presumption that any medical bill submitted is reasonable.”).

To hold otherwise would unmistakably and

unacceptably frustrate the MVRA’s explicit purposes. See KRS 304.39-010(3) and (5). Indeed, permitting an obligor to withhold BRB until it is satisfied that illegal activity by a healthcare provider did not occur would place claimants in a similar position as the pre-no-fault system that the MVRA was designed to remedy. Assuming a claimant otherwise satisfies the conditions precedent to coverage under a given policy, there is no reason that claimant should be burdened by not receiving the BRB to which he or she is legally entitled because an obligor is suspicious of a healthcare provider.

Thus, to the extent permitted, reparation obligors may question their claimants in an effort to investigate potentially illegal activity on behalf of medical providers, but they may not withhold payment of BRB while they do so. Rather, they must pay those expenses to claimants monthly as they accrue, KRS 304.39-210(1), and, if their suspicions of illegal activity are substantiated, they must seek repayment of those monies as provided for under KRS 304.39-210(4) of the MVRA and/or KRS 367.4083 of the CPA.

KRS 304.39-210(4) provides that “[a] reparation obligor may bring an action to recover benefits which are not payable, *but are in fact paid*, because of an intentional misrepresentation of material fact.” (Emphasis added). Compare this language with KRS 304.39-215, the statute that immediately follows it. That section forbids any referral by a healthcare provider to a person or entity with whom the provider has either an ownership or investment interest or a compensation arrangement. KRS 304.39-215(2). But, unlike KRS 304.39-210(4), which contemplates payment by the obligor followed by an action to recover that payment, KRS 304.39-215(4)(a) directs that “[n]o insurer *shall be required to pay* basic or added reparations benefits to a person or entity for health care services referred to that person or entity in violation of this section.” (Emphasis added). If the General Assembly had contemplated that an obligor could withhold payment of BRB until it was satisfied that an intentional misrepresentation of material fact had not occurred, it would have worded KRS 304.39-210(4) in the same manner it worded KRS 304.39-215(4)(a). It did not.

Similarly, KRS 367.4083(2) of the CPA states that “Any charges billed *and paid by, or on behalf of*, a person of a motor vehicle accident for healthcare services rendered by a healthcare provider to the person, in violation of KRS 367.4082 [(the anti-solicitation statute)], *shall be returned* to the reparations obligor.” (Emphasis added). Again, the clear presumption contemplated by statute is for the obligor to pay BRB first, and then seek indemnification if its investigation does uncover illegal activity.

III. CONCLUSION

Based on the foregoing, we affirm the Court of Appeals.

All sitting. Bisig, Conley, Goodwine, Keller, and Nickell, JJ., concur. Thompson, J., concurs in result only by separate opinion.

CRIMINAL LAW**DEATH PENALTY****ADMINISTRATIVE LAW****DECLARATORY AND CONSTITUTIONAL
CHALLENGES TO ADMINISTRATIVE
REGULATIONS CONCERNING EXECUTION
PROCEDURES****EXHAUSTION OF
ADMINISTRATIVE REMEDIES****WRIT OF PROHIBITION**

Instant action began in 2006, when several death row inmates filed action in Franklin Circuit Court seeking declaratory and injunctive relief concerning Kentucky's execution procedures — Eventually, Kentucky Supreme Court held that Department of Corrections was required to promulgate execution procedures through formal administrative rulemaking process set forth in Kentucky's Administrative Procedure Act — Further litigation ensued concerning the validity and sufficiency of the promulgated regulations which became effective in 2010 — Inmates amended their pleadings to maintain certain unresolved claims, conform existing claims to revised regulations, and withdraw claims rendered moot by amendments to regulations — Remaining claims challenge various aspects of current regulations, including provisions relating to intellectual disability determinations, insanity procedures, attorney access, and execution protocols — Commonwealth moved to dismiss remaining claims arguing that inmates failed to exhaust administrative remedies under KRS 454.415 before pursuing judicial relief — Trial court denied motion, finding that remaining claims principally challenged the validity and sufficiency of the execution regulations themselves and that exhaustion was not required under the circumstances presented because the grievance process could not provide the relief sought or adjudicate the constitutional and regulatory issues presented — Commonwealth then filed instant petition for a first-class writ of prohibition directing trial court to dismiss the declaratory judgment action because inmates failed to exhaust administrative remedies — DENIED the petition for a writ of prohibition — Exhaustion of remedies disputes often depend heavily upon the nature of the claims asserted, the statutory authority of the relevant agency, and the procedural posture of the underlying action — Exhaustion may not be required where an agency lacks authority to resolve the issue presented, such as certain constitutional challenges or requests for relief beyond the agency's statutory power — Exhaustion requirements may operate jurisdictionally within particular statutory administrative-review schemes — Thus, applicability and effect

of exhaustion principles must be evaluated within the particular statutory and procedural context presented — Commonwealth has not argued a generalized exhaustion argument — Rather, it contends on a claim-by-claim basis that inmates' remaining allegations constitute grievable conditions-of-confinement claims subject to KRS 454.415 requiring administrative exhaustion before judicial review — Those arguments are not insubstantial and may bear upon whether certain claims should ultimately proceed, whether particular claims are properly characterized as facial or operational, or whether the trial court correctly denied dismissal — However, those questions concern the propriety of proceeding on individual claims, not whether the trial court lacked fundamental subject matter jurisdiction over this class of case altogether — Underlying action is a declaratory judgment and constitutional challenge to administrative execution regulations, which is a category of controversy plainly within the general jurisdiction of circuit courts — Even assuming portions of the trial court's exhaustion analysis may ultimately prove erroneous, any such error would constitute alleged legal error occurring within the court's jurisdiction, rather than action wholly outside it sufficient to justify extraordinary first-class writ relief — Further, exhaustion remedies are generally intended to afford administrative agencies the first opportunity to resolve disputes, develop factual records, apply agency expertise, and potentially obviate the need for judicial intervention — Those purposes have largely been fulfilled or rendered inapplicable in instant action — Commonwealth's belated invocation of exhaustion principles weighs against the exercise of extraordinary writ authority in instant action —

Com. v. Hon. Phillip J. Shepherd, J., Franklin Cir. Ct., and Benny Hodge; Brian Keith Moore; David Matthews; David Sanders; Donald Johnson; Karu Gene White; Kentucky Department of Corrections; Mitchell Willoughby; Ralph Baze; Robert Foley; Roger Wheeler; Ronnie Bowling; Victor Taylor; Virginia Caudill; and William Thompson (2025-SC-0310-OA); In Supreme Court; Opinion by Justice Keller, *denying petition for writ of prohibition*, rendered 8/20/2026. [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 Commonwealth obtained death penalty convictions for the parties involved in these proceedings, and there has been extensive litigation over the course of decades. The Commonwealth petitions this Court for a first-class writ of prohibition directing the Franklin Circuit Court to dismiss a longstanding declaratory judgment action, which includes current regulations in dispute, on the grounds that the inmate-plaintiffs failed to exhaust administrative remedies under KRS¹ 454.415. The issue is whether the Franklin Circuit Court acted outside its jurisdiction by permitting death-sentenced inmates to litigate claims allegedly filed without exhausting said administrative remedies.

¹ Kentucky Revised Statutes.

This Court concludes that the Franklin Circuit Court had subject matter jurisdiction over this type of case—declaratory and constitutional challenges to administrative regulations—regardless of any unresolved questions about how the exhaustion doctrine applies to particular claims and without deciding whether exhaustion was required for some or all of them. Accordingly, first-class writ relief is unavailable. Because exhaustion is a non-jurisdictional procedural requirement, any alleged error concerning its application can be addressed on appeal after final judgment.

As extraordinary writ relief is unavailable under these circumstances, we deny the petition.

**I. FACTS AND PROCEDURAL
BACKGROUND**

This litigation originated in 2006, when several inmates, under sentences of death, filed an action in Franklin Circuit Court seeking declaratory and injunctive relief concerning Kentucky's execution procedures. The inmates alleged that the Department of Corrections ("DOC") had implemented execution protocols without promulgating them as administrative regulations in accordance with KRS Chapter 13A, Kentucky's Administrative Procedures Act ("APA"). The inmates sought to enjoin executions until lawful procedures were adopted and lawfully reviewed.

In *Bowling v. Kentucky Department of Corrections*, 301 S.W.3d 478 (Ky. 2009), this Court held that the DOC was required to promulgate execution procedures through the formal administrative rulemaking process set forth in the APA. We concluded that the execution protocols constituted administrative regulations subject to KRS Chapter 13A and, therefore, could not be implemented solely through internal departmental policies. Following that decision, the DOC promulgated formal execution regulations which became effective in 2010.

Extensive and ongoing litigation concerning the validity and sufficiency of those regulations followed. See *id.*; *Baze v. Rees*, 553 U.S. 35 (2008). Over the ensuing years, the DOC amended the regulations multiple times, while the inmates repeatedly amended their pleadings to challenge revised provisions relating to execution procedures, intellectual disability determinations, insanity procedures, attorney access, and related matters. The parties engaged in substantial motion practice, discovery, injunction proceedings, and constitutional litigation. No executions have been performed during these proceedings.

Following additional amendments to the execution regulations in 2023 and 2024, the inmates amended their pleadings to maintain certain unresolved claims, conform existing claims to the revised regulations, and withdraw claims rendered moot by the amendments. The remaining claims challenge various aspects of the current regulations, including provisions relating to intellectual disability determinations, insanity procedures, attorney access, and execution protocols.

In response, the Commonwealth moved to

dismiss the remaining claims on the ground that the inmates failed to exhaust administrative remedies under KRS 454.415 before pursuing judicial relief. The Franklin Circuit Court denied the motion, concluding that the remaining claims principally challenged the validity and sufficiency of the execution regulations themselves and that exhaustion was not required under the circumstances presented because the grievance process could not provide the relief sought or adjudicate the constitutional and regulatory issues raised. The Commonwealth thereafter filed the present petition for writ of prohibition, contending the alleged failure to exhaust deprived the circuit court of jurisdiction to proceed further in the underlying action.

II. STANDARD OF REVIEW

This Court, when deciding a petition for writ, must first determine whether the writ is appropriate. *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961). The petition must be dismissed if the remedy is not available. *Id.* See also *Hoskins v. Maricle*, 150 S.W.3d 1, 18 (Ky. 2004) (“[O]nly after determining that the prerequisites exist will the court decide whether an error occurred for which a writ should issue.”).

A writ of prohibition is an extraordinary remedy that the Courts of the Commonwealth have been cautious and conservative in entertaining and granting. *Newell Enters., Inc. v. Bowling*, 158 S.W.3d 750, 754 (Ky. 2005); *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 808 (Ky. 2005); *Each* differ materially. A first-class writ concerns situations in which a lower court is proceeding outside its jurisdiction, while a second-class writ concerns alleged erroneous action occurring within the lower court’s jurisdiction. *Id.*; *Hoskins*, 150 S.W.3d at 10. Here, the Commonwealth expressly seeks only first-class writ relief, contending the alleged failure to exhaust administrative remedies under KRS 454.415 deprived the Franklin Circuit Court of jurisdiction to proceed in the underlying action. Accordingly, before addressing the merits of the Commonwealth’s exhaustion arguments, this Court must first determine whether the alleged defect implicates the circuit court’s jurisdiction in the sense contemplated by Kentucky writ jurisprudence. Hence, before we look to the merits of the petitioner’s claim, we must decide whether a writ is the appropriate remedy. *Bender*, 343 S.W.2d at 801.

Writs are generally divided into two classes: (1) those where the inferior court is acting without jurisdiction; or (2) the court is acting within its jurisdiction but erroneously. *Grange*, 151 S.W.3d at 808. A higher court may issue an extraordinary writ, *i.e.* a writ of prohibition, if the lower court is acting without jurisdiction. *Indep. Order of Foresters v. Chauvin*, 175 S.W.3d 610, 613 (Ky. 2005). If the inferior court is acting erroneously but within its jurisdiction, a writ may be granted if “there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.” *Hoskins*, 150 S.W.3d at 10. However, irreparable harm need not be shown “provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration.” *Bender*, 343 S.W.2d at 801 (emphasis in original). The right to appeal does not necessarily indicate an adequate remedy. *Chamblee v. Rose*, 249 S.W.2d 775, 777 (Ky. 1952).

The decision whether to issue a writ always lies within the discretion of the Court. *Hoskins*, 150 S.W.3d at 5. We exercise this discretion conservatively because a “careful approach is necessary to prevent short-circuiting normal appeal procedure.” *Bender*, 343 S.W.2d at 801 (“Our cases involving controversies in this second class, where it is alleged the lower court is acting or proceeding erroneously within its jurisdiction,

have consistently [apparently without exception] required the petitioner to pass the first test, *i.e.*, he must show he has no adequate remedy by appeal or otherwise.”). A writ of prohibition is a remarkable remedy and proper only:

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

Hoskins, 150 S.W.3d at 10.

When considering a writ of this type, a court must first concern itself with the prerequisites—no adequate remedy on appeal and great and irreparable harm—before consideration of the merits. *Caldwell v. Chauvin*, 464 S.W.3d 139, 145 (Ky. 2015). “Even if the requirements are met and error found, the grant of a writ remains within the sole discretion of the Court.” *Id.* at 145-46.

Lynch v. Commonwealth, 718 S.W.3d 726, 729 (Ky. 2025).

As recently reiterated in *Marcum v. Scorsone*, 457 S.W.3d 710, 716 (Ky. 2015), the distinction between first-class and second-class writs remains significant because the requirements applicable to each differ materially. A first-class writ concerns situations in which a lower court is proceeding outside its jurisdiction, while a second-class writ concerns alleged erroneous action occurring within the lower court’s jurisdiction. *Id.*; *Hoskins*, 150 S.W.3d at 10. Here, the Commonwealth expressly seeks only first-class writ relief, contending the alleged failure to exhaust administrative remedies under KRS 454.415 deprived the Franklin Circuit Court of jurisdiction to proceed in the underlying action. Accordingly, before addressing the merits of the Commonwealth’s exhaustion arguments, this Court must first determine whether the alleged defect implicates the circuit court’s jurisdiction in the sense contemplated by Kentucky writ jurisprudence. Hence, before we look to the merits of the petitioner’s claim, we must decide whether a writ is the appropriate remedy. *Bender*, 343 S.W.2d at 801.

III. ANALYSIS

A. Subject matter jurisdiction exists with the circuit court.

The Commonwealth argues the Franklin Circuit Court lacked subject matter jurisdiction to proceed on the inmates’ remaining claims because the inmates failed to exhaust administrative remedies as required by KRS 454.415. Relying principally upon *Jefferson Cnty. Bd. of Educ. v. Edwards*, 434 S.W.3d 472, 476-79 (Ky. 2014), *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624 (Ky. 2001), *Ky. State Police v. Scott*, 529 S.W.3d 711 (Ky. 2017), and *Popplewell’s Alligator Dock No. 1, Inc. v. Rev. Cabinet*, 133 S.W.3d 456 (Ky. 2004), the Commonwealth contends exhaustion of administrative remedies constitutes a jurisdictional prerequisite to judicial relief where the General Assembly has mandated exhaustion by statute. The Commonwealth

maintains KRS 454.415 expressly requires inmates to exhaust all available administrative remedies before commencing litigation concerning prison conditions and further requires verification of exhaustion within the pleadings themselves. According to the Commonwealth, the inmates’ surviving claims—including challenges concerning execution procedures, competency and intellectual disability determinations, medical procedures, attorney access, and related execution protocols—constitute grievable “conditions-of-confinement” claims subject to the statute’s mandatory exhaustion provisions. The Commonwealth further argues the inmates improperly attempt to avoid exhaustion requirements by characterizing operational and fact-dependent claims as facial constitutional challenges even though, in the Commonwealth’s view, many of the claims necessarily depend upon individualized circumstances, implementation procedures, factual development, and prison administration. Thus, the Commonwealth contends the circuit court lacked authority to proceed on non-exhausted claims altogether and that any continued adjudication of such claims constitutes action outside the court’s jurisdiction sufficient to warrant extraordinary first-class writ relief without any additional showing of irreparable injury or lack of appellate remedy.

In response, the inmates contend the Franklin Circuit Court plainly possesses subject matter jurisdiction over declaratory judgment actions and constitutional challenges to administrative regulations. Citing *Spears v. Goodwine*, 490 S.W.3d 347, 352 (Ky. 2016), the inmates emphasize that “[t]he court has subject matter jurisdiction when the ‘kind of case’ identified in the pleadings is one which the court has been empowered, by statute or constitutional provision, to adjudicate.” The inmates further maintain that circuit courts possess general jurisdiction over declaratory judgment actions pursuant to KRS 23A.010 and KRS 418.040 and note that this Court itself reopened the underlying action in 2010 under CR² 60.02 and expressly directed the filing of amended petitions challenging the execution regulations promulgated pursuant to Bowling and KRS Chapter 13A. See *Bowling v. Ky. Dep’t of Corr.*, No. 06-CI-574 (Franklin Cir. Ct. May 21, 2010 Order). With this, they argue the Commonwealth improperly conflates alleged legal error concerning exhaustion with the absence of subject matter jurisdiction itself. In the inmates’ view, even assuming some claims may ultimately be subject to administrative exhaustion requirements under KRS 454.415, such disputes concern whether the circuit court correctly exercised its authority in particular instances, not whether the court lacked the fundamental adjudicative power to entertain this longstanding declaratory judgment action altogether. See also *Romines v. Coleman*, 671 S.W.3d 269, 276 (Ky. 2023) (recognizing that a court may act “within its jurisdiction” even where legal error is alleged).

² Kentucky Rules of Civil Procedure.

This Court finds this matter to be appropriately before us.

Subject matter jurisdiction is an issue readily addressed “before the trial court and, if unsuccessful at the trial court level, ultimately in the normal appellate process.” (emphasis added). Not only is such an issue capable of

resolution via direct appeal, but it is also subject to determination by a higher court via a writ of prohibition. CR 81; *Spears v. Goodwine*, 490 S.W.3d 347, 351-52 (Ky. 2016).

Bd. of Educ. of Paris v. Earlywine, 719 S.W.3d 1, 5 (Ky. 2025), *reh'g denied* (Aug. 14, 2025) (internal citations omitted).

Kentucky appellate courts have recognized that exhaustion disputes often depend heavily upon the nature of the claims asserted, the statutory authority of the relevant agency, and the procedural posture of the underlying action. See *DLX*, 42 S.W.3d at 626-29; *Cunningham v. Lexington-Fayette Urb. Cnty. Gov't*, 326 S.W.3d 5, 9-10 (Ky. 2010); *Popplewell's Alligator Dock*, 133 S.W.3d at 471-72. This Court has recognized that exhaustion may not be required where an agency lacks authority to resolve the issue presented, such as certain constitutional challenges or requests for relief beyond the agency's statutory power. See *DLX*, 42 S.W.3d at 626-29; *Cunningham*, 326 S.W.3d at 9-10. At the same time, Kentucky cases have also recognized that exhaustion requirements may operate jurisdictionally within particular statutory administrative-review schemes. See *Edwards*, 434 S.W.3d at 476-79; *Ky. State Police v. Scott*, 529 S.W.3d 711, 716-18 (Ky. 2017). Accordingly, the applicability and effect of exhaustion principles must be evaluated within the particular statutory and procedural context presented.

We recognize the Commonwealth has not advanced a generalized exhaustion argument, but rather contends on a claim-by-claim basis that the inmates' remaining allegations constitute grievable conditions-of-confinement claims subject to KRS 454.415 requiring administrative exhaustion before judicial review. Those arguments are not insubstantial and may bear upon whether certain claims should ultimately proceed, whether particular claims are properly characterized as facial or operational, or whether the circuit court correctly denied dismissal. But those questions concern the propriety of proceeding on individual claims, not whether the Franklin Circuit Court lacked fundamental subject matter jurisdiction over this class of case altogether. The underlying action remains a declaratory judgment and constitutional challenge to administrative execution regulations—a category of controversy plainly within the general jurisdiction of the circuit courts. Thus, even assuming portions of the circuit court's exhaustion analysis may ultimately prove erroneous, any such error would constitute alleged legal error occurring within the court's jurisdiction rather than action wholly outside it sufficient to justify extraordinary first-class writ relief.

B. Exhaustion of administrative remedies favors denying the writ.

The Commonwealth's exhaustion argument is further undermined by the procedural posture and extraordinary history of this litigation. This action has been pending in various forms for nearly two decades. Since this Court's decision in *Bowling*, *supra*, the parties have engaged in repeated rounds of regulatory amendments, amended pleadings, discovery, injunction practice, and substantive adjudication concerning the validity of Kentucky's execution regulations. Numerous claims presently before the Court have remained pending for more than seven years. During that time, the

Commonwealth actively litigated the merits of those claims and, at multiple junctures, expressly contemplated that the remaining constitutional and regulatory issues would proceed toward adjudication.

Against that backdrop, the Commonwealth now seeks extraordinary writ relief on the theory that the circuit court lacked authority to entertain the action because Plaintiffs failed to exhaust administrative remedies. The timing of that argument raises substantial concerns regarding the practical purposes underlying the exhaustion doctrine. Exhaustion requirements are generally intended to afford administrative agencies the first opportunity to resolve disputes, develop factual records, apply agency expertise, and potentially obviate the need for judicial intervention. Those purposes have largely already been fulfilled—or rendered inapplicable—in this case.

The record before the Court is extensive and well-developed. The DOC has repeatedly articulated its substantive positions regarding the challenged regulations through formal rulemaking proceedings, Statements of Consideration, discovery responses, motion practice, and litigation positions advanced over many years. The record reflects that the DOC itself has, at times, asserted that it lacks authority to implement certain changes requested by the inmates absent formal regulatory amendment. The Commonwealth has likewise litigated the constitutional and statutory validity of the regulations on the merits for years before renewing its exhaustion objection in the present procedural posture.

This prolonged course of merits litigation materially distinguishes the present matter from cases in which exhaustion objections are timely raised at the outset of proceedings before substantial judicial and party resources have been expended. While jurisdictional principles cannot be disregarded merely because litigation has progressed extensively, courts considering extraordinary writ relief may appropriately evaluate whether the requested intervention would meaningfully advance the policies underlying the asserted procedural doctrine or instead produce duplicative proceedings, additional delay, and inefficiency. The Court is also mindful that the Commonwealth seeks a writ—"an extraordinary remedy" that is "disfavored" and reserved for exceptional circumstances. *Marcum*, 457 S.W.3d at 716. Here, the challenged litigation is not in its infancy. Rather, it approaches final adjudication after years of judicial supervision and substantive rulings.

Permitting the action to proceed to final judgment preserves the availability of ordinary appellate review while avoiding the substantial risk that issuance of a writ at this late stage would merely restart already extensive litigation concerning claims long known to the parties and the Court. Therefore, the Court concludes that the Commonwealth's belated invocation of exhaustion principles weighs against the exercise of extraordinary writ authority in this matter.

The Commonwealth alternatively contends that, even if the Franklin Circuit Court possessed general subject matter jurisdiction over declaratory judgment actions, the circuit court nevertheless exceeded its lawful authority by permitting

this action to proceed absent exhaustion of administrative remedies under KRS 454.415. Framed variously as a statutory limitation on judicial authority, an exclusivity requirement, and a prerequisite to judicial review, the Commonwealth's theories ultimately seek the same result: treatment of the alleged exhaustion defect as one depriving the circuit court of authority to proceed for purposes of first-class writ relief.

We decline to adopt such an expansive conception of jurisdiction.

Kentucky circuit courts are courts of general jurisdiction. They unquestionably possess constitutional and statutory authority to adjudicate declaratory judgment actions, constitutional challenges, requests for injunctive relief, and disputes involving the validity of administrative regulations. The underlying action falls squarely within that category of cases. Whether the circuit court correctly interpreted and applied exhaustion principles in this particular case is a distinct question from whether the court possessed subject matter jurisdiction to entertain the action at all. Kentucky law has long recognized that "[s]ubject matter jurisdiction does not mean jurisdiction over 'this case'; rather, it means jurisdiction over 'this kind of case.'" *Spears*, 490 S.W.3d at 351.

The Commonwealth's reliance upon the mandatory language of KRS 454.415 does not alter that conclusion. To be sure, the statute imposes important procedural obligations upon inmate litigants and may, in appropriate circumstances, require dismissal of claims filed without exhaustion. But mandatory statutory language does not automatically transform a procedural prerequisite into a jurisdictional limitation depriving a circuit court of adjudicatory power. The General Assembly did not expressly state that noncompliance with KRS 454.415 divests circuit courts of subject matter jurisdiction, and this Court declines to infer such a sweeping jurisdictional consequence absent unmistakable legislative direction.

Nor are we persuaded by the Commonwealth's characterization of the DOC's grievance process as an exclusive administrative forum whose invocation is a jurisdictional prerequisite to judicial review in every circumstance. The claims remaining in the underlying action include substantial constitutional and regulatory challenges to the validity of execution regulations themselves. Kentucky precedent has long recognized that facial constitutional challenges occupy a distinct posture within exhaustion jurisprudence because administrative agencies lack authority to adjudicate the constitutional validity of statutes and regulations. See *DLX*, 42 S.W.3d at 626; *Commonwealth v. AT&T Corp.*, 462 S.W.3d 399, 401 (Ky. 2015). Without deciding the precise scope of those exceptions as applied to each remaining claim, their presence alone counsels against treating the exhaustion issue presented here as a clear jurisdictional defect appropriate for extraordinary writ intervention.

Likewise unavailing is the Commonwealth's suggestion that the circuit court lacked authority to proceed because the claims were insufficiently ripe or because further factual development should first have occurred through administrative review. The underlying litigation has been pending in various forms for nearly two decades. During that time, the

parties have engaged in extensive motion practice, discovery, rulemaking proceedings, and substantive litigation regarding the challenged regulations. The record before the circuit court is substantial and fully developed in many respects. Whatever force such arguments might carry at the inception of litigation, they do not establish the sort of patent jurisdictional defect necessary to support issuance of a first-class writ in the present posture of this case.

Ultimately, the Commonwealth's alternative theories amount to assertions that the circuit court committed legal error in declining to dismiss some or all claims on exhaustion grounds. Even assuming *arguendo* that the circuit court erred in some respect, such alleged errors would constitute, at most, erroneous action within the court's jurisdiction—not action outside it. Kentucky's extraordinary writ jurisprudence carefully distinguishes between those categories. A first-class writ is reserved for situations in which a lower court wholly lacks jurisdiction over the type of case before it. That circumstance is not present here.

Moreover, the extraordinary procedural history of this matter further counsels against writ relief. The parties have litigated these issues extensively over many years, and the Commonwealth itself has participated in substantial merits litigation concerning the challenged regulations. At this advanced stage of the proceedings, ordinary appellate review following final judgment provides an adequate mechanism for review of any preserved exhaustion arguments or alleged legal errors committed by the circuit court.

Accordingly, because the Franklin Circuit Court possessed subject matter jurisdiction over the underlying declaratory judgment action, and because the Commonwealth has failed to establish the type of jurisdictional defect necessary to justify extraordinary intervention by first-class writ, the petition for writ of prohibition is denied.

IV. CONCLUSION

Whether some, all, or none of the remaining claims ultimately required exhaustion under KRS 454.415 is a question that may be addressed, if necessary, through ordinary appellate review following final judgment. The present writ proceeding does not require this Court to definitively resolve those questions because the Franklin Circuit Court unquestionably possessed subject matter jurisdiction over declaratory judgment actions of this type, and any alleged exhaustion error would constitute, at most, potential legal error within that jurisdiction.

All sitting. Bisig, Goodwine, and Nickell, JJ., concur. Lambert, C.J., concurs in result only by separate opinion which Conley and Thompson, JJ., join.

CRIMINAL LAW

DRIVING UNDER THE INFLUENCE (DUI)

MANSLAUGHTER

BLOOD TEST

VOLUNTARINESS OF A DEFENDANT'S CONSENT TO A BLOOD TEST

In May 2018, defendant was involved in a two-vehicle crash after she crossed the center line and struck another vehicle — Driver of the other vehicle was injured and driver's son died — Trooper Burton arrived at accident scene and informed defendant of the fatality — Trooper Burton told defendant that any time there is a fatality, it is their policy to request blood from all drivers involved and that they needed to go to the hospital for the blood draw — Trooper Burton asked defendant if she would consent to that — Defendant consented to give blood at the hospital — Trooper Burton did not read defendant an implied consent warning and she was not arrested at the scene — At this point, Trooper Burton did not expect that defendant would be charged with any crimes — However, Trooper Burton later testified that it was Kentucky State Police (KSP) policy to obtain, not simply request, blood draws from both drivers in a fatality accident and then ask for their consent — If defendant had not consented, Trooper Burton said the policy required him to request a search warrant — Trooper Burton did not recall telling defendant that blood draw was mandatory — Trooper Burton did not tell defendant that she would incur any penalties for refusing because, under then-existing policy, implied consent warning was read only at the blood draw site, not at the scene — Trooper Burton testified that if defendant attempted to leave the scene or avoid a blood draw, she would have immediately been detained while awaiting a search warrant — Trooper Burton said he did not and would not have told defendant she was free to leave because he wanted her to go to the hospital to have her blood drawn — Defendant declined to ride in an ambulance because she was not injured, but agreed to have her boyfriend drive her to the hospital in his car — Trooper Burton asked Constable Tackett, who was assisting with traffic, to follow defendant and her boyfriend to the hospital — Trooper Burton wanted to make sure they immediately went to the hospital — Constable Tackett told defendant and her boyfriend to follow him to the hospital — Constable Tackett testified that he understood defendant was not free to deviate from the path to the hospital — Constable Tackett never told defendant she was not free to leave, did not arrest her, said she was not in his custody, asked her no questions, and never gave her *Miranda* warnings — Constable Tackett did not know why defendant was going to the hospital or

that any charges would be filed — Trooper Kelly went to the hospital and spoke with the other driver — Trooper Kelly read the other driver an implied consent card and informed him that KSP policy required troopers to obtain blood tests from drivers involved in a fatality or possible fatality accident — Other driver agreed to blood test — Trooper Kelly was then notified that defendant was coming to the hospital — When defendant arrived, Constable Tackett handed defendant over to Trooper Kelly — Trooper Kelly read defendant his implied consent card — At that time, card used by KSP detailed potential penalties defendant would face if she refused to submit to blood draw, including, but not limited to, a double minimum jail sentence upon conviction and revocation of her license — Trooper Kelly explained KSP policy in fatality or possible fatality accidents — Defendant then consented to blood test — Defendant and Trooper Kelly both signed hospital's consent form — Trooper Kelly testified that he did not coerce or threaten defendant and that she was cooperative — At the time, Trooper Kelly did not know defendant would be charged with a crime — No officer directed Trooper Kelly to prevent defendant from leaving — Trooper Kelly testified that if defendant refused to submit to a blood test, she would have been free to leave, but that they would have sought a search warrant to obtain her blood — Trooper Kelly never told defendant that she could not leave the hospital — Standard hospital consent form stated that defendant was under arrest — Trooper Kelly testified that the form was false and that defendant was not under arrest — Officers never performed field sobriety tests or gave defendant *Miranda* warnings — Defendant was later indicted on numerous charges, including second-degree manslaughter and driving under the influence (DUI), first offense with aggravating circumstances — Defense counsel filed motion to suppress evidence obtained through blood draw — Defense counsel attached affidavits from defendant and her boyfriend to motion to suppress — In her affidavit, defendant stated that an officer at the scene told her it was mandatory to submit to a blood draw because there was a fatality; that she was never read the implied consent warning; and that she was never informed of her right to an attorney — Defendant submitted to the blood draw because officers at accident scene told her it was mandatory, and if she did not submit to it, the penalty would be worse — Trial court found that, under the totality of the circumstances, defendant did not validly consent to blood test; therefore, it granted defendant's motion to suppress — Court of Appeals reversed — Defendant appealed — REVERSED, REINSTATED the trial court's suppression order, and REMANDED for further proceedings — Although there was conflicting evidence, trial court's decision, which was based on the totality of the circumstances, was supported by substantial evidence — *Com. v. McCarthy* (Ky. 2021) and *Haney v. Com.*

(Ky. 2022) provide that being read a coercive implied consent warning is but one factor to consider in analyzing whether consent was voluntary — Under instant facts, it was appropriate for trial court to determine whether defendant's initial encounter with Trooper Burton at the accident scene was voluntary — The line of demarcation between a consensual encounter and an investigative detention is a police officer's use of physical force, show of authority, or other application of explicit or implicit means of coercion which would compel a reasonable person to believe he was not free to leave — This standard is objective and does not depend on the suspect's or officer's subjective beliefs regarding the nature of the encounter —

Shelly Damron v. Com. (2024-SC-0300-DG); On review from Court of Appeals; Opinion by Justice Goodwine, *reversing and remanding*, rendered 8/20/2026. [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 Letcher Circuit Court granted Shelly Damron's ("Damron") motion to suppress evidence obtained through a blood draw. The Commonwealth filed an interlocutory appeal. The Court of Appeals reversed and remanded. We granted discretionary review to consider whether Damron's consent to the blood test was voluntary. After careful review, we reverse the Court of Appeals, reinstate the circuit court's suppression order, and remand for further proceedings.

BACKGROUND

In May 2018, Damron was involved in a two-vehicle crash after crossing the center line and striking another vehicle. The driver of the other vehicle was injured, and the driver's son died. Damron was indicted on charges of second-degree manslaughter; second-degree assault; DUI, first offense with aggravating circumstances; first-degree criminal mischief; reckless driving; and speeding. Damron moved to suppress the blood test results, arguing she did not give valid consent to the blood draw. After a hearing, the circuit court granted the motion. The Court of Appeals reversed.

At the scene of the accident, Trooper Burton informed Damron of the fatality, and he told her that "any time with a fatality, our policy is that we request blood from all drivers involved, and that we would need to go to the hospital to get blood taken" and asked if she would consent to that. Then, Damron consented to give blood at the hospital. Trooper Burton did not read Damron an implied consent warning. She was not arrested at the scene, and at that point, Trooper Burton did not expect she would be charged with any crimes.

However, Trooper Burton later testified that it was Kentucky State Police ("KSP") policy to obtain, not simply request, blood draws from both drivers in a fatality accident and then ask for their consent. Had Damron not consented, Trooper Burton said the policy required him to request a search warrant. The trooper did not recall telling Damron that a blood draw was mandatory. He said he did not tell Damron she would incur any penalties for refusing because, under the then-existing policy, the implied

consent warning was read only at the blood draw site, not at the scene.

Trooper Burton also testified that if Damron attempted to leave the scene or avoid a blood draw, she would have been immediately detained while awaiting a search warrant. Trooper Burton said he did not and would not have told her she was free to leave because he wanted her to go to the hospital to have her blood drawn.

Damron declined to ride in an ambulance because she was uninjured, but she agreed to have her boyfriend drive her to the hospital in his car. Trooper Burton testified that Constable Tackett had been assisting with traffic and offered to help, so he asked the constable to follow Damron and her boyfriend to the hospital. The trooper wanted a timeline from leaving the scene to arriving at the hospital to ensure they did not try to run, did not go home to bathe, and that she did not arrive at the hospital an hour later. Trooper Burton further testified that Constable Tackett contacted the Post by radio to confirm the times of departure and arrival.

Constable Tackett testified that he assisted with the crash by helping with traffic and escorting Damron to the hospital. As to the hospital escort, the constable testified that he walked Damron and her boyfriend to his car. Constable Tackett told them to follow him to the hospital, and he watched them the whole way because he was worried. The constable testified that he understood Damron was not free to deviate from the path to the hospital, and that if she were free to leave, Trooper Burton would not have asked him to escort them there. Constable Tackett never told Damron she was not free to leave, did not arrest her, said she was not in his custody, asked her no questions, and never *Mirandized* her. He did not know why she was going to the hospital or that any charges would be filed. The constable testified that his role was to escort Damron to the hospital. However, if she had fled, even though he felt he did not have the authority to stop her, he would have called it in because she was supposed to go to the hospital.

Trooper Kelly testified that he was working on another complaint when he heard the Post dispatch Trooper Burton to the accident scene. When Trooper Kelly finished his complaint, he called to see if he should go straight to the hospital. He first spoke with the other driver, who was being transported to the hospital by ambulance. The trooper read the other driver an implied consent card and informed him that KSP policy required troopers to obtain blood tests from drivers involved in a fatality or possible fatality accident. The other driver agreed to the blood test. Trooper Kelly asked in which direction the driver was traveling because he heard there was some confusion at the scene.

Trooper Kelly was then notified that Damron was coming to the hospital in a personal vehicle, escorted by Constable Tackett. When she arrived, the constable handed Damron over to Trooper Kelly. The trooper read Damron his implied consent card. At the time, the card used by KSP detailed potential penalties that Damron would face if she refused to submit to the blood draw, including, but not limited to, a double minimum jail sentence upon conviction and revocation of her license. Then, Trooper Kelly explained to Damron that "the reason I'm asking for this test is because this is . . . our procedure

any time we have a fatality or a possible fatality, we're required to get blood from the drivers." After receiving these warnings, Damron consented to the test. She and Trooper Kelly both signed the hospital's consent form. He walked Damron to the lab to have her blood drawn.

He testified he did not coerce or threaten her; she was cooperative and made small talk. At the time, he did not know she would be charged with a crime. Neither Trooper Burton nor any other officer directed him to prevent Damron from leaving. He left the hospital after the blood draw. He never said it was mandatory but told her the policy required it. Trooper Kelly testified that if Damron had refused to submit to a blood test, she would have been free to leave, but they would have sought a search warrant to obtain her blood. He never told Damron she could not leave the hospital. The standard hospital consent form stated that Damron was under arrest.

Trooper Kelly testified that the form was false, and she was not under arrest. Trooper Kelly had signed this form numerous times in the past and never questioned it.

At no time did law enforcement seek a search warrant, place Damron under arrest, read her *Miranda* warnings, physically restrain her, or conduct field sobriety tests. During the hearing, the troopers expressed unfamiliarity with developments in the law regarding search warrants and consent to blood draw.

Although not mentioned in the suppression order, KSP Detective Brandon Thomas, the lead investigator, also testified at the hearing. His testimony was not relevant to the voluntariness of Damron's consent because he arrived at the scene and began his investigation after Damron and Constable Tackett left for the hospital. The detective only spoke to Trooper Kelly after he returned from the hospital. Detective Thomas first spoke to Damron after her blood had been drawn.

Damron did not testify at the hearing. Although not mentioned in the trial court's order, defense counsel attached affidavits from Damron and her boyfriend to the motion to suppress and filed another affidavit from Damron on the day of the hearing. The Commonwealth moved to exclude both, arguing that the original affidavits attached to the suppression motion were not notarized and that the second was not attached to the motion. The trial court determined the original affidavits substantially complied with filing requirements and considered them in ruling on the motion. The trial court excluded the second affidavit because it was improperly filed.

In Damron's original affidavit, Damron stated that an officer at the scene told her it was mandatory to submit to a blood draw because there was a fatality. She rode in her boyfriend's vehicle to the hospital, followed by a law enforcement officer. She stated that she was never read the implied consent warning or informed of her right to an attorney. She was never asked to perform any field sobriety tests or take a preliminary breath test. Damron stated she submitted to the blood draw because the law enforcement officer at the accident scene told her it was mandatory, and if she did not submit to it, the penalty would be worse.

In her boyfriend's affidavit, he stated that Damron called and told him she had been in an accident. He arrived at the scene approximately ten minutes later. Her boyfriend stated the law enforcement officer at the scene said both parties had to submit to a blood draw because there was a fatality. He drove Damron to the hospital with a law enforcement officer following behind them. When they arrived at the hospital, additional law enforcement officers were there. Her boyfriend did not hear any of the officers read the implied consent warning to Damron or inform her of her right to contact an attorney prior to the blood draw.

The circuit court found that the totality of the circumstances demonstrated that Damron did not validly consent to the blood test. Her actions were restricted by a display of authority from a series of officers, and she submitted to the blood test in the face of enhanced criminal penalties. The circuit court found that the blood test constituted an unreasonable search in violation of the Fourth Amendment and suppressed the evidence.

The Court of Appeals reweighed the evidence presented at the suppression hearing and determined that Damron gave valid consent to the blood draw at the scene of the accident. The appellate court disagreed with the trial court's characterization of the evidence presented at the suppression hearing. The Court of Appeals did not discuss Constable Tackett's or Trooper Kelly's testimony and solely relied on Trooper Burton's statement that Damron freely consented to have her blood drawn. Furthermore, the court found that because Damron's initial consent was valid and she did not withdraw it, Trooper Kelly's reading of the implied consent warning did not invalidate her prior consent. The Court of Appeals reversed the trial court's suppression order. This Court granted discretionary review and heard oral arguments.

STANDARD OF REVIEW

Because the "Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, [a] warrantless search is per se unreasonable . . . 'unless an established exception applies.'" *Osborne v. Commonwealth*, 718 S.W.3d 622, 626–27 (Ky. 2025) (quoting *Payne v. Commonwealth*, 681 S.W.3d 1, 3 (Ky. 2023)). Consent to a search is a valid "exception to the warrant requirement under the Fourth Amendment." *Id.* "To establish that a party has consented to a search, the government must show 'by a preponderance of the evidence' that the consent was 'voluntary, unequivocal, specific, intelligently given, and uncontaminated by duress or coercion.'" *Story v. Commonwealth*, 706 S.W.3d 263, 276 (Ky. 2024) (quoting *United States v. Shekles*, 996 F.3d 330, 346 (6th Cir. 2021)).

We apply a two-part standard in "reviewing a trial court's decision on a motion to suppress. First, we must accept the trial court's findings of fact as conclusive if they are supported by substantial evidence." *Osborne*, 718 S.W.3d at 627. "[A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Turley v. Commonwealth*, 399 S.W.3d 412, 417–18 (Ky. 2013). "Second, we review de novo the trial court's application of the law to the

particular facts of the case." *Osborne*, 718 S.W.3d at 627.

ANALYSIS

Damron argues that the totality of the circumstances shows she never validly consented to the blood draw. First, she contends that her initial consent was invalid because Trooper Burton's request was more of a command, and she was objectively in custody based on law enforcement's actions. Second, Damron argues that her consent at the hospital was invalid because the implied consent warning threatened criminal punishment.

First, we consider whether the trial court's findings of fact were supported by substantial evidence. The Court of Appeals failed to defer to the trial court's factual finding and impermissibly reweighed the evidence, concluding that the trial court ignored Damron's voluntary consent at the accident scene. The appellate court faulted the trial court for failing to give greater weight to Trooper Burton's statement that Damron freely consented to have her blood drawn at the hospital, the fact that law enforcement had not physically restrained her or made a show of force, and the hospital escort's lack of meaningful impact.

The Court of Appeals failed to address the conflicting evidence cited by the trial court, including Trooper Burton's testimony that if Damron had attempted to flee, she would have been detained immediately because KSP policy required a blood test. The court also failed to consider any of Constable Tackett's or Trooper Kelly's testimony, which was relevant to determining whether Damron's consent was voluntary under the totality of the circumstances.

Although there was conflicting evidence, the trial court's decision was supported by substantial evidence. The testimony of each law enforcement officer would have supported either denying or granting Damron's motion to suppress. The following facts would have supported an inference that Damron's consent was voluntary: the law enforcement officers consistently testified that Damron was not physically restrained, was not formally arrested, consented to the blood test, and agreed to go to the hospital in a private vehicle.

In support of the trial court's finding that her consent was involuntary, law enforcement officers consistently testified that if Damron had refused the blood test or attempted to flee, she would have been detained while awaiting a search warrant. Trooper Burton and Constable Tackett testified that the hospital escort was intended to prevent Damron from fleeing. The constable handed Damron over to Trooper Kelly at the hospital. He told her that KSP policy required a blood test, read her an implied consent warning that included enhanced penalties for refusal, and escorted her from the exam room to the lab for the blood draw. Trooper Burton's testimony was internally inconsistent. He testified that he informed Damron that the policy required him to request a blood draw and that she freely consented. However, he later testified that the policy required a blood test and, though he did not communicate it to Damron, that she was not free to leave. Damron's affidavit also supported the finding that her consent was involuntary. The trial court's findings of fact were supported by the testimony at the suppression hearing and were not clearly

erroneous.

Next, we consider whether the trial court correctly applied the law to the facts. To determine whether Damron's consent was valid, we must examine the totality of the circumstances from the accident scene through her agreement to have her blood drawn at the hospital. In *Birchfield v. North Dakota*, 579 U.S. 438 (2016), the Supreme Court of the United States considered "whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream." *Id.* at 454. The Supreme Court held "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 477. Pertinent to this appeal, one defendant agreed to have his blood drawn after hearing an implied consent warning "informing him that test refusal in these circumstances is itself a crime." *Id.* at 439. Although the defendant "was not prosecuted for refusing a test," he submitted because "police told him that the law required his submission." *Id.* at 478. The Supreme Court reversed the North Dakota Supreme Court's holding that the defendant's "consent was voluntary" because that holding was based "on the erroneous assumption that the State could permissibly compel both blood and breath tests." *Id.* The United States Supreme Court held that "voluntariness of consent to a search must be determined from the totality of all the circumstances" and remanded the case to the state supreme court to reevaluate the defendant's consent. *Id.* at 478 (internal quotation marks omitted).

In *Commonwealth v. McCarthy*, 628 S.W.3d 18 (Ky. 2021), McCarthy was arrested for driving under the influence and submitted to a blood test after receiving an implied consent warning that threatened enhanced criminal penalties. This Court extended *Birchfield*, holding that the defendant "could not be subjected to an enhanced penalty due to his refusal to submit to a warrantless Fourth Amendment search in the form of a blood test" under KRS 189A.105(2)(a). *Id.* at 34. This Court reversed the defendant's conviction and remanded the case to the trial court for further proceedings, excluding the erroneous evidence. *Id.* at 40.

In *Haney v. Commonwealth*, 653 S.W.3d 559 (Ky. 2022), this Court applied *McCarthy* in a case where the defendant had not been arrested before submitting to a blood test. In *Haney*, the defendant crossed the center line and struck a motorcycle. 653 S.W.3d at 562. At the hospital, a trooper interviewed the defendant, who "was awake and alert." *Id.* The trooper told her he knew little about the accident except that there was a fatality and that he had been sent to talk to her and get a blood sample. *Id.* The trooper told the defendant she was not under arrest, and she voluntarily spoke to him. *Id.* The trooper read the defendant the implied consent warning, and she acquiesced to a blood draw. *Id.* at 563. The defendant was later "indicted for two counts of wanton murder based on driving while under the influence of drugs." *Id.* (footnote omitted). The trial court denied her motions to suppress her statements and blood test results.

This Court determined in *Haney* that the defendant was never in custody for *Miranda* purposes because she testified that she never "felt restrained, restricted, or otherwise compelled to speak with" the trooper. 653 S.W.3d at 565. Thus,

the trial court's denial of her "motion to suppress her statements was not erroneous." *Id.* at 566. However, because the order denying suppression of the blood test results was entered before *McCarthy*, this Court reversed and remanded the case to the trial court to consider whether "consent was voluntary under the totality of the circumstances, which included the warning that if she refused the blood test and if she were convicted of DUI, her mandatory minimum jail sentence would be doubled." *Haney*, 653 S.W.3d at 568.

In *Story*, the defendant was arrested, invoked "his statutory right to an independent blood test," and a warrant authorized the Commonwealth to test the sample. 706 S.W. 3d at 276-79. The district court found that "the Commonwealth could test the sample because Story had voluntarily provided it in the course of seeking his independent blood test" and denied the suppression motion. The appellate courts affirmed. *Id.* at 279. This Court reversed the lower courts and held that the defendant did not consent to law enforcement testing because "law enforcement had not even requested such testing at the time Story gave the blood. Quite simply, Story cannot be deemed to have consented to a request not made at the time he purportedly gave consent." *Id.*

This is our first opportunity to review a trial court's suppression of blood test results considering the totality of the circumstances under *McCarthy* and *Haney*. Aside from the coerciveness of an implied consent warning, this Court has not considered what other factors are relevant to a totality of the circumstances analysis. Here, the trial court considered the totality of Damron's encounter with law enforcement and seemed to implicitly find that Damron was in custody because her actions were restricted by the display of authority from a series of law enforcement officers. Additionally, it found her ultimate submission to the test was accomplished through the threat of enhanced criminal penalties.

Given the circumstances, we deem it appropriate to determine whether Damron's initial encounter with Trooper Burton at the accident scene was voluntary. "The line of demarcation between a consensual encounter and an investigative detention is a police officer's use of physical force, show of authority, or other application of explicit or implicit means of coercion 'which . . . would compel a reasonable person to believe he was not free to leave.'" *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999).

The standard governing this determination is objective and does not depend on the suspect's or the officer's "subjective beliefs regarding the nature of the encounter." *Osborne*, 718 S.W.3d at 629 (footnote omitted). Furthermore, "[w]hen confronted with inconsistent testimony or other conflicting evidence at a suppression hearing, the trial court, as factfinder, is entitled to weigh the evidence and judge the credibility of the witnesses." *Id.* Though the totality of the evidence may support "two inconsistent conclusions," the trial court is not prevented from supporting its factual findings by substantial evidence. *Id.*

Supra, we reviewed the trial court's findings of fact and concluded they were supported by substantial evidence. The evidence supports the trial court's finding that Damron's freedom of

movement was restricted and that she would have been detained while awaiting a warrant if she had refused the test. Damron was escorted to the hospital to prevent her from fleeing, and Trooper Burton did not leave her presence until after her blood had been drawn. Although Damron was not arrested, the record also shows she was never told she was free to leave. Trooper Kelly's implied consent warning was coercive under *McCarthy*.

Although the trial court did not address it, Damron's and her boyfriend's affidavits supported a finding that she was not free to leave from her first encounter with law enforcement at the scene until her blood was drawn. She stated that although she was not formally arrested or physically restrained, she was told to sit in her boyfriend's truck and was not free to leave the scene. She was told the blood test was mandatory, which is why she was escorted to the hospital. Her boyfriend's affidavit agreed that Damron was told the blood test was mandatory. The Commonwealth takes issue with Damron's statement that she was never read an implied consent warning because it is inconsistent with law enforcement testimony. However, it was within the trial court's discretion to weigh inconsistencies "within the context of the overall proof." *Osborne*, 718 S.W.3d at 627.

Trooper Burton initially testified that he told Damron that KSP policy required him to request a blood draw and that she was not under arrest. He later testified that a blood test was mandatory and that she was not free to leave. The affidavits also contradict his account. Although the trial court's order does not mention these inconsistencies, the statements were part of the overall proof, and the court clearly weighed the evidence in finding that Damron's freedom of movement was restricted.

Though we may have weighed the facts differently, we defer to the trial court's assessment of the evidence and witness credibility. The following circumstances support the trial court's conclusion that Damron's consent was involuntary: First, Damron was never outside the presence of law enforcement from the time they arrived at the accident scene until her blood was drawn, so a reasonable person would not believe she was free to leave under the circumstances. Second, although Trooper Burton testified that he requested a blood test, both he and Trooper Kelly testified that KSP policy required one. Trooper Kelly told Damron that KSP policy required her to submit to a blood test. Damron's affidavit stated that she was told the blood test was mandatory. Third, the implied consent warning Trooper Kelly read was essentially the same as the coercive warnings in *McCarthy* and *Haney*.

The facts at hand demonstrate why a totality-of-the-circumstances analysis is crucial. *McCarthy* and *Haney* provide that being read a coercive implied consent warning is but one factor to consider in the analysis. Each factor alone may not have rendered Damron's consent involuntary. However, when considering Trooper Kelly's reading of the coercive implied consent warning in the context of Damron's entire encounter with law enforcement, the Commonwealth failed to prove by a preponderance of the evidence that Damron gave valid consent to the blood test. Based on the totality of the circumstances, suppression of Damron's blood test results was proper.

CONCLUSION

For the foregoing reasons, we reverse the opinion of the Court of Appeals, reinstate the Letcher Circuit Court's order suppressing the blood test results, and remand for further proceedings.

All sitting. Conley, Nickell, and Thompson, JJ., concur.

Keller, J., dissents by separate opinion in which Lambert, C.J., and Bisig, J., join.

GOVERNMENT

CONTRACTS

KENTUCKY MODEL PROCUREMENT CODE (KMPC)

SOVEREIGN IMMUNITY

EXPRESS WRITTEN CONTRACT WITH A COUNTY

ORAL CONTRACT MODIFICATIONS

IMPLIED CONTRACTS

UNJUST ENRICHMENT

County experienced serious flooding in the summer of 2021 — County received FEMA grant for repair work — County invited bids for infrastructure repairs due to flooding and provided specifications required by FEMA — Advertisement for bids stated that projects will be using unit pricing for materials — Concrete company alleged that prior to submitting its bid, it spoke with county employee and informed employee that FEMA-specified quantities of materials for the project were not sufficient to restore roads to industry standards — Employee allegedly instructed company to bid unit pricing pursuant to listed specifications, but assured company that it would pay for the number of units ultimately required, even if it went beyond listed specifications — Company submitted written bids — Nowhere in the wording of the bid was there any indication that company's bid was a "unit pricing" bid in which the totals were based on estimates of the quantities to be used — County awarded company two repair projects — Company relied on employee's assurances that it would be paid for its work based upon the unit prices bid by the company to complete the job to the county's standards and industry standards and on employee's instruction during the actual repair projects to exceed FEMA specifications for the paved road width — Company alleged that employee was on job sites and was aware that company was using extra materials as needed — Company completed jobs — While the cost of each unit remained the same, based on the additional units that were used in the projects,

company's requested payment was increased — County paid only the total from the original bids — Company filed instant action against county employee, in his individual capacity, alleging that company relied on employee's representations to its detriment — Further, county had a history of using unit pricing and had always paid the amount for the number of units needed, whether it was higher or lower than the amount listed in the bid — Company later amended its complaint to include county as a defendant, alleging that county breached the contract and, alternatively, county was unjustly enriched — County and employee filed separate motions to dismiss — Trial court denied motions to dismiss — County and employee appealed — Court of Appeals dismissed county based on sovereign immunity — Court of Appeals concluded that employee could not be individually liable, but vacated trial court's decision denying him immunity on the basis that further discovery was required to determine if his duties were ministerial or discretionary — Company appealed as to the decision dismissing county — Decision concerning employee was not appealed — **REVERSED IN PART, AFFIRMED IN PART, and REMANDED** — Sovereign immunity generally extends to county governments as basic subdivisions of the Commonwealth — Commonwealth waived sovereign immunity for written contracts in KRS 45A.245 of the Kentucky Model Procurement Code (KMPC) — This statute does not mention counties as being subject to this waiver of sovereign immunity — However, pursuant to *Illinois Central Gulf Railroad Co. v. Graves County Fiscal Court* (Ky. App. 1984), common law permitted suit against counties to enforce express written contracts — Thus, trial court properly denied dismissal as to county in so far as company made a claim against county for violating their express written contract — Whether contract was fulfilled or not depends upon whether it required unit pricing or fixed pricing, a matter which has yet to be determined — Oral contracts with counties are unenforceable because sovereign immunity prevents their enforcement — Therefore, oral modifications of written contracts are also unenforceable — Implied contracts with counties are similarly unenforceable based on sovereign immunity — Recovery is also barred on equitable grounds as sovereign immunity has not been waived for such recovery —

King-Crete Drilling, Inc. v. Whitley County Fiscal Court; Whitley County, Kentucky; and Jimmy Bates (2024-SC-0232-DG); On review from Court of Appeals; Opinion by Justice Thompson, reversing in part, affirming in part, and remanding, rendered 8/20/2026. [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 issue before us is whether the Whitley Fiscal Court and Whitley County, Kentucky (the County) should be immune from King-Crete Drilling, Inc.'s

suit because of the County's sovereign immunity regarding their written contract. King-Crete alleges it is due more money as the written contract required unit pricing and was additionally modified orally or through course of dealing, or it should receive additional payment in quantum meruit for unjust enrichment.

The Court of Appeals determined that the County was wholly immune pursuant to sovereign immunity. We agree with the Court of Appeals that sovereign immunity has not been waived for the County by the legislature's enactment of Kentucky Revised Statutes (KRS) 45A.245, the Kentucky Model Procurement Code (KMPC). However, a narrow, longstanding exception to total immunity for counties does allow recovery under the terms of any express written contract, as stated in *Illinois Central Gulf Railroad Co. v. Graves County Fiscal Court*, 676 S.W.2d 470 (Ky. App. 1984) (Illinois Central). As the parties dispute what the original written contract requires, we reverse and remand for the trial court to interpret its express terms and proceed to determine whether the County's payment fulfilled these terms.

Sovereign immunity bars suit against the County on any other basis than the express written contract. Therefore, we affirm the dismissal of King-Crete's claims based on oral modifications of the contract and equitable grounds.

I. FACTUAL AND LEGAL BACKGROUND

Serious flooding occurred in Whitley County during the summer of 2021, causing significant damage to its infrastructure. Floodwaters damaged public roads, necessitating repairs.

The County received a Federal Emergency Management Agency (FEMA) grant for repair work. On July 28, 2021, the County invited bids for these projects through a newspaper advertisement which stated: "These projects will be bid using unit pricing for materials." In stating how the bids were to be submitted, the advertisement reiterated the need for "including unit pricing[.]"¹

¹ See *Types of Contracts—Fixed-Unit Price Contract*, 1 Brunner & O'Connor on Construction Law § 2:25 (explaining that fixed-unit pricing allows for payment for completed work items which can only be estimated as to quantity at the time of bidding, meaning that "[t]he contractor is entitled to payment at the fixed unit price for the aggregate units of work performed").

King-Crete alleged in its complaint that Jimmy Bates, the Director of Infrastructure and County Project Development for the County, provided bidders the required specifications from FEMA and told bidders that they were to supply bids based on the already specified quantities of materials. King-Crete alleged that upon reviewing the FEMA specifications for the projects it noticed that the amount of materials and/or labor within the FEMA specifications, in particular those relating to asphalt and aggregate base, were insufficient to adequately repair and restore the roadbeds at issue to industry standards. King-Crete alleged that it communicated this fact to Bates on numerous occasions and Bates instructed and directed King-Crete to bid unit pricing pursuant to the FEMA specifications

and not go beyond them, assuring them that "the county would pay for the number of units that were ultimately required regardless of the actual FEMA specifications[.]"

On August 16, 2021, King-Crete submitted road repair bids to the County. Nowhere in the wording of the bid was there any indication that King-Crete's bid was a "unit pricing" bid in which the totals were based on estimates of the quantities to be used.

On August 17, 2021, the fiscal court voted to accept the low bids. As a low bidder, King-Crete was awarded two repair projects. In a letter dated August 18, 2021, and signed by Pat White, Jr., Whitley County Judge Executive, King-Crete was informed:

Please be advised that the Whitley County Fiscal Court during its regularly held court meeting on August 17, 2021 awarded King-Crete, Inc. the bids as listed below:

Lower Laurel Fork E - \$41,890.59
Dal Road B - \$172,844.82

King-Crete states that it relied on Bates's assurances that it would be paid for its work "based upon the unit prices bid by [King-Crete] to complete the job to the county's standards and to industry standards" and relied on his instruction during the actual repair projects to exceed the FEMA specifications for the paved road width. King-Crete also alleged that Bates was present on the job sites and was aware that King-Crete was using the extra material as was needed to properly make the repairs.

King-Crete completed the projects in approximately three months. On November 19, 2021, King-Crete submitted its invoices to the County. The invoices billed unit prices for the materials. While the cost of each unit remained the same, based on the additional units that were used in the construction projects, the requested payment was increased. The County paid only the total from the original bids.

On August 9, 2022, King-Crete filed a complaint against Bates in his individual capacity, alleging he violated his duty of reasonable care by making false representations and assertions of material fact (or was reckless as to the truth or falsity of his representations) that it relied upon to its detriment. King-Crete also alleged that the County had a history of using unit pricing and had always paid the amount for the number of units needed, whether it was higher or lower than the amount listed in the bid. King-Crete alleged that Bates was engaging in a ministerial duty and was not entitled to governmental immunity.

On November 18, 2022, King-Crete filed a motion requesting that the trial court allow it to file an amended complaint. In its amended complaint, King-Crete incorporated the contents of its previous complaint and named the County as a defendant. King-Crete alleged that the County and Bates breached the contract and were jointly and severally liable, and alternatively, the County was unjustly enriched by its labor.

On January 20, 2023, the County filed a motion to dismiss pursuant to Kentucky Rules of Civil Procedure (CR) 12.02, primarily on the basis that

the County was immune pursuant to sovereign immunity. The County argued that the KMPC, which waived sovereign immunity for the Commonwealth of Kentucky as to written contracts, did not apply to counties and would have required filing in the Franklin Circuit Court. The County also stated it was entitled to sovereign immunity for an unjust enrichment claim. The County further argued that an oral contract violated the KMPC, which required “a writing;” an oral contract was not valid for a sale of goods; and Bates could not bind the County because it did not ratify his actions.

That same day, Bates also filed a motion to dismiss, stating that he was not a party to the written contract between King-Crete and the County, and the County had sovereign immunity or, at most, was obligated to fulfill the written contract.

On March 10, 2023, the trial court denied the motions to dismiss.² The County and Bates each appealed. Their two appeals, 2023-CA-0384-MR, which was the appeal by the County, and 2023-CA-0386-MR, which was the appeal by Bates, were resolved in one opinion by the Court of Appeals.

² The trial court also allowed King-Crete to file a second amended complaint which clarified that it was seeking quantum meruit for its unjust enrichment claim.

The Court of Appeals concluded as to the County that there was no statutory waiver of sovereign immunity for written contracts for counties, as there was for the Commonwealth pursuant to the KMPC as set out in KRS 45A.245, and the County was dismissed because of immunity.

The Court of Appeals concluded that Bates could not be individually liable, but vacated the trial court’s decision denying him immunity on the basis that further discovery was required to determine if his duties were ministerial (in which case qualified official immunity would not be available to him) or discretionary (in which case it would need to be determined if he acted in bad faith).

King-Crete sought discretionary review only as to 2023-CA-0384-MR, the case upon which we are deciding this appeal. As neither King-Crete nor Bates sought discretionary review in 2023-CA-0386-MR, the Court of Appeals’ decision as to Bates is final. In 2023-CA-0384-MR, Bates was an appellee; he is also an appellee before our Court. Although King-Crete’s briefs before this Court raise arguments regarding both the County and Bates, this cannot broaden the scope of the discretionary review granted. Therefore, we disregard all briefing regarding 2023-CA-0386-MR by all the parties as this matter is not before us and is final.

II. ANALYSIS

“[S]overeign immunity, for the state itself, has long been the rule in Kentucky.” *Comair, Inc. v. Lexington-Fayette Urban Cnty. Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009). 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[.]” *Yanero v. Davis*, 65 S.W.3d 510, 517-18 (Ky. 2001).

“Under the common law, a state, by reason of its prerogatives as a sovereign and on the ground of public policy, cannot be sued without its consent, and this immunity from the processes of the courts is absolute and unqualified.” *Ky. State Park Comm’n v. Wilder*, 256 Ky. 313, 76 S.W.2d 4, 5 (1934). *See also Foley v. Constr. Co. v. Ward*, 375 S.W.2d 392, 393-94 (Ky. 1963). In the absence of a waiver, sovereign immunity extends to prevent suit against the sovereign to enforce a contract or to receive damages for a tort. *See Ammerman v. Bd. of Educ. of Nicholas Cnty.*, 30 S.W.3d 793, 797 (Ky. 2000); *Univ. of Louisville v. Martin*, 574 S.W.2d 676, 677 (Ky. App. 1978).

Sovereign immunity generally extends to county governments as basic subdivisions of the Commonwealth, some of which preexisted the formation of the Commonwealth. *Ruplinger v. Louisville/Jefferson Cnty. Metro Gov’t*, 607 S.W.3d 583, 585 (Ky. 2020); *Bryant v. Louisville Metro Hous. Auth.*, 568 S.W.3d 839, 845 (Ky. 2019); *Comair, Inc.*, 295 S.W.3d at 94; *Lexington-Fayette Urb. Cnty. Gov’t v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004). Fiscal Courts of counties similarly share in their sovereign immunity. *Edmonson Cnty. v. French*, 394 S.W.3d 410, 414 (Ky. App. 2013); *Doe v. Magoffin Cnty. Fiscal Ct.*, 174 Fed. Appx. 962, 971 (6th Cir. 2006).

The question of whether a defendant is entitled to the defense of sovereign immunity is a matter which we review de novo as it is a question of law. *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 647 (Ky. 2017).

When interpreting statutes to determine whether they waive sovereign immunity, “we must first look to the plain language of a statute and, if the language is clear, our inquiry ends.” *Id.* at 648. “[I]f a statute is clear and unambiguous and expresses the legislature’s intent, the statute must be applied as written.” *Hall v. Hosp. Res., Inc.*, 276 S.W.3d 775, 784 (Ky. 2008).

We presume that the legislature is aware of the judicial construction of prior enactments of a statute and can alter the statute in further iterations to clarify its intentions if needed, and the failure to do so implies that our prior interpretation was correct. *Indep. Bank v. Welch*, 636 S.W.3d 528, 535–36 (Ky. 2021).

King-Crete argues that there are two possible grounds upon which a written contract might be enforceable against a county:

(1) By interpreting the waiver of sovereign immunity as set out in the KMPC in KRS 45A.245 as applying to counties.

(2) From the precedent of *Illinois Central* which ruled there is an exception to counties’ sovereign immunity for the enforcement of express contracts.

The KMPC Does Not Waive the Sovereign Immunity of Counties.

King-Crete argues that the KMPC provides a waiver of sovereign immunity for counties which permits the enforcement of its written contract with the County because the KMPC generally waives sovereign immunity on written contracts.

The waiver of the Commonwealth’s sovereign immunity in the KMPC, KRS 45A.245, states:

(1) Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth³ 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.

(2) If damages awarded on any contract claim under this section exceed the original amount of the contract, such excess shall be limited to an amount which is equal to the amount of the original contract.

³ For purposes of KRS 45A.245, “Commonwealth” is defined in KRS 45A.240(1) as “mean[ing] the Commonwealth of Kentucky and any of its departments or agencies.” Departments or agencies are not defined.

This statute does not mention counties as being subject to this waiver of sovereign immunity. This, alone, would be a valid reason for concluding that the sovereign immunity of counties was not waived in the KMPC, as there is no “express language” or “overwhelming implications from the text” that waiver was intended, which would “leave no room of any other reasonable construction.” *Withers v. Univ. of Ky.*, 939 S.W.2d 340, 346 (Ky. 1997). The conspicuous absence of any language pertaining to counties implies that they were simply not included in this waiver of sovereign immunity. *Commonwealth v. Harris*, 59 S.W.3d 896, 900 (Ky. 2001).

This ruling is also consistent with our longstanding interpretation that a similar provision in the Board of Claims Act (BOCA), which waives sovereign immunity as to the Commonwealth, does not thereby also waive sovereign immunity as to counties.⁴ *See Smolcic*, 142 S.W.3d at 133-34; *Harris*, 59 S.W.3d at 900-01; *Bd. of Claims of Ky. v. Banks*, 31 S.W.3d 436, 438-39 (Ky. App. 2000).⁵ The General Assembly has not abrogated the sovereign immunity of counties in either of these acts. However, that is not the end of our inquiry.

⁴ Compare KRS 45A.240 (defining “Commonwealth” in the KMPC) with KRS 49.060 (waiving sovereign immunity under the BOCA for “the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any of its officers, agents, or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus, or agencies to be able to assert their just claims as herein provided”).

⁵ These cases were interpreting KRS 44.070 (the general BOCA statute), which was renumbered to KRS 49.040 in 2017.

Pursuant to the Common Law, Sovereign Immunity is Waived for Counties as to Express Written Contracts.

King-Crete argues that *Illinois Central*, a 1984 opinion of the Court of Appeals, is precedent that permits King-Crete to enforce its written contract with the County. *Illinois Central* involved a county which entered into a written contract with a railroad agreeing to pay the cost for installation of an automatic flashing light signal and bell at a grade crossing leading to an industrial park maintained by the county, estimated as costing \$14,990.00, and when presented with the bill for \$15,366.56 decided to disclaim any responsibility for paying anything. 676 S.W.2d at 471. When the railroad sued to enforce the contract, the county raised sovereign immunity as a complete defense to suit, and the trial court dismissed the case. *Id.*

The Court of Appeals in *Illinois Central* reversed based upon existing precedent which interpreted our common law as permitting suit against counties to enforce express written contracts. *Illinois Central* has been controlling law for more than forty years.

We observe that sovereign immunity is a creation of the common law and has its roots there and not in the Kentucky Constitution. *Yanero*, 65 S.W.3d at 523-24. Where it is well established in the common law that sovereign immunity does not extend to bar suit against counties on express written contracts, the fact that the General Assembly has not itself waived sovereign immunity for counties under the KMPC is not dispositive as to whether counties wholly retain sovereign immunity as to written contracts. The General Assembly's silence as to counties in the KMPC (and in its predecessor statutes) could also express agreement with the existing common law waiving counties' immunity for express written contracts.

Therefore, the trial court properly denied dismissal to the County in so far as King-Crete made a claim against the County for violating their express written contract, a matter for which sovereign immunity is waived. Whether the contract was fulfilled or not depends upon whether it required unit pricing or fixed pricing, a matter which has yet to be determined.

Sovereign Immunity Bars All Other Relief.

Oral contracts with counties are unenforceable because sovereign immunity prevents their enforcement. *Commonwealth v. Whitworth*, 74 S.W.3d 695, 700 (Ky. 2002); *All-Am. Movers, Inc. v. Kentucky ex rel. Hancock*, 552 S.W.2d 679, 681 (Ky. App. 1977). Therefore, oral modifications of written contracts are likewise unenforceable.

Implied contracts with counties are similarly unenforceable based on sovereign immunity. See *Furtula v. Univ. of Ky.*, 438 S.W.3d 303, 310 (Ky. 2014).

Recovery is also barred on equitable grounds as sovereign immunity has not been waived for such recovery. In *Lipson v. Univ. of Louisville*, 556 S.W.3d 18, 28 (Ky. App. 2018), the Court explained that there was no waiver of sovereign immunity for unjust enrichment claims.

The County has sovereign immunity, which requires dismissal of King-Crete's additional

claims for relief against it.

III. CONCLUSION

We reverse the Court of Appeals to the extent that it determined that the Whitley Circuit Court erred in failing to dismiss King-Crete's suit to enforce an express written contract against the Whitley County Fiscal Court and Whitley County, Kentucky, based on their defense of sovereign immunity. We affirm the Court of Appeals to the extent it determined that sovereign immunity is not waived for oral contracts or to provide equitable relief against counties. We remand to the circuit court for further proceedings.

At this early stage, there is no resolution about what the written contract requires or what documents form this contract. See *Univ. of Ky v. Regard*, 670 S.W.3d 903, 912, 916-20 (Ky. 2023) (discussing how other documents could be incorporated into a contract and how this amalgamated written contract was sufficient to waive governmental immunity under the KMPC); *Lonnie Hayes & Sons Staves, Inc. v. Bourbon Cooperage Co.*, 777 S.W.2d 940, 942 (Ky. App. 1989) ("Separate writings may form the memorandum of contract required by the Statute of Frauds"). The written contract will control whether unit pricing or fixed pricing was required by the contract. This is the dispositive issue in resolving whether the County has fulfilled its obligations under the terms of the contract. While solicitations for bids are typically not part of a contract, see *Ohio River Conversions, Inc. v. City of Owensboro*, 663 S.W.2d 759, 761 (Ky. App. 1984), this may be the rare case that is an exception to that general rule. Accordingly, this breach of contract claim may proceed to an adjudication on its merits.

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

ATTORNEYS

Suspended from the practice of law for two years —

In re: *Mark Carter Eppley* (2026-SC-0093-KB); In Supreme Court; Opinion and Order entered 8/20/2026. [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).]

Respondent, Mark Carter Eppley, KBA Member No. 95204, whose bar roster address is P.O. Box 54446, Cincinnati, Ohio 45254, was admitted to the practice of law in the Commonwealth of Kentucky on October 11, 2012. On January 22, 2026, the Supreme Court of Ohio imposed a two-year suspension, fully stayed on conditions, for extensive violations of the Ohio Rules of Professional Conduct. The Kentucky Bar Association (KBA), through the Office of Bar Counsel (OBC), petitions this Court for the imposition of identical reciprocal discipline pursuant to Rules of the Supreme Court (SCR) 3.435.

We issued a show-cause order directing Eppley to state why identical discipline should not be

imposed. Eppley responded and did not contest the charges and did not object to reciprocal discipline. We now issue this Opinion and Order imposing reciprocal discipline.

I. BACKGROUND

The KBA's petition summarizes the Ohio disciplinary proceeding and attaches a certified copy of the Ohio Supreme Court's order and opinion. In those proceedings, Eppley was found to have neglected two clients' legal matters, charged excessive fees, mishandled client funds, failed to maintain appropriate trust-account records, failed to timely return client files and unearned fees, engaged in unauthorized practice in Tennessee, and made misleading communications about his law firm.

Ohio found that Eppley effectively misappropriated nearly \$35,000 in client funds by depositing payments into his law-firm operating account and, in one instance, his personal bank account rather than a client trust account. He failed to take reasonable steps to protect a client's interests upon termination and failed to promptly refund even the undisputed portion of one client's fee. He also represented and advised a client in Tennessee for more than two years without being licensed or admitted pro hac vice, and used the firm name "Eppley Legal Group" despite being a solo practitioner while maintaining outdated information about a departed associate on his firm website.

The parties stipulated to numerous rule violations, and the Ohio Supreme Court agreed that Respondent violated Ohio Prof. Cond. R. 1.3, 1.4(a)(3)-(4), 1.5(a), 1.15(a), 1.15(c), 1.16(d), and 5.5(a).

II. ANALYSIS

The Ohio Supreme Court imposed a two-year suspension, fully stayed, conditioned upon:

1. Refraining from further misconduct;
2. Serving a two-year term of monitored probation;
3. Participating in monthly meetings with a monitoring attorney;
4. Providing the monitoring attorney full access to trust-account and business-account records; and
5. Completing three hours of CLE in law-office management and three hours in client-trust-account management.

The KBA petition requests that identical discipline be imposed in the Commonwealth.

SCR 3.435(4) mandates that this Court impose identical discipline unless the respondent proves, by substantial evidence: (a) lack of jurisdiction or fraud in the out-of-state proceeding, or (b) that the misconduct warrants substantially different discipline in Kentucky. Under SCR 3.435(4)(c), the foreign jurisdiction's adjudication of misconduct is conclusive.

Eppley has provided no substantial evidence of fraud or jurisdictional defect in the Ohio proceedings. The record reflects that he participated

in the disciplinary process, stipulating to facts and violations, and that the Ohio Supreme Court acted within its authority in imposing discipline. The KBA petition identifies no irregularities suggesting fraud or lack of jurisdiction.

The KBA petition provides a detailed comparison between the Ohio Rules of Professional Conduct violated by Respondent and their Kentucky analogues. Those comparisons show that the corresponding Kentucky rules—SCR 3.130(1.3), (1.4), (1.5), (1.15), (1.16), and (5.5)—are substantively the same. While Ohio’s trust-account rule contains additional record-keeping requirements not present in SCR 3.130(1.15), the core obligations regarding the safekeeping of client property are consistent across both jurisdictions. Identical discipline is appropriate where the misconduct violates Kentucky’s analogous rules, even if the formulation of those rules differs somewhat. *Ky. Bar Ass’n v. Meehan*, 237 S.W.3d 546, 547 (Ky. 2007) (“SCR 3.435 does not require that the rules be identical to allow for the imposition of reciprocal discipline.”).

Eppley’s conduct—neglect, failure to communicate, excessive fees, mishandling of client funds, failure to return files and unearned fees, unauthorized practice, and misleading communications—would warrant discipline under Kentucky law independent of the Ohio findings. Nothing in the record supports the imposition of a lesser or different sanction in Kentucky.

Eppley, in his response to our show-cause order, did not object to reciprocal discipline, and our review of the record does not identify grounds under SCR 3.435(4)(a) or (b) to avoid the imposition of identical reciprocal discipline. The Ohio Supreme Court’s adjudication conclusively establishes the misconduct, and this Court will impose the same sanction unless an exception applies.

III. ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Respondent Mark Carter Eppley is retroactively suspended from the practice of law in the Commonwealth of Kentucky for two years, effective January 22, 2026, with the entire suspension stayed, to run concurrently with his Ohio suspension.
2. Respondent’s stayed suspension is subject to the conditions outlined in the Supreme Court of Ohio’s order in Case No. 2025-0788 issued on January 22, 2026.
3. Respondent shall immediately discontinue use of any misleading firm name or designation in Kentucky, including “Eppley Legal Group,” unless compliant with SCR 3.130(7.1) and (7.5).
4. Respondent shall pay all costs associated with this proceeding pursuant to SCR 3.450.

All sitting. All concur.

ENTERED: August 20, 2026.

CRIMINAL LAW

RAPE IN THE FIRST DEGREE

JURY SELECTION

LEAD DETECTIVE’S CONTACT WITH PROSPECTIVE JURORS

JURY’S PREMATURE DISCUSSION OF TESTIMONY

Defendant appealed as a matter of right his convictions for first-degree rape; second-degree unlawful transaction with a minor; and being a first-degree PFO — AFFIRMED convictions — Before voir dire began, lead detective who investigated instant allegations spotted a former teacher in the jury pool — Detective and teacher acknowledged one another and hugged briefly while speaking — Other prospective jurors witnessed this interaction — Trial court characterized interaction as improper — Defense counsel questioned panel about interaction — Two prospective jurors said they had seen hug, but that it would not affect their fairness — Trial court, apparently erring on the side of caution, excused these two prospective jurors — Teacher was also not seated on the jury — Defendant has not shown that any juror who decided the case was influenced improperly, or even at all, by this incident — Trial court did not abuse its discretion in declining to discharge the entire panel — On final day of trial, after Commonwealth rested, Juror P.P. sent a note requesting to speak with trial court — Juror P.P. reported that during a break in victim’s testimony, jurors discussed her testimony in jury room — Juror P.P. stated that a verdict was not discussed, but that jurors made comments concerning “their interpretation” of what had occurred on witness stand — Juror P.P. returned to jury room, but was brought back to courtroom for further questioning — Juror P.P. said 3-5 jurors were actual participants in the discussion, which occurred in front of the entire jury, and that a conclusion was strongly suggested by participating jurors — Trial court instructed Juror P.P. not to identify what that conclusion was, if any — Defendant moved for mistrial — Commonwealth suggested, and defense counsel agreed, that court first question jurors individually — Judge called each juror in separately — Three jurors in addition to Juror P.P. recalled hearing some discussion of witnesses by fellow jurors — None of the three remembered hearing any discussion concerning conclusions about witness credibility or ultimate issues in the case — None said they had participated in an inappropriate conversation, only that they overheard comments from others — Remaining jurors said they did not recall any inappropriate conversations or that they were not listening — No juror reported that the jury had discussed a verdict; that jury had agreed

upon defendant’s guilt or innocence; or that the discussion had caused them to form an opinion about a witness or the case that could not be set aside — Defendant then renewed his motion for mistrial — Trial court denied motion — Jurors who, contrary to the judge’s instructions, discuss the evidence before the case is submitted to them for deliberation commit misconduct — After conducting an adequate inquiry, a trial court is required to grant a mistrial only if juror misconduct creates a reasonable likelihood of impact on the verdict — In instant action, juror testimony provided a sufficient basis to find that misconduct had occurred — Kentucky Supreme Court agreed with defendant’s assertion that trial court did not have discretion to avoid learning from Juror P.P. what the “implied conclusion” was for the jurors participating in the discussion — A court must assemble a record that allows it to get to the bottom of what the misconduct was, how serious it was, and its likely effect on the jury — However, adequacy of the inquiry must be judged based on all the information that is learned through questioning of the jurors, not simply what was learned during the initial conversation with Juror P.P. — Nevertheless, trial court conducted a methodical inquiry and questioned every juror individually — Other jurors’ accounts did not corroborate Juror P.P.’s description of a conversation involving 3-5 jurors and occurring in front of the entire jury — Rather, the other jurors who remembered anything described isolated comments concerning different aspects of the testimony — No extrinsic information reached the jury; no juror reported that an express conclusion about defendant’s guilt or innocence had been stated; and no juror indicated that the discussion had produced a fixed opinion or impaired their ability to decide the case impartially — Even if trial court had allowed Juror P.P. to identify the conclusion he inferred, this information would have been one account for trial court to weigh alongside the materially different accounts given by other jurors — Record provided a reasonable basis for trial court to find that misconduct was not of a degree and pervasiveness reasonably likely to affect the verdict — Further, instant record defeats defendant’s structural-error characterization —

Victor Eugene Gardner v. Com. (2025-SC-0175-MR); Logan Cir. Ct., Hendricks, Jr., J.; Opinion by Justice Conley, *affirming*, rendered 8/20/2026. [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).]

Victor Eugene Gardner appeals as a matter of right from a judgment of the Logan Circuit Court convicting him of first-degree rape, second-degree unlawful transaction with a minor, two counts of third-degree unlawful transaction with a minor, and of being a first-degree persistent felony offender. The trial court sentenced Gardner to life imprisonment in accordance with the jury’s recommendation.

Gardner raises five claims of error. He argues that: (1) the trial court should have declared a mistrial due to the lead detective's contact with prospective jurors and jurors' premature discussion of testimony; (2) the trial court committed palpable error by admitting records of Snapchat communications; (3) the Commonwealth improperly used those communications to impeach N.T.; (4) the prosecution recalled Detective Edmonds to bolster testimony; and (5) the trial court should have directed a verdict on the first-degree rape charge.

The most significant issue is that of the premature discussion by jurors. Considering the evidence as a whole, the trial court created a record sufficient to assess the nature and probable effect of the misconduct. It therefore did not abuse its discretion by denying the motion for a mistrial. Gardner's remaining claims likewise establish no reversible error. We affirm.

I. Facts and Procedural History

M.L. testified that Gardner forced her into sexual intercourse during an overnight stay at N.T.'s home. M.L. and N.T. testified, as did several other witnesses. The Commonwealth also presented digital communications, investigative testimony from law enforcement, and medical evidence. Gardner's defense hinged on inconsistencies among the witness accounts, as well as limitations in the medical evidence.

One irregularity occurred right away. Before voir dire began, Detective Edmonds spotted a former teacher in the jury pool. The two acknowledged one another and even hugged briefly while speaking. Other prospective jurors were present to witness this interaction. The trial court characterized the interaction as improper, and defense counsel questioned the panel about it. Two prospective jurors said they had seen the hug but insisted it would not affect their fairness. The court apparently erred on the side of caution and excused each of them. The prospective juror whom Edmonds hugged was also not seated on the jury.

During trial, the Commonwealth questioned N.T. about Snapchat communications involving her account, confronted her with particular messages, and presented three exhibits containing records of those communications after she identified them. N.T. identified some of the communications and testified about conversations in which she participated, but she did not authenticate entries across all the pages she was presented. She disagreed with some of the Commonwealth's characterizations and offered her own version of the communications. Detective Edmonds explained that the records had been obtained through the investigation in response to legal process, although he was not very familiar with their format. The certificate from Snapchat that should have accompanied its production of the communications was not introduced, and the messages were confusingly read in reverse chronological order. Gardner did not object to the admission of the exhibits or to the Commonwealth's questioning of N.T.

L.D. testified that she overheard a telephone conversation involving Gardner. When questioned about whether Gardner made an incriminating statement concerning M.L., L.D. hesitated, then said she had told Detective Edmonds about the remark.

She similarly acknowledged, with qualification, the location she had previously identified. The Commonwealth later recalled Edmonds, who—over Gardner's objection—testified that L.D. showed no similar hesitation during her first interview and clearly mentioned the incriminating statement and location.

The most significant irregularity emerged on the final day of trial, after the Commonwealth rested. Juror P.P. sent a note requesting to speak with the trial court. P.P. reported that, during a break in M.L.'s testimony, jurors had discussed it in the jury room. He stated that "there was nothing of, like, a verdict that was discussed," but that jurors made comments concerning "their interpretation" of what had occurred on the witness stand. VR 2025-01-23 12.36.23.092 at 17:00–18:00. P.P. returned to the jury room but was brought back for follow-up questions. He stated that although only about three to five jurors were actual participants, the conversation occurred in front of the whole jury. He estimated that the discussion lasted one to two minutes.

The court asked whether the participating jurors had formed any conclusions, but also instructed P.P. not to identify what that conclusion was, if any. P.P. said a conclusion was strongly suggested but denied hearing explicit discussion of one: "it can be heavily implied what the conclusion could be based on what they said." *Id.* at 20:00–21:00.

Gardner moved for a mistrial, but the Commonwealth suggested, and defense counsel agreed, that the court first question the jurors individually. The judge called each juror in separately, keeping previously questioned panelists apart from the group. Three other jurors in addition to P.P. recalled hearing some discussion of witnesses by fellow jurors. One recalled comments concerning the emotional effect of seeing M.L. testify. Another remembered someone noting inconsistencies between some witnesses. A third recalled a fellow juror questioning whether a witness's memory could be reliable given the time that had passed. None of the three remembered hearing any discussion concerning conclusions about witness credibility or ultimate issues in the case. None said that they had participated in an inappropriate conversation, only that they overheard comments from others. The remaining jurors said they did not recall any inappropriate conversations or that they were not listening.

No juror reported that the jury had discussed a verdict. No juror stated that the jury had agreed upon Gardner's guilt or innocence. And no juror stated that the discussion had caused them to form an opinion about a witness or the case that could not be set aside. Following this inquiry, Gardner renewed his mistrial motion. The Commonwealth argued that although some improper conversation had occurred, no prejudice had resulted in light of the inquiry. The trial court denied Gardner's motion.

The jury convicted Gardner of first-degree rape, second-degree unlawful transaction with a minor, two counts of third-degree unlawful transaction with a minor, and also of being a first-degree persistent felony offender. The jury recommended a life sentence, which the trial court imposed. This appeal followed.

II. ANALYSIS

A. The trial court properly exercised its discretion when it refused Gardner's mistrial requests.

Gardner's initial argument concerns two separate incidents. The first occurred before voir dire, when Detective Edmonds spoke to potential jurors. The second occurred during trial, when a group of jurors talked about testimony before the court gave them the case.

We review denial of a mistrial for abuse of discretion. A trial court abuses its discretion where its ruling is arbitrary, unreasonable, unfair, or unsupported by the evidence. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). While both incidents raised by Gardner were improper, under the totality of the circumstances they did not rise to the level of requiring termination of the trial.

1. Detective Edmonds's encounter with potential jurors

The trial court correctly characterized the interaction as improper. But improper conduct does not itself require a mistrial. The question is whether the incident caused a problem that jury selection could not fix, or that a more rigorous process of selection left untried could have fixed. "The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way." *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996). A mistrial is an extraordinary remedy appropriate only when a fundamental defect in the proceedings creates a manifest necessity to terminate the trial. *Sutton v. Commonwealth*, 627 S.W.3d 836, 856 (Ky. 2021). "It is the prejudice that is of import in making the mistrial decision." *Commonwealth v. Padgett*, 563 S.W.3d 639, 647 (Ky. 2018). "[I]f an otherwise flagrant violation of a court order leaves the jury merely unaffected, or is cured by admonition, then a mistrial is improper, even given a party's impermissible breach of court order." *Id.*

Much as in *Wright v. Commonwealth*, 590 S.W.3d 255, 260–61 (Ky. 2019), Gardner has not shown that any juror who decided the case was influenced improperly—or even at all—by this incident. The trial court investigated and dismissed the prospective jurors who admitted witnessing it. The prospective juror whom Edmonds hugged was also not seated. The trial court declined to discharge the entire panel, and that decision was not an abuse of its discretion.

2. The premature discussion of witness testimony

Jurors who, contrary to the judge's instructions, discuss the evidence before the case is submitted to them for deliberation commit misconduct. *Graham v. Commonwealth*, 319 S.W.3d 331, 340 (Ky. 2010); RCr 9.70; KRS 29A.310(1). When credible information comes to the court that jurors may have engaged in meaningful inappropriate discussion about the case, the court must investigate further. The right to an impartial jury requires "a jury capable and willing to decide the case solely on the evidence before it," as well as "a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when

they happen.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

After conducting an adequate inquiry, the court is required to grant a mistrial only if the juror misconduct creates a reasonable likelihood of impact on the verdict. *Conyers v. Commonwealth*, 530 S.W.3d 413, 427 (Ky. 2017). This depends on the circumstances of the particular case, and we have not adopted a fixed test for determining when premature juror discussion specifically creates a reasonable likelihood of prejudice. “Each case turns on its own facts, and on the degree and pervasiveness of the prejudicial influence possibly resulting.” *Id.* In addition to this prejudice analysis, some juror misconduct might effectively cause one or more members of the jury to become partial or biased. Were that to happen, the error is structural error, and prejudice is presumed. *Commonwealth v. Douglas*, 553 S.W.3d 795, 799–800 (Ky. 2018).

In this case, the testimony of the jurors provided a sufficient basis to find that misconduct had occurred. At least some jurors heard other jurors discussing testimony before the case was submitted to them. The Commonwealth acknowledged that the issue was whether the misconduct rose to the level of prejudice, not whether misconduct had taken place. The question is whether the trial court abused its discretion by finding that the misconduct did not rise to that level.

Gardner points to the court’s instruction that P.P. not reveal the “implied conclusion” he believed could be inferred from what he overheard. Gardner contends that the court prevented itself from learning information that might have demonstrated the prejudicial effect of the misconduct, and that its resulting finding of no prejudice was therefore an abuse of discretion.

To be sure, we do not mandate a particular script. Trial courts have considerable discretion as to the form and scope of the inquiry. That said, we agree with Gardner that a court does not have discretion to avoid learning the information it needs to make its decision. The court must assemble a record that allows it to get to the bottom of what the misconduct was, how serious it was, and its likely effect on the jury.

But the adequacy of the inquiry must be judged based on all the information learned through the questioning of the jurors, not simply what was learned during the initial conversation with P.P. The judge’s initial exchange with P.P. was incomplete. The court knew that several jurors were alleged to have discussed a witness’s testimony and that P.P. believed their comments implied a conclusion. The court should have asked P.P. to explain what he heard and to describe the comments themselves to the extent he remembered them.

Despite this, the court went on to conduct a more methodical inquiry and questioned every juror one at a time. It identified the handful of comments remembered by jurors other than P.P.: the overheard emotional reaction of one unidentified juror to the testimony of M.L.; the overheard puzzlement of an identified juror about some of the differences in the testimony; and the overheard skepticism of another juror regarding a witness’s ability to remember events. None of these jurors reported an express conclusion about Gardner’s guilt or innocence, an agreement about the outcome of the case, or a fixed

opinion that could not be set aside.

Their accounts also did not corroborate P.P.’s description of a conversation involving three to five jurors and occurring in front of the entire jury. No other juror described a conversation of that scope. Instead, the other jurors who remembered anything described isolated comments concerning different aspects of the testimony.

The question, then, is whether the record developed after all the jurors were questioned permitted the trial court to find that the misconduct was not of a “degree and pervasiveness” reasonably likely to affect the verdict. *Conyers*, 530 S.W.3d at 427.

Kentucky cases illustrate the range of circumstances that may arise when analyzing possible juror taint. Although *Lawless v. Commonwealth*, 724 S.W.3d 679, 692–94 (Ky. 2025), arose in a different context, it demonstrates circumstances sufficiently severe to establish structural error in the form of a partial jury even if actual prejudice is murky. There, extrajudicial information reached the entire jury during deliberations, communicated the trial court’s own adverse assessment of a key witness’s credibility, and caused one juror to report an inability to decide the case based solely on the evidence. This Court found the information inherently prejudicial because it rendered the jury no longer impartial and was thus a structural error.

By contrast, in *Woodard v. Commonwealth*, 219 S.W.3d 723, 729–30 (Ky. 2007), a concern about possible premature discussion arose after one juror requested that the defendant provide a handwriting sample. The trial court’s inquiry established that the jury had not discussed the case and that no other juror had joined in the request, and this Court affirmed the denial of a mistrial.

The circumstances here are substantially closer to *Woodard* than to *Lawless*. Unlike in *Woodard*, the inquiry established that some premature discussion of the testimony occurred. But no extrinsic information reached the jury, no juror reported that an express conclusion about Gardner’s guilt or innocence had been stated, and no juror indicated that the discussion had produced a fixed opinion or impaired the ability to decide the case impartially.

Even if the court had allowed P.P. to identify the conclusion he inferred, his answer would have remained one account for the trial court to weigh alongside the materially different accounts given by the other jurors. The court had before it no report of an express conclusion, no account of an agreement about the outcome of the case, and no indication that any juror’s mind had been made up. The record therefore provided a reasonable basis for the trial court to find that the misconduct was not of a degree and pervasiveness reasonably likely to affect the verdict under *Conyers*.

Gardner also characterizes the premature discussion as structural error requiring reversal without a separate showing of prejudice, as described in *Douglas*, 553 S.W.3d at 799–800, and as was found under the facts of *Lawless*. Once a defendant establishes that an actually biased or irreparably tainted jury decided the case, the resulting denial of an impartial jury is structural and is not subject to harmless-error review. Prejudice

is presumed even if it is not clear that the verdict was affected. *Id.* Gardner has not established that predicate violation here. No juror testified to having reached a fixed conclusion before deliberations, and the trial court’s inquiry did not otherwise establish that the jury was actually biased or irreparably tainted. The same record that supports the trial court’s finding that the misconduct was not reasonably likely to affect the verdict therefore also defeats Gardner’s structural-error characterization.

B. Gardner has not established palpable error in the admission of the Snapchat records.

Gardner challenges the admission of three exhibits containing records of Snapchat communications. He argues that they were not properly authenticated and included inadmissible hearsay. Gardner did not object when this evidence was offered, so we review for palpable error under RCr 10.26. Palpable error must be plain, affect substantial rights, and result in manifest injustice. *Davis v. Commonwealth*, 620 S.W.3d 16, 30 (Ky. 2021).

As is sometimes the case when law is practiced in the real world, the presentation of these exhibits was not ideal. Detective Edmonds was not very familiar with the records’ format. The certificate from Snapchat that should have accompanied its production of the communications was not introduced. N.T. identified some of the communications but did not authenticate entries across all pages she was presented. Furthermore, the messages were confusingly read in reverse chronological order.

Those circumstances would have supported a contemporaneous foundational objection, at which point, if sustained, the Commonwealth would have had to do some more work to get the records authenticated. No objection was raised, however, so the Commonwealth had no reason to fix what might have ailed the evidence, as no ailment was suggested.

The existing record does not establish an obvious evidentiary violation. If the defense had objected to these exhibits being admitted on authentication grounds, the trial court’s decision whether or not to admit them would be reviewed under an abuse of discretion standard. *Brafman v. Commonwealth*, 612 S.W.3d 850, 866 (Ky. 2020). N.T. identified communications tied to her account and testified about the conversations she participated in. Detective Edmonds explained that the records were obtained through the investigation in response to legal process. With these indicia of authenticity present, we cannot say it would have been an abuse of discretion to admit the exhibits.

In other words, this would have been a fact-dependent authentication issue, to be decided after the Commonwealth did its best to overcome an authentication objection. With no such objection having been made, the evidence does not present a plain and readily perceptible error.

Nor has Gardner shown manifest injustice. The witnesses testified concerning the communications and they were available for cross-examination. The defense was game for cross-examination and exposed the confusion created by the order and presentation of the messages. Even if we assume that some portion of the exhibits should have

been excluded, Gardner has not demonstrated a probability that their admission altered the result of the trial.

No palpable error occurred.

C. Gardner has not established palpable error from the Commonwealth's questioning of N.T.

Gardner separately argues that the Commonwealth improperly used the Snapchat communications to impeach N.T. This claim is also not preserved.

The Commonwealth questioned N.T. about communications involving her account, confronted her with particular messages, and presented the exhibits after she identified them. N.T. disagreed with some of the Commonwealth's characterizations and offered her version. Again, the defense did not object at trial, so the court was never asked to decide whether the questions were proper for a particular purpose allowed under the rules of evidence, such as for impeachment, authentication, refreshed recollection, etc. It does not seem to us that Gardner has identified any obvious violation of KRE 607, KRE 613, or KRE 403 that resulted in manifest injustice. He is not entitled to palpable-error relief.

D. Any error in allowing Detective Edmonds to recount L.D.'s prior statement was harmless.

L.D. testified that she overheard a telephone conversation involving Gardner. When questioned about whether Gardner made an incriminating statement concerning M.L., L.D. hesitated, then said she told Detective Edmonds about the remark. She similarly acknowledged, with qualification, the location she had previously identified. The Commonwealth later recalled Edmonds, who—over Gardner's objection—testified that L.D. showed no similar hesitation during her first interview, and clearly mentioned the incriminating statement and location.

Gardner argues that L.D.'s prior account was not inconsistent with her trial testimony because she did not deny making the statements, and so the detective should not have been permitted to testify about the prior account under KRE 801A(a)(1). Gardner also says the detective's testimony was not permitted as a recalled witness under KRE 613 because it did not introduce any new facts. It merely described how confident she had allegedly been at an earlier time.

We need not decide whether the difference between L.D.'s prior certainty and her trial hesitation was sufficient to permit the detective's testimony under KRE 613 and KRE 801A(a)(1). Rather, taking the evidence in the light most favorable to Gardner's argument that its admission was error, we hold that even if the detective's testimony should not have been permitted, the mistake was harmless. In this case, the very considerations raised by Gardner against its admissibility also indicate harmlessness. After all, the jury knew about the prior statements L.D. had made to police, because L.D. acknowledged she had made them during her testimony before the jury. After all, Detective Edmonds added no substantially new evidence: he mainly described L.D.'s prior confidence. The jury observed her demeanor and could judge any

hesitation for themselves.

A nonconstitutional evidentiary error is harmless when the Court can determine with reasonable confidence that the judgment remained largely unaffected. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky. 2009). Considering the testimony as a whole, we are satisfied that Detective Edmonds's minimal testimony about L.D.'s previous certainty did not affect the jury's decision.

E. The trial court properly denied Gardner's motion for a directed verdict.

Finally, Gardner argues that the evidence presented at trial was insufficient to sustain the first-degree rape charge and that his motion for a directed verdict on that count should have been sustained.

When deciding a directed-verdict motion, the trial court should draw all reasonable inferences for the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). On appellate review, reversal is appropriate only if, viewing all the evidence, it would have been clearly unreasonable for the jury to find guilt. *Id.*

M.L. testified that Gardner forced her into a sexual encounter that would meet the elements for first-degree rape. Gardner's defense noted inconsistent witness accounts and evidence that could undercut M.L.'s story, if believed by the jury. But conflicting testimony and proposed contradictions in the evidence goes to credibility and weight. The existence of such issues for the jury to have to weigh says nothing about whether there is sufficient evidence for a reasonable guilty verdict. The jury had every right to accept M.L.'s account despite evidence that didn't quite match up with, or that seemed contradictory to, that account. The jury's finding Gardner guilty of first-degree rape was reasonable.

The trial court properly denied the directed-verdict motion.

III. CONCLUSION

The jurors' premature discussion violated the trial court's admonition, and the trial court's initial instruction that P.P. not identify the conclusion he believed the comments implied unnecessarily limited the first stage of the inquiry. But the court thereafter questioned every juror individually and developed a record sufficient to determine the nature and scope of the discussion. That record did not establish that the jurors had made up their minds or that Gardner's case was decided by a partial jury.

Because the trial court did not abuse its discretion by denying a mistrial, and because Gardner's other claims do not establish reversible error, the judgment of the Logan Circuit Court is affirmed.

All sitting. All concur.

WORKERS' COMPENSATION

TORTS

EMPLOYER'S RECOVERY OF WORKERS' COMPENSATION BENEFITS WHEN A THIRD PARTY IS LEGALLY LIABLE, AS SET FORTH IN KRS 342.700(1), AS AMENDED IN 2018

ATTORNEY FEES

As amended in 2018, KRS 342.700(1) provides, in part, that whenever an injury for which compensation is payable under workers' compensation statutes has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil action against the other person to recover damages, or proceed both against the employer for compensation and the other person to recover damages, but he cannot collect from both — If workers' compensation benefits have been paid by the employer or the employer has become liable therefor, the employer may recover from the other person in whom legal liability for damages exists, not to exceed the indemnity and medical expenses paid and payable to or on behalf of the injured employee, less a pro rata share of the employee's legal fees and expenses — When applying KRS 342.700(1), ALJ must first determine which amounts are duplicative of workers' compensation damages, *i.e.*, the amount subject to subrogation — Then, ALJ must reduce the amount subject to subrogation by the employer's share of attorney fees and legal expenses, *i.e.*, the amount the employee owes in attorney fees and expenses from obtaining the recovery amount that is duplicative of workers' compensation benefits — After subtracting the employer's pro rata share of legal fees and expenses, the remaining amount is what is ultimately available to the employer in subrogation — The employer or insurer is entitled to immediate recoupment of benefits already paid, and, if applicable, a credit for benefits payable in the future —

K-VA-T Food Stores Inc. v. Chantella Blackburn and Hon. John B. Coleman, ALJ; and Workers' Compensation Board (2025-SC-0335-WC) and *Chantella Blackburn v. K-VA-T Food Stores, Inc.; Hon. John B. Coleman, ALJ; and Workers' Compensation Board* (2025-SC-0367-WC); On appeal from Court of Appeals; Opinion by Justice Bisig, affirming in part, reversing in part, and remanding, rendered 8/20/2026. [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).]

Pursuant to Kentucky Revised Statute (KRS) 342.700(1), employers and workers' compensation insurers are permitted to recover workers' compensation benefits paid to an injured employee from a third party who is deemed liable for the

injury. At issue in this appeal is the application of this statute, particularly in light of a 2018 amendment imposing responsibility on the employer or insurer for a pro rata share of the employee's legal fees and expenses incurred by pursuing the third-party action.

Chantella Blackburn, who was injured while working for K-VA-T Food Stores, received workers' compensation benefits from her employer. Blackburn also pursued a third-party claim against a store vendor whose actions played a role in causing her injury. Ultimately, Blackburn recovered \$295,000 via settlement with the vendor. K-VA-T then sought reimbursement via subrogation by way of KRS 342.700(1). The Administrative Law Judge (ALJ), Workers' Compensation Board (Board), and Court of Appeals reached differing conclusions regarding the applicability and timing of K-VA-T's obligation to pay a pro rata share of Blackburn's legal fees and expenses. After review, we agree with the ALJ and Board that K-VA-T is entitled to immediate reimbursement for the benefits it has paid to Blackburn that are duplicated by the settlement she obtained, though only after first reducing the settlement proceeds that K-VA-T may reach in subrogation by the amount of K-VA-T's pro rata share of Blackburn's legal fees and expenses.

FACTS AND PROCEDURAL HISTORY

On February 1, 2022, Chantella Blackburn suffered a work-related injury when she fell from a step ladder onto a third-party vendor's cart, injuring her right wrist and other body parts. Blackburn pursued a workers' compensation claim, and an ALJ awarded her disability benefits based on a 6% impairment rating. She received temporary total disability benefits, permanent partial disability benefits of \$17.08 per week for 425 weeks, and future medical expenses for 780 weeks.

Blackburn also initiated a negligence claim against the third-party vendor, claiming her injury was caused by her stepping down off the step ladder and onto the cart being used by the vendor. The negligence claim was ultimately settled for \$295,000. Because the settlement did not allocate damages, the ALJ determined one-third of the settlement represented pain and suffering and subtracted that amount from the total award, leaving \$196,666.66 remaining as damages that duplicated the workers' compensation benefits Blackburn received.¹

¹ Pain and suffering cannot be recovered in workers' compensation, so damages for those amounts cannot be reached in subrogation.

In allocating the settlement award, the ALJ referenced the agreement between Blackburn and her attorney, which was for a 40% attorney's fee, thus reducing the amount of duplicative damages by \$78,666.66, leaving \$118,000 available for subrogation. The parties do not dispute the ALJ's allocation of the settlement funds.² Finally, the ALJ noted the legal expenses Blackburn incurred in pursuing recovery from the third-party vendor, which was \$1,797.54. The ALJ reduced the available subrogation amount by the percentage of the settlement reflecting pain and suffering (one-third), leaving \$117,400.82 available for subrogation.

² Where a civil action fails to apportion the settlement proceeds between compensable and non-compensable items of damage, the ALJ has the authority to determine the appropriate amounts to be apportioned between pain and suffering, lost wages, and medical expenses. *Whittaker v. Hardin*, 32 S.W.3d 497 (Ky. 2000).

Because K-VA-T had already paid medical expenses of \$19,776.54 and income benefits of \$5,469.89, totaling \$25,246.43, the ALJ concluded that K-VA-T was entitled to recover that amount from the settlement funds. Additionally, the ALJ awarded K-VA-T a remaining credit of \$92,154.39 against future benefits owed to Blackburn (amount available for subrogation (\$117,400.82) minus amount already paid in medical expenses and benefits (\$25,246.43) equals available future credit of \$92,154.39). Blackburn filed a petition for reconsideration, arguing that K-VA-T cannot recover the amounts it already paid from the proceeds of the settlement. Further, she contended that the subrogation credit was calculated incorrectly.

On appeal to the Workers' Compensation Board, the majority affirmed in part, vacated in part, and remanded the claim to the ALJ. The Board concluded that the ALJ erred by applying different percentages to the attorney's fees and expenses. While the ALJ subtracted two-thirds of the attorney's fees from the amount available for subrogation, the ALJ only subtracted one-third of the legal expenses. The statute states that the employer is entitled to part of the recovery in a third-party claim, "less a pro rata share of the employee's legal fees and expenses." KRS 342.700(1). Therefore, the Board reasoned that the amount available for subrogation had to be reduced by an additional \$599.18 because the employer is responsible for two-thirds of the legal expenses. Further, a majority of the Board agreed with the ALJ that K-VA-T is entitled to recoup the benefits paid immediately, and that the remaining credit becomes effective when it is awarded. One Board member dissented, asserting that the ALJ incorrectly calculated the subrogation credit and that K-VA-T had to first pay income and medical benefits totaling its pro rata share of Blackburn's legal fees and expenses before it could recoup its subrogation credit.

On appeal, the Court of Appeals affirmed in part and reversed in part. At the outset of its analysis, the Court of Appeals acknowledged that the sole issue on appeal is whether K-VA-T is entitled to recover immediately the amounts it paid to Blackburn, or whether KRS 342.700(1) permits recovery only after the amount K-VA-T has paid exceeds its share of Blackburn's legal fees and expenses. While the Court of Appeals recognized that in *Mastin v. Liberal Markets*, 674 S.W.2d 7 (Ky. 1984), this Court held that an employer is entitled to immediate restitution as to the amount of a settlement that duplicated the employee's workers' compensation benefits, two cases rendered after *Mastin* proceeded on the assumption that the claimant's legal expenses were deducted from the subrogation credit, not from the settlement. *AIK Selective Self Ins. Fund v. Bush*, 74 S.W.3d 251 (Ky. 2002); *AIK Selective Self Ins. Fund v. Minton*, 192 S.W.3d 415 (Ky. 2006). Notably, KRS 342.700(1) was amended in 2018 after the Court rendered both *Bush* and *Minton* to include language explaining that the employer was

entitled to a subrogation credit "not to exceed the indemnity and medical expenses paid . . . , less a pro rata share of the employee's legal fees and expense." The amendment expressly added the "pro rata share" language. The Court of Appeals concluded that K-VA-T could recover only when the benefits it paid exceeded Blackburn's pro rata share of the legal fees and expenses. K-VA-T now appeals to this Court.

ANALYSIS

At the outset, we note that Blackburn argues an ALJ does not have jurisdiction over an employee's personal funds obtained outside the scope of KRS Chapter 342. She contends that by awarding subrogation to K-VA-T directly against her civil settlement, the ALJ acted outside her authority. We disagree.

The right to subrogation credit in a workers' compensation case is purely statutory. See KRS 342.700. Thus, because the statutory right to subrogation falls within the workers' compensation chapter, then by definition, the administrative law judge has jurisdiction to resolve any subrogation issues.

Whittaker v. Hardin, 32 S.W.3d 497 (Ky. 2000). As such, it was entirely permissible for the ALJ to award subrogation against the civil settlement because that is precisely what KRS 342.700 allows.

An injured worker in Kentucky is permitted to pursue both a workers' compensation claim and a third-party tort claim, provided she does not "collect from both." KRS 342.700(1). Since 1916, Kentucky workers' compensation law has consistently allowed an employer or workers' compensation insurer to recover from a third-party tortfeasor. While an employee has historically been permitted to assert claims against both his employer and a third party, "to the extent he collects from one he may not collect from the other." *Book v. City of Henderson*, 176 Ky. 785, 197 S.W. 449 (1917). Simply stated, the statute does not allow double-dipping.

As explained in *Mastin v. Liberal Markets*, 674 S.W.2d 7 (Ky. 1984), the purpose of KRS 342.700(1) is to prevent dual recovery and ensure fairness to both the employee and employer. In that case, Melody Mastin was employed by Liberal Markets when she inhaled insecticide sprayed by Rose Exterminators at her place of employment. *Id.* at 9. Mastin pursued a workers' compensation claim and also filed a products liability claim against Rose Exterminators. *Id.* She ultimately settled her claim against Rose Exterminators for \$50,000. *Id.* When Liberal Markets learned of the settlement, it suspended further payments of workers' compensation benefits and requested immediate reimbursement for the amounts it previously paid. *Id.*

The Court was tasked with determining whether Liberal Markets was entitled to restitution from Mastin for amounts previously paid, or only a credit against future payments. *Id.* at 11. Mastin argued that KRS 342.700 only entitled the employer to reduce its future liability, and not to a subrogation credit against present liability. *Id.* The Court explicitly rejected Mastin's proposal, emphasizing that the statute states an employee "shall not collect from both" and that Mastin had done just that.

Further, nothing in the statute limited an employer’s right of reimbursement to future payments.

While the Court remanded the case back to the trial court to allocate the settlement for each of the elements of damages (i.e., to determine what portions of the settlement compensated the employee for lost wages, medical expenses, and pain and suffering), it nonetheless stated that the employee was

entitled to immediate statutory subrogation as to such amount of her settlement as duplicate worker’s compensation benefits. The appellees have overpaid to this extent and are entitled to restitution as soon as the trial court can decide the factual questions underlying the amount subject to restitution.

Id. at 14. In sum, the Court held that once the employee has recovered damages duplicating workers’ compensation benefits received, the employer is entitled to immediate restitution for those duplicative amounts. Further, the Court emphasized that the purpose of KRS 342.700(1) is to prevent double recovery and to ensure fairness to both the employee and employer. *Id.* at 11.

In *AIK Self Selective Insurance Fund v. Bush*, 74 S.W.3d 251, 252 (Ky. 2002), the Court was again tasked with interpreting and applying KRS 342.700(1). Bush was injured at work and later filed a tort action against a doctor whom he claimed was negligent in providing treatment for his injury, thereby exacerbating his injury and prolonging his disability. *Id.* A jury apportioned fault for Bush’s workplace injuries, determining that the doctor was 25% at fault, leaving the employer 75% at fault. *Id.* at 253. The Court held that the employer could only recover 25% of the compensation benefits paid to prevent double recovery, limited to damages duplicative of compensation – past and future lost wages and medical expenses. *Id.* at 255. However, the Court then held that if the employee’s legal fees and expenses exceeded the employer’s subrogation claim, no recovery was available. *Id.* at 258. Four years later, this Court again required an employer’s recovery in a subrogation claim to be reduced by the workers’ entire amount of legal fees and expenses incurred in pursuing recovery from a tortfeasor. *AIK Selective Self-Insurance Fund v. Minton*, 192 S.W.3d 415 (Ky. 2006).

The interpretation utilized by this Court in *Bush* and *Minton* was based on a then-existing version of KRS 342.700(1), which required that the entirety of an employee’s legal fees and expenses be carved out from the employer or insurer’s subrogation recovery. Stated differently, if the employee’s legal fees and expenses in pursuing a third-party claim exceeded the employer or insurer’s subrogation interests, the subrogation claim was “wiped out.” *Minton*, 192 S.W.3d at 417. Thus, the statute paired with this Court’s interpretation in the *Bush* and *Minton* opinions significantly limited an employer’s subrogation rights.

In 2018, the General Assembly amended KRS 342.700(1) to instead impose proportional subrogation. The statute reads:

Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to

pay damages, the injured employee may either claim compensation or proceed at law by civil action against the other person to recover damages, or proceed both against the employer for compensation and the other person to recover damages, **but he shall not collect from both.** If the injured employee elects to proceed at law by civil action against the other person to recover damages, he shall give due and timely notice to the employer and the special fund of the filing of the action. If compensation is awarded or paid under this chapter, the employer, . . . , having paid the compensation or having become liable therefor, may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, **not to exceed the indemnity and medical expenses paid and payable to or on behalf of the injured employee, less a pro rata share of the employee’s legal fees and expense.**

(Emphasis added). Based on this amendment, the statute currently explicitly provides that an employer or insurer may recover compensation benefits “less a pro rata share of the employee’s legal fees and expense.” The implementation of a pro rata share is intended to reflect only that portion of the fees that were used to obtain damages that are duplicative of the workers’ compensation award. For example, pre-2018, if an employee obtained a \$300,000 third-party settlement, with attorney’s fees of \$100,000, and the employer had paid \$100,000 in medical expenses, the employer had a right to subrogate \$100,000. But because the employer was responsible for the entirety of the legal fees and expenses, the employer’s subrogation lien was effectively extinguished, and the employer could not recover because the attorney’s fees equaled the lien. However, with the 2018 amendment, the employer’s lien is reduced only by its pro-rata share of the legal fees and expenses. If an employer was only responsible for one-third of the \$100,000 in legal fees (\$33,333), then they have a recoverable subrogation amount of \$66,667.

Here, the parties agree that K-VA-T is only responsible for its pro-rata share of the legal fees and expenses, but dispute the point at which those fees are accounted for. K-VA-T argues that, as the ALJ and the Board concluded, the legal fees should be taken off the top of the settlement. So, considering the amount of the settlement that is duplicative of workers’ compensation benefits (\$196,666.66), the ALJ took the attorney’s fees off the top and thereby reduced that amount available for subrogation by 40%, given the contingency fee agreement Blackburn maintained with her attorney. Upon subtracting K-VA-T’s share of legal expenses (\$1,198.36 (which is two-thirds of \$1,797.54)), \$116,801.64 is available in subrogation. The math is more simply described as follows:

Settlement amount	\$295,000.00
Portion of settlement duplicative of workers’ compensation benefits	\$196,666.66
Subtract K-VA-T’s pro rata share of attorney’s fees (\$196,666.66 - \$78,666.66)	\$118,000.00

Subtract K-VA-T’s pro rata share of legal expenses (\$118,000 - \$1,198.36)	\$116,801.64
Total amount available in subrogation:	\$116,801.64

Blackburn agrees that K-VA-T’s pro rata share of legal fees and expenses is \$79,865.03. But conversely, Blackburn asserts the legal fees and expenses should not be taken off the top of the settlement amount, and instead that K-VA-T is not entitled to immediate recoupment nor credit for the duplicative amounts until it has paid benefits or expenses equal to its responsibility of the legal fees and expenses. Thus, she advocates for a different formulation in which the employer’s responsibility of legal fees and expenses (\$79,865.03) is subtracted from the amount of benefits the employer has already paid (\$25,246.43), resulting here in a negative number: -\$54,618.60. She posits that the fact that the number is negative means that, even though K-VA-T has already paid \$25,246.43 in benefits to Blackburn, only after K-VA-T has paid an additional \$54,618.60 in benefits (for a total paid of \$79,865.03 – its pro rata share of legal fees and expenses), will K-VA-T be entitled to a credit against any further benefits payable. In simplest terms, Blackburn advocates for an approach under which an employer may only begin to recover in subrogation when its benefits paid exceed its pro rata share of legal fees and expenses.

The resolution of this issue requires statutory interpretation. This Court has held that when interpreting statutes, we must

look first to the plain language of a statute and, if the language is clear, our inquiry ends. We hold fast to the rule of construction that “[t]he plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source. In other words, “we assume that the ‘[Legislature] meant exactly what it said, and said exactly what it meant.”

Univ. of Louisville v. Rothstein, 532 S.W.3d 644, 648 (Ky. 2017). The statute allows an injured worker to claim workers’ compensation or proceed against a third party, so long as the worker does not recover from both. Tracking through the language further, if workers’ compensation is awarded, (1) the employer, who has paid compensation or becomes liable for compensation; (2) may recover from the liable third party; (3) not to exceed the indemnity and medical expenses *paid* and *payable* to the injury employee – “paid” clearly contemplating amounts already received from the employer and “payable” indicating the amounts an employer is liable to pay in the future; (4) less a pro rata share of the employee’s legal fees and expenses. The statute explicitly entitles the employer to recovery for amounts it has paid and amounts it is liable to pay in the future.

Notably, there is no “fee-first” threshold included in the statute – it does not state that subrogation is barred unless benefits paid exceed fees incurred. Instead, it mandates proportional reduction – “less” means subtraction, and “pro rata” means allocation. Neither of these terms authorize the extinction of an employer’s statutory right to subrogate when

the legal fees and expenses exceed benefits paid. Further, “not to exceed” establishes a cap and ensures the employer only benefits by way of the amounts it has paid or is liable to pay. The statute instructs that if workers’ compensation is awarded, the employer may recover from the liable party. It explicitly states that the employer’s recovery cannot exceed the indemnity and medical expenses **paid and payable** – meaning the amounts paid or the amounts of the workers’ compensation award – less a pro rata share of the employee’s legal fees and expenses. In sum, the statute directs an ALJ to first look to the amounts an employer has paid or been ordered to pay, then deduct the employer’s share of the legal fees and expenses. Had the legislature wanted the statute to operate in the way that Blackburn proposes, it could have read indemnity and medical expenses **paid**, rather than also including “payable” expenses.

Blackburn’s interpretation would effectively rewrite the statute by inserting a prerequisite the Legislature did not include nor intend. That interpretation would also allow Blackburn to retain the entire duplicative portion of her \$295,000 civil settlement while continuing to receive workers’ compensation benefits without any corresponding reduction – a result explicitly contemplated and prohibited by the statute. Allowing an employee to continue receiving compensation payments as if no civil recovery occurred is not proportional allocation, but effectively serves as immunity from subrogation, which certainly cannot be what the legislature intended.

We must give effect to the 2018 amendment to KRS 342.700(1), which is a clear expression of the legislature’s intent to help preserve an employer’s right to subrogate. Requiring immediate restitution gives effect to the amendment that was implemented to address the inequity in the subrogation process. In *Bush* and *Minton*, the employer’s subrogation rights were eliminated because of its obligation to pay legal fees and expenses. By amending the statute to only obligate an employer for its share of the legal fees and expenses, the legislature expressed its desire to keep this avenue of redress open for employers. While we recognize the beneficent purpose of the workers’ compensation system, i.e., to protect and aid injured workers,³ this particular statute is designed specifically to (1) prevent an employee’s double recovery, and (2) give the employer an express right to subrogate when it performed its required duties under the workers’ compensation system – paid benefits to injured employees. Moreover, our interpretation also serves the statute’s purpose insofar as it obligates the employer to first fully account for its pro rata share of legal fees and expenses before proceeding in subrogation against the remaining settlement funds.

³ Ky. *Uninsured Emps.’ Fund v. Hoskins*, 449 S.W.3d 752, 762 (Ky. 2014).

The Court of Appeals returns to *Bush* and *Minton* to reach the conclusion that the amount in legal expenses should be deducted from the employer’s subrogation credit, not from the settlement. The appellate court noted that those cases did not address the issue directly. The problem with reliance upon *Bush* and *Minton* is that those cases predated the 2018 statutory amendment, which was specifically

aimed at increasing the amount an employer can claim in subrogation by making an employer *only* responsible for its share of legal fees and expenses.

While the *Mastin* case also predates the 2018 amendment, the principles announced in *Mastin* were unaffected by the statutory change. An employer is still entitled to immediate restitution for amounts it already paid that were subsequently recovered from a third party. Applying this principle undoubtedly carries out the legislature’s expressed intention in enacting KRS 342.700(1), which is to prevent an employee from doubly recovering.

CONCLUSION

When applying KRS 342.700(1), the ALJ must first determine which amounts are duplicative of workers’ compensation damages – the amount subject to subrogation. Then, the ALJ must reduce the amount subject to subrogation by the employer’s share of attorney’s fees and legal expenses – the amount the employee owes in attorney’s fees and expenses from obtaining the recovery amount that is duplicative of workers’ compensation benefits. After subtracting the employer’s pro rata share of legal fees and expenses, the remaining amount is what is ultimately available to the employer in subrogation.

We thus conclude that when applying KRS 342.700(1), an employer or insurer’s responsibility of attorney’s fees is initially subtracted from the amount available in subrogation from amounts an injured worker recovers from a third party. The employer or insurer is entitled to immediate recoupment of benefits already paid, and, if applicable, a credit for benefits payable in the future. As such, we reverse the Court of Appeals insofar as it concluded that K-VA-T may begin to recover only when the benefits it has paid exceed the pro rata share of legal fees and expenses. We reinstate the opinion of the Board, which remands the claim to the ALJ for correction of the ALJ’s mathematical error.

All sitting. All concur.

ATTORNEYS

Indefinite suspension —

In re: Richard Davis Null (2026-SC-0192-KB); In Supreme Court; Opinion and Order, entered 8/20/2026. [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).]

Richard Davis Null was admitted to the practice of law with the Kentucky Bar Association (KBA) on April 24, 1998. His KBA number is 87271, and his bar roster address is 535 Broadway St., Paducah, Kentucky 42001.

The KBA Board of Governors recommended that Null be found guilty of three counts of violating the Supreme Court Rules; that he remain indefinitely suspended from the practice of law; that he make restitution of \$1,250 to a former client; that he return any documents to that client; and that he pay costs of \$272.69 associated with this action. For the reasons below, we adopt the Board’s recommendation that Null remain indefinitely

suspended but reject the Board’s recommendation to impose conditions.

BACKGROUND

On June 18, 2024, Danyel Loar, a former client, filed a bar complaint against Null. In November 2018, Loar retained Null to represent him in a contract case and paid a \$1,250 retainer. Null was suspended from the practice of law on December 15, 2022, and did not inform Loar of the suspension until March 2023. Loar then made several attempts to contact Null to request the return of documents Loar had provided for his case. Null did not respond. He failed to return the client’s documents or refund the unearned portion of the retainer. Loar sent his bar complaint via certified mail to Null’s bar roster address, but it was returned on July 8, 2024. The McCracken County Sheriff’s Office attempted to serve Null, but the attempt failed. The Executive Director later served him on August 19, 2024.

The Inquiry Commission filed a three-count charge against Null, asserting violations of the following Rules of Professional Conduct. First, the Inquiry Commission alleged that Null violated SCR 3.130(1.4)(a)(3) and (4), which require a lawyer to “keep the client reasonably informed about the status of the matter” and “properly comply with reasonable requests for information.” Second, the Inquiry Commission alleged that Null violated SCR 3.130(1.16)(d), which requires a lawyer, upon termination of representation, to “to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.” Third, the Inquiry Commission alleged that Null violated SCR 3.130(3.4)(c), which provides that a “lawyer shall not: knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.”

The Commission’s attempts to serve Null by certified mail and the McCracken County Sheriff’s Office were unsuccessful. Null was ultimately served via the KBA Executive Director under SCR 3.035(2). Null failed to file an answer to the charge, so it was submitted to the Board of Governors (Board) as a default case under SCR 3.210(1).

On May 5, 2026, the Board filed findings of fact, conclusions of law, and a recommendation for indefinite suspension. The Board unanimously recommended that Null be found guilty of the violations. The Board further recommended that Null remain indefinitely suspended; make restitution of \$1,250 to Loar; return Loar’s documents; and pay costs of \$272.69 associated with this action.

On May 7, 2026, this Court entered an order for Null to show cause why he should not be indefinitely suspended for failure to file an answer to the Board’s findings of fact, conclusions of law, and recommendation. Null did not respond.

Prior Discipline

Null has an extensive disciplinary history. In 2008, this Court privately reprimanded Null. In 2013, this Court suspended Null from the practice

of law for 61 days and probated him for two years for failing to refund the unearned portion of his fee and to provide the former client with his file. *Null v. Ky. Bar Ass'n*, 408 S.W.3d 76, 78 (Ky. 2013). The Inquiry Commission privately admonished Null four times between July 8, 2019, and March 9, 2022. Two of the admonitions ordered Null to refund unearned fees to former clients.

On December 15, 2022, this Court resolved eight separate disciplinary actions against Null and imposed a one-year suspension from the practice of law, with 185 days to be served and 185 days to be probated for two years, subject to conditions. *Null v. Ky. Bar Ass'n*, 714 S.W.3d 354 (Ky. 2022), modified March 23, 2023. Null was found guilty of violating seven counts of SCR 3.130(1.3) for failing to “act with reasonable diligence and promptness in representing a client”; two counts of SCR 3.130(1.4)(a)(3) for failing to “keep the client reasonably informed about the status of the matter”; four counts of SCR 3.130(1.4)(a)(4) for failing to “promptly comply with reasonable requests for information”; one count of SCR 3.130(1.6)(a) for disclosing information relating to representation of a client without informed consent; two counts of SCR 3.130 (1.15)(a) for failing to have a trust account to safeguard client funds; seven counts of SCR 3.130(1.16)(d) for failing to refund the unearned portion of his fee to six clients, two counts of SCR 3.130(8.1)(a) for knowingly making a false statement of material fact that he refunded his fee to a client; one count of SCR 3.130(8.1)(b) for failing to correct the misapprehension and knowingly failing to provide deposit information requested by Bar Counsel; and four counts of SCR 3.130(8.4)(c) for “engaging conduct involving dishonesty, fraud, deceit misrepresentation.”

On April 26, 2023, the KBA moved this Court to enter a show cause order against Null for violating the conditions of his probation. On May 19, 2023, this Court entered an order directing Null to show cause why the 185-day probated portion of his one-year suspension should not be imposed for violating the conditions of his probation. Null failed to respond to this Court’s show cause order. On August 22, 2023, this Court entered an order imposing the full one-year suspension with conditions that Null inform clients of his inability to represent them within ten days, not to accept new clients or collect unearned fees, and immediately cancel and cease any advertising activities. *Null v. Ky. Bar Ass'n*, 677 S.W.3d 344 (Ky. 2023).

One year later, on August 22, 2024, this Court entered an order indefinitely suspending Null from the practice of law. *In re Null*, 701 S.W.3d 224, 225 (Ky. 2024). In that case, two former clients filed complaints against Null raising substantially similar allegations to those resulting in his 2022 temporary suspension. The Board of Governors unanimously recommended a two-year suspension to run consecutively to his previously ordered suspension. *Id.* at 224-25. This Court noted that Null’s location was unknown, and it appeared “that Null decided to effectively, and permanently, cease observing the Rules of Professional Conduct and cease complying with the direct orders of this Court once his initial term of temporary suspension became effective on December 15, 2022.” *Id.* at 226-27.

This Court declined to follow the recommendation and instead indefinitely suspended Null from the practice of law under SCR 3.167(1) based on his

“prior disciplinary actions, his current suspension, the abandonment of his former clients, and his complete disregard for the orders of this Court and the rules of practice in this Commonwealth.” *Id.* at 227. This Court further explained that Null’s suspension would remain in effect pending further review by this Court, upon Null’s filing a motion for an accounting of his failure to respond and requesting a final determination, upon the KBA’s motion for a final disposition, or upon the Court’s own motion. *Id.*

ANALYSIS

In the instant action, the Board recommended that Null be indefinitely suspended from the practice of law, pay restitution to the client, return the client’s documents, and pay costs. Null is currently indefinitely suspended from the practice of law, as ordered on August 22, 2024, for his failure to participate in a prior disciplinary action. This Court remains unaware of Null’s current location, and he has remained unresponsive since his temporary suspension on December 15, 2022. Because he did not dispute the Board’s findings of fact, we adopt the Board’s finding that Null is guilty of the following violations: one count of SCR 3.130(1.4)(a)(3) and (4); SCR 3.130(1.16)(d); and SCR 3.130(3.4)(c).

The Board recommended that we order Null to pay restitution in the amount of \$1,250 and to return any documents to Loar. Though not specifically addressed in prior disciplinary cases, our rules do not permit this Court to impose conditions when it indefinitely suspends an attorney from the practice of law. SCR 3.380 sets forth the degrees of discipline available for violations of our rules: discipline may be administered by way of public reprimand, suspension from practice for a definite time, or permanent disbarment, all of which may be with or without such conditions as the Court may impose. This Court has held that the “plain language of the rule indicates that” because “permanent disbarment stands alone separated from the language allowing us to impose conditions by the word ‘or,’” this Court cannot impose conditions on an attorney. *Ky. Bar Ass'n v. Chesley*, 393 S.W.3d 584, 602 (Ky. 2013).

Indefinite suspension is not included as an available sanction under SCR 3.380. Instead, SCR 3.167(1) allows this Court to “suspend the Respondent from the practice of law for an indefinite period of time in cases in which the Respondent has failed to file an answer to a Charge pursuant to SCR 3.164, or having answered, has thereafter failed to participate in the disciplinary process.” SCR 3.167 does not include language allowing this Court to impose conditions in conjunction with indefinite suspension. Indefinite suspension is even further removed from the language in SCR 3.380 allowing us to impose conditions, as it is part of a separate rule. Thus, our rules do not allow us to impose conditions in an order indefinitely suspending an attorney from the practice of law.

Though this order indefinitely suspends Null from the practice of law, our August 22, 2024, order of indefinite suspension remains in effect. Under SCR 3.167(5), “[i]f a Respondent fails to seek reinstatement within five (5) years after entry of an Order of Indefinite Suspension, the Office of Bar Counsel shall move the Court for permanent disbarment.” (emphasis added). If Null fails to

seek reinstatement within five years of August 22, 2024, the Office of Bar Counsel must move for permanent disbarment after five years of the entry of the August 22, 2024, order.

We reiterate the conclusion in our August 22, 2024, opinion and order:

We do not regard this as a final adjudication of the matter. Null’s indefinite suspension shall remain in effect pending further review by this Court upon his motion for a final determination in this case which includes an accounting for both his failure to respond in this current matter and his failures to abide by the prior orders of this court, upon a motion of the Kentucky Bar Association for a final disposition, upon the presentation of additional charges against Null, or upon the Court’s own initiative.

In re Null, 701 S.W.3d at 227.

Accordingly, this Court ORDERS that:

1. Richard Davis Null is found guilty of the above-described violations of the Rules of Professional Conduct.
2. Null remains indefinitely suspended from the practice of law.
3. All prior orders of this Court, including but not limited to those concerning the refunding of money by Null to each of his former clients, remain in full force and effect.
4. If he has not already done so, Null must, within 10 days after issuance of this order, notify, by letter duly placed with the United States Postal Service, all courts or other tribunals in which he has matters pending, and all clients of his inability to represent them and of the necessity and urgency to promptly obtain new counsel as required by SCR 3.390. Null shall simultaneously provide a copy of all such letters of notification to the Office of Bar Counsel.
5. If he has not already done so, Null shall immediately cancel any pending advertisements, to the extent possible, and shall terminate any advertising activity for the duration of the term of suspension.
6. If he has not already done so, Null is instructed to promptly take all reasonable steps to protect the interests of his clients. He shall not, during the term of suspension, accept new clients or collect unearned fees, and he shall comply with the provisions of SCR 3.130(7.50); and
7. In accordance with SCR 3.450, Null is directed to pay all costs associated with these disciplinary proceedings in the amount of \$272.69, for which execution may issue from this Court upon finality of this Opinion and Order.

Lambert, C.J.; Bisig, Conley, Goodwine, Keller, and Thompson, JJ., sitting. All concur. Nickell, J., not sitting.

ENTERED: August 20, 2026.

INSURANCE**COMMERCIAL GENERAL
LIABILITY (CGL) POLICY****PROFESSIONAL LIABILITY
ENDORSEMENT****NEGLIGENCE****NEGLIGENCE ARISING FROM AN
ALLEGED SEXUAL ASSAULT OF A CHILD
IN A DAY CARE****“OCCURRENCE” AND “ACCIDENT”****FORTUITY DOCTRINE**

In May 2000, child, who was two-years-old at the time, began attending day care — Day care was owned by John Thomas (Thomas) — Within the first week of attending day care, child sustained injuries consistent with attempted vaginal penetration with a blunt object — At bedtime on May 31, 2000, child informed her mother that another child at day care, Madison, had touched her vaginal area inappropriately — The next day, father picked child up from day care — Child told father that “it hurts to go potty” — Father found child’s vaginal area to be “red and raw” — Parents took child to family physician — Gynecologist later examined child and determined that her injuries were indicative of attempted penetration by a blunt object — Gynecologist opined that injuries were not caused by another child — Child made various statements suggesting several perpetrators: (1) five-year-old Madison; (2) Thomas’s thirteen-year-old son, Jacob; and (3) Thomas — When questioned about who was present when abuse occurred, child looked at her father and said “somebody gonna get you” — Day care employees stated that abuse did not occur there and none recalled any injuries or complaint of pain from child — Further, employees noted that because of the open setup of the day care, it would have been impossible for anyone to be alone with a child without being observed — Both father and Thomas underwent polygraph and urine tests, and each provided DNA samples — Thomas was deemed to have been truthful during polygraph — Father’s polygraph results were deemed to be inconclusive — Semen was found on several pairs of child’s underwear, including a pair that she had not worn to day care — DNA testing excluded Thomas, but the sample included a mixture of DNA from child and father — Father was ultimately indicted for sexual abuse; however, he was acquitted following a jury trial — No other criminal charges have been brought against any other alleged perpetrator — Thomas never informed day care’s insurance company (Monroe Guaranty) of the alleged assault or police

investigation — Thomas purchased insurance policy from Monroe Guaranty, with effective date covering period during which child was injured — Insurance policy includes commercial general liability (CGL) and professional liability coverage — Specifically, CGL is supplemented by “Day Care/Day Care Professional Liability” endorsement (day care endorsement) (collectively “policy”) — Since Thomas operated day care as a sole proprietor, policy identities named insured as Thomas, doing business as day care — CGL base policy provides coverage for bodily injury and property damage — Coverage is triggered if the loss is caused by an “occurrence” — CGL base policy defines occurrence as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions” — Day care endorsement amends CGL base policy to provide additional coverage for bodily injury, property damage, and “other injur(ies) arising out of the rendering of or failure to render professional services in connection with the operation of the Insured’s business as a day care” — Policy contained numerous exclusions — CGL base policy excludes from coverage any injury that was “expected or intended from the standpoint of the insured” — Coverage under day care endorsement excluded injuries arising from (1) violation of any statute, or government rule or regulation; (2) liability of an insured, if an individual, for personal acts or omissions of a nature other than day care; or (3) dishonest, fraudulent, criminal or malicious acts or omissions of the insured, any partner or employee — Monroe Guaranty had a duty to defend Insureds from any suit seeking damages for a covered occurrence and it must indemnify Insureds for damages it is obligated to pay due to injuries arising from a covered occurrence — In December 2013, child’s mother filed instant action on child’s behalf against Thomas and day care, alleging negligence, negligent infliction of emotional distress, and negligent failure to rescue — Complaint alleged Thomas was negligent in operating day care, including his hiring, training, and supervision of employees — Monroe Guaranty disclaimed coverage, provided Thomas with defense counsel under a reservation of rights, and filed an intervening complaint seeking declaratory relief from its contractual obligation to defend and indemnify Thomas under the policy — Monroe Guaranty’s declaratory action pled that child’s injuries failed to qualify as a covered “occurrence” under policy — Further, even if child’s injury qualified as an occurrence, policy exclusions precluded coverage — In 2015, child reached the age of majority and was substituted as the party plaintiff — In 2016, after substantial discovery had occurred, Monroe Guaranty filed motion for declaratory and summary judgment — Trial court concluded that plaintiff’s injuries arose from “sexual molestation,” in violation of KRS Chapter 510; therefore, trial court granted motion — On appeal, Court of Appeals affirmed

— Kentucky Supreme Court granted discretionary review and reversed Court of Appeals, stating that trial court failed to conduct an assessment regarding whether the policy afforded Insureds an initial grant of coverage for plaintiff’s injury — On remand, trial court needed to make adequate findings which clearly denote its reasoning for its ruling on coverage — Record was not adequately developed for an appellate court to assess whether plaintiff’s claims constituted an occurrence under the policy — On remand, trial court again granted Monroe Guaranty’s declaratory judgment and summary judgment motion — Trial court’s factual findings were confined to a single paragraph that focused solely on either Thomas or father as the individual who perpetrated the sexual assault — Trial court did not mention any facts concerning plaintiff’s allegations that Madison or Jacob caused her injuries — Trial court failed to identify any facts concerning day care’s business operations or facts surrounding day care’s supervision of plaintiff on the day of the incident — Trial court analyzed coverage exclusively under CGL base policy, ignoring coverage under day care endorsement entirely — Trial court ruled that “the sexual assault of a child of tender years, under the care of an insured, falls squarely within intending an event to occur and that the sexual assault of a child could never be categorized as a ‘chance event’ beyond the control of the insured” — Trial court denied Insureds’ motion for summary judgment, finding that genuine issues of material fact remained, including whether plaintiff was injured while at day care and whether Thomas or day care acted negligently in protecting her from injury — This portion of the order on appeal is not before Kentucky Supreme Court — Court of Appeals affirmed — **AFFIRMED IN PART, REVERSED IN PART, and REMANDED** — CGL base policy failed to define “accident” as it was used in defining “occurrence” — Where “accident” is not defined in a policy, Kentucky courts define the term by its ordinary meaning — Inherent in the plain meaning of “accident” is the doctrine of fortuity, which requires courts to analyze the insured’s intent and control — Specifically, courts consider (1) whether the insured intended the event to occur; and (2) whether the event was a chance event beyond the control of the insured — Thus, if the Insureds did not intend the event to occur, or if it was beyond their control, the event was an accident — Court of Appeals erred when it classified plaintiff’s injury as a “sexual crime” in which intent may be inferred under Kentucky law — Facts viewed in a light most favorable to plaintiff show that her injuries occurred at the hands of another child — If another child perpetrated the harm, the court cannot classify the event as a sexual criminal offense — To do so erroneously assumes a five-year-old child maintained and furthered a sexual purpose for her alleged conduct — First prong of fortuity analysis contemplates intent from the

standpoint of the Insured, not a layperson — Thus, the focus of the first prong in instant action asks whether Insureds, *i.e.*, Thomas or day care employees, intended for plaintiff to be harmed through forceful vaginal penetration with an object — Plaintiff has alleged two factual scenarios, which if found true by trier of fact, would forestall a finding that Insureds intended for the harm-producing conduct to take place: either Madison or Jacob were the actors responsible for plaintiff's injuries — These allegations are supported by testimony from plaintiff's parents — Plaintiff's allegations regarding Madison and Jacob are further documented in medical records, police records, and intake records — Trial court failed to mention or consider these facts — If trial court had, perhaps it would have concluded that Insureds did not intend for another child to use a blunt object to penetrate plaintiff's vagina — Kentucky Supreme Court could not approve of blanket proposition "that the sexual assault of a child could never be categorized as a 'chance event' beyond the control of the insureds" — Nevertheless, Insureds maintained control over the event as they were in charge of caring for and the safety of the children, layout of the day care, and staffing — Plaintiff failed to identify any genuine issue of material fact on the question of control — Insureds had control over the event in question, thereby failing to meet the second prong of the tortuity analysis — Thus, coverage under CGL base policy was not triggered as the event that caused plaintiff's injuries, whether it was the act of vaginal penetration or the Insureds' negligence, did not qualify as an occurrence — Trial court's declaratory and summary judgment order is completely devoid of any analysis regarding coverage under the day care endorsement; therefore, Supreme Court confined its review to the Court of Appeals' holding that day care endorsement does not provide coverage — Court of Appeals erroneously made its own factual findings to determine that plaintiff's damages did not arise out of the Insureds' rendering of or failure to render professional services — On REMAND, trial court must complete a full coverage analysis, which now encompasses only coverage under the day care endorsement — Coverage is triggered under that endorsement if (1) plaintiff's damages (2) arose out of (3) the rendering of or failure to render professional services in connection with the operation of the day care — If the trial court concludes that the policy provides an initial grant of coverage, then it must consider coverage exclusions, and, if applicable, any exceptions to those exclusions —

Brianna Robinson v. Monroe Guaranty Insurance Company; John Abbington Thomas; John Abbington Thomas d/b/a Room to Grow Preschool; and Room to Grow Preschool, LLC (2025-SC-0111-DG); On review from Court of Appeals; Opinion by Justice Goodwine, *affirming in part, reversing in part, and remanding*, rendered 8/20/2026. [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).]

Appellant, Brianna Robinson ("Brianna"), appeals from the Calloway Circuit Court's order granting Monroe Guaranty Insurance Company ("Monroe Guaranty") declaratory and summary judgment. For the second time, this Court must consider whether the trial court performed an adequate insurance coverage evaluation.

For the reasons stated below, we affirm the Court of Appeals' holding that the subject commercial general liability ("CGL") base policy does not afford John Abbington Thomas ("Thomas"), doing business as Room to Grow Preschool ("Room to Grow"), coverage for Brianna's claimed damages. However, we reverse the Court of Appeals' holding that Brianna's claimed damages are not covered under the subject professional liability endorsement. We remand this case to the trial court for a more complete coverage evaluation under the subject professional liability endorsement.

BACKGROUND

This appeal stems from a negligence action brought by Brianna against Thomas and Room to Grow (collectively, the "Insureds") following injuries she sustained while attending Room to Grow. Monroe Guaranty intervened seeking a declaratory judgment that it is under no obligation to defend or to indemnify the Insureds.

I. Brianna's Injuries

In May of 2000, Brianna, who was two years old at the time, began attending Room to Grow, located in Murray, Kentucky. Within the first week of attending Room to Grow, Brianna sustained injuries consistent with attempted vaginal penetration with a blunt object. In Robinson's first appeal to this Court, styled *Robinson v. Thomas*, Nos. 2019-SC-0451-DG & 2020-SC-0153-DG, 2022 WL 3641184 (Ky. Aug. 18, 2022) ("*Robinson I*"), we summarized the evidence as follows:

Over two decades ago, two-year-old Brianna was enrolled in Room to Grow. . . . Within a few days, it became clear Brianna did not want to attend the preschool. At bedtime on May 31, 2000, she told her mother, Lisa Robinson, another child at Room to Grow, Madison, had touched her vaginal area inappropriately. Unsure how to respond, Lisa put the child to bed. The following day, Brianna's father, Dr. Thomas Robinson, picked her up from Room to Grow. Shortly thereafter, she told her father "it hurts to go potty." After Dr. Robinson found her vaginal area to be "red and raw," he and his wife agreed Brianna should be seen by their family physician, Dr. Richard Crouch.

Dr. Crouch opined a serious fall caused the injury or the irritation had been caused by someone's intentional act. Dr. Crouch recommended Brianna be taken to a gynecologist immediately. The next day, Dr. Dawn Deeter examined Brianna under anesthesia. She determined Brianna's hymen was stretched and discovered labial and vulvar lacerations indicative of attempted penetration with a blunt object. . . . Dr. Deeter indicated she had consulted with another physician who opined Brianna's injuries were not caused by a child. . . . Brianna had made

various statements suggesting several possible perpetrators. On separate occasions, Brianna stated she had been touched or rubbed by five-year-old Madison, Thomas's thirteen-year-old son [Jacob], and Thomas himself. When questioned about who was present when the abuse occurred, [Robinson] looked at her father and said "somebody gonna get you."

[Room to Grow employees] stated the abuse did not occur at Room to Grow and none recalled any injuries or complaints of pain from Brianna. Further, because of the open setup of the daycare, each indicated it would have been impossible for anyone to be alone with a child without being observed.

[Dr.] Robinson and Thomas subsequently underwent polygraph and urine testing, and each provided DNA samples. Thomas was deemed to have been truthful during the polygraph. Dr. Robinson's polygraph results were deemed to be inconclusive. Semen was discovered on several pairs of Brianna's underwear, including a pair she had not worn to Room to Grow. DNA testing excluded Thomas as the contributor, but the sample included a mixture of DNA from [Brianna] and Dr. Robinson.

Dr. Robinson was ultimately indicted for sexual abuse. He was acquitted following a jury trial. No other criminal charges have been brought against any other alleged perpetrator. Thomas never informed Monroe Guaranty of the alleged assault or the ensuing police investigation.

Id. at *1-*2. We recite additional facts throughout this Opinion where necessary.

II. Monroe Guaranty Insurance Policy

Thomas purchased the policy of insurance at issue through Monroe Guaranty, with an effective date covering the period during which Brianna was injured. The insurance policy includes CGL and professional liability coverage. More specifically, the CGL is supplemented by a "Day Care/ Day Care Professional Liability" endorsement ("day care endorsement") (collectively, "the policy"). Since Thomas operated Room to Grow as a sole proprietor, the policy identifies the named insured as Thomas, doing business as Room to Grow.

The CGL base policy provides coverage for two types of losses, bodily injury and property damage. Coverage is triggered if the loss "is caused by an 'occurrence. . . .'"¹ The CGL base policy defines occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The day care endorsement amends the CGL base policy to provide additional coverage for bodily injury, property damage, and "other injur(ies) arising out of the rendering of or failure to render professional services in connection with the operation of the Insured's business as a day care." As such, the day care endorsement amends the CGL base policy's definition of occurrence to also include "any act or omission arising out of the rendering of or failure to render professional services as a day care."

¹ Coverage is triggered if the loss is caused by an "occurrence" that takes place in the "coverage 'territory,'" and during the "policy period." There

is no dispute that Brianna's alleged injuries were sustained during the policy period and within the coverage territory.

The policy includes numerous exclusions. The CGL base policy excludes from coverage any injury that was "expected or intended from the standpoint of the insured." Coverage under the day care endorsement is excluded if the injury arises out of the following: (1) the violation of any statute, or governmental rule or regulation; (2) liability of an insured, if an individual, for personal acts or omissions of a nature other than day care; or (3) dishonest, fraudulent, criminal or malicious acts or omissions of the insured, any partner or employee.

Pursuant to the policy's agreement, Monroe Guaranty has a duty to defend the Insureds from any suit seeking damages for a covered occurrence. Similarly, Monroe Guaranty must indemnify the Insureds for damages it is obligated to pay due to injuries arising from a covered occurrence.

III. *Procedural History*

In December of 2013, Brianna's mother commenced suit on her behalf against Thomas, Room to Grow, and Room to Grow, LLC.² The three-count complaint alleged negligence, negligent infliction of emotional distress, and negligent failure to rescue. The complaint further alleged nine specific instances of negligence. The gravamen of the complaint is that Thomas' negligence in operating Room to Grow, including his hiring, training, and supervision of employees, resulted in her injuries.

² Room to Grow Preschool, LLC, has been dismissed as a party-defendant because the entity was not formed until 2007, more than five years after the subject incident.

Monroe Guaranty disclaimed coverage, provided Thomas with defense counsel under a reservation of rights, and filed an intervening complaint seeking declaratory relief from its contractual obligation to defend and indemnify Thomas under the policy. Monroe Guaranty's declaratory action pled that Brianna's injuries failed to qualify as a covered "occurrence" as defined by the policy. Moreover, Monroe Guaranty averred that even if Brianna's injury qualified as an occurrence, policy exclusions precluded coverage. In 2015, after reaching the age of majority, Brianna was substituted as party plaintiff in place of her mother.

i. *Robinson I*

In 2016, after substantial written and oral discovery, Monroe Guaranty filed a motion for declaratory and summary judgment, arguing that it did not owe the named defendants a duty to defend or indemnify. The trial court concluded that Brianna's injuries arose from "sexual molestation," in violation of "multiple sections of [Kentucky Revised Statutes ("KRS")] Chapter 510." As a result, the trial court granted Monroe Guaranty's motion, concluding that coverage is excluded for injuries arising from a violation of any statute. On appeal, a divided Court of Appeals panel affirmed the trial court's judgment.

This Court granted discretionary review and reversed the Court of Appeals, stating that the trial court failed to conduct an assessment regarding whether the policy afforded the Insureds an initial grant of coverage for Brianna's injury. *Robinson*, 2022 WL 3641184, at *4. We explained that the trial court should consider policy exclusions only after establishing an initial grant of coverage. *Id.* at *5 (citing *Am. Mining Ins. Co. v. Peters Farms, LLC*, 557 S.W.3d 293, 298 (Ky. 2018)). In evaluating coverage under the CGL base policy, this Court reiterated the doctrine of fortuity, which applies when coverage is triggered by an occurrence defined as an accident. *Id.* (citing *Martin/Elias Props., LLC v. Acuity*, 544 S.W.3d 639, 643 (Ky. 2018) and *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 76 (Ky. 2010)). The doctrine of fortuity considers whether an insured intended for the event triggering coverage to occur and whether the event was a chance event beyond the insured's control. *Martin/Elias Props.*, 544 S.W.3d at 643.

As our analysis progressed, however, we declined the opportunity to assess whether Brianna's claims constituted an occurrence under the policy. This Court provided the following reasoning:

The question presented is whether injuries sustained as the result of a sexual assault inflicted upon a child of tender years while that child is under the care and supervision of a licensed daycare qualifies as an "occurrence" within the meaning of the CGL policy. The answer to that question necessarily depends on the facts of the case and factual determinations are to be made by trial courts as those tribunals are ideally situated to make such decisions. Unfortunately, the trial court did not do so, and the record is insufficiently developed to permit an appellate court to adequately discern the appropriate answer. . . .

Because the trial court's grant of declaratory and summary judgment was based on a flawed and incomplete factual and legal analysis, it was infirm. Thus, we are constrained to reverse the Court of Appeals and remand to the trial court for further proceedings.

Id. at *5-6.

Moreover, regarding the trial court's application of the "violation of any statute" exclusion, we underscored that the exclusion only applied in the context of coverage under the day care endorsement. This Court expressed further concern over "the expansive reading embraced by the trial court of the 'violation of any statute' exclusion and the apparent broadening of that interpretation by the Court of Appeals to include [any] violation . . . of the Commonwealth's thousands of statutes—regardless of the subject matter covered thereby." *Id.* at *6. Upon remand, we offered the following instructions:

The trial court is encouraged to make adequate findings which clearly denote the reasoning for its ruling on coverage. The trial court should also carefully analyze and explicitly explain its ruling on the applicability of exclusionary language based on its factual findings. Including such findings will ensure the record is fully developed to enable effective and adequate appellate review, if necessary and requested.

Id. at * 6.

ii. *Robinson II*

On remand, the trial court once again granted Monroe Guaranty declaratory judgment and summary judgment. The trial court's factual findings were confined to a single paragraph that focused solely on either Thomas or Brianna's father as the individual who perpetrated the sexual assault. The trial court did not mention any facts concerning Brianna's allegations that Madison or Jacob caused her injuries. The trial court also failed to identify any facts concerning Room to Grow's business operations or the facts surrounding Room to Grow's supervision of Brianna on the day in question. In assessing whether Brianna's injury arose from an "occurrence," the trial court analyzed coverage exclusively under the CGL base policy, ignoring coverage under the day care endorsement entirely. Ultimately, the trial court ruled that "the sexual assault of a child of tender years, under the care of an insured, falls squarely within intending an event to occur and that the sexual assault of a child could never be categorized as a 'chance event' beyond the control of the insured."

In addition, the trial court denied the Insureds' motion for summary judgment, concluding that genuine issues of material facts remain, including whether Brianna was injured while at Room to Grow and whether Thomas or Room to Grow acted negligently in protecting her from injury. This portion of the order on appeal is not before us.

The Court of Appeals affirmed the trial court's judgment. The Court of Appeals rejected Brianna's contention that the Insureds' negligence is the event qualifying as an occurrence. The Court of Appeals opined that Brianna's injury, which was caused by vaginal penetration with an object, is the event to be analyzed when assessing the existence of an occurrence under the CGL base policy.

In evaluating the harm-producing act, the Court of Appeals concluded that the unknown perpetrator's actions were intentional and within the Insureds' control. The Court of Appeals reasoned that whether an action is intentional "as opposed to accidental, is supposed to be viewed from the standpoint of a layperson. And any reasonable layperson would conclude that penetration of a two-year-old's vagina with a blunt instrument was not an accident, by-chance event, or fortuity." The Court of Appeals went further by assuming that Brianna's injuries were caused by a criminal sexual assault, and therefore intent may be inferred pursuant to *Thompson v. West American Insurance Co.*, 839 S.W.2d 579, 581 (Ky. App. 1992). Specifically, the Court of Appeals held that "[a] plain reading of case law shows that [Brianna's] status as the victim of a sexual crime sufficiently demonstrates an intent to harm and injure her." As to the element of control, the Court of Appeals concluded that Thomas and Room to Grow maintained full control over the conditions that led to Brianna's sexual assault, including the layout of the premises, the placement of staff, and the staff's supervision of children.

Turning to potential coverage under the day care endorsement, the Court of Appeals, citing *Employers Insurance of Wausau v. Martinez*, 54 S.W.3d 142, 144 (Ky. 2001), first determined that coverage is not appropriate under the day care endorsement because Brianna's injuries resulted

from intentional acts that did not “arise out of” the Insureds’ failure to render professional services. The Court of Appeals reached this conclusion by rendering its own factual findings. The Court of Appeals further found that the “undisputed facts show that [Room to Grow] maintained an open layout setup, whereby employees observed the children, and at no time was [Brianna] left alone with another child, Thomas, or a [Room to Grow] employee.” In its concluding paragraph, the Court of Appeals stated that the day care endorsement did not provide “liability insurance for criminal, intentional actions perpetrated upon [Room to Grow’s] premises.”

This Court granted Brianna’s petition for discretionary review. Brianna alleges the trial court and the Court of Appeals made several errors in evaluating coverage under the policy. We address each allegation of error in turn below.

STANDARD OF REVIEW

Pursuant to Kentucky Rules of Civil Procedure (“CR”) 56.01, a party seeking declaratory judgment may move at any time for summary judgment in his favor. In *Robinson I*, this Court detailed the following standard of review for evaluating a judgment obtained through CR 56.01:

When “a summary judgment has been granted in a declaratory judgment action and no bench trial held, the standard of review for summary judgments is utilized.” *Ladd v. Ladd*, 323 S.W.3d 772, 776 (Ky. App. 2010) (citation omitted). “The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012) (citations omitted). “If a question of material fact exists when viewing the evidence through a lens most favorable to . . . the party opposing summary judgment, summary judgment is inappropriate.” *Allstate Ins. Co. v. Smith*, 487 S.W.3d 857, 860 (Ky. 2016). Summary judgment is only proper when “it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citation omitted). The word “impossible” in *Steelvest* was “used in a practical sense, not in an absolute sense.” *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

2022 WL 3641184, at *4.

We must also apply *de novo* review to the lower court’s interpretation of an insurance contract. *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 638 (Ky. 2007). Ambiguous terms are to be construed against the drafter and in favor of the insured. *Id.* (citing *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 279 (Ky. 1991)). “[W]here not ambiguous, the ordinary meaning of the words chosen by the insurer is to be followed.” *Id.* (citing *Washington Nat’l Ins. Co. v. Burke*, 258 S.W.2d 709 (Ky. 1953)).

ANALYSIS

At issue before this Court is whether the policy obligates Monroe Guaranty to defend the Insureds

in this action, and, if so, indemnify the Insureds for damages that it may be legally obligated to pay. Here, the trial court’s analysis ended with the threshold determination that the policy did not provide the Insureds with initial coverage for the loss. However, the trial court’s ruling considered coverage only under the CGL base policy, not the day care endorsement. On appeal, we must determine if the Court of Appeals erred in affirming the trial court’s incomplete analysis and resulting conclusion.

I. Coverage under the CGL base policy

The CGL base policy defines “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” The CGL base policy, like most form CGL policies, fails to define the term accident. Where “accident” is not defined in the policy, Kentucky courts define the term by its ordinary meaning. *Am. Mining Ins. Co.*, 557 S.W.3d at 296. “Inherent in the plain meaning of ‘accident’ is the doctrine of fortuity,” which requires courts to analyze the insured’s intent and control. *Cincinnati Ins. Co.*, 306 S.W.3d at 74. Specifically, we consider “1) whether the insured intended the event to occur; and 2) whether the event was a ‘chance event beyond the control of the insured.’” *Martin/Elias Props.*, 544 S.W.3d at 643 (quoting *Cincinnati Ins. Co.*, 306 S.W.3d at 76). Thus, if the Insureds did not intend the event to occur, or if it was beyond their control, the event was an accident, and the trial court erred in refusing to extend an initial grant of coverage under the CGL base policy.

Brianna’s first argument is that the event triggering coverage under the CGL base policy was the Insureds’ negligence, rather than the act of vaginal penetration itself. Existing Kentucky law does not address this specific question, and the Court of Appeals’ cited support is unhelpful. We tend to agree with Brianna that under the plain and ordinary language of the CGL base policy, which states that coverage is triggered if Brianna’s bodily injuries were “caused by an ‘occurrence,’” this logically triggers coverage for injuries sustained from more than one event. With that being said, we will not analyze this point further because even if we accept Brianna’s proposition as true, the Insureds clearly had control over whether or not they acted negligently in failing to protect Brianna from harm, thereby precluding the event from qualifying as an accident.

Moving forward, we address defects in the Court of Appeals’ fortuity analysis. Although we affirm the Court of Appeals on this issue, it is important that we clarify the law.

Regarding intent, we highlight the trial court’s conclusion that the “sexual assault upon a child of tender years, under the care of an insured, falls squarely within intending an event to occur . . .” The Court of Appeals agreed with the trial court’s conclusion that the Insureds failed to meet the first prong of the fortuity analysis. The Court of Appeals reached this holding by utilizing the inferred-intent rule. *See Thompson*, 839 S.W.2d at 581 (holding that “sexual molestation is so inherently injurious, or substantially certain to result in some injury, that the intent to injure, or the expectation that injury will result, can be inferred as a matter of law”). The Court of Appeals affirmed the trial court’s ruling because “[a] plain reading of case law shows that

[Brianna’s] status as the victim of a sexual crime sufficiently demonstrates an intent to harm and injure her.”

We find obvious missteps in the Court of Appeals’ analysis. First, the Court of Appeals classified the injury as a “sexual crime.” The classification of the event is important because, as apparent from the Court of Appeals’ opinion, if the event in question is classified as criminal sexual assault, then intent may be inferred under Kentucky law. *See Thompson*, 839 S.W.2d at 581. KRS 456.010(6) defines sexual assault as “conduct prohibited as any degree of rape, sodomy, or sexual abuse under KRS Chapter 510 or incest under KRS 530.020[.]” Chapter 510 provides for three main sexual offenses with varying degrees, including sexual abuse, rape, and sodomy. All offenses require some form of “sexual contact” or “sexual intercourse” that, in turn, require a sexual purpose or sexual gratification. While the perpetrator of Brianna’s vaginal penetration is unknown, the facts, as viewed in a light most favorable to Brianna, show that her injuries occurred at the hands of another child. If we assume that another child perpetrated the harm, we cannot classify the event as a sexual criminal offense. To do so erroneously assumes a five-year-old child maintained and furthered a sexual purpose for her alleged conduct. Moreover, while this Court previously used the term “sexual assault” when referring to the alleged penetration of Brianna’s vagina, in this case it is more appropriately referred to as an act of vaginal penetration upon a child by a child, not criminal sexual assault.

Second, despite our clear direction in *Martin/Elias Properties*, the Court of Appeals explained that “what acts are intentional, as opposed to accidental, is supposed to be viewed from the standpoint of a layperson.” This is not the legal standard. The first prong of the fortuity analysis contemplates intent from the standpoint of the *insured*, not a layperson. In the case *sub judice*, the policy defines an “insured” as one who is designated in the policy declarations. Here, “John A. Thomas DBA Room to Grow Preschool” is identified as the named insured on the declarations page. In addition, the policy defines an Insured as an “employee” of Room to Grow if performing acts within the scope of their employment or while performing duties related to the conduct of the business. Thus, the focus of the first prong of the fortuity analysis questions whether the Insureds—Thomas or Room to Grow employees—intended for Brianna to be harmed through forceful vaginal penetration with an object.

Brianna has alleged two factual scenarios, which if found true by the trier of fact, would forestall a finding that the Insureds intended for the harm-producing conduct to take place. These scenarios allege that Madison or Jacob were the actors responsible for Brianna’s injuries. These allegations are supported by testimony from Brianna’s parents, both of whom testified in their depositions that Brianna claimed, on more than one occasion, that Madison or Jacob perpetrated the harm. Brianna’s allegations regarding Madison and Jacob are further documented in medical records, police records, and intake records. Unfortunately, the trial court failed to mention or consider these facts. If the trial court had, perhaps it would have concluded that the Insureds did not intend for another child to use a blunt object to penetrate Brianna’s vagina.

On the element of control, the Court of

Appeals agreed with the trial court's conclusion "that the sexual assault of a child could never be categorized as a 'chance event' beyond the control of the insureds." We cannot approve this blanket proposition. Nonetheless, we agree with the Court of Appeals' conclusion that the Insureds maintained control over the event as "the insured(s) w[ere] in charge of planning and executing the operation and had full control over the work. . . . [The Insureds] were responsible for business of the company (school for children), the planning of the job to be done (caring for them), the layout of the area, the supervision of its workers, staffing, the placement of the children, and their safety and well-being."

Brianna fails to identify any genuine issue of material fact on the question of control. Therefore, we affirm the Court of Appeals finding that the Insureds had control over the event in question, thereby failing to meet the second prong of the fortuity analysis. In sum, coverage under the CGL base policy was not triggered as the event that caused Brianna's injuries, whether it was the act of vaginal penetration or the Insureds' negligence, did not qualify as an occurrence. We therefore affirm the Court of Appeals' opinion on this issue, although on different grounds.

II. Coverage under the day care endorsement

The second source of potential coverage is through the day care endorsement that adds coverage for "occurrences" that result in bodily injury or "other 'injury' arising out of the rendering of or failure to render professional services in connection with the operation of the Insured's business as a day care." We note that Monroe Guaranty has consistently acknowledged that the day care endorsement provides professional liability coverage which is distinct from general liability coverage as found in the CGL base policy. Surprisingly, however, the trial court's declaratory and summary judgment order is completely devoid of any analysis regarding coverage under the day care endorsement. Therefore, our review is confined to the Court of Appeals' holding that the day care endorsement does not provide coverage for Brianna's damages.

Similar to the Court of Appeals' analysis on coverage under the CGL base policy, we find fundamental errors in its assessment. The crux of the Court of Appeals' holding is that "there can be no coverage under a professional errors or mistakes policy of insurance for claims arising from deliberate harmful acts." This is simply not reflected in the policy language and is certainly not supported by the law. We find it apparent that the Court of Appeals confused an initial grant of coverage under the policy, which is not dependent on intentionality, with the application of potential exclusions. The Court of Appeals' misplaced reliance on *Martinez*, 54 S.W.3d at 144, reveals its misunderstanding. In *Martinez*, this Court evaluated coverage under a professional liability insurance policy for cemetery mismanagement. *Id.* This Court evaluated whether a policy exclusion prohibited coverage for willful violations of a penal statute. *Id.* The question before this Court was whether the exclusion required a criminal conviction. *Id.* We found that the exclusion's unambiguous language did not require a conviction for the exclusion to apply. *Id.* at 144-45. Even a strained interpretation of *Martinez* does not lead to a conclusion that a claimant cannot obtain an initial grant of coverage

from a professional liability policy merely because the harmful act was deliberate.

In addition, the Court of Appeals erroneously made its own factual findings to determine that Brianna's damages did not arise out of the Insureds' rendering of or failure to render professional services in connection with the operation of Room to Grow. The Court of Appeals explained that the phrase "arising out of" merely connotes a causal connection with the acts at issue." (citing *Hugenberg v. W. Am. Ins. Co./Ohio Cas. Grp.*, 249 S.W.3d 174, 186 (Ky. App. 2006)). The Court of Appeals found that there were no genuine issues of material fact because Room to Grow maintains an open layout setup and employees did not witness a sexual assault. However, these facts do not foreclose the possibility that the Insureds' negligence led to the harm or permitted the harm to occur, considering Brianna made statements that her injuries were caused by other children, and both of her parents denied the existence of her injuries prior to the day in question, during which she was in the care of Room to Grow. See *W. Am. Ins. Co. v. Dickerson*, 865 S.W.2d 320, 323 (Ky. 1993) ("There is only one witness's (being appellee) undisputed testimony, but there are still different inferences to be drawn therefrom (evidenced by a dissent that is sure to follow.>").

While we will not determine whether a genuine issue of material fact exists, a cursory review of the record reveals information and evidence that neither the trial court nor the Court of Appeals addressed, which could call into question whether the facts were "undisputed" and, if disputed, whether they were material.³ We, therefore, hold that the Court of Appeals impermissibly weighed the evidence to conclude that the day care "[e]ndorsement does not operate to turn the undisputed fact of an intentional assault into a negligence claim." Reversal is warranted.

³ For example, evidence of access to an upstairs area where investigators discovered a female child's underwear and a statement taken from another Room to Grow parent alleging abuse at the day care.

To conclude, the trial court's failure to examine coverage under the day care endorsement renders its analysis incomplete, as the day care endorsement is not only a part of the policy, but also ensures risks not covered in the CGL base policy. See *Kemper Nat'l Ins. Cos. v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869 (Ky. 2002). For the same reasons we articulated in *Robinson I*, we must reverse the Court of Appeals and remand to the trial court for a complete factual and legal analysis.

As this is the second time we are remanding this matter to the trial court, we again instruct the trial court to complete a full coverage analysis, which now encompasses only coverage under the day care endorsement. To bring finality to this matter, we make it clear that coverage is triggered under the day care endorsement if (1) Brianna's damages (2) arose out of (2) the rendering of or failure to render professional services in connection with the operation of Room to Grow. Should the trial court conclude that the policy provides an initial grant of coverage, then it must consider coverage exclusions, and, if applicable, any exceptions to

those exclusions.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is affirmed in part, reversed in part, and the matter is remanded to the Calloway Circuit Court for further proceedings consistent with this Opinion.

All sitting. All concur.

CRIMINAL LAW

ARSON IN THE FIRST DEGREE

WANTON ENDANGERMENT IN THE FIRST DEGREE

DOUBLE JEOPARDY

"SINGLE COURSE OF CONDUCT"

DEFENDANT'S REQUEST FOR NEW COUNSEL

Defendant appealed as a matter of right his convictions for first-degree arson, three counts of first-degree wanton endangerment, and being a first-degree PFO — AFFIRMED convictions — Double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute requires proof of an additional fact which the other does not — Elements of first-degree arson, set forth in KRS 513.020, and first-degree wanton endangerment, set forth in KRS 508.060, are quite different — Starting a fire or causing an explosion with the intent to damage or destroy a building is required to be convicted of first-degree arson, but is not necessary to convict for first-degree wanton endangerment — Engaging in conduct manifesting an extreme indifference to the value of human life is mandatory for a conviction of first-degree wanton endangerment, but such conduct is irrelevant in first-degree arson — Arson in the first degree is a crime against property, while wanton endangerment in the first degree is in the nature of a crime against a person — In instant action, defendant's conduct in intentionally setting ablaze the front porch of a home he knew was occupied by three people plainly violated both KRS 513.020 and KRS 508.060 — Each of those statutes requires proving elements of a crime that the other does not; therefore, defendant's convictions under both statutes did not violate double jeopardy — Record revealed no adequate reason or abuse by counsel sufficient to warrant removal and replacement of defense counsel — Defendant presented nothing more than his own subjective beliefs that counsel was not providing proper representation —

Joseph Gordon Young v. Com. (2025-SC-0487-

MR); Jefferson Cir. Ct., Wilcox, J.; Opinion by Justice Nickell, *affirming*, rendered 8/20/2026. [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).]

Joseph Gordon Young was convicted of arson in the first degree, three counts of wanton endangerment in the first degree, and being a persistent felony offender in the first degree (PFO I) following a jury trial in the Jefferson Circuit Court. He received a total sentence of thirty-two years' imprisonment and now appeals to this Court as a matter of right.¹ Following a careful review, we affirm.

¹ KY. CONST. § 110(2)(b).

FACTS AND PROCEDURAL HISTORY

Tracie Wallace lived with her elderly grandmother, Kathy, and her autistic minor sister, R.F.,² on Taylor Boulevard in Louisville, Kentucky. Young approached Tracie and Kathy in mid-2023, offering to help with odd jobs in exchange for food and money. Shortly thereafter, Young's ex-wife kicked him out of her home, so Tracie offered to let him stay in the family's basement. During his stay, Young mowed the yard, did woodwork on the deck, put a pool together, and cleaned the garage.

² We use initials to protect the privacy of the minor victim. See Kentucky Rules of Appellate Procedure (RAP) 13(B).

About a week after he moved in, on May 16, 2023, Young awoke early and left the house through the rear door. He walked to a nearby Thorntons gas station where surveillance cameras captured his arrival at 5:38 a.m. Young purchased a coffee, a pack of cigarettes, and a snack. After exiting the store, Young walked to the gas pumps and began searching the trash cans. He salvaged a small container from one of the cans and placed it next to a gas pump. He then went back inside the store, paid for one dollar's worth of gasoline, then retrieved the container and filled it with gas at 5:51 a.m. Young left Thorntons at 6:00 a.m. and began walking in the direction of Taylor Boulevard.

A doorbell camera attached to the front of Tracie's home recorded Young arriving back at the residence at 6:19 a.m. and entering the enclosed front porch carrying the small container in his hand. Approximately four minutes later, the camera captured Young exiting the porch and placing his backpack on the front sidewalk. Three minutes thereafter, Young is seen by the camera leaning out the porch door, adjusting the adjacent window from the outside, and observing traffic passing by the house. At 6:29 a.m., Young was recorded bursting out the door as a large orange glow is seen behind him and sparks swirling around him. Young quickly ran away from the house, grabbing his backpack as he passed.

While these events were unfolding, Tracie was playing a video game in her upstairs bedroom. She heard a loud bang and felt the house shake. When she looked outside, she noticed smoke and proceeded downstairs to investigate. After

determining there was an active fire on the front porch, she rushed to get her grandmother and sister out of the home. Tracie looked for Young but could not find him. The home's security system triggered a call to emergency services, and the Louisville Fire Department (LFD) was dispatched to the scene. Ultimately, four fire engines and two fire trucks responded to battle the blaze. The home suffered significant damage from the fire and smoke. The enclosed front porch was nearly destroyed; vinyl siding was melted away; aluminum wall panels were melted and warped; several windows were broken out; and the living room and two downstairs bedrooms had smoke and soot stains. Once the fire had been suppressed, and because the cause could not be readily ascertained, the on-scene incident commander called the LFD Metro Arson Unit to investigate. LFD Captain Jason Sanders and LFD Sergeant Jeffrey McNulty responded to begin the arson investigation. At some point while the firefighters and arson investigators were on the scene, Young returned to the house.

Captain Sanders interviewed Tracie, canvassed the neighborhood, and collected video surveillance footage. He then interviewed Young, and the interaction was captured by Captain Sanders' body-worn camera. Young initially stated he had left the house between 2:30 and 3:00 a.m., but when confronted with contradictory video evidence, he agreed it might have been later than he thought. He stated he had been on the porch that morning to "check things out" but didn't see or smell anything out of the ordinary. He denied smoking on the porch or having any involvement in starting the fire. Young left the scene shortly thereafter.

Due to inconsistencies in his statements, investigators located and brought Young to their office for a formal interview. At first, Young indicated the door to the front porch was cracked open when he returned, but he did not see anyone on the porch when he looked. He denied intentionally or accidentally starting the fire. As the interview progressed, Young's story shifted. He stated that he saw a spark on the front porch and that a neighbor who had been threatening him previously was standing there pointing a gun at him, so he ran away as the fire started behind him. Young claimed his cellphone would "tell the story" and prove his claims. Sergeant McNulty obtained consent to retrieve and look through the phone. A subsequent search of Young's phone revealed no information related to the fire or any additional suspect. At the conclusion of the interview, Young was arrested and subsequently charged with arson in the first degree and three counts of wanton endangerment in the first degree. Prior to trial, he was separately indicted for being a PFO I. Following a multi-day jury trial, Young was convicted on all counts, with the jury recommending a sentence of twenty-two years for arson and ten years on each of the wanton endangerment charges, with all to run consecutively for a total sentence of fifty-two years. At final sentencing, the trial court ordered the sentences for the wanton endangerment counts to run concurrently with one another but consecutively to the arson charge for a total sentence of thirty-two years' imprisonment. This appeal followed.

ANALYSIS

Young raises four allegations of error in seeking reversal. First, he asserts his convictions for arson in the first degree and wanton endangerment in the

first degree violate the prohibition against double jeopardy. Second, he contends the trial court committed reversible error in failing to address his pretrial request for new counsel. Next, Young alleges the trial court erred in permitting the Commonwealth's arson experts to testify to their beliefs that the fire was intentionally started. Finally, he argues it was error to permit the Commonwealth and Tracie to inform the jury that R.F. had severe autism. We shall address each allegation in turn.

I. No Double Jeopardy Violation Occurred.

For his first contention of error, and raising what appears to be a matter of first impression, Young argues the acts and dangers underlying his convictions for wanton endangerment in the first degree were already contemplated in the conviction for arson in the first degree, and therefore his convictions of all charges violated the prohibition against double jeopardy. He asserts the exact same facts of his singular act of setting the house on fire could prove the commission of both offenses, and therefore the double jeopardy clause mandates that he could be convicted of only one of the crimes. Young concedes this argument is unpreserved for appellate review and requests palpable error review under RCr³ 10.26. In reviewing for palpable error, this Court will only reverse the judgment if "the error is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Johnson v. Commonwealth*, 676 S.W.3d 405, 417 (Ky. 2023) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006)). "It should be so egregious that it jumps off the page . . . and cries out for relief." *Id.* (quoting *Chavies v. Commonwealth*, 374 S.W.3d 313, 323 (Ky. 2012)). However, "we have long held that double jeopardy questions may be reviewed on appeal, even if they were not presented to the trial court." *Mullikan v. Commonwealth*, 341 S.W.3d 99, 102 (Ky. 2011) (citations and internal quotation marks omitted).

³ Kentucky Rules of Criminal Procedure.

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." A virtually identical provision appears in § 13 of the Kentucky Constitution. This Court has long acknowledged that the protections afforded under these two provisions are parallel and that decisions of the United States Supreme Court are relevant to a double jeopardy analysis under both constitutions. *Cooley v. Commonwealth*, 821 S.W.2d 90, 93 (Ky. 1991). "Double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'" *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). This foundational rule is also codified in KRS⁴ 505.020. At bottom, when called upon to determine whether a single course of conduct may establish more than one offense, courts must determine whether the conduct violates two distinct statutes and, if so, whether each statute requires proof of an element that the other does not. *Id.* at 811. Nevertheless, Young urges this Court to adopt a different test and look to the legislative intent relative to the harm underlying each offense rather than the statutory elements of

the crimes to determine whether a double jeopardy violation occurred. We decline to do so. The plain text of the Fifth Amendment and § 13 prohibit multiple prosecutions for the “same offence,” and an offense, for double jeopardy purposes, is to be “measured by its statutory elements.” *Currier v. Virginia*, 585 U.S. 493, 507 (2018).

⁴ Kentucky Revised Statutes.

KRS 513.020, the first-degree arson statute, states in pertinent part:

(1) A person is guilty of arson in the first degree when, with intent to destroy or damage a building, he starts a fire or causes an explosion, and;

(a) The building is inhabited or occupied or the person has reason to believe the building may be inhabited or occupied[.]

Wanton endangerment in the first degree is proscribed in KRS 508.060. That statute provides, in pertinent part:

(1) A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he or she wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.

Even a cursory reading of these two statutes reveals the elements of the two crimes are quite different. Starting a fire or causing an explosion with the intent to damage or destroy a building is required to convict of arson in the first degree but is not necessary to convict of wanton endangerment in the first degree. Engaging in conduct manifesting an extreme indifference to the value of human life is mandatory for a conviction of wanton endangerment in the first degree, but such conduct is irrelevant to an offense of arson in the first degree, as the building does not actually have to be inhabited or occupied at the time the fire is set, so long as the defendant had a reasonable belief a person was present. In addition, arson in the first degree is a crime against property while wanton endangerment in the first degree is in the nature of a crime against a person. Although there may be an overlap of proof covering the two offenses in this case, that does not, in and of itself, constitute a double jeopardy violation. See *Clark v. Commonwealth*, 267 S.W.3d 668, 677 (Ky. 2008).

The proof adduced at trial was sufficient to prove that Young’s conduct in intentionally setting ablaze the front porch of a home he knew was occupied by three people plainly violated both KRS 513.020 and KRS 508.060. And each of those two statutes requires proving elements of a crime that the other does not. It cannot be said that either crime is “included within” the other, as they simply do not have the same elements. *Burge*, 947 S.W.2d at 811. Young intended to start a fire to destroy or damage the home while simultaneously acting wantonly and with utter indifference to the value of the lives of the three women lying in their beds inside the house. Contrary to Young’s averments, it is not logical to assume the General Assembly intended for wanton endangerment in the first degree to

be subsumed within arson in the first degree. The crimes here are distinct offenses directed at different harms with dissimilar elements. They are separate offenses subject to multiple punishments, even when a single discrete act forms the factual basis for both crimes. Thus, we conclude Young’s convictions under both statutes did not constitute a double jeopardy violation.

II. The Trial Court Adequately Addressed Young’s Request for New Counsel.

Young next asserts the trial court erred in failing to address his pretrial request for substitute counsel. We disagree.

At a pretrial conference some nine months before trial began, Young informed the trial court he wanted a new attorney because he did not “feel like [he was] being represented properly” by his court-appointed counsel. The trial court took up the matter and asked for counsel’s position. Defense counsel acknowledged Young was not completely happy with his performance to that point and there were issues surrounding potential defenses at trial. However, after discussing the case “at length” with him, because of concerns which had arisen during recent conversations with Young, counsel moved the trial court for a competency evaluation as he believed Young might not possess the “ability to work with his attorney” and participate meaningfully in his own defense.

The trial court then informed Young that it had no control over which attorney the Department of Public Advocacy assigned to a particular case. It told Young his current counsel had been before the court before and always did a good job representing his clients. Further, the trial court gave Young the option of hiring his own attorney or remaining with the counsel selected by the public defender’s office as having the skill level appropriate to handle the issues presented. After additional discussions, the trial court indicated appointed counsel would remain on the case and granted the motion for a competency evaluation. Young did not again raise any issues or concerns with his counsel, but he now contends the trial court reversibly erred by not inquiring further into his concerns about his perceived deficiencies in counsel’s performance or granting his request for new counsel.

Under the Sixth Amendment to the United States Constitution, criminal defendants have a right to be represented by counsel. See *Samuels v. Commonwealth*, 512 S.W.3d 709, 712 (Ky. 2017) (citing *Gideon v. Wainwright*, 372 U.S. 335, 345 (1962)). In Kentucky, indigent defendants are provided court-appointed representation primarily through the Department of Public Advocacy. *Pillersdorf v. Dep’t of Pub. Advoc.*, 890 S.W.2d 616, 619 (Ky. 1994). However, “a defendant who is represented by a public defender or appointed counsel does not have a constitutional right to be represented by any particular attorney, and is not entitled to the dismissal of his counsel and the appointment of substitute counsel except for adequate reasons or a clear abuse by counsel.” *Henderson v. Commonwealth*, 636 S.W.2d 648, 651 (Ky. 1982) (citations omitted). A defendant is not entitled to force the government to provide him with the attorney of his choosing. *Luis v. United States*, 578 U.S. 5, 12 (2016). Rather, he must show that good cause exists for a replacement in order to obtain a new court-appointed attorney. *Dunn v.*

Commonwealth, 573 S.W.2d 651, 654 (Ky. 1978). “Whether good cause exists for substitute counsel to be appointed is within the sound discretion of the trial court.” *Deno v. Commonwealth*, 177 S.W.3d 753, 759 (Ky. 2005) (citing *Pillersdorf*, 890 S.W.2d at 622).

Our review of the record reveals no adequate reason or abuse by counsel sufficient to warrant removal and replacement that was presented to the trial court. Indeed, Young presents nothing more than his own subjective beliefs that counsel was not providing proper representation and hypotheticals of what he “may have felt” when expressing his dissatisfaction to the trial court. But “mere dissatisfaction with appointed counsel’s performance” is an improper basis for the relief sought. *Stinnett v. Commonwealth*, 364 S.W.3d 70, 81 (Ky. 2011). Young alleged no conflict of interest, no complete breakdown of communications, nor that counsel was prejudicing his legitimate interests, any of which could be adequate and sufficient cause for removing counsel from the case. *Baker v. Commonwealth*, 574 S.W.2d 325, 327 (Ky. App. 1978). He did not do so and cannot now be heard to complain.

His contention that the trial court should have done more to determine whether he had legitimate concerns with counsel’s performance is also unavailing. Indeed, the trial court was not required to make a “searching inquiry” into his complaint as its only determination under the circumstances was whether counsel had “the ability and the preparedness to effectively assist” Young in his defense. *Padgett v. Commonwealth*, 312 S.W.3d 336, 343 (Ky. 2010). The trial court adequately undertook this task and concluded it was inappropriate to remove counsel at that time. Over the nine months that followed, Young never again expressed any dissatisfaction or concerns with counsel’s performance, although he showed little difficulty in speaking up during his multiple appearances to raise issues and ask questions of the trial court and prosecutor. To now imply that he was reserving some complaint about counsel throughout those numerous hearings and discussions with the trial court is disingenuous at best. There was no abuse of the trial court’s discretion.

III. No Error in the Testimony of the Commonwealth’s Arson Experts.

Prior to trial, the Commonwealth disclosed that it anticipated Captain Sanders and Sergeant McNulty to give expert testimony as arson investigators. The disclosure indicated Sergeant McNulty would testify to his opinion that the fire had been set intentionally. During trial and before Captain Sanders took the witness stand, Young preemptively objected to him or Sergeant McNulty testifying consistently with their written reports opining the fire was started intentionally, asserting only the jury could make that determination. He further requested that the written report be redacted to remove reference to the findings of intentional conduct. The trial court overruled the motions. On cross-examination, and in response to counsel’s assertion to the contrary, Captain Sanders indicated the video recordings and other evidence from the scene led him to believe the fire had been started intentionally. Likewise, on direct examination, Sergeant McNulty opined that the fire was incendiary and intentional, having been caused by using an open flame to ignite available combustibles assisted by an ignitable liquid. He

further testified he had ruled out any accidental ignition sources based on his examination of the scene and all available evidence.

Young now argues this testimony constituted inadmissible expert opinion testimony which invaded the province of the jury on the ultimate issue. He further asserts Captain Sanders and Sergeant McNulty were not qualified to testify that he set the fire intentionally. We disagree.

Trial courts act as gatekeepers of expert testimony, *Miller v. Eldridge*, 146 S.W.3d 909, 913 (Ky. 2004), and must scrutinize such testimony to ensure it is admissible and scientifically reliable. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993). “To fulfill this role, the trial court must undertake a two-part analysis wherein it must first assess whether the methodology or reasoning underpinning the proposed expert testimony has valid scientific reliability. Second, the trial court must determine whether the expert’s testimony will assist the trier of fact to understand a fact in issue.” *Renot v. Secura Supreme Ins. Co.*, 671 S.W.3d 282, 287-88 (Ky. 2023) (citing *Daubert*, 509 U.S. at 592-93). See also KRE⁵ 702. We review a trial court’s decision to admit expert testimony for abuse of discretion. *Hollingsworth v. Commonwealth*, 718 S.W.3d 738, 746 (Ky. 2025). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). “An abuse of discretion exists only when we are ‘firmly convinced that a mistake has been made.’” *Rossi v. CSX Transp., Inc.*, 357 S.W.3d 510, 515 (Ky. App. 2010) (quoting *Overstreet v. Overstreet*, 144 S.W.3d 834, 838 (Ky. App. 2003)).

⁵ Kentucky Rules of Evidence.

Here, Young does not challenge the expert qualifications of Captain Sanders or Sergeant McNulty as arson investigators. Nor does he raise any issue relative to the reliability of their principles and methods or that they failed to appropriately apply those principles and methods to the facts of his case. Instead, he contests only their ability to opine that he intentionally started the fire, which he contends is the ultimate issue in the case to be put to the jury for a decision. However, Kentucky has conclusively abandoned the “ultimate issue rule” relative to expert testimony. *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky. 1997). Additionally, a review of the testimony reveals neither investigator testified as Young suggests.

“In a criminal case, the ultimate fact in issue is whether the defendant is guilty or not guilty.” *Id.* Had either Captain Sanders or Sergeant McNulty testified he believed Young was guilty of the crimes charged, such testimony would have constituted improper opinion testimony.

However, an opinion that a result is consistent with a factual scenario is not an opinion that the scenario occurred.

The real question should not be whether the expert has rendered an opinion as to the ultimate issue, but whether the opinion “will assist the trier of fact to understand the evidence or to determine a fact in issue.” KRE 702. Generally,

expert opinion testimony is admitted when the issue upon which the evidence is offered is one of science and skill, *Greer’s Adm’r v. Harrell’s Adm’r*, 306 Ky. 209, 206 S.W.2d 943 (1947), and when the subject matter is outside the common knowledge of jurors. *O’Connor & Raque Co. v. Bill*, Ky., 474 S.W.2d 344 (1971). Presumably, jurors do not need assistance in the form of an expert’s opinion that the defendant is guilty or not guilty. However, they usually do need the assistance of [an] expert in determining the cause of a physical condition in order to understand the evidence and determine the ultimate fact in issue. KRE 401; KRE 702.

Id. at 889-90. Here, both Captain Sanders and Sergeant McNulty provided the jury with opinions which concerned a subject peculiarly within the knowledge of a trained arson investigator relating to the cause and manner of the origin of the fire. Their opinions were scientific in nature and were outside the common knowledge of a layperson. Thus, the testimony served to “assist the trier of fact to understand the evidence or to determine a fact in issue” and was admissible. KRE 702. We discern no abuse of discretion by the trial court in so concluding.

IV. Testimony Regarding R.F.’s Autism Was Not Improper.

Finally, Young contends the trial court erroneously overruled his pretrial motion in limine to exclude testimony that R.F. was autistic and compounded the error by allowing testimony and commentary from Tracie and the Commonwealth that R.F. was severely autistic and required assistance with basic activities of daily living. He asserts this evidence was not relevant and any potential probative value it held was outweighed by the danger of undue prejudice, confusing the issues, or misleading the jury. His assertions are without merit.

“[A] certain amount of background evidence regarding the victim is relevant to understanding the nature of the crime.” *Bussell v. Commonwealth*, 882 S.W.2d 111, 113 (Ky. 1994). During the guilt phase of a trial, the Commonwealth is permitted to introduce evidence that is intended to identify a victim as a living person rather than a simple statistic. *McQueen v. Commonwealth*, 669 S.W.2d 519, 523 (Ky. 1984). This type of evidence may include, among other things, “the victim’s age, job, interests, and level of education.” *Brown v. Commonwealth*, 297 S.W.3d 557, 561 (Ky. 2009). Victim background evidence is not deemed unduly prejudicial “as long as the victim is not glorified or enlarged.” *Bowling v. Commonwealth*, 942 S.W.2d 293, 302 (Ky. 1997). On the contrary, “introduction of victim impact evidence during the guilt phase is reversible error.” *Tackett v. Commonwealth*, 445 S.W.3d 20, 33 (Ky. 2014). The difference between victim impact and victim background evidence is that the former is “generally intended to arouse sympathy for the families of the victims, which, although relevant to the issue of penalty, is largely irrelevant to the issue of guilt or innocence.” *Bennett v. Commonwealth*, 978 S.W.2d 322, 325 (Ky. 1998).

Here, when discussing R.F.’s autism, the Commonwealth and Tracie spoke evenly and without excess emotion. The statements were brief and targeted toward R.F.’s mental condition and the

physical assistance she required on a daily basis to accomplish basic tasks. They were intended to humanize R.F. rather than to villainize Young. Further, because Young was aware of R.F.’s mental and physical limitations, the testimony was relevant to the jury’s ability to determine that Young’s action in starting the fire constituted “circumstances manifesting extreme indifference to the value of human life” which is an essential element of wanton endangerment in the first degree. KRS 508.060.

As with all relevant evidence, “[t]his evidence . . . was prejudicial . . . but it was not unfairly prejudicial.” *Meece v. Commonwealth*, 348 S.W.3d 627, 667 (Ky. 2011). The danger of undue prejudice did not substantially outweigh the probative value of the testimony. KRE 403. Neither the Commonwealth nor Tracie unduly emphasized R.F.’s autism, nor did any of the statements improperly glorify or enlarge her status as a victim or attempt to garner the jurors’ sympathies. *Brown*, 297 S.W.3d at 560-61. Further, nothing in Tracie’s testimony or the Commonwealth’s statements in opening and closing arguments was “overly emotional, condemnatory, accusative, or demanding vindication.” *Foley v. Commonwealth*, 953 S.W.2d 924, 937 (Ky. 1997). As such, we conclude there was no misuse of victim background evidence during the guilt phase of Young’s trial, and no error by the trial court in permitting its admission.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the Jefferson Circuit Court are affirmed.

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

SUPREME COURT RULINGS

DEPUBLISHING OPINIONS OF

THE COURT OF APPEALS

Com. v. Campbell, 72 K.L.S. 7, p. 40; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of RAP 40(D)(2) on 8/12/2026.

Kentucky Assoc. of Counties All Lines Fund v. City of Somerset, Ky., 72 K.L.S. 7, p. 20; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of RAP 40(D)(2) on 8/12/2026.

Lowe's Home Centers, L.L.C. v. Arnold, 72 K.L.S. 9, p. 1; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of RAP 40(D)(2) on 8/12/2026.

2 Brothers Market, LLC v. Kentucky Farm Bur. Ins. Co., 72 K.L.S. 11, p. 65; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 8/12/2026.

PETITIONS FOR REHEARING, ETC.

FILED AND FINALITY ENDORSEMENTS

ISSUED BETWEEN

JULY 23, 2026 AT 10:00 A.M.

AND AUGUST 20, 2026 AT 10:00 A.M.

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

PETITIONS: None.

MOTIONS for extension of time to file petitions: None.

RULINGS on petitions previously filed:

Hodge v. Kentucky Parole Bd., 73 K.L.S. 3, p. 48; Petition for rehearing was denied on 8/20/2026. Finality endorsement was issued on 8/20/2026.

Torian v. City of Paducah, Ky., 72 K.L.S. 12, p. 65; Petition for rehearing was denied on 8/20/2026. Finality endorsement was issued on 8/20/2026.

FINALITY ENDORSEMENTS:

During the period from July 23, 2026, through August 20, 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).

Hodge v. Kentucky Parole Bd., 73 K.L.S. 3, p. 48; Petition for rehearing was denied on 8/20/2026. Finality endorsement was issued on 8/20/2026.

Torian v. City of Paducah, Ky., 72 K.L.S. 12, p. 65; Petition for rehearing was denied on

8/20/2026. Finality endorsement was issued on 8/20/2026.

DISCRETIONARY REVIEW:

MOTIONS granted:

Com. v. Campbell, 72 K.L.S. 7, p. 40; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of RAP 40(D)(2) on 8/12/2026.

Kentucky Assoc. of Counties All Lines Fund v. City of Somerset, Ky., 72 K.L.S. 7, p. 20; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of RAP 40(D)(2) on 8/12/2026.

Lowe's Home Centers, L.L.C. v. Arnold, 72 K.L.S. 9, p. 1; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of RAP 40(D)(2) on 8/12/2026.

MOTIONS denied:

Com. v. A.L., 73 K.L.S. 4, p. 1; Motion for discretionary review was denied on 8/12/2026.

Estate of Blevins v. Howe, 72 K.L.S. 10, p. 33; Motion for discretionary review was denied on 8/12/2026.

O'Connell v. Thieneman, 73 K.L.S. 1, p. 25; Motion for discretionary review was denied on 8/12/2026.

Reagan v. Capital One Fin. Corp., 72 K.L.S. 11, p. 50; Motion for discretionary review was denied on 8/12/2026.

Saturday v. Fayette Cty. Bd. of Educ., 72 K.L.S. 9, p. 12; Motion for discretionary review was denied on 8/12/2026.

2 Brothers Market, LLC v. Kentucky Farm Bur. Ins. Co., 72 K.L.S. 11, p. 65; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 8/12/2026.

MOTIONS filed:

Com., Cab. for Health and Fam. Servs. v. Coleman, 73 K.L.S. 5, p. 28; Motion for discretionary review was filed on 7/28/2026.

Hampton v. Com., 73 K.L.S. 7, p. 46; Motion for discretionary review was filed on 8/6/2026.

Pelfrey v. The Estate of McDowell, 73 K.L.S. 6, p. 10; Motion for discretionary review was filed on 8/13/2026.

MOTIONS for extension of time to file motions for discretionary review: None.

OTHER: None.

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

Cisco v. Com., 73 K.L.S. 2, p. 11—730 S.W.3d 800.

In re: McLeod, 73 K.L.S. 3, p. 53—730 S.W.3d 932.

—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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Dependency, neglect, or abuse (DNA) action; "Person exercising custodial control or supervision" under KRS 600.020(47); Sufficiency of the evidence - 7:22

Dependency, neglect, or abuse (DNA) action; Sufficiency of the evidence; Emotional injury; Educational neglect; Homeschooling - 3:31

Dependency, neglect, or abuse (DNA) action; Termination of parental rights; Appellate practice; Procedures set forth in *Anders v. California* (1967) and *A.C. v. Cab. for Health and Fam. Servs.* (Ky. App. 2012) do not apply to DNA appeals; Attorneys; Duties of appointed counsel in DNA appeals - 7:48

Divorce; Family law; Domestic violence order (DVO); Children's fear of unnecessary and repeated visits to the doctor and hospital as a basis for issuing a DVO - 2:1

Domestic violence order (DVO); Appellate practice; Right to an oral argument; Failure to file an appellee brief; Deficiencies in the appellant's *pro se* brief - 3:14

Domestic violence order (DVO); Sufficiency of the evidence; Appellate practice; Appellate brief from the minor child's guardian *ad litem* - 3:21

Interpersonal protection order (IPO); Sufficiency of the evidence - 3:8

Landlord and tenant law; Fair housing discrimination complaint; Family law; Termination of a lease under KRS 383.300; "Protected tenant;" Emergency protection order (EPO); Retaliation under KRS 383.300 and KRS 344.280 - 8:33

Order of protection; Domestic violence order (DVO); Interpersonal protection order (IPO); Stalking; Sufficiency of the evidence; Use of AOC Form 275.3 - 8:37

FORECLOSURE:

Purchase of real property upon which a residence is to be constructed; Foreclosure; Priority of liens; Equitable lien - 2:4

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 - 4:13

GARNISHMENT:

Construction law; Contracts; Attorney fees; Contractual attorney fees; Non-wage garnishment against a joint bank account; Exemption from garnishment for monthly pension benefits from the Kentucky Teachers' Retirement System (TRS); Application of the exemption when TRS pension benefits are payable to a spouse, but are deposited into a joint bank account - 5:5

GOVERNMENT:

Contracts; Kentucky Model Procurement Code (KMPC); Sovereign immunity; Express written contract with a county; Oral contract modifications; Implied contracts; Unjust enrichment - 8:61

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 - 4:19

Separation of powers; The Governor's powers of appointment and removal; House Bill (HB) 334, The Executive Branch Ethics Commission Act; HB 518, The Fair Board Act; HB 334 and HB 518 are unconstitutional - 6:31

HEALTH CARE, HEALTH FACILITIES, AND HEALTH SERVICES:

Automobile accident; Insurance; Basic reparation benefits (BRB); Examination under oath (EUO); Insurance company's questions during an EUO concerning possible statutory misconduct by the plaintiff's healthcare provider; Solicitation of the patient; Insurance fraud; Consumer Protection Act (CPA) - 8:49

Medicaid; Administrative law; Withholding Medicaid payments; Failure to exhaust administrative remedies; Futility exception to exhausting administrative remedies - 1:52

Medicaid; Behavioral health services; House Bill (HB) 56, which concerns the provision and reimbursement of behavioral health services under Medicaid; HB 56 is constitutional; Appellate practice; Attorney General's authority to prosecute an appeal under KRS 15.090 - 5:28

Negligence; Negligent training; Gross negligence; Respondeat superior; Negligent supervision; A hospital employee sexually assaults a patient; Civil procedure; Appellate practice; Final and appealable order - 7:26

Wrongful death; Medical malpractice; Health care, health facilities, and health services; Long-term care facility; Doctor negligently prescribed medicine that caused the patient's death; Arbitration; Waiver of the right to proceed under an arbitration agreement; Civil procedure; Dismissal of an action for lack of prosecution - 3:26

INMATES:

Civil procedure; Appellate practice; Timely filing of an appeal; Clerk's failure to serve a party with notice of a judgment's entry; Inmate's belated appeal of the dismissal of his petition for a declaration of rights; Prison mailbox rule - 6:78

Open Records Act; Inmates; Inmate's request for inspection of records regarding his certificates and diplomas for all rehabilitation programs - 1:29

Wrongful death; Negligence; Death of an inmate after the use of oleum capsicum spray to restrain inmate; Suit against various jail employees in their individual capacities; Qualified official immunity; Civil procedure; Denial of an interlocutory motion for summary judgment - 6:10

INSURANCE:

Automobile accident; Insurance; Basic reparation benefits (BRB); Examination under oath (EUO); Insurance company's questions during an EUO concerning possible statutory misconduct by the plaintiff's healthcare provider; Solicitation of the patient; Insurance fraud; Consumer Protection Act (CPA) - 8:49

Automobile accident; Insurance; Single-vehicle accident in Kentucky involving a Michigan husband and wife who were insured by a Michigan insurance

company; Bad faith claim; Civil procedure; Personal jurisdiction; Long-arm statute; Due process - 5:14
 Commercial general liability (CGL) policy; Professional liability endorsement; Negligence; Negligence arising from an alleged sexual assault of a child in a day care; "Occurrence" and "accident;" Fortuity doctrine - 8:73
 Construction law; Insurance; Fire at a construction site; Negligence; Contractual waiver of subrogation; KRS 371.180, which concerns construction service contracts; Attorney fees; Civil procedure; Motion to intervene - 3:1
 Real property; Insurance; Homeowner's insurance; Restoration work for water damage to a home; Breach of contract; Unjust enrichment; *Quantum meruit*; Punitive damages; Attorney fees; Mechanic's and materialman's lien; Slander of title; Wrongful use of civil proceedings; Kentucky Consumer Protection Act (KCPA); Appellate practice; Timeliness of an appeal - 5:39

JUDGES:

Criminal law; Wanton murder; Leaving the scene of an accident involving a death; Defendant's notice to introduce evidence of his mental health; Dismissal of an indictment; Trial court's dismissal of an indictment for lack of substantial evidence; Trial court's *sua sponte* dismissal of an indictment for prosecutorial misconduct and selective prosecution; Burden of proving defendant's mental state; Prosecutorial misconduct; Party-presentation doctrine; Trial court's receipt and use of extrajudicial evidence; Judges; Recusal - 1:1
 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 - 4:19

LANDLORD AND TENANT LAW:

Fair housing discrimination complaint; Family law; Termination of a lease under KRS 383.300; "Protected tenant;" Emergency protection order (EPO); Retaliation under KRS 383.300 and KRS 344.280 - 8:33

LEGAL MALPRACTICE:

Employment law; Kentucky Civil Rights Act; Civil rights retaliation claim; Attorneys; Legal malpractice; Statute of limitations - 3:29

LIMITED LIABILITY COMPANIES (LLCs):

Corporations; Limited liability companies (LLCs); Piercing the corporate veil - 5:21

MEDICAID:

Behavioral health services; House Bill (HB) 56, which concerns the provision and reimbursement of behavioral health services under Medicaid; HB 56 is constitutional; Appellate practice; Attorney General's authority to prosecute an appeal under KRS 15.090 - 5:28
 Health care, health facilities, and health services; Medicaid; Administrative law; Withholding Medicaid payments; Failure to exhaust administrative remedies; Futility exception to exhausting administrative remedies - 1:52

MEDICAL LICENSING:

Employment law; Breach of contract; Tortious interference with prospective business relations; Impaired physicians program created under KRS 311.616; Qualified privilege under KRS 311.6191 to those who furnish information to a statutorily created impaired physicians program; Professional

licensing; Medical licensing; Tortious interference with prospective business relations when the improper interference concerns a state licensing agency's relationship with its licensee - 6:65
 Torts; Negligence; False light claim; Medical licensing; Physician's negligence action against a pharmacy for misattributing prescriptions to the physician that were written by other medical providers and then reporting those misattributions to KASPER; Physician's claim that pharmacy's negligence in its misattributions caused the physician to be investigated by the Kentucky Board of Medical Licensure (KBML), state authorities, and federal authorities - 5:1

MEDICAL MALPRACTICE:

Negligent credentialing; Discovery; Privileged information as set forth in KRS 311.377; Writ; Writ of prohibition - 6:91
 Retained foreign object in a surgical patient's body; *Res ipsa loquitur*; Standard of care; Expert testimony - 6:57
 Statute of limitations; Discovery rule; Civil procedure; Motion for summary judgment; Joinder with co-defendant's motion for summary judgment - 8:25
 Wrongful death; Medical malpractice; Health care, health facilities, and health services; Long-term care facility; Doctor negligently prescribed medicine that caused the patient's death; Arbitration; Waiver of the right to proceed under an arbitration agreement; Civil procedure; Dismissal of an action for lack of prosecution - 3:26

MINERAL RIGHTS:

Divorce; Settlement agreement; Husband and wife remain married, but are living separately; Trusts; Irrevocable trust; No-contest provision; Trustee's fees; Wills and estates; Probate; Taxation; Federal estate taxes; Real property; Mineral rights; Civil procedure; Jury instructions; Bare-bones jury instructions - 7:29

NEGLIGENCE:

Automobile accident; Negligence; Negligent hiring; Cargo carriers and brokers; Federal Aviation Administration Authorization Act; Preemption of state law negligent hiring claims - 7:42
 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 - 4:25
 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 - 4:9
 Construction law; Insurance; Fire at a construction site; Negligence; Contractual waiver of subrogation; KRS 371.180, which concerns construction service contracts; Attorney fees; Civil procedure; Motion to intervene - 3:1
 Health care, health facilities, and health services; Negligence; Negligent training; Gross negligence; Respondeat superior; Negligent supervision; A hospital employee sexually assaults a patient; Civil procedure; Appellate practice; Final and appealable order - 7:26
 Insurance; Commercial general liability (CGL) policy; Professional liability endorsement; Negligence; Negligence arising from an alleged sexual assault of a child in a day care; "Occurrence" and "accident;" Fortuity doctrine - 8:73
 Medical malpractice; Negligent credentialing;

Discovery; Privileged information as set forth in KRS 311.377; Writ; Writ of prohibition - 6:91
 Products liability; Negligence; Employer's duty to protect against foreseeable harm from alleged household ("take-home") asbestos exposure; Civil procedure; Motion for summary judgment; Discovery; Expert witness; Limitation of expert testimony; Workers' compensation; Exclusivity provision - 3:53
 Torts; Negligence; False light claim; Medical licensing; Physician's negligence action against a pharmacy for misattributing prescriptions to the physician that were written by other medical providers and then reporting those misattributions to KASPER; Physician's claim that pharmacy's negligence in its misattributions caused the physician to be investigated by the Kentucky Board of Medical Licensure (KBML), state authorities, and federal authorities - 5:1
 Torts; Negligence; Loss of parental consortium claim; Statute of limitations; Tolling of the statute of limitations under KRS 413.170(1) - 6:85
 Torts; Negligence; Plaintiff's civil suit over a state trooper's use of excessive force; State trooper's indemnification rights under KRS 16.185; State trooper's assignment of his indemnification rights to plaintiff - 1:21
 Torts; Negligence; Products liability; Breach of implied warranty; Fraud; Statute of limitations; Civil procedure; CR 60.02; Appellate practice - 5:37
 Trusts; Accounting; Removal of a trustee; Negligence; Breach of contract; Civil procedure; Appellate practice; Jurisdiction in a trust case; Writ of prohibition - 1:26
 Wrongful death; Negligence; Death of an inmate after the use of oleum capsicum spray to restrain inmate; Suit against various jail employees in their individual capacities; Qualified official immunity; Civil procedure; Denial of an interlocutory motion for summary judgment - 6:10

OPEN RECORDS ACT:

Employment law; Wrongful termination; Retaliation; Open Records Act (ORA); Terminated employee sought evidence of her wrongful termination via ORA requests made to her government employer - 5:24
 Inmates; Inmate's request for inspection of records regarding his certificates and diplomas for all rehabilitation programs - 1:29
 "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 - 4:35

PLANNING AND ZONING:

Appeal of a zoning permit; Appellate practice; Civil procedure; Motion for summary judgment; Declaratory judgment action; Jurisdiction; Particular-case jurisdiction; Standing; Statutory standing - 8:29
 Conditional use permit; Operation of a recreational vehicle park; Right to Farm Act; Agricultural supremacy clause - 1:40
 Utilities; Solar-powered electric generation and electric transmission facility; Merchant Electric Generating Facility as set forth in KRS 278.700 *et seq.*; Local ordinances on solar power facilities - 6:1

PROBATE:

Divorce; Settlement agreement; Husband and wife remain married, but are living separately; Trusts; Irrevocable trust; No-contest provision; Trustee's

fees; Wills and estates; Probate; Taxation; Federal estate taxes; Real property; Mineral rights; Civil procedure; Jury instructions; Bare-bones jury instructions - 7:29

Wills and estates; Probate; Will contest; Testamentary capacity; Undue influence - 8:8

PRODUCTS LIABILITY:

Negligence; Employer's duty to protect against foreseeable harm from alleged household ("take-home") asbestos exposure; Civil procedure; Motion for summary judgment; Discovery; Expert witness; Limitation of expert testimony; Workers' compensation; Exclusivity provision - 3:53

Torts; Negligence; Products liability; Breach of implied warranty; Fraud; Statute of limitations; Civil procedure; CR 60.02; Appellate practice - 5:37

PROFESSIONAL LICENSING:

Employment law; Breach of contract; Tortious interference with prospective business relations; Impaired physicians program created under KRS 311.616; Qualified privilege under KRS 311.6191 to those who furnish information to a statutorily created impaired physicians program; Professional licensing; Medical licensing; Tortious interference with prospective business relations when the improper interference concerns a state licensing agency's relationship with its licensee - 6:65

REAL PROPERTY:

Deeds; Cemeteries; Private family cemetery; Burial rights in a family cemetery - 8:14

Divorce; Settlement agreement; Husband and wife remain married, but are living separately; Trusts; Irrevocable trust; No-contest provision; Trustee's fees; Wills and estates; Probate; Taxation; Federal estate taxes; Real property; Mineral rights; Civil procedure; Jury instructions; Bare-bones jury instructions - 7:29

Easements; County roadway; Abandonment of an easement - 1:56

Insurance; Homeowner's insurance; Restoration work for water damage to a home; Breach of contract; Unjust enrichment; *Quantum meruit*; Punitive damages; Attorney fees; Mechanic's and materialman's lien; Slander of title; Wrongful use of civil proceedings; Kentucky Consumer Protection Act (KCPA); Appellate practice; Timeliness of an appeal - 5:39

Purchase of real property upon which a residence is to be constructed; Foreclosure; Priority of liens; Equitable lien - 2:4

Purchase of residential real estate; Statutory seller's disclosure form; Seller's alleged misrepresentations on disclosure form; Civil procedure; Amendment of the pleadings - 1:43

Recorded subdivision plat; Deeds; Land on a dedicated recorded plat set aside for usage of the public or other subdivision owners that is later sold as private property - 1:47

Trusts; Real property; The sale of real property owned by a trust; Torts; Tortious interference with business relations; Abuse of process; Kentucky Uniform Public Expression Protection Act (KUPEPA) - 5:17

TAXATION:

Divorce; Settlement agreement; Husband and wife remain married, but are living separately; Trusts; Irrevocable trust; No-contest provision; Trustee's fees; Wills and estates; Probate; Taxation; Federal estate taxes; Real property; Mineral rights; Civil procedure; Jury instructions; Bare-bones jury instructions - 7:29

Local transient room taxes pursuant to KRS 91A.390;

Civil procedure; Standing; A voluntary association's declaratory judgment action purporting to establish the tax liability of a private party on behalf of various governmental entities; Constitutional standing; Associational standing; Sovereign standing; Subject-matter jurisdiction; Writ; A first-class writ is available to remedy a lack of constitutional standing - 6:21

TORTS:

Employment law; Breach of contract; Tortious interference with prospective business relations; Impaired physicians program created under KRS 311.616; Qualified privilege under KRS 311.6191 to those who furnish information to a statutorily created impaired physicians program; Professional licensing; Medical licensing; Tortious interference with prospective business relations when the improper interference concerns a state licensing agency's relationship with its licensee - 6:65

Negligence; False light claim; Medical licensing; Physician's negligence action against a pharmacy for misattributing prescriptions to the physician that were written by other medical providers and then reporting those misattributions to KASPER; Physician's claim that pharmacy's negligence in its misattributions caused the physician to be investigated by the Kentucky Board of Medical Licensure (KBML), state authorities, and federal authorities - 5:1

Negligence; Loss of parental consortium claim; Statute of limitations; Tolling of the statute of limitations under KRS 413.170(1) - 6:85

Negligence; Plaintiff's civil suit over a state trooper's use of excessive force; State trooper's indemnification rights under KRS 16.185; State trooper's assignment of his indemnification rights to plaintiff - 1:21

Negligence; Products liability; Breach of implied warranty; Fraud; Statute of limitations; Civil procedure; CR 60.02; Appellate practice - 5:37

Real property; Insurance; Homeowner's insurance; Restoration work for water damage to a home; Breach of contract; Unjust enrichment; *Quantum meruit*; Punitive damages; Attorney fees; Mechanic's and materialman's lien; Slander of title; Wrongful use of civil proceedings; Kentucky Consumer Protection Act (KCPA); Appellate practice; Timeliness of an appeal - 5:39

Trusts; Real property; The sale of real property owned by a trust; Torts; Tortious interference with business relations; Abuse of process; Kentucky Uniform Public Expression Protection Act (KUPEPA) - 5:17

Workers' compensation; Torts; Employer's recovery of workers' compensation benefits when a third party is legally liable, as set forth in KRS 342.700(1), as amended in 2018; Attorney fees - 8:68

TRUSTS:

Accounting; Removal of a trustee; Negligence; Breach of contract; Civil procedure; Appellate practice; Jurisdiction in a trust case; Writ of prohibition - 1:26

Divorce; Settlement agreement; Husband and wife remain married, but are living separately; Trusts; Irrevocable trust; No-contest provision; Trustee's fees; Wills and estates; Probate; Taxation; Federal estate taxes; Real property; Mineral rights; Civil procedure; Jury instructions; Bare-bones jury instructions - 7:29

Real property; The sale of real property owned by a trust; Torts; Tortious interference with business relations; Abuse of process; Kentucky Uniform Public Expression Protection Act (KUPEPA) - 5:17

UNIFORM COMMERCIAL CODE:

Sales; Sale of a used automobile; Warranties; Civil procedure; Small claims court; Failure to enter the written sales contract into evidence - 8:1

UTILITIES:

Planning and zoning; Utilities; Solar-powered electric generation and electric transmission facility; Merchant Electric Generating Facility as set forth in KRS 278.700 *et seq.*; Local ordinances on solar power facilities - 6:1

VAPOR PRODUCTS:

House Bill (HB) 11, which concerns vapor products containing nicotine; HB 11 is constitutional - 4:12

WILLS AND ESTATES:

Divorce; Settlement agreement; Husband and wife remain married, but are living separately; Trusts; Irrevocable trust; No-contest provision; Trustee's fees; Wills and estates; Probate; Taxation; Federal estate taxes; Real property; Mineral rights; Civil procedure; Jury instructions; Bare-bones jury instructions - 7:29

Probate; Will contest; Testamentary capacity; Undue influence - 8:8

WORKERS' COMPENSATION:

Average weekly wage; Excluding mileage reimbursements from the calculation of the average weekly wage; Unpaid medical bills; The 45-day rule; Appellate practice; Dismissal of a part of an appeal as moot; Voluntary cessation exception to the mootness doctrine; Filing of an amicus brief in a workers' compensation appeal - 3:45

Cumulative trauma injury; Permanent partial disability (PPD) benefits; Enhancement of benefits under KRS 342.730(1)(c)1 - 4:52

Interlocutory finding of fact; Petition for reconsideration; Failure to preserve a factual misstatement argument; Newly-discovered evidence - 2:21

Products liability; Negligence; Employer's duty to protect against foreseeable harm from alleged household ("take-home") asbestos exposure; Civil procedure; Motion for summary judgment; Discovery; Expert witness; Limitation of expert testimony; Workers' compensation; Exclusivity provision - 3:53

Retaliation claim; Attorney fees; Reasonableness of the attorney fees - 7:1

Torts; Employer's recovery of workers' compensation benefits when a third party is legally liable, as set forth in KRS 342.700(1), as amended in 2018; Attorney fees - 8:68

Up-the-ladder immunity; Exclusive liability provision; A manufacturer who contracts for the delivery and transportation of raw materials - 2:30

WRITS:

Attorneys; Conflict of interest; Concurrent conflict; Disqualification of counsel; Writs - 6:87

Criminal law; Attorneys; Writ of prohibition; Writ of prohibition to bar enforcement of a trial court's order disqualifying defense counsel from continuing to represent the defendant in her criminal matter based on the trial court's finding that defense counsel had become a potential trial witness - 2:38

Criminal law; Death penalty; Administrative law; Declaratory and constitutional challenges to administrative regulations concerning execution procedures; Exhaustion of administrative remedies; Writ of prohibition - 8:55

Criminal law; Grant of the Commonwealth's motion for a mistrial; Denial of the defendant's subsequent

motion to dismiss the case with prejudice; Writs; Writ of mandamus and prohibition to prevent retrial and to mandate an order dismissing the case with prejudice - 5:47

Criminal law; RCr 11.42; Affidavit from the defendant that is filed alongside his RCr 11.42 motion; Evidentiary hearing; Commonwealth's attempt to call the defendant as a witness during an evidentiary hearing regarding his RCr 11.42 claims; Writ of prohibition; Defendant's writ of prohibition seeking to prohibit the trial court from allowing him to be called as a witness at the evidentiary hearing; Privilege against self-incrimination - 2:28

Discovery; Motion to compel the deposition of the plaintiff's attorney in the underlying tort action; Information sought was whether the plaintiff's attorney initiated contact with a newspaper reporter about the underlying tort action; Writ of prohibition - 3:17

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 - 4:19

Medical malpractice; Negligent credentialing; Discovery; Privileged information as set forth in KRS 311.377; Writs; Writ of prohibition - 6:91

Taxation; Local transient room taxes pursuant to KRS 91A.390; Civil procedure; Standing; A voluntary association's declaratory judgment action purporting to establish the tax liability of a private party on behalf of various governmental entities; Constitutional standing; Associational standing; Sovereign standing; Subject-matter jurisdiction; Writs; A first-class writ is available to remedy a lack of constitutional standing - 6:21

Trusts; Accounting; Removal of a trustee; Negligence; Breach of contract; Civil procedure; Appellate practice; Jurisdiction in a trust case; Writ of prohibition - 1:26

WRONGFUL DEATH:

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 - 4:25

Medical malpractice; Health care, health facilities, and health services; Long-term care facility; Doctor negligently prescribed medicine that caused the patient's death; Arbitration; Waiver of the right to proceed under an arbitration agreement; Civil procedure; Dismissal of an action for lack of prosecution - 3:26

Negligence; Death of an inmate after the use of oleum capicum spray to restrain inmate; Suit against various jail employees in their individual capacities; Qualified official immunity; Civil procedure; Denial of an interlocutory motion for summary judgment - 6:10

ZONING:

Appeal of a zoning permit; Appellate practice; Civil procedure; Motion for summary judgment; Declaratory judgment action; Jurisdiction; Particular-case jurisdiction; Standing; Statutory standing - 8:29

Conditional use permit; Operation of a recreational vehicle park; Right to Farm Act; Agricultural supremacy clause - 1:40

Utilities; Solar-powered electric generation and electric transmission facility; Merchant Electric Generating Facility as set forth in KRS 278.700 *et seq.*; Local ordinances on solar power facilities - 6:1